

Conduct Regulations pose Off-Payroll compliance challenges for agencies



Recruitment agencies requiring that contractors work via an umbrella company as an alternative to operating their own payroll are warned that they may be in breach of the [Conduct of Employment Agencies and Employment Business Regulations 2003](#).

The Off-Payroll legislation requires that the 'fee-payer' - which in most cases will be an agency - calculates, reports and processes tax on payments made to contractors deemed within scope of IR35 via Pay As You Earn (PAYE). In a bid to circumvent these perceivably burdensome obligations under Off-Payroll, many recruiters have attempted to insert an umbrella company into the supply chain.

However, director of [The Law Place](#) Martyn Valentine warns that those taking this approach must be careful to ensure that they don't fall foul of their other legal obligations:

"Unfortunately, many agencies don't have payroll in place to comply with their requirements under the Off-Payroll legislation. This is why many are making the provision of work-finding services conditional on using a paid service, which is arguably a criminal offence."

Are umbrella margins compatible with the Conduct Regulations?

The issue stems from the margin charged by the umbrella company for its services. In exchange for operating a payroll, and the provision of certain employment rights and protections, it will charge a weekly or monthly sum, which is typically paid by the contractor.

However, the legality of arrangements whereby agencies hire contractors on the basis that they agree to work via an umbrella company is questionable, as Valentine highlights:

"Ultimately, contractors are typically required to pay umbrella companies a regular fee for their services. But agencies are forbidden from making the provision of work-finding services conditional on the contractor using a service involving payment."

Valentine notes that this is in breach of regulation 5 of the Conduct Regulations, which states: *'Neither an agency nor an employment business may make the provision to a work-seeker of work-finding services conditional upon the work seeker using other services for which the act does not prohibit the charging of a fee.'*

Can contractors be forced to opt out?

Whereas contractors working outside of IR35 are advised to opt out of the Conduct Regulations to support their deemed status, there are few, if any, benefits to opting out for a contractor operating 'inside IR35'.

"The Conduct Regulations are intended to protect agency workers from malpractice by agencies and businesses by providing a number of

protections,” notes [Alexander Wilson](#) of Invicta Chambers. “Opting out means they would lose these protections, so I can’t see any significant upside to doing so.”

Despite this, there have been reports of agencies encouraging contractors to opt out, although Wilson observes that the regulations prevent organisations from insisting that workers do so in exchange for finding them work:

“Agencies are required to offer workers the opportunity to opt out but cannot make the provision of work-finding services conditional on opting out, as stated in section 32(13).

“Although I would hesitate to advise all contractors to do one thing or another, should they feel pressured by an agency into opting out, I would certainly encourage them to think carefully about the protections they are losing if they do so. These may be very valuable compared to the administrative convenience of opting out. The regulations provide important safeguards for workers which may seem very inconvenient for agencies.”

How can agencies ensure compliance with the Conduct Regulations?

Contractors shouldn’t be charged for work-finding services, but Valentine is keen to clarify that the agency’s legal obligations don’t end there: “The legal position is abundantly clear. Agencies must provide contractors with a choice; internal payroll or another means of deducting the correct employment tax.”

Valentine adds that a compliant solution might be for the agency to fund the umbrella company margin: “This would work on the basis that the contractor hasn’t suffered a detriment and therefore has no loss for the purpose of litigation.”

Wilson reaffirms the importance of providing contractors options, alluding back to regulation 5: “The regulation states that work-providing services can’t be offered conditionally on the use of a paid service, but it doesn’t specify who pays for the service.

“So theoretically, given our original scenario, an agency couldn’t overcome this hurdle by covering the umbrella margin itself because it is still offering the contractor work conditionally on the basis that they use the umbrella company.

“Provided use of a particular umbrella company or payroll provider isn’t a condition upon which a contract is offered, it might not be a breach,” Wilson adds. “For example, an agency could recommend a payroll provider to the contractor while still allowing for the contractor to choose their own provider.”

Agencies warned against contrived arrangements

Whereas Wilson describes a potentially compliant scenario, other contrived arrangements that appear to offer contractors options may still fall foul of the Conduct Regulations.

A tactic reportedly employed by some agencies to encourage contractors to use umbrella companies is to advertise two rates; one to work via the agency PAYE and another slightly more lucrative rate for working under an umbrella company. This is perceivably an attempt to encourage the contractor to take the umbrella option, ridding the agency of its compliance requirements and risks under the Off-Payroll legislation.

“I would still consider this to be in breach of the Conduct Regulations, because the agency is offering a diminished fee for the contractor to go on its payroll,” says Valentine. “The two cannot be considered comparable offers when the contract rates differ.”

Valentine concludes: “If an agency is forcing contractors to use an umbrella company, the risk of civil and criminal liability for the directors must be considered. Agencies have to ask themselves whether they should be in business if complying with their legal obligations is too much of a burden.”

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