



Department for
Business, Energy
& Industrial Strategy

EMPLOYMENT AGENCY STANDARDS INSPECTORATE (EAS)

Enforcement Policy Statement



June 2017

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1. Introduction

The Employment Agency Standards inspectorate (EAS) is located in the Department for Business, Energy and Industrial Strategy (BEIS). Its mission is to work with recruitment agencies, hirers and work-seekers to ensure compliance with employment rights, particularly for vulnerable agency workers, and that everyone who uses the services of a private recruitment agency to find work is treated fairly.

The main role of EAS is to ensure compliance with the provisions of The Employment Agencies Act 1973 (as amended), and associated Conduct of Employment Agencies and Employment Businesses Regulations 2003 (as amended).

EAS enforcement policy is in accordance with the Regulators' Compliance Code and the regulatory principles required under the Legislative and Regulatory Reform Act 2006. The code can be downloaded from the GOV.UK website:

www.gov.uk/government/publications/regulators-code

Firm but fair enforcement is implemented using the five key principles of good regulation as set out by the Hampton code and The Better Regulation Executive (BRE):

www.gov.uk/government/groups/better-regulation-executive

The Employment Agencies Act 1973 and associated Conduct of Employment Agencies and Employment Businesses Regulations 2003, require all employment agencies and employment businesses to abide by specified minimum standards of conduct. Further guidance can be found on the GOV.UK website: www.gov.uk/employment-agencies-and-businesses

The Employment Agencies Act (as amended) can be downloaded from:

www.legislation.gov.uk/ukpga/1973/35

The Conduct Regulations and the 2007 Amendment Regulations; the 2010 Amendment Regulations; and the 2016 Amendment Regulations can be downloaded from:

www.legislation.gov.uk/uksi/2003/3319/contents/made

www.legislation.gov.uk/ukdsi/2007/9780110789927/contents

www.legislation.gov.uk/ukdsi/2010/9780111497326/contents

www.legislation.gov.uk/ukdsi/2016/9780111144169

2. Purpose of enforcement

The purpose of enforcement is to encourage and sustain compliance with the legislation. Following an investigation or inspection by EAS, any breaches of the legislation will be brought to the attention of the offender and followed up by the issue of a warning letter.

Employment agencies and employment businesses must ensure they take prompt action to fully comply with the legislation where any breaches are brought to their attention by EAS. Each warning letter will set out where the agency or employment business has contravened the legislation and will include the full provision of the relevant regulation they need to comply with. Failure to respond to a warning letter issued by EAS could result in further enforcement action. This could include;

- (a) a Labour Market Enforcement (LME) undertaking being sought from the employment agency or employment business;
- (b) a LME Order where the employment agency or employment business fails to comply with the undertaking;
- (c) consideration of prosecution proceedings; or
- (d) consideration of prohibition proceedings.

3. Principles of enforcement

The Hampton principles¹ require enforcement activity to be targeted at non-compliance and to be proportionate in how it responds to non-compliance.

The Better Regulation Executive and EAS are part of the Department for Business, Energy and Industrial Strategy (BEIS) and apply the five principles of good regulation.

Proportionality

EAS will seek to secure compliance with the legislation by ensuring a proportionate response to the offences by the most appropriate enforcement option. Proportionality in obtaining compliance will include intervention only where necessary, taking into account the degree of the risk of harm caused by non-compliant agencies or employment businesses towards workers and/or hirers.

Accountability

EAS must be able to justify decisions and be accountable for the efficiency, effectiveness and cost of the inspectorate. EAS will publish an annual report detailing the performance of the inspectorate for the previous financial year. Published reports will appear on the GOV.UK webpages.

¹ <http://webarchive.nationalarchives.gov.uk/+http://www.bis.gov.uk/policies/better-regulation/improving-regulatory-delivery/assessing-our-regulatory-system>

Consistency

The EAS inspectorate will be consistent in its approach to enforcement in all the legal jurisdictions in which it operates (England, Wales and Scotland). Consistency means taking a similar approach in similar circumstances to achieve similar ends. However, this does not mean uniformity. Discretion will be applied. EAS recognises that the facts and circumstances of cases will never be identical and have to be considered on their own merits.

Transparency

Transparency means helping those regulated to understand what is required from them and what they should expect from the regulator. EAS will be clear about the consequences of non-compliance (i.e. warning letter, prosecution and/or prohibition).

Targeting

EAS applies a risk based assessment process for determining priorities and directing compliance and enforcement work to where it is likely to achieve results. The process includes a weighting towards:

- Geographic areas where EAS receives higher than average numbers of complaints, or a pattern is emerging;
- Sectors where EAS receives higher than average numbers of complaints, or a pattern is emerging;
- Where the nature of the activity is high risk;
- History of previous inspections of employment businesses or agencies in particular sectors or locations; and
- Information from other related enforcement bodies (such as the Gangmasters and Labour Abuse Authority; The Pensions Regulator; HM Revenue and Customs' National Minimum Wage teams which suggests non-compliance;

EAS is continuing to refine its risk-based assessment processes and procedures.

4. Investigations

EAS will consider every complaint received about an agency or employment business. In deciding whether further investigation is necessary, EAS will:

- Consider whether the complaint is in scope of the legislation enforced by EAS (Inspectors can only investigate matters that fall within the remit of the Employment Agencies Act and Conduct Regulations); and
- Assess what other information can be obtained regarding the agency, both from the complainant and other sources.

Details from complainants will be treated in confidence and not disclosed during an investigation unless the complainant has given EAS permission to disclose their information.

EAS will acknowledge all complaints received and EAS inspectors have a target of five working days to make contact with complainants from the time the complaint is submitted. If the complaint does not fall within the scope of the Act or Conduct Regulations EAS will inform the complainant accordingly.

Where EAS follows up a complaint and investigate it will aim to conclude the investigation within six weeks from the date the complaint was received in EAS. Many complaints are completed within this timeframe. During the period 2015/16, around 75% of cases were cleared within 6 weeks. Those cases that were not cleared within the specified period included cases where there were complexities in obtaining information or evidence for EAS to progress or conclude cases. Where an investigation is protracted EAS will inform the complainant of the reason for the delay at the end of the six week period, and at six weekly intervals thereafter, if appropriate.

Following receipt of a complaint or information which needs to be followed up, EAS will conduct an investigation in order to establish:

- Causes of complaint;
- Any non-compliance with the Act and Conduct Regulations;
- The seriousness of any breaches of the law;
- What action has been taken or needs to be taken by the agency or employment business in order to comply with the Act and Conduct Regulations;
- An appropriate and proportionate response to any breaches of the law that were identified; and
- That compliance with the law has been achieved.

The EAS enforcement powers set out in Section 9 (1) of the Employment Agencies Act 1973 give EAS inspectors' powers to inspect those premises which they believe are being used, or have been used, for the purpose of an employment agency or employment business. This would include online job boards, caught by s13 of the Employment Agencies Act 1973 as employment agency or employment business activity, and where the activity was conducted from premises within Great Britain. Inspectors can inspect, copy or remove (for the purpose of copying), any records and documents kept in accordance with the Act or Conduct Regulations. It is an offence under Section 9-(3) for a person to obstruct an inspector in the exercise of their powers. If the EAS inspector is refused entry or access to records, they may issue a formal caution (in accordance with the Police and Criminal Evidence Act 1984) and consider criminal proceedings.

5. Inspections

EAS also acts proactively in carrying out targeted inspections of employment agencies and employment businesses. These targeted operations are based on risk analysis and intelligence received. Targeted operations can be in sector type and/or geographical area. When carrying out inspections of agency records, EAS will be using its enforcement powers (see section 4 above) and inspectors will endeavour to perform their duties in a business friendly way in order to cause the least disruption to business and the economy.

6. What to expect during an investigation or inspection

Where EAS decides that there is sufficient cause to conduct an investigation and/or inspection, the inspector can either contact the appropriate agency or employment business by telephone or correspondence or carry out a visit to the agency's premises.

When carrying out investigations, it is standard practice for EAS to deal with the case initially by telephoning and corresponding with the agency or employment business as this may be the most effective and efficient compliance intervention to resolve complaints.

When the EAS inspector writes to an agency or employment business about a complaint under investigation they will set out the reasons in the correspondence and, if necessary, the allegations being made by the complainant. The inspector will also include details of the legislation that specifically relates to the complaint and will seek a response. Inspectors may ask for documentation to be sent to them including (but not limited to) the agency's terms and conditions with work-seekers; terms of business with hirers; details of any additional services provided to work-seekers; payments of fees or wages to work-seekers.

The letter will contain details of the powers conferred in section 9 of the Act (see section 4) in seeking compliance and a written response from the agency or employment business.

All EAS inspectors are appointed under delegated powers by the Secretary of State for BEIS. When an inspector visits an agency or employment business premises, either unannounced or by appointment they will produce their warrant or identity cards and a written document setting out their enforcement powers under s9 of the Act. GLAA Labour Abuse Protection Officers (LAPOs) have had these powers since December 2016 under the Immigration Act 2016. They may act as EAS inspectors where it is appropriate for them to do so.

When carrying out an investigation/inspection visit to an agency or employment business premises, EAS inspectors will complete an appropriate record of inspection. This record is a document that is retained by EAS and is not published and is not made available to any third party. S9 of the Act provides that it is illegal for any EAS Inspector to disclose any information they obtain during an investigation or inspection. The only exception for disclosure might be under a legal gateway that EAS has with another enforcement partner (for example HMRCs National Minimum Wage team).

During an investigation or inspection visit Inspectors may ask for examples of the agency's or employment business' terms and conditions to work-seekers and terms of business with hirers. Inspectors will normally inspect the following documentation:

- Details of several placements (temporary assignments or introductions to employers));
- Details of any additional services provided to work-seekers;
- Payments of fees or wages to work-seekers, (including where necessary timesheets, invoices remittances, bank statements etc.); and
- Advertising of vacancies.

In addition, inspectors are able to examine or request financial records and other financial documents produced or received by the agency or employment business.

If these records are not held on the agency or employment business premises or available at the time of the inspection/investigation visit EAS can write to the agency or employment business to ask them to produce such records on a specified date and time, in a reasonable time period, as prescribed by EAS. If an agency or employment business fails to comply with this request EAS can write to the agency's or employment business' bank and require the bank to supply the financial records. EAS inspectors can demand detailed information not only from the agency's Directors, Sole Traders and Managers, but also from other bodies (e.g. employees and third parties), who may be in possession of relevant documents and information. Inspectors may also extend their investigation where necessary and contact users of the agency services (e.g. hirers and work-seekers) for information during the course of an investigation.

7. Infringements of the Act and Regulations

Where infringements are found, EAS will seek resolution of matters by the most appropriate enforcement action. This can be achieved in most cases by issuing warning letters but in serious or repeat cases could lead to LME undertakings; LME orders; prosecution and/or prohibition proceedings.

8. Warning letters

Usually EAS will initially seek compliance by issuing warning letters. Every warning letter will contain a clear statement of the infringements that have been found. They will also contain a formal warning of the EAS powers regarding LME undertakings and orders as well as prosecution and prohibition.

Those issued with warning letters will be asked to confirm in writing what remedial action they intend to take, or have taken, in order to correct each infringement and, where appropriate, to provide supporting evidence. In all warning letters issued by EAS, the agency or employment business will be asked to provide a written response with 14 days of the date of the warning letter. If further time is needed to respond, for example to include revised documentation, the agency or employment business must contact EAS and obtain written agreement to any extension.

9. Labour Market Enforcement (LME) – undertakings and orders

In May 2016, the government introduced measures in the Immigration Act 2016 to provide a more coherent framework for identifying and preventing abuses of labour market legislation, and to strengthen the enforcement response. This includes new powers to apply Labour Market Enforcement (LME) undertakings and orders. EAS (and the Gangmaster and Labour Abuse Agency and HMRC National Minimum Wage officers) will have regard to the Code of Practice when using the LME regime. Further details are available on the GOV.UK website: www.gov.uk/government/publications/labour-market-enforcement-undertakings-and-orders-code-of-practice

LME Undertakings

An undertaking may be sought where EAS believes a trigger offence (a breach of the Employment Agencies Act 1973 or Conduct of Employment Agencies and Employment Businesses Regulations 2003 – both as amended) has been or is being committed and a measure in the undertaking is necessary to prevent further non-compliance.

The following factors will be taken into account by EAS before seeking an undertaking from an agency or employment business:

- the number of trigger offences that are believed to have been committed;
- if previous enforcement action has been taken;
- the number of workers affected by the offence;
- any harm, physical or otherwise, to workers;
- the amount of money due to workers;
- whether the breach believed to have been committed was committed recklessly or intentionally, as opposed to by straightforward error, and if so;
- the level of recklessness by the business that led to the breach; and
- whether EAS believes the breach was committed intentionally.

In any undertaking that is issued EAS will set out the offence and the reason and invite the recipient to commit to meet the measures aimed at preventing non-compliance set out in the undertaking. An undertaking can be required from an individual, company or both. An undertaking takes effect when it is accepted by EAS and the relevant agency or employment business and the duration will be specified in the undertaking subject to a maximum of 2 years.

An undertaking can be used instead of or alongside existing sanctions. For example EAS could seek to enforce the payment of wages due to a temporary worker and seek an undertaking to prevent future non-compliance. Where EAS issue an undertaking they will take reasonable steps to monitor whether the agency or employment business is adhering to it and if necessary apply to the courts for an LME order in cases where the subject of an undertaking has failed to comply with its terms.

LME Orders

EAS may apply to the courts for an LME order where an agency or employment business has refused to give an LME undertaking or has breached one of the measures in it.

Additionally, a court may or be invited to make an LME order when sentencing a defendant and where EAS has brought a prosecution case against that person. In such cases, the LME order process may start at sentencing and it would not be necessary for EAS to have issued a LME undertaking first.

An offence would be committed if a respondent fails, without reasonable excuse, to comply with an LME order. The maximum penalty on conviction on indictment is 2 years imprisonment and/or an unlimited fine. The maximum penalty on summary conviction is 12 months imprisonment and/or a fine.

Where offences are committed under more than one area of legislation (enforced by EAS; GLAA; HMRC) the GLAA can co-ordinate activity and seek a combined undertaking/order. Each enforcement authority will work together closely to identify the appropriate response to non-compliance where more than one is involved. The government's intention is that a business should only be subject to one undertaking or order at a time where possible.

10. Criminal proceedings

In determining whether or not it is appropriate to refer a case for criminal proceedings, EAS will consider a range of factors including:

- The extent to which work-seekers have been affected by the breach and whether they have been subjected to abuse by the failure of the agency or employment business to comply with the law;
- Any explanation or statement that has been provided by the agency or employment business;
- Whether the agency or employment business has been found to have breached the legislation previously and has disregarded any previous advice and guidance regarding compliance;
- The impact or potential impact of the offence on the industry;
- The severity and degree of noncompliance;
- The benefit, financial or otherwise, to the offender arising from the failure to comply;
- Whether there is sufficient admissible and reliable evidence to provide a realistic prospect of conviction; and
- Whether it would be in the public interest.

11. Prosecution

The purpose of prosecution is condemnatory and a deterrent to others. Where there is sufficient evidence and it is in the public interest, EAS will normally prosecute the offences as provided in the 1973 Act and associated regulations.

Prosecution in England and Wales

EAS will engage BEIS prosecution lawyers to decide whether it is appropriate to instigate proceedings.

The decision whether to prosecute is for BEIS prosecution lawyers and will take account of the evidential stage and the relevant public interest factors set down by the Director of Public Prosecutions in the Code for Crown Prosecutors². The Code also requires that the decision to prosecute is kept under continuous review and any new facts or circumstances are considered.

² www.cps.gov.uk/publications/code_for_crown_prosecutors/ - a non-exhaustive list of some common public interest factors can be found at 4.16 and 4.17.

Prosecutions in England and Wales commence in a Magistrate's Court. However, cases which are taken forward can be tried "either way". This means that the case can be tried in a Magistrate's Court or a Crown Court, which can result in potentially unlimited fines.

Prosecution in Scotland

The Procurator Fiscal needs to be satisfied that there is sufficient evidence and that prosecution is in the public interest in Scotland before deciding whether to bring a prosecution. This may be on the basis of a recommendation by EAS. However, the decision as to proceedings is made by the prosecutor, having taken into account the evidence and judgement of the EAS inspectorate.

Further information about the The Crown Office and Procurator Fiscal Service Prosecution Code can be found at:

www.copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/Prosecution20Code20_Final20180412_1.pdf

12. Prohibition

Under section 3(a) of the Employment Agencies Act 1973, the EAS can, on application by the Secretary of State, apply to an Employment Tribunal to prohibit (ban) an individual or corporation from running or being involved in running an employment agency or employment business, because of their misconduct or unsuitability.

A prohibition can take different forms. Generally, once someone has been prohibited, they cannot run or be involved with running any employment agency or employment business during their prohibition period. However, different conditions can be attached. For example, a person can be prohibited from running an agency from their own home, but not necessarily from business premises. A prohibition order could also prevent a person from running online job boards that was caught by s13 of the Employment Agencies Act 1973 as employment agency or employment business activity, and where the activity was conducted from premises within Great Britain.

A prohibition may be sought by EAS after a successful LME order; or an EAS prosecution for offences under the Conduct of Employment Agencies or Employment Businesses Regulations. EAS may also use other evidence, including prosecutions by other enforcement bodies, as a basis for applications for a prohibition.

The maximum period of any prohibition order is 10 years. Any person who breaches a prohibition order can face criminal proceedings.

13. Publicity

EAS maintains a public list of individuals who have been prohibited from running an employment business on the GOV.UK website at: www.gov.uk/government/publications/list-of-people-banned-from-running-an-employment-agency-or-business

The EAS also seeks press and other publicity for successful prosecutions and major investigations to help encourage higher levels of compliance.

14. Corporations, partnerships and individuals

Prosecution and/or prohibition will be taken against individual persons considered to be responsible for the offence. Where it is alleged that a corporation (partnership, limited company, or association) is involved in the offence, EAS can also prosecute that legal entity. EAS may also commence legal proceedings against officers of any corporation, including directors, managers, consultants, who have control over the relevant activities and there is considered to be sufficient evidence of their guilt or neglect.

15. Sharing information

Section 9 (4) of the Employment Agencies Act 1973 provides that information obtained in the course of exercising the powers conferred by the Act shall not be disclosed without the consent of the person by whom the information was furnished, unless by order from the Secretary of State.

Information can also be shared where there is a legal gateway. Currently EAS can share information with the Gangmasters and Labour Abuse Authority and HM Revenue & Customs National Minimum Wage officers.

In addition, EAS can disclose information to certain other public authorities under section 17 of the Anti-Terrorism, Crime and Security Act 2001 if it is relevant for the purposes of any criminal investigations or proceedings, or the initiation of such investigations or proceedings.



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