

Consultation on agency workers recommendations

Response from the Recruitment & Employment Confederation

1. Introduction

- 1.1. As the professional body for recruitment, we know that jobs transform lives and we fully support Matthew Taylor and the government's ambition that all work in the UK economy should be fair and decent with realistic scope for development.
- 1.2. The Recruitment & Employment Confederation (REC) have engaged in the Taylor Review process since it was first announced, attending the regional roadshow events, giving oral evidence, making a written submission, engaging with the government following the publication of the report, and attending the Ministerial roundtable immediately following the government's response. We were broadly supportive of both the Taylor Review itself¹ as well as the government's response².
- 1.3. We particularly welcome this consultation and the approach taken by the government to consult on these proposals before making any significant policy changes that would impact on our sector. We have engaged hundreds of members in the consultation process, through our Employment Policy Commission, sector and regional events, and two dedicated webinars.
- 1.4. We are encouraged by the government's acknowledgement of the value of both the flexible labour market and the recruitment industry in particular in their response to the review and in this consultation. According to our Recruitment Industry Trends 2016/17 report the recruitment industry is now worth £32.2 billion, placing 1.1 million agency workers on assignment on any given day, and last year placed over 1 million people into a permanent job. The industry also directly employs over 100,000 dedicated recruitment professionals.
- 1.5. We agree with the consultation's assessment that 'any reforms that are made need to ensure that the sector continues to operate efficiently and provide a reliable and trustworthy service to hiring businesses and work seekers'. This is particularly important, as the recruitment industry has changed significantly since the Employment Agencies Act was first introduced in 1973 and the Conduct of Employment Agencies and Employment Businesses Regulations in 2003. With recruitment supply chains becoming increasingly long and complex and new digital work platforms developing, it is time that legislation keeps pace.
- 1.6. However, **it is important to recognise that agency work is already much more regulated than similar forms of flexible work** such as the growing gig economy, and agency workers receive greater protection than similar workers who are directly engaged by employers and the self-employed. What our sector needs is updated and reformed legislation and better, more targeted and well-resourced enforcement of that legislation to ensure a level playing field for the industry.

¹ <https://www.rec.uk.com/news-and-policy/press-releases/rec-responds-to-matthew-taylor-review>

² <https://www.rec.uk.com/news-and-policy/press-releases/rec-responds-to-matthew-taylor-review>

- 1.7. The government should work with the REC to ensure that any changes made do not have unintended consequences on the industry.

2. Improving transparency of information provided to work seekers

2.1. To what extent would you agree that a 'key facts' page would support work seekers in making decisions about work?

2.1.1. We fully support the principle that individuals who are agency workers (meaning individuals who are engaged by one party but supplied to provide their services to another) should have absolute clarity as to who they are engaged by and what they will be paid and any deductions that will/may be made from their pay. However it is important that the obligations for both employment agencies and employment businesses are considered and that where there are other intermediaries in the supply chain, it is clear which party is required to provide information to individual work-seekers.

2.2. What information would be important to include in a 'key facts' page?

2.2.1. The information should make it clear what service will be provided to them together with the information above.

2.3. (a) What conditions should be in place to ensure the 'key facts' page is provided and understood by the work seeker before any contractual engagement?

2.3.1. While we fully support the provision of clearer information being providing to individual agency workers, we also acknowledge that some of the information may be difficult to obtain at registration stage and it may potentially only be possible to provide certain details to the agency worker at the time that a specific assignment is offered.

2.4. Should an employment business be required to ensure that the work seeker understands fully the information being given to them?

2.4.1. There is little justification for requiring agencies to go further than other employers to provide information about terms and conditions under which they will be engaged.

2.5. Do you feel an hour is an accurate estimate of the time it would take to produce information document for a work seeker?

2.5.1. In most instances, employment businesses and employment agencies already capture and provide much of this information under the current legislation. However the current obligations should not be duplicated with the requirement to provide a key facts document.

2.6. We have set out below more in more detail our responses to above consultation questions:

2.6.1. Where the arrangements under which workers are supplied to provide work to clients of recruitment businesses has changed since enactment of the current legislative framework that governs the recruitment sector. The use of additional intermediaries in the supply arrangements and also the emergence of online recruitment platforms and the 'gig economy' as new forms of providing contingent labour, it is necessary to update the legislative framework

and the enforcement strategy that supports it. This will help to ensure that it remains effective and current in protecting those using the services of recruitment business, while also ensuring a level playing field. As technology develops, there is scope for other supply arrangements to emerge rapidly and it is important that changes made at this stage are forward looking.

2.6.2. We agree that the individual needs to understand key information such as:

- What service is being/will be provided by the recruitment business
- Who will be the individual's engager/employer and from that point – who will be responsible for paying the individual and meeting their employment rights.
- The pay and some basic terms that will be offered and any payments.

2.6.3. The current recruitment legislative framework that applies to the recruitment industry legislation currently applies to employment agencies and to employment businesses – these are specifically defined in the Employment Agencies Act 1973. As recruitment processes and supply arrangements for temporary workers change, the distinction between the two can sometimes be blurred. For the purpose of this consultation response, we refer to them generically as recruitment businesses, however to summarise the legal definitions, an employment businesses supplies persons that it employs to work under the control of another person (this could be an individual or a body corporate). An employment agency provides a service of finding employment for persons – effectively introducing persons to others who will employ them directly.

2.6.4. In over 40 years, these definitions have barely changed but modern working practices have moved on significantly. Businesses that are now involved in the supply of agency workers may not look like the traditional employment businesses and employment agencies that existed when these definitions were created, but it is important that the enforcement regime is flexible enough to recognise new supply models and to utilise the existing definitions to ensure that work-seekers continue to be protected within the scope of the legislative framework.

2.6.5. Understanding the range of different supply arrangements and how this impacts in the status of the recruitment business

2.6.5.1. Some intermediaries provide a pure payroll function to the recruitment business, purely processing pay for the recruitment business but not employing or otherwise engaging the individuals whose pay is processed.

2.6.5.2. Other intermediaries offer to employ or otherwise engage the individuals who are ultimately supplied to provide services to the

recruitment businesses clients. In this case, there is no contract between the recruitment business and the individual who will be doing the work.

2.6.5.3. In some instances, individuals already have a contractual relationship with an umbrella company, and when they approach a recruiter seeking work, their expectation is that the recruiter will enter into a contract with the umbrella company that they have already chosen to be engaged by.

2.6.5.4. Increasingly we are seeing online platforms which look like employment businesses but appear to have a model by which they do not engage individuals at all. They work in conjunction with umbrella companies who ultimately engage the individual or leave it to the client to employ the individual directly.

2.6.5.5. The specific arrangement will determine in what capacity the recruitment business is acting – i.e. as an employment agency (if it is not going to engage the individual) or as an employment business, if it is going to engage the individual.

2.6.6. Current obligation to provide information to work-seekers

2.6.6.1. While supporting proposals to ensure that individuals are provided with clear information, we would highlight the fact that there are existing provisions which already impose obligations on employment agencies and employment businesses to provide information to work-seekers about pay and terms of engagement. The exact requirement depends on the capacity in which the recruitment business is operating. It is not clear from the consultation document whether the 'key facts' document would replace the existing obligations and we would certainly argue that it would be an unnecessary burden for these obligations to be duplicated.

2.6.6.2. The information that must currently be provided depends on whether the recruitment business is acting as an employment agency or as an employment business. The former must comply with the requirements in schedule one and the latter must comply with the requirements in schedule two (attached). Our view is that it would make sense to update these provisions to ensure that the individual receives full information about pay and in particular, any proposed deductions that either the employment business or the party that they will be engaged by, intends to make. If necessary refer to them as key facts if this aids the understanding of the work-seeker of the service that is going to be provided to them.

2.6.6.3. The REC previously submitted a paper to the Department for Business, 'REC query to BIS regarding clarification on agency use of umbrella companies' in which we set out how we identified the issue of clarifying information provided to individual work-seekers who work through intermediaries could be resolved.

2.6.6.4. In our view, it is imperative that the enforcement regime recognises the circumstances in which a recruitment business acts as an employment

agency to an individual work-seeker if it is not intending to engage the individual directly, but will instead introduce that individual to another party (umbrella company/other intermediary) that will employ them. If not, this could lead to unintended consequences as set out below.

2.6.7. Unintended consequences

2.6.7.1. A recruitment business cannot be regarded as acting as an employment business in respect of individuals it does not engage directly. The proposals for employment businesses to provide the key facts document should not, in our view, apply to recruitment businesses that do not engage individual work-seekers. If the recruitment business is acting as an employment agency, it will not be required to provide the key facts document to an individual work-seeker. In many instances an umbrella company/intermediary meets the definition of an employment business and this is the party that should be providing either the information in Schedules 1 and 2/or the key facts information.

2.6.7.2. A failure to recognise which part in the supply chain is actually acting as an employment business to the individual work-seeker could leave individual work seekers without the benefit of the key facts document – see our response blow to question 2 of the consultation. Also, individuals engaged through other supply arrangements involving businesses that have never regarded themselves as employment businesses (online platforms and providers in the gig economy), will not benefit from the key facts document.

2.7. Timing/when should the information be provided

2.7.1. Employment businesses and employment agencies will need to work to ensure that the intermediaries they engage with provide the information that is to be provided in the key facts document.

2.7.2. Information such as who will be engaging the individual should be provided at the point of registration so that there is clarity from the outset, as should minimum rates of pay. However, the detail around rates of pay are likely only to be available to the employment agency or employment business once a specific assignment has been identified and a rate agreed with a client. The provisions should allow for this details to be provided at the point that an assignment is offered to the individual.

2.8. Avoid creating additional confusion about employment status.

2.8.1. It is important to keep in mind the interaction of this consultation document, with the Employment Status consultation which was also opened in response to the Taylor Review. There is a clear drive to address the complexities around employment status, noting that currently ‘particularly for those in atypical work, employment status can be a complex issue.’

2.8.2. The consultation document refers to individuals being ‘employed for payroll purposes’ by the intermediary/umbrella company. However, this is not a

recognised employment status. The recruitment business should identify whether it or another party will be engaging the individual.

2.9. Summary

- 2.9.1. We agree that there is a need for clearer information to be provided to individual work-seekers where there are other intermediaries in the supply arrangements that clarifies the basis on which they will be engaged, payment they will receive, who will be engaging them, and any deductions that will be made from their pay.
- 2.9.2. This needs to be implemented in a way that ensures that there is a level playing field across different recruitment models. The enforcement process needs to recognise circumstances where recruiters are acting in the capacity of an employment agency (i.e. they are not engaging individual work-seekers but introduce them to another party to be engaged).
- 2.9.3. The existing requirements to provide information set out in Regulations 14,15, 18 and 21 could be updated to achieve this outcome and **the key facts requirements should not be introduced as an addition to this requirement as this unnecessarily duplicate the processes that recruitment businesses already follow.**

3. Extending the remit of the Employment Agency Standards Inspectorate to cover umbrella companies and intermediaries in the supply chain

3.1. Businesses that carry out the activities of an employment agency or an employment business should already be regulated by the Employment Agency Standards inspectorate (EAS)

3.1.1. The legal definition of an employment business is as follows:

.... employment business means the business (whether or not carried on with a view to profit and whether or not carried on in conjunction with any other business) of supplying persons in the employment of the person carrying on the business, to act for, and under the control of, other persons in any capacity.

3.1.2. So in short, an employment business supplies persons that it employs to act under the control of another person. There is no legal definition of an umbrella company and the label is becoming increasingly unhelpful as such businesses have a tendency to shift and alter their business models in the face of changing legislation, principally around tax.

3.1.3. However, broadly speaking, and as set out in paragraph 22 of the consultation document:

'Umbrella companies provide different business models and in most cases engage work seekers on an overarching contract of employment and the work seeker becomes an employee of the umbrella company.'

3.1.4. So where the worker is employed by the umbrella company, but supplied to work for an end-user client under that client's control, the umbrella company is acting as an employment business.

3.1.5. Umbrella companies and other intermediaries that fall within the definition of an employment business or an employment agency should already be regulated by the EAS along with traditional employment agencies and employment businesses. If required, for clarity the REC would support any amendments required to the current legislation to clearly ensure that the above entities are included and are brought within the remit of the EAS. In this respect, we would also point towards the wider definition of a temporary work

agency within the Agency Workers Regulations 2010 (AWR), which clearly includes intermediaries, such as, umbrella companies.

3.2. EAS to adapt its enforcement strategy

- 3.2.1. The Employment Agencies Standards inspectorate (EAS) needs to adapt its enforcement strategy to look beyond traditional employment businesses; i.e. those that identify themselves as such and or have always been in the business of supplying temporary workers directly to their clients and ensure that as new supply models develop, whether they look like traditional employment agencies or not, they are still regulated if they fall within the legal definitions.
- 3.2.2. Businesses which meet the definition of an employment business or an employment agency should not go under the enforcement radar simply because they choose a different label, offer other additional services or present themselves to the market as something other than an employment agency or employment business.
- 3.2.3. One of the issues that has formed part of our dialogue with Employment Agency Standards inspectorate (EAS) over recent years is umbrella companies and the way that they are approached under the legal framework for employment agencies and employment businesses (the Employment Agencies Act 1973 (the Act) and the Conduct of Employment Agencies and Employment Businesses Regulations 2003 (the Conduct Regulations)).
- 3.2.4. Taking a more vigorous and proactive approach to different supply models and using the current employment agency and employment business definitions will also help to ensure that those working in the 'gig economy' and through emerging online platforms have similar protections to those engaging with traditional recruitment businesses. This will also mean that there is a level playing field across businesses that provide recruitment activities.

3.3. Experience of REC members working with umbrella companies/other intermediaries

- 3.3.1. All REC members are required to adhere to the REC Code of Professional Practice (the Code). The Principles set out in the Code include compliance with the Act and the Conduct Regulations. This is supported and enforced by the REC complaints function. The REC also carries out audits on its members. Through these channels it has become evident that there is much confusion about who should be providing information to individual work-seekers where the (traditional employment business/employment agency) works with an umbrella company/other intermediary where the latter is the party that actually engages the work-seeker.
- 3.3.2. REC members also report that when they have been inspected by EAS, the approach is that they are required to provide information to an individual

work-seeker (see Schedule 2) relating to the terms on which they will engage that work-seeker even where they have no intention of engaging that work-seeker, because he or she will be engaged by the umbrella company/intermediary. Where the umbrella company/intermediary does engage the work-seeker and issues him or her with, (typically), a contract of employment, the work-seeker will be left with two sets of terms and confusion about who has actually engaged them. In our view the information set out in schedule 2 should be provided by one party to the work-seeker – i.e. the party who is acting in the capacity of an employment business to that work-seeker.

3.4. Activities that should be regulated by EAS

3.4.1. The EAS should focus its enforcement on activities that are those of an employment agency or an employment business, even when they do not identify as such. Where this approach is taken, umbrella companies and other intermediaries that engage and supply employees/workers to work under the supervision of another party would be required to provide the same information that employment businesses currently have to provide to those they engage/propose to engage. (See Schedule 2) This would ensure that individuals have clarity about the nature of their engagement and ensure that information about any additional services and costs for those services is also set out clearly from the outset. This approach would also address issues of non-payment of wages, deductions from wages which the work seeker has not agreed to by the umbrella/intermediary.

3.5. Other activities umbrella companies/other intermediaries offer

3.5.1. We don't believe that it would be appropriate for the EAS to extend its remit to regulate activities beyond that of employment agencies and employment businesses. Areas such as tax for example should continue to be regulated by HRMC but we would advocate that there should be close collaboration between the enforcement bodies to ensure that there is sufficient oversight of compliance generally.

3.6. Resource

3.6.1. In order for the EAS to extend its enforcement regime to include umbrella companies and other intermediaries, no doubt significant additional resource would be required. This would make it difficult also to extend enforcement to cover the AWR. Disputes regarding AWR are likely concerned with points of interpretation of the legislation, which in our view are best addressed by employment tribunals which have expertise in this area. We have responded in more detail in our response below.

4. Pay Between Assignments

4.1. Have you used or are you currently using a pay between assignments (PBA) contract?

- 4.1.1. It is hard to determine the exact number of agency workers working through a PBA contract. We do not believe the research commissioned in this area by the government has gained the sample size necessary for it to be robust enough for significant policy change. We also believe the data produced more recently from some organisations may over-estimate the number of agency workers on these contracts.
- 4.1.2. Our engagement with members show only a relatively small proportion of REC members have a prominent use of Pay Between Assignments (PBA) contracts; these tend to be clustered in a number of sectors such as the industrial sector or in the public sector, and in the vast majority of cases this is at the request of the end client.
- 4.1.3. According to the latest REC Jobs Outlook³ survey, from April 2018, which asked a panel of 600 employers about their hiring intentions, only 17 per cent reported that their agency workforce earn less than their permanent counterparts, 18 per cent reported that they earn more, and 59 per cent report pay parity. However, it is difficult to determine out of the 17 per cent who earn less, how many of those are on contracts that are less than 12 weeks or how many are on PBA contracts.
- 4.1.4. We have heard from some members that the use of these contracts has reduced as increases in the National Minimum Wage and National Living Wage have closed the gap between agency and permanent staff and some large employers are now starting to move away from these contracts due to candidate shortages and wanting to attract and retain agency workers post-Brexit.
- 4.1.5. The fact that recent and robust data is not available on the use of these contracts, should be reason for the government not to rush into any changes in this area. While some of our members do not feel strongly about the retention of these contracts, we would be concerned about any rushed changes which may result in unintended consequences for workers, agencies and employers. As flagged below, some members have specifically referred to alternatives that employers might turn to.
- 4.1.6. We very much welcome these consultation questions which is long over-due and believe it is an opportunity for the government to gain some quality evidence on the use of these contracts. Any changes in this area should be on the principle of evidence-based policy and not be seen as a short-term 'quick win'.

³ REC/ComRes, Jobs Outlook, April 2018

- 4.1.7. In his evidence to the BEIS and DWP Select Committees in October 2017 Matthew Taylor said:

"If it is authentic it would be fine—if you have a big gap and you are paid for that, yes, it is great—but a lot of times it is being abused"

However, the evidence of abuse cited in his report did seem anecdotal. If the government finds robust evidence of widespread misuse of these contracts through this initial consultation, then we would welcome a further consultation on future options. In the first instance we would welcome a careful review of the legislation to ensure PBA contracts work as they were first intended, providing a true trade-off between pay and security for the worker.

- 4.1.8. If the government were minded to abolish these contracts, we would urge them to undertake a full impact assessment of the likely behavior of employers in response to this. A move to widespread use of zero hour contracts (without security of a PBA contract) or greater out-sourcing would not necessarily be for the benefit of the work seeker. We would also urge the government to consider how such a repeal could take place. We would urge the government to make this as easy as possible for agencies to do, removing any penalty fares for ending contracts for example.
- 4.1.9. The REC fully supports effective enforcement which is in the interests of compliant agencies as well as individual workers. The REC campaigned with the TUC to ensure that EAS was maintained and we have built a positive ongoing dialogue with various government inspectorates. However, we do not believe that enforcement of AWR by EAS would be the best course of action for a number of practical reasons outlined elsewhere in our response.

4.2. In your experience, what are the benefits and any problems associated with working on a PBA contract basis?

- 4.2.1. We would firstly like to reiterate that **the use of PBA contracts is not a loophole**. This language is inaccurate and portrays the users of these contracts as being non-compliant. This is not the case.
- 4.2.2. The Swedish Derogation of the Agency Worker Regulations was an agreement between two social partners, the CBI and the TUC, prior to the regulations coming into place.
- 4.2.3. PBA contracts provide agency workers with a legitimate compromise – the PBA contract sacrifices pay parity in return for the security of a contract of employment, pay of at least 50% of wages (or the National Minimum Wage) between assignments, a guarantee that an agency will try and find new work once an assignment has ended, and four weeks of pay if the contract is ended. They protect workers from unemployment for a number of weeks, and could provide much needed security for workers in times of economic down turn.

- 4.2.4. We therefore do not agree with recent commentary on this subject by unions and other commentators on this topic. For example, this Early Day Motion (<https://www.parliament.uk/edm/2017-19/833>) on BT Call Centre workers, highlights the lack of pay parity that workers enjoy without highlighting the benefits they get by being on these contracts, and this is a false portrayal of these contracts. Matthew Taylor himself has acknowledged that the concept of these contracts is 'fine' but is concerned of their 'abuse'.
- 4.2.5. What wasn't anticipated when the regulations were agreed, however, was how these contracts would work during times of high employment and therefore the majority of PBA agency workers do not see the key benefit of these contracts because they find new work after each assignment.

4.3. In your experience, how effective do you think pay between assignments contracts are in supporting workers and work seekers when they are not working?

- 4.3.1. When there is low employment and high unemployment PBA contracts could prove to be useful in supporting work seekers when they are not working – however with a record employment rate, and very high demand for candidates, employment businesses tend to find work seekers new work straight away and therefore do not benefit from any pay between assignments. This shouldn't be a reason to remove these contracts, however, as during an economic downturn they could prove advantageous to work seekers.

4.4. Do you have evidence that there are wider issues (beyond equal pay) with PBA contracts, for example agency workers not being able to access to facilities, rest break, annual leave or job vacancies?

- 4.4.1. One area that Matthew Taylor had concerns over was over examples he had heard of people being asked to go to on an assignment for an hour for lunch, and then not having to pay the workers for the rest of the time that week. This could be explained by the 'one hour per week' rule. In BIS's 2011 guidance on this it states:

*"The Regulations refer to contracts of greater than 'one hour' per week in order to demonstrate that providing a 'zero hours' contract (which may not provide a sufficient amount of mutuality of obligation, required in an employer/employee relationship) will not meet the requirements of the derogation contract."*⁴

- 4.4.2. It could be that this provision has led to some employers undertaking the behaviour that Matthew Taylor described above. This could be an area of the legislation for the government to look at.

⁴https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/32121/11-949-agency-workers-regulations-guidance.pdf

- 4.4.3. Another area of the legislation that the government could amend to tackle potential abuse is around the anti-avoidance measures. The government initially put in anti-avoidance provisions to prevent the structuring of assignments that are put in place to intentionally circumvent the regulations. However, these provisions only come into place after two assignments. This is what BIS's 2011 guidance states:

"In all circumstances, the agency worker must have completed at least two assignments or two roles (in substantively different roles which break the qualifying period) with the same hirer or connected hirers within the same group, in order for the anti-avoidance provisions to become relevant"

- 4.4.4. We can see no good reason for this criteria to remain.

4.5. Do you believe that that the above issues would justify wider state enforcement?

- 4.5.1. No, as highlighted above, many of the 'abuses' cited by Taylor, could be cleared up by amending the legislation, better guidance, and awareness raising amongst workers.
- 4.5.2. It should be noted that the tribunal is able to award up to £5,000 where it can be proven that assignments are structured to deprive a worker of their rights. There have been very few tribunal cases regarding PBA contracts – this could be explained by recent high tribunal fees, or by a lack of understanding by workers of these contracts.

4.6. To what extent do you agree that enforcement of the Agency Worker Regulations 2010 should come within the remit of the Employment Agency Standards inspectorate?

- 4.6.1. We strongly disagree with the enforcement of the Agency Worker Regulations 2010 coming under the remit of the Employment Agency Standards Inspectorate. The EAS would face significant difficulties in attempting to enforce the Agency Workers Regulations 2010 (AWR).
- 4.6.2. The legal system is based on key concepts which include the judiciary being responsible for the task of interpreting legislation which is made by parliament.
- 4.6.3. Using a state body such as the EAS to enforce the AWR in their entirety not only undermines that principle also but will mean that the EAS will take on part of the function that properly currently sits with employment tribunals and employment judges in the first instance. This process ensures that legislation is determined by an employment judge with the requisite expertise and that there is an appropriate appeal procedure in place.
- 4.6.4. HMRC has faced similar difficulties in in efforts to enforce the National Minimum Wage (NMW) legislation. Quite simply, areas of interpretation should properly be determined through the employment tribunal system.

- 4.6.5. Additionally, from a resourcing point of view, EAS would also struggle to include enforcement of the AWR to its remit if, as we have advocated, it includes enforcement of umbrella companies and other intermediaries which fall within the definition of an employment agency or employment business.
- 4.6.6. Enforcement of the AWR by the EAS would simply add an extra burden for the majority of compliant recruitment business and take resources from elsewhere where they are more greatly needed.

Schedule 1: Information that currently must be provided by an employment business to a work-seeker before the employment business provides any work-finding services. A summary of regulations 14 and 15 of the Conduct Regulations

Before first providing any work-finding services to a work-seeker, an employment business shall obtain the agreement of the work-seeker to the terms which apply or will apply as between the employment business and the work-seeker including--

- a statement that the employment business will operate as an employment business in relation to the work-seeker;
- the type of work the employment business will find or seek to find for the work-seeker; and
- the terms referred to below:
 - whether the work-seeker is or will be employed by the employment business under a contract of service or apprenticeship, or a contract for services, and in either case, the terms and conditions of employment of the work-seeker which apply, or will apply;
 - an undertaking that the employment business will pay the work-seeker in respect of work done by him, whether or not it is paid by the hirer in respect of that work;
 - the length of notice of termination which the work-seeker will be required to give the employment business, and which he will be entitled to receive from the employment business, in respect of particular assignments with hirers;
 - either--
 - the rate of remuneration payable to the work-seeker; or
 - the minimum rate of remuneration the employment business reasonably expects to achieve for the work-seeker;
- details of the intervals at which remuneration will be paid; and
- details of any entitlement to annual holidays and to payment in respect of such holidays.

This information must be set out in one document or if not possible more than one document, but these must all be given to the work-seeker at the same time. There is no requirement to give this information to work-seekers who are instead given a written statement of particulars (which alternatively sets out the basic terms of employment).

Schedule 2 – Information that currently must be provided by employment agencies AND an employment businesses at the time that they put a work-seeker forward for a particular role. A summary of regulations 18 and 21 of the Conduct Regulations

An agency or employment business shall ensure that at the same time as it offers a work-seeker a position with a hirer it gives to the work-seeker the information below:

- the identity of the hirer and, if applicable, the nature of the hirer's business;
- the date on which the hirer requires a work-seeker to commence work and the duration, or likely duration, of the work;
- the position which the hirer seeks to fill, including the type of work a work-seeker in that position would be required to do, the location at which and the hours during which he would be required to work and any risks to health or safety known to the hirer and what steps the hirer has taken to prevent or control such risks;
- the experience, training, qualifications and any authorisation which the hirer considers are necessary, or which are required by law, or by any professional body, for a work-seeker to possess in order to work in the position;
- any expenses payable by or to the work-seeker; and
- if the actual rate of pay has not previously been agreed, this must be provided at this stage.

The following only applies to employment agencies and not to employment businesses

- in the case of an agency--
- the minimum rate of remuneration and any other benefits which the hirer would offer to a person in the position which it seeks to fill, and the intervals at which the person would be paid; and
- where applicable, the length of notice which a work-seeker in such a position would be required to give, and entitled to receive, to terminate the employment with the hirer.

Schedule 3

REC query to BIS regarding clarification on agency use of umbrella companies

Note: All references to 'regulations' are to the Conduct of Employment Agencies and Employment Businesses Regulations 2003, which are referred to as the Conduct Regulations.

Where used, 'employment agency' and 'employment business' refer to the definitions given in the Employment Agencies Act 1973, but they are referred to collectively as agency/agencies.

Candidate is a reference to any individual person seeking the services of an employment agency or employment business.

Increased use of umbrella companies

There has been a significant growth in the use of umbrella companies in recent years. They are now used extensively in many sectors which previously had no dealings with any type of limited company contractor.

There is no specific guidance for agencies or individual workers which explains how the Conduct Regulations apply to arrangements that involve umbrella companies in the supply chain. Agencies and workers may therefore be unclear about what is expected of them and what their rights are, respectively.

One of the few descriptions of an umbrella company and its relationship with agencies and individual candidates is set out in a previous consultation carried out by the then, Department for Business, Enterprise and Regulatory Reform (BERR) (predecessor to the Department for Business Innovation and Skills (BIS)).

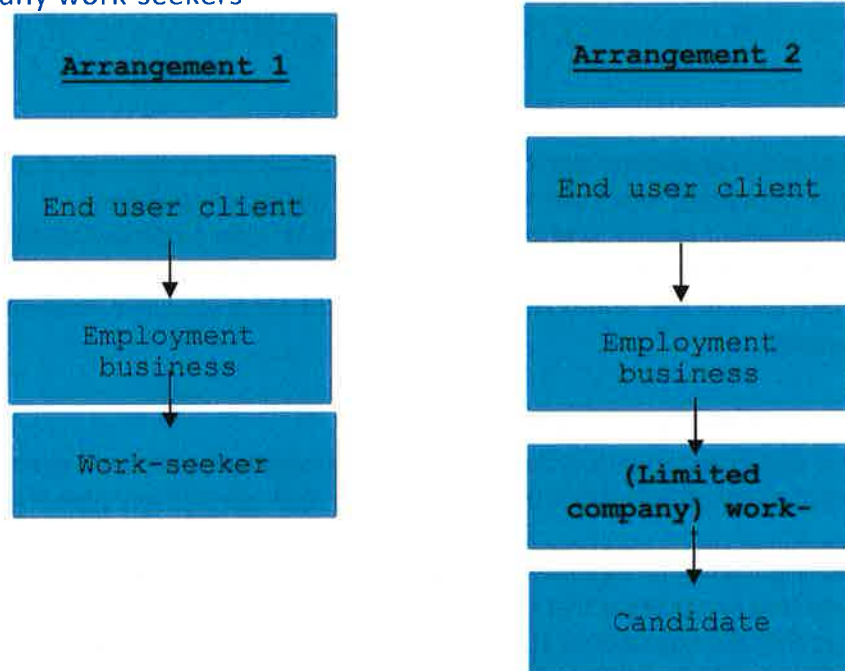
The consultation document provides a definition and explanation of what an umbrella company is. It states:

1. ...there is no express prohibition on them [agencies] insisting that the work seeker work through an umbrella company.⁵
2. An umbrella company acts as an employer to independent contractors who work under a temporary contract. The worker has an employment contract with the umbrella company.⁶

⁵ Page 16 BERR Conduct of Employment Agencies and Employment Businesses Regulations 2003 Consultation and Impact Assessment, March 2009.

⁶ Page 17 BERR Conduct of Employment Agencies and Employment Businesses Regulations 2003 Consultation and Impact Assessment, March 2009.

Working arrangements for supply of individual work-seekers and the supply of limited company work-seekers



In each case, it is the party that has the contract with the employment business which is the work-seeker. In the second scenario the limited company work-seeker could be, for example, a personal service company or an umbrella company.

Agencies operating with '100% umbrella company' arrangements

The business models of many agencies now are such that they only engage limited company work-seekers which means that any individual seeking a temporary assignment can only do so with their own PSC or as an 'employee' of an umbrella company. The latter option is very much the norm for agencies operating in sectors which previously did not typically attract limited company contractors. In some cases the candidate will already have a relationship with an umbrella company, in which case the agency enters into (or has already entered into) a contract with that umbrella company to supply it (and the candidate) to the agency's client.

If the candidate does not have a relationship with an umbrella company, agencies are now typically introducing them to umbrella companies. Importantly, for these agencies, due to their business model, there is no intention to ever engage the candidate directly. They operate 100% umbrella company arrangements.

The enforcement approach has typically required agencies to ensure that they agree terms with individual candidates who are seeking temporary assignments that comply with regulation 14. That approach works in the case of agencies which provide the option of working either under a direct engagement with the agency or through an umbrella company. Effectively, it ensures that the agency has set out the terms on which the worker will be engaged if he or she never elects to work through an umbrella company.

However, for those agencies which are not set up to engage workers directly, this approach is increasingly problematic. Regulation 14, in conjunction with regulation 15, requires an employment business to obtain the agreement of work-seekers as to the terms that will apply between them, including, 'whether the work-seeker is or will be employed by the employment business under a contract of service, or apprenticeship, or a contract for services and in either case, the terms and conditions of employment of the work-seeker which will apply'.

The problems are:

1. The agency is not proving work-finding services as an employment business (as defined in regulation 2) to the candidate because the candidate is not an employee of the agency, nor is there any intention that the candidate will become an employee of the agency.
2. Given that there is no intention (and in many cases no possibility) of the agency ever engaging the candidate directly, it is disingenuous of the agency to enter into an agreement which does not correctly reflect the intentions of both parties, and which could, arguably amount to a misrepresentation which is actionable by the candidate.

The enforcement regime is inadvertently encouraging agencies to enter into terms with candidates which are potentially misleading and which could be seen as not entirely honest.

While it has become increasingly clear that the Conduct Regulations are ill equipped to address umbrella company arrangements, it is also increasingly evident that agencies that no longer intend to offer any direct engagement terms for individual candidates are not acting as employment businesses to those candidates. Their activities more closely resemble that of an employment agency in introducing the candidate to the umbrella company to be engaged by that umbrella company, albeit that under a separate contract, the agency acts as an employment business in supplying the umbrella company.

How does this work in practice?

The first step is that the agency acts as an employment agency in introducing the candidate (the work-seeker) to its client the umbrella company (the hirer). In this instance, the agency is acting as an employment agency to both parties and there is no issue of it purporting to be an employment business to one and an employment agency to the other in breach of regulation 9 or vice versa. The second step is for the agency to agree terms, if has not done so already, with the umbrella company to supply the umbrella company. The agency is now acting in the capacity of an employment business and must have terms in place with the umbrella company, which is the (limited company) work-seeker that complies with regulation 14 of the Conduct Regulations. The candidate is not the work-seeker but is 'the person who would be supplied by the work-seeker' (the umbrella company) (as per regulation 32). As such the Conduct Regulations do not require the agency to agree terms with the candidate as it has not and has no intention of engaging him/her at any stage.

The candidate must not be supplied unless/until he/she is engaged by the umbrella company. If the agency supplies an individual who is not engaged by the umbrella company then it would be in breach of regulation 14 because, by default, the person would be engaged by the agency.

Information to be provided by the agency to the candidate

The agency will provide the candidate with the following information before offering an assignment to the candidate:

- Confirmation that it will not employ the candidate directly, but that it will act as an employment agency and introduce the candidate to a third party directly (the umbrella

company) to engage the candidate to do work (the type of which is agreed between the candidate and the agency). The candidate may choose to accept an engagement as an employee of the umbrella company, details of which will be provided before an assignment is offered. Any assignment carried out will be under a contract between the candidate and that umbrella company.

- The candidate is not and will not be engaged by the agency when carrying out assignments.
- The agency acts as an employment business to the umbrella company but will provide certain information to the candidate regarding the assignments, as the person who will be supplied by the umbrella company.
- The agency will provide the following information either as part of its own documentation or as provided in a document created by the umbrella company, prior to or at the same time as offering an assignment:
 - Identity of the umbrella company
 - Date on which the umbrella company requires the individual to start work and the duration or likely duration of the work
 - The position the umbrella company requires the individual to fill (type of work, location, hours and any risk to health and safety)
 - The experience training, qualifications and authorisation the umbrella company considers necessary for the individual to work in the position
 - Any expenses payable by the individual
 - Minimum rate of pay/intervals of pay and details of any benefits
 - Notice required for the individual to terminate his/her contract with the umbrella company and vice versa.

The agency already has/or enters into a contract, which complies with regulation 14, with an umbrella company, which is the work-seeker to be supplied to agency's client.

The candidate will be informed that the assignment can only be undertaken if he or she enters into a separate contract with the umbrella company.

Information to be provided by the agency to the client

In supplying the umbrella company to the client, the agency will be required to confirm:

- The name of the umbrella company and the person who would be supplied by the umbrella company.
- That the umbrella company and the person who would be supplied by the company has the experience, training, qualification and skills required by law or the hirer.
- That the umbrella company and the person who would be supplied by the umbrella company is willing to work in the position the client has to fill.

Conclusion

Under this process the agency will make clear to the individual from the outset:

- That any work that he/she is offered will be under a contract that he or she enters into with the umbrella company, the basic terms of which will be provided by the agency prior to any assignment being offered or undertaken.
- That an assignment can only be undertaken by the candidate if he/she enters into a contract with the umbrella company.

Regulation 27 – Advertising

Agencies will need to be clear in any advertisement whether the role is temporary or permanent and, if the rate of pay is given, it must accurately reflect the rate that the individual will receive when engaged by the umbrella company.

Pay roll/other additional services

We are aware that the reference to an umbrella company can be used to describe a variety of businesses that either engage and/or provide services to candidates and agencies.

Some offer themselves as providing an outsourced pay roll function only (calculating and processing pay on behalf of the agency) and there is no engagement by the pay roll provider of the candidate(s). Where an agency chooses to use this type of facility, there is no intention that the candidates will be engaged by the pay roll service provider. In this case, the agency acts as an employment business to the candidate and must comply with regulations 14 and 15, the pay roll function is an additional service (i.e. it is a service over and above a work-finding service).

Regulation 5 will apply only where the pay roll service is provided by the employment business or a person connected (as defined in regulation 3) to the employment business.

Regulation 13 will apply in relation to any charges levied in respect to the pay roll services.

Guidance/clarification required

While it may be the case that imminent changes to tax laws may result in fewer agencies using umbrella companies in the way they do now, there is undoubtedly a need for updated guidance for agencies that currently use umbrella companies, particularly to understand what the Employment Agency Standards inspectorate expects of them in terms of enforcement.

1. If an employment agency does provide the information set out under the 'Information to be provided by the agency to the candidate' section above, what issues, if any, would there be in terms of compliance with the Conduct Regulations?
2. If an agency does only work with umbrella companies, and does not engage candidates directly, how can that agency avoid misleading workers if it is required to issue candidates with an agreement that states that it will engage the candidate on a contract when this will not be the case?

REC

28 January 2016

Background information on the REC

The REC represents 3,350 recruitment businesses – 80 per cent of the UK's £31.5 billion industry by turnover – and 8,400 individual recruiters through its Institute of Recruitment Professionals. REC member agencies supply workers into every sector of the UK economy. All members must abide by a code of professional practice and must take a compliance test to enter and stay in membership. The REC is committed to raising standards and highlighting excellence throughout the recruitment industry.

For more information, please contact: