

Contractors opting out of the Conduct of Employment Regulations: where do they stand?

The **Conduct of Employment Regulations** by their very nature cause many contractors problems, by automatically tipping them into **IR35**. This means that most choose to opt out of the regulations. But they must time their opt-out with care.

The regulations are designed to protect vulnerable agency workers from exploitation by unscrupulous agencies and gang-masters. Clearly, this is not of relevance to most highly paid contractors with sought-after skills, so typically they choose to opt out.

But following changes to the regulations in April 2008, unless the paperwork is handled and timed correctly, issues arise that can cause problems, and sometimes opportunities, for contractors and agencies alike.

Opting out makes sense

Contractors who work through a **contracting limited company** are not the kind of vulnerable agency workers the Conduct of Employment Regulations were designed to protect.

Despite this, according to Regulation 32, they still apply to 'work seekers who are incorporated', ie limited company contractors. The wording of the regulations is such that the work seekers (or contractors) are presumed to be under the control of the hirer (or client), which leaves contractors wide open to being found to be working within IR35.

Fortunately, the regulations allow contractors to opt out. But for the opt-out to be valid, the contractor and the agency must exchange paperwork before the contractor starts working for the client.

Opt-out timing is crucial

The contractor, known in the regulations as the 'incorporated work seeker' and/or the 'person(s) to be supplied to do the work', if not the contractor, have to inform the agency or employment business that they are opting out before they are introduced to the hirer (the client).

If the contractor fails to sign the opt-out before the contract starts, this invalidates the opt-out, potentially leaving the contractor vulnerable and the agency out of pocket if the contractor joins the client as a permanent employee.

Maintaining records

The agent is responsible for maintaining a record of the signed paperwork confirming the contractor has opted out, although contractors should keep their own records of all documentation.

The agent must inform the client that the contractor has opted out of the regulations. The agent should also maintain a record that this has been done, and that the Conduct of Employment Regulations do not apply in the contractor's case.

Invalid opt out allows working direct

Under normal circumstances, most contractors would want the reassurance before the contract starts that they are legitimately opted out of the regulations and all the relevant paperwork has been done. Similarly the agency wants to be sure they can charge transfer fees if the contractor's status changes.

But when the contractor is considering the option of being taken on by their client as a full-time employee, then the exact timing of the opt-out becomes crucial.

If the contractor started work on the contract before their opt-out was signed, then the opt-out is technically invalid and the agency would not be able to charge transfer fees to the client.

So, not having the paperwork signed can sometimes work in the contractor's favour. But it is not wise to dismiss the regulations and avoid opting out just for this reason, as the risks of falling foul of IR35 are likely to outweigh considerably the advantages of the slight chances that the contractor wants a permanent job.

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