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**Introduction to**  
**The Conduct of Employment Agencies and Employment Businesses**  
**Regulations 2003**  
**with particular reference to agencies in the IT industry**

**by**

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13<sup>th</sup> October 2004 revision

## **1. INTRODUCTORY**

### **1.1. Disclaimer**

- 1.1.1. This document is of its essence a paraphrase of the more important aspects of the Regulations.
- 1.1.2. It is not (nor is it intended to be) either comprehensive or complete, it may well contain inaccuracies, and is it not intended as an authoritative statement of the law. For this you must look to the regulations themselves. This document is intended to do no more than act as a quick pointer to the relevant areas of the regulations.
- 1.1.3. So - particularly for anything important – cross-check with the regulations themselves!

### **1.2. Download**

- 1.2.1. The regulations themselves can be downloaded at [http://www.egos.co.uk/FAQ/CEAEBR\\_2003\\_annotated.doc](http://www.egos.co.uk/FAQ/CEAEBR_2003_annotated.doc)
- 1.2.2. The latest revision of this introduction can be downloaded at [http://www.egos.co.uk/FAQ/20040930\\_EAA\\_regs\\_introduction.pdf](http://www.egos.co.uk/FAQ/20040930_EAA_regs_introduction.pdf)

## 2. TERMINOLOGY

### 2.1. 'Employment'

- 2.1.1. The Act itself defines 'employment' in a broad sense, including not only employment in its conventional sense, but also '**employment by way of professional engagement or otherwise under a contract for services**'<sup>1</sup>.
- 2.1.2. Thus, everywhere you read 'employment' in the Act and in the regulations you have to remember that the term also includes a professional engagement or other contract for services. Likewise 'work-seeker' (formerly 'worker') and 'hirer' (formerly 'employer') carry similar extended meanings.

### 2.2. 'Employment Agencies' and 'Employment Businesses'

- 2.2.1. To try to reduce confusion in the terminology used:
  - 2.2.1.1. in my discussion, I will reserve the word 'agency' for the specific meaning defined by the Act, and where I wish to refer to an 'agency' in its looser and more commonly accepted industry sense, I intend to use the term 'facilitator' as a general term to refer to the business entity which may be carrying on such business.
  - 2.2.1.2. The Act originally used the term 'contractor' to refer to either an employment agency or an employment business; thankfully that confusing terminology does not appear to be carried forwards into the new regulations.
  - 2.2.1.3. The legislation covers 'Employment Agency' and 'Employment Business'. We need to understand what these terms mean.
- 2.2.2. As a starting point:
  - 2.2.2.1. a single placement may be an 'Employment Agency' placement – in which case, the facilitator is acting as an Employment Agency in relation to that placement; or
  - 2.2.2.2. a single placement may be an 'Employment Business' placement – in which case, the facilitator is acting as an Employment Business in relation to that placement; or
  - 2.2.2.3. a single placement may be neither - in which case, it would appear that the facilitator will not bound by the terms of the Act (or, therefore, by any regulations made under it) in relation to that placement.
- 2.2.3. Thus a single facilitator's business may include:
  - 2.2.3.1. making arrangements where it is acting as an 'Employment Agency', within the meaning of the Act; and also
  - 2.2.3.2. making arrangements where it is acting as an 'Employment Business', within the meaning of the Act; and also
  - 2.2.3.3. making other arrangements, when it is acting as neither

### 2.3. 'Employment Agency'

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<sup>1</sup> s13(1)(a)

- 2.3.1. 'Employment Agency' is defined by section 13(2) of the Act to mean
  - 2.3.1.1. ***'the business...of providing services for the purpose of finding workers employment with employers or of supplying employers with workers for employment by them.'***
- 2.3.2. Taking into account the extended definition of employment, and put simply, this means matching workers (now called 'work-seekers') with direct engagements - if part of a business involves supplying individuals who will then be engaged directly by a hirer - whether permanently or temporarily on the hirer's payroll, or under a contract for services direct with the hirer, then it follows those placements are 'Employment Agency' placements, within the meaning of the Act, and that in relation to them, the facilitator is acting as an Employment Agency.
- 2.3.3. This will of course include eg introducing a permanent worker, in exchange for a one-time fee from the hirer; it will also include an introduction for a temporary engagement, where the contractual arrangements for the work are made directly between the work-seeker and the engager, and the Employment Agency receives a repeated periodic commission or fee (whilst in our experience in the IT industry this situation is relatively rarely encountered in practice, nevertheless it does happen from time to time).
- 2.3.4. **In short, where the contract for the engagement is directly between 'work-seeker' and hirer, the business is 'Employment Agency' business.**
- 2.3.5. We will note that there is no requirement for the engager to have any degree of control over the work-seeker in the case of an engagement falling within the definition of 'Employment Agency' – unlike the position in the case of an Employment Business, as will be seen below.

## 2.4. 'Employment Business'

- 2.4.1. 'Employment Business' is defined by section 13(3) of the Act to mean
  - 2.4.1.1. ***'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.'***
- 2.4.2. Taking into account the extended definition of employment, and again put simply, this means hiring workers (work-seekers) to hirers - if part of a business involves supplying individuals who will be engaged by the facilitator (even if only temporarily, and whether or not on the facilitator's PAYE payroll) and then hired on to work under the control of the hirer, then it follows that those placements are 'Employment Business' placements, within the meaning of the Act, and that in relation to them, the facilitator is acting as an Employment Business.
- 2.4.3. Note that 'control', a concept with which IR35 has made us familiar, is an essential element of Employment Business; therefore where a hiring in and on placement is made, on the basis that the work-seeker is NOT to be under the control of the hirer, then it would appear that (a) such a placement is not Employment Business, and (b) that therefore the facilitator is not an Employment Business, in relation to that placement. The placement (and, in relation to it, the facilitator) would thus appear to be outside the scope of the Act and the regulations.
- 2.4.4. However, caution is urged against depending on this as a means of sidestepping the regulations. The 'control' test for these purposes is black and white - either the work-seeker is working under the control of the hirer, or (s)he is not. Experience, particular in relation to IR35 issues, has shown that In the real world, control is far more a matter of infinite shades of grey - control over what is done, and over where, when and how it is done. And there may further be submissions to control in day to day performance, wholly beyond the facilitator's knowledge, but which might nevertheless fundamentally affect the issue of whether the placement fell inside or outside the Act and

regulations. Contractually minimising control may appear to avoid a business becoming subject to the Act and regulations, as well as being IR35-friendly, but it may be dangerous to depend on this potential avenue to avoid the Act and the regulations.

## 2.5. 'Client'

- 2.5.1. To add further confusion, in the regulations 'client' is used as a collective term for both work-seekers and hirers. I'll try to avoid the use of the word in this discussion, and where I can't I'll reserve it for use in the sense in which it is used in the Regulations.

## 2.6. Application where a work-seeker is a limited company – regulation 32

- 2.6.1. Subject to minor modifications in relation to particular regulations (see 32 (2)-(8)), the regulations apply equally to work-seekers which are limited companies as they do to individual work-seekers.
- 2.6.2. Opt out: With exceptions for situations where the ultimate recipients of the services provided by the work-seeker are particularly vulnerable by reason of age or infirmity, Reg 32(9) provides that the regulations shall not apply to a corporate work-seeker where a corporate work-seeker **and** the person who is to 'be supplied by the work-seeker to carry out the work'
- 2.6.2.1. agree that the regulations shall not apply, and
- 2.6.2.2. give notice of that agreement to the facilitator **before introduction or supply**
- 2.6.3. 32(10-11): An Opt-Out notice may be withdrawn by the person carrying out the work, but if notice to withdraw is given whilst work is being carried out it shall not take effect until the person stops working in the position
- 2.6.4. 32(12): provision of work-finding services may not be made conditional on opting out.

## 2.7. So in summary:

- 2.7.1. '**employment**' includes not only employment in its conventional sense, but also engagement under a contract FOR services
- 2.7.2. '**hirer**' means the engager - the party we generally regard as the client
- 2.7.3. '**Employment Agency**' means matching a work-seeker with a direct engagement – where the work-seeker will then be engaged directly by a hirer -
- 2.7.4. '**Employment Business**' means hiring in and hiring on, where work-seekers are to be under the control of the hirer.
- 2.7.5. the capacity in which a facilitator acts in relation to a placement may be as an 'Employment Agency', or as an 'Employment Business', or (possibly) outside the Act and regulations, according to the nature of the placement; and therefore the overall business of one facilitator may fall into both categories - Employment Agency, and Employment Business.
- 2.7.6. '**work-seeker**' includes both an individual seeking a contract, and the company through which that individual trades; the company and the individual may agree to opt out of the regulations; such agreement may be withdrawn, but not whilst the individual is in fact working.
- 2.7.7. '**client**' may be used as a collective term for both work-seekers and hirers

### **3. GENERAL AND ONGOING OBLIGATIONS ON EMPLOYMENT BUSINESSES - MAJOR IMPORTANCE**

#### **3.1. Regulation 5 – additional services**

3.1.1. Neither an agency nor an employment business may make provision of work-finding services conditional on the work-seeker using other services for which a fee may be charged, or hiring or purchasing goods, either from the agency / employment business or from a connected third party.

#### **3.2. Regulation 27: Advertisements**

3.2.1. Regulation 27 provides that every advertisement issued by an EA or an EB

['Advertisement' is defined by regulation 2 to include 'every form of advertising by whatever means']

must include the full name of the EA or EB

must state whether the services advertised are EA or EB

*[Note: the regulations do not appear to recognise the possibility that a business may be an EA or an EB and yet conducting some business that is outside the scope of the Act and regulations (eg hiring in and on, where the work-seeker is not to be under the control of the hirer). Where a 'position' is to be advertised which falls into this category, it might be wise to expressly say so.]*

must not advertise information about positions unless the Employment Agency or Employment Business has (a) information about all advertised specific positions, and (b) the hirer's authority, either to try to fill the position, or at least to advertise it.

must (where rates of pay are given in an advertisement) also state the nature and location of the work, and the minimum required experience / training / qualifications to receive those rates of pay.

3.2.2. Thus eg

'[position details – no figures] – X Ltd advertises this position as an Employment Agency' (or, of course, 'Employment Business')

'[position details – no figures] – X Ltd does not advertise this position as either an Employment Agency or as an Employment Business'

'[position details – figures] - X Ltd advertises this position as an Employment Agency' (or, of course, 'Employment Business') – [location] – [minimum experience/training/qualifications]

3.2.3. It's all very user-unfriendly, I agree – particularly for online services.

#### **3.3. Regulation 28: Confidentiality**

3.3.1. Regulation 28 provides that:

information relating to a work-seeker may not be disclosed without the work-seeker's prior consent other than

for providing work finding services to that work-seeker, or  
for the purposes of legal proceedings, or  
to the work-seeker's professional body (if any).

additionally,

information relating to a work-seeker may not be disclosed to the work-seeker's current employer without the work-seeker's prior consent (which has not been withdrawn); and

an Employment Agency or Employment Business may not make provision of services conditional on such consent

This suggests that it may be unwise to rely on a general consent given at the outset, and therefore that procedures should be in place to ensure that before a work-seeker's details (even omitting the name) are sent to a hirer, a check is made to see that the prospective hirer who is to be sent details is not the current engager of the work-seeker – and if the hirer is in fact the work-seeker's present engager, at the very least a further check should be made to ensure that the facilitator has not been notified that such consent has been withdrawn; ideally, the work-seeker should be expressly asked to confirm such consent.

3.3.2. The above provisions will apply in addition to the requirements of the Data Protection Act, of course.

#### **3.4. Regulation 29: Records**

3.4.1. Sufficient records must be kept to show that the provisions of the Act and the Regulations are complied with, except where no action is taken on an application. They must be kept for at least one year. They may be kept offsite if they can be produced within 2 days on the request of *any* employee, and they may be kept electronically if they can be reproduced legibly. The records must include:

3.4.1.1. in relation to applications from work-seekers (sch 4):

1. Date application received.
2. Work-seeker's name, address and (if under 22) date of birth.
3. Any terms which apply or will apply between the agency or employment business and the work-seeker, and any document recording any variation thereto.
4. 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).
5. Details of any requirements specified by the work-seeker in relation to taking up employment.
6. Names of hirers to whom the work-seeker is introduced or supplied.
7. Details of any resulting engagement and date from which it takes effect.

8. Copy of any contract between the work-seeker and any hirer entered into by the agency on the work-seeker's behalf.

9. Date application withdrawn or contract terminated (where applicable).

10. 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; or, as appropriate, statements of dates and amounts of sums deducted from money received by the agency on the work-seeker's behalf in accordance with regulation 25(5), to the extent that these are not required to be comprised in records maintained in respect of a client account in accordance with paragraph 12 of Schedule 2.

11. 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.

3.4.1.2. in relation to applications from hirers (sch 5):

1. Date application received.

2. Hirer's name and address, and location of employment if different.

3. Details of the position(s) the hirer seeks to fill.

4. Duration or likely duration of work.

5. Experience, training, ability, qualifications, and authorisation required by hirer, by law, or by any professional body; and any other conditions attaching to the position(s) the hirer seeks to fill.

6. The terms offered in respect of the position(s) the hirer seeks to fill.

7. Copy of the terms between agency or employment business and hirer, and any document recording any variation thereto.

8. Names of work-seekers introduced or supplied.

9. Details of enquiries under regulations 18 and 20 about the hirer and the position the hirer seeks to fill, with copies of all relevant documents and dates of their receipt.

10. Details of each resulting engagement and date from which it takes effect.

11. Dates of requests by the agency or employment business for fees or other payment from the hirer and of receipt of such fees or other payments, and copies of statements or invoices.

3.4.1.3. in relation to dealings with other Employment Agencies or Employment Businesses (sch 6):

1. Names of any other agencies or employment businesses whose services the agency or employment business uses, and details of enquiries (and the answers thereto) under regulation 23(1) (a) as to that agency or employment business's

suitability, with copies of all relevant documents and dates the enquiries were made and the answers received.

2. Date and copy of any agreement under regulation 23(1)(b).

**3.5. Regulation 30: Civil liability:**

3.5.1. Any failure to comply with the regulations may give rise to a civil claim by someone who has suffered loss as a result of that failure

**3.6. Regulation 31: Prohibited and Unenforceable contract terms**

3.6.1. A prohibited or unenforceable contract term does not affect the rest of the contract if it remains capable of binding the parties without that term

3.6.2. Any monies paid by a hirer under such a term are recoverable

**3.7. Regulation 33: Electronic communications**

3.7.1. Notices, consents, or other communications required by the Regulations must either:

3.7.1.1. be given and received in person and on paper, or

3.7.1.2. be sent by post, fax, or other electronic means to an address provided for that purpose

and provided in each case the relevant information is clearly legible by the recipient.

**3.8. Regulation 23(1): Where more than one Employment Agency / Employment Business is involved:**

3.8.1. before they enter any arrangement with each other they must first check each other out and be satisfied that the other will act in accordance with the Act and with these regulations

3.8.2. they must each agree in what capacity each of them will act

3.8.3. where one is an agency entitled to charge a work-seeker, additional provisions apply

3.8.4. the terms of the agreement between them on these points must be reduced to writing (paper or electronic)

**3.9. Regulation 23(2):**

3.9.1. Neither an Employment Agency nor an Employment Business may subcontract or assign its obligations with either hirer or work-seeker to another without

3.9.1.1. the prior consent of the hirer or work-seeker,

3.9.1.2. the terms being recorded in a single document, and

3.9.1.3. a copy of which document is provided to the hirer or work-seeker

## 4. GENERAL AND ONGOING OBLIGATIONS ON EMPLOYMENT BUSINESSES - OF MORE MINOR SIGNIFICANCE IN THE IT REAL WORLD

### 4.1. Industrial Action (Reg 7)

- 4.1.1. Employment Businesses may not supply a work-seeker to a hirer to replace the hirer's own staff engaged in official industrial action (reg 7)

### 4.2. Payment by an agency (Reg 8)

- 4.2.1. An employment **agency** may not become involved in payments to a work-seeker, unless the agency is permitted to charge by reg 26 & complies with reg 25 (client accounts)

### 4.3. Consistency of Capacity (Reg 9)

- 4.3.1. Employment Agencies / Businesses may not hold themselves out as acting in one capacity (Agency or Business) to one party (hirer / work-seeker) and in another capacity (Business / Agency) to the other - there must be consistency

### 4.4. Entering contract on behalf of client (Reg 11)

- 4.4.1. An employment business may not enter a contract on behalf of either hirer or work-seeker with the other

- 4.4.2. An agency may not enter a contract **on behalf of either** hirer or work-seeker with the other, unless

- 4.4.2.1. authorised, and

- 4.4.2.2. where acting for work-seeker, it is permitted to charge;

in any event, it may not enter the contract for *both* parties, and where it enters a contract on behalf of one of them, must notify both within time limits.

### 4.5. Charges To Work-Seekers (Regs 13 & 26; Sch 3)

- 4.5.1. Apart from a few exceptions (relevant to Employment Agencies in the entertainment and sports industries, but not generally to IT) and subject to other conditions (26(2)), no charges to work-seekers may be made by an Employment Agency or Employment Business.

- 4.5.2. If the Employment Agency or Employment Business seeks to provide services or goods to the work-seeker which are to be charged for, notice containing certain information must be given.

- 4.5.3. If any inducements are offered to persuade a work-seeker to engage the services of the Employment Agency or Employment Business, the full terms on which the inducement is offered must be disclosed before the offer can be accepted (regs 13 & 26; Sch 3)

## **5. PROVISIONS IN THE REGULATIONS NOT COVERED IN THIS PAPER**

### **5.1. Special obligations apply in the case of au pairs, persons seeking engagement in domestic service, and those under 18**

5.1.1. I have not covered these provisions as they are outside the scope of the anticipated readership for this paper.

### **5.2. Client Money (regulation 25 & Schedule 2)**

5.2.1. Special provisions apply in the case of Employment Agencies who receive eg advances from hirers of monies which may become due to work-seekers, and requiring that such monies be held in a client account, to which various rules apply (regulation 25 & Schedule 2).

## **6. PRE-CONTRACT REQUIREMENTS (CONTRACTOR)**

### **6.1. Regulations 14-16: preliminary agreement to terms**

- 6.1.1. Before providing any services to a work-seeker, an Employment Agency or Employment Business must first obtain the work-seeker's agreement to certain basic points, including:
- 6.1.1.1. the capacity in which it will act - ie Employment Agency, or Employment Business
  - 6.1.1.2. the type of work which the Employment Agency or Employment Business will seek to find
  - 6.1.1.3. in the case of an Employment Business,
    - whether the contract will be a contract for services, or a contract of service - and the terms which will apply
    - an undertaking that the Employment Business will pay the work-seeker, whether or not the Employment Business has been paid by the hirer
    - the length of notice the work-seeker will be required to give to terminate any engagement
    - the rate (or the minimum expected rate) of remuneration
    - payment frequency
    - details of any annual leave or period of absence, and payment arrangements for such period of absence
  - 6.1.1.4. In the case of an Employment Agency which is entitled to charge a fee:
    - details of the services to be provided
    - details of the agency's authority to act on behalf of the work-seeker, and the extent to which it is authorised to enter contracts on behalf of the work-seeker
    - whether the agency is authorised to receive money on behalf of the work-seeker
    - details of any fees and rebates payable
    - length of notice, either way
- 6.1.2. In either case (unless the work-seeker is an employee (in the conventional sense) of the Employment Business), these terms must be recorded in a single document and a copy must be provided to the work-seeker; such terms may not subsequently be varied without the work-seeker's consent; any such agreement to vary must likewise be included in a single document and provided to the work-seeker within 2 days; continued provision of services may not be made conditional on agreeing to such a variation.
- 6.1.3. In the case of an Employment Agency, these regulations (14 & 16) do not apply if the only service is the provision of a publication (paper or electronic).

## 6.2. Regulation 24: Accommodation

- 6.2.1. Reg 24(2-3): Where a work-seeker 'in order to take up (a) position must occupy accommodation other than his home', then unless the work-seeker is to be on the hirer's PAYE payroll, the Employment Agency or Employment Business must take 'all reasonably practicable steps' to ensure that
- 6.2.1.1. suitable accommodation will be available before he starts work, and
  - 6.2.1.2. suitable travel arrangements have been made.
- 6.2.2. There might be some uncertainty as to whether or not this applies where the work-seeker is not required to occupy any particular accommodation, but it is nevertheless obvious from his address and the contract location that he cannot 'occupy' his home. A warranty that the work-seeker has arranged his own suitable accommodation may be appropriate.
- 6.2.3. Reg 24(4): where travel TO the place of work is provided (free of charge, or fares paid), then either
- 6.2.3.1. the return journey must also be provided free of charge or fares paid, or
  - 6.2.3.2. the Employment Agency or Employment Business must obtain an undertaking from the hirer that the hirer will provide the return journey free of charge or fares paid (and must provide such return journey free of charge or fares paid itself if the hirer fails to do so)
- whether the engagement does not start, or ends. Additionally, the Employment Agency or Employment Business must give the work-seeker a notice setting out the details of the free-of-charge or fares-paid travel and any applicable conditions.
- 6.2.4. Reg 24(9-10): any loan arranged by the Employment Agency or Employment Business (whether from itself or from the hirer) towards travel or other expenses must be interest-free, and all the terms must be recorded in a document given to the work-seeker (save for any terms between hirer and work-seeker that the Employment Agency or Employment Business is not aware of).

## **7. PRE-CONTRACT REQUIREMENTS (CLIENT)**

### **7.1. Regulation 17: preliminary agreement to terms**

- 7.1.1. Before providing any services to a hirer, an Employment Agency or Employment Business must first obtain the hirer's agreement to certain basic points, including:
  - 7.1.1.1. the capacity in which it will act - ie Employment Agency, or Employment Business
  - 7.1.1.2. procedures to be followed if a work-seeker supplied is unsatisfactory
  - 7.1.1.3. details of fees and rebates
  - 7.1.1.4. in the case of an Employment Agency, details of the agency's authority to act on behalf of the work-seeker, and the extent to which it is authorised to enter contracts on behalf of the work-seeker
  - 7.1.1.5. these terms must be recorded in a single document and a copy must be provided to the hirer; such terms may not subsequently be varied without the hirer's consent; any such agreement to vary must likewise be included in a single document and provided to the hirer within 2 days (reg 17).

## 8. PRE-INTRODUCTION & PRE-SUPPLY REQUIREMENTS

### 8.1. Regulation 18: preliminary info from hirer

8.1.1. Before making an introduction or supplying a work-seeker to a hirer, an Employment Agency / Employment Business must **obtain from the hirer sufficient information to select a suitable work-seeker**, including:

- 8.1.1.1. identity of hirer and nature of hirer's business
- 8.1.1.2. start date and duration
- 8.1.1.3. position, type of work, location and hours; health and safety risks, and steps taken to control such risks
- 8.1.1.4. the experience, training, qualifications and any authorisation which the hirer considers are necessary, or which are required by law or by any professional body
- 8.1.1.5. details of any expenses payable
- 8.1.1.6. in the case of an Employment Agency,
  - minimum rate of remuneration and payment frequency
  - length of notice either way

and (Regulation 21) at the same time as it makes an offer must provide such information as it has itself been provided with to the proposed work-seeker, and (if an Employment Business) must tell the hirer what the rate is, and (if not provided in writing) must confirm in writing (paper or electronic) by the end of the second working day afterwards;

### 8.2. Regulation 19: preliminary from work-seeker

8.2.1. Before making an introduction or supplying a work-seeker to a hirer an Employment Agency / Employment Business must **obtain from the work-seeker confirmation:**

- 8.2.1.1. of identity
- 8.2.1.2. that the work-seeker has the experience, training, qualifications and any authorisation which the hirer considers are necessary, or which are required by law or by any professional body
- 8.2.1.3. that the work-seeker is willing to work in the position which the hirer seeks to fill

and (Regulation 21) must provide such information as it has itself been provided with to the proposed hirer, and (if an Employment Business) must tell the hirer whether the work-seeker to be supplied will be employed by it under a contract of service or apprenticeship or a contract for services, and (if not provided in writing) must confirm in writing (paper or electronic) by the end of the second working day afterwards;

### 8.3. Regulation 20: Preliminary – legal requirements of position; general non-detrimental

8.3.1. Before introduction or supply an Employment Agency or Employment Business must

- 8.3.1.1. take all steps reasonably practicable to ensure that work-seeker and hirer are both aware of any requirements imposed by law or by any professional body which must be satisfied for the work-seeker to work for the hirer in the position to be filled
- 8.3.1.2. make 'all such enquiries as are reasonably practicable to ensure that it would not be detrimental to the interests of the work-seeker or the hirer for the work-seeker to work for the hirer in the position which the hirer seeks to fill'.

**8.4. Regulation 22: Preliminary – qualifications & references**

- 8.4.1. Where the work-seeker is required by law or any professional body to have any qualifications or authorisation to work in a position for which he is to be supplied or introduced to a hirer, before introduction or supply an Employment Agency or Employment Business must:
  - 8.4.1.1. first obtain copies of any relevant qualifications or authorisations of the work-seeker, and offer to provide copies thereof to the hirer
  - 8.4.1.2. first obtain two references from persons not related to the work-seeker, and offer to provide copies thereof to the hirer - unless it has taken all reasonably practicable steps to obtain references and been unable to do so, in which case it shall notify the hirer of that fact
- 8.4.2. There are additional requirements where the work-seeker is to have responsibility for caring for young or otherwise vulnerable persons.

## **9. CONTRACT-RELATED REQUIREMENTS (CONTRACTOR CONTRACT)**

### **9.1. Outside scope of regulations?**

9.1.1. Terms in all such contracts making clear that the Contractor is not to be under the control of the hirer *may* result in the business not being an Employment Business within the meaning of the regulations, and therefore in the conduct of the business itself being outside their scope. Whilst it may be worthwhile structuring terms accordingly so as to preserve this line of argument, it would probably be unwise to assume that the regulations might therefore be disregarded.

### **9.2. Regulation 6 – detrimental action:**

9.2.1. Neither an agency nor an employment business may, either by contract terms or otherwise,

9.2.1.1. subject or threaten any detriment to a work-seeker on the ground that

he has terminated (or given notice)

(employment business) he intends to take up / has taken up employment with another

9.2.1.2. require notification of the identity of any future employer

9.2.2. The following are not 'detriments':

9.2.2.1. loss of a potential benefit had the contract not been terminated

9.2.2.2. recovery of losses as a result of failure to perform work the work-seeker has agreed to perform

9.2.2.3. a requirement for a reasonable period of notice.

9.2.3. Such a term in an existing contract may not be enforced after the end of the transitional period – Sch 1 2(4)

### **9.3. Regulation 12:**

9.3.1. Terms providing that payment to the work-seeker is conditional on any of the following are prohibited:

9.3.1.1. payment being received by the Employment Business from the hirer

9.3.1.2. work-seeker producing timesheets signed by the hirer

9.3.1.3. work-seeker working for any period other than the period to which the payment relates

9.3.1.4. anything else within the Employment Business' control

9.3.2. Such a term in an existing contract may not be enforced after the end of the transitional period – Sch 1 2(4)

## 10. CONTRACT-RELATED REQUIREMENTS (CLIENT CONTRACT)

### 10.1. Outside scope of regulations?

10.1.1. Terms in all such contracts making clear that the Contractor is not to be under the control of the hirer *may* result in the business not being an Employment Business within the meaning of the regulations, and therefore in the conduct of the business itself being outside their scope. Whilst it may be worthwhile structuring terms accordingly so as to preserve this line of argument, it would probably be unwise to assume that the regulations might therefore be disregarded.

### 10.2. Regulation 10(1-3):

10.2.1. A provision entitling an Employment Business to a commission or other payment from a hirer if a work-seeker introduced by or supplied by the Employment Business is engaged by the hirer other than through that Employment Business will be unenforceable, **unless** the contract itself provides that the hirer may elect

10.2.1.1. where the work-seeker has not yet been supplied to the hirer, to engage the work-seeker through the Employment Business on terms specified in the contract for the period specified therein; or

10.2.1.2. where the work-seeker has already been supplied to the hirer, to engage the work-seeker through the Employment Business on no less favourable terms than hitherto, for a specified hire period

and unless (in either case) the Employment Business does in fact so supply the work-seeker for the specified hire period, unless the employment business is **in no way at fault** for any failure to do so.

10.2.2. The lack of such a provision in an existing contract may be covered by the giving of a notice to like effect, before the worker actually starts working direct - Sch 1 2(6-8).

10.2.3. In order to mitigate the effects of this regulation, action is required in three separate areas:

10.2.3.1. **Contractual** arrangements need to be in place between Employment Business and hirer **before** the initial introduction, including (1) the terms on which the work-seeker is offered, and (2) adequate 'getout' for the Employment Business to cover the risk of the work-seeker declining to contract with the Employment Business. The law of confidentiality should certainly no longer be regarded as sufficient to cover such eventualities.

10.2.3.2. the Client terms of business need to include the option for the hirer to extend as an alternative to the 'transfer fee', again with an adequate 'getout' for the Employment Business to cover the risk of the work-seeker declining to contract for an extension with the Employment Business

10.2.3.3. Client terms of business for existing contracts: transitional provisions allow for a notice to be given to the hirer, instead of requiring the contract itself to be changed. The notice needs to cover the same points (ie offering the hirer the right to elect for a (further) specified hire period on no less favourable terms), and to be given to the hirer **before** the work-seeker starts working direct or through another employment business.

### 10.3. Regulation 10 (4-6):

10.3.1. Note:

10.3.1.1. this also includes terms operating if the work-seeker takes up an engagement with a third party to whom the work-seeker has been introduced by the hirer; and

10.3.1.2. it provides that after the 'relevant period' has elapsed, even the notice / election procedure of reg 10(1-3) cannot save the day - so after that period, the terms are, quite simply, unenforceable.

10.3.2. The 'relevant period' is the later of

10.3.2.1. 8 weeks from the day after the last day the work-seeker was supplied to the hirer by the Employment Business, and

10.3.2.2. 14 weeks from the first such day, where (a) a break of 42 days or less still counts as part of the 14 weeks, and (b) a break of more than 42 days starts the 14 weeks running afresh.

#### **10.4. Regulation 10(7) – enforceability**

10.4.1. An Employment Business may not seek to enforce a term rendered unenforceable by this regulation, or otherwise request a payment to which it is not (as a result of this term) not entitled. Remember that failure to comply any of with these regulations is an offence, and additionally may give grounds for an application for a prohibition order. Additionally, regulation 31 expressly provides that any money paid by a hirer in respect of an unenforceable term is recoverable by the hirer.

#### **10.5. Regulation 10 – transitional**

10.5.1. Reg 10 does not apply to any right which has accrued before the end of the transitional period – Sch 1 2(5)

## **11. ONGOING (FIRST 3 MONTHS FROM INTRODUCTION)**

### **11.1. Regulation 20:**

- 11.1.1. If an employment business receives information giving reasonable grounds to believe a work-seeker supplied to a client is unsuitable, must inform the hirer and end the supply.
- 11.1.2. If an employment business receives info suggesting work-seeker may be unsuitable but which falls short of giving reasonable grounds to believe work-seeker is in fact unsuitable, must inform the hirer and investigate further.

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