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BECAUSE RECRUITMENT MATTERS

Legal bulletin

WHAT'S ON THE HORIZON FOR THE NEW YEAR?

SHORTLISTED FOR THE ASSOCIATION EXCELLENCE AWARDS 2015

BEST ASSOCIATION NEWSLETTER AWARD

As we enter into 2015 it is helpful to look at some of the new legislation that will have an impact on the recruitment sector.

NEW ADVERTISING RESTRICTIONS FOR RECRUITERS FROM 5 JANUARY 2015

The Conduct of Employment Agencies and Employment Businesses Regulations (the Conduct Regulations) have been amended to include provisions which now specifically prohibit employment agencies and businesses from advertising vacancies exclusively in other European Economic Area (EEA) countries. This came into force on 5 January 2015.

While there appears to be little evidence to support the Government's stance that UK nationals are being excluded from employment opportunities by recruiters, employment agencies and businesses are now required to advertise any 'GB vacancy' in English in Great Britain (England, Scotland and Wales) at the same time as it advertises the vacancy in another EEA country or at least 28 days before advertising in another EEA country.

A 'GB VACANCY' IS DEFINED AS A VACANCY FOR A POSITON, THE DUTIES OF WHICH WILL BE PERFORMED IN GREAT BRITAIN

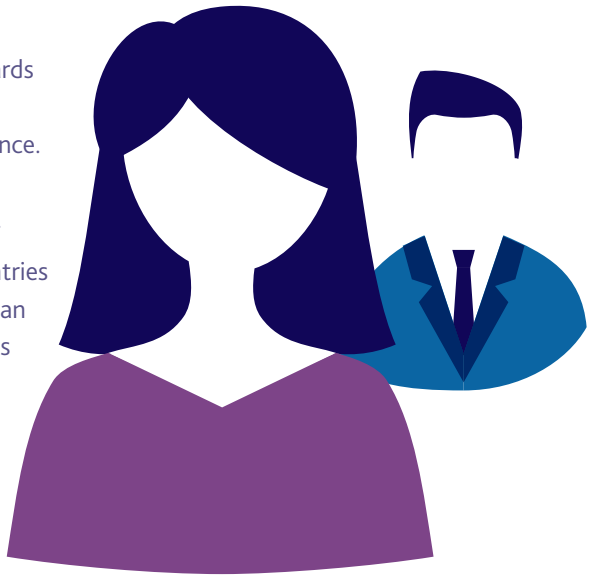
IN THIS ISSUE:

As with the rest of the Conduct Regulations, the Employment Agency Standards Inspectorate (part of the Department for Business Innovation and Skills) can take action in respect of any breach and a failure to comply is a criminal offence. Additionally anyone who suffers a loss as result of the breach (e.g. clients or candidates) can take action in the courts to recover monies to cover the loss.

However agencies and businesses that choose to advertise in other EEA countries without complying with the above requirements will have a defence if they can show doing so would be disproportionate on reasonable grounds, on the basis that advertising in English in Great Britain would be unlikely to attract a candidate with the right skills for the position.

Also the advertising requirements do not apply to vacancies for staff who will work under the control of the employment agency or business itself (e.g. vacancies for internal staff as opposed to candidates for clients).

Aside from these new provisions, denying job opportunities to individuals based on nationality or declining to offer services as a recruiter would in most cases potentially infringe existing discrimination legislation (i.e. the Equality Act 2010).



NEW REPORTING REQUIREMENTS FOR RECRUITERS FROM 6 APRIL 2015

In April 2014 changes were made to the Income Tax (Earnings and Pensions) Act 2003 which increased the potential liability for employment businesses where the temporary workers supplied by them worked through another intermediary e.g. a Construction Industry Scheme intermediary or a personal services company. Further changes will come into effect on 6 April 2015 which will require the party with the contract with the end client (this could be an employment business or a vendor) to report certain information on all temporary workers supplied to that client. HMRC will use this information to check that the appropriate tax and National Insurance is being paid by the temporary worker. The REC has already commented on the draft regulations but at the time of writing we are waiting for the final regulations to be produced. In the meantime we have produced a FACTSHEET setting out the draft proposals. One key concern is the sheer volume of information employment businesses will be required to report (or to forward to a vendor if there is one) and the software requirements needed to back this up. The first quarterly report will be due on 5 August 2015 reporting on the period 6 April to 5 July 2015. The requirements will impact on members in different sectors in different ways - to help us tailor advice for the sectors in which members operate we would ask you to complete the BRIEF SURVEY

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NEW LEGISLATION TO LIMIT BACKDATED CLAIMS FOR UNLAWFUL DEDUCTIONS FROM WAGES

The recent media spotlight on holiday pay claims relating to overtime payments and commission payments has caused significant concern for employers, particularly in relation to the prospect of back payments being sought over a significant number of years.

Following the Employment Appeal Tribunal's (EAT) decision in the Bear Scotland v Fulton group of cases (see the November/December 2014 Legal bulletin) the GOVERNMENT SET UP A TASKFORCE to examine the impact of the decision for businesses.

Of particular concern was the prospect of claims being brought as unlawful deductions from wages claims which potentially could go back over the whole period of employment where there had been a series of deductions. Although the EAT decision limited the scope for this the Government has nevertheless now legislated to specifically limit such claims.

Under the Deduction from Wages (Limitation) Regulations 2014 which came into force on 8 January 2015, employment tribunals will only be able to deal with claims for deductions that relate to any fee, bonus, commission, holiday pay or other emolument referable to the claimant's employment, made within two years of the date the claim is issued.

Additionally, the new provisions clarify that the entitlement to statutory holiday pay does not give rise to a separate contractual right to claim. A breach of contract claim gives a claimant up to six years to take action to recover payment, whereas the time limit to bring a claim in the employment tribunal is normally only three months.

THE NEW PROVISIONS WILL ONLY APPLY TO CLAIMS THAT ARE ISSUED IN EMPLOYMENT TRIBUNALS ON OR AFTER 1 JULY 2015

However the new provisions will only apply to claims that are issued in employment tribunals on or after 1 July 2015 so this will have no impact on individuals who issue claims before this deadline.

FAQs

CHRIS CUCKNEY, LEGAL ADVISER AT THE REC, BRINGS YOU A SAMPLE OF QUESTIONS POSED TO THE LEGAL HELPLINE

Should I include commission payments in the calculation of holiday pay for my recruitment consultants?

In 2014 we saw a number of key decisions regarding the calculation of holiday pay, for example in November 2014 the Employment Appeal Tribunal held that non-guaranteed overtime must be included within the calculation of holiday pay for workers who have normal working hours (see earlier REC REPORT).

The case of Lock v British Gas is scheduled to be heard in the Employment Tribunal (ET) in February 2015, the expectation is that this case will represent another key development in the calculation of holiday pay. The case revolves around whether commission payments should be included within the calculation of holiday pay for workers with **normal** working hours.

It should be noted that in the UK workers who do **not have** normal working hours should have their holiday pay calculated by taking an average of the **total** pay received over a 12 week reference period. As temporary workers typically do not have their working hours fixed by their contracts, their holiday pay should normally already include any commission payments.

This case may not impact on the holiday pay calculation of temporary workers, but it will be important for recruitment companies who typically pay their recruitment consultants commission.

This case was originally brought under the Working Time Regulations 1998 and was referred by a UK ET to the Court of Justice of the European Union (CJEU). The CJEU held that under the European Working Time Directive commission payments need to be included in the calculation of pay for the purposes of annual leave because they are intrinsically linked to a worker's work. The case has now been referred back to the UK ET and is scheduled to be heard in February 2015. The expectation is that the ET will follow the reasoning of the CJEU and include commission payments within the calculation of holiday pay. However there is always the possibility that the parties could reach a settlement agreement before the case is heard in February.

If the ET rules that commission payments should be included in the calculation (as is expected), there is a risk that you could receive some backdated holiday pay claims. Businesses will need to reconsider the basis on which holiday pay is calculated and include any commission which is intrinsically linked to a worker's work, such as a recruitment consultant. The REC Legal Team will keep our members updated on any developments with this case through the REC WEBSITE.

BUSINESSES WILL NEED TO RECONSIDER THE BASIS ON WHICH HOLIDAY PAY IS CALCULATED

I placed a permanent candidate with a client a month ago, I have now discovered information which might make the client change their mind about employing the candidate. Can I pass the information to the client?

IT SHOULD BE INFORMATION THAT WOULD MEAN YOU WOULD NOT HAVE PUT THE WORK SEEKER FORWARD IN THE FIRST PLACE AND MUST BE MORE THAN JUST GOSSIP

The REC Legal Helpline frequently receive queries from both employment agencies and employment businesses who have come across information about a particular candidate that they feel obliged to pass on to the client. The Conduct of Employment Agencies and Employment Businesses Regulations 2003 (the Conduct Regulations) place employment agencies and employment businesses under certain obligations if they receive information which impacts upon a work-seekers suitability to perform the role with the client. This obligation is slightly different for employment agencies (introducers of permanent candidates) and employment businesses (suppliers of temporary workers).

The sort of information that might indicate a worker is unsuitable will depend on the circumstances but may be a relevant criminal conviction that should have been disclosed; qualifications found to be false; or a medical condition that means the candidate may either be at risk by performing the work or may be placing others at risk. It should be information that would mean you would not have put the work-seeker forward in the first place, and must be more than just gossip.

Under the Conduct Regulations where an employment agency obtains information within three months from the date of introducing a candidate to the client which indicates that the candidate is or may be unsuitable for that role with the client, they must inform the client without delay. The key question is whether the information you have learnt impacts upon the candidate's suitability to perform the role for the client. If it does impact their suitability the client should be informed on the same day or the next business day if that is not reasonably practicable. Information which impacts upon the suitability could include (for example) placing a candidate into a role which involves working with money and you subsequently discover they have an unspent criminal conviction for theft.

UNSUITABILITY AND THE DATA PROTECTION ACT

Before complying with the above, employment agencies should consider data protection issues before passing any information to their clients. REC members often obtain information that they think their client would like to know, as opposed to information they need to know because it impacts upon the candidate's suitability to perform the role. Where the information received by the agency does not impact upon their suitability to perform the role, employment agencies will typically need a candidate's consent to be able to pass any personal information to the client.

However where the information does impact upon the candidate's suitability to perform the role, it is likely that the obligations under the Conduct Regulations will be an exception to the Data Protection Act 1998 where "it is necessary for the purposes of exercising or performing any right or obligation which is conferred or imposed by law on the data controller in connection with employment" or it is "necessary to protect the vital interests of the data subject or another person in a case where consent cannot be given…or the data controller cannot reasonably be expected to obtain the consent of the data subject" (Schedule 3 Data Protection Act 1998).

However you should be careful to check the accuracy of any information you receive as the communication of any false or misleading information prejudicial to the worker could give rise to a possible claim for damages for defamation. You should therefore ensure that if this situation does arise that you do not disclose more information to the client than is necessary.

I currently supply an agency worker engaged under a contract for services to one of my clients; the client wants to discipline the worker for performance issues. Should I allow the client to do this?

THIS COULD CAUSE EMPLOYMENT STATUS ISSUES FOR THE CLIENT OR THE EMPLOYMENT BUSINESS

Ultimately disciplining a temporary worker isn't as straight forward as it may sound, this could cause employment status issues for the client or the employment business. Employment status issues are important to consider because in law individuals are entitled to different rights depending on which of the three categories of employment status they fall into. In the UK there are currently three different categories of employment status, individuals can be either 'employees,' 'workers' or they can be 'self-employed'.

Temporary workers engaged under contracts for services are workers and consequently they are not entitled to employment rights such as statutory notice, unfair dismissal protection and maternity leave. The UK courts hear many employment status cases each year during which individuals claim to be employees as opposed to workers and consequently are entitled to employee rights. These claims include claims by agency workers that they have become employees of either the client or the employment business.

The courts have established that the following elements need to be present for a contract of employment to be present:

- The existence of an agreement or 'contract' either express or implied, in writing or verbal between the individual and the employer;
- The existence of some "mutuality of obligation" between the parties. Mutuality of obligation is where there is an obligation on the part of the employer to provide and pay for work done and an obligation on the worker to perform that work;
- The worker agrees to be subject to a sufficient degree of control on the part of the employer over how, when and where they work;
- There is an obligation for the worker to provide his services personally;
- The facts are not inconsistent with a contract of employment.

If the client has treated a temporary worker like one of their own employees during the course of the assignment, this could create an employment relationship between worker and client. By disciplining a temporary worker, the client runs the risk of treating them like their own employees and they should therefore refrain from doing this. If the client has any issues or complaints about a temporary worker they should be referred to the employment business to deal with. Ultimately it will be for an Employment Tribunal to decide whether an employment relationship has been created, however you must ensure that the contracts in place genuinely and accurately reflect the actual relationship between all parties and that that actual relationship is not operating in such a way as to create a direct relationship between the worker and the client.

LEGAL ROUND UP

Draft Public Contracts Regulations 2015

The Cabinet Office published the draft Public Contracts Regulations back in September 2014 and the draft regulations largely replicate the directives as the 'copy out' principle has been applied in order to avoid gold plating (which means minimising the risk of over-regulation on UK businesses). The structure of the regulations is sufficiently clear; however, there were some challenges with interpretation as the legislation maintains a strong European style.

REC members in the health and social care sector will be more concerned with the implementation of the light touch regime. Given that the directive removed the current distinction between Part A and Part B services, the light touch regime will be for health, education and social services, where the contract value meets the threshold of €750,000 (£625,050). Members that supply workers to the NHS will still be subject to the Part B regime in the existing PUBLIC CONTRACTS REGULATIONS 2006 until the light touch regime comes into force in 2016. The full provisions of the light touch regime are not specified in the draft regulations but the intention is to ensure that the procurement process is simpler and more flexible.

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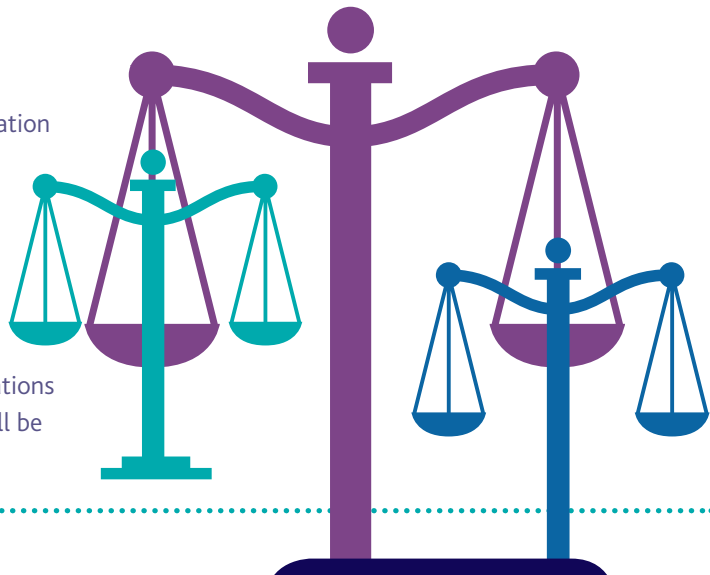
It is also important to remember that one of Government's key proposals is to remove barriers for small and medium-sized enterprises and facilitate their access to public sector contracts. We hope that the regulations when they come into force in 2015, including the light touch regime, fulfil Government and the public's expectations. Further information on the implementation of the regulations from Cabinet Office is available HERE and in the July /August 2014 REC LEGAL BULLETIN.

Government plans for changes to the recruitment industry legislation

It has now been two years since the Government launched a consultation on plans to overhaul the key legislation for the recruitment sector (the Conduct of Employment Agencies and Employment Businesses Regulations 2003) with a view to significantly stripping back their content and scope. Following that process we have been awaiting sight of the draft revised regulations as the new regime was due to come into force by April 2015. The Department for Business, Innovation and Skills has now confirmed that the revised draft regulations will not be published this side of the coming general election; this will be a task for the next Parliament.



Government consultation on travel and subsistence schemes

On 16 December 2014 the Government opened a consultation into the use of travel and subsistence schemes by employment businesses and umbrella companies to reduce tax and National Insurance contributions. They are also looking at the growth in the use of overarching contracts of employment which HMRC believes has been driven by aggressive tax avoidance. It is concerned that whilst these schemes lead to substantial revenue loss for the taxpayer, workers on these contracts also lose out on contributions related benefits.

The consultation closes on 10 February 2015. The REC will submit a response but we are keen to collect information from our members to support this. REC corporate members are therefore invited to complete a **BRIEF SURVEY** about the consultation but if you have any other questions or comments, please contact **lewina.farrell@rec.uk.com**.

The consultation document is available **HERE**.

WHILST THESE SCHEMES LEAD TO SUBSTANTIAL REVENUE LOSS FOR THE TAXPAYER, WORKERS ON THESE CONTRACTS ALSO LOSE OUT ON CONTRIBUTIONS RELATED BENEFITS

Changes to employers National Insurance

From 6 April 2015 employers will not be required to pay employers National Insurance contributions on earnings up to the Upper Secondary threshold for employees under the age of 21. See **HERE** for further details.

Updated Home Office guidance on right to work checks

New guidance has been issued by the Home Office on right to work checks. The new guidance (dated December 2014) can be found **HERE**.

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