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The Conduct of Employment Agencies and Employment Businesses Regulations 2003 – an explanation

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This factsheet is a summary of the key Conduct Regulations. A full copy of the legislation can be accessed on www.legislation.gov.uk. It is not a substitute for detailed legal advice on related matters and issues that arise and should not be taken as providing specific legal advice on any of the topics discussed.

The information set out in this guide, together with all hyperlinks (which open in the electronic version), is correct at the time of print.

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What are the Conduct of Employment Agencies and Employment Businesses Regulations 2003?

The Employment Agencies Act 1973 (the Act) and the Conduct of Employment Agencies and Employment Businesses Regulations 2003 (the Conduct Regulations) are the main statutory rules governing the conduct of employment agencies and employment businesses operating in England, Scotland and Wales. For those who operate in Northern Ireland similar legislation, the Employment (Miscellaneous Provisions) (Northern Ireland) Order 1981 and the Conduct of Employment Agencies and Employment Businesses Regulations 2005 apply. The REC Code of Professional Practice is based on the Conduct Regulations.

The Conduct Regulations have been amended on a number of occasions, most recently in May 2016. Further changes are expected in 2019 but we do not have the detail as yet. This factsheet shows the position at the time of writing.

The Employment Agency Standards Inspectorate

The Employment Agency Standards Inspectorate (EAS) which is part of the Department for Business, Energy and Industrial Strategy (BEIS), enforce the Conduct Regulations. EAS has wide ranging powers including authority to inspect, issue warnings and implement measures to ensure compliance. A breach of the Conduct Regulations is a breach of the Act which is a criminal offence. Sanctions, on prosecution, range from fines of up to £5000 to unlimited fines if action is taken in the Crown Court and banning orders which prevent individuals from running an employment agency for up to a maximum of ten years. New sanctions were made available under the Immigration Act 2016 (see below).

For detailed information on the work of EAS see the EAS Annual Report 2017 to 2018.

The Director of Labour Market Enforcement

The Director of Labour Market Enforcement (DLME) was created by the Immigration Act 2016. The DLME oversees the work of the EAS alongside that of the Gangmasters and Labour Abuse Authority (GLAA) and HMRC's National Minimum Wage team. The Director must produce an annual strategy – he has also created an intelligence hub enabling data sharing between the director, the enforcement bodies and other bodies (such as the Police or Border Force). The DLME's remit and powers extend across the whole of the labour market, from direct employment to labour providers, and the whole spectrum of non-compliance, from accidental infringement to serious criminality. Additional

sanctions are now also available to EAS, the GLAA and HMRC including Labour Market Enforcement Undertakings (LMEUs) and Labour Market Enforcement Orders (LMEOs).

1. Labour Market Enforcement Undertakings and Orders

The Government introduced measures in the Immigration Act 2016 to provide a more coherent framework for identifying and preventing abuse in the labour market and to strengthen the enforcement response. This includes new powers to apply Labour Market Enforcement undertakings and orders, which are intended for more serious or persistent offenders where this type of intervention is judged appropriate to prevent further offending.

A Labour Market Enforcement Undertaking (LMEU) is a sanction that can be used as an alternative, or in addition to, other sanctions where there are breaches of certain laws (including the Employment Agencies Act 1973), which underpin compliance in the labour market. An LMEU is an agreement by the non-compliant person or business, with one of the enforcing authorities on what that person or business will do to restore and maintain compliance. The agreement will set out what needs to be done, by a specific date, and how. It can be removed if compliance is achieved. Alternatively, it can remain in force for a period of 2 years, even if the specific conditions have been met, if there is considered to be a continuing risk.

An undertaking may be sought where an enforcing authority believes a *trigger offence* [1] has been or is being committed and a measure in the undertaking is necessary to prevent further non-compliance. They are not designed to replace the current sanctions to punish breaches and seek redress but can be used alongside them.

Negotiation period: A negotiation period of 14 days will be triggered by the service of notice given to the business to provide an opportunity for them to propose alternative means of achieving compliance.

Measures in an LMEU or LMEO: LME undertakings or orders may include prohibitions, restrictions or impose requirements on businesses, only if the measures do one or both of the following:

[1] A trigger offence is defined in section 14(4) of the Immigration Act 2016 and means an offence under the Employment Agencies Act 1973, an offence under the National Minimum Wage Act 1998 or an offence under the Gangmasters (Licensing) Act 2004 including secondary inchoate offences. All trigger offences can trigger the use of an LMEU in Great Britain. Only National Minimum Wage trigger offences can do so in Northern Ireland.

1. prevent or reduce the risk of non-compliance with requirements in the enactment containing a trigger offence; or
2. bring into existence of the understanding, the circumstances in which it was given and any action taken (or not taken.)

In addition to the above, the LME undertakings or orders must be just and reasonable. They must also make clear how the measures address the trigger offence that the enforcing authority suspects has been committed and any risk of future non- compliance with the legislation.

Release: A business can be released from an LMEU by the enforcing authority and must be released where, in the judgement of an enforcing authority, compliance has been achieved and the compliance will be maintained without measures in the LMEU being in place.

2. Labour Market Enforcement Order

An enforcing authority may apply to the court for a Labour Market Enforcement Order (LMEO) where an undertaking has not been given within the negotiation period or where an undertaking has been breached. The standard of proof relating to a breach is the balance of probabilities. The higher criminal standard of proof will be applied if the respondent is prosecuted for breaching an LMEO imposed by the court (i.e. that it is beyond reasonable doubt that the respondent breached the LMEO). The maximum penalty is 2 years' imprisonment and/or a fine on conviction on indictment and 12 months' imprisonment (6 months in Northern Ireland) and/or fine on summary conviction. It is not necessary to wait until a new trigger offence is committed before prosecuting for breach of the LME order – it is enough that one of the measures in the order has not been complied with.

EAS have already warned agencies and employment businesses that they may be subject to LMEUs and LMEOs if they do not correct breaches of the Conduct Regulations which EAS have identified.

For the purposes of this guide we will use the term "client" to mean the hirer.

Regulation 2 - definitions used in the Conduct Regulations

The following definitions are contained within the Conduct Regulations/the Act:

"Employment agency" s.13 (2) of the Act	*the business of (whether or not carried on with a view to profit and whether or not carried on in conjunction with any other business) of providing services (whether by the provision of information or otherwise) for the purpose of finding workers employment with employers or of supplying employers with persons for employment by them.*

An employment agency introduces candidates/jobseekers to be employed or engaged directly by the client on a permanent or temporary basis including for a fixed period.

"Employment business" s.13 (3) of the Act	*the business (whether or not carried on with a view to profit and whether or not carried on in conjunction with any other business) or supplying persons in employment of the person carrying on the business, to act for, and under the control of, other persons in any capacity.*

An employment business engages and pays workers directly and supplies their services to a client who will direct or control the worker in the course of their work.

All of the following definitions are set out in Regulation 2 of the Conduct Regulations.

"Hirer"	*means a person (including an employment business) to whom an agency or employment business introduces or supplies or holds itself out as being capable of introducing or supplying a work-seeker.*
"Work-finding services"	*services (whether by the provision of information or otherwise) provided-* *(a) by an agency to a person for the purpose of finding that person employment or seeking to find that person employment;*

i.e. finding a candidate a position directly with a client.

(b) by an employment business to an employee of the employment business for the purpose of finding or seeking to find another person, with a view to the employee acting for and under the control of that other person;

i.e. the employment business finding a work-seeker work with a client but engaging the person on a contract of employment or a contract for services and paying them for the work done. The word "employee" used here is not defined in either the Act or the Conduct Regulations but "employment" is defined widely to include those engaged on a contract of services.

(c) 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;

i.e. the provision of services to limited company contractors of finding them work with clients where they are under the control of the client.

"Work-seeker" *a person to whom an agency or employment business provides or holds itself out as being capable of providing work-finding services.*

The definitions above extend to include those who choose to work via a limited company.

"Vulnerable person" *means any person who by reason of age, infirmity, illness, disability or any other circumstance is in need of care or attention, and includes any person under the age of eighteen.*

Regulation 5 – restriction on use of additional services

Employment agencies and employment businesses, or any person connected to them, are prohibited from making the provision of work-finding services conditional on the work-seeker (or the person supplied to do the work if the work-seeker is a limited company) using any chargeable service e.g. CV writing or hiring or buying goods from them.

If a work-seeker uses chargeable services provided by the employment agency or business, then the employment agency or business must ensure that the work-seeker can cancel or withdraw from using the services by giving notice in writing or electronically (by e-mail for example), without being penalised or subjected to a detriment. The notice period is five days but 10 days for services relating to the provision of accommodation.

Regulation 6 – restriction on detrimental action relation to work-seekers working elsewhere

An employment agency or employment business is prohibited from taking any detrimental action or including restrictive terms in work-seekers' contracts which prevents them from (a) terminating their contract with the agency or business, (b) from working for others e.g. directly with a client or via another employment business, or (c) which require the work-seeker to notify them, or any person connected with them, of the identity of any future employer.

Regulation 7 – restriction on providing work-finding services in industrial disputes

An employment business is prohibited from supplying a work-seeker to clients to perform:

1. the duties normally performed by a worker who is taking part in a strike or other industrial action ("the first worker"); or

2. the duties normally performed by any other worker employed by the client and who is assigned by the client to perform the duties normally performed by the first worker.

An employment business must not supply a work-seeker to a client to perform the duties of the client's staff (the first worker) or any other worker who has been assigned by the client to carry out the duties of the first worker where the first worker is taking part in official industrial action (unless you are unaware or have no reason or grounds for knowing that the first worker is involved in industrial action).

So although you cannot supply additional work-seekers to cover the work of those employees who are on strike, the existing temporary workers can still continue to work if they are undertaking the same work as they were before the strike and do not take on any additional duties to cover the staff participating in the strike.

Practical tip – if you are aware of potential issues regarding industrial action, you should ask for written confirmation from the client that the work-seekers requested will not be used to replace workers who are on official strike or to replace staff that the client has transferred to undertake the duties of workers on strike.

Note – an employment business will not be liable if it doesn't know or have reasonable grounds for knowing that the client's workers are taking part in official industrial action.

Regulation 8 – restriction on paying work-seekers' remuneration

An employment agency which has introduced a work-seeker to a client may not pay or make arrangements to pay that work-seeker either directly or via any person connected with it.

Practical tip – When you have introduced a work-seeker to a client for direct recruitment by the client, you should not pay or arrange to pay that work-seeker's wage.

Regulation 10 – restriction on charges to hirers (transfer fees)

In order for an employment business to charge a client a transfer fee the following conditions must be satisfied:

1. there must be an express provision in the contract with the client that meets the requirements of Conduct Regulation 10 to enable you to claim a transfer fee;

2. the contract must allow the client to opt for an extended period of hire instead of paying a transfer fee. REC recommends a maximum extended hire period of 26 weeks as anything more than this may not be reasonable and may be difficult to enforce.
   a. The client must give you notice of their decision to extend the period of hire and you should state in your terms of business the length of the notice they must give. This is usually at least 7 days.

b. If the client chooses to take the work-seeker on for an extended period of hire you must supply that worker for the whole period except in circumstances where this is beyond your control. If you do not supply the work-seeker for the whole of the hire period, you cannot then alternatively enforce payment of a transfer fee, unless failure to supply the worker for the whole period is in no way your fault, for example because the work seeker has obtained a job elsewhere and your contract provides for this. The REC model terms of business make provision for this (for example see Clause 8 of Contract 3);

3. the transfer of the work-seeker must take place within the statutory 'relevant period' which is defined as either 14 weeks from the beginning of the first assignment, or 8 weeks from the day after the end of the last assignment, whichever period ends later. If there is a break of more than 42 days between assignments then this will break the continuity of the assignment for the purpose of calculating the start of the 14 week period and the later assignment will be taken as the first assignment. Please note that **the relevant period is set and cannot be changed by the employment business or client.**

If the transfer of the worker does not occur during the assignment or within the statutory relevant period, then the client will not be liable to pay a transfer fee.

The Conduct Regulations apply in their entirety unless you have a valid opt out (see Regulation 32). Where they apply, you must include the Conduct Regulation 10 requirements in your terms of business or you will not be able to enforce your transfer fee provision.

Regulation 10 applies to 3 scenarios:

1. ***Where there has been an introduction to a client but <u>no supply</u>*** *(i.e. you introduced a work-seeker to a client but the client rejected them only to employ them other than via you at a later date whether temp to temp or temp to perm)*
   To be able to claim a transfer fee and enforce it you must include a transfer fee charging clause compliant with Conduct Regulation 10 . The contract must contain a term giving the client the option to opt for an extended period of hire instead of paying a transfer fee. The terms specified in the contract between the employment business and the client will continue to apply during the extended period of hire. If the client opts to pay a fee rather than use the extended period of hire, then the transfer must take place within the relevant period in order to charge the client a fee; or

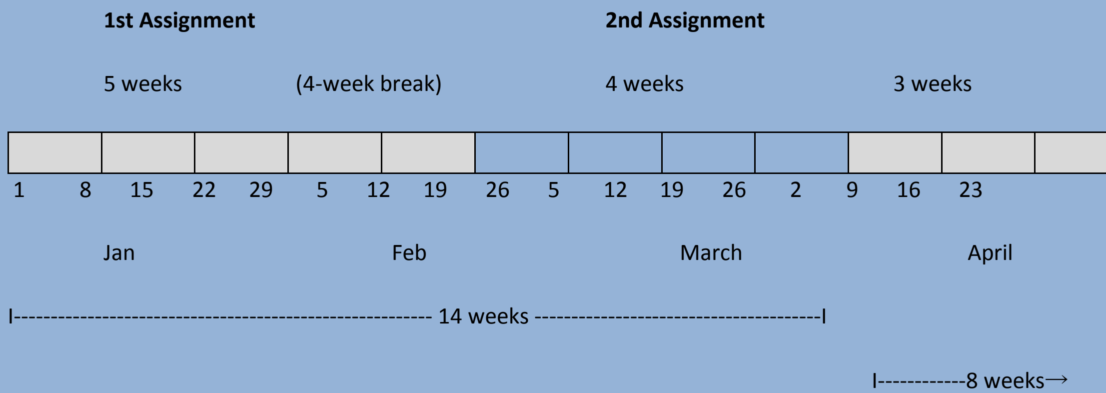
2. ***Where there <u>has been a supply</u> and there has been a subsequent engagement of the work-seeker by the client or via another employment business (temp-to-perm or temp-to-temp*)**
   To be able to claim a transfer fee you must include a transfer fee charging clause compliant with Conduct Regulation 10. The terms specified in the contract between the employment business and the client will continue to apply during the extended period of hire. If the client opts to pay a fee rather than use the extended period of hire, then the transfer must take place within the relevant period in order to charge the client a fee; or

3. ***Where there has <u>been a supply</u> to the client and then the <u>client has introduced</u> the work-seeker <u>to a third party</u> (temp-to-third party) –*** an employment business does not need to offer the option to the client of opting for the extended period of hire as an alternative to paying a transfer fee. In order to charge a fee the transfer must take place within the relevant period.

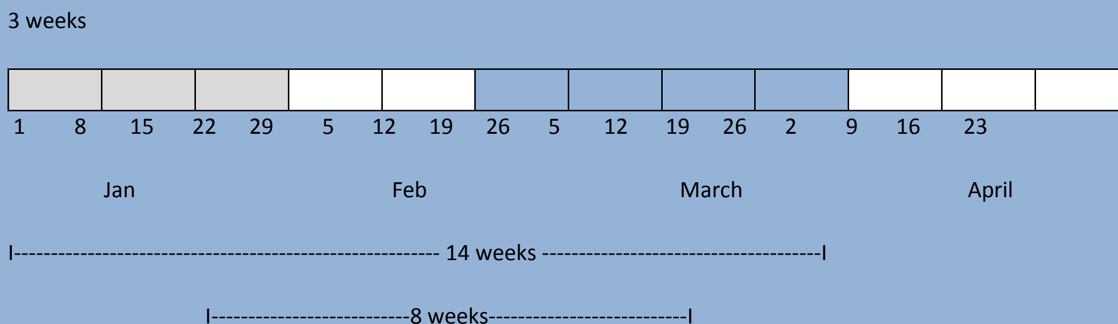
> **Practical Tip:** You must set out how you calculate the transfer fee in the terms of business.

EXAMPLES OF PERIODS DURING WHICH TRANSFER FEES MAY BE CHARGED UNDER REGULATION 10 OF THE CONDUCT OF EMPLOYMENT AGENCIES AND EMPLOYMENT BUSINESSES REGULATIONS 2010.

Example 1: TEMP-TO-PERM FEES - Agency (A) supplies Temporary Worker (TW) to Client (C) for an assignment starting on 1 January 2018 for 5 weeks. After a 4-week break TW is supplied to C for a further 4 weeks. The 2nd assignment ends on 30 March 2018. On 23 April 2018 C directly employs TW in a permanent position without informing A. In this case A can charge C a temp-to-perm fee as this occurs within 8 weeks of the day on which TW last worked for C.



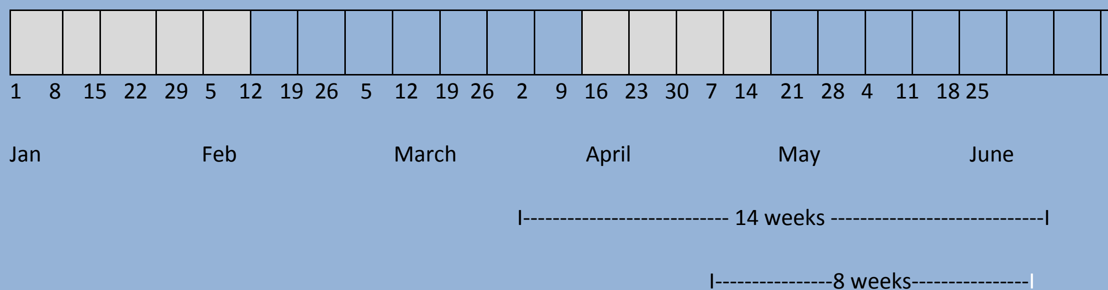
Example 2: TEMP-TO-THIRD-PARTY FEE - A supplies TW to C for a single assignment lasting 3 weeks from 1 January 2018 to 19 January 2018. A finds out that C introduced TW to a subsidiary of C's where TW was taken on permanently on 2 April 2018. This is more than 8 weeks from the end of the assignment. However A can still charge a temp-to-perm fee as it is within 14 weeks from 1 January i.e. the day on which TW was first supplied.



Example 3: **TEMP-TO-TEMP FEE** - A supplies TW to C for an assignment starting on 1 January 2018 for 5 weeks. After a break of 7 weeks TW is supplied back to C for a further 4 weeks ending on 20 April 2018. On 25 June 2018 C takes on TW through another agency. A is able to charge a fee because the 'first day' on which s/he was supplied is taken as the start of the second assignment i.e. 26 March 2018. So while it is more than 8 weeks since s/he was last supplied it is just within 14 weeks from the start of the 2nd assignment.

1st Assignment **2nd Assignment**

5 weeks 7-week break 4 weeks



Regulation 12 – prohibition on employment business withholding payment to work-seekers on certain grounds

An employment business cannot withhold whole/part payment in respect of any work done by the work-seeker on any of the following grounds:

1. non-receipt of payment from the client i.e. you cannot have a pay when paid clause;
2. work-seeker's failure to produce documentary evidence;
3. the work-seeker not having worked during any period other than that to which the payment relates; or
4. any matter within the control of the employment business.

However you are not prevented from reasonably delaying payment while you satisfy yourself by other means (e.g. phone call or email to the client) that the work-seeker has worked in the period in question.

If the temporary worker is a limited company and both the company and the individual who is carrying out the work have opted out of the Conduct Regulations, this provision will not apply.

In all cases you should also check the terms of the contract that you have with the work-seeker to see what contractual obligations you may have in respect of any disputed payments.

Regulation 13 - notification of charges and the terms of offers

Before providing or arranging the provision of any services to a work-seeker for the first time, an employment agency and an employment business must notify the work-seeker which services they charge a fee for. Where providing a service which may be charged for, such as CV writing/ training etc. you must also inform the work-seeker of the amount of or method of calculation of any fee for those services, the identity of the person to whom it is payable, a description of the services and a statement that the work-seeker has a right to withdraw from those services by giving the notice period applicable under Regulation 5 (see above). The employment agency or business must also confirm whether any refunds or rebates are payable and if so, how they are calculated. Otherwise you should states that there are no refunds or rebates.

If an employment agency or employment business offers any gift or makes an offer of any benefit to a work-seeker, as an inducement for him/her to use its services, it must make clear the terms and conditions on which the gift or benefit is offered, before the offer is open for acceptance by the work-seeker.

Practical tip – For example if you offer vouchers to work seekers who register with you for temporary work, but the vouchers will only be given once a number of hours work is performed, this condition must be notified to the work seekers before they register.

> *E.g. Drivers wanted – register today and you will receive £250 worth of vouchers**
> ** Offer subject to the worker holding an HGV licence and completing one or more assignments of 40 hours*.

Regulation 14 – requirement to obtain agreement to terms with work-seekers: employment businesses

Before an employment business provides work-finding services to a work-seeker, it has to obtain agreement to terms with the work-seeker including:

1. a statement that the employment business will operate as an employment business
2. the type of work that you will find for the work-seeker and;
3. the terms in Regulation 15:

Regulation 15 – content of terms with work-seekers: Employment businesses

The terms to be agreed between the employment business and the work-seeker shall include:

1. whether the work-seeker is/will be employed by the employment business under a contract of service, apprenticeship, a contract for services, and in either case, terms and conditions of employment of the work-seeker which apply/will apply;
2. an undertaking that the employment business will pay the work-seeker in respect of work done by him, whether or not it is paid by client in respect of that work;
3. the length of notice of termination which the work-seeker is entitled to give and entitled to receive- if none, a statement to this effect;
4. either the rate of remuneration; or
5. the minimum rate of remuneration the employment business reasonably expects to achieve for the work-seeker;
6. details of the intervals at which remuneration will be paid; and
7. details of any entitlement to annual leave and to payment in respect of annual leave.

All the terms in respect of which you have obtained the work-seeker's agreement must be recorded in a single document, or where this is not possible in more than one document. Where more than one document has been issued copies of all documents should be given at the same time as each other to the work-seeker. If the work-seeker has been issued a written statement of particulars in line with Part 1 of the Employment Rights Act 1996 there is no requirement to issue this in one document.

An employment business cannot vary the terms unless the work-seeker has agreed to the variation. Where a work-seeker has agreed to any variation of the terms you must as soon as possible, but no later than the end of the 5th business day following the day of the agreement, provide the work-seeker with another document containing the full details of the new terms including the date they come into effect.

An employment business cannot make the continued provision of any services to the work-seeker conditional on the work-seeker agreeing to the variation.

The REC Model terms with work-seekers cover the above legal requirements and can be accessed in the REC Model Document Library.

Regulation 17 – requirement for employment business to obtain agreement to terms with hirers (repealed 8 May 2016)

This regulation is no longer in force as of 8 May 2016. However:

1. it remains a requirement as part of the REC Code of Professional Practice that members continue to agree terms with clients prior to providing a service. All REC members are required to comply with the Code;
2. to be able to charge a transfer fee it remains a legal requirement to have a contract in place that includes a clause compliant with Conduct Regulation 10 (see above) i.e. the contract gives the client the option to choose to use the services of the work-seeker for an extended period of hire instead of paying a transfer fee. Without a contract you won't be able to meet the Conduct Regulation 10 requirements and therefore won't be able to charge a transfer fee; and
3. having agreed terms in place with a client will reduce the scope for disputes at a later stage and ensure that there is an agreement in place for payment by the client.

If you carry out temporary recruitment, you should agree terms with clients in writing before first providing services to the client. Ensure that these terms include:

1. the type of service that will be provided (e.g. acting as an employment business, temporary placements etc.)
2. details of fees and how they will be calculated (amount or method of calculation)
3. if a refund/rebate is applicable the terms should set out clearly how this will be calculated and any conditions that need to be met for the client to benefit from the refund/rebate, and
4. details of the procedure to be followed if a work-seeker introduced or supplied to the client proves unsatisfactory.

Regulation 18 - information to be obtained from a hirer

An employment agency or an employment business cannot introduce or supply a work-seeker to a client unless they have obtained sufficient information from the client to select a suitable work-seeker for the position which the client is looking to fill which includes:

1. the identity of the client, and, if applicable, the nature of the client's business;
2. the date work is to commence and the duration/likely duration of the work;
3. the position the client is looking to fill, including the type of work, location, hours, health and safety risks known to the client and what steps the client has taken to prevent or control such risks
4. the experience, training, qualifications and any authorisation which the client considers are necessary, or which are required by law, or any professional body, for a work-seeker to possess in order to work in the position;
5. any expenses payable to the work-seeker;
6. An employment agency must state the minimum rate of remuneration and any other benefits which the client would offer, the intervals of payment, and where applicable, length of notice the client will give to and receive from the work-seeker.

Regulation 19 - confirmation to be obtained about a work-seeker

An employment business may not introduce a work-seeker to a client unless it has obtained confirmation about:

1. the identity of the work-seeker; and
2. the work-seeker has the experience, training, qualifications, and any authorisation which the client considers are necessary, or which are required by law or by any professional body to work in the position which the client seeks to fill.

An employment agency may not introduce a work-seeker to a client where the work-seeker is taking up a position which involves working with, caring for or attending a vulnerable person unless it has obtained confirmation about:

1. the identity of the work-seeker; and
2. that the work-seeker has the experience, training, qualifications and any authorisations which the client considers are necessary, or which are required by law or by any professional body, to work in the position which the client seeks to fill.

An employment agency or employment business may not introduce or supply a work-seeker to a client unless it has obtained confirmation that the work-seeker is willing to work in the position which the client seeks to fill.

Practical tip – Before sending a work-seeker's CV to your client you should confirm with that work-seeker that they are willing to work in the job position that your client is wishing to fill.

Regulation 20 – steps to be taken for the protection of the work-seeker and the hirer

Neither an employment agency nor an employment business may introduce or supply a work-seeker unless it has taken reasonably practicable steps to ensure that the client/work-seeker are aware of the requirements imposed by law, or by any professional body which must be satisfied to work in the position. An employment agency or employment business should also make all reasonably practicable enquiries to ensure that it would not be detrimental to the interests of the work-seeker or client for the work-seeker to work for the client in the position.

Where, during supply, an employment business receives/obtains information which gives it reasonable grounds to believe the work-seeker is unsuitable it shall without delay: (a) inform the client and (b) end the supply of the work-seeker to the client.

Where an employment business receives information which indicates that the work-seeker **may be** unsuitable, but that information does not give it reasonable grounds to believe the work-seeker is unsuitable, it shall (a) inform the client of the information; and (b) commence making further enquiries as are reasonably practicable as to the suitability and inform the client of any information it receives/ obtains. Where the enquiries lead the employment business to have reasonable grounds to believe that the work-seeker is unsuitable for the position concerned it shall (a) inform the client of the information and (b) end the supply of the work-seeker to the client.

Unsuitability and data protection rules

The sort of information that might indicate a worker is unsuitable will depend on the circumstances but it may be a relevant criminal conviction that should have been disclosed; qualifications found to be false; or a medical condition that means the worker may either be at risk by performing the work or s/he 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.

Data protection laws (including the General Data Protection Regulation (GDPR) and the Data Protection Act 2018 (DPA 2018)) require organisations holding personal data to process personal data only where they have a legal basis to do so, and then to process accurately, fairly, only for so long as necessary and to have appropriate technical and other safeguards in place. It is likely that the “processing” of personal data under Conduct Regulation 20 will satisfy the requirements of Article 6 (regarding the lawful basis for processing personal data) and Article 9 (regarding the processing special category data) of the GDPR and Sections 10 and 11 of the DPA 2018. Please view the Data Protection section of the Legal Guide for further information about the processing of personal data.

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. It may be sufficient where you have supplied a temporary worker to simply state that *“the worker is being withdrawn pending investigations into their suitability”* without stating what the allegations are.

Regulation 21 - provision of information to work-seekers and hirers

When employment agency or an employment business proposes a work-seeker to a client it must give the client all the information it has obtained about the work-seeker under Regulation 19. When acting as an employment business you must also make clear to the client the contractual basis upon which it has engaged the work-seeker i.e. whether you have engaged the work-seeker under a contract for services or employed them under a contract of employment or apprenticeship.

Where an agency or an employment business offers a work-seeker the position with the client you will need to give the work-seeker (orally or otherwise) all information provided in Regulation 18.

If you give the information verbally to the work-seeker at the time you offer him a position, you must confirm such information in writing as soon as possible, and in any event no later than the end of the third business day following the day on which the information was previously given to him subject to the circumstances set out in paragraphs (a) to (b) below.

(a) The same position?
If you are introducing or supplying a work-seeker into a position and you have supplied that same work-seeker into the same position within the last 5 business days and nothing has changed about that position, you do not have to give the information about the client to the work-seeker again unless the work-seeker requests it.

(b) Position of less than or more than 5 business days:
If you are placing a work seeker into an assignment with a client for 5 consecutive business days or less, and you have already provided all the essential information set out at Step 1 above, and where that assignment is intended to be for 5 working days or less, and that information remains the same as when it was first provided, you only need to provide the work-seeker with the identity of the client, the nature of the client's business, the date on which the work-seeker must start work and the duration or likely duration of the work. You can comply with Conduct Regulation 19 by giving the client the name of the work-seeker and a written statement that you have complied with Conduct Regulation 19.

However, where an assignment is extended beyond 5 days, the outstanding information must be given to the work-seeker in writing within 8 business days of the start of the assignment, or where the assignment ends sooner, the end of that assignment.

Regulation 22 – additional requirements where professional qualifications or authorisation are required or where work-seekers are to work with vulnerable persons

Before an employment agency or an employment business supplies or introduces a work-seeker to a client to work with vulnerable persons they must, in addition to satisfying the requirements in Conduct Regulations 18 to 21, ensure that they comply with Regulation 22 which requires that you:

1. obtain copies of any relevant qualifications or authorisation as may be required and offer to provide these to the client;
2. obtain two references or take steps to obtain such references from persons not related to the work seeker (this need not be a current or former employer but could for example, be a bank manager or teacher/tutor) with consent to pass these on to the client or take all reasonable steps to obtain such references and, inform the client that you were unable to obtain these references; and
3. take all reasonably practicable steps to ensure that the work-seeker is suitable for the position.

You must take all reasonably practicable steps to comply obtain the relevant qualifications/ authorisations and references (as set out above) but if you are unable to do so, you must advise your client in writing that you have taken all reasonable practicable steps to comply and also inform your client of the steps that you have taken to try to fully comply with the requirements.

The following provision only applies to employment businesses (supplying temporary workers).

Where a work-seeker is required by law or any professional body to have any qualifications or authorisation to work in a particular role, the employment business must:

1. obtain copies of any relevant qualifications or authorisations as may be required and offer to provide these to the client or take all reasonable steps to obtain such copies and notify the client that none are available;
2. take all reasonably practicable steps to ensure that the work-seeker is not unsuitable for the position.

You must take all reasonably practical steps to fully comply with the requirement to obtain copies of the relevant qualifications/authorisations (as set out above) but if you are unable to do so, you must advise your client in writing that you have taken all reasonable practicable steps to comply and also inform your client of the steps that you have taken to try to fully comply with the requirements.

Regulation 27/ 27A - advertisements

Every advertisement issued by an employment agency or an employment business has to mention in either audibly spoken works or easily legible characters the full name of the agency or employment business and in relation to each position advertised whether it is for temporary or permanent work.

An employment agency or employment business may not issue an advertisement about positions which a client is seeking to fill unless it has information about the specific position of all types to which the advertisement relates and in relation to each position, the authority of the client concerned to find work-seekers for that position, or the authority to issue the advertisement.

An employment agency or employment business in every advertisement for work-seekers which contains the rates of pay will have to state the nature of the work, the location at which the work-seeker would be required to work, and the minimum experience, training or qualifications which the work-seeker would be required to have in order to receive those rates of pay.

Additionally, under Regulation 27A employment agencies and businesses must not publish a 'relevant recruitment advertisement' in another European Economic Area (EEA) country unless:

1. it publishes the advertisement in English in Great Britain (England, Scotland and Wales) at the same time as it advertises the vacancy in the other EEA country; or
2. it has published the advertisement in English in Great Britain in the 28 day period which ends on the day that the vacancy is advertised in the EEA country.

'Relevant recruitment advertisement' is defined as either:

1. a vacancy for a positon, the duties of which will be performed in Great Britain; or
2. an advertisement where the employment agency or business tries to find workers looking for positions where the duties will be performed in Great Britain.

This therefore applies both to advertisements for specific vacant positions, but also to general advertisements where the agency or business is not seeking to fill a specific position.

This requirement does not apply where:

> *The agency or employment business believes, on reasonable grounds, that advertising* [the vacancy] *in English in Great Britain would be disproportionate having regard to the likelihood that doing so would bring the advertisement to the attention of a person with the skills sought by the agency or employment business.*

In other words there is a defence where the employment agency or business can demonstrate that it has reasonable grounds for believing that advertising the vacancy as otherwise required would not have yielded a suitable candidate with the skills for the role.

Note that this defence has yet to be tested and it is unclear how 'reasonable grounds' would be established. **The REC strongly recommends that, to avoid the risk of the significant penalties and potential reputational damage that could follow a breach of this provision, vacancies should be advertised as required under this Regulation on each and every occasion.**

Additionally, from 8 May 2016, the agency or employment business needs reasonable grounds to believe that the advertisement would not come *to the attention of* a person with the skills sought, whereas previously it needed only to consider whether it would bring about an *application* from such a person.

Advertising on a website covers all places from where the website can be viewed, so the requirement can be met where position is placed on a website which can be accessed from Great Britain.

Where any decision is made to rely on the defence, agencies must ensure that they keep records in line with Regulation 29 (see below) to support the application of the defence.

Note that this advertising provision relating to vacancies advertised in other EEA countries does not apply to agencies and employment businesses when they are recruiting their own (internal) staff as opposed to candidates who will be supplied to or introduced to clients.

Regulation 29 - records

An employment agency or employment business must keep records that are sufficient to show that it has complied with the Act and the Conduct Regulations. This includes details of its compliance with:

1. Schedule 4, which sets out the details that the agency or employment business, must include in its records relating to work-seekers; and
2. Schedule 5, which sets out the details the agency or employment business must include in its records relating to clients.

The records in Schedule 4 and 5 must be kept for at least one year after their creation. They must also be retained for at least one year following the date the employment agency or business last provided it services to the client and/or work-seeker.

An employment agency or employment business is not required to keep details of a work-seeker if it does not provide any work finding services to the work-seeker.

The records can be kept at the premises where the agency or business trades, or it can be kept elsewhere so long as the records are readily accessible and can be delivered to the trading premises

to which they relate. The records must be delivered by no later than the end of the second business day following the day on which a request for them is made.

Practical tip – Under data protection laws, data subjects (e.g. work-seekers) have a right to request that a data controller (e.g. an employment agency or business) delete their personal data. However this is not an absolute right - where a data controller has another legal basis to continue to process that data, e.g. it has a legal obligation to hold certain records for a certain period of time, those obligations will take precedence over the data subject's right. The data controller cannot delete that personal data until the time required has expired.

For further information on record keeping see the Data Protection section of the Legal Guide and the Record Keeping Table.

Regulation 32 - application of the Conduct Regulations to work-seekers which are incorporated

Limited company contractors are entitled to opt out of the Conduct Regulations provided they give notice to that effect in writing signed by both the individual supplied to do the work and someone on behalf of the limited company, before the start of any assignment. A limited company contractor cannot opt out if they are being supplied to work with vulnerable persons (i.e. anyone under 18 or vulnerable adults). Additionally, the employment business is required to notify the client of the opt out arrangement before it introduces or supplies the limited company contractor to the client. A work-seeker who does not work through a limited company cannot opt out of the Conduct Regulations.

In order for any opt out to be valid it must be entered into before the limited company contractor is supplied to the client. The opt out should be signed by both the limited company and the Individual who is or would be supplied.

An employment agency or employment business cannot make the provision of work finding services conditional upon the limited company contractor or worker giving notice to opt out of the Regulations.

When a limited company work-seeker opts out of the Conduct Regulations none of the the Conduct Regulations apply.

For more detailed information on the opt-out, please see the REC Guide to opting out of the Conduct Regulations in the REC's Factsheets and Guides.

You can access the opt-out notifications as part of the REC's Model Terms and Conditions for Limited Company Contractors.

Schedule 4 – includes the particulars to be included in records re work-seekers and hirers

Regulation 29 specifies that an employment business must retain the records in Schedule 4. These are:

1. the work-seeker's name, address and, if under 22, date of birth;
2. any terms which apply or will apply between the agency or employment business and the work-seeker, and any document recording any variation;
3. details of the work-seeker's training, experience, qualifications, and any authorisation to undertake particular work (and copies of any documentary evidence of the same obtained by the agency or employment business);
4. names of client to whom the work-seeker is introduced or supplied;
5. details of any resulting engagement and date from which it takes effect;
6. copy of any contract between the work-seeker and any client entered into by the agency on the work-seeker's behalf;
7. in the case of an agency that is permitted to charge fees to work-seekers, dates of requests by the agency for fees from the work-seeker and of receipt of such fees, with copy statements or invoices, numbers and amounts;
8. details of enquiries made under Regulations 19, 20 and 22 about the work-seeker and the position concerned with copies of all relevant documents and dates they were received or sent as the case may be.

Schedule 5 – particulars to be included in an agency's or employment business's records relating to hirers

Regulation 29 specifies that an employment business must retain the records in Schedule 5. These are:

1. details of the position(s) the client seeks to fill;
2. duration or likely duration of work;
3. experience, training, ability, qualifications, and authorisation required by the client, by law or by any professional body; and any other conditions attaching to the position(s) the client seeks to fill;
4. details of enquires under Regulations 18 and 20 about the client and the position the client seeks to fill, with copies of all relevant documents and dates of their receipt;
5. dates of requests by the agency or employment business for fees or other payment from the client and of receipt of such fees or other payments, and copies of statements or invoices.

Previous versions of the Conduct Regulations also required the employment business to retain records of:

1. the date the application was received;
2. the client's name and address, and location of employment if different;
3. the terms offered in respect of the position(s) the client seeks to fill;
4. copies of the terms between the agency or employment business and the client, and any document recording any variation;
5. names of work-seekers introduced or supplied; and
6. details of each resulting engagement and the date from which it takes effect.

From 8 May 2016, it is no longer a requirement of the Conduct Regulations to keep this information. However, REC members should still continue to keep it (particularly any terms agreed) for the reasons set out above (see Regulation 17).

REC model documents:

The REC has prepared a suite of documents for members to use depending on whether the work-seeker has opted out of the Conduct Regulations or not. All contracts come in pairs, one each for the client and the work-seeker (see table below). There are also model assignment details and opt out forms. When considering which contracts to use members will also need to consider the IR35 status of the work-seeker. See our Legal Guide for more information on IR35.

The REC's Model Document Library includes Model Terms and Conditions for corporate members to download.

List of REC model contracts to use with limited company contractors:

Opt out of the Conduct Regulations?	Inside/ Outside IR35 *	Partner Contract for Client/ Hirer	REC Contract for the Worker/Contractor
YES - Opt out notice to be given	Inside	Contract 5/ 5A - Terms of Business for the Supply of Limited Company	Contract 6/ 6A - Terms of Engagement of Limited Company Contractors
NO	Inside	Contract 7/ 7A - Terms of Business for the Supply of Limited Company Contractors	Contract 8/8A - Terms of Engagement of Limited Company Contractors
YES - Opt out notice to be given	Outside	Contract 9/9A Terms of Business for the supply of Consultancy Services	Contract 10/ 10A - Agreement for Consultancy Services by a Limited Company Contractor
NO	Outside	Contract 11/ A - Terms of Business for the supply of Consultancy Services	Contract 12/ 12A - Agreement for Consultancy Services by a Limited Company Contractor

NOTE 1: Contracts 5, 6, 7 and 8 all regard the limited company contractor to be an agency worker for the purposes of the Agency Workers Regulations 2010 (AWR). For further advice on AWR please see the REC Legal Guide entry on the Agency Workers Regulations 2010. In addition, please see AWR Factsheet 2 which discusses the applicability of the AWR to limited company contractors.

NOTE 2: Contracts 9, 10, 11 and 12 do not regard the limited company contractor as an agency worker for the purposes of the Agency Worker Regulations 2010 (AWR).

Note 3: Contracts 5A – 12A inclusive are for use where the client is a public authority.

REC Legal Team
January 2019

Amendments to this factsheet

Amendments made January 2019	
Guidance notes	We have added text regarding the Director of Labour Market Enforcement, Labour Market Enforcement Undertakings and Orders.
Data Protection	We have updated page 19 to reflect that the General Data Protection Regulation and the Data Protection Act 2018 came into effect in May 2018.
Regulation 22	We have made the requirements more explicit.
Regulation 29	We have added a note regarding requests to delete personal data.

This document has been created for REC Corporate Members for information only. It is not a substitute for detailed legal advice on related matters and issues that arise and should not be taken as providing specific legal advice on any of the topics discussed.

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