Gaby Hardwicke SOLICITORS

Briefing Note: Employment Agencies and Employment Businesses

Introduction

This guide explains the law regulating the supply of workers for permanent or temporary employment with hirers by employment agencies and employment businesses. The note is structured to provide an overview of the legislation and relevant definitions before covering key aspects of the relationships with the work seeker and the hirer. It is intended to be a helpful guide to all of those involved in this heavily regulated sector but should not be relied upon as legal advice and you should contact us for advice on your specific circumstances.

Briefing Note
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Summary
A guide to the law relating to employment agencies and employment businesses.

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Legislation and Terminology

1. Employment Agencies Act 1973

The regulation of employment agencies and businesses has always been subject to state control. Prior to the Employment Agencies Act 1973, agencies used to be licensed by the Secretary of State. The 1973 Act enabled the Secretary of State to implement detailed statutory provisions regulating the industry and the first Regulations appeared in 1976. They have broadly remained unaltered until the implementation of the Conduct of Employment Agencies and Employment Businesses Regulations 2003 (**the Conduct Regulations**).

The Employment Agencies Act 1973 contains little by way of regulation itself, other than a section prohibiting an agency or business charging a fee to those individuals it tries to obtain work for (with the exception of those operating in the modelling and entertainment industries). It also gives the Secretary of State the power to apply to an Employment Tribunal for an Order prohibiting a person carrying on an Employment Agency or Business on the grounds that they are unsuitable. Such an Order may last for up to ten years and breach of the Conduct Regulations may be cited by the Secretary of State as evidence that a person is unsuitable.

2. The Conduct Regulations

The Conduct Regulations provide comprehensive regulation of the recruitment industry in Great Britain. They have been amended in 2007, 2010, 2016 and again in 2019 (which take effect in April 2020).

The Conduct Regulations exclude certain businesses from their scope including those certified to find employment for ex-forces personnel and prisoners; childminding agencies; those concerned with the letting of vehicles, plant and equipment; local authorities; police forces; members services provided by trade unions and employers organisations and services provided by some educational establishments.

3. Employment Agency or Employment Business?

The Employment Agencies Act 1973 categorises those involved in the recruitment industry as either "Employment Agencies" or "Employment Businesses". It is essential to identify which one of the two categories applies to your business, because the Conduct Regulations vary depending upon which business activity is being undertaken.

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An "Employment Agency" introduces work seekers to client employers for direct employment by them, usually known as permanent recruitment but occasionally they can be supplied for casual or short-term contracts. In this case, the contract is between the Agency and the Hirer and if successful the Hirer will then enter into a contract with the worker and be responsible for paying them.

"Employment Businesses" actually engage those seeking work under contracts and supply them to client hirers on temporary assignments, where they will be under the hirer's supervision or control. The Work Seekers have a contact with the Employment Business rather than with the Hirer and the Employment Business is responsible for paying them. The worker will then usually be supplied with an assignment schedule or schedule of works by either the Hirer or the Employment Business.

Those looking for both permanent and temporary work through either an Employment Agency or Business, are defined under the Conduct Regulations as "Work Seekers" and importantly this definition extends not only to individuals, but also to limited company contractors. Those who actually use the services to hire Work Seekers, either on a temporary or permanent basis, are described as "Hirers".

Many organisations in the recruitment industry will fall into both the categories of Employment Agency and of Employment Business. The organisation must provide both Work Seekers and Hirers with written terms, which make clear the capacity in which it is acting in relation to the services being provided. The practice of firms claiming to be operating on one basis to the Work Seeker whilst advising the hirer that they are operating on another is specifically prohibited in the Regulations.

For the purposes of this note Employment Agencies will be referred to as Agencies and Employment Businesses will be referred to as Businesses.

The Relationship with the Work Seekers

4. Provision of Terms and Conditions

Before an Agency or a Business provides any services to a work seeker it must agree with them the terms, which should be set out in a single written document (or if this is not possible more than one document). The terms cannot then be varied without the work seeker's consent. If there is an agreed variation, a new agreement must be issued within 5 business days.

The Conduct Regulations prescribe certain information that must be included within the written agreement.

In the case of Businesses

- The status of the Work Seeker, whether he will work under a contract of employment or apprenticeship or a contract for services and in either case the terms and conditions that will apply.
- An undertaking that the Business will pay the Work Seeker in respect of work done by him whether or not it is paid by the Hirer.
- The length of notice the Work Seeker is entitled to give and entitled to receive.
- The rate of pay or alternatively the minimum rate of pay the Business reasonably expects to achieve for the Work Seeker.
- Details of the intervals at which remuneration will be paid.

- Details of the entitlement to paid annual leave.

From 6 April 2020 this information will need to be provided by the Business to the Work Seeker in a single document headed "Key Information Document". This must be provided before an agreement is reached with the Work Seeker. The key information is wider than that which must currently be supplied.

In the case of Agencies

The following information only needs to be provided by Agencies who are permitted to charge a fee to the Work Seeker, ie modelling and entertainment agencies, other Agencies are exempt from this requirement:-

- Details of the work finding services to be provided by the Agency.
- Details of the Agency's authority to act on behalf of the Work Seeker, including the extent it is authorised to enter into contracts with Hirers.
- Confirmation of whether or not the Agency is authorised to receive money on behalf of the Work Seeker.
- Details of any fee payable by the Work Seeker, including the amount or method of calculation, description of the service to which the fee relates, circumstances and scale of any refunds or rebates and method of payment.
- The length of notice the Work Seeker is entitled to give and entitled to receive.

5. Charging Fees

The only circumstances in which an Agency can charge a Work Seeker a fee are limited to the occupations listed within schedule 3 to the Conduct Regulations, mainly comprising work in the entertainment, sports and modelling industry.

In these situations the Agency is still prohibited from charging a fee to the Work Seeker if it is also charging the Hirer who is engaging the Work Seeker. Any fee that the Agency does charge the Work Seeker must be payable out of the Work Seeker's earnings for work actually done, rather than as a signing-on fee. Fees can also be charged for including the Work Seeker's details in a publication but, in the case of fashion and photographic models, these fees should also only come out of the model's actual earnings.

Where an Agency receives money on behalf of a Work Seeker, it must place the money on client account and hold it on trust on the Work Seeker's behalf. There are extensive rules within the Conduct Regulations governing the setting up and running of client accounts in such situations the details of which are beyond the scope of this guide.

6. Ancilliary Services and Cooling off

In the past, Agencies and Businesses from time to time circumvented the prohibition on charging fees by charging for additional services such as CV writing, training, photographic services or the provision of protective equipment. It is unlawful to make the provision of work finding services conditional upon the Work Seeker using any of these ancillary services. If however, the Work Seeker voluntarily chooses to use those services, then the level of fees and the service to which they relate must be set out in the contract. The Work Seeker also has the right to cancel or withdraw from these ancillary services at any time without incurring a detriment or penalty, by giving five business days' notice.

In the case of Work Seekers looking for employment in the entertainment, sports or modelling industry, there is a 30 day cooling off period, during which:-

- Where the service includes the production of photographs, audio or video recordings of the Work Seeker, the Agency or Business cannot charge for that part of the service.
- The Work Seeker has the right to cancel or withdraw from the contract for such a service with immediate effect, without having to make any payment to the Agency or Business.

These rights, during a cooling off period, have to be notified to the Work Seeker in writing.

7. Detrimental Action against Work Seekers

It is unlawful for an Agency or Business to subject or threaten to submit a Work Seeker to any detriment on the ground that the Work Seeker has terminated or given notice to terminate any contract with the Agency or Business or, in the case of a Business, that the Work Seeker has taken up or proposes to take up employment with any other person.

This prohibition does not extend to any loss of benefits that the Work Seeker might have become entitled to had they not terminated, the recovery of any losses incurred by the Agency or Business as a result of the Work Seeker's failure to perform work that had been agreed or the requirement for the Work Seeker to give a reasonable period of notice.

The Work Seeker cannot be required to notify the Agency or Business of the identity of any future employer. One of the most significant effects of this provision is to prohibit the inclusion of any post-termination restrictive covenants in the Work Seeker's contract.

8. Withholding Payment

Businesses are prohibited from withholding or threatening to withhold any payment or part payment to a Work Seeker, in respect of work done, on the grounds that either the Business has not received payment from the Hirer; the Work Seeker has not produced a signed time sheet or that the Work Seeker has failed to work for a stated minimum number of hours.

It is important to note that the Business is not prevented from delaying payment to the Work Seeker while it makes reasonable enquiries to verify the number of hours actually worked. However, the Guidance suggests that this period will usually be for a few days at the most.

Businesses are recommended to review carefully their procedures, particularly in relation to the receipt of timesheets and to ensure sufficient safeguards are built into their contracts with hirers, to avoid the potentially harsh effects of this provision.

9. Confidentiality

Agencies and Businesses are prohibited from disclosing any information about a Work Seeker without their prior consent unless it is for the purposes of providing work finding services; for legal proceedings or to

provide information to a professional body of which the Work Seeker is a member or is otherwise permitted under the legislation.

Furthermore, an Agency must not disclose information relating to a Work Seeker to that Work Seeker's current employer without first obtaining their prior consent and the Agency may not make the provision of any services to that Work Seeker conditional on such consent being given, or not withdrawn.

The Relationship with the Hirer

10. Provision of Terms and Conditions

It is no longer a mandatory requirement for Businesses to have contracts in place with Hirers. That said, it is clearly desirable for both Agencies and Businesses to have comprehensive contracts in place with Hirers for many of the reasons contained in this Briefing Note, not least of which is the ability to charge transfer fees.

11. Industrial Action

Businesses are prohibited from providing Work Seekers and Agency Workers to Hirers to replace individuals taking part in an official strike or other official industrial action, or to replace individuals who have themselves been transferred by the Hirer to perform the duties of those on strike or taking industrial action. The Business will not be liable if it can establish that it did not know and did not have reasonable grounds to know that official action was taking place.

12. Transfer Fees

Transfer fees may be charged by a Business to a Hirer where a Work Seeker is engaged directly by the Hirer ("temp-to-perm"); where they are supplied to the same Hirer but through a different Business ("temp-to-temp"), for example, where the Hirer puts work out to tender and requires a mandatory transfer of all agency staff to the successful tenderer; or where the Work Seeker is introduced by the Hirer to a new employer ("temp-to-third-party").

The rationale behind transfer fees is that they compensate the Business for the time and effort investing in locating and introducing the Work Seeker and for loss of future revenue from the supply of that Work Seeker. Conversely, the Government were concerned to ensure that transfer fees are not used unreasonably as a means of discouraging Hirers from offering permanent work to Agency Workers. The rather convoluted regime in relation to transfer fees, therefore, reflects something of a compromise between these two objectives.

The Conduct Regulations do not specify how a transfer fee is calculated. Ultimately, this will be determined by the respective bargaining strengths of the Business and the Hirer.

Where a Business has introduced (but not actually supplied) a Work Seeker to a potential Hirer, the Business may charge a transfer fee in its contract with the Hirer, provided it also offers the Hirer the option of having that Work Seeker supplied to it for a specified extended period of hire, at the end of which the worker can transfer without any transfer fee becoming payable. There is no limit of time on this extended period of hire, but once offered the Work Seeker must be supplied for the entirety of that period.

Where a temporary worker has actually been supplied to a Hirer and the Hirer offers the temporary worker a permanent position, or alternatively requires him to transfer to another Business, a transfer fee can be charged, provided the option of an extended period of hire is given and the transfer takes place within either 14 weeks of the first assignment or within 8 weeks of the end of any assignment, whichever is the later. If however, there has been a break of more than 42 days between assignments, the later assignment will be taken as the first. There is no specified maximum period of extended hire but guidance from the industry body the REC suggests it should be no more than six months.

The third scenario covers the situation where the temporary worker has been supplied and the Hirer has introduced the temporary worker to a third party, either another Business or another Hirer. In this situation a transfer fee can be charged to the original Hirer provided the transfer takes place within either 14 weeks of the start of the first assignment or within 8 weeks of the end of any assignment, whichever is later. There is no obligation to offer the option of an extended period of hire.

As it is unlawful for the Business to enforce any contractual term against the Hirer that falls outside of these provisions or otherwise directly or indirectly request payment from a Hirer in such circumstances, it follows that it is *essential* that detailed provisions of charging of transfer fees are included in contracts between Businesses and Hirers. Often, these provisions will be heavily negotiated between the parties and their lawyers.

Information Gathering and Obligations

13. Information from the Hirer and the Work Seeker

The Conduct Regulations impose onerous obligations upon Agencies and Businesses, with the objective of ensuring that work seekers are suited to the Hirer's requirements and vice versa. Agencies and Businesses must not introduce or supply a Work Seeker unless they have obtained information about the identity of the Hirer, the nature of the Hirer's business, the start date, likely duration, position, type of work, location, hours, experience, training and qualifications sought by the Hirer, and in the case of an Agency minimum rate of pay, other benefits and length of notice.

The Agency or Business must inform themselves about any health and safety risks known to the hirer and must ensure that a thorough risk assessment of the site, equipment and working conditions has been undertaken by the hirer, before the introduction takes place.

Similarly the Agency or Business must confirm the identity of the Work Seeker and document the same, ensure that the Work Seeker has suitable experience, training, qualifications and authorisations and is willing to undertake the work.

No introduction may be made unless the Agency or Business has carried out checks to ensure that the Work Seeker and the Hirer are aware of any legal or professional requirements that need to be satisfied before the assignment or engagement can take place. Evidence of the checks carried out should be retained by the Agency or Business to show compliance.

However, the Conduct Regulations go even further by requiring the Agency or Business to ensure that it would not be detrimental to the interests of either party for the placement to go ahead. This is more than a

health and safety issue and guidance suggests that it could cover situations where the Agency or Business suspects the hirer is in severe financial difficulties or is engaged in immoral or illegal practices.

The Business is also under an obligation to the Hirer to inform them of any information that it becomes aware of that suggests that the Work Seeker is or may be unsuitable for the Hirer's purposes. In the case of an Agency, this obligation remains for a period of three months after the engagement of the Work Seeker. We strongly recommend that all Agencies and Businesses have robust vetting procedures in place, preferably through the use of comprehensive questionnaires.

14. Working with Vulnerable Persons

Additional requirements are imposed where the Work Seeker is:-

- Expected to work with vulnerable persons (by reason of age, infirmity, illness, disability or is under the age of 18)
- Required to have professional qualifications or authorisation

In such circumstances, the Agency or Business must obtain copies of the qualifications and two references (which must be from individuals who are not related to the Work Seeker) and the Agency or Business must have taken all reasonable steps to confirm that the Work Seeker is suitable for the position concerned.

If, having taken all reasonably practicable steps, the Agency or Business is unable to give such confirmation, it must inform the Hirer and of the reason why it is unable to give that assurance. In some circumstances, Agencies and Businesses involved in the management or control of a "regulated activity" may have additional obligations in relation to the undertaking of DBS checks and to refer prescribed information to the DBS, the details of which are beyond the scope of this Briefing Note.

Opt Out

Temporary Workers who supply their services through a limited company have the right to opt-out of the Conduct Regulations in their entirety unless the work involves working with vulnerable persons. The opt-out is not selective. None of the provisions of the Conduct Regulations will apply where the opt-out is exercised.

If the opt-out is exercised, then both the Agency Worker and his limited company (whether that is a personal service company or an umbrella company) must give notice to the Agency or Business before they are introduced or supplied to a Hirer. It is incumbent upon the Agency or the Business to inform the prospective Hirer of the opt-out. Opt-out notices cannot be given part way through an assignment and they will not be effective until the temporary worker has finished any existing assignment.

Many Agencies and Businesses strongly encourage Work Seekers to opt-out of the Conduct Regulations as this enables them to impose post-termination restrictive covenants, unrestricted temp-to-perm transfer fees and the ability to pay late when they have not been paid by the Hirer. However, it is unlawful for an Agency or Business to make the provision of its work finding services conditional upon the worker/limited company contractor opting out of the Conduct Regulations. The Agency or Business can, however, offer inducements for the Work Seeker to opt-out, such as offering more favourable rates of pay or other contract terms.

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Record Keeping

It is a requirement of the Conduct Regulations that Agencies and Businesses keep records to demonstrate compliance. The Conduct Regulations require the records to be kept for at least one year after the date on which the Agency or Business last provided the services. Although our recommendation would be that they are kept for up to 6 years. Records may be kept in an electronic format.

Advertising

Agencies and Businesses must ensure that any advert:-

- Mentions the full name of the Agency or Business and in relation to each position advertised, whether it is for temporary or permanent work.
- Is not placed unless the Agency or Business has information about specific positions of all types to which the advertisement relates and the authority of the Hirer to find Work Seekers for that position.

Furthermore, where rates of pay are stated, the advert must state the nature of the work, location and minimum experience, training or qualifications required to receive those rates of pay.

Additionally, it is unlawful for an Agency or Business to advertise a vacancy in Great Britain (**GB**) in another EEA state unless it also advertises the vacancy in English and in GB, at the same time, or it has already done so in the preceding 28 day period. This prohibition does not apply if the vacancy relates to a position within the Agency or Business itself where the Agency or Business is acting in the capacity of employer.

Furthermore, an Agency or Business will have a defence if it can show that it reasonably believed that advertising the GB vacancy in GB would be disproportionate having regard to the (slim) likelihood that this would result in an application from a person with the skills required to fill the vacancy.

Sanctions and Enforcement

Where non-compliance with the Conduct Regulations causes loss to a third party, they can sue the Agency or Business for damages. Furthermore, contract terms which do not comply with the Conduct Regulations are unenforceable although the remaining contractual terms will remain in force.

The body with responsibility for enforcing the Conduct Regulations is the Employment Agency Standards Inspectorate (**EASI**) and it has wide-ranging powers of inspection, warnings and, where appropriate, prosecution.

A breach of the Conduct Regulations is also a breach of the Employment Agencies Act 1973 which can result in an unlimited fine (from a Crown Court) and a fine of up to £5,000 (from a Magistrates Court). Where the offence is committed with the consent or connivance of a company director, they may be prosecuted personally. Further, a court or tribunal may on an application from the EASI ban an individual from carrying on or being concerned in the running of an Agency or Business for up to 10 years.

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With all of the above in mind, it is essential that all Agencies and Businesses have properly and comprehensively drafted contracts with their Work Seekers and Hirers; that the information gathering obligations are fully complied with in every case and that records of compliance are maintained and retained.

If you would like to know more about this topic or our other legal services, please contact Paul Maynard paul.maynard@gabyhardwicke.co.uk

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