

GUIDANCE ON THE APPLICATION OF THE CONDUCT OF EMPLOYMENT AGENCIES AND EMPLOYMENT BUSINESSES REGULATIONS 2003 TO PROVIDERS OF TUTORING SERVICES

This document gives general guidance on some provisions of the Employment Agencies Act 1973 (the Act) and Conduct of Employment Agencies and Employment Businesses Regulations 2003 (the Regulations) – both as amended – as they might apply to services that operate as a tutoring service. This guidance should not be regarded or relied upon as an authoritative or comprehensive interpretation of those provisions and each business model or activity will be considered on its own set of facts.

The guidance seeks to clarify what is required by law (as set out in the Act and Regulations) should the business model of a tutoring service be such that it falls within the scope of the Act and Regulations.

The guidance covers some key areas that will apply to a tutor service but the full provisions of the Act and Regulations, which must be complied with, are not fully set out in this guidance. Anyone setting up a new tutoring service or running an existing one should consider seeking their own independent legal advice on their obligations under the Act and Regulations.

More detailed guidance about the application to the Act and Regulations to all employment agencies and employment businesses can be found through the Employment Agency Standards (EAS) Inspectorate website – <https://www.gov.uk/government/organisations/employment-agency-standards-inspectorate>

There is also further guidance for employment agencies and employment businesses - <https://www.gov.uk/government/publications/conduct-regulations-2003-guidance-for-employment-agencies-and-employment-businesses>

What is a tutoring service?

For the purposes of this guidance, EAS considers a tutoring service is a service which seeks to introduce tutors to students. This includes services which—

- are free or which are run with a view to profit;
- are provided together with other services.

Other services which may be provided might include—

- payment collection and distribution services
- diary management
- dispute resolution.

The method of service delivery may be on-line, remotely or face to face or a combination of them.

Who the Act applies to?

This section aims to provide helpful summaries of key terms, as set out in the Act and associated Regulations, to provide an understanding of how business models are interpreted by EAS.

The Act applies to people carrying on business as employment agencies and employment businesses whether they are carried on by commercial concerns for profit or by non-profit making bodies.

Defining Employment Agency and Employment Business

The meaning of the terms “employment agency” and “employment business” are defined in full in section 13 of the Act as amended, but the following is a summary:

Employment Agency

Broadly speaking an employment agency introduces a “person” (work-seeker) to an “employer” (hirer) for direct employment¹ by those employers. The legal definition within the Act is very wide and includes “any service”, including the “provision of information” about work-seekers to employers or about employers or jobs to work-seekers.

This is sometimes called “permanent recruitment” although, in fact, the duration of employment can be long term or very short term.

This model can include websites or job sites that provide a matching or selection service for students, or parents of students, to find a suitable tutor for their needs; or for tutors to market their skills and details in order to obtain work as a tutor.

Employment Business

An employment business engages a work-seeker directly and supplies that work-seeker, sometimes called an “agency worker”, to a hirer under a contract between the employment business and the hirer for temporary assignments or contracts where they will be under the hirer’s supervision or control.

The duration of these assignments can be short term or sometimes long term. This is usually known in the recruitment industry as the “supply of temporary workers”.

A company engaged in both “permanent recruitment” and “the supply of temporary workers” will fall into the definition of both employment agency and employment business to reflect both sides of the business and must comply with the regulations as they apply to employment agencies and employment businesses respectively.

¹ Section 13 of the Employment Agencies Act 1973 sets out that “employment” includes (a) employment by way of a professional engagement or otherwise under a contract for services

Fees

Employment agencies and employment businesses are prohibited from charging fees to work-seekers for finding them or seeking to find them work. To do so is an offence punishable with a fine.

There is an exception where the finding of work relates to performers and certain other workers in the entertainment field and photographic and fashion models. These specific occupations (set out in schedule 3 to the Regulations) do NOT include tutors.

The Regulations

The Regulations provide the legislative detail for the conduct of employment agencies and employment businesses and by extension the private recruitment industry and establishes a framework of minimum standards that users - both work-seekers and hirers - are entitled to expect and that employment agencies and employment businesses must adhere to. Breaching the Regulations is an offence punishable with an unlimited fine.

In addition to the Regulations, employment agencies and employment businesses and their staff should be aware of and comply as necessary with other relevant legislation, taking account of statutory codes and guidance, relating, but not limited to, equal opportunities, equal pay, health and safety, immigration, national minimum wage or national living wage, working time and trade union membership, equal treatment under the Agency Worker Regulations; carrying out Disclosure and Barring Service (DBS) checks.

Helpful definitions within the Conduct Regulations

Hirer

“Hirer” is defined in the Regulations. It means the person (including firms and corporate bodies) to whom a work-seeker is introduced by an employment agency for direct employment; or supplied as a temporary work-seeker by an employment business.

Work-Finding Services

“Work-finding services” are defined in the Regulations. These are the services provided by an employment agency or employment business to persons (work-seekers) and include looking for permanent work or temporary work for those persons.

Work-seeker

“Work-seeker” is defined in the Regulations. This term refers to persons looking for work either, or both, directly through an employment agency or indirectly through an employment business and includes not only work-seekers who are individuals but can also include persons such as freelancers who supply their services through their own or other limited company vehicles, or umbrella payroll companies.

A work-seeker is not only a person that an employment agency or employment business provides work-finding services to, but also a person to whom it holds itself out to as being capable of providing such services. In other words, both those who get work through the agency or employment business and those who are on its books and for whom it may get work in the future.

The principal factor determining whether the Act and the Regulations apply is whether the work-seeker is or is seeking to be in an employment relationship with the hirer in the employment agency model or the employment business in the employment business model.

Unlike most areas of employment law, “employment” is very widely defined in section 13 of the Act and includes some relationships which are not generally considered to be “employment”. For this reason, the status of a work-seeker as an “employee”, “worker” or “contractor” under general employment law principles does not determine whether the Act or Regulations apply to a particular business model.

Why the business model is important (Payment Mechanisms)?

Whether the business model of a tutoring service has the effect that it is trading as an employment agency or an employment business affects how it can operate within the Act and Regulations. In particular, this affects who is permitted to pay the work-seeker.

If a tutoring service is providing a work-finding service, as either an employment agency or employment business, which seeks to match a work-seeker (tutor) to a hirer (student/parent) through the provision of information (electronic or otherwise) then EAS considers that the tutoring service is likely to be concerned with “employment” as defined by the Act and so is likely to be operating within the scope of the Act and Regulations. Whether it is, as a matter of fact, will depend on the precise nature of the business model.

Under the “employment business” model, work-seekers can be supplied on a temporary or short-term basis to hirers and to act for and under the control of the hirer. In most cases, the temporary work-seeker who is supplied by the employment business to the hirer is engaged directly under a contract between the work-seeker and the employment business (or sometimes indirectly through a third-party “umbrella company” or intermediary) and is paid directly for the hours that they work either by the employment business or by the umbrella company. Such payment arrangements do not contravene the Act or Regulations.

An “employment agency” however, is restricted by **regulation 8**, from directly or indirectly paying a work-seeker on behalf of the hirer to whom it has introduced the work-seeker. **Regulation 8(1)** provides that an employment agency (as opposed to an employment business), which has provided a hirer with a work-seeker, may not pay or make arrangements to pay that work-seeker either directly or via any person connected with it.

Regulation 8 therefore seeks to ensure that, where a recruitment company is supplying temporary workers, it is only able to be concerned with the work-seeker’s pay where there is an employment relationship between it and the work-seeker.

In other words, since the employment business engages the work-seekers that it supplies to hirers for temporary assignments either under a contract of employment or a contract for services, it will also be responsible for their pay and any statutory benefits such as holiday pay. The employment business will therefore be the workers' employer and the services of the work-seeker will form part of services it provides to the hirer.

EAS recognise that some employment businesses deal with third party umbrella companies or intermediaries who pay the person who is supplied to carry out the work.

It may be permissible for a third party to generate invoices for an employment agency and a tutor and send them to a hirer so long as the tutor and employment agency each feed into that third party independently and bear their own costs. In such cases, the hirer could pay a combined sum to that third party, from information provided to it by both the tutor and employment agency. The third party receives the combined sum from the hirer into an independent account that does not belong to either the tutor or employment agency and the third party splits the combined sum into the correct amounts and pays the amounts to the tutor and employment agency respectively with tutors and the employment agency bearing their own costs.

In any such third party arrangement, there would need to be transparency in the documents that an employment agency provided to both hirers and tutors before services commence. If there are fees incurred by the tutor by using the third party invoicing software or the payment processor the employment agency will need to comply with **regulation 13, regulation 5 and regulation 8.**

Standards of Conduct

Employment agencies and employment business

A tutoring service which is trading as an employment agency or employment business must obtain adequate information from hirers and work-seekers for the purpose of selecting a suitable work-seeker (tutor) for the vacancy and vice versa (**Regulation 18 and regulation 19**);

Where a work-seeker (tutor) is likely to be working with and providing tutoring services to a vulnerable person (i.e. a person who by reason of age, infirmity, illness, disability or any other circumstances is in need of care and attention, and includes any person under the age of 18) a tutoring service which is trading as an employment agency or employment business must, before introducing or supplying a work-seeker to a hirer, obtain at least two references on that work-seeker and agree with the referees that they can be disclosed to the hirer. In addition, it must take all other reasonably practicable steps to confirm that the work-seeker is suitable for the position concerned. A practical way to help to comply with this obligation is for employment agencies and employment businesses to obtain Disclosure and Barring Service (DBS) checks on each work-seeker before they introduce or supply a work-seeker (tutor) to a hirer – **regulation 22.**

A tutoring service which is trading as an employment agency or employment business cannot restrict a work-seeker (in terms or otherwise) to prevent them from either:

- i) terminating their contract or terms with it;
- ii) working for others - such as with the hirer (client) directly or through another employment agency or employment business.
- iii) require a work-seeker to notify the tutoring service, or any person connected with it, of the identity of any future employer.

It is important to remember, when applying **regulation 6**, that the term “work-seeker” includes a person who supplies their service through a limited company. Under **regulation 32**, limited company work-seekers and the person supplied by the limited company can give notice to “opt-out” of the Regulations in specific circumstances. However, where the work-seeker (or person supplied by the work-seeker) provides tutoring services it cannot “opt-out” if they are going to work with a vulnerable person.

Employment businesses - contractual relationship

If a tutoring service trades as an employment agency, there is no requirement in the legislation to have a contract in place between it and the work-seeker or the hirer. However, such a tutoring service will want to have one with the hirer to ensure that it is paid for the work-finding service it has provided. How the hirer engages with the work-seeker is entirely down to them, and could, for example, be as an employee or on a self-employed basis delivering a service under a contract for services.

If a tutoring service is trading as an employment business, it will need to issue terms of business to its work-seekers. This can be a contract of employment, a contract for services, professional engagement, apprenticeship or as a limited company contractor. All of these will need to include specific information and must be agreed before any work-finding service is provided (for good practice the terms should be signed by both parties) – **regulation 14 and regulation 15**.

Where a tutoring service trades as an employment business and it supplies a temporary work-seeker to carry out work with a hirer, it is illegal (**regulation 12**) for it to withhold payment to the work-seeker or to their umbrella company on the following grounds:

- i) Non-receipt of payment from the hirer in respect of the supply of that work-seeker;
- ii) The work-seeker’s failure to produce documentary evidence approved by the hirer that the work-seeker has carried out work with the hirer and arranged by you or through your website;
- iii) The work-seeker not having worked during any other period other than that to which the payment relates;
- iv) Any matter within the control of the employment business.

Record keeping – employment agencies/employment businesses

Where a tutoring service trades as either an employment agency or employment business, it must keep records which are sufficient to show that it has fully complied with the relevant provisions of the Act and Regulations, which are included in this guidance note and as set out in full in the Act and Regulations – both as amended – **regulation 29**.

Enforcement Policy Statement

EAS publishes an Enforcement Policy Statement on its website –
<https://www.gov.uk/government/publications/employment-agency-standards-eas-inspectorate-enforcement-policy-statement>

We are governed by the Regulators' Code -
<https://www.gov.uk/government/publications/regulators-code>

Where EAS carry out investigations or inspections of an employment agency or employment business our aim is to seek compliance with the statutory obligations in the Act and Conduct Regulations.

Where infringements are found, EAS will seek resolution of matters by the most appropriate enforcement action. This can be achieved in most cases by issuing Warning Letters but in serious or repeat cases this could lead to a Labour Market Enforcement (LME) undertaking; LME orders; prosecution and/or prohibition proceedings.

Warning letters

Those issued with warning letters will be asked to confirm in writing what remedial action they intend to take, or have taken, in order to correct each infringement and, where appropriate, to provide supporting evidence. In all warning letters issued by EAS, the agency or employment business will be asked to provide a written response with 14 days of the date of the warning letter.

Prosecution

Anyone who contravenes the prohibition on charging fees to work-seekers for finding them work; or contravenes or fails to comply with any of the regulations made to secure the proper conduct of employment agencies and employment businesses; will be guilty of an offence and liable on summary conviction to an unlimited fine in either a Magistrates' Court or Crown Court.

Prohibition

An employment tribunal may, on application by the Secretary of State, make an order prohibiting a person (which can include a limited company) from carrying on, or being concerned with the carrying on of, an employment agency or employment business for up to 10 years on the grounds that the person concerned is unsuitable because of misconduct or any other sufficient reason.

Labour Market Enforcement (LME) Undertaking

An undertaking may be sought where EAS believes a trigger offence (a breach of the Act or Regulations – both as amended) has been or is being committed and a measure in the undertaking is necessary to prevent further non-compliance.

Labour Market Enforcement (LME) Order

EAS may apply to the courts for an LME order where an agency or employment business has refused to give an LME undertaking or has breached one of the measures in it.

Additionally, a court may or be invited to make an LME order when sentencing a defendant and where the defendant has been convicted of a breach of the Act or Regulations. In such cases, the LME order process may start at sentencing and it would not be necessary for EAS to have issued an LME undertaking first.

An offence would be committed if a respondent fails, without reasonable excuse, to comply with an LME order. The maximum penalty on conviction on indictment is 2 years imprisonment and/or an unlimited fine. The maximum penalty on summary conviction is 12 months imprisonment and/or an unlimited fine.