



## **CONDUCT REGULATIONS & OPTING OUT**

On the 6<sup>th</sup> April 2004, the Government introduced the Conduct of Employment Agencies and Employment Business Regulations 2003 (the Conduct Regulations) to raise standards within the recruitment industry.

The regulations offer protection from issues such as:

- "handcuff clauses" – whereby the agency prevents you from working directly with the client for a set period (e.g. one year)
- "temp to perm fees" – where an agency charges you or the client if you choose to become a permanent employee of the client
- Late payment – in cases where the agency refuses to pay because they have not yet been paid by the client.

On 6<sup>th</sup> July 2004, the Conduct Regulations were extended to cover work seekers who supply their services through a limited company, known as Limited Company Contractors (LCCs). In complying with the Conduct Regulations, recruiters owe LCCs similar obligations to those workers engaged on a PAYE basis.

### **Opting out of the Regulations**

Many limited company contractors appear to be taking the view that opting-in to the Agency Regulations may place them at a disadvantage in securing a contract assignment with a particular client. In particular, the additional procedural requirements imposed upon the employment business and the client may delay the evaluation of that limited company contractor about a contractor who has opted-out of the Agency Regulations.

Also, some clients appear to be concerned about the additional employment risk of limited company contractors seeking to opt in on the basis that by being subject to the Agency Regulations the limited company contractor will be more akin to a temporary employee rather than an independent contractor. Consequently, some clients may encourage the recruitment of contractors who have opted out of the Agency Regulations.

It is suggested that there are additional costs to clients for additional administrative requirements for managing contractors who have opted into the Agency Regulations. This again may disadvantage contractors where clients prefer to avoid these additional costs.

Some contractor groups have also suggested that those limited company contractors seeking to legitimately challenge the application of IR35 to their services could be more likely to be assessed within IR35 if the limited company contractor is subject to the Agency Regulations. This is because some view the Agency Regulations as principally applying to protect the supply of individual workers who are similar to temporary employees, which would undermine any arguments of a limited company contractor seeking to challenge IR35.

## Remaining within the Regulations

If you remain within the Conduct Regulations, a recruiter will owe you and the client a range of obligations. Some of the obligations the recruiter will be required to follow are as follows:

- A recruiter must confirm on what basis they are to offer work finding services, the type of work they are looking for you and the terms which apply to you.
- Before you commence an assignment or a position by the recruiter you must be given information about the proposed position including:
  - ✓ The identity of the hirer
  - ✓ Start date
  - ✓ Location
  - ✓ Likely duration of the work
  - ✓ Type of work
  - ✓ Hours
  - ✓ Any risks to health and safety and steps the hirer has taken to prevent or control such risks
  - ✓ The experience, training and qualifications required for the role
  - ✓ Any expenses applicable, and
  - ✓ The actual rate of remuneration to be paid.

The above information is often discussed verbally; however, we would always suggest getting any final agreements confirmed in writing.

Other factors to consider when opting in the regulations include:

- If you were to carry out work on an assignment, but are unable to obtain a signed timesheet, you are entitled to be paid for the hours you worked by an employment business. The employment business is however permitted to delay payment for a reasonable period to check whether you have worked the hours claimed.
- As a worker within the regulations, you may not be subjected to a detriment or penalty as a result of you or the employment business terminating an assignment, for example, an employment business may not insert a clause in the contract seeking to prevent you from taking up employment directly with the client.

The decision to opt out is likely to be determined by the assignment and whether you will be regarded as genuinely self-employed. Under Inland Revenue IR35 rules there are a range of factors which are assessed to determine whether an LCC is genuinely self-employed, such as the contractual relationship between the parties, the level of control a client maintains over the LCC, financial risk taken by the LCC in providing its services, whether there is a right of substitution in the LCC; turns on whether this is in fact ever exercised, whether the LCC provides it's own tools or uses tools provided by the client hirer, and length of engagement. If you decide against opting out, you will enjoy the legal protections of the Conduct Regulations and be treated by the recruiter akin to a PAYE worker. If you are

genuinely self-employed, then you may wish to consider opting out so as to achieve greater flexibility in negotiating your contract terms.

### **Which route to take?**

Whether you decide to remain within the Regulations or to opt out is a decision for you. The fact of being opted out, in itself, has little effect on your tax status but the fact that you can negotiate the terms of your contract may be considered by the Inland Revenue to reflect genuine self-employment.

In any event, LCCs who are considering remaining within the Regulations or opting out should seek independent tax advice. Under the Regulations, recruiters are required to carry out certain checks on work seekers and obtain information from clients in respect of the position and to supply such information to both client and worker. If you opt out, the Regulations do not apply to that assignment, which means there is less administration for the recruiter resulting in possible incentives to opt out. However, the recruiter must never make their services conditional upon you opting out.

### **How do I opt-out?**

To opt-out, you must give prior notice to your agency and employment company/umbrella company before you are introduced or supplied to a client.

For example here at SmartWork, we issue you with an opt-out form along with your contract of employment. You will then need to sign and return this form, along with your contract of employment, to our contracts team via post or email on [contracts@smartwork.com](mailto:contracts@smartwork.com). Once returned your agency will be informed and once you have given your notice to opt out, none of the Conduct Regulations applies for the duration of the assignment.