

**EXPLANATORY MEMORANDUM TO**  
**THE CONDUCT OF EMPLOYMENT AGENCIES AND EMPLOYMENT BUSINESSES**  
**(AMENDMENT) REGULATIONS 2014**

**2014 No. [XXXX]**

**1.** This explanatory memorandum has been prepared by the Department for Business Innovation and Skills and is laid before Parliament by Command of Her Majesty.

**2. Purpose of the instrument**

2.1 The instrument amends the Conduct of Employment Agencies and Employment Businesses Regulations 2003 to include a prohibition which will restrict advertising of jobs by the recruitment sector elsewhere in the EEA. The prohibition applies in the case of jobs where the employee will usually work in Great Britain. Subject to a defence, employment agencies and employment businesses will have to advertise these jobs in English in Great Britain before (but no more than four weeks before) or at the same time as advertising them elsewhere in the EEA.

**3. Matters of special interest to the Joint Committee on Statutory Instruments**

3.1 None.

**4. Legislative Background**

4.1 The recruitment sector is regulated by the Employment Agencies Act 1973 and the Conduct of Employment Agencies and Employment Businesses Regulations 2003 (the ‘Conduct Regulations’). The sector has two legally defined types of service: employment agencies which introduce people to be employed by the hirer directly; and employment businesses which employ or engage people to work under the supervision of another person.

4.2 The legislation covers all employment agencies and employment businesses in England, Scotland and Wales and provides a framework for contracts between employment agencies/employment businesses, hirers and work-seekers. It also covers principles such as restrictions on fee-charging and ensuring that temporary workers are paid for the work they have done.

4.3 The legislation is enforced by the Employment Agency Standards inspectorate (EAS) based in BIS. Criminal penalties exist within the Employment Agencies Act and a successful prosecution may currently lead to a fine of up to £5,000 in a Magistrate’s Court (the limit will be removed when section 85(1) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 comes into force) or an unlimited fine in a Crown Court. In addition, section 3A of the Employment Agencies Act 1973 enables the

Secretary of State to make an application to an Employment Tribunal for a Prohibition Order to prevent an individual or individuals from running or being involved in the running of an employment agency or employment business for up to 10 years. However, in line with the Regulators' Code, EAS focuses its work on encouraging and promoting compliance. Prosecutions and prohibitions are only pursued in cases of sustained and wilful non-compliance.

4.4 Under regulation 30 of the Conduct Regulations, an individual can also make a claim in the civil courts if they believe they have been caused 'damage' by the failure of an employment agency or employment business to comply with the Employment Agencies Act 1973 or the Conduct Regulations.

4.5 The legislation does not currently regulate where employment agencies and employment businesses place advertisements for vacancies or require that all advertisements be published in English (although overseas-only advertising could potentially be a breach of the Equality Act 2010).

## **5. Territorial Extent and Application**

5.1 This instrument applies to Great Britain

## **6. European Convention on Human Rights**

6.1 The Parliamentary Under Secretary of State for Employment Relations and Consumer Affairs, Jo Swinson MP, has made the following statement regarding Human Rights:

In my view the provisions of the Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2014 are compatible with the Convention rights.

## **7. Policy Background**

- What is being done and why

7.1 The Government wants to create a level playing field for workers by requiring employment agencies and employment businesses to ensure that all advertisements for jobs based in Great Britain are advertised in Great Britain and in English. Employment agencies and employment businesses will be free to publish advertisements in additional languages, if they choose to. The regulation will be enforced primarily by the Employment Agencies Standards inspectorate (EAS) based in BIS. However, we have not excluded the possibility for individuals to make civil claims on the basis of the new regulation if they can show that they have been denied the opportunity to apply for a vacancy for which they have the necessary skills as it was not advertised in Great Britain and/or in English.

7.2 The new regulation will only apply to vacancies advertised in other EEA countries. UK immigration rules already favour native workers over non-EEA through the requirement for each position to undergo a ‘Resident Labour Market Test’ prior to being advertised outside the EEA. In order to fill the requirements of the test each position must be advertised in the UK for a minimum of 28 days through two separate media. Only if the employer is unable to fill a position within this period are they free to advertise overseas. Although there are no criminal or civil penalties directly attached to breaching the Resident Labour Market Test, the Home Office will take action related to an employer’s “sponsor’s licence” . Depending on the severity of the breach, the Home Office may either downgrade the licence (meaning the employer cannot sponsor any new migrants and must comply with an action plan) or revoke it (meaning the employer loses any existing sponsored migrants and cannot reapply for a licence for at least six months). Ultimately, though, an employer who knowingly takes on employees who do not have the right to work in the UK will commit a criminal offence. As the position of those recruiting within the EEA is so different from that of those recruiting outside it, we consider that not extending the new regulation to advertising outside the EEA is justified.

7.3 Overseas-only advertising is already potentially a breach of section 55 of the Equality Act 2010 which makes it unlawful for an employment service provider to discriminate in the arrangements made to recruit to a post. Such breaches could be investigated by the Equality and Human Rights Commission (EHRC). However, owing to the criminal nature of their investigations, EAS inspectors have more extensive investigatory powers than their EHRC counterparts under section 9 of the Employment Agencies Act 1973 and are not subject to some of the procedural constraints that apply to EHRC investigations. This means that EAS inspectors can act quickly in response to a complaint.

7.4 There will be a defence where a recruiter believes on reasonable grounds that advertising a vacancy in English in Great Britain would be disproportionate. In addition, to ensure that employment agencies and employment businesses are in the same position as other businesses when they take on their own staff, the new prohibition does not apply when they are recruiting on their own account.

- Consolidation

7.5 There are no immediate plans to consolidate the Conduct Regulations, not least because further changes are expected to be made next spring.

## **8. Consultation**

8.1 The Government consulted on this between the 29 July and 2 September 2014. We received 31 responses to the consultation. The majority of respondents were broadly supportive of the Government’s objective to create a level playing field for workers in Britain. However, some respondents commented that overseas-only advertising is not a problem in the recruitment sector and, if it did occur, would potentially be a breach of the Equality Act 2010.

## **9. Guidance**

9.1 We will publish guidance on gov.uk and circulate the link to interested parties such as REC (the trade association for the recruitment industry).

## **10. Impact**

10.1 The impact on business, charities or voluntary bodies is likely to be minimal. We estimate that costs to business will be around £0.8 million.

10.2 The impact on the public sector is also minimal.

10.3 An Impact Assessment is attached to this memorandum and will be published alongside the Explanatory Memorandum on the legislation.gov.uk website.

## **11. Regulating small business**

11.1 The legislation applies to small business.

11.2 We consider that the regulation should not disproportionately affect small and micro businesses.

## **12. Monitoring & review**

12.1 We will monitor the number of complaints received by EAS relying on the new prohibition and the progress of those complaints to assess whether any further amendment is necessary.

## **13. Contact**

Caroline Daly at the Department for Business Innovation and Skills can answer any queries regarding the instrument. Caroline can be contacted on 020 7215 8184 or [caroline.daly@bis.gsi.gov.uk](mailto:caroline.daly@bis.gsi.gov.uk)