

Contractors can circumvent poor agents that fail to adhere to the Conduct Regulations

Contractors who have not expressly opted out of the [Conduct Regulations](#) before being introduced by an agent to a potential client are considered to be automatically and *permanently* 'opted in', and as a result could cut the agent out of the loop.

"The timing of opting out is critical," warns Roger Sinclair from contractor legal specialist [Egos](#), "because unless the contractor chooses to opt out of the regulations before being introduced to a client it is not possible to opt out subsequently, in respect of engagements with that client."

When a contractor is within scope of the Conduct Regulations, the agency may not lawfully impose restrictions, such as [restrictive covenants](#), and in such circumstances contractors may be able to circumvent poorly performing agencies and [work direct for the client](#).

Timing of the opt out is vital

The regulations state that, if there is to be an effective opt out, it has to be notified to the agency by the contractor and the contractor's company, and by the agency to the client, before 'introduction or supply' of the workseeker, the contractor, to the client. Sinclair explains: "Assuming the contractor has already been introduced to the client, the contractor cannot then effectively opt out, even if they sign a piece of paper, such as a contract, saying that they do."

This means that if an agency did not secure an opt out before introducing the contractor to the client and then, when offering an assignment, introduced a clause in the contractor's contract saying the contractor has chosen to opt out, then even if the contractor signs the contract, the opt out provision should have no legal effect.

"Once the contractor has been introduced to a specific client by the agency it is not possible for the contractor to opt out at a later stage," emphasises Sinclair. "The contractor is considered to be within scope of the regulations, even when there appears to be a separate agreement between the contractor and the client prohibiting the contractor from working directly for the client and circumventing the agency."

In circumstances where the contractor has an existing relationship with a client, and is then requested by the client to contract via the client's preferred agency, the contractor may still retain the option to opt out of the conduct regulations, until the point of 'supply' by the agency, on the basis that the agency did not in fact introduce the contractor to the client.

Circumventing the agency, but only when it fails the contractor

Agencies with professional and effective processes will normally establish a contractor's status with regard to the Conduct Regulations at an early stage, and certainly before introducing the contractor to a client. The Conduct Regulations also require the agency to confirm that the contractor has the right skills and experience for the client's assignment.

But where an agency is not acting professionally, not having opted out before being introduced to the client does allow the contractor to choose to cut the agent out of the loop at a later stage if the agent's poor performance warrants it.

"In normal circumstances, a healthy and professional relationship between the contractor, agency and client should work in favour of all parties, so contractors should not seek to circumvent the agency," says Sinclair. "However, if the agency becomes the weak link in the chain through its failure to perform, an opted-in contractor could go direct without the fear of punitive action by the agency on the basis of, for example, a restrictive covenant."

Who enforces the Conduct Regulations?

The Conduct of Employment Agencies and Employment Businesses Regulations 2003 – better known to most as the 'conduct regs' – were introduced by the last government to provide workers and hirers with minimum standards they could expect from private-sector recruitment agencies and employment businesses. Contractors concerned that an agency may have flouted the rules should contact the Department of Business, Innovation and Skills ([BIS](#)), which is the body responsible for enforcing the conduct regulations.

Sinclair adds: "All contractors working through employment businesses, i.e. agencies, are considered to be within the scope of the Conduct Regulations unless they have expressly opted out, and the decision to opt out should be the contractor's, not the agency's. So, once a contractor has been introduced to the client by the agency without expressly opting out, the conduct regulations automatically apply. This means that, if the agency's performance has become an issue, a contractor can cut out the agency, either working direct or via another agency.

"But," concludes Sinclair, "taking such action should generally be a last resort for contractors, where an agency's poor performance genuinely warrants it."

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Roger Sinclair, Egos



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