PROFESSIONAL CONTRACTORS GROUP POSITION PAPER

AGENCY REGULATIONS 2002

The PCG has re-considered the draft regulations in light of the Government's response to the previous consultation exercise. The PCG understands and welcomes the Government's wish to properly regulate Employment Agencies and Businesses and to protect the rights of temporary employees. However, our members are not "temps", they are small service businesses and we believe it would be counter-productive to shackle this sector of the economy with the same legislation. We would like to make the following points about the latest proposals:

Regulation 26-(8) (Circumstances in which fees may be charged to work-seekers)

PCG welcomes new regulation 26-(8), exempting employment agencies from the prohibition on charging fees to work-seekers who are companies. However we believe more needs to be done in this area.

In the original consultation PCG pointed out the problems PCG members have in engaging the services of telemarketing firms or independent sales consultancies because of long-standing restrictions preventing businesses from charging those defined as "work-seekers" and the unclear definitions within the Agency Act leading to uncertainty whether this kind of relationship would be covered.

The redefinition of "work-seeker" to include businesses (if this were to go ahead) would only serve to make matters worse.

We believe many more freelancers would choose to make use of sales and marketing outsourcing functions if it was clear that this would not fall foul of the agencies legislation.

While the PCG welcomes the fact that the Government's has recognised this problem, we feel that the proposed exemption does not go far enough to remove the burden this legislation places on businesses, since in respects other than charging fees, the agencies legislation will still apply to such a relationship.

Our position can perhaps best be illustrated with three examples:

- An oil engineer providing his services through a limited company pays a telemarketing firm to find his company work. As a result of the telemarketing campaign, the engineer finds a new work on an oil rig. Some weeks after starting work, the engineer is killed in a helicopter crash. The combination of Regulation 18c and Regulation 30 could mean that the telemarketing firm which found the client could now be civilly liable for a claim for damages from the engineer's widow for failing to ensure the health and safety of the engineer. Is it reasonable that a telemarketing firm should be subject to Part IV-V of the regulations?
- Is it reasonable that under Regulation 24(3) for a trade directory or internet portal to have to arrange "suitable accommodation" for a business who finds work outside of the local area by using their services?
- Is it the intention of the Government that a CV-writing firm should have to speak directly to the parent or guardian of a customer, if that customer is under 18, as set

out in Regulation 24(8)? Furthermore, any incorporated company which employs staff under-18 and finds clients through a trade directory would have to pass the details of that employee's parents on to the trade directory.

Since under UK law a "person" can be any business or individual, the Employment Relations Act alteration means that *every* business-generation service provided to the service sector is going to be an "Employment Agency" under the definitions of the Act, regardless of the size of the hirer's business or the "work-seeker" business. Every employee of any service business is potentially a work-seeker under the definitions set out in these regulations. Every "work-seeker" business is potentially also either an Employment Agency or an Employment Business (including behemoths such as EDS, BT, Logica, etc). Many "hirer" businesses will also be Employment Agencies or Businesses (including the very same behemoths). Therefore, the Act compromises trading relationships across the entire service sector without offering any additional protection to the employees of these companies.

The DTI has not defined "Limited Company Contractors" or "Marketing Service Companies" in the regulations, in spite of using these terms in the consultation. These may be the enterprises the DTI had in mind when drafting the regulations, but the law does not recognise these distinctions, and neither will a 'negligence' lawyer when presented with the potential compensation claims that could result from Regulation 30.

Contrary to the Better Regulation Guide, the Regulatory Impact Assessment does not consider the impact of the Act and the regulations on businesses such as telemarketing firms, CV writing businesses, trade directories, internet portals, or any other business that may provide a means for other enterprises to obtain new work.

If the Government wishes to meet its commitment to Better Regulation, then this legislation should focus upon those people the Government has considered in the Impact Assessment and avoid bringing a much wider range of business relationships into scope. Should these regulations continue to affect businesses which have never been included in any impact assessment, the PCG would have no hesitation in referring the matter to the Better Regulation Taskforce.

We believe these concerns can be addressed (as discussed in greater detail below) by provisions to the effect that a business (incorporated or otherwise) will not be considered a "work-seeker" for the purposes of the Act.

A less satisfactory alternative would be for the Government to use its powers under section 13(7)(i) of the Act to exclude categories of business which are not employment agencies in the commonly accepted sense.

New Regulation 20 (Steps to be taken for the protection of the work-seeker and the hirer)

The PCG has no comment on this regulation except to say that it is another example of a provision which would not be appropriate where businesses are engaged by other enterprises to find customers.

Application of the regulations to incorporated work-seekers

The PCG supports the total exclusion of " incorporated work-seekers" from the agencies legislation. We would ask in addition for an explicit provision to the effect that a business will not be considered a "worker" for the purposes of the Act, and that the change to the Employment Agency definition within the Agencies Act (changing "worker" to "person") should not be activated.

The sections above discuss some of the problems that arise when a business is treated as a worker with respect the Employment Agencies regulations. In our view it would be even more damaging for incorporated businesses to be treated as work-seekers with respect to Employment Businesses.

This would mean that for the first time the majority of PCG members would find their relationships with “agencies” covered by this legislation.

We have stated in a number of different contexts that professional contractors are not “temps”, but are independent freelancers, in business on their own account. PCG members seek to be treated as businesses in relation to taxation, employment and agency regulations. Professional contractors have made a conscious decision to provide their services on business-to-business terms, and do not seek the protection that the Government understandably seeks to extend to employees and agency “temps”.

We do not see any need for the agencies legislation to be applied to incorporated work-seekers, whether the “limited company contractor” represented by PCG or any other kind of company, and we see considerable disadvantages for our members, if agencies are required to treat “business-to-business” relationships as “agency-to-temp” relationships.

Moreover, any firm intending to operate in this area and offer vital marketing services to our members may be discouraged by the potential liabilities. The PCG has evidence that two firms have already been advised not to sell marketing services to our members, because of the potential difficulties with the *existing* legislation.

We would add that the Act and the regulations are clearly aimed at employee relationships. The revised Regulatory Impact Assessment makes no mention of the impact of this legislation on businesses, despite the wide remit of the definitions.

Furthermore, regulation 30 means that the DTI no longer has control over who can be sued under this legislation. Although the DTI may wish to protect as many workers as possible by leaving the scope of the legislation deliberately wide, we believe that the liabilities that would stem from Regulation 30 would encourage some legal firms to force the legislation to be applied in a manner the Government never originally envisaged.

Regulation 10 (Transfer fees)

The PCGs position as stated above is that the agency legislation should not apply to businesses, and that therefore it should not apply to professional contractors.

It might be thought that PCG members would benefit from a limit on the length of “handcuff clauses” common in the industry, and to an extent this is true. However we maintain a consistent position that the protections due to temporary workers are not appropriate in a business-to-business context. The regulation of business contracts, where it is necessary, should not be lumped together with the regulation of employment or employment-like relationships.

We consider that unreasonably long contractual restrictions on the freedom to negotiate new business may amount to a restraint on trade. However we consider at the present time that this is best regulated by market forces and by voluntary agreements within the industry, and we do not see any current need for legislation in this area.

We further believe that the freeing up of the contract market that would result from certainty that the agency regulations will not apply to relationships between companies

would open up many new opportunities for our members and that this will be of greater benefit to our members than any advantages that might be gained by limiting handcuff clauses.

Interpretation

Is it the intention of the Government that consultancy companies providing the services of their own permanent employees to clients should be classified as Employment Businesses?

It appears the regulations could potentially apply to consultancy companies of all sizes, from large consultancies such as EDS to the "Limited Company Contractors" represented by PCG. PCG does not see any need for the agency regulations to apply where the workers have the protection of permanent employment with a consultancy company, and the consultancy company takes direct responsibility to the client for the work done.

We would seek a reassurance that the agency regulations are not intended to apply in such circumstances, and ask whether any additional provisions (such as an exclusion under section 13(7)(i) of the Act) are required to ensure this.

Conclusion

The Government needs to recognise that business makes much greater use of outsourced contractual relationships between service firms than thirty years ago. The extension the agencies legislation to business-to-business relationships, and the convoluted nature of the regulations would place unnecessary and damaging red tape burdens on a wide range of business activities for no discernible benefit.

It is clear that the legislation is intended to protect the interests of individuals seeking temporary or permanent work on an employment basis. However, as drafted, the legislation would affect a much wider range of businesses and open the possibility of a liability free-for-all that will be exploited by law firms specialising in compensation claims.

The Government has recognised some of the problems that may be faced by 'limited company contractors' and 'marketing service companies'. However the actual legislation does not recognise these definitions, and the attempts at alteration still place considerable restrictions on businesses that do not deserve them.

The PCG strongly recommends that the Government restricts the definition of "Employment Agency", "Employment Business" and "Employment" so that the legislation protects those temporary employees and permanent job-seekers it is intended to protect and does not inadvertently damage the business-to-business sales market or the freelance service sector. The freelancers (incorporated and unincorporated) represented by the PCG do not need or want these regulations interfering with their business activities.

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