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**BIS Recruitment sector: changes to the regulatory framework
including stopping EEA-only recruitment**

Response from the Employment Lawyers Association

23 November 2015

Employment Lawyers Association Response

Department for Business Innovation and Skills Consultation Paper

Recruitment sector: changes to the regulatory framework including stopping EEA-only recruitment

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Introduction

The Employment Lawyers Association (“ELA”) is a non-political group of specialists in the field of employment law and includes those who represent Claimants and Respondents/Defendants in the Courts and Employment Tribunals. It is therefore not ELA’s role to comment on the political merits or otherwise of proposed legislation, rather to make observations from a legal standpoint. The ELA’s Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes, including to consider and respond to proposed new legislation.

A sub-committee, co-chaired by Robert Davies and David Ludlow was set up by the Legislative and Policy Committee of ELA to consider and comment on the consultation document Recruitment sector: changes to the regulatory framework including stopping EEA-only recruitment. Its report is set out below. Members of the sub-committee are listed at the end of this paper.

Consultation questions

Definitions

- **Employment agencies** find work for work-seekers, to be employed and paid by employers not the agency.
- **Employment businesses** engage work-seekers under contract to then work under the supervision of another organisation. This is normally called ‘temporary agency work’ or ‘temping’. Workers under these arrangements are paid through the employment business rather than directly by the organisation they are supplied to.
- **Work-seekers** are the individuals who are contracted by the employment business or agency and are placed with a third party to carry out ‘temporary agency work’ or become an employee of that third party.
- **Hirers** are the organisations that contract with employment businesses and agencies to supply individuals to carry out work on their behalf or to find new employees.

Question 1)

a) How do you think the removal of **Regulation 9** would affect employment agencies/employment businesses, work-seekers and hirers?

	Positively	No Impact	Negatively
Employment agencies/employment businesses		X	
Work-seekers			X
Hirers		X	

b) Please explain briefly what you think the impact would be

We are unaware of reports/complaints from work-seekers or hirers complaining about the circumstances which are prevented by Regulation 9 so, on balance, we do not believe the removal of Regulation 9 will have a substantial impact in practice.

Having said that we recognise that the absence of such complaints may be precisely because of the prohibition contained in Regulation 9. There is, therefore, a risk that by removing Regulation 9, work-seekers are more likely to be treated in this way which may impact them negatively.

Regulations 14(1)(a), 15(a), 16(1)(a), which require the work-seeker to be advised of the services provided by the employment business/employment agency provide a mechanism under which clear statements are required with regard to the nature of services to be provided. Therefore, it is arguable that despite the removal of Regulation 9, employment businesses/employment agencies already have to provide this information, albeit in a different form. However, it is not clear what the sanction would be if an employment business/employment agency were to act in breach with respect to the described services. It is not apparent whether the EAS Inspector would be able to take any action in a scenario where such a statement has been provided but the employment business’/employment agency’s approach in practice differs from the content of the statement. Were this to have been an intended method of enforcement then Regulation 9 may not have been necessary. Potentially, the work-seeker would have a breach of contract claim for damages under Regulation 14, 15 and 16. Their loss may be difficult to quantify though; i.e. the loss between the remuneration received for a permanent placement they were told they were being put forward for versus the temporary placement they were given. The work-seeker would also have a duty to take reasonable steps to mitigate that loss. In summary, if Regulation 9 is removed and the EAS Inspector is unable to enforce a failure to act in accordance with the statement made to the worker (which we suspect to be the case), then a work-seeker will arguably still have some limited recourse via the Courts.

As an aside, notwithstanding that our members clients’ experience is that the generic name of Employment Agencies is generally well understood by hirers and work-seekers alike, as suggested previously, we believe the work-seeker will have greater clarity as to the services being provided to him/her if the titles of employment business/employment agency are changed

to “Temporary Placement Agency” and “Permanent Placement Agency” respectively in the legislation.

Question 2)

- a) How do you think the removal of **Regulation 11** would affect employment agencies/employment businesses, work-seekers and hirers?

	Positively	No Impact	Negatively
Employment agencies/employment businesses	X		
Work-seekers			X
Hirers		X	

- b) Please explain briefly what you think the impact would be

It is unclear why the removal of Regulation 11 is felt to be appropriate. Paragraph 10 of the Consultation Paper states that the reason for doing so is “ we do not consider its omission will affect many employment agencies or employment businesses”.

However, the purpose of Regulation 11 would appear to be intended to provide practical clarity for work-seekers and hirers. Whilst we accept that Regulation 16 will assist work-seekers in the modelling and entertainment sectors and where, potentially, there may be a greater degree of familiarity with the specifics of contractual arrangements, that does not appear to be a rationale for removing Regulation 11 in its entirety. The absence of an impact assessment makes it challenging to assess whether it is anticipated that the deletion of Regulation 11 will prompt differences in behaviour in practice.

Also, we note that Regulation 11(6) provides that an agency may not act as agent for both the hirer and the work-seeker simultaneously, which appears to be sensible and may be appropriate to retain in the interests of work-seekers and hirers.

Question 3)

- a) How do you think the removal of **Regulation 17** would affect employment agencies/employment businesses, work-seekers and hirers?

	Positively	No Impact	Negatively
Employment agencies/employment businesses	X		
Work-seekers			X
Hirers		X	

- b) Please explain briefly what you think the impact would be.

We agree that Regulation 17 addresses business to business contractual issues such that the interests of both businesses would be expected to be served via accurate written agreements; the latter being the impetus for accessible written terms. However, the relationship ultimately is tri-partite in the wider sense in that work-seekers also need to be considered even within the context of business to business engagement. Therefore, the interests of work-seekers do also need to be assessed if Regulation 17 is to be deleted in its entirety.

Therefore, if there is evidence available to suggest that Regulation 17 bolsters the effective operation of Regulation 15, for example, that would indicate that its retention may be beneficial. Likewise if there is evidence that (less commercially experienced) hirers have been materially disadvantaged in the absence of Regulation 17. The removal of a criminal sanction is clearly a benefit to an employment agency/employment business and we agree that a criminal sanction for the technical breach of Regulation 17 may be disproportionate. It is a policy issue for Government as to whether an alternative sanction may be appropriate or necessary.

The proposal is perhaps a missed opportunity to simply or remove what agencies and hirers regard as the unnecessarily cumbersome and difficult to understand rules in Regulation 10. Employment agencies and hirers are in reality capable of negotiating more sensible transfer fee arrangements on a business-to-business basis.

Question 4)

- a) How do you think the proposed amendment to **Regulation 23** would affect employment agencies/employment businesses, work-seekers and hirers?

	Positively	No Impact	Negatively
Employment agencies/employment businesses		X	

Work-seekers		X	
Hirers		X	

b) Please explain briefly what you think the impact would be.

The working group has limited experience in relation to the entertainment and modelling sectors. Paragraphs 12 and 13 of the Consultation Document appear proportionate.

Question 5)

a) How do you think the removal of **Regulation 27** would affect employment agencies/employment businesses, work-seekers and hirers?

	Positively	No Impact	Negatively
Employment agencies/employment businesses		X	
Work-seekers			X
Hirers			X

b) Please explain briefly what you think the impact would be.

There is some evidence that rogue agencies make up positions where in fact there is no job in order to attract candidates on to their books. However, in practice, an employment agency/employment business will usually only include relevant information in an advertisement as they do not want a flood of applications from unsuitable work-seekers; which would increase cost for the employment agency/employment business. Another potential detrimental impact of the removal of Regulation 27 to work-seekers that we anticipate is that they could apply for a role that they believe to be permanent, in which case they would be employed directly by the hirer, when in fact it is a temporary role. This leads to confusion for the work-seeker and (arguably) decreased job security.

There is potential for the removal of Regulation 27 to detrimentally impact upon hirers if, in their service agreements with employment businesses/agencies, the fee that they must pay to the employment agency/employment business is dependent upon the number of applicants for the role (e.g. the number who have responded to the advertisement). However, this can be dealt with

in the drafting of the relevant contract, such that the hirer would presumably seek to ensure at least that it states that the fee is dependent on the work-seekers' being "suitable" for the role.

Question 6)

- a) How do you think the proposed amendment to *Schedule 4* would affect employment agencies/employment businesses, work-seekers and hirers?

	Positively	No Impact	Negatively
Employment agencies/employment businesses			X
Work-seekers		X	
Hirers			X

- b) Please explain briefly what you think the impact would be.

We consider that a case can be made that Schedule 4, paragraph 4 should be retained on potential safety grounds.

In the Hirer's case, where the hirer is supplied by an employment business with someone who requires certain qualifications and training, the employment business should be required to keep this on file as this is likely to be of assistance if there are allegations that such person acts negligently when performing services for the Hirer. This is for the protection of both the hirer (with respect to claims by consumers) and the employment business (with respect to contractual claims from the hirer).

Question 7)

- a) How do you think the proposed amendment to *Schedule 5* would affect employment agencies/employment businesses, work-seekers and hirers?

	Positively	No Impact	Negatively
Employment agencies/employment businesses		X	
Work-seekers		X	
Hirers		X	

b) Please explain briefly what you think the impact would be.

In our view, whilst it appears commercially sensible and prudent to retain records of this information, it is perhaps harder to justify a mandatory requirement to do so.

Question 8)

a) How do you think the removal of *Schedule 6* would affect employment agencies/employment businesses, work-seekers and hirers?

	Positively	No Impact	Negatively
Employment agencies/employment businesses		X	
Work-seekers		X	
Hirers		X	

c) Please explain briefly what you think the impact would be.

. The experience of certain of the working group is that Schedule 6 does not receive much practical attention day-to-day.

Question 9)

a) Do you agree with the decision not to remove ‘job boards’ from the scope of the legislation?

Yes/No – YES.

b) If you answered no to the above question, how would you define ‘job board’?

Question 10)

We are interested in the impact of the proposal to ban employment agencies and employment businesses from recruiting from overseas without advertising in Great Britain.

- a) How do you think the proposed ban would affect employment agencies/employment businesses, work-seekers and hirers?

	Positively	No Impact	Negatively
Employment agencies/employment businesses		X	X
Work-seekers	X		
Hirers		X	

- b) Please explain briefly what you think the impact would be.

It will positively impact UK/EEA work-seekers due to the obligation to first advertise in Great Britain giving such work-seekers the first opportunity to apply for a role.

It will only negatively impact those employment agencies/employment businesses currently undertaking this recruitment activity, which as far as we are aware, affects very few employment businesses/agencies. In their case, the only negative impact may be that the recruitment process is slowed down due to this additional advertising in the UK requirement. On balance, this does not appear to be a substantial detriment.

We note that this regulation only restricts employment agencies/employment businesses, not hirers from doing this in which case they would not be directly impacted by this.

Question 11)

- a) Do you think the proposal to ban employment agencies and employment businesses recruiting from overseas without advertising in Great Britain would increase the number of job opportunities available to workers in Britain?

Yes/No YES

- b) Please give reasons for your answer

In theory, more work-seekers based in Great Britain will have first choice of the roles and so hopefully an employment business/employment agency will find them to be suitable for the role. However, in reality, it may be that a hirer economically pitches the terms at a level which it anticipates to be materially more attractive to a foreign worker (if it is considered that they earn less in their home country for doing the same work), in which case this may have no impact on work-seekers in Great Britain as the hirer will instead wait for a foreign worker who is willing to accept the lower rate of pay.

Question 12)

- a) Do you have any evidence of employment agencies and employment businesses recruiting solely from other EEA countries without advertising in Great Britain?

Yes/No - NO

- b) If yes, please provide details of the scale of this activity, including the sectors in which this takes place.

Question 13)

- a) Do you have any evidence of employment agencies and employment businesses recruiting solely from non-EEA countries without advertising in Great Britain?

Yes/No NO

- b) If yes, please provide details of the scale of this activity, including the sectors in which this takes place.

Members of ELA Sub-committee

Co-Chairs: Robert Davies, CMS Cameron McKenna and David Ludlow, Barlow Robbins LLP

Phillippa Canavan, Squire Patton Boggs (UK) LLP

Tessa Fry, GSC Solicitors

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