

# racs<sup>o</sup>

## GROUP

June 2011

0845 604 0571

read our  
**NEW**  
blog!



[www.racsgroup.com](http://www.racsgroup.com)

# AWR: THE SOLUTION

## AN AGENCY GUIDE

RACS Group has not one, but a portfolio of workable solutions to help the recruitment industry adapt to all aspects of the Agency Workers Regulation (AWR) - multiple routes that take into account the full extent of the guidance notes. Each route is designed to serve the industry and is dependent upon each individual agency requirement.

This guide is designed to explain, in plain English, the specific requirements, responsibilities and best practices for Agencies prior to the regulations coming into force on 1st October 2011.

Please do not delay... We have already heard that some Unions are ready and willing to start legal proceedings with effect from 2nd October 2011 and 25th December 2011...

Some of the areas included in this guide will be:

- **A brief overview of the AWR and what it means to your Agency, common requirements and best practices**
- **Day One Rights, 12 week rights and qualifying periods - plus risk levels i.e. which industries have higher and lower risk factors**
- **Maintaining compliance throughout, understanding the legislation what the pitfalls are and the anti-avoidance penalties**
- **SOLUTION ONE:** Comply with the regulations and what is required to maintain true and accurate records
- **SOLUTION TWO:** Umbrella Company Options, The 'Swedish Derogation' contractual relationships and record keeping
- **SOLUTION THREE:** Own Limited Company contractors - inside and outside of both IR35 and the AWR - what this means?
- **SOLUTION FOUR:** The Contractor's Profession - Is the contractor a member of a profession? Does the contractual relationship reflect this and show that the hirer is in fact the client?





## INDEX

---

What is AWR?	4
Analysing the Risk	5
Rights & Responsibilities	6-7
Best Practices	8-9
Our Solutions	10-16
Contractual Relationships	17
The Next Steps	18



## WHAT IS AWR?

---

The new Agency Workers Regulations derive from European legislation designed to give temporary agency workers parity in pay and employment conditions as they would have been entitled to had they been recruited by the hirer directly to do the same job.

The regulations were ushered through Parliament during the last administration under a Labour Government. They were strengthened by Union backing to protect a vulnerable work force and as such were initially meant to apply to the lower end of the agency worker market.

Unfortunately the legislation does not actually set out to do this and demonstrates a 'one-size-fits-all' approach, thus applying to all agency workers irrespective of occupation, status, qualifications and pay levels.

With effect from 1st October 2011, the regulations clearly define what is required by all parties in the supply chain for agency workers to ensure equal pay, equal entitlements and equal treatment after a specific qualifying period.

Subsequent rulings have dictated to the masses that there will be no changes to the regulations as originally passed and the emergence of the formal guidance notes in May 2011 has shed some positive light on the overall part they play in the execution of the regulations.

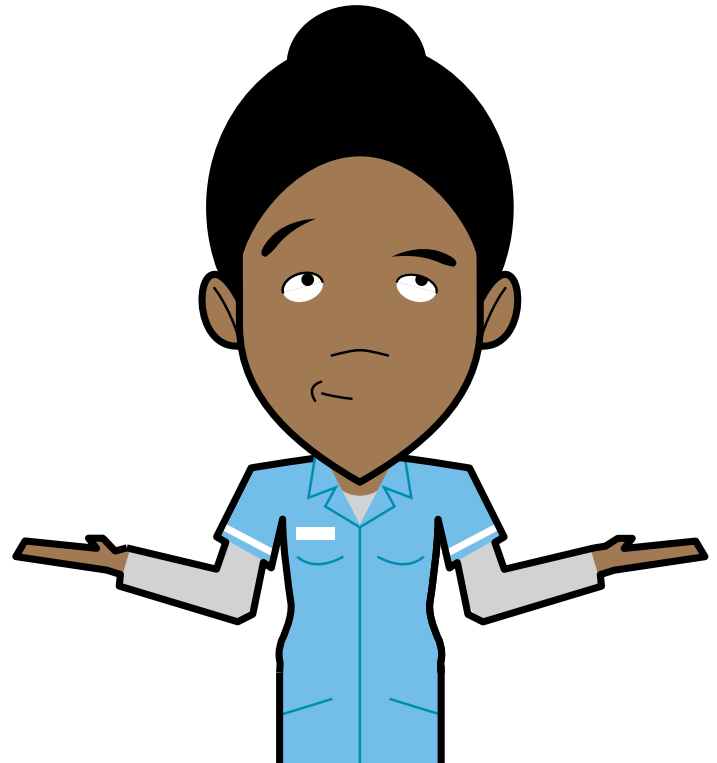
RACS Group has formulated a series of solutions to comply with and never to circumnavigate the AWR. But before we explain our models it is imperative that a broader understanding is achieved regarding who is responsible for which element, and best practices and procedures required to work within the spirit of the guidance.

This document sets out our understanding of the regulations in plain English, raising some fundamental points to ensure that compliance is always maintained. Any route that appears to constitute anti-avoidance will be strongly challenged by the powers that be and we are already aware of potential Union involvement with agency workers that are seen to be disadvantaged from day two of the effective date.

Caution! These regulations carry one of the most draconian set of anti-avoidance measures known to this sector. Penalties for avoidance can involve not only the under-paid salaries and benefits but an additional £5,000 per case on top of the original sum awarded!

Please therefore make sure that you have adequate systems in place prior to 1st October 2011, that you have clear direction on your approach and that you document everything before any assignment commences.

***RACS Group can assist you in all of these areas - but remember to act today!***



## ANALYSING THE RISK

Most experts believe that the regulations will become highly regulated by third party organisations, such as the Unions and other trade bodies. It is our belief, and again to adhere to the spirit of the legislation, that certain sectors and profession levels will not be so concerned about total compliance in all areas and take a more fluid approach to conformity.

Examples of these types of sectors will be typically split into areas where ‘the going rate’ and benefits far exceed any comparators that are currently in place - or more succinctly, where agencies already go that extra mile to ensure that their agency workers get a far better deal than a full-time employee doing the same or similar role.

### Risk Levels (our Interpretation):

Low Paid Workers in a heavily unionised/trade body arena	HIGH RISK
Medium/High Paid Workers in a heavily unionised/trade body arena	MEDIUM/HIGH RISK
Very High Paid Workers in a heavily unionised/trade body arena	MEDIUM/LOW RISK
Low Paid Workers in a NON unionised/trade body arena	MEDIUM RISK
Medium/High Paid Workers in a NON unionised/trade body arena	MEDIUM/LOW RISK
Very High Paid Workers in a NON unionised/trade body arena	LOW RISK

The thing to consider with all of the above is the overall cost of a potential claim! If it remains a single claim from the individual agency worker then this accounts, similar to a standard Employment Tribunal claim - and one that is usually settled before the case is heard: this option obviously has some cost but very rarely sees a courtroom. The greatest concern is where a Union or trade body assists multiple individuals in presenting a class action. By the very nature of this type of claim the costs almost instantly mount up! Legal fees, time and effort to defend and of course the overall impact of back pay, benefits and penalties should the case go against you.

It is therefore extremely important to categorise your business into one or several of the above risk levels and apply one or multiple solutions tailored to each. Choosing the wrong model can prove itself the ‘kiss of death’ in the event of a class action claim.

The following section aims to highlight the responsibilities attached to each party within the supply chain and serves to employ the best practices and procedures to each.



## RIGHTS & RESPONSIBILITIES

---

### Day One Rights

Broadly taken from the regulations, day one rights are the sole responsibility of the hirer and **MUST** include:

- Equal treatment - access to amenities and facilities that are generally utilised by full time employees of the hirer, such as: canteens, lockers, uniforms, car parking, memberships and all other generally accepted items that are not given as a result of long service or loyalty.
- Equal Opportunity - access to all job vacancies that are 'relevant' to the agency worker, giving them the chance to apply directly for a full-time or hired position. Typically to include: notice boards, intra net access, direct correspondence, email notification of posts and/or any other form of making the agency worker aware.

Whilst day one rights are the responsibility of the hirer alone, we feel it good practice that all agency businesses put in place standard guidelines to make sure all hirers are aware of these rules.

### Rights After 'The Qualifying Period'

The Qualifying Period is denoted as being 12 weeks in the same or similar role with the hirer. This does not take into account any natural breaks during this time such as holidays, sickness, maternity and other statutory reasons whilst the clock for qualifying is paused. It is also prudent to note that the period is set out for a time worked with a particular hirer, meaning an agency worker could have already worked for the hirer before they join your business and therefore, may have qualified for equal treatment instantly.

The qualifying clock resets if there has been a break of 6 weeks or more from the previous hirer and where the agency worker has moved to a different hirer. It is extremely important to ascertain an agency worker's previous working history and to document these details before they start with your business - we suggest that you look back at a total of 6 month's history prior to them joining your recruitment business. Multiple hirer arrangements performed at the same time are also a great cause for concern and monitoring.

---

### What are the rights after 12 weeks?

The agency worker is entitled to the following equal rights after they have completed the required qualifying period and this is in direct relation to an individual performing the same or similar role with the hirer, who is employed directly or hired directly by the hirer:

- Equal pay to the individual - including performance-related commissions, bonuses and benefits.
- Equal holiday entitlement - number of comparative days and pay levels.
- Rest breaks - the number of and the length of breaks during the working day.
- Opportunity to work different shifts and days where a comparator likewise has the same opportunities.
- Duration of working time - not being asked to work more or less hours than a comparator.

There are of course many determining factors relating to these rights and it is paramount that all eventualities and conditions are obtained from the hirer before the commencement of any assignment - ***all parties are responsible!***



## BEST PRACTICES

---

### Assisting Hirers

As previously mentioned it is purely the hirer's responsibility to ensure that all day one rights are adhered to. It would however be extremely prudent of your agency to guide and assist your clients with this obligation from the outset and at the start of any new instructions after 1st October 2011.

We strongly suggest that you analyse what your hirers currently offer and ask the necessary questions to establish if this is sufficient for AWR 'day one' purposes. Furthermore, documented evidence of this fact will assist in a duty of care by your agency and assist in strengthening any case raised.

### Comparator Information - Obtain from Hirers

Whilst we appreciate that each model offered may or may not require comparator information in all instances, we do believe that a solid best practice would be to obtain this information as part of your proposed 'take-on' process for every new and existing client from October. Moreover and in any event, should the worker require this information at any time, it is a requirement that your agency provides it in writing, within 28 days of the formal request, irrespective of which model the worker is utilising.

We are aiming to produce a full questionnaire that will assist in gathering the necessary information prior to any assignment commencing. This information will also be required by ourselves and any other third party that your agency wishes to engage for the 'supply of' and/or 'payment of' agency workers.

The typical items required would be (in comparison to a similar worker of the hirer):

- Full Job Title
- Work Sector
- Relevant Qualifications for the Role
- Contract Start Date
- Contract End Date
- Pay Levels
- Holiday Entitlement
- Bonuses/Commissions
- Breaks (Number Per Day)
- Hours to be Worked
- Additional Items Issued
- WTR's per Week
- Worked for Hirer before
- Break from Hirer
- Additional Information

This is by no way an exhaustive list but will be fully explained in our forthcoming questionnaire. Adaptations and natural amendments/additions will take place as time progresses.

---

### Contractor Information - Qualifications & Skills

In addition it would be advisable to capture the contractor's current skill and qualification levels in all scenarios. Many agencies do this already but some additional information would also be useful, particularly as any claim made would be from the worker directly.

The additional questions could include:

*"Do you consider yourself within a Profession?"*

*"What qualifications/skills are needed for you to perform your tasks?"*

*"Are these qualifications legally required to perform your task?"*

*"Do you belong to a Union?"*

*"Do you belong to a professional body?"*

*"Are you in a regulated organisation?"*

*"Are you listed on an official list?"*

These types of questions serve to point a worker into a particular model/solution.



## OUR SOLUTIONS

---

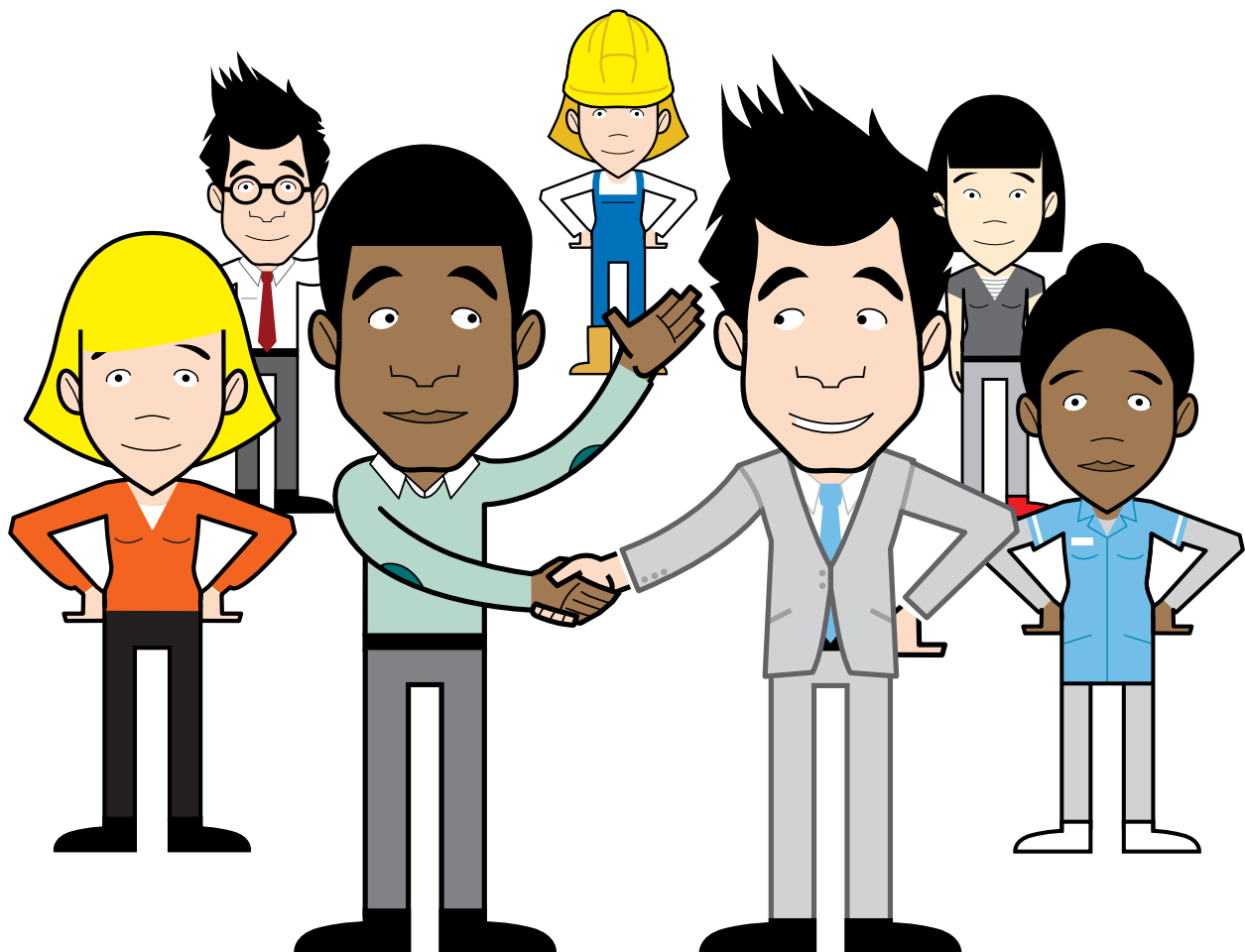
Now that BIS (The Department of Business, Innovation and Skills) has released their full guidance notes we can reveal that RACS Group has devised a number of workable solutions that will ease the overall impact, workability and additional cost surrounding the October deadline.

One underlying factor throughout the legislation and guidance is the factual demonstration of equal treatment for Agency Workers. With regards to equal pay and financial implications for all parties, there are a number of possibilities that comply fully with the legislation.

Our solutions, which are detailed below, are not designed to circumnavigate any aspect of this legislation, but more to work entirely within the designed legislative framework. Unfortunately for most in the supply chain of temporary workers, there will be additional work to be done.

This largely concerns recruitment businesses and their contractual relationship, comparative pay scales and assignment time frames when working with their end clients. RACS Group can assist your business with all of these factors.

RACS Group's solutions to AWR are featured on the following pages.



# Option One

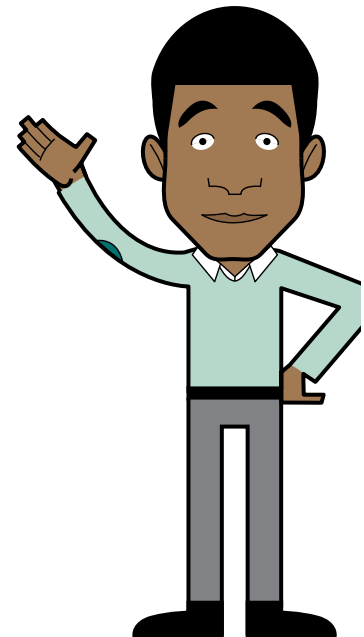
---

Contractors who **will never work** more than the stipulated 12 week qualifying period (or less if their occupation dictates) for a single end client is by definition **NOT** caught under the AWR. Therefore all current payroll models will be available to them, provided they are eligible in the first place to have them (standard eligibility guidelines apply). These models can include: standard PAYE, an Employment Umbrella (with an over-arching employment contract) or their Own Limited Company. A Section 3(2)b contract chain is mandatory for this option.

It is still mandatory under **Option One** that all standard occupation rate comparators **MUST** be in place at the start of any assignment and strict commencement/end dates **MUST** also be adhered to throughout. Should the assignment then be extended or renewed within the qualifying period or indeed during the minimum break between assignments timescale - this will, by definition, constitute full qualification under the AWR. Therefore additional steps will need to be taken in order to comply with being caught under the AWR: equal pay, holidays, sickness, benefits and bonuses etc.

**Option One** also applies whereby an agency utilises and pays in accordance with the full comparator information; this is typically evident within the public sector, where rate/salary levels are published and agency workers already meet or exceed these rates and benefits - please be aware that equal treatment **MUST** still be realised in all cases. Day one rights are also required, but remain the full responsibility of the hirer. We are suggesting that agencies assist hirers in all areas of day one rights.

This Option if **NEVER** breached will not incur any additional cost to your business and will run entirely as if it were prior to October 2011. Please be aware that manufacturing assignment lengths to fit non-qualifying periods could constitute avoidance under the terms of the AWRs anti-avoidance measures.





## Option Two

### Swedish Derogation Umbrella

This option applies where assignments are designed to exceed a qualifying period, where contract extensions make an assignment qualifying, where minimum breaks are not achieved between contracts or where qualification starts from day one of an assignment.

RACS Group are fully anticipating that the commonly known 'Swedish Derogation' model will prove fully workable for our employment Umbrella solution. The Derogation stipulates that where a contractor qualifies and thus becomes encapsulated by the AWR, certain benefits are then potentially due. These benefits will amount to a maximum pay out of up to four weeks between assignments and at the greater of the National Minimum Wage or 50% of the confirmed contract rate. Obviously, this option will typically require additional cost from agencies and/or end clients to fully cover the four week requirement. RACS Group, together with a third party is implementing an assurance scheme that greatly reduces your potential financial burden.

The guarantee is that RACS Group under the employment Umbrella will continue to act as the employer, removing all employer/employee responsibilities from the supply chain as normal. We are effectively asking for an increased marginal **AWR assurance fee** per pay period of up to 5% of gross salary and in turn we will cover the entire four weeks under the Swedish Derogation model.

This additional AWR assurance cost can be claimed from either your agency, the contractor directly (as a processing charge) or a mixture of both thus minimising any agency cash-flow issues. In essence, this percentage rise would be less than the similar cost of the employer's National Insurance saving currently made by your agency when using an Umbrella for this time period.

This particular method allows for all circumstances, assignment lengths and extensions to be taken into consideration from day one, therefore removing the entire liability from outset for equal pay - equal treatment **MUST** still be applied under the regulations.

The benefits of your business using this model:

- Still no employer/employee responsibility by using our Umbrella
- No need to worry about exceeding the twelve week qualifying period
- One percentage fee per period to cover all liabilities (Swedish Derogation)
- Still making the employer's NIC saving (over and above the AWR assurance fee)
- No requirement to increase end client charges

## Option Two (continued)

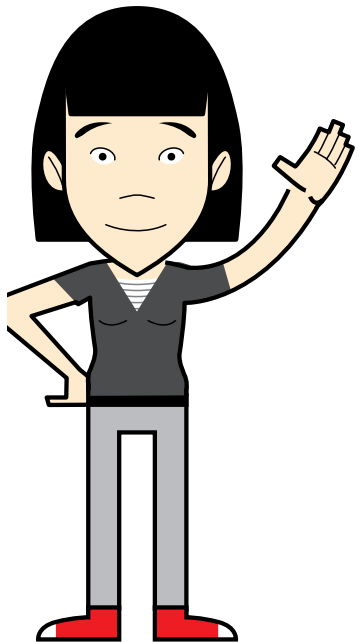
---

RACS Group feels that this is an outstanding solution to cover all bases, yet it still complies fully with the legislation. The supply chain **MUST** have a Section 3(2)b contract in place for this model to work. RACS Group can assist you with changes to your existing contracts.

RACS Group has instructed three industry renowned legal teams to look at the various stages within the supply chain and the contractual requirements for each. Barrister's opinion has been sought throughout the process and upon release of the guidance notes, the viability of this option will be made apparent.

RACS Group will provide full and finalised contractual reviews and best practices in due course.





## Option Three

### Conditional Own Limited Company

Many schools of thought would dictate that a contractor who has their Own Limited Company is by definition outside of the AWR. In essence, this would appear to be the case! But how would clarification of 'true' self-employment and that of being 'in business' for yourself sit where IR35 is clearly breached and the contractor is certainly subjected to direction, supervision and control in the workplace?

The questions we should be asking are:

- What is the 'true test' for self-employment under the AWR?
- Can falling foul of IR35/IR56 still allow you to remain outside of the AWR?
- Do these factors really matter and how can one secure true self-employed status?

Thankfully, the introduction of the Section 3(2)b contract chain will look to minimise or indeed remove the risk entirely for all those who are genuinely self-employed. The chain, as mentioned before **MUST** be replicated from the Limited Company to the Recruitment Business and onward to the End Client. Comparative End Client employment rates would still need to be confirmed in any event.

RACS Group has engaged a specialist contract legal firm that works within the recruitment sector to review all contracts for us. QC opinion has been obtained and the finer detail is still to be confirmed after receipt of the official guidance notes.

The importance of this contractual arrangement should not be underestimated as without it, all parties to the supply chain may still be liable under the AWR. The good news is that when a claim is made under the 'equal pay, bonuses and benefits rules' surrounding the AWR and where a Section 3(2)b contract is evident for an Own Limited Company contractor, the ultimate liability will rest with the Own Limited Company and obviously the one through which the contractor works. So in short, the contractor will have to make a claim **against his own company**, this being an outcome that is highly unlikely in our opinion.

In summary, provided a contractor is at least eligible to have his Own Limited Company, then clearly this is by far the best option for your business and one which retains the 'status quo' in relation to today's models.

RACS Group offers independent tailored advice to all contractors wishing to use our service(s) and guides them towards the best option for them personally. The Best Advice Matrix specifically asks a series of set questions about their assignment, their attitude to risk, contract earnings levels and intentions in the future. All advice and recommendations are documented and stored to best serve and safeguard your business with an independent, 'personal choice' style approach.

Finally, should you require any additional information, clarification on any of our options, service offerings or compliance standards, then please feel free to contact us on **0845 604 0571**.

***Don't wait until October 2011!***

# Option Four

## The Contractors' Profession (Umbrella or Own Limited Contractors)



When one closely analyses the legislation in conjunction with the guidance notes it clearly shows two real exclusions to the regulations where all of the standard rules apply to ascertaining who is an Agency Worker. These can be clearly viewed under Section 3(2) as outlined below.

### **The meaning of agency worker, Section 3:**

- (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.

The key elements include demonstrating from outset the following criteria:

- Is the contractor a member of a profession?
- Does the contractual relationship reflect this and show that the hirer is in fact the client?



## Option Four (continued)

---

What we need to establish is what constitutes the term 'Profession'

The dictionary describes the word as:

- *a vocation requiring knowledge of some department of learning or science: the profession of teaching. Compare learned profession.*
- *any vocation or business.*
- *the body of persons engaged in an occupation or calling: to be respected by the Medical profession.*

Therefore it necessarily follows that a person who carries on a profession is by definition not an Agency Worker and therefore outside of the scope of the regulations provided that: 'there is a contract to the same whereby the hirer is the client'. This area needs to be established both contractually and in the normal course of events and usual practices - relatively easy to prove when the contractor works at the hirer's site(s).

In summary, where a contractor has a profession and a Section 3(2)b contractual chain denominating the hirer as the client then all aspects are indeed satisfied to show that the contractor is in fact **NOT** an Agency Worker and thus outside of the regulations. This similarly applies to Own Limited contractors who also demonstrate that they have their own business!

***QC opinion has likewise been sought to reinforce these terms as perfectly valid and correct!***

## CONTRACTUAL RELATIONSHIPS

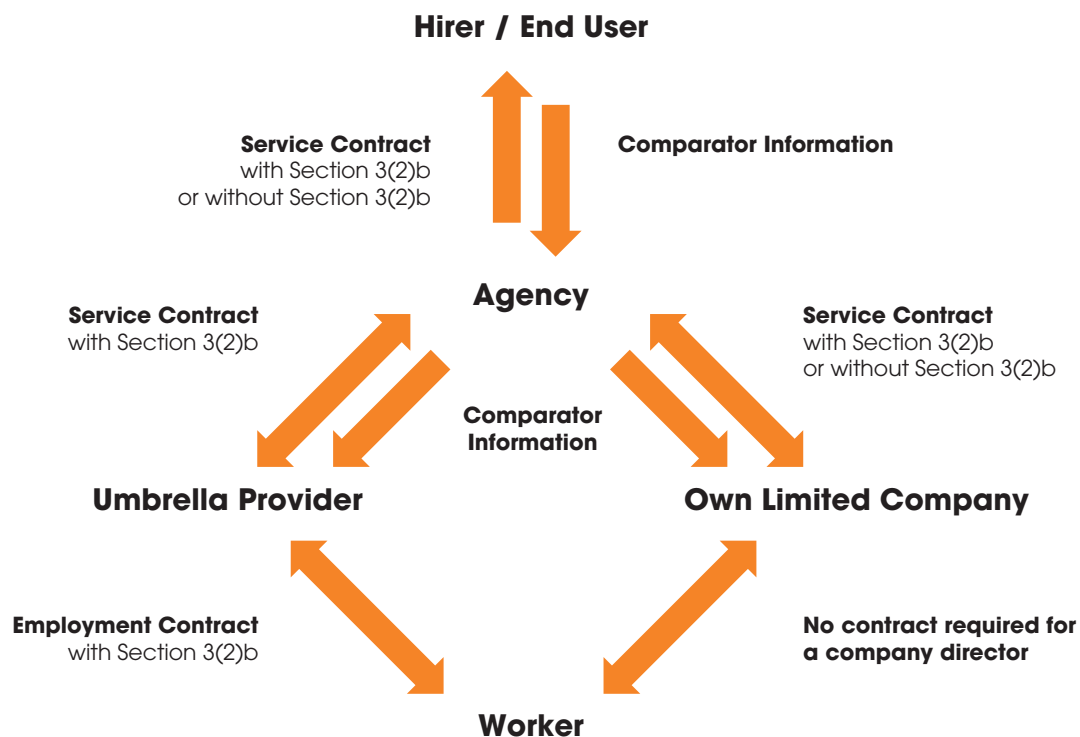
Properly drawn-up contracts, **specific to each model** are of paramount importance to all parties in the supply chain. We have instructed three industry specialist legal practices to review all of our current contracts with the aim of selecting the most appropriate clauses, common objectives and unique requirements relating to each. This way we should hopefully define an industry standard “type” contract pack for all.

The contract chain will usually include:

- A contract for an Umbrella Worker (Using the “Swedish Derogation” model & a standard comparator model).
- A contract for an Own Limited Company worker (including & excluding Section 3(2)b clauses)
- A contract between RACS Group and your agency.
- A sample contract/clauses to include with the hirer/master vendor etc.

In addition we will produce a flow chart and questionnaire detailing specific questions that need to be answered so that the above contracts can be completed correctly and in a timely fashion - **PLEASE** note that we are advised the we cannot agree to any commencement of an assignment prior to receipt of a valid, signed contract.

The contractual chain should ideally look like:



## THE NEXT STEPS

---

Unfortunately, time is now of the very essence to consider your chosen options depending on your business requirements. Please consider these regulations extremely carefully and in good time for 1st October 2011.

RACS Group anticipate having a “tried and tested” model for each solution by the beginning of September 2011. This will include internal software implementation and testing, legally approved contractual arrangements, standard take-on process with questionnaires and aides memoirs for agencies and hirers and fully trained internal staff/staffing levels to cope with the foreseeable increased workloads.

Under these tight time constraints we would strongly advise you to do likewise and make sure that all angles are covered and even tested “in-house” before 1st October 2011. We cannot stress enough that there are several professional bodies out there ready to “jump-on” non-compliance and make “test case” examples of agencies, hirers and providers who cannot or do not conform from day one.

*Should you require any assistance or additional information, please contact us as soon as possible.*

**Address:** RACS Group  
51 Market Place  
Warminster  
Wiltshire  
BA12 9AZ

**Telephone:** 0845 604 0571  
**Sales:** 0845 604 0572 (until 7pm)  
**Fax:** 0845 604 0573

**Email:** [info@racsgroup.com](mailto:info@racsgroup.com)  
**Web:** [www.racsgroup.com](http://www.racsgroup.com)  
**Blog:** [www.racsgroupblog.com](http://www.racsgroupblog.com)





# racs<sup>o</sup>

GROUP

51 Market Place | Warminster | Wiltshire | BA12 9AZ  
Main 0845 604 0571 | Sales 0845 604 0572 | Fax 0845 604 0573 | info@racsgroup.com | www.racsgroup.com



©RACS Group 2011  
All rights reserved.

The information contained within this document represents the views of RACS Group.

Whilst every effort has been taken to ensure the accuracy of any statement, view point or suggestion, it is strongly advisable that you seek independent professional advice before implementing any item contained herein.