The Conduct Regulations: rights, restrictions and responsibilities

The recruitment industry in Great Britain is governed by two key pieces of legislation, which establish specific standards and legal requirements for its operation. The first is the Employment Agencies Act 1973 ("EAA 1973"), and the second is the Conduct of Employment Agencies and Employment Businesses Regulations 2003 (as amended), commonly referred to as the "Conduct Regulations."

All temporary workers, employment businesses, recruitment agencies, end-user clients, and umbrella companies must understand their rights and obligations under the Conduct Regulations.

This piece takes a step back to explore the basics, looking at who is covered by the Conduct Regulations, what protections they offer to the various parties in the supply chain, and when an individual can or cannot opt out of these Regulations.

Who falls under the scope of the Conduct Regulations?

The Conduct Regulations are intended to protect work-seekers, that is, individuals seeking either permanent or temporary employment. This definition of a work-seeker extends beyond individuals to include corporate entities, such as personal service companies (PSCs) and umbrella companies.

In addition to work-seekers, the Conduct Regulations also offer certain protections to end-user clients (hirers). For instance, they place limits on when a hirer can be charged a transfer fee.

The protections provided to work-seekers and hirers under the Conduct Regulations are enforced by placing specific obligations and limitations on employment agencies and employment businesses.

Under the Employment Agencies Act 1973 (EEA 1973), an employment agency is broadly defined as a business that introduces candidates to clients for direct employment by the client, commonly known as “permanent recruitment.”

Employment businesses, by contrast, are responsible for sourcing and supplying work-seekers for temporary assignments with clients. Legally, an employment business is defined as a business that “supplies persons in the employment of the person carrying on the business, to act for, and under the control of, other persons in any capacity.”

But what about self-employed work-seekers?

The use of terms like “employment” and “control” in the Conduct Regulations has created some uncertainty about whether these rules extend to self-employed contractors.

While the Employment Agencies Act 1973 (EEA 1973) provides a broad definition of “employment” including engagement through a professional arrangement or under a contract for services the concept of “control” is notably undefined within the Conduct Regulations. This creates ambiguity, as control (or the absence of it) is a key factor in assessing employment status. Typically, a genuinely self-employed individual is not subject to significant control by the client. However, it is possible for a client to exercise a certain level of control over a contractor that is sufficient to bring the engagement within the scope of the Conduct Regulations, without necessarily undermining the contractor’s self-employed status. At present, there is no specific case law that defines “control” in the context of these Regulations.

However, umbrella companies, employment businesses, agencies, and clients should take note of the recent High Court decision in Simply Learning Tutor Agency Ltd v Secretary of State for Business, Energy and Industrial Strategy [2020], which examined the meaning of "employment" under the Conduct Regulations. In this case, several "tutor-introducing" companies facilitated introductions between private tutors and parents, charging an introduction fee for their services. The tutors were engaged directly by the parents on a self-employed basis under contracts for services. The companies argued that, because the tutors were self-employed independent contractors, they fell outside the scope of the Employment Agencies Act 1973 and the Conduct Regulations – and therefore the restriction on charging work-seekers for work-finding services did not apply. However, the High Court ruled that the definition of "employment" for the purposes of the Conduct Regulations does encompass individuals providing services on a self-employed basis. As a result, the tutor-introducing companies were found to be subject to the requirements of the Conduct Regulations and the EEA 1973.

The FCSA takes the view that individuals employed by an umbrella company under an overarching contract of employment – as well as those engaged on a self-employed or CIS contract for services – fall within the scope of the Conduct Regulations when supplied to a client through an employment business. This is subject to the individual having not opted out, as discussed further below.

What is the purpose of the Conduct Regulations?

As outlined above, the primary objective of the Conduct Regulations is to protect work-seekers. However, they also provide certain protections for clients or hirers. The Regulations are designed to ensure that all parties in the supply chain have adequate information about the assignment or role, as well as the work-seeker's skills and experience, so they can be confident that the individual is suitably matched to the position on offer.

Key Principles of the Conduct Regulations

Protections for Work-Seekers

The Conduct Regulations provide important protections for individuals seeking work through employment businesses and agencies. Key provisions include:

- Provision of a Key Information Document
- Employment businesses must provide a Key Information Document to all work-seekers (and any person they may supply to perform the work) before entering into a contract.
- This requirement applies to:
- PAYE agency workers,
- Individuals working through a personal service company (PSC), and
- Workers employed by umbrella companies.

The document must include specified information such as:

- The rate of pay for the assignment,
- Holiday entitlement, and
- The type of contract under which the worker will be engaged.

- **Ban on Charging Fees to Work-Seekers**

Employment businesses and agencies must not charge work-seekers for finding them work.
(An exception applies to certain work-finding services in the modelling and entertainment industries.)

Restrictions on Withholding Pay

Employment businesses must not withhold, or threaten to withhold, payment to a worker for any of the following reasons:

- The client has not yet paid the employment business,
- The worker has not submitted a signed timesheet (although short delays may be allowed to verify hours worked), or
- The worker did not complete a minimum number of hours.
- For instance, if a worker agreed to a one-week assignment but left after three days, they are still entitled to payment for those three days.

Protection from Detriment

Employment businesses and agencies must not subject a worker to any detriment, or threaten to do so, on the grounds that:

- The worker has resigned or given notice to end their contract with the agency or employment business, or
- In the case of employment businesses, the worker has accepted or intends to accept employment with another party, including the client.

Furthermore, agencies and employment businesses cannot require a work-seeker to disclose the identity of a future employer. This means that a worker is not obliged to inform the agency if they are offered a direct contract with the client.

Protections for the Client/Hirer

One of the key protections offered to clients under the Conduct Regulations relates to transfer fees. The Regulations place strict limits on when an employment business can charge such fees.

A transfer fee may only be charged in specific circumstances, including:

- When a worker originally supplied by the employment business is subsequently employed directly by the client (temp-to-perm),

- When the worker is introduced to another employment business, which then supplies the worker back to the same client (temp-to-temp), or
- When the client introduces the worker to another employer, who then hires them directly (temp-to-third-party).

These restrictions are designed to ensure fairness and transparency in the supply and engagement of temporary workers.

In cases involving temp-to-perm or temp-to-temp transfers, an employment business may only lawfully charge a transfer fee if it first offers the client an alternative option -namely, to extend the period of supply. This is known as an extended hire period, after which the worker can transfer to the client without any fee being payable.

Furthermore, where the worker has been supplied (rather than merely introduced) to the client, a transfer fee may only be charged if the transfer occurs:

- Within 14 weeks of the start of the worker's first assignment with the client, or
- Within 8 weeks of the end of any assignment with the client,

- whichever of these periods ends later.

This same time limit also applies to temp-to-third-party transfers (where the client introduces the worker to another employer who hires them), although in such cases, there is no requirement for the employment business to offer an extended hire period.

Opting Out of the Conduct Regulations

When the Conduct Regulations were first introduced, some professional contractors raised concerns, arguing that as experienced and self-employed individuals, they did not require the protections offered by the legislation. Many felt that the Regulations imposed unnecessary administrative burdens and restrictions on their commercial arrangements.

To address these concerns, the Regulations include an opt-out provision. This allows corporate work-seekers - that is, individuals providing their services through a limited company - to opt out of the Conduct Regulations entirely.

It's important to understand that the opt-out applies to the Regulations as a whole - contractors cannot selectively opt out of specific provisions. Once an opt-out is in place, none of the protections under the Conduct Regulations will apply, except for two key exceptions:

- The employment business must still provide a Key Information Document, and
- It must retain records demonstrating compliance with the Conduct Regulations and the Employment Agencies Act 1973.

As a result, contractors who opt out forfeit all other protections– for example, the right to be paid even if the client has not yet paid the employment business.

The opt-out was originally intended for use by Personal Service Companies (PSCs), where, in most cases, the director and controlling individual of the company is also the person performing the services for the client. As outlined above, the opt-out was designed with professional contractors in mind: individuals who are genuinely in business on their own account and have the experience and commercial awareness to manage their affairs without needing the protections offered by the Conduct Regulations.

Some self-employed contractors are also concerned that remaining within the scope of the Conduct Regulations could potentially undermine their self-employed status or their classification as being "outside IR35". While it is conceivable that HMRC might consider this as part of an employment status assessment, it is unlikely to be a decisive factor. This is particularly true given that, in certain cases, corporate work-seekers are not permitted to opt out of the Conduct Regulations, even if they wish to do so (as discussed further below).

However, the legislative reference to “a work-seeker which is a company” has resulted in umbrella companies and the individuals they employ or engage, being considered eligible to opt out of the Conduct Regulations. Arguably, this was not the original intention behind the corporate opt-out, as many umbrella employees are not truly experienced professional contractors operating independently. In reality, umbrella workers often have little distinction from other agency workers whom the Conduct Regulations were designed to protect. Nevertheless, until there is a specific prohibition preventing umbrella companies and their workers from opting out, our position is that they are entitled to do so if they choose.

Importantly, however, no limited company contractor, whether operating through a PSC or an umbrella company, may opt out of the Conduct Regulations if their assignment involves working with vulnerable individuals. Vulnerable people are defined as those under eighteen years of age or those who, due to age, infirmity, illness, disability, or other circumstances, require care or attention. For instance, teachers and nurses providing their services via a PSC or umbrella company are prohibited from opting out of the Conduct Regulations, regardless of their preference.

Crucially, umbrella companies, employment businesses, agencies, and end-user clients should understand that the decision to opt out of the Conduct Regulations rests entirely with the corporate work-seeker. Employment businesses cannot make the assignment of work conditional on the worker choosing to opt out. Similarly, end-user clients should avoid pressuring employment businesses to supply only those workers who have opted out.

We recommend that employment businesses and umbrella companies prepare template contracts that address both scenarios: where a worker chooses to remain covered by the Conduct Regulations and where they opt out. Failure to do so may lead the Employment Agencies Standards Inspectorate (EASI), which oversees compliance with the Conduct Regulations, to conclude that workers are not being given a genuine choice to remain within the Regulations.

Additionally, although the recruitment industry often refers to “opting in” to the Conduct Regulations, it is important to understand that the default position is that all relevant work-seekers are **automatically covered** by the Regulations unless they have validly opted out.

A valid opt-out requires both the limited company (whether an umbrella or PSC) **and** the individual performing the work to notify their employment business or agency **before** being introduced or supplied to the client. The employment business or agency is then responsible for informing the end-user client about the opt-out.

Opt-out notices will not be effective until the worker has finished their current assignment and so cannot be given part-way through an assignment.

Conclusion

We hope this article serves as a useful reminder for agency workers, umbrella companies, employment businesses, agencies, and end-user clients of their respective rights and responsibilities under the Conduct Regulations. This understanding will help promote a compliant, transparent, and fair supply chain.

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