

Recruitment Industry Briefing - Spring 2004

Since 1999 the Government has been in the process of reviewing legislative regulation of the recruitment industry. On 17 December 2003, the Conduct of Employment Agencies and Employment Businesses Regulations 2003 ("the Regulations") were enacted and will come into force, in the main, on 6 April 2004, with limited provisions coming into force shortly thereafter on 6 July 2004. This bulletin provides information on some of the main changes introduced by the Regulations and their effect on both members of the recruitment industry and their clients.

For the benefit of those readers who are not members of the recruitment industry, the following definitions have been adopted in this bulletin:

- "employment agency" means a business supplying employers with workers for employment by them, i.e. facilitating permanent or fixed term recruitment.
- "employment business" means a business supplying persons in the employment of the person carrying on that business, to work for a third party in any capacity, i.e. the supply of temporary staff.
- "hirer" means a person to whom an employment agency or employment business introduces or supplies work-seekers i.e. the end client.
- "work-seeker" means a person to whom an employment agency or an employment business provides work finding services. i.e. candidates for permanent or temporary employment.

What are the main effects of the Regulations?

Restrictions on the circumstances in which recruitment businesses can charge a "transfer fee".

Employment agencies and businesses are currently permitted to charge fees to their clients/hirers in circumstances where a temporary worker supplied to that client becomes a permanent employee of the client (temp to perm fee), or is engaged as a temp by the client through an alternate employment business (temp to temp fee), or is engaged or employed by a third party to whom the temp has been introduced by the client (temp to third party fee).

The Regulations will restrict these types of transfer fees. First, if a client/hirer wishes to engage a temp directly, or through an alternate employment business, or introduces the temp to a third party who wishes to engage the temp, the client will have a right to either

(i) pay a transfer fee immediately or

(ii) give notice to the recruitment business of its intention to maintain the supply of the temp through the recruitment business for a specific extended period, after which, no transfer fee will be payable or

(iii) cease to use the temp for a specific quarantine period, after which, the client, its alternate recruitment business or the third party introduced by the client will be free to engage the temp, without liability to pay a transfer fee. These options will be a compulsory part of the terms of business between the recruitment business and the client.

The rate of the transfer fee [option (i)], if payable, or the length of the extended period of hire [option (ii)] are a matter for negotiation and contract. The quarantine period [option (iii)] is prescribed by the Regulations and is a period of 8 weeks from the end of an assignment or 14 weeks from the start of a first assignment, if that period is longer.

Clearly, this provision will reduce the levels of transfer fees that can be charged to hirers. For

example, it is unlikely that fees which represent a high percentage of starting salary for a temp to perm transfer, which are presently common in the industry, will survive. Clearly it will be far more cost effective for the hirer to simply terminate the temp engagement and wait 8 weeks, as the hirer will then be able to employ with temp directly and free of charge. The only risk to the hirer is that the candidate may receive a better offer in the quarantine period. To try and make a transfer fee attractive, employment businesses are going to have to pitch them at a level which is reasonable, balanced against the hirer's risk and fear of losing the candidate during the 8 or 14 week quarantine period.

Prohibition on restrictions on work-seekers

Employment agencies and employment businesses will be prevented from taking detrimental action (including placing restrictive terms in a work-seeker's contract) which prevents them from (i) terminating their contract with the employment agency or business; or (ii) working for others, e.g. the hirer or an alternate employment business; or (iii) which requires them to notify the employment agency/business of the identity of any future employer.

This prohibition applies to individual work-seekers and to the representatives of limited company contractors. It appears that the legislature's aim is to encourage employment and it is therefore making the direct employment of temporary workers by their hirer, more attractive and accessible by introducing this provision and the restrictions on transfer fees.

Statement of employment status

The Regulations will require employment agencies and businesses to state in their contracts with temporary workers, whether the temp will be employed by the recruitment business under a contract of service or apprenticeship, or a contract for services, and in either case, the terms and conditions of employment that will apply.

The employment status of temporary workers has been much discussed in recent case law, such as *Motorola v Davidson* and others (2001), *Dacas v Brook Street* and *Wandsworth LBC* (2002) and *Recruit Employment Services v Dillon* (2003). The case law appears to be undecided as to whether temps are employees of the recruitment business or the hirer, or whether they are self employed, or in a unique category of employment in themselves. A statement of status in the temp's contract may assist in determining this question.

The Regulations will also require that the temp is informed as to the identity of the entity that will be responsible for paying him/her, which may also assist in determining employment status.

Positive obligations to verify candidate suitability

Employment agencies and businesses are not presently required to verify the qualifications or experience of a work-seeker or otherwise test their suitability for temporary or permanent employment. The Regulations will require them to:

1. obtain confirmation of the identity of the work-seeker;
2. confirm that the work-seeker has the experience, training, qualifications and any authorisation which the hirer considers is necessary or which is required to law or by any professional body, to work in the position which the hirer seeks to fill;
3. make all such enquiries as are reasonably practicable to ensure that it would not be detrimental to the interest of the work-seeker or the hirer for the worker seeker to fill the

- hirer's vacancy;
4. inform the hirer on an ongoing basis if it receives information which gives reasonable grounds to believe (or which may give reasonable grounds to believe upon further investigation by the recruitment business) that a work-seeker is unsuitable for the position with a hirer for which the work-seeker is being supplied and if appropriate, end the supply of that work-seeker to the hirer;
 5. obtain copies of relevant qualification and authorisations of the work-seeker, and 2 references and take all other reasonably practicable steps to confirm that the work-seeker is not unsuitable for the position concerned, where either the work-seeker is required by law or any professional body to have particular qualifications or authorisation to work in a position for which he is to be supplied or introduced to a hirer, or if the work-seeker is to be working or caring for persons under the age of 18 or who by reason of age, infirmity or other circumstances, is in need of care or attention.

Opt out option for limited company contractors

The definition of a "work-seeker" within the Regulations includes a work-seeker that is a company rather than an individual. Limited company contractors, i.e. individuals who contract with recruitment companies, via their own personal service companies, have objected to the effects of the Regulations, on the basis that the increased controls imposed by them may increase the likelihood of exposure to tax liability under IR35.

The government has therefore provided an "opt-out" option from the protection of the Regulations for limited company contractors. A work-seeker which is a company, and any person who is or would be supplied by the work-seeker to carry out the work in question, can agree that the protection of the Regulations should not apply by giving notice of that agreement to the employment business or agency, provided that such notice is given before the introduction or supply of the worker seeker or the person who would be supplied by the work-seeker to do the work, to the hirer. The Regulations state that limited company contractors cannot be coerced into providing an opt out notice.

Prohibition on VAT exempt schemes

The Regulations will prohibit the practice of introducing work-seekers to a hirer, where the work-seeker becomes directly employed by the hirer, but the employment agency / business retains responsibility for paying the worker. This arrangement has previously permitted the employment agency / business to charge VAT to the hirer, only on that part of the fee that is the agency's / business's margin, not on the part that represents the worker's pay.

The only choices that will be open to the hirer in future are to employ the worker direct and to pay the worker themselves, or to take the worker on as a temporary worker, who is engaged by the employment business, in the traditional way.

Compulsory documentation and information

The Regulations require recruitment companies to have agreed contracts in place with hirers and both temporary and permanent work-seekers, prior to making any introductions to either party. With regard to work-seekers the Regulations have listed information which is to be compulsory in the contract between the work-seeker and the employment agency or business at regulations 14 to 16. With regard to the contract between hirers and the employment agency or business, the compulsory information which must be included is set out in regulation 17.

Furthermore, the Regulations will require the employment agencies and businesses to be fully informed of the requirements of the hirer and the work-seeker, prior to making an introduction for a particular vacancy. A list of the matters which must be addressed by the employment agency or business prior to making an introduction (which includes the obligation to verify the suitability of the candidate as referred to above) is set out in regulations 18 to 22.

Conclusion

For the recruitment industry, the Regulations may come as something of a blow, as they both increase the administrative burden that employment agencies and employment businesses have to meet in order to lawfully provide their services, and restrict the previously lucrative area of transfer fees.

Conversely, the Regulations may encourage hirers to make more use of the services of employment businesses for the provision of temporary workers, as a way of assessing whether a particular candidate may make a good permanent employee, as they need not worry about prohibitively large transfer fees.

Finally, as the recruitment industry is aware, the Regulations have been contemplated by the government since 1999, but were delayed by the EC's proposal to introduce an Agency Directive. This directive was originally mooted in March 2002 and sought to give temporary workers comparable pay and working conditions to the hirer's permanent staff. Clearly, this level of protection was far more extensive than anything our domestic legislature or the industry had previously considered and was not welcomed. Whilst the Directive was in consideration the Regulations were stalled. In June 2003 however, the Council of Ministers failed to reach agreement as to the proposed content of the Directive and the Directive was shelved. The government, by finally enacting the Regulations, appears to be indicating that it does not expect the Directive to be revived in the near future, which will be a relief to the industry and its clients.

This guide is for general information and interest only and should not be relied upon as providing specific legal advice. In relation to any particular matter, readers are advised to seek advice.

Further information:

If you would like more information about any of Goodman Derrick's Recruitment Law services please telephone and ask to speak to a member of

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