

## Contractors guidance to the Conduct Regulations

The Conduct of Employment Agencies and Employment Businesses Regulations 2003 (the “Conduct Regs”).

The Conduct Regs, governed by the Employment Agencies Act 1973 (EAA), regulate the activities of employment agencies and employment businesses<sup>1</sup>. The main body of the regulations came into force on 6 April 2004, this was with the exception of regulation 32 which concerned the inclusion of Limited Company Contractors (LCC) in the regulations. The latter came into force on 6 July 2004.

This article covers the issues related to whether an LCC should be covered by the regulations or elect to opt-out and whether this has any bearing on IR35 status.

The regulations were brought in by the government in an attempt to control the rapidly expanding recruitment industry. The main thrust of the regulations was to protect the temporary workers employed by recruitment companies and to lower the barriers to permanent employment of these workers. The LCC’s were only included at the last minute as it had been argued by various representative organisations that contractors working through their own limited company were quite different from the typical temporary worker and did not need the same level of protection. The compromise was to include LCC’s but to provide an opt-out clause in the regulations. Regulation 32(9) therefore provides that:

*“ Subject to paragraph (12), paragraphs (1) - (8) shall not apply where a work-seeker which is a company, and the person who is or would be supplied by that work-seeker to carry out the work, agree that they should not apply, and give notice of that agreement to an employment business or agency, provided that such notice is given before the introduction or supply of the work-seeker or the person who would be supplied by the work-seeker to do the work, to the hirer.”*

The opt-out must be agreed by both the service company and the contractor being supplied. The decision to opt back into the regulations, however, can only be taken by the contractor and not by the service company. Where the service company and the contractor are not one and the same, for example those working through an umbrella company, then the decision to opt-out lies with the contractor.

If the option to opt-out is not exercised, then the full regulations automatically apply, until such time as the option is exercised. Although, if the option is taken part-way through a contract it will not take affect until the end of the relevant contract. This applies equally to a contractor who has opted-out and then wants to change their mind.

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<sup>1</sup> Roughly speaking *an employment agency* deals with permanent recruitment whereas, an *employment business* deals with temporary contract work. One recruitment company can be acting as both if they deal with permanent and contract placements.

The opt-out is not selective, so if the contractor does decide to opt-out, none of the provisions of the regulations apply. In order to make this decision the contractor needs to be aware of the facts and whether, as has been noted, it will affect their IR35 status.

The main provisions of the Conduct Regs applying to LCC's:

#### Pros

- Prohibition on restricting contractors from going to clients direct or through another employment business;
- Payment to the contractor has to be made regardless of whether the employment business has been paid by the client.
- Payment cannot be withheld on the grounds that the contractor has not produced a signed timesheet. Although the employment business is entitled to delay payment for a reasonable time to establish the hours worked.
- Where the contractor is required to work away from home the employment business now has to ensure that arrangements for suitable accommodation have been made.

#### Cons

- More paperwork involved including signing the general terms and conditions of the business, in addition to the contract for the specific engagement;
- Providing proof of identity, qualifications, experience, training, etc;
- Unsuitable contractors can be removed from their contract immediately;
- May provide evidence of control factor in IR35 status disputes;
- May also provide evidence against a contractor being in business on their own account in IR35 status disputes.

Although the ability to go direct to the client, after a certain period of time<sup>2</sup>, and payment not being dependent on signed time sheets may be attractive, it is worth looking at the affect the regulations may have from a business point of view.

The cost of the increased administrative burdens imposed by the regulations will have a heavy impact on business. The cost of compliance involves not only drawing up new contracts but also complying with the ongoing administration and recording keeping procedures. And it must be remembered also that the same companies had to have their contracts redrafted recently for IR35 purposes.

Another consequence on cost of the regulations is the prohibition on restricting contractors from going to clients either direct or through another employment business. If a contractor decides to take this option it is likely, in time, that the employment business would have to increase their margin to cover lost revenues. Loyalty may also be a factor here because those that do go direct may suffer the consequences when re-applying to the employment business for more work.

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<sup>2</sup> The contractor can go direct to the client 8 weeks after the last day of the contract or 14 weeks from the first day of the contract whichever period ends later.

Another complication arises in the potential conflict with IR35. Does being governed by the regulations affect your status? Some say it makes no difference because a business can make its own mind up whether it needs the added protection, others say it may provide the Inland Revenue with more pointers to employment.

It is interesting to note that the definition of *work-finding services* provided by an *employment business* in the regulations means:

“[services provided] by an employment business to a person (the “first person”) for the purpose of finding or seeking to find another person (the “second person”), with a view to the first person becoming employed by the employment business and *acting for and under the control of the second person.*”

The definition of *employment business* in the EAA also states:

“For the purposes of this Act 'employment business' means the business ... of supplying persons in the employment of the person carrying on the business, *to act for, and under the control of, other persons in any capacity.*”

Whether this point would be picked up by the Inland Revenue is debatable, but legally it does state that the person being supplied is to act under the control of the client. For those that don't know, control is a factor in establishing employment status for the purposes of IR35.

There is no doubt that there are some very attractive provisions in the regulations for the benefit of the contractor and that some recruitment companies need regulation, especially in the temp market. But whether this is something that is needed by an LCC as a 'business on its own account' remains to be seen.

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