

Recruitment Industry Update

Conduct of Employment Agencies and Businesses - New Regulations

Due to come into force on 6 April 2008 the Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2007 amend the 2003 Regulations of the same name and are the result of a Government consultation document concerning measures to protect vulnerable agency workers which received “widespread support from those who responded to the consultation paper” (Pat McFadden, Minister for Employment Relations and Postal Affairs).

The Regulations seek to ‘increase protection for work-seekers, reduce certain regulatory burdens on employment businesses and make minor clarifications to the 2003 Regulations’.

The main amendments are as follows:

- Regulation 3 amends the old Regulation 5. An agency or employment business must now ensure that workers who take up ‘additional services’ from them (e.g. transport or accommodation) can give five business days’ (ten if accommodation is provided) notice to cancel those services without incurring any detriment or penalty.
- Regulation 5 amends the old Regulation 21. It provides that employment businesses intending to send work-seekers on short assignments are required to provide only

basic information to them. This is hoped to ease the administrative burden on employment businesses. For these purposes a ‘short assignment’ is one of 5 days or less.

- Regulation 7 amends the old Regulation 26. This increases the protection given to work seekers where agents propose to charge fees for including information about them in publications.
- Various other minor amendments to correct drafting errors and to provide clarity.

Employment Bill 2007/08 - changes to employment agency standards enforcement

Published in December, sections 14 and 15 of the Employment Bill 2007/08 strengthen the employment agency standards enforcement regime.

Under the current regime, breach of the Conduct Regulations by an agency or business is actionable in civil court, to the extent that it causes damage. Damage for these purposes includes the death of or injury to any person including any disease and any impairment of that person’s physical or mental condition.

In addition, pursuant to the Employment Agencies Act 1973, the Employment Agencies Standards Inspectorate can investigate complaints about the conduct of an agency/employment business.



Recruitment Industry Team

Helen Wyatt
Partner

Clare Gilroy-Scott
Solicitor

Belinda Copland
Consultant

If you would like further information about the issues raised in this newsletter, or any other aspect of employment law or the recruitment industry, please contact Helen Wyatt, Head of Employment, or any other member of Goodman Derrick LLP’s employment department.

January 2008

Where there has been infringement of the Act or Conduct Regulations the EAS Inspectorate can initiate 2 types of sanction, namely (1) criminal prosecution and (2) issue a prohibition order.

A person can be prosecuted if he/she:

- (a) contravenes the prohibition on charging fees to workers;
- (b) contravenes or fails to comply with any of the Regulations made to secure the proper conduct of employment agencies and employment businesses;
- (c) falsifies entries to be made in any record or document that has to be kept under the Employment Agencies Act 1973 or the Conduct Regulations; or
- (d) fails without reasonable excuse to comply with a prohibition order.

If found guilty, such person will be liable on summary conviction to a fine. In addition, any person who obstructs an officer in carrying out any enforcement functions will be guilty of an offence and liable on summary conviction to a fine.

A prohibition order is an order made by an employment tribunal may, on application by the Secretary of State, prohibiting a person (including a company) from carrying on, or being concerned with the carrying on of, an employment agency or employment business for up to 10 years on the grounds that the person concerned is unsuitable because of misconduct or any other sufficient reason.

The new sections to be introduced by the Employment Bill make offences under the Employment Agency Act 1973 each-way offences (i.e. capable of being prosecuted in Crown Court as well as Magistrates Court, which would allow access to greater penalties) and confer further inspection powers to the Inspectors.

The Bill is due to be in effect by April 2009, though there is no official implementation date set.

[Postponement of cases related to the employment status of agency workers](#)

In December 2007 the president of the employment tribunals issued a practice direction staying all cases in which agency workers claim rights particular to employees, pending the judgment in **James v London Borough of Greenwich [2006] IRLR 1686**. In this case, Mrs James was involved in an agreement with an agency to work for Greenwich Council having signed a temporary worker agreement that expressly stated no contract of employment would arise between herself and the agency or between herself and the Council. When dismissed by the Council, she claimed unfair dismissal and the existence of an implied contract of employment. Both the tribunal and the EAT were of the opinion that the express term meant that there was no such implied contract of employment. Mrs James has appealed the decision of the EAT to the Court of Appeal and a judgment will be made early this year.

The practice direction issued as a result of her appeal now provides that:

- Where there is a written contract of employment between a claimant and a respondent and the respondent accepts that it is the employer, the case should proceed to tribunal.
- In all other circumstances, the case should be postponed pending the decision of the Court of Appeal in *James v Greenwich* (subject to certain exceptions relating to claims by Civil Servants).

Still no EU agreement on the amended Temporary Workers Directive

On 5 and 6 December 2007 the Employment, Social Policy, Health and Consumer Affairs Council EU ministers met to discuss the proposals for an amended directive on temporary agency work as suggested by the Portuguese Presidency. No agreement could be made.

Proposals for this directive were initially tabled in early 2002 and would originally have provided agency workers with the same basic rights as other employees of the end-user from the start of their employment and the same pay after six weeks of employment. The amended bill was suggested as part of a European drive to reduce 'red tape and over-regulation'. It contains certain exceptions to equal treatment, including one

that relates to pay for agency and temporary workers who do not work for more than six weeks.

The news that no agreement could be reached is generally perceived as good news in the UK. Helen Reynolds of the REC said: "We are very pleased with the outcome. There was great pressure placed on the UK Government to sign up to the agency workers directive, even though it could have reduced the opportunities to temp". In practical terms, implementation of the directive is likely to create difficulties in practice and complicate the placement of temporary workers. In the absence of an agreement at EU level, there have been attempts to introduce similar legislation in the UK (see below: *'Equal treatment between temporary/agency workers and other employees - Draft Bill'*).

Equal treatment between temporary/agency workers and other employees - Draft Bill

On 22 February the Temporary and Agency Workers (Equal Treatment) Bill 2007-08 will be read by Parliament for a second time, after being heard once already last December. As a private members bill, it will only be allocated limited time and is relatively low down on the ballot list. If however it is passed, it will seek to require equal treatment between temporary and agency workers and permanent employees of the end-user and lay down the rights of each in more detail at a UK level, following the collapse of negotiations at EU level on the Temporary Workers Directive.

This guide is for general information and interest only and should not be relied upon as providing specific legal advice.

The Bill contains anti-discrimination provisions similar to the EU Directive outlined above, except where a temporary worker is assigned to an employer for less than six weeks, in which case there is no entitlement to equal pay.

New immigration rules on illegal working

Measures to prevent employment of illegal workers in the UK will come into force from February 2008 as a result of a consultation about the Immigration, Asylum and Nationality Act 2006 (the Act) last year by the Border and Immigration Agency (BIA). The new rules will impose fines of up to £10,000 per illegal worker on employers who negligently hire workers who do not have the right to work in the UK. Where an employer is found to have knowingly hired an illegal worker, they may incur an unlimited fine or even imprisonment. The new measures will make also it easier for employers to check the working status of potential employees.

Further changes to expect as a result of the Act include:

- A points based system to ensure that only workers with skills to benefit the UK economy will come to the UK;
- Consolidation of various agencies (the BIA, Customs and UK Visas) to create a single border force at airports and ports;
- ID cards for foreign nationals outlining their entitlements.

Entitlement to SSP for agency workers

Ministers at the Department of Work and Pensions have decided to make amendments to the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 in order to extend the entitlement of Statutory Sick Pay to agency workers with engagements of less than 3 months. There has been no information provided as to when these changes may be implemented.

Currently, agency workers with contracts of less than 3 months can become entitled to SSP if there are two or more contracts with the agency separated by up to 8 weeks, and the total time working exceeds 13 weeks.

© GOODMAN DERRICK LLP



Goodman Derrick LLP
90 Fetter Lane
London
EC4A 1PT
t: 020 7404 0606
f: 020 7831 6407
www.gdlaw.co.uk