

Agency/Supply Staff and Casual/AWR Staff

Schools have raised many queries about the position of supply/agency staff and we are aware that schools are being contacted direct by agencies with different interpretations of the current guidance from government and other sources. To try and assist schools we have set out below our current understanding of the position. If you do have a particular query or concern please **do not hesitate to contact us in schools HR** and we will do all we can to assist you in resolving the situation.

We have also provided some guidance on the position of AWR/Casual Staff.

AGENCY/SUPPLY STAFF

As a start point we have reproduced guidance that has been provided by the Local Government Association (LGA). The guidance from the LGA is set out in italics. We have then set out some additional points of guidance for you.

Guidance from the Local Government Association:

Whether an agency worker will remain entitled to be paid through their agency will depend first on whether they are entitled to be paid under the Agency Worker Regulations 2010. Broadly speaking those Regulations give agency workers the right to equal treatment in terms of "basic working and employment conditions", as if they had been employed directly by the hirer to do the same job. In many cases this means that agency workers will be entitled to the same rate of pay as a comparable employee, so if a comparable employee is being paid during the workplace closure period, then the agency worker may be entitled to be paid.

However, that right only applies after a 12-week qualifying period. To determine entitlement under the Regulations therefore authorities will need to check whether the worker has met that 12-week qualifying period.

Importantly though, any entitlement under the Regulations will apply only for the length of the assignment. For example, if a worker was brought into cover absence for a week, then they would remain entitled only to be paid until the end of that week. To determine the length of the assignment the first step will be to check the agreement between the agency and the authority to see whether that sets out its length. In some cases though the length of the assignment may be more difficult to determine, for example if they were covering sick leave on an open ended basis. In such cases employers may want to make an assessment of how long the assignment might reasonably be expected to have lasted.

Ultimately though in terms of liability under the Regulations for any non-payment, responsibility for providing rights under the Regulations is primarily with the employment agency. However, if the reason the agency worker was not being paid was because the authority stopped paying the agency then if a claim was brought by an agency worker then an employment tribunal might well find that the authority was responsible for the breach and so it should be liable for the non-payment or an element of it.

If the worker does not have any entitlement to pay under the Regulations, authorities should still check whether there is any contractual obligation with the agency and/or worker which would require them to continue paying for the worker.

In some cases though it may be that the employment agency will be able to consider using the Government's Coronavirus Job Retention Scheme, under which 80% of the agency worker's pay would be funded by that scheme, and in such cases schools might want to discuss top up pay with the agency so the worker does not receive a drop in pay.

Finally, in many cases schools will choose to continue to pay an agency worker for the school closure period, irrespective of whether there is any legal entitlement to pay and it is also entirely possible that the Government will seek to legislate on this issue to deal with the extraordinary situation we are dealing with

Some further points of guidance

- At this time of challenge it is important to think about our whole school community. For agency/casual/zero hours workers many will be the most vulnerable in terms of security within our staff community. Schools will have budgeted for such costs from within the funding they receive and therefore should consider continuing to pay agency staff.
- If agency/supply staff who are currently contracted to work at the school have to self-isolate for a COVID 19 related issue (including contracting the symptoms, being part of the vulnerable group, shielding ...etc.) then the school should contact the agency involved and being mindful of any agreed contractual arrangement or expectation regarding the length of the placement, should make payment for the agency worker. In doing this the school (a) should check with the agency that the payment they make to the agency will go to the agency worker and (b) ask the agency to consider a reduction in the fee payable by the school (but not the payment made to the agency worker) to reflect that the school is supporting the agency worker during this period of self-isolation. The school is entitled to expect the agency worker to work from home if they are not ill and providing it is practical to arrange for them to do this.

Example: Supply teacher engaged for a 4 week period, has to self-isolate in weeks 2 and 3 and is still paid and then is available for work in week 4.

- These are exceptional circumstances and the response is in support of a public health and government initiative. It may therefore be prudent to also explain to the agency and agency worker that making any supportive payment arrangement does not constitute admittance of any type of employment relationship.
- Although it is unclear the extent to which the Government's Coronavirus Job Retention Scheme, (which would compensate up to 80% of a worker's pay) is or is not applicable to supply/agency staff in schools, it is a scheme which is accessed by employers and schools are not the employers of agency/supply staff, this is why our guidance refers to agencies seeking to access the scheme.
- We would not expect an agency to be accessing the scheme for an agency worker where a contractual arrangement is in place for an agency worker at a school as in this case the school would be paying the agency worker.

- Schools have asked if they can negotiate with an agency to bring about the early termination of a placement where the work requirement no longer exists. This approach does go against the spirit of this guidance, which suggests that schools should honour any pre agreed expectation/obligation and pay the agency worker for the duration of the anticipated assignment. Schools should of course continue to talk to their agencies about the arrangements at their own establishments.
- Where you are continuing to pay for an agency worker it is entirely reasonable to expect them to work as a part of your schools workforce, mindful of course of all the health and welfare requirements which would apply equally to them.
- Where schools are experiencing difficulty with meeting required staffing levels needed through their own workforce, we would encourage the use of agency/supply staff to supplement this need.

CASUAL/AWR STAFF

- Although, casual staff (as and when staff or zero hours contract staff as they are sometimes called) do not have all the same rights as other employees, schools should consider their position sympathetically and reasonably. Therefore, if **they would be scheduled to work** and they are unable to do so because of a COVID 19 related issue (including contracting the symptoms, being part of the vulnerable group, shielding ...etc.) or school closure then they should be paid as if they had worked the hours that were scheduled.
- As with other staff, if it is at all possible to assign them work to do whilst in isolation then this should be arranged.
- Similar to agency staff, it would be appropriate to explain to them that this is an exceptional arrangement in support of a public health and government initiative and that therefore it does not constitute admittance of any type of enhancement of any employment relationship.
- Where schools are experiencing difficulty with meeting required staffing levels needed through their own workforce, we would encourage the use of AWR/Casual staff to supplement this need.

We are aware of a Cabinet Office Procurement Policy Note (action note PPN 02/20) which relates to supplier relief due to Covid 19. If, after review and consideration, this document impacts on the position of supply agencies and agency workers in schools we will review this guidance.

