

## PERSONNEL COMMITTEE – 4TH DECEMBER 2018

### Report of the Head of Strategic Support

#### Part A

#### ITEM 6      TEMPORARY AGENCY WORKERS POLICY AND GUIDANCE

##### Purpose of Report

To gain the Personnel Committee's approval to introduce a revised Temporary Agency Workers Policy and Guidance. These changes were agreed with SMT on 18th October 2018 and discussed at JMTUM on 19th April 2018.

##### Recommendation

That the revised version of the Council's Temporary Agency Workers Policy and Guidance be approved and adopted. This document will replace the current Agency Worker Regulations Guidance.

##### Reason

The Temporary Agency Workers Policy and Guidance has been reviewed to include the latest legislation and best practice relating to Agency Workers. This includes information on the IR35 regulations. The revised policy is intended to support managers in greater detail when employing agency workers.

##### Policy Justification and Previous Decisions

The Council implemented a guidance document on 28th September 2011 outlining Agency Worker Regulations. The proposed Temporary Agency Workers Policy and Guidance document has been reviewed and revised to ensure it complies with legislation and recommended best practice.

##### Implementation Timetable including Future Decisions

It is recommended that the Temporary Agency Workers Regulations be published on the intranet and the current Agency Workers Regulations be deleted, following approval by Personnel Committee.

##### *Financial Implications*

There are no immediate financial implications arising from this decision.

##### *Risk Management*

There are no specific risks associated with this decision.

Background Papers: none

Annex A: Temporary Agency Worker Policy and Guidance

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## **Part B**

### Background

1. The Council implemented a guidance document on 28th September 2011 outlining Agency Worker Regulations.
2. The proposed Temporary Agency Workers Policy and Guidance document has been reviewed and revised to ensure it complies with legislation and recommended best practice.
3. The revised Temporary Agency Workers Policy and Guidance clarifies in greater detail, the information already contained within the current Agency Workers Regulations Guidance. In addition, it introduces the following new areas:

### Corporate Contract: Matrix

This section outlines information regarding Matrix as the Managed Service Provider and reference to the online ordering system.

### Exceptional Circumstances (Other Agencies)

It is recognised that there may be occasions where use of an agency outside the corporate contract is necessary. In this circumstances approval would be needed from a Head of Service.

### IR35 – Intermediaries Legislation

The intermediaries Legislation comprises a set of HMRC rules relating to the treatment of Income Tax and National Insurance contributions for individuals who are supplied to the Council via an intermediary. As a public sector organisation, in accordance with the IR35 rules the Council is required to determine whether IR35 applies to an agency worker. This section outlines the requirements under IR35 for managers.

### Candidate Vetting

Pre-employment checks must be completed prior to assigning an agency worker and this is normally the responsibility of the agency. Managers must take steps to ensure this is completed, as highlighted in this section.

### Verifying and Agency Worker's Identity

All agency worker must be checked by the manager to confirm that they are the actual person put forward for the role by the agency at the start of the first day of an assignment. This is especially important where the role is considered to be a "regulated activity".

### Managing Agency Workers

The proposed policy outlines the following key areas for managers to be aware of when appointing and managing agency workers:

- Induction
- Conduct, Performance and Attendance
- Complaints and Grievances
- Investigations
- Referral to a Professional Organisation
- Notice Periods
- Changing the Terms of an Assignment
- Reasonable Adjustments

### Industrial Action

This section outlines that the Council will not engage agency workers specifically to provide cover where employees are absent due to industrial action, as it is unlawful to do so.

### Health and Safety

Health and Safety requirements are covered within this section as both the Council and agency are responsible for providing a safe working environment for the agency worker.

### Employing or Engaging Agency Workers Directly

If a manager appoints an agency worker to a post within the Council, the agency may charge a fee, if this is outside of the Matrix Corporate Contract.

### Retention of Agency Worker Records

Managers need to retain information about an agency worker as there are no central records kept. The information retained must be held securely in accordance with the Retention and Disposal Guidance outlined by the LGA.

### Public Sector English Fluency

As a public sector employer, the Council has a statutory duty as part of the Immigration Act 2016 to ensure that individuals employed or engaged in “public facing” roles have a sufficient level of fluency in spoken English to properly carry out their duties. It is outlined within the guidance document that the duty applies to the engagement of agency workers.

### Appendix B (in the guidance document attached) – Example Communication to Agencies

In line with the IR35 – Intermediaries Legislation the Communication to Agencies document has been produced to inform an agency of the manager’s determination regarding the IR35 status of a particular assignment.



## Temporary Agency Workers Policy & Guidance

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### Information about this Policy and Guidance

Managers should ensure that they are familiar with the latest version of the Agency Workers Policy & Guidance, along with the associated [Recruitment and Selection Guidance](#) and Casual Workers.

Managers should refer to these sources of information in the first instance.

Charnwood Borough Council has appointed MatrixSCM as its Managed Service Provider for the supply of agency workers. All agency worker requirements must be referred to MatrixSCM in the first instance.

## Purpose

The purpose of this guidance is to assist managers to identify situations in which use of an agency worker may be appropriate, to fulfil their legal responsibilities in relation to the use of agency workers, and to provide information about managers' contractual obligations regarding Charnwood Borough Council's corporate contract with Matrix which covers the supply of all agency workers including niche and sector specialist requirements.

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## Definition of an Agency Worker

An agency worker is employed or engaged by an employment agency, for the purpose of being assigned to a client of the agency on a temporary basis to carry out a particular role or piece of work. The term 'agency worker' is a general one which applies to all temps, interims, contractors and consultants supplied by an agency.

Agency workers are usually used for a short period of time to cover work that, for some reason, cannot be done by the regular workforce and/or using the regular recruitment and selection procedure will not immediately meet the needs of the service. A report will be submitted to Senior Management Team periodically for information regarding the use of agency workers within the Council. SMT will review cases where an agency worker is engaged for a period in excess of 6 months.

Pay rates are normally agreed based on an hourly or daily rate, and the agency worker will be paid by the agency upon receipt of a timesheet authorised by the manager supervising their assignment.

It is important to note that agency workers are not employees of the Council, although they are under the supervision of the manager.

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## Alternative Options

Where a manager identifies a situation in which they are considering engaging an agency worker, they must first give consideration to whether it would be more appropriate to cover the work using existing resources, or by recruiting an employee. This is especially important if the period during which cover is required is expected to be significant, e.g. during maternity or adoption leave.

Examples of alternative options include:

- Employing someone using normal [recruitment and selection procedures](#), on a permanent or fixed-term basis;
- Reallocating work within the team;
- Offering extra hours by agreement, if appropriate;
- Using a casual worker; or:
- Offering a secondment.

Using agency workers is usually the most expensive option and may not offer value for money in comparison to alternative means of covering the work to be done. Managers must be able to justify the additional cost of using agency workers against the needs of the service.

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## Corporate Contract: Matrix

Charnwood Borough Council has appointed Matrixscm as its Managed Service Provider for the supply of agency workers for all roles including consultants and interims.

All agency worker requirements must be referred to Matrix, using their online ordering system ([matrix-cr.net](#)) which is also used to manage timesheets. Matrix will work with their network of carefully chosen supplier agencies to fulfil managers' orders. Further details about how to engage with Matrix, including requesting a registration to use [matrix-cr.net](#), can be found on the [Intranet](#).

The contract with Matrix has been structured to ensure compliance with the [Agency Workers' Regulations 2010](#), and with robust safeguarding and safer recruitment procedures. Matrix carry out regular audits of their network of suppliers to ensure the agencies they work with operate to high standards of compliance.

Agency charge rates have been agreed as part of the contract, and are intended to be competitive in comparison with the cost of sourcing agency workers directly from employment agencies, offering the Council value for money.

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## Exceptional Circumstances

While all requirements for agency workers must be referred to the Council's Managed Service Provider, there may be rare occasions on which use of an agency outside the corporate contract is appropriate. This may occur for example where the Managed Service Provider has been unable to fill a role despite all efforts being made on both sides to resolve the situation. Authorisation from a Head of Service

must be obtained in each case before using any agencies outside the corporate contract.

Where approval from a Head of Service has been granted, the manager will select the agency to be used on a strictly ad-hoc basis. Managers must ensure that they have carefully read the terms and conditions of the agency. Additionally, the manager needs to consider the implications under IR35 – Intermediaries Legislation.

The selection must be carried out in accordance with the Council's [Contract Procedure Rules](#). Managers should seek further advice from the Finance Section.

The manager will be fully responsible for managing the relationship with the agency for the duration of the assignment, and this will include provision of any information that the agency requires as well as carrying out ongoing checks to ensure that the agency acts in accordance with all relevant legislation. The manager will need to verify that the agency applies stringent candidate vetting procedures which at least meet the standards outlined in the [Recruitment and Selection Guidance](#), along with any other service-specific requirements. The manager will also need to ensure that arrangements are made for timesheets to be authorised and reconciled against the agency's invoices, and for the agency's invoices to be paid in accordance with the Council's normal payment processing times. Further advice on payment of invoices can be obtained from the Finance Section.

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## Agency Workers' Regulations 2010

The Agency Workers' Regulations 2010 (AWR) give agency workers the right to equal treatment in certain terms and conditions compared to employees of the Council, but do not change the status of agency workers - they do not automatically become employees of the Council.

Agency workers will be entitled to certain rights from the first day of an assignment, while others require a 'qualifying period' of 12 weeks to be served. Further information can be found at [Appendix A](#).

The Council's Managed Service Provider will be kept informed of the minimum general terms and conditions of employment but managers must provide any additional information required promptly upon request.

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## IR35 – Intermediaries Legislation

The Intermediaries Legislation comprises a set of HMRC rules relating to the treatment of Income Tax and National Insurance contributions for individuals who are supplied to the Council via an intermediary. Further information about IR35 and intermediaries can be found on the [Gov.uk website](#).

As a public sector organisation, in accordance with the IR35 rules the Council is required to determine whether the Intermediaries Legislation applies to each separate agency worker assignment. If the IR35 rules apply to the assignment, it is deemed to be 'inside IR35' and deductions for Income Tax and National Insurance contributions must be made. Where agencies are used, the agency which engages the worker will be responsible for the making the appropriate deductions in respect of the individual for Income Tax and National Insurance contributions, unless the manager does not notify the agency of the IR35 status of the assignment within 31 days.

HMRC have developed an online [Employment Status Service \(ESS\) Tool](#) to help managers decide whether the IR35 rules apply to an assignment. However, managers must not rely solely on the outcome of the tool; other evidence must be available to support the decision in order for the manager to be able to show that they have taken 'reasonable care' in identifying the correct IR35 status. This may include taking specialist advice. It is not sufficient to rely upon information provided by the agency or the agency worker.

If the outcome of the online [Employment Status Service \(ESS\) Tool](#) is 'indeterminate', managers must take specialist advice to obtain confirmation of the correct status.

Managers are required to:

- Carefully consider all the information available to make an evidence-based assessment of the IR35 status of each assignment;
- Inform the agency of their decision regarding an assignment's IR35 status (see [Appendix B](#) for an example communication) within 31 days;
- Provide any further information or supporting evidence requested by the agency in response within 31 days;
- Request written assurances from the agency that they will apply the correct deductions for Income Tax and National Insurance contributions;
- For any assignments falling outside IR35, refer the written assurance from the agency to the Council's [Finance Section](#) upon receipt along with a copy of the outcome of the HMRC online [Employment Status Service \(ESS\) Tool](#) and any specialist advice taken;

- Keep records locally of any contact and correspondence with the agency and regarding specialist advice taken in regard to IR35;
- Where an assignment is extended or changed, carry out a re-assessment and inform the agency of the outcome of the re-assessment within 31 days.

## **Compliance**

Failure to inform the agency of an assignment's IR35 status, to be able to demonstrate that reasonable care was taken in determining the correct IR35 status of an assignment, or respond to an agency within the timescales above may lead to the Council becoming liable for making deductions for Income Tax and National Insurance contributions in respect of the agency worker. These will be charged to the manager's budget along with interest, fines or additional costs imposed by HMRC.

## **Internal Review of Income Tax and National Insurance Determinations**

Each engagement of an agency worker may be subject to review to verify the basis on which the IR35 determination has been made. The review will take into account all the information provided to the agency but further details may be needed, and managers must be prepared to provide this upon request. Following the review, it may be necessary for the manager to complete an updated HMRC online [Employment Status Service \(ESS\) Tool](#) and instruct the agency to amend the role's IR35 status. Written confirmation must be obtained from the agency that the appropriate arrangements for Income Tax and National Insurance contributions will be applied.

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## **Candidate Vetting**

It is normally the responsibility of the agency which engages the worker to carry out any vetting of candidates' suitability for the role prior to an agency worker starting an assignment with the Council, upon instruction from the manager.

The Council's Managed Service Provider ensures that its supplier agencies are aware of the Council's requirements in regard to pre-employment checks. The Managed Service Provider will then audit its suppliers on a regular basis to verify that pre-employment checks are being completed.

When ordering agency workers, managers must take steps to satisfy themselves that the agency has carried out the necessary pre-employment checks as detailed in the [Recruitment and Selection Guidance](#); however, it may not be possible for the agency to send copies of all documentation due to confidentiality obligations. The Council's Managed Service Provider will notify managers once all checks have been completed, and this can be retained on file by the manager in case of inspection.

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## Verifying an Agency Worker's Identity

When an agency worker arrives at the start of the first day of an assignment, the manager must confirm that the individual who attends is the person who was put forward for the role by the agency. This is especially important where the role is considered to be a '[regulated activity](#)'. Where a manager is unable to verify the agency worker's identity, they must contact the Council's Managed Service Provider or the agency supplying the worker immediately before allowing the individual to start work.

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## Managing Agency Workers

### Induction

Managers should ensure that agency workers who are new to the Council and/or new to their service area are given an [induction](#) to familiarise them with the work that they will be expected to complete, their colleagues and Council procedures.

### Conduct, Performance and Attendance of Agency Workers

It is acceptable for a manager to communicate their expectations of an agency worker while they are working in an assignment for the Council. Managers must not attempt to apply the Council's employment policies and procedures, for example regarding Disciplinary-, Capability- or Attendance-related matters, as agency workers are not employees of the Council; however, managers should act quickly to address concerns in an appropriate way.

Where there are indications that the concerns may be of a more serious nature, the manager should contact the Council's Managed Service Provider or the agency which supplied the worker straight away.

Managers should contact Human Resources in the first instance for advice in specific and complex cases.

### Duration of Assignment

Managers should review, at 6 monthly intervals, the length of time an agency worker has been assigned to a position and assess whether continuing the assignment is the most appropriate solution for the service area.

### Complaints and Grievances

The manager should contact the Council's Managed Service Provider or the agency which supplied the worker as soon as possible, even if the manager is not currently

considering terminating the agency worker's assignment, if any of the following occur:

- A grievance is raised about an agency worker by an employee of the Council;
- A complaint is raised about an agency worker by someone else, for example a service user or member of the public; or
- The agency worker attempts to raise a grievance.

It is not appropriate for managers to use the Council's Grievance Policy and Procedure to deal with a grievance raised by an agency worker, but it may be necessary for the manager to investigate to some degree and take action internally.

A general complaint raised by an agency worker should be addressed according to normal complaint resolution procedures.

### **Investigations**

It is acceptable for a manager to make enquiries and gather sufficient information about an agency worker to enable them to take a decision about how to address a particular situation. In some cases, it may be necessary for the manager to conduct an investigation for internal purposes, for example if a complaint is raised in connection with health and safety concerns.

Managers should co-operate with any investigation undertaken by the Managed Service Provider or the agency which supplied the worker, but managers must be aware that some information may be confidential and it may not be possible to release it. Similarly, managers may not always be informed of the outcome of any investigation conducted by the Managed Service Provider or the agency which supplied the worker; however, the manager should satisfy themselves that the matter has been addressed appropriately.

### **Referral to a Professional Organisation**

In some cases, concerns may be serious enough for the agency or the manager to consider whether it is appropriate to make a referral to a professional organisation such as the [Disclosure and Barring Service \(DBS\)](#). Managers considering taking this step should initially discuss the matter with the agency.

### **Notice Periods**

Agency workers supplied by the Council's Managed Service Provider are not subject to a minimum period of notice, should the manager feel it is necessary to terminate their assignment before the expected end date. If an agency worker has been supplied outside the corporate contract, managers should check with the agency whether they have agreed a minimum period of notice.

### **Changing the Terms of an Assignment**

Where it becomes necessary to make changes to a current assignment, for example extending or shortening its expected duration, managers should contact the Council's Managed Service Provider or the agency which supplied the worker in the

first instance. The agency will liaise with the worker regarding the revised arrangements. Managers should not agree the changes directly with the agency worker, as this can lead to payment issues and may result in the agency withdrawing the agency worker. Managers must ensure that notification regarding the [IR35 status](#) of the revised assignment is provided to the agency.

### **Reasonable Adjustments**

Managers may receive requests for reasonable adjustments to be made in respect of agency workers who have a disability, and it is the responsibility of both the agency and the Council to put them in place. A request may be received directly from an agency worker or from the agency who supplied them. Managers should initiate contact with and work closely with the agency to identify any reasonable adjustments which can be implemented. For further advice, managers should contact Human Resources.

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## **Industrial Action**

The Council will not engage agency workers specifically to provide cover where employees are absent due to industrial action e.g. strikes, as it is unlawful to do so. The Council's Managed Service Provider will be made aware of dates of planned industrial action, and will be entitled to refuse requests for agency workers if they are made to cover employees on strike on the given dates.

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## **Health & Safety**

Agency workers are covered by health and safety-related legislation, such as the Health & Safety at Work Act 1974 and the Working Time Regulations, and both the Council and agency are responsible for providing a safe working environment. Managers and agencies must work together to ensure that any workplace risks, including work-related stress, are minimised. Managers should take a proactive approach and initiate contact with the agency where it becomes apparent that there may be a concern.

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## **Employing or Engaging Agency Workers Directly**

Managers should follow [normal recruitment procedures](#) if they intend to employ someone to fill a role covered by an agency worker. This applies even if the agency worker covering the role is interested in being considered for employment with the Council.

Where agency workers are offered employment or an engagement directly with the Council, managers must be aware that the agency may charge a fee, if they are outside of the Matrix corporate contract. This is sometimes known as a 'temp to perm' or 'introduction' fee, regardless of the basis on which employment is offered e.g. permanent/fixed-term, casual or self-employed contractor.

Fees may also be payable if an agency worker ceases to be supplied to the Council by a particular agency and is subsequently supplied to the Council by a different agency or company.

These fees may apply even if the roles undertaken are not the same.

Managers should check with the agency whether they will be expected to pay a fee before making any offer of employment.

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## Retention of Agency Worker Records

As no central records are kept relating to agency workers who have been assigned to work at the Council, managers will need to hold information locally about the agency workers they have used. This information must be retained securely and in accordance with the [Local Governments Associations \(LGA\) Retention and Disposal Guidance](#). The manager may be required to produce details about agency workers in the event that the service is inspected by an external body e.g. the Care Quality Commission or OFSTED, or where a request is received under the Freedom of Information Act 2000.

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## Appendix A: Key Legislation concerning Agency Workers

### Agency Workers' Regulations (AWR) 2010

#### **'Day One' Rights**

From the first day of an assignment, the manager must ensure that agency workers are informed of and are able to access:

- The Council's 'collective facilities' which are available to employees. This includes for example canteen facilities, shower facilities, car parking and access to any Multi Faith facilities.
- Details of any relevant vacant posts. This includes vacancies that are advertised internally only, and ensuring that all agency workers have access to [Charnwood's Job Page](#) available on the intranet.

#### **Rights on Completion of the Qualifying Period**

If an agency worker completes at least 12 calendar weeks in an assignment, which can be full or part-weeks, they will become entitled to the same minimum 'basic working and employment conditions' as if they had been recruited directly by the Council. Basic working and employment conditions only include terms in relation to pay, duration of working time, night work, rest periods, rest breaks, annual leave and certain pregnancy-related entitlements.

Terms relating to pay include:

- Basic pay;
- Holiday pay;
- Overtime payments;
- Enhanced payments for working on a public holiday;
- Additional premium for working at night;
- Any other allowance eg shift premium.

Once the qualifying period has been served, the agency worker will also be entitled to incremental salary increases within the grade for their role (if available) if they are in assignment for a long enough period of time to qualify for this.

Note that agency workers whose agreed rates of pay exceed those which a regular employee would receive for the same work will not be entitled to further payments as detailed above.

Pay does not include:

- Contractual sick pay;
- Contractual maternity, paternity or adoption pay;
- Expenses;



- Redundancy or other termination payments;
- Pensions.

Agency workers may be entitled to receive pension contributions from the agency that employed or engaged them to be supplied to the Council, and if this is the case pension contributions may be included in the agency's charge rates to the Council.

### **Annual Increments**

Once the qualifying period has been served, the agency worker will also be entitled to incremental salary increases within the grade for their role (if available) if they are in assignment for a long enough period of time to qualify. Pay will not be increased if the agency worker is already in receipt of a rate that exceeds the normal pay for the role.

### **Pension Contributions**

Agency workers may be entitled to receive pension contributions from the agency that employed or engaged them to be supplied, and if this is the case pension contributions may be included in the agency's charge rates.

### **Apprenticeship Levy**

Agencies are required to comply with rules regarding payment of the Apprenticeship Levy where their payroll bill for workers supplied to clients on a PAYE basis exceeds the minimum threshold set by Central Government. The Apprenticeship Levy charge, currently set at 0.5% of the payroll bill, will in most cases be passed onto clients.

### **Pregnancy-Related Entitlements**

On completion of the qualifying period, or from the first day of an assignment if the agency worker is an employee of the agency, an agency worker is entitled to:

- Have changes made to their working conditions if the agency worker is pregnant and a health and safety risk to the agency worker and/or their baby is identified;
- Be offered alternative work by their agency if suspended on maternity grounds
- Be paid while suspended on maternity grounds;
- Receive reasonable time off during their normal working hours with pay to attend antenatal appointments, except for the first appointment;
- Receive reasonable unpaid time off during their normal working hours to accompany a pregnant woman to up to two antenatal appointments of maximum 6½ hours each, provided that the agency worker is the father of the baby, or in an enduring relationship with the expectant mother, or is one of the intended parents in a formal surrogacy arrangement.

For agency workers who are not entitled to reasonable paid time off to attend antenatal appointments, the manager must give consideration to allowing the agency



worker to take unpaid leave during normal working hours if required, subject to the needs of the service.

### **Calculating Service for Agency Workers for AWR Purposes**

The qualifying period of 12 weeks need not be continuous under certain circumstances. An agency worker's service is broken if:

- They begin a new assignment with a different hirer;
- They remain with the same hirer, but take up a 'substantially different' assignment;
- There is a break between assignments with the same hirer of more than six weeks that is not one which must be disregarded for the purpose of calculating the agency worker's service, as detailed below.

The types of break to that will not break the agency worker's service, but will not be counted towards the 12 week qualifying period, are:

- Breaks for the purpose of taking any leave to which the worker is entitled, such as annual leave;
- A break of no more than six calendar weeks for any reason, when the agency worker returns to a role that is not substantially different with the same hirer;
- A break of up to 28 calendar weeks due to the agency worker being incapable of work due to sickness or injury;
- A break of up to 28 calendar weeks to allow the agency worker to attend for jury service;
- Breaks caused by planned shutdown or industrial action at the hirer's workplaces.

Note that during any breaks due to maternity leave, adoption leave, paternity leave, or due to pregnancy or childbirth, the agency worker's service will continue to accrue for the originally intended or likely duration of the assignment, whichever is longer.

An agency worker could have more than one qualifying period in operation at any time, for example if they are working in one or more substantially different assignments.

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### **Anti-Avoidance Provisions**

The AWR include a series of deterrents, known as the 'anti-avoidance provisions', which are intended to prevent hirers from avoiding their obligations under AWR, for example by arranging assignments in such a way that the agency worker is deliberately prevented from completing their qualifying period.

Anti-avoidance provisions will apply if the agency worker:

- Has been moved to more than two substantively different roles with the hirer, or:

- Has completed two or more successive assignments with the hirer, and:
- The most likely reason for the termination of an assignment or moving the agency worker to a different assignment was to prevent the agency worker from becoming eligible for equal treatment under AWR, and:
- The agency worker would have qualified for equal treatment under AWR had they not been moved to a different assignment.

The agency worker may apply to the Employment Tribunal on the grounds that the Council and agency have breached AWR. If successful, the Employment Tribunal can make an award of up to £5,000 to the worker.

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## Equality Act 2010

Agency workers are protected by the provisions of the Equality Act 2010. Managers and agencies must therefore work together to ensure that agency workers are not subjected to unlawful discrimination, and managers should not wait for the agency to make contact in the event that concerns arise.

The Council may become liable for the actions of an agency working on their behalf, if the agency operates in a discriminatory manner and the manager does not take steps to address this with the agency, and vice versa.

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## Public Sector English Fluency

As a public sector employer, the Council has a [statutory duty](#) as part of the Immigration Act 2016 to ensure that individuals employed or engaged in 'public-facing' roles have a sufficient level of fluency in spoken English to properly carry out their duties. This duty applies to the engagement of agency workers as well as regular recruitment exercises.

### Definition of a 'public-facing' role

These are roles which require postholders to speak with members of the public as a 'regular and intrinsic' part of the job, in person and/or using the telephone. Although some roles may involve a degree of interaction with the public, this may not be enough to qualify as 'regular and intrinsic'. Managers will need to consider the purpose of roles and consider factors including:

- The extent to which the job requires or necessitates contact with members of the public in order to achieve its purpose;
- Whether contact with members of the public is regular and planned;

- The amount of time spent interacting with members of the public;
- The level of service quality and responsiveness expected by the public.

Managers should note that ‘members of the public’ does not include colleagues who are internal to the Council and working in other teams or departments.

### **Determining the required level of English fluency**

The level of English fluency applicable to each role will need to be assessed based on the type of role and the nature of the interaction required in order to carry out the duties. Factors which managers will need to take into account will include:

- The frequency and amount of time spent speaking with members of the public;
- The subject(s) that the postholder will need to talk about, and whether this will include technical or specialist vocabulary;
- The likely audience;
- The extent to which communication is essential to the purpose of the role.

It is unlikely that managers will need to specify a minimum standard of spoken English fluency in the job profile; however, where there are indications that the post will fall within the statutory duty, the person specification must include the following as an essential criterion:

*‘The ability to converse with ease with customers and provide advice and information in accurate spoken English is essential for the post’.*

Some public-facing roles may already be subject to a standard of English fluency set externally by a professional or regulatory body, such as those set out in the Teachers’ Standards. It is not likely that the level of English fluency required for these roles will need to change.

### **Assessing English fluency**

The interview stage is key in providing shortlisted candidates with an opportunity to demonstrate their ability to converse in English, and for this skill to be assessed.

Applying tests to candidates or asking specific questions relating to English fluency is not likely to be necessary, as this can be adequately assessed during the course of an interview.

Managers may find it useful to refer to the [Common European Framework of Reference for Languages](#) for further guidance on levels of language fluency.

As a guide, indicators of a candidate’s level of English fluency may include:

- Speaking with confidence and accuracy;
- Use of appropriate vocabulary;

- Sentence structures;
- Smoothness and flow of conversation;
- Ability to listen and understand.

The following must be disregarded, as they are not indicative of fluency:

- Accents and dialects;
- Speech impediments;
- Tone of conversation.

### **Carrying out the duty fairly**

Candidates' English fluency must only be assessed if the post is within scope of the duty. As the level of English fluency should be appropriate to the role, a high level of fluency may not always be required.

The same assessment must be applied to all candidates, including candidates who speak English as a first or main language.

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## Appendix B: Example Communication to Agencies

### DRAFTING NOTES

**Purpose:** This communication is to be used to inform an agency of the manager's determination regarding the IR35 status of a particular assignment. If the agency has requested this information, it must be supplied within 31 days of the request.

This communication may be emailed, or issued by letter. If drafting as a letter the text outlined below must be transferred onto CBC letterhead. Please remove all drafting notes, headers and footers before finalising the draft.

- The text is coded as follows:
  - Plain text and **bold text**: should be included.
  - *[Italic text in square brackets]*: must be replaced with information as described.
  - Text in CAPITALS: remove when drafting.
  - Underlined text: remove text that does not apply.
- Please ensure that any *[italic]* or underlined text is formatted to normal text, and brackets and watermarks are removed.
- The communication must demonstrate that the manager has taken 'reasonable care' in sourcing information and evidence, and has used this to make an informed decision. This means there must be an explanation of what information has been taken into account and why this points to a particular determination regarding the IR35 status of the role.

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### STRICTLY PRIVATE AND CONFIDENTIAL

*[Agency Contact Person Name]*

*[Agency Address]*

*[Date]*

Dear *[Agency Contact Person Name]*,

IF NOT USING AN AGENCY WORKER SOURCED BY REED: I recently contacted you regarding an order for a temporary agency worker to cover the assignment of *[Enter job title or short description of the assignment]*. I am required to inform you that Charnwood Borough Council is a public sector employer and has a duty to

advise you of this, and to provide you with my determination regarding the IR35 status of this assignment.

OR:

IF USING AN AGENCY WORKER SOURCED BY MATRIX: I recently contacted you regarding an order for a temporary agency worker to cover the assignment of [Enter job title or short description of the assignment], and I am writing to provide you with my determination regarding the IR35 status of this assignment.

Having carefully considered the role and our requirements, I believe that this assignment falls inside the IR35 rules. This is because [Enter reasoning and include all relevant details – for example, this role would normally be undertaken by an employee, and/or I require a high degree of control over the work and how it is done, and/or I would not accept a substitute etc.].

OR:

Having carefully considered the role and our requirements, I believe that this assignment falls outside the IR35 rules. This is because [Enter reasoning and include all relevant details – for example, niche or highly specialist requirements, the degree of control over how, when and where the work is done, willing to accept the worker sending a substitute at their own expense, worker will provide their own equipment and materials, amount of time spent working for the Council etc.].

I have consulted HMRC's online Employment Status Service (ESS) Tool regarding this particular assignment, and the outcome suggests that *[the IR35 rules do OR do not apply OR IR35 status is indeterminate]*. Please find enclosed OR attached a copy of the outcome of the HMRC online Employment Status Service (ESS) Tool for your reference.

Also enclosed are the following documents to which I have referred when making my determination:

- *[Enter itemised list]*
- [Copy of the HMRC online Employment Status Service (ESS) Tool outcome completed for this assignment, OR:
- Advice received regarding the status of the assignment for Income Tax and National Insurance purposes obtained from specialist advisor.]

I would appreciate if you would confirm that your agency will apply the appropriate payroll arrangements in respect of the agency worker(s) assigned to this role.

Should you require any further information, please do not hesitate to contact me.

Yours sincerely,

*[Manager's Name]*

*[Manager's Job Title]*