

Conduct of employment regulations: a guide to opting in or out

Contractors starting their first contract, or starting a new contract with a brand new agency, will find one of the first questions the agency asks is whether they want to 'opt-out' from the Conduct Regulations.

The Conduct Regulations, or to give the legislation its full title, The [Conduct of Employment Agencies and Employment Businesses Regulations 2003](#), were introduced by the Department of Business, Innovation and Skills (BIS) to provide workers and hirers with minimum standards they could expect from private sector recruitment agencies and employment businesses.

The regulations are designed to apply to workers who are controlled by the client, which means that not only do the vast majority of contractors simply not require the protection which the regulations bring, but also as skilled professionals in business in their own right are not controlled by their clients and so technically the regulations will not apply.

BIS provides [guidance to the regulations](#) as they stand, although these are scheduled to be updated in October 2010.

Conduct Regulations 'opt out'

In recognition of the fact that some high-earners working through their own limited companies might want to choose whether to be 'protected', when the regulations came into force in 2004 an 'opt-out' provision was introduced. Although technically highly skilled contractors not controlled by their clients should not be covered by the regulations, most agencies still request that their contractors formally opt out.

Agencies should offer and receive a signed opt-out before the contractor is introduced to the client, otherwise the opt-out could be invalid, leaving the agency in breach of the regulations, and also preventing the agency from putting restrictions on the contractor that have been requested by the client.

Contractors should also expect to see a clause in the opt-out from the agency that clarifies that the regulations don't apply and that the client does not control the contractor.

If a contractor is considered to be controlled by the client and does not opt out, then the agency is required to work through a series of steps. These include creating paperwork about the client's requirements and contractor's suitability for the role, possibly checking the contractor's qualifications and completing a CRB (Criminal Record Bureau) check for certain roles.

Pros and cons of opting out

Contractors do suffer some disadvantages from opting out. For example, the agency is required to pay workers who are covered by the regulations even if they have not been paid; contractors who have opted out lose this protection. Plus, the agency must agree terms with the contractor before introducing them to the client; this significantly reduces contractor flexibility in what is supposed to be a flexible, highly skilled labour resource.

In addition, if a contractor has opted out, then the agency can use restrictive covenants that can potentially restrict the contractor from using a competing agency or going to a competitor of the client. There are other regulations relating to temporary-to-permanent fees, which can negatively impact on the client if they want to take the contractor on as an employee or a direct contractor.

However, although employment status is determined on a case-by-case basis, a limited company contractor accepting on paper that they are controlled by the client and wish to be covered by the regulations is sending a pretty negative message to HMRC about their employment status. Control by the client is a key factor in determining the employment status of a contractor, and can be part of a package of evidence that puts a contractor inside IR35.

But, as highlighted earlier, genuine contractors are not controlled by their client, and so technically the regulations do not apply anyway.

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Changes in October 2010

The Department of Business, Innovation and Skills conducted a consultation about the regulations in 2009, and as a result a number of changes are currently planned to come into force in October 2010.

The opt out for limited company contractors will remain unchanged. Online recruiters and job boards will no longer be required to complete candidate suitability checks when placing contractors leaving the sector in a permanent role, although they will have to continue to check contractors moving on to a new contract.

Ultimately, genuine contractors in business on their own right should treat any agency agreements and contracts as business deals and ensure that they negotiate a deal that is in their favour.

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