

# Freelancers and the Agency Workers Regulations

Working with freelancers after October 2011

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# Freelancers and the Agency Workers Regulations ('AWR')

This guide is designed to help you understand

- what your position will be as an agency or as a hirer when you engage freelancers after October 2011, and
- the circumstances in which you can engage freelancers after October 2011 without being adversely affected by the AWR, and without assuming additional risk.

Freelancers who are in business on their own account and engaged as such, whether or not they are working through a limited company, will generally be outside the scope of the regulations.

## Who are Freelancers?

Freelancers can be contractors, independent professionals, interims and consultants. Freelancers work across all sectors, from HR to IT, graphic design to engineering, at every corporate level – from the boardroom down. They may work through their own limited company or LLP, as a sole trader, or via an 'Umbrella' provider.

Engagement of freelancers is common in highly skilled, senior, or specialist industries such as IT, engineering, and project management, and many companies needing to hire in such services prefer the flexibility and specialism that can be obtained by engaging a single freelance individual in a business to business relationship, as opposed to engaging a larger consultancy firm, or taking on another employee.

Freelancers bring flexibility, help you to manage risk and to unlock innovation and talent within your business. Freelancers can plug in rapidly to your business to bolster expertise and improve speed to market. The UK's flexible labour market is unique in Europe and provides a significant competitive advantage.

There are an estimated 1.4 million freelancers in the UK.

## About PCG

PCG, the voice of freelancing, is the cross-sector association for freelance contractors and consultants in the UK, providing its members with knowledge, representation, community and protection. With around 20,000 members, PCG is the largest association of independent professionals in the EU. It is our fundamental belief that flexibility in the labour market is the key to ensuring Britain's future economic success.

Founded in 1999 by a community of freelancers, the association is governed by its members. Any member is eligible to stand for election to the Consultative Council, and from there, for election to the Board of Directors.

Additional copies of this document can be downloaded from [www.pcg.org.uk/agencies](http://www.pcg.org.uk/agencies) together with a wide range of other resources to help you get the best from your freelancers.

## Foreword from Professor Patricia Leighton:

This Guidance to the AWR aims to help you be aware of the demands of this new area of law. It looks complicated and detailed, but it is important to appreciate what this new law is trying to achieve.

It implements an EU Directive of 2008 which was concerned to improve the position of what are referred to as 'vulnerable temps'. These are people supplied through agencies, typically, at lower pay and on worse employment conditions than a comparable directly employed person. The aim is to prevent abuse and, in effect, the law adopts the legal approach of anti-discrimination law. This implies that people doing similar or the same work should not be treated 'less favourably' than another simply because one is a temp.

It is not intended to prevent genuine flexible working practices or entrepreneurship and; indeed; the Directive calls for the removal of barriers to agency working.



In reality and for various reasons relatively few temps will be able to exercise the rights that come on stream after 12 weeks on an assignment. Nonetheless, the Regulations are important and not just for 'vulnerable temps', not least because they may provide the opportunity for employment relationships to be scrutinised. Care must be taken in all dealings with agencies to confirm not only that you are 'in business on your own account, you have a limited company etc but that matters of discretion, choice and autonomy are always stressed. The key words in the Regulations are that those who are 'in scope' are subject to 'supervision and direction'. Genuinely self-employed people should not be capable of being described as such, performance appraisals to determine pay or enhanced should be avoided. This is another dimension of the risks associated with the fact that the client relationship should not exhibit submission to 'supervision and direction' so all documents need to be carefully perused from this perspective.

It is anticipated that very few PCG members will want to access what are the very limited rights provided by these Regulations. It is important that independence can be demonstrated from both the agency and the client so as to avoid legal challenges asserting 'implied' contracts of employment. Similarly, contract documents and practices must be consistent so as to avoid arguments that they are a 'sham'. 'Shams' etc are legally speaking hot topics at the present so the best advice is to check with PCG if you have concerns and make your business arrangements as watertight as possible.

### **Professor Patricia Leighton**

July 2011

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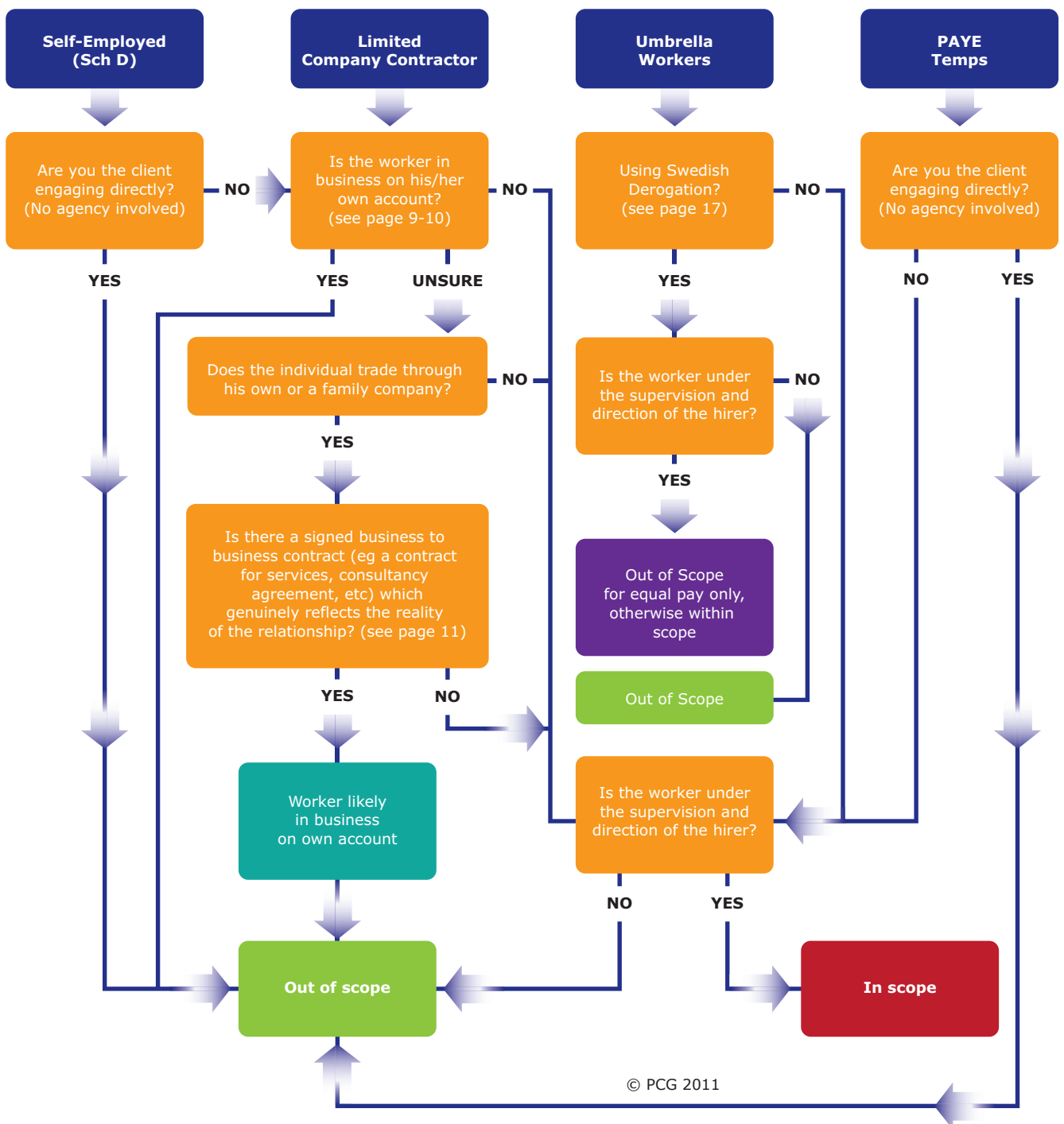
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**The voice of freelancing**

# In or Out of Scope? Quick Start Guide



## What are The Agency Workers Regulations 2010?

The Agency Workers Regulations 2010 (often known simply as “the AWR”) are intended to protect vulnerable low paid “agency workers” (“temps”), and safeguard the positions of permanent employees from being undercut by lower-cost agency workers.

The regulations are designed to achieve this by enshrining in law the rights for an agency worker to receive equal treatment, comparable to that which the worker would have received, had he/she been engaged directly by the hirer. **The regulations come into effect on 1st October 2011.**

### What do the Agency Workers Regulations 2010 cover?

The term ‘Agency Worker’ has a particular meaning, as defined by the AWR (see p6).

### What rights do the Agency Workers Regulations 2010 give?

**12 week rights:** Once an ‘Agency Worker’ has been in a role for a particular hirer for more than 12 weeks, the individual’s rights in terms of how much he/she is paid, holiday entitlement, and working hours must be no less favourable than they would be if the individual had been directly employed by the hirer, such that the individual is not discriminated against on the grounds of being an “Agency Worker”. The hirer, the temporary work agency, and any other companies in the supply chain all have responsibilities for ensuring that these rights are complied with.

**Day 1 rights:** There are other ‘day 1’ rights for which the hirer alone is responsible. These include the right to be treated equally in relation to access to site facilities, and to access to information about job opportunities.

### Does ‘Equal Treatment’ work both ways?

Many temporary workers earn more than a comparable permanent employee. It has been suggested that an employee could try and bring a claim for equal treatment under the AWR where they earn “less” than a contractor. Rest assured this is not possible under the AWR – the regulations **only** have effect in relation to workers supplied through a temporary work agency.

### Where can I find a copy of the regulations?

A full copy of the regulations can be found at  
<http://www.bis.gov.uk/policies/employment-matters/strategies/awd>

### Has any official guidance been published?

At the time of writing this document, the most recent version of the official guidance was that published on 27th May 2011 (ref 11/949). A full copy of this guidance can be found at  
<http://www.bis.gov.uk/policies/employment-matters/strategies/awd>

#### Key Points

- The regulations take effect from 1st October 2011
- The hirer is responsible for ‘Day 1’ rights (site facilities, access to job opportunities)
- Rights to equal pay, holiday and working hours apply after 12 weeks
- The hirer, the agency, and any other company in the supply chain all have responsibilities for the 12 weeks rights

## What is a 'temporary work agency'?

A 'temporary work agency' is defined by the regulations.

The essence of the definition is:

- a business (whether or not for profit), which
- supplies individuals,
- to work temporarily,
- under the supervision and direction of a third party.

The definition is therefore broad, and may also include other companies in the supply chain (such as an umbrella company).

### What do the regulations say?

#### 3 The meaning of temporary work agency worker

(1) In these Regulations "temporary work agency" means a person engaged in the economic activity, public or private, whether or not operating for profit, and whether or not carrying on such activity in conjunction with others, of—

(a) supplying individuals to work temporarily for and under the supervision and direction of hirers; or

(b) paying for, or receiving or forwarding payment for, the services of individuals who are supplied to work temporarily for and under the supervision and direction of hirers.

(2) Notwithstanding paragraph (1)(b) a person is not a temporary work agency if the person is engaged in the economic activity of paying for, or receiving or forwarding payments for, the services of individuals regardless of whether the individuals are supplied to work for hirers.

#### Key Points

- If a business supplies individuals to work under the supervision and direction of third parties, it will be a 'temporary work agency'
- 'temporary work agency' includes those businesses generally described as employment agencies (strictly, 'employment businesses')
- 'temporary work agency' may also include umbrellas and any other companies in the contract chain
- 'temporary work agency' will not include the hirer – the end client to whom the individual is supplied, and under whose supervision and direction the individual is in fact working.

## Who is an 'Agency Worker'?

An Agency Worker is:

- an individual,
- supplied by a temporary work agency,
- to work under supervision and direction,
- exercised by a third party hirer.

However, the definition ***specifically excludes those who are in business on their own account***, where the status of the agency or end client is that of a customer of that business. ***It is likely that most freelance contractors will be excluded for this reason.***

It can be seen that the regulations exclude from the definition of an Agency Worker those who do not work under the 'supervision and direction' of the hirer.

The regulations do not cover temporary workers of any sort, where the individual is engaged directly by the client, and is not supplied by a temporary work agency.

### What do the regulations say?

#### 3 The meaning of agency worker

(1) In these Regulations "agency worker" means an individual who—

(a) is supplied by a temporary work agency to work temporarily for and under the supervision and direction of a hirer; and

(b) has a contract with the temporary work agency which is—

(i) a contract of employment with the agency, or

(ii) any other contract to perform work and services personally for the agency.

(2) But an individual is not an agency worker if—

(a) the contract the individual has with the temporary work agency has the effect that the status of the agency is that of a client or customer of a profession or business undertaking carried on by the individual; or

(b) there is a contract, by virtue of which the individual is available to work for the hirer, having the effect that the status of the hirer is that of a client or customer of a profession or business undertaking carried on by the individual.

#### Key Points

- AWR only apply to Agency Workers
- An individual in business on their own account and engaged to provide services in the course of that business will **not** be an Agency Worker.
- An individual **not** working under the supervision and direction of a third party hirer will **not** be an Agency Worker.

## Exclusion of engagements which are business to business (B2B) relationships

The AWR exclude individuals from the definition of an 'Agency Worker' in circumstances where

- the individual works under a contract, and
- the effect of that contract is that **the status of the agency or hirer** is that of a **client or customer of a profession or business undertaking**<sup>1</sup> carried on by the individual

This suggests that engagements which are B2B (business to business) relationships between the individual and the agency/hirer are outside the scope of the AWR. The published guidance makes clear that this is the intention.

To understand where that exclusion can safely be relied on to ensure an engagement is outside the scope of the AWR, we need to consider

- 1. whether or not the individual is in fact carrying on a profession or business undertaking (see page 10)**
- 2. the general nature of the contract – is it a B2B contract for the freelancer's services to be provided in the course of that business? (see page 11)**

Where the answers to the above two questions are 'yes', it will generally follow that the status of the agency / hirer under that contract is clearly that of a client or customer of the business.

**Freelance contractors who operate through their own limited companies and who are genuinely in business on their own account, where the individual's services are engaged in the course of that business, should generally be outside the scope of AWR – and agencies and hirers should be able to continue dealing with such freelancers, without having to make changes to accommodate the AWR.**

<sup>1</sup> For convenience in this guide the expression 'business' may be used in place of the more cumbersome expression 'profession or business undertaking'

## 1. Is the individual in fact carrying on a profession or business undertaking?

An individual carrying on a profession or business undertaking may be described as being 'in business on their own account', ie for their own benefit.

The expressions seem synonymous – if an individual is carrying on a profession or business undertaking, then that individual is in business on their own account, and if an individual is in business on their own account then it follows that the individual is carrying on a profession or business undertaking.

### What if the individual uses a limited company?

The fact that an individual may use a limited company to contract for the provision of their services does not **of itself** affect the question of whether or not the individual is an Agency Worker.

Umbrella workers for example use a limited company **which is not their own** to provide services. In such circumstances their position in the company would be that of an employee only, and such individuals have no right to participate in that company's profits. It may be hard for such a freelancer to show that they are indeed in business on their own account. For more details on umbrella workers, see p16.

### What about freelancers who use their own companies?

Many individual freelancers provide their expertise through a **limited company** which is **owned by the individual freelancer** (perhaps in conjunction with other family members).

In the case of such individuals, it would seem that the simple fact that they do so must be a **strong pointer** suggesting that the individual is indeed **in business on their own account**

- the business is the utilisation of the individual freelancer's expertise, by a succession of engagements
- the company keeps accounts, and may make a profit or a loss
- the owners of the company stand to benefit from the company's profits.

**Indeed, it would be difficult to view such an arrangement as anything other than one whereby the freelancer is in business on their own account.**

#### Key Points

- Limited company contractors are not necessarily out of scope **simply** because they operate through a limited company
- The AWR do not apply where the freelancer works under a contract which has the effect that the agency or end client is a client or customer of the freelancer's profession or business.
- Freelance contractors who are in business on **their own** account and who operate through their own limited companies will generally be out of scope, provided that the status of the agency / end client is that of a client or customer of the freelancer's profession or business
- Umbrella workers will generally not be in business on their own account and so will generally fall within the scope of the regulations

## 2..What is a B2B contract?

Quite simply – a contract between two businesses – one of which is the business conducted by the freelancer, the other is the engaging agency.

The core differences one would generally expect to see between a B2B contract and an employment-type contract for the engagement of an individual as an employee or worker may be summarised as follows:

	Employment-type contract	B2B contract
Requirements	To fill a role and work as directed from time to time	To perform specified tasks / produce outcomes / deliverables
Mutuality of obligation, and payment	General entitlement to payment for contracted time spent, regardless of quality of work; there may be an obligation (express or implied) to provide work or pay in lieu, even during a notice period	Entitlement to payment based on delivery of requirements; may or may not be measured on time basis; but no general obligation to provide work, and no obligation to do tasks other than those contracted
Control	Engager has broad rights to control; individual may expect to be supervised and directed	Contractor is engaged to provide expertise in relation to the requirements, need for control limited. Would not generally expect to find rights to control which extend beyond what is necessary within the scope of the tasks
Personal service	Employee / worker places himself at the disposal of the hirer and must <b>personally</b> work as instructed	May be a right to substitute, the core of the engagement is the provision of the tasks / outcomes / deliverables, and not the provision of a named individual to be at the disposal of the hirer
Financial risks / Opportunity for profit	Little or no risk carried Profit opportunity limited to payment at agreed rate for time spent	Takes responsibility for what is delivered; may include correction of defective work at own cost and in own time Working efficiently may give greater opportunity for profit in this and/or future engagements

It will be seen that the B2B contract has close parallels with the 'IR35 friendly' contract for which freelance contractors already have a strong preference.

Ideally, to obtain the greatest degree of comfort that an engagement with a freelancer will be out of scope of the AWR, the contract under which the freelancer is engaged will contain an express statement to the effect that the freelancer is an independent business, and enters the contract in the course of that business.

It should be noted that IR35 and the AWR are separate and unrelated pieces of legislation. IR35 forms part of tax law, the AWR is employment legislation. However, those who are genuinely self-employed and outside of IR35 are perhaps more likely to see themselves as outside the AWR's scope. If in any doubt on either IR35 status or AWR status professional advice should be sought.

PCG has extensive resources on IR35, available at [www.pcg.org.uk](http://www.pcg.org.uk)

Agencies who offer to engage genuine freelancers on B2B contract terms (and hirers who support engagements on this basis) are likely to find them welcomed by freelancers who find those terms IR35-friendly:

- by engaging genuine freelancers who are in business on their own account on B2B terms, both agency and hirer can have confidence that the burdens and risks associated with AWR will not apply to the engagement
- freelancers themselves are likely to welcome being engaged on B2B terms because of their IR35-friendliness, and because such an engagement recognises and respects their position as carrying on their own businesses.

Clearly there are benefits for all parties involved - freelancers, agencies, and end clients - in ensuring contracts are on a solid B2B basis

### **Key Points**

- PCG has an approved contract scheme which checks and approves agency contracts for being IR35 friendly (as well as looking at other key factors that impact the contractor) - visit [www.pcg.org.uk/agencies](http://www.pcg.org.uk/agencies) for details
- IR35 friendly contracts help to ensure that an individual is clearly in business on their own account and so are also helpful with regards to the AWR

## What about ‘supervision and direction of a hirer’?

An individual will not be an Agency Worker – and so will be out of scope of AWR –**EITHER** if they are in business on his own account, **OR** if they are not working under the ‘supervision and direction’ of the hirer.

Absence of ‘supervision and control’ may result in some umbrella workers falling outside the scope of AWR, even though they may not generally be able to claim to be in business on their own account.

There may be a degree of risk for an agency (who may have limited firm knowledge of the reality of whether supervision and direction is in fact exercised by the Client) to rely on lack of ‘supervision and direction’ as the basis for forming a view that AWR does not apply.

However, an agency which obtains in good faith a **contractual assurance** from a Client that it will **not exercise supervision and direction**, and a **corresponding assurance** from a freelancer (as will often be the case anyway in IR35-friendly contracts) may be justified in concluding that for this reason, the individual falls outside the definition of an Agency Worker, and so that the AWR do not apply.

### Key Points

- An individual can only be an Agency Worker if working under the supervision and direction of a hirer
- Umbrella workers who are **not** working under the supervision and direction of a hirer, would fall outside the scope of the AWR, even though they may not generally be considered to be in business on their own account
- An agency wishing to rely on this approach would be wise to get clear assurances from both contractor and hirer

## What about the Conduct Regulations?

The Conduct of Employment Agencies and Business Regulations (2003) ('Agency Conduct Regulations' or more often 'Conduct Regulations') apply a number of protections to certain agency workers regarding contractual terms.

Whilst they sound similar to the AWR they are in fact a separate piece of legislation, and should not be confused.

The Conduct Regulations remain in force and are not affected by the new AWR. The criteria governing whether or not an engagement is covered by the Conduct Regulations are different from those which govern whether or not AWR apply.

Currently, limited company contractors can choose to "opt out" of the Conduct regulations. **There are no corresponding 'opt out' provisions in AWR.**

In practice, a contractor's decision as to opting out under the Conduct Regulations is unlikely of itself to affect the contractor's position in relation to AWR.

PCG provides a guide to the Agency / Conduct Regulations available at [www.pcg.org.uk/agencies](http://www.pcg.org.uk/agencies).

### Key Points

- The "Conduct Regulations" are entirely separate to the AWR
- A contractor cannot opt out of the AWR
- Opting out of the Conduct Regulations will not affect the AWR position.

## If I give some 'equal rights' to a freelancer, might that make an AWR claim more likely?

This is not the case.

The AWR give Agency Workers certain rights. It may be more convenient for hirers not to distinguish between employees and Agency Workers on the one hand, and freelancers on the other, in for example, the access they allow to site facilities.

Whether an individual is an Agency Worker will be determined by the factors set out in the AWR (see page 6), and not by the question of whether or not equality may or may not be afforded in relation to any other rights.

**Giving equal access to some facilities cannot of itself create grounds for a claim for equal pay.**

The position is simple – either an individual is an Agency Worker, or he/she is not.

### Access to facilities—the facts

One of the areas for which "equal treatment" will apply is access to facilities. This means that those within scope of the regulations should have the same access to facilities as a permanent member of staff would. "Facilities" covers staff canteens, workplace crèches, common rooms, etc.

Some clients may find it easier just to give equal access to facilities to both those in and out of scope of the regulations. For example, allowing a freelancer to access communal facilities at a small company may be simpler than exempting such an individual or issuing a specific building pass which limits their access. Allowing somebody who is out of scope (such as a freelance contractor) access to facilities would not put that individual within scope of the regulations.

### Key Points

- You may find it easier to afford all freelancers equal access to facilities
- Doing so for freelancers would not make them "in scope" of the AWR

## What do I have to do if I want to use freelancers and avoid having to worry about AWR?

### IF YOU ARE AN AGENCY

- Check the status of the freelancer being engaged, are they an umbrella worker or in business on their own account
- If an umbrella worker, ascertain the method of operation ('supervision and direction') to assess any risk (see the 'Quick Start Guide' on page 5)
- Take care to use a B2B / 'IR35 friendly' contract which is suitable for the requirement, and will genuinely reflect working practices
- Avoid imposing unnecessary contractual requirements for 'supervision and direction'
- Keep contractors/freelancers aware of their status and rights (if applicable) under the AWR

### IF YOU ARE A HIRER (THE 'END CLIENT')

- Freelancers can add a great degree of a value to a business as they are professional, highly skilled specialists. Check the status of the freelancer being engaged, are they an umbrella worker or in business on their own account
- If an umbrella worker, ascertain the method of operation ('supervision and direction') to assess any risk (see the 'Quick Start Guide' on page 5)
- There should be no AWR-related concerns where genuine freelancers, in business on their own account, are engaged on B2B terms. Engagement on the basis of non-controlling B2B / 'IR35 friendly' contracts will help contain your risks
- Try not to impose unnecessary contractual requirements for 'supervision and direction'
- Take steps to ensure that working practices reflect the contract.
- Keep contractors/freelancers aware of their status and rights (if applicable) under the AWR

#### Key Points

- Use of genuine freelancers is an effective strategy for minimising impact of the AWR and containing risk
- PCG has an approved contract scheme which checks and approves agency contracts for being IR35 friendly (as well as looking at other key factors that impact the contractor) - visit [www.pcg.org.uk/agencies](http://www.pcg.org.uk/agencies) for details
- The AWR provides an ideal opportunity to review working arrangements and contracts.

## Umbrellas are covered by the AWR in most cases

### Umbrellas are covered by the AWR in most cases

Umbrella workers will generally only fall outside the scope of AWR if they are not working under the supervision and direction of the hirer.

It may be hard for an umbrella contractor to show that they are indeed carrying on their own profession or business undertaking of which the agency/hirer is a client or customer, and so where there is a degree of 'supervision and direction', they are likely to be an Agency Worker and so entitled to equal treatment under the AWR (the question of how to extend equal treatment is outside the scope of this guide).

### Why are most umbrella workers within the scope of AWR?

Most umbrella workers will have chosen to work as such precisely to avoid the burdens associated with being in business, and instead have chosen to be employed by the umbrella company. The nature of the arrangement is such that they will not generally have an ownership stake in the umbrella company which is their employer, and will be an employee of (and receive PAYE employment income from) the umbrella.

Such individuals will therefore generally fall within the definition of an 'Agency Worker', and AWR will apply to them.

Umbrella workers who genuinely **do not** work under the supervision and direction of the hirer or end client will however be **outside** the scope of AWR.

Even if within the scope of AWR, they will be exempt from the right to receive "equal pay" under the AWR if their agency/ umbrella provider uses the 'Swedish Derogation'.

### The 'Swedish Derogation'

Workers, such as those who use an umbrella, are exempt from the need to receive "equal pay" under the AWR if they are paid between assignments and some other formalities are complied with. This is known as the 'Swedish Derogation'. It is not yet clear how widely used this derogation will be.

## Summary

Where an agency engages a freelance contractor

- who operates through their **own family company**
- on the terms of a **B2B / 'IR35 friendly' contract**

then, provided of course the contract 'fits' with the reality, the freelancer will almost certainly **not** be an 'Agency Worker', and will be outside the scope of the AWR.

Where there may be some doubt as to whether or not the freelancer is in business on his own account, but where

- the freelancer will **not be working under the 'supervision and direction'** of a hirer
- the agency obtains a **contractual assurance from hirer** that it will not expect to exercise 'supervision and direction'
- the agency obtains a **contractual assurance from freelancer** that it will not require 'supervision and direction'

then it is likely that the freelancer will **not** be an 'Agency Worker', and should be outside the scope of the AWR.

Where the freelancer works through an umbrella company and there is a degree of supervision and direction by the hirer, then it is likely that

- if the umbrella company operates the Swedish derogation, all equality rights given by the AWR other than 'equal pay' will apply;
- otherwise, all equality rights given by the AWR will apply.

An agency and a hirer are entitled to take all the above into account when selecting a freelancer for an engagement.

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# Support from PCG:

**Help for freelancers:** PCG is the voice of freelancing with a growing base of circa 20,000 members throughout the United Kingdom.

PCG's Guide to Freelancing is available to download for free from the PCG website. It is the definitive source of information for new and established freelancers, offering a wealth of helpful advice about running a successful freelance business. [www.pcg.org.uk/guide](http://www.pcg.org.uk/guide)

The guide covers:

- **Setting up a business**
- **Accounting, banking and insurance**
- **Tax matters**
- **Credit management**
- **Running a business**
- **Securing work**
- **Personal finances**
- **Closing a company**



**The voice of freelancing**



**Helping for clients of freelancers:** PCG provides advice and guidance for those people in business looking to engage and work with freelancers. [www.britainsbraingain.com](http://www.britainsbraingain.com)

**Help for recruitment agents:** PCG has available a range of template contracts and has developed an Approved Contract Scheme. Carrying the 'PCG Approved Contract' stamp on a contract is indicative of a sound business-to-business engagement (it should be noted that contracts are only one aspect here and must reflect the actual working practices). [www.pcg.org.uk/agencies](http://www.pcg.org.uk/agencies)

**PCG for all:** PCG is a highly respected, pragmatic organization and is the ultimate authority on issues that affect the freelance community. [www.pcg.org.uk](http://www.pcg.org.uk)

### About PCG

PCG, the voice of freelancing, is the cross sector association for freelancers, contractors and consultants in the UK, providing its members with knowledge, representation, community and insurance.

With around 20,000 members, PCG is the largest association of independent professionals in the EU.

It is PCG's fundamental belief that flexibility in the labour market is the key to ensuring Britain's future economic success.

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