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Staffing solutions and the supply of labour

Inside

Introduction

The supply of labour is a growing area of the UK economy. As employers require more flexible staffing solutions, new business models have emerged offering a range of labour-supply options.

Many businesses that have historically provided services have also expanded into the supply of labour, providing their clients with people to supplement their existing workforce.

This Inbrief sets out the key obligations of businesses who supply labour and the consequences of non-compliance.

Statutory regulation

The UK has for decades regulated its recruitment industry and the supply of labour. The Employment Agencies Act 1973 ("the Act") and the Conduct of Employment Agencies and Employment Businesses Regulations 2003 ("the Conduct Regulations") regulate businesses providing "work-finding" services. These laws stipulate when fees may be charged and the terms which must be contained in contracts governing the supply of labour. They also mandate various record-keeping and administrative requirements.

The concept of "work-finding" services is broad, covering much more than just traditional recruitment firms and temping agencies. Businesses within scope include sports and entertainment agents, online CV libraries, apps for finding locums or tradespeople and professional firms supplying highly skilled employees to work on client projects. Whether or not a business model constitutes providing work-finding services, bringing it within scope of the Act or the Conduct Regulations, is ultimately a matter for the courts to determine on the particular facts of the case.

While this Inbrief considers the main statutory obligations that apply across all forms of labour supply, additional regulation applies in certain sectors. In the agriculture and food processing sectors, for example, labour suppliers must be licenced by the Gangmasters & Labour Abuse Authority. Licensing is also required in much of the care sector.

Key definitions

For the purposes of this Inbrief, we use the following definitions:

"Hirer" means the person, company or organisation which requires the additional staffing.

"Work-seeker" means the individual looking for work and includes agency workers as well as contractors.

The Act defines two types of staffing provider:

An "employment agency" - more commonly known as a recruiter, agent, head-hunter or job-board - makes introductions to hirers who then engage work-seekers directly.

An "employment business" - more often referred to as a temping or staffing agency - supplies labour to hirers on a temporary or ongoing basis.

Many traditional recruitment businesses provide both types of service to hirers and work-seekers

Protection for work-seekers and hirers

The statutory regime seeks to prevent bad practice in the industry and includes protections for work-seekers and, in some cases, hirers. Employment agencies and employment businesses are prevented from:

- charging work-seekers any fees for providing work-finding services to them (subject to limited exceptions discussed below)
- requiring work-seekers to purchase goods or services as a condition of providing work-finding services
- disclosing information relating to a work-seeker without their consent, including contacting any current employer
- providing work-seekers' information to hirers, unless the employment agency or employment business has confirmed in advance that the work-seeker is willing to work in the position the hirer seeks to fill
- subjecting work-seekers to detriments (e.g. withholding pay) on the basis that they terminate their contract and/or propose to work elsewhere.

Hirers are entitled to be notified if the employment agency (within three months of introducing a work-seeker) or the employment business (at any time) receives information that a work-seeker is no longer suitable for the work.

Employment agencies (recruiters)

Employment agencies make introductions to hirers who then engage work-seekers directly. An introduction includes any form of job-matching service where, through the provision of information, work-seekers can find work with hirers. Publishers of job adverts are not within matching service where, through the provision of information, work-seekers can find work with hirers. Publishers of job adverts are not within scope if work-seekers contact hirers directly and

do not go through the publisher.

Employment agencies are subject to less regulation than employment businesses because the hirer will have a direct contractual relationship with the successful work-seeker. This is often an employment contract, but not always. Hirers may also engage work-seekers directly as workers, contractors or consultants.

Employment agencies are required to:

- take steps to ensure that the work-seeker and hirer are aware of any requirements imposed by law or by a professional body which must be satisfied to enable the work-seeker to work in the position the hirer seeks to fill
- obtain copies of relevant qualifications and two references, which will be provided to the hirer, where the work will include working with children or vulnerable people (e.g. teaching, medical or caring roles).

Unless a special exemption for entertainment or modelling agencies applies (see below), employment agencies cannot make payments to work-seekers or be involved in any payment arrangements with work-seekers. (Only employment businesses can do this.)

Employment agencies often charge fees either on a one-off basis for a successful appointment, or on a retainer basis where a hirer pays fees upfront and/or on receipt of a shortlist of candidates.

Employment businesses (temping agencies)

Employment businesses supply labour to hirers on a temporary or ongoing basis. They act as intermediaries to supply work-seekers to carry out work for hirers. The employment business contracts with the work-seeker and remains involved in the flow of payments. There is normally a commercial contract between the employment business and the hirer, with no contract between the hirer and the work-seeker.

Employment businesses are required to:

- provide Key Information Documents (KIDs) to work-seekers prior to agreeing terms with them, setting out details about pay, deductions and benefits (see below)
- contract with work-seekers. Terms of engagement must contain details about the minimum rate of pay and the type of work the employment business will find for the work-seeker. (These requirements are in addition to the requirement to provide a written statement of employment particulars under section 1 of the Employment Rights Act 1996 when contracting with work-seekers as employees or workers)
- pay work-seekers (and account for NICs, PAYE and the apprenticeship levy to HMRC), even if the hirer has not paid the employment business
- comply with applicable employment laws, including payment of holiday pay and auto-enrolment in a pension scheme
- obtain information from hirers about work-seeker requirements including, if applicable, details of any comparators for the purposes complying with pay-matching obligations under the Agency Workers Regulations 2010 (AWR)
- state in their terms of business with hirers any fees that a hirer would be liable to pay if it (or a related third party) engages the work-seeker directly or through another employment business. Such fees are often called "transfer fees" and are discussed further below
- provide certain information to hirers when introducing potential work-seekers.

Employment businesses are prohibited from supplying work-seekers to perform work affected by industrial action.

Employment businesses also need to comply with any applicable requirements under the AWR – see our separate Inbrief *Agency workers* for details.

Transfer fees

If a hirer is using one employment business, but then decides to use a different one or seeks to engage a work-seeker directly, employment businesses sometimes charge hirers additional fees to compensate for the loss of that individual from their roster of available work-seekers. These fees, referred to as "transfer fees", "temp-to-perm fees" or "temp-to-temp fees", are subject to strict rules under the Conduct Regulations.

No fee can be charged if there is no transfer fee clause. When there is a clause in an employment business's terms of business with hirers, it may only charge transfer fees if both of the following apply:

- The hirer can choose to extend the labour supply for a specified period (known as an extended period of hire) instead of paying a transfer fee. During this period the work-seeker will continue to be supplied on the same terms as before and at the end the work-seeker can transfer without additional cost to the hirer.
- The engagement by the hirer or new employment business takes place within either: eight weeks from the last day on which the work-seeker worked for that hirer; or 14 weeks from the first day the work-seeker worked for that hirer (whichever is the later).

Any attempt by an employment business to request payment of a transfer fee which does not meet the above criteria is a breach of the Conduct Regulations.

Opting out of the Conduct Regulations

If the work-seeker is a limited company contractor (often a personal services company), they can choose to opt out of the protection provided by the Conduct Regulations. The limited company and the individual who will perform the work must give written notice to the employment business or employment agency that they have agreed to opt out.

For the opt-out to be effective, the employment agency or employment business must inform the hirer of the existence of the written notice before the work starts.

Once the opt-out is in place, employment agencies and employment businesses can charge fees for work-finding services to the limited company contractor, but only in circumstances where the hirer is not also charged a fee.

Employment agencies and employment businesses cannot insist that contractors opt out, and opting out is prohibited when the work involves any child or vulnerable person.

Services outside the scope of the Conduct Regulations

Certain types of organisation are excluded from the statutory regime. These include: charities; childminding agencies; various police services; trade unions and employers' organisations; services provided by universities and other educational institutions; organisations which obtain employment for former members of the armed services; and organisations which work exclusively with offenders released from custodial sentences.

In addition, where a supplier is not providing labour but is instead providing outsourced services (e.g. catering services, cleaning services or IT helpdesk support), the supply will be outside of the scope of the Conduct Regulations. Sometimes it is not clear whether a supplier is providing labour (and so subject to this statutory regime), services (outside scope, but with the alternative complication that TUPE could apply) or both. Various factors will need to be considered to make this determination, and we recommend you seek specialist advice. Two specific pointers to look out for, however, are:

- Who is responsible for the project/ deliverables performed by the work-seeker? If the hirer, this is probably supply of labour. If the supplier, it is probably outsourcing.
- Who directs what the work-seeker does day to day? If the hirer, this is probably supply of labour. If the supplier, it is probably outsourcing.

Employees seconded from one business to another will also be outside of the scope of the Conduct Regulations. This applies if the employee was employed for a conventional job (i.e. they are not employed in order to be supplied as supplementary labour to hirers) and will return to their conventional employment with the service provider at the end of the secondment.

In complex staffing-supply arrangements, other intermediaries may also be involved in the supply chain between the hirer and the work-seeker. These could include "master vendors" (described further below), as well as payroll providers and umbrella companies (used to employ lots of work-seekers, often as an alternative to each work-seeker setting up their own limited company). In some cases, these intermediaries may also be acting as employment businesses and so will be subject to the statutory regime.

A master vendor is a term used to describe an employment business which, in addition to supplying its own work-seekers, also contracts with other employment businesses to provide extra work-seekers when needed to fulfil a hirer's requirements. Another example of an intermediary acting as an employment business is when a hirer contracts directly with an umbrella company to provide additional staffing. In that situation, the umbrella company may also be acting as an employment business and, if so, it will be subject to the statutory regime and will need to ensure pay-matching under the AWR.

Modelling and entertainment agencies

Special exemptions apply for entertainment and modelling agencies, which permit them to charge work-seekers a fee for their services (often in the form of an agreed percentage). This exemption applies to a fixed list of roles set out in a schedule to the Conduct Regulations, including: actors; musicians; photographic or fashion models; and professional sportspeople. Modelling or entertainment agencies act as employment agencies and maintain special client accounts for work-seekers which allow them to accept fees on their behalf for their performances.

In contrast to the usual approach, hirers who engage work-seekers in these industries will have agreements in place with both the agent and the work-seeker who will deliver the performance.

Enforcement

If an employment agency or employment business breaches its obligations, hirers and work-seekers (and often competitors) can complain to the Employment Agency Standards (EAS) Inspectorate. The EAS has wide powers to enter and inspect businesses, including accessing and removing documents, records and financial information.

Any breach of the Conduct Regulations is a criminal offence, as is any breach of the Act's prohibition on charging fees to work-seekers for providing services. The EAS has the power to bring prosecutions which may result in unlimited fines if an employment agency or employment business is found guilty of an offence. Individuals can also be subject to prohibition orders issued by Employment Tribunals which prohibit them from carrying on or being concerned in any employment agency or employment business.

The EAS takes a risk-based approach to enforcement and will focus on protecting the most vulnerable work-seekers who are at risk of exploitation. It will also seek to recover any money owed to work-seekers or unlawfulfees charged to them.

Hirers and work-seekers may also bring claims in the civil courts against employment agencies and employment businesses where, as a result of non-compliance with the statutory regime, they suffer loss or damage.

Cross-border issues

In the UK, unless operating in specific sectors such as care or agriculture (see above), staffing suppliers do not require a licence in order to operate as an employment agency or employment business. In many other countries, however, licences are required and staffing suppliers are subject to even more onerous compliance regimes. In some European countries "illegal lending of employees" is a criminal offence.

Staffing suppliers operating cross-border or internationally will need to check local requirements before providing services to hirers or work-seekers.

Recent changes

Since April 2020, all employment businesses are required to issue KIDs to new work-seekers, prior to agreeing terms of engagement. These must set out the rate of pay, pay intervals, all statutory and non-statutory deductions which will be made, details of leave entitlement (e.g. holidays) and any benefits (e.g. gym membership).

Where the work-seeker is being supplied either through a personal services company or an umbrella company (an intermediary), KIDs must set out the identity of the person who will pay

the work-seeker. In addition, the KID has to provide details of any costs or deductions applied by that intermediary, as well as any costs and deductions applied by the employment business.

Employment businesses are also required to include a worked example, using real figures, showing pay and deductions. If employment businesses offer various engagement models for work-seekers, they will need different KIDs for each option.

KIDs must also provide details about the EAS, including its contact information, in case the work-seeker wishes to make a complaint. This may increase work-seeker awareness of the EAS and could result in it receiving more complaints for investigation.

As of April 2021, users of self-employed people working through a personal services company are now required to assess their IR35 status and deduct PAYE from their fee if they do not meet self-employment status requirements. In the case of a chain involving an employment business, the hirer must undertake the IR35 assessment and communicate that to the employment business. Which must then deduct PAYE from the work-seeker's fee. For further details, see our Inbrief *IR35 reforms from April 2021*.

How we can help further

- Lewis Silkin can audit and update terms of business with both employment agencies and employment businesses, as well as terms of engagement for work-seekers.
- While our own standard agreements include appropriate IR35 wording, we can also provide such wording for inserting into existing terms of business between employment businesses and hirers.
- Our specialist group of lawyers can discuss any staffing business models and give advice on whether the arrangements are likely to fall within the scope of the Act and Conduct Regulations.
- We can advise managers and HR on how to negotiate with staffing providers to ensure hirers are getting the right staffing services.
- We can co-ordinate international and cross-border advice on staffing business models.

For further information on this subject please contact:

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