

EXPLANATORY MEMORANDUM TO
THE AGENCY WORKERS (AMENDMENT) REGULATIONS 2019

2019 No. 724

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Business, Energy and Industrial Strategy and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 To revoke regulations 10 and 11 of The Agency Workers Regulations 2010 (the ‘AWR’), which allow agency workers to opt out of equal pay entitlements that become available after twelve weeks in the same role with the same hirer, subject to certain conditions including pay between individual assignments.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 The territorial application of this instrument includes Scotland.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is England and Wales and Scotland.
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5. European Convention on Human Rights

- 5.1 The Minister for Small Business, Consumers and Corporate Responsibility has made the following statement regarding Human Rights:

“In my view the provisions of the Agency Workers (Amendment) Regulations 2019 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 The AWR transposed EU directive 2008/104/EC of 19th November 2008, the Temporary Agency Work Directive (OJ L 332, 5.12.2008, p.9). They stipulate that after twelve weeks in the same role with the same hirer, an agency worker is entitled to the same pay, as well as the same basic terms and conditions, as a permanent employee of that hirer.
6.2 Under regulations 10 and 11 of the AWR, agency workers can waive this right to the same pay as permanent employee of the hirer if they sign a “pay between assignments” contract, also known as a “Swedish derogation” contract. This means that they become

a permanent employee of the employment business and are paid between individual assignments.

- 6.3 Following a public consultation, the Secretary of State has taken the decision to revoke regulations 10 and 11 of the AWR using the powers conferred to him through section 2(2) of the European Communities Act 1972.

7. Policy background

What is being done and why?

- 7.1 Matthew Taylor wrote in his Review of Modern Working Practices that workplace flexibility must be reciprocal and benefit the employee as well as the employer. The Review identified concerns that Swedish derogation, or pay between assignments, contracts were being misused to avoid giving agency workers their equal pay entitlements.
- 7.2 Abuse identified by the review included that workers may never receive material pay between assignments by being kept on artificial, minimum hours contracts, or that their 'between assignments' pay is deducted from their 'on assignment' pay. Agency workers may have little choice when it comes to contract type and can be engaged under Swedish derogation contracts without necessarily understanding what they entail. The government's agency workers recommendations consultation showed limited evidence that agency workers are benefitting from pay between assignments contracts, with little awareness that they are waiving their right to potentially higher pay after twelve weeks.
- 7.3 This instrument will therefore revoke the Swedish derogation in regulations 10 and 11 of the AWR to ensure that agency workers receive the rate of pay to which they are otherwise entitled after twelve weeks.
- 7.4 The Swedish derogation will be revoked on 6 April 2020. From this date agency workers will no longer be able to opt out of equal pay entitlements after twelve weeks in the same assignment.
- 7.5 Employment businesses will still be able to offer pay between assignments contracts to agency workers after revocation, but workers will not be able to opt out of equal pay entitlements after twelve weeks in the same role with the same hirer.
- 7.6 To ensure workers are aware that they are no longer opted out of their equal pay rights, employment businesses using Swedish derogation contracts must issue a written statement to affected agency workers informing them of their revised entitlement in relation to pay.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act 2018.

9. Consolidation

- 9.1 The Department for Business, Energy and Industrial Strategy does not intend to produce consolidated versions of the instruments amended.

10. Consultation outcome

- 10.1 The Department for Business, Energy and Industrial Strategy carried out a full public consultation into Matthew Taylor's agency workers recommendations from 7 February 2018 to 9 May 2018. A section of this consultation covered the Swedish derogation.
- 10.2 The consultation received 97 responses in total. Unions were firmly in favour of the revocation of the Swedish derogation, whilst a number of business groups were warier of a complete ban and concerned about its impact. Most responses acknowledged the confusion for workers around these contracts, but the proposed means to remedy this varied between respondents. Some responses suggested government, businesses, and unions work together to identify ways in which the derogation could be reformed to counteract abuse.

11. Guidance

- 11.1 The government will release guidance for employment businesses and other stakeholders in the recruitment sector through the Employment Agency Standards Inspectorate.

12. Impact

- 12.1 This change will impact on business, charities and the public sector, as hirers of agency workers on pay between assignments contracts will need to pay those workers equal pay after twelve weeks in an assignment. The estimated cost to business is £265.3 million per annum.
- 12.2 A full Impact Assessment will be submitted with this memorandum and published alongside the Explanatory Memorandum on the legislation.gov.uk website.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses. Pay between assignments contracts will no longer be able to provide for any worker to opt out of their right to equal pay.

14. Monitoring & review

- 14.1 The regulations include a statutory review clause in line with the requirements of the Small Business, Enterprise and Employment Act 2015.

15. Contact

- 15.1 Ian Jordan or Alex Midgley at the Department for Business, Energy and Industrial Strategy can be contacted with any queries regarding the instrument. Telephone: 020 7215 0209 or 020 7215 4842 or email: ian.jordan@beis.gov.uk or alex.midgley@beis.gov.uk
- 15.2 Emma Waite at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Kelly Tolhurst MP at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.