

A guide to opting out of the Conduct Regulations

The Conduct of Employment Agencies and Employment Businesses Regulations 2003 (the Conduct Regulations) dictate how a recruitment company supplies work-seekers to an end client. The definition of “work seeker” in the Regulations includes individuals who supply their services through limited companies, umbrella companies as well as personal service companies.

This factsheet will provide limited company contractors (LCCs) and umbrella workers with information on their ability to opt out of the Conduct Regulations. REC corporate members can provide this factsheet to any LCCs or umbrella workers who have requested further information on opting out of the Conduct Regulations.

What are the Conduct Regulations?

The Conduct Regulations and the Employment Agencies Act 1973 are the main statutory rules governing the conduct of employment agencies and employment businesses operating in England, Scotland and Wales. For those who operate in Northern Ireland, the Conduct of Employment Agencies and Employment Businesses (Northern Ireland) Regulations 2005 apply.

Opting-out of the Conduct Regulations:

Under Regulation 32, LCCs are entitled to opt out of the Conduct Regulations ***provided they are not working with anyone under the age of 18 or with vulnerable adults***. Where there has been a valid opt-out, the provisions of the Conduct Regulations will not apply. Furthermore, under Regulation 32(13), an employment business cannot make the provision of work finding services conditional upon an LCC opting out of the Conduct Regulations.

How do I opt out?

The default position is that the Conduct Regulations will apply unless the LCC gives notice of their desire to opt out. Therefore, in order for there to be valid opt-out, notice signed by both the LCC and a representative of the limited company must be given to the employment business. The Conduct Regulations clearly state that this notice must be in writing. In the event of a dispute, where an employment business cannot demonstrate that a valid opt out is in place, the Conduct Regulations will be deemed to apply. Where an LCC is supplied by a corporate member of the REC, the employment business will have an appropriate opt-out form for the LCC and the limited company to sign as well as appropriate terms of business. The opt-out notice must be in place **before the start of any assignment** and the employment business must notify the client of the opt-out arrangement before it introduces or supplies the LCC to the client.

Where an LCC has previously given notice to the employment business of their intention to opt out of the Conduct Regulations, further notice should be given to the employment business where the LCC wishes to withdraw their decision to opt out. However, where the LCC is working in an assignment with a client, their notice to withdraw the opt-out will not take effect until after the LCC stops working in that assignment with the client.

Remaining inside the Conduct Regulations:

If the LCC decides not to opt out of the Conduct Regulations, the employment business managing the supply to the client will have various obligations towards the LCC and the client. These obligations include (but are not limited to):

1) The employment business must confirm on what basis they are to offer work finding services, the type of work they are looking for and the terms which apply between the employment business and the limited company.
2) Under Regulation 21, the employment business must pass certain information to an LCC before the start of an assignment including:

- the identity of the hirer and the nature of their business;
- the assignment start date;
- the duration, or likely duration, of the assignment;
- type of work,
- location and hours of work;

- any risks to health and safety as well as any steps the client has taken to prevent or control such risks
- the experience, training, qualifications and any authorisations that the client considers are necessary to perform the role;
- any expenses applicable, and
- the actual rate of remuneration to be paid.

3) If an LCC carries out work on an assignment, but is unable to obtain a signed timesheet, the employment business is still obliged to pay for the hours worked. However please note that the employment business is permitted to delay payment for a reasonable period to check whether the LCC worked the hours claimed.

4) As an LCC is a 'work-seeker' within the definition specified in the Conduct Regulations, they must not be subjected to a detriment or penalty as a result of the LCC or the employment business terminating an assignment, for example an employment business may not insert a clause in the contract seeking to prevent an LCC from taking up employment directly with the client.

Genuinely self-employed:

LCCs typically choose to opt out because they wish to demonstrate that they are genuinely self-employed. An individual's self-employment status is determined by whether they are inside or outside of the IR35 tax legislation, opting out of the Conduct Regulations will therefore have little impact on whether an individual is genuinely self-employed under IR35. There are a number of factors which are assessed in order to determine whether an LCC is genuinely self-employed. These factors include an assessment of:

- the contractual relationship between parties;
- the level of control a client maintains over the LCC during the assignment;
- whether there is any financial risk taken by the LCC in providing its services (for example whether the LCC pays for their own professional indemnity insurance);
- whether there is a right of substitution in the contract that can actually be invoked; and
- whether the LCC provides their own tools or uses tools provided by the client.

Ultimately whether an LCC decides to opt out of the Conduct Regulations is entirely a decision for them to make, LCCs may wish to get their own tax and legal advice before making this decision.

Charging LCCs for finding work:

The Conduct Regulations permit employment agencies, in certain circumstances, to charge LCCs a fee for introducing them to potential contacts and clients where the LCC will be engaged by the client directly. This is an exception to the general rule that recruiters may not charge fees to work seekers for providing work finding services.

Where can I find more information?

Further information on the Conduct Regulations can be found in the guidance produced by the Department for Trade and Industry (now the Department for Business Innovation and Skills): <http://www.bis.gov.uk/files/file24248.pdf>. It should be noted that this guidance was produced before the 2010 amendments to the legislation, however none of these amendments affected the LCC opt out.

Review of the Conduct Regulations:

As part of the Government's Red Tape Challenge, the Department for Business Innovation and Skills (BIS) are reviewing both the Conduct Regulations and the Employment Agencies Act 1973. As part of this consultation, BIS are reviewing the provision allowing LCCs to opt out. In our consultation response, the REC recommended that the LCC opt-out provision remains in place. This consultation closed on 11 April 2013, details of the consultation as well as the full REC response can be found here. For more detailed information on the Conduct Regulations please see the following guide: "The Conduct of Employment Agencies and Employment Businesses Regulations 2010 – an explanation" https://www.rec.uk.com/legal_guide/Factsheetsandguides