

SUMMARY OF CHANGES TO THE DRAFT CONDUCT OF EMPLOYMENT AGENCIES AND EMPLOYMENT BUSINESSES REGULATIONS 2001 FOLLOWING THE PUBLIC CONSULTATION IN 2001

The Government's objective in overhauling the existing legislative framework governing the private recruitment industry, which dates from 1976, is simpler, clearer regulations, which are relevant to the labour market of today and of the future. Most of the proposed new Conduct of Employment Agencies and Employment Businesses Regulations are simply designed to be updated, streamlined versions of existing requirements and we propose to repeal those that now appear out of date and unnecessary.

The DTI's original consultation document on the draft Conduct Regulations was issued in May 1999. As a result of that consultation, we produced revised Regulations, which were the subject of a further public consultation in February/March 2001. The last consultation document was sent to representative bodies and placed on the DTI website. There were 167 representations received to the consultation. This document summarises the changes to the 2001 draft Regulations arising from the last public consultation.

Those who responded

The representations broken down by category of the respondent were as follows:

Employment Agencies' Representative Bodies 12
Individual Agencies/Employment Businesses 119
Bodies Representing Workers 7
Individual Workers 10
Employers and Bodies Representing Employers 5
Law Firms 4
Government Departments 2
Other Organisations 8

The final proposals will be put before Parliament, subject to further consultation.

This note sets out the significant changes proposed for the draft Conduct Regulation arising from comments raised during the last consultation exercise and issues that have arisen since then.

PART I: GENERAL AND INTERPRETATION

Citation and Commencement

Regulation 1: Citation and Commencement

No change has been made to the title of the regulations. Subject to Parliamentary approval it is proposed that they come into force on [May 2003] but certain regulations will be subject to transitional provisions detailed in Regulation 4 and Schedule 1, which provide for a transitional period of 3 months.

Regulation 2: Interpretation

The definitions section has not been substantially altered from that contained in the previous consultation document.

Regulation 4: Transitional and Saving Provisions and Revocation

The transitional and saving provisions and revocation have not changed.

PART II

General obligations

Regulation 5: Restriction requiring work-seeker to use additional services

The revised Regulation 5(b) has been extended to prevent an agency/employment business from making the provision of work finding services conditional upon the work-seeker "hiring" goods. Previously the regulation only referred to "purchasing goods".

Regulation 6: Restriction on contractual terms preventing work-seekers working elsewhere

The heading has been altered to: "Restriction on detrimental action relating to work-seekers working elsewhere" and the regulation has been recast to prevent agencies and employment businesses including a term in a contract with a work-seeker or otherwise to subject or threaten to subject him to any detriment for specified reasons. These reasons are that the work-seeker has ended or intends to end the contract; or, in the case of an employment business, he has started or proposes to start working with any other person. In addition, the agency/employment business should not require the work-seeker to disclose the identity of his future employer. Regulation 6(2) clarifies the term "detriment" and sets out what does not constitute a detriment within the meaning of the revamped Regulation 6(1)(a). These are: the loss of any benefits to which the work-seeker might have become entitled at the end of the contract; the recovery of losses incurred by the agency/employment business if the work-seeker fails to carry out the work he has agreed to perform; a requirement in a contract for the work-seeker to give a period of notice that is reasonable.

The requirement for an agency/employment business to ensure that the work-seeker has paid work during the notice period has been removed.

Regulation 6(3) has been added to clarify that the provisions of this regulation do not apply to those work-seekers who are employed by the employment business under contracts of service or apprenticeship.

Regulation 7: Restriction on providing work-seeker in industrial disputes

No substantive changes.

Regulation 8: Restriction of paying work-seekers' remuneration

Regulation 8(1)(c) has been restricted to preventing an agency introducing or referring the hirer to any person "with whom the agency is connected", in order for that person to pay, or make arrangements for payment to, the work-seeker. Previously this regulation had referred to "any person (including a company)".

Regulation 8(2)(c) and (3) have been removed. This provision had been included to take account of a High Court decision under the Goods Vehicle (Licensing of Operators) Act 1995. The effect of that decision was that the employment business supplying the temporary staff would have been the "user" under the 1995 Act and, therefore, liable to obtain the goods vehicle licence. A subsequent Court of Appeal Judgement decided that the drivers supplied by the recruitment firm are the temporary servants of the hirer, who is therefore responsible for obtaining the licence.

Regulation 9: Restriction on agencies and employment businesses purporting to act on a different basis

No change.

Regulation 10: Restriction on charges to hirers

Regulation 10(4)(a) and (b) has been amended to remove the references to "person connected with the hirer".

Regulation 10(5) has been altered to apply the "relevant period" provisions of the "temp to perm" transfer fees to "temp to temp" and "temp to third party" transfers. In the 2001 draft Regulations the "relevant period" for "temp to temp" and "temp to third party" transfers was 4 weeks commencing on the day after the day on which the work-seeker last worked for the hirer

having been supplied by the employment business. Where the work-seeker has been supplied by the employment business, the relevant period is whichever of the following ends the later:

- (i) 8 weeks commencing on the day after the work-seeker last worked for the hirer; or
- (ii) 14 weeks beginning on the first day on which the work-seeker first worked for the hirer.

The new Regulation 10(6) clarifies the arrangement to deal with breaks of more than 42 days.

Regulation 11: Entering into a contract on behalf of a client

The new Regulation 12(4) and (5) have extended the maximum period allowed before the terms of a contract are notified to the party or parties to the contract, other than the party on whose behalf the agency has acted. The period has increased from the end of the second business day following the day on which the agency entered into the contract to the end of the fifth.

Regulation 12: Prohibition on employment businesses making payment to work-seekers subject to certain conditions

This regulation has been retitled: "Prohibition on employment businesses withholding payment to work-seekers on certain grounds".

For clarity, this regulation has been simplified. In addition, it provides that the employment business cannot threaten to withhold any payments from the work-seeker, whether through a term in the contract with the work-seeker or otherwise. Regulation 12(b) provides that the employment business cannot withhold payment from the work-seeker because of the work-seeker's failure to produce documentary evidence authenticated by the hirer. However, the employment business can confirm by other means that the work-seeker worked for the period in question.

PART III

Requirements to be satisfied before services are provided

Regulation 13: Notification of charges and the terms of offers

Regulation 14: Requirement to obtain agreement to terms with work-seekers

Regulation 15: Content of terms with work-seekers: Employment businesses

Regulation 16: Content of terms with work-seekers: Agencies

The changes to these regulations are only minor drafting amendments, which do not change the effect of the Regulations.

Regulation 17: Requirement to obtain agreement to terms with hirers

Regulation 17(1)(c) provides that, where an employment business is concerned, the agreement should include details of the procedure to be followed if the work-seeker proves unsatisfactory.

Regulation 17(2) now requires that the agency/employment business shall, unless the hirer has a copy, send to the hirer a copy of the document setting out the agreed terms "as soon as is practicable".

Regulations 17(3) provides that the agency or employment business shall, unless the hirer has a copy, give to the hirer a document setting out the details of any variation in those terms "as soon as is practicable", rather than "no later than the end of the second business day" following the day on which the variation was agreed.

PART IV

Requirements to be satisfied in relation to the introduction or supply of a work-seeker to a hirer

Regulation 18: Information to be obtained from a hirer

Regulation 18(a) has been amended to require that before introducing or supplying a suitable work-seeker the agency/employment business should obtain, where it is applicable, sufficient information concerning the hirer's business.

The reference to an au pair's free time has been removed from Regulation 18(c).

Under the revised Regulation 18(d) the requirement for an agency or employment business to obtain details of the ability, which the hirer considers is necessary for a work-seeker to possess in order to work in the position has been removed.

Regulation 19: Confirmation to be obtained about a work-seeker

As with the revised Regulation 18(d), the new Regulation 19(b) removes the obligation on the agency or employment business to obtain confirmation that the work-seeker has the ability, which the hirer considers is necessary to work in the position that the hirer seeks to fill.

Regulation 20: Steps to be taken for the protection of the work-seeker and the hirer

The new Regulation 20(2)-(7) will impose a duty to act where the agency/employment business receives information concerning the work-seeker's unsuitability to carry out the job once he is in post.

Regulation 21: Provision of information to work-seekers and hirers

Regulation 21(1)(a) and (b) clarifies that the agency/employment business should provide (orally or otherwise) all information it has been provided with concerning matters detailed in Regulations 19 and 18 respectively.

Under Regulation 21(2) where the agency/employment business has not given the information described in Regulation 21(1) to the work-seeker or hirer in writing, it must do so as soon as possible but in any event, no later the end of the third business day after the day on which it was given to the work-seeker or hirer. The previous version required the information to be confirmed before the end of the second business day.

Regulation 22: Additional requirements where professional qualifications are required or where work-seekers are to work with vulnerable persons

The requirement in Regulation 22(2)(b) to obtain two references now states that, subject to the new Regulation 22(3), the persons providing the references must have agreed to the references they provide being disclosed to the hirer. Regulation 22(3) provides that, if the agency/employment business has taken all reasonable practicable steps to comply with Regulation 22(2)(a) and (b) but has been unable to do so, it may satisfy the requirements in 22(2)(a) and (b) by complying with the provisions to the extent it is able to and by notifying the hirer that it has taken all reasonably practicable steps to try and comply, setting out what those steps are.

PART V

Special situations

Regulation 23: Situations where more than one agency or employment business is involved
Regulation 23(1)(a) has been amended to remove the requirement that the first

agency/employment business should make enquiries and receive satisfactory responses to establish that the second does not intend contravening any of the provisions of the legislation covering the private recruitment industry. This change acknowledges that if the second agency/employment business is operating within Great Britain, it will be regulated by the legislation. However, if it were operating in another country, the legislation would not apply.

The 2001 version of the draft Regulation 23(1)(c)(ii) provided that, if the first agency is permitted by Regulation 26(1) to charge the work-seeker for providing work-finding services, the agencies could agree that the second may receive any payment due to the work-seeker.

Under such circumstances, the earlier version of draft Regulation 23(1)(c)(ii)(bb) required that there should be a contract of insurance, or indemnity, provided for members of a trade association to cover the risk of the agency failing to pay the monies owed to the work-seeker. The consultation exercise showed that it would be extremely difficult to arrange realistic insurance or indemnity cover under this proposal.

The revised Regulation 23(1)(c)(ii)(bb) will enable the work-seeker to enforce the terms of the agreement against the second agency, in so far as it relates to payment, even though the work-seeker is not a party to the contract between the two agencies. The revised Regulation 23(1)(c)(ii)(aa) achieves this by making it a requirement that the contract between the two agencies provides that the work-seeker can enforce that part of the contract relating to payment, thus satisfying section 1(1)(a) of the Contracts (Rights of Third Parties) Act 1999.

Regulation 24: Situations where work-seekers are provided with travel or required to live away from home

The new Regulation 24(3)(b) provides an additional protection for work-seekers who are required to live away from home. The agency/employment business must provide written details of the accommodation that will be available. Those details will include the terms on which the accommodation is provided and if there is any cost to the work-seeker. Previous Regulation 24(3)(b) therefore becomes 24(3)(c).

PART VI

Client accounts and Charges to work-seekers

Regulation 25: Client accounts

Regulation 25(12) contains a new sub-paragraph (b), which makes it a requirement that all invoices issued by an agency in respect of work done by a work-seeker should state that cheques or bankers' drafts should be payable to the agency's client account.

Regulation 26: Circumstances in which fees may be charged to work-seekers

Regulation 26(2) has been amended and new Regulation 26(3) added to allow an agency, which is connected with the hirer, to charge a fee to a work-seeker under Regulation 26(1) provided it informs the work-seeker of this relationship before providing work-finding services. The restriction on charging fees to a work-seeker, where there is an agreement between the agency and the hirer that the agency will satisfy all or a substantial part of the hirer's requirement for work-seekers, has been removed.

New Regulation 26(5)(a)(ii) sets out a further exception to the restriction contained in s.6(1)(a) of the 1973 Act on charging fees to work-seekers, in relation to publications whose purpose is wholly for finding work-seekers employment, or providing hirers with information about work-seekers, in any of the occupations listed in Schedule 3. The Regulation allows an agency to charge a fee for this service provided that the charge is no more than a reasonable estimate of the cost, attributable to the inclusion of that work-seeker's information, of producing and circulating the publication.

Regulation 26(8) is also new and allows agencies to charge a fee for providing work-finding services to a work-seeker that is a company where the employment is not an occupation listed in Schedule 3.

PART VII

Regulation 27: Advertisements

Regulation 28: Confidentiality

Regulation 29: Records

Regulation 30: Civil liability

Regulation 31: Effect of prohibited or unenforceable term and recoverability of monies

No substantial changes have been made to these regulations.

Regulation 32: Application of these Regulations to work-seekers that are incorporated

Regulation 32(2) has been amended to include the "hiring" of goods to bring it into line with changes proposed for Regulation 5.

Regulation 33: Electronic communications
No substantial changes.

SCHEDULE 1

Transitional and Savings provisions

2: Application to existing contracts

Paragraph 2(2), (3) and (4) are amended to take account of changes to the headings of, and alterations to, various Regulations.

Savings in respect of existing contracts

Ongoing supplies and first occasion of supply

Restriction on paying work-seeker's remuneration and client accounts

No substantial changes.

SCHEDULE 2

Operation of client account

Interpretation

A definition of the term "accounting reference date", used in paragraph 10 of the Schedule, has been added.

Maintenance of client accounts

Paragraph 6(a) allows an agency to withdraw money from a client account for payment to the

client or payment to another person, provided the client has given a written request for such a payment to be made and that the agency has previously agreed to make such a payment.

Paragraph 6(b)(iii) allows that, where the client has given written permission, monies may be withdrawn from the client account to repay the agency for monies already paid to the client by the agency, prior to the agency being paid by the hirer, as an advance of all or part of the remuneration from the client's employment with the hirer.

Accounts and records

Paragraph 9(4) changes the deadline, by which an agency must compare balances, as at the last day of the previous calendar month, prepare and reconcile accounts, and to take the appropriate action to reconcile any differences. It has been extended from 15 business days of to 21 days from the end of each calendar month.

Inspection and report

Two changes have been made to this paragraph. The requirement to have accounts and records inspected by an independent accountant eligible for appointment as an auditor of a limited company under the terms of section 25 of the Companies Act 1989 within four months of the end of the accounting period has been changed to provide for the appointment of an independent person who is the member of any of the bodies listed in section 249D(3) of the Companies Act 1985. The period of 4 months has been increased to 10 months.

Accounting period
Preservation of client account records
No substantial change.

Interest

Paragraph 13 has been altered to limit the requirement on an agency to account to the client for any interest earned on any sum that is held on behalf of the client in an account relating only to that client for more than 10 days.

SCHEDULE 3

Occupations in respect of which employment agencies may charge fees to work-seekers

The list of occupations for which an employment agency may charge a fee has been extended to include: stunt arranger, stage manager, producer, choreographer and theatre designer.

SCHEDULES 4 - 6

No substantial amendment.

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