



Department
for Business
Innovation & Skills

**Prohibiting employment
agencies and employment
businesses from advertising
jobs exclusively in other EEA
countries**

Government response to
consultation

NOVEMBER 2014

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Government response to the consultation on prohibiting employment agencies and employment businesses from advertising jobs exclusively in other EEA countries

1. Executive summary

- 1.1. The recruitment sector plays an important role in ensuring that the UK's labour market is flexible, effective and fair by improving the efficiency of matching demand for jobs to demand for workers. The sector is regulated by the Employment Agencies Act 1973 and the the Conduct of Employment Agencies and Employment Businesses Regulations 2003 (the 'Conduct Regulations'). The legislation is enforced by the Employment Agency Standards (EAS) inspectorate.
- 1.2. The legislation does not currently regulate where job vacancies are advertised. This means that some employment agencies and employment businesses may be advertising vacancies in other EEA countries without giving workers in Britain the opportunity to apply. The Government wants to create a level playing field for workers by ensuring that all vacancies are advertised in Great Britain and in English.
- 1.3. The Government consultation sought views on a proposal to amend the Conduct Regulations to ban overseas-only advertising. The proposed new regulation would prohibit employment agencies and employment businesses from advertising vacancies in other EEA countries without also advertising them in Great Britain and in English.
- 1.4. The Government has now considered responses to the consultation and intends to proceed with introducing the proposed new regulation. We have, however, made some amendments to the wording of the regulation following feedback from stakeholders. It is our intention that the new regulation will come into force in December 2014.

2. Introduction

- 2.1. The sector in Great Britain is regulated by the Employment Agencies Act 1973 and the Conduct of Employment Agencies and Employment Businesses Regulations 2003 (the 'Conduct Regulations'). The sector has two legally defined types of service; employment agencies which introduce people to be employed by the hirer directly; and employment businesses which employ or engage people to work under the supervision of another person
- 2.2. The legislation does not currently regulate where, or in which language, job vacancies are advertised. This means that some employment agencies and employment businesses may be advertising British-based vacancies in other EEA countries without giving workers in Great Britain the opportunity to apply. The Government wants to create a level playing field by requiring employment agencies and employment businesses to ensure that all advertisements for jobs ordinarily based in GB are published in GB and in English.
- 2.3. Between the 29 July and the 2 September 2014 the Government consulted on a proposal to amend the Conduct Regulations to include a new regulation which would require employment agencies and employment businesses to ensure that all jobs that are based in GB are advertised in GB and in English. The proposed regulation will only apply to vacancies advertised in EEA countries. UK immigration rules already favour native workers over non-EEA through the requirement for each position to undergo a 'Resident Labour Market Test' prior to being advertised outside the EEA.
- 2.4. The consultation asked whether the draft regulation would meet the Government's objective of creating a level playing field for workers in Britain; whether it would be suitable to deal with recruitment advertisements on websites and whether it would provide a wider access to jobs and workers. The consultation also sought views on whether respondents had any evidence of employment agencies or employment businesses advertising exclusively overseas.
- 2.5. We received 31 responses to the consultation, through the online survey and submissions. The respondents represented a range of interested parties including business representatives, employment agencies, employment businesses, trade unions, legal bodies, central Government and individuals. Government officials also met with interested parties to discuss the proposal.
- 2.6. This document is a summary of the consultation responses received and the Government's response to the consultation. We will publish individual consultation responses, where we have permission to do so.

3. Analysis of respondents

Overall analysis is based on 31 consultation responses.

Group	Number	Percentage of total
Business representative organisation/trade body	8	25.8
Central Government	2	6.5
Charities or Social enterprise	0	0.0
Individual	6	19.4
Large business	2	6.5
Legal representative	2	6.5
Local Government	0	0.0
Medium Business	2	6.5
Micro business	7	22.6
Small business	1	3.2
Trade union or Staff association	1	3.2
Other	0	0.0

4. Summary of responses to the consultation

Q1. Do you think that the draft regulation meets the Government's objective of creating a level playing field for workers in Britain by prohibiting employment agencies and employment businesses from advertising jobs solely in other EEA countries?

Response	Number	Percentage of total	Of those who responded
Yes	19	61.3%	61.3%
No	12	38.7%	38.7%
No response	0	0.0%	

The majority of respondents agreed that the proposed regulation did meet the Government's objective of creating a level playing field for workers in Britain. There were comments that it would allow for a wider access to jobs and labour force. Some respondents said that this was a good starting point in tackling overseas-only advertising.

42.9% of business representatives, trade bodies, large businesses and central government believe that the regulation would create a level playing field. 76.5% of medium/small/micro businesses, individuals and staff associations/trade unions agreed that the regulation meets the Government objective. A couple of respondents added that the regulation would need to be properly enforced to meet the Government's objective.

Of those who did not believe the draft regulation would meet the Government's objective, there were some comments that the regulation did not go far enough as it only covered advertising and not the whole recruitment process. Some respondents were also concerned that the measure only applied to agencies in GB and this would not stop hirers using agencies based overseas or that the measure did not apply to employers recruiting directly.

Some respondents felt that the draft regulation was unnecessary as the existing provisions in the Equality Act 2010 are sufficient.

Q2. If you answered ‘no’ to the previous question, why do you think that the draft regulation will not meet the Government’s objective?

Response	Number	Percentage of total	Of those who responded
Comments	11	35.5%	100%
No response	20	64.5%	

57% of Business representatives, trade bodies, large businesses and central government do not believe that the regulation is necessary to create a level playing field as there is little or no evidence of jobs being solely advertised abroad. Some commented that the impact of the regulation would be minimal.

Nautilus International believed that a definition of a “GB vacancy” would be needed within the regulation to clarify its parameters. Concerns were raised by respondents regarding the regulation and a need for advertisement criteria. The belief is that if there is no advertisement criteria, employment agencies and businesses would be able to side step the provision.

Other respondents felt that the current draft regulation needs more clarity as it is currently very narrow in scope. They identified two specific areas; when should a GB vacancy be advertised in the UK in relation to the overseas advertisements, and potential exploitation of the regulation if the regulation does not clarify where to advertise, on what scale and by whom.

There were a series of comments from companies such as Tempo Ltd. stating that the regulation did not go far enough as it only covered advertising and not the whole recruitment process. Some respondents including the Employment Lawyers’ Association were also concerned that the measure only applied to agencies in GB and this would not stop hirers using agencies based overseas to place vacancies on their behalf and that the measure did not apply to employers recruiting directly.

Q3. Do you agree that the regulation is appropriate to deal with recruitment advertising on websites?

Response	Number	Percentage of total	Of those who responded
Yes	17	55%	55%
No	14	45%	45%
No response	0	0%	

Within the individual responses, there is no clarification or agreement within categories (i.e. business representatives/trade bodies) whether the regulation is appropriate to deal with recruitment advertising on websites or not. 50% of business representatives and trade bodies who responded believe it is not appropriate to deal with the advertisements on websites.

75% of all businesses whom responded to the consultation believe the regulation is appropriate. However 77.8% of these respondents consist of micro business which all responded “yes” to the question.

Several respondents (including APSCo and the Employment Lawyers’ Association) who answered “no” stated that the regulation was not appropriate because section 39(1)(a) of the Equality Act 2010 already provides applicants for vacancies with protection from discrimination. There were comments that a more appropriate action would be to raise greater awareness for applicants of the ability to invoke and pursue their rights under the Equality Act.

Some respondents such as Think IT Recruitment raised concerns over the policing of the regulation as it is very difficult to regulate the internet. Some felt that the internet can be very easily exploited and expressed concern that there are potential “loop holes” with internet regulation although they did not give details of what these loopholes could be. Because of this, questions were raised as to whether there would be any effective prosecutions if there was a breach of the regulation.

Tempo (UK) Ltd. believe that the regulation should contain an anti-avoidance sub-clause. The sub-clause should require the agency or employment business to be able to demonstrate that the media or website used is widely accessible by the appropriate parties.

Question 4: We believe that the new regulation would both expand the range of job opportunities open to people in the UK and also expand the range of people that businesses can choose from. Do you agree?

Response	Number	Percentage of total	Of those who responded
Yes	20	64.5%	64.5%
No	11	35.5%	35.5%
No response	0	0%	

Business representatives/Trade bodies and Legal representatives had lower proportions who agreed that the regulation would expand the range of job opportunities and people that businesses can choose from relative to respondents overall. Large, medium and micro businesses had much higher proportions in agreement, with Central Government, individuals and staff associations/trade unions also more in agreement.

Question 5: In Relation to Q4, can you see any downsides - in terms of costs or any other issues?

Response	Number	Percentage of total	Of those who responded
Yes	14	45.2%	45.2%
No	17	54.8%	54.8%
No response	0	0%	

The majority of business representatives and large businesses could not see any downsides. However, legal representatives, small and micro businesses were more likely to see potential costs/issues than respondents overall.

The majority of respondents answered ‘no’ to this question. There were some comments that it would be a cost to businesses who will have to place adverts within the UK in order to comply. A number of respondents said that there would be an administrative burden to employment agencies and businesses particularly where different advertising methods are used in GB and other EEA countries.

Of those that responded ‘no’, there were comments that this regulation would have minimal impact as there is very little evidence of such actions being carried out. Some respondents also said that the regulation does not go far enough as it would only regulate the advertising of vacancies and not the recruitment process in general.

Question 6: Do you have any information about jobs that have been advertised solely in other EEA countries?

Response	Number	Percentage of total	Of those who responded
Yes	2	6.5%	6.5%
No	29	93.5%	93.5%
No response	0	0%	

There was a high level of “no” responses to this question. 6.5% of respondents have evidence of overseas advertising. We are currently looking into the evidence to determine whether it would fall within scope of the proposed regulation.

Some respondents who stated “no” commented that they were unable to provide evidence but have heard of such activity anecdotally.

Question 7: Do you have any other comments to add in relation to this consultation?

Response	Number	Percentage of total	Of those who responded
Yes (comment)	14	45.2%	100%
No response	17	54.8%	

Some respondents stated that the Equality Act 2010 prevents all employers, which includes employment agencies and employment businesses, from discriminating in the recruitment process and this would include overseas only advertising. They said that as the Conduct Regulations only apply to employment agencies and employment businesses this proposed regulation is not only duplication, but could also be seen as creating an un-level playing field for different types of businesses.

The Recruitment and Employment Confederation (REC) also expressed concern that the wording of the draft regulation means that employment agencies and employment businesses would be in scope not only in their capacity as employment agencies and employment businesses as defined in the Employment Agencies act 1973 but also in their capacity as employers in their own right. They were concerned that the new regulation would impose a record-keeping obligation on employment agencies and employment businesses which does not apply to other businesses recruiting their own staff.

REC also stated that if the proposed amendment is made it will result in monitoring and enforcement action by two enforcement bodies - the Employment Agency Standards inspectorate (EAS) and the Equality and Human Rights Commission. The regulation would require the EAS to assess whether actions are unlawful under section 55 of the Equality Act in order to determine whether the defence included applies. It was stated that this type of assessment could be left to the enforcement body that already has familiarity with the Equality Act and established expertise in its application, rather than placing an additional burden on the EAS.

Birmingham Law Society observed that unless there were minimum requirements as to how advertisements should be placed, employment agencies and employment businesses could effectively circumvent the regulations by carrying out only the most minimal advertising in Great Britain (they used the example of an agency advertising a vacancy in a local shop noticeboard for two hours).

5. Government response

5.1. The Government has considered responses to the consultation and intends to proceed with the proposal to introduce a new regulation which would prohibit employment agencies and employment business from advertising exclusively in other EEA countries. We believe that the proposed regulation will improve equality in the labour market, and will also expand the range of potential applicants that businesses can choose from.

5.2. In response to feedback from stakeholders, we have made some amendments to the wording of the draft regulation. Some respondents commented that requiring a vacancy to be advertised in Great Britain 'before or at the same time' as it is advertised overseas could be open to interpretation unless the Government clarified a time limit for 'before'. We have therefore amended the draft to say:

'(1) An agency or employment business must not advertise a GB vacancy in an EEA state other than the United Kingdom unless—

- (a) It advertises the vacancy in English in Great Britain at the same time as it advertises the vacancy in the other EEA state; or
- (b) It has advertised the vacancy in English in Great Britain in the period of 28 days ending with the day on which it advertises the vacancy in the other EEA state.'

5.3. The Government does not think it is appropriate to prescribe in legislation exactly how long a vacancy should be advertised in Great Britain, as we appreciate that the timeframe in which a vacancy must be filled will vary from case to case. However, we will encourage employment agencies and employment businesses to advertise vacancies in Great Britain for as reasonable a length of time as possible.

5.4. There was also concern that the draft wording of the regulation meant that employment agencies and employment businesses would be in scope not only when they are acting in their capacity as employment agencies and employment businesses as defined by the Employment Agencies Act 1973, but also in their capacity as employers in their own right. We have addressed this by amending the draft to say:

“(2) Paragraph (1) does not apply if the GB vacancy is for a worker to act solely for, and under the control of, the agency or employment business itself.”

5.5. A copy of the draft regulation is attached at Annex A. It remains subject to internal Whitehall procedures for scrutinising regulation and, of course, ultimately to Parliamentary approval. However, it is our intention that the amendment should come into force by the 31 December 2014.

5.6. The Government will shortly be consulting separately on wider reforms to the Conduct Regulations.

Annex A: Draft Statutory Instrument

Draft Regulations laid before Parliament under section 12(5) of the Employment Agencies Act 1973 for approval by resolution of each House of Parliament.

DRAFT STATUTORY INSTRUMENTS

2015 No. 0000

EMPLOYMENT AGENCIES, ETC.

The Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2014

Made - - - - - ***

Coming into force in accordance with regulation 1

The Secretary of State, having consulted such bodies as appear to the Secretary of State representative of the interests concerned⁽¹⁾, makes the following Regulations, in exercise of powers conferred by sections 5(1) and 12(3) of the Employment Agencies Act 1973⁽²⁾.

A draft of these Regulations was laid before Parliament in accordance with section 12(5) of the Employment Agencies Act 1973⁽³⁾ and approved by a resolution of each House of Parliament.

Citation and commencement

1. These Regulations may be cited as the Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2014 and shall come into force at the end of the period of 21 days beginning with the day on which they are made.

Amendment to the Conduct of Employment Agencies and Employment Businesses Regulations 2003

2. After regulation 27 of the Conduct of Employment Agencies and Employment Businesses Regulations 2003⁽⁴⁾ insert—

“Advertising in other EEA states

27A.—(1) An agency or employment business must not advertise a GB vacancy in an EEA state other than the United Kingdom unless—

^(a) Section 12(2) of the Employment Agencies Act 1973 requires the Secretary of State to consult with representative bodies before making Regulations under that Act.

^(b) 1973 c.35; section 5(1) was amended by the Employment Relations Act 1999 (c.26), section 31 and Schedule 7, paragraphs 1 and 2.

^(c) Section 12(5) was amended by the Employment Relations Act 1999 (c.26), section 31 and Schedule 7, paragraphs 1 and 6.

^(d) S.I. 2003/3319; relevant amending instruments are S.I. 2007/3575, 2010/1782.

- (a) it advertises the vacancy in English in Great Britain at the same time as it advertises the vacancy in the other EEA state; or
- (b) it has advertised the vacancy in English in Great Britain in the period of 28 days ending with the day on which it advertises the vacancy in the other EEA state.

(2) Paragraph (1) does not apply if the GB vacancy is for a worker to act solely for, and under the control of, the agency or employment business itself.

(3) It is a defence in any proceedings under—

- (a) section 5(2) of the Act⁽⁵⁾, or
- (b) regulation 30,

in respect of a contravention of paragraph (1) that the agency or employment business believes, on reasonable grounds, that advertising the GB vacancy in English in Great Britain would be disproportionate having regard to the likelihood that such advertising would result in an application from a person with the skills required to fill the vacancy.

(4) For the purposes of this regulation—

- (a) references to advertising include causing to be advertised,
- (b) advertising on a website is taken to be advertising in all places from which the website can be accessed,
- (c) “a GB vacancy” means a vacant position the duties of which are ordinarily to be performed in Great Britain.”

Name

Parliamentary Under Secretary of State for Employment Relations and Consumer Affairs

Date

Department for Business, Innovation and Skills

^(a) Section 5(2) was amended by the Employment Act 2008 (c.24) , section 15.

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