Employment Intermediaries Legislation
Changes to ITEPA 2003 via the Finance Bill 2014

A guide for workers

Introduction

This guidance document is intended for use by APSCo members to provide to their workers. The facts, information, and opinions contained herein are correct to the best of APSCo’s knowledge as at time of publication. This document is intended as a concise guide to the changes to the ITEPA legislation with regard to the engagement of workers through intermediaries (colloquially known as the “Agencies Legislation”), which came into force on the 6th April 2014. It is not an exhaustive and complete reference document on this subject.

APSCo can take no responsibility or liability for the use of or reliance on the information contained within this document or for any decisions or the consequences of any such decisions made by APSCo members or their workers in relation to this guidance.

The complete, new legislation, as part of the Finance Bill 2014 can be found here http://www.publications.parliament.uk/pa/bills/cbill/2013-2014/0190/14190.pdf

Definitions

In this guidance the terms below have the following meanings:

“Intermediary” means a company, which contractually provides the services of a worker to an end-user client, or pays the worker for services provided to an end-user client.

“Intermediary 1” means the intermediary that has a direct contractual relationship with the end-user client.

“Umbrella Company” means an intermediary, which has an over-arching contract of employment with the worker, so that the worker is an employee of the umbrella company.

“Worker” means any person providing their services to an end-user client.

Aim of the changes

Offshore Employment Intermediaries

The Government published its consultation on the 8th May 2013 with the aim of ensuring that offshore companies employing individuals that work in the UK pay the correct tax and NI. Under previous legislation offshore companies could make such payments, but HMRC has no jurisdiction over offshore companies, and so had no power to enforce payment. The Government’s stated motivation for this change is the growing use in recent years of such offshore UK workers to avoid paying employment taxes, which they believe has become widespread in several industries.

Onshore Employment Intermediaries: False Self-employment

The Chancellor stated in his Autumn Statement on 5th December 2013 that “We’re going to tackle the growth of intermediaries disguising employment as false self-employment, depriving workforces of basic employment rights like the minimum wage in a bid to avoid employer national insurance.”

According to the consultation document, published on 10 December 2014 HMRC has evidence of a substantial and growing number of people who are falsely self-employed. The consultation is clear that there are many
legitimate reasons why a worker may be engaged through an intermediary on a self-employed basis, and that it is not HMRC’s intention that these measures should affect those who are genuinely self-employed.

The sectors that the consultation mentions as being the ones in which false self-employment practices are most prevalent include construction, driving, catering and security. HMRC also suggests that it has evidence of existing permanent employees being taken out of direct employment and being moved into false self-employment arrangements through intermediaries. It also believes that often such workers do not realise that they are no longer employed, and no longer have the same employment rights.

**Legislative Changes**

**Offshore Employment Intermediaries**

With effect from 6th April 2014 changes to section 689 of ITEPA 2003 (PAYE: employee of non-UK employer) mean that in situations where a worker is ultimately employed by an offshore company, and is supplied to work in the UK for an end-user client, Intermediary 1 is wholly and immediately liable for all “employer obligations” regarding the worker.

**Oil and Gas:** The Government recognised that the oil and gas industry is structured differently, and therefore has put in place different rules for this sector. Due to the fact that a large proportion of offshore employers in this sector retain a presence, or have an associated company in the UK, the changes to ITEPA 2003 mean that where the offshore employer has an associated company, agency, or branch based in the UK (within the meaning of section 449 of the Corporation Tax Act 2010), that associate will be liable for the NICs and tax of their associate offshore employer.

In the infrequent cases where there is no associated company, branch, agency, or presence in the UK for the offshore employer, the licensees will be responsible for accounting for tax and NICs.

Related changes are also contained in the National Insurance Contributions Act 2014.

**Onshore Employment Intermediaries: False Self-employment**

With effect from 6th April changes to Section 44 of Chapter 7, Part 2 of ITEPA 2003 mean that where a worker is provided to an end-user client via an intermediary, the worker is to be treated for income tax purposes as being employed by Intermediary 1 (the duties of the employment will be the services the worker provides to the client). Therefore, Intermediary 1 is responsible and liable for the payment of PAYE and NICs in relation to all remuneration receivable by the worker in consequence of providing the services.

However, there are circumstances under which this section will not apply. The legislation assumes that the manner in which the worker provides the services is subject to, or to the right of the supervision, direction, or control of someone within the supply chain (including the client, or any intermediary), if this is not the case then this section will not be relevant, and Intermediary 1 will not be considered the employer of the worker for tax purposes. Also, where the worker’s remuneration constitutes employment income outside of this provision, where tax and NICs are accounted for by another entity, Intermediary 1 will not become liable.

Intermediary 1 may also not be liable (as explained above) where the client or the intermediary below them in the supply chain (where they are resident or have a place of business in the UK) provides Intermediary 1 with a fraudulent document, which is intended to prove that either there is no supervision, direction or control (in the case of the client), or (in the case of the intermediary) that the worker’s remuneration is already being treated as employment income elsewhere. Where this is the case, the worker will be treated for tax purposes as being either an employee of the client or the intermediary (as the case may be).
There is a new Section 46A (Anti-Avoidance), which is the targeted anti-avoidance rule (TAAR) that applies where the main or one of the main purposes of an arrangement is to avoid the application of section 44 (as explained above).

There is a new Chapter 3A of ITEPA, which applies to a relevant PAYE debt of a company if that company doesn’t deduct, account for, or pay the amount as required. In such situations HMRC may serve a personal liability notice to a director of the company for the unpaid amount and any interest relating to the unpaid amount, which must be paid within 30 days of such notice being served. If personal liability notices are served on more than one director in respect of the same amount the directors will be jointly and severally liable. This new chapter also allows for the right of appeal by a director.

There is a new section 716B of ITEPA that gives HMRC the right with regard to Chapter 7, Part 2 of ITEPA 2003 (the treatment of agency workers, as described above) to require intermediaries to keep and preserve specified information, records or documents for a specified period; and to provide HMRC with specified information, records or documents within a specified period or at specified times. There are penalties attached to the failure to provide the required information. This requirement will not come into effect until tax year 2015/16.

**What does this mean & how does it affect workers?**

**Offshore Employment Intermediaries**

The changes mean that where you are ultimately employed offshore (whether through your own personal service company ("PSC"), an umbrella company, or other company), and your services are supplied to work in the UK for an end-user client, Intermediary 1 is responsible for accounting for the tax and NICs and other statutory obligations in relation to you.

In other words, the recruitment firm with the direct contract with the client will have to deduct employment taxes (PAYE) and National Insurance from the payments it makes to the company supplying your services.

From the intermediary’s point of view they are unlikely to want to account for tax and NICs in relation to you, so it is important that all intermediaries within the supply chain (including RPOs, MSPs, recruitment firms, and umbrella companies) ensure that they are not engaging with any workers that are employed offshore. Although the tax and NICs liability will sit with Intermediary 1, this entity is almost certainly going to require (via contractual obligations and indemnities) evidence that the worker is not employed offshore, and such obligations and indemnities are likely to flow down the supply chain. Therefore, you, or the company providing your services is likely to start seeing contractual indemnities and obligations requiring confirmation that no offshore employment relationship exists.
Onshore Employment Intermediaries: False Self-employment

**Self-employed Supply Model**

The changes mean that where you are engaged on a self-employed model through an intermediary, Intermediary 1 will be liable for payment of tax and NICs in relation to the services you provide, unless Intermediary 1 can show to HMRC's satisfaction that you are not subject to, or to the right of the supervision, direction or control of any entity in the supply chain, or they can show that the correct taxes have already been accounted for to HMRC by another entity.

A self-employed model (in this context) is one where you are ultimately engaged by an intermediary on a self-employed basis, which means that the company engaging pays you gross without the deduction of tax or NICs. This is not a personal service company model, which is discussed later in this guidance.

HMRC has provided guidance on what it believes constitutes supervision, direction, and control, which can be found at [https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/290051/Definition_of_Supervision_Direction_or_Control_with_supporting_examples.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/290051/Definition_of_Supervision_Direction_or_Control_with_supporting_examples.pdf). The guidance includes a number of scenarios designed to give examples of where supervision, direction or control (“SDC”) is and isn't present. However, these scenarios only cover fairly obvious “in” and “out” situations, and do not explore the greyer and more complex areas, which arguably would be more helpful. However, if you are unfamiliar with the basic tests, this guidance may be of use.

**Can an intermediary determine the existence of control?**

Even where an intermediary has a good understanding of SDC, it is going to be difficult for anyone in the supply chain other than the end-user client to determine whether it exists in the actual working relationship.

As with HMRC’s enforcement activity under IR35, it will look not only at the contracts in place, but at the reality of the situation. Therefore, if intermediaries are going to engage with workers who are supplied via a self-employed model without deducting tax and NICs, they will need to gain the end-user client’s opinion and confirmation that the worker is not subject to, or to the right of SDC.

Therefore, end-user clients will also need to be clear about the factors that contribute towards HMRC’s view of the existence of SDC. Due to the legislation’s assumption that SDC are present unless proved to HMRC’s satisfaction otherwise, it will be necessary for Intermediary 1 to limit its risk of unpaid taxes by gaining a written assurance from the end-user client as to whether the worker is subject to, or to the right of SDC.

**End-user client ‘transfer of debt’ risk**

If an end-user client gives Intermediary 1 a written assurance that there is no, and no right of SDC with regard to a worker, can Intermediary 1 pay the intermediary(ies) further down the supply chain in the knowledge that they will not be liable for any unpaid taxes or NICs? Generally speaking the answer is yes, although there are a number of factors that Intermediary 1 and the end-user client should take into consideration.

The legislation includes a provision that says where fraudulent documents are provided with the intention of proving that there is no SDC present, the tax and NICs liability will transfer to the end-user client. Therefore, an end-user client will need to be careful when giving such assurances, and if it gives a false assurance regarding SDC, then it could become liable for the outstanding unpaid taxes and NICs.
In such circumstances, where the employment intermediary has acted in good faith, it is clearly not fair for them to be penalised. For that reason, the clause also brings in a provision that, where fraudulent documents have been provided, the party that provided the documents to the employment intermediary is the employer for income tax purposes. That will ensure that, where intermediaries have done their due diligence, asked the right questions, received the necessary assurances and acted in good faith on the documents provided, they will not be penalised. Instead, those who have sought to deceive are the ones who suffer the consequences.

David Gauke MP Exchequer Secretary to the Treasury

APSCo raised concerns that “intent” in the case of a fraudulent document would be difficult to prove. However, the Exchequer Secretary to the Treasury, made a statement in a Finance Bill Committee session on the 1st May 2014 that clearly shows that where the intermediary acts in good faith then the liability will fall to the party that originated the document.

Therefore, will end-user clients want to take on this potential risk?

This is probably unlikely. What is more likely is that the end-user client will confirm that some form of SDC does exist, so that it has no exposure to the tax liability. It’s possible that this may lead to workers that are genuinely self-employed being treated as “employed” for tax purposes, unless, of course, the worker decides to set up their own PSC.

Intermediary ‘transfer of debt’ risk

The fraudulent documents defence described above also relates to documents provided to prove that taxes and NICs have been correctly paid elsewhere. In other words, an intermediary engaging you may provide confirmation that it has paid, or is paying the correct taxes and NICs in regard to your services. This confirmation will be provided to the entity with which the intermediary has a contractual relationship (this may or may not be Intermediary 1), and thus this proof will work its way up the supply chain to Intermediary 1.

The legislation provides that where such confirmation is provided fraudulently (taking into consideration the Exchequer Secretary’s comments, as above) then the liability for unpaid taxes and NICs will transfer to the intermediary that has a direct contractual relationship with Intermediary 1. Please note that this will not necessarily be the intermediary that has engaged you and originally provided the confirmation.

The risk transfer is illustrated in the chart below. Assuming that the document is proved as being fraudulent, the confirmation originates from “Red” and is provided to “Green”. “Green” subsequently passes on the proof to “Blue”. “Blue” and “Green” rely on the document and pay “Red” without the deduction of taxes and NICs. At a later date it is discovered that the document is fraudulent, and the correct taxes and NICs are not being paid by “Red” in regard to the worker. “Blue” proves that a fraudulent document was provided, and is no longer liable for the unpaid taxes and NICs, and the debt transfers to “Green”.

In this illustration it is entirely possible that “Green” is a completely innocent intermediary that checked the document and believed it to be correct, however, it is now responsible for the debt.
Due to this anomaly in the defence for intermediaries, it is less likely that intermediaries will want to engage with workers who are being supplied on a self-employed model, unless all parties in the chain are absolutely sure that the workers are truly behaving as a self-employed person (with no SDC).

**Personal Service Company Supply Model**

HMRC has provided extra clarification on the interaction between the revised Agencies Legislation (Chapter 7 S44-47 ITEPA 2003) and the Intermediaries Legislation (known as IR35), which states that the Agencies Legislation will not generally apply where a worker is engaged via a personal service company ("PSC"), also known as a limited company contractor, as all the criteria relating to the Agencies Legislation will not apply.


In other words, HMRC has tried to reassure the sector that PSC workers will probably not be caught by the changes to the legislation. This is because salary paid by the PSC to the worker will be treated as employment income and taxed accordingly, dividends are not paid as a consequence of the provision of the services, and loans are taxed appropriately as well. Obviously HMRC has caveated this statement in case of an avoidance scheme.

Unfortunately, there is no statutory definition of a PSC, however, APSCo has made an educated assumption in its Compliance Checks Guidance to its members that a worker who is a director and shareholder of the company, usually solely or with a spouse is likely to be a PSC.

Therefore, it is likely that if you work through a PSC you will be asked to confirm the directors and shareholders of your business.

It should also be noted that if you are engaged through your PSC there is no requirement for any intermediary or the end-user client to confirm whether there is, or is a right to any supervision, direction, or control.

**Umbrella Company Supply Model**

By the term “umbrella” we mean a company that has an over-arching contract of employment with the worker. There are companies that call themselves umbrellas, but which do not fit the definition we are using.

Workers engaged through umbrella companies should not be caught by this legislation because the new measures do not apply where the worker’s remuneration constitutes employment income outside of this provision.

In other words if you are employed by an umbrella company where employment income tax and NICs are accounted for before payment is made to you, then Intermediary 1 will not become liable.

Therefore, it is likely that if you work through an umbrella company the intermediary engaging the umbrella, for the provision of your services will ask to see a signed copy of your contract of employment with that umbrella to prove that there is an employment relationship in existence.

Obviously, checking an employment relationship does not confirm that the umbrella is remitting the correct taxes and NICs, so recruitment firms are going to want to ensure that they are dealing with reputable, onshore umbrella companies. This is likely to lead to the proliferation of umbrella company approved or preferred supplier lists being used by recruitment firms, which means that you may be asked to engage with an umbrella company on the recruitment firm’s approved list.
**Record keeping and reporting requirements**

The changes in the onshore legislation include a requirement on intermediaries to keep records of, and report to HMRC on payments made in respect of workers that are not accounted for via intermediaries’ normal PAYE payrolls.

One of the changes that HMRC made, following its consultation on this legislation, was to postpone this record keeping and reporting requirement until tax year 2015/16. It is not clear as yet what the requirements will be, although HMRC has indicated that reporting will be quarterly and there will be a reduced requirement when reporting on PSCs. However, this may change in the next year.

HMRC did not comment in its response to the consultation on reporting for umbrella company workers, which was an issue APSCo raised with them, and their silence is concerning. The original requirement to report fully on umbrella company workers, would be a complete duplication of the information provided by the umbrella about its employees, and seems nonsensical. We will have to wait and see what 2015 brings with regard to this issue.

However, you should be aware that once the reporting requirements are defined, and in the run up to the 2015/16 tax year, you are likely to experience requests for information, which may have not previously been required due to Intermediary 1’s legal requirement to record and report on certain information.

**When will the liability commence?**

The legislation became effective on the 6th April 2014. From this date intermediaries are liable for tax and NICs relating to affected workers. The law is not retrospective.

With regard to the record keeping and reporting requirements, intermediaries will not need to start record keeping until April 2015, with the first quarterly report being due after that.

**What are some of the consequences – unintended or otherwise?**

**The effect on the professional recruitment sector**

For APSCo members the effect of this legislation may not be as serious or significant as it will be in some other sectors of the industry, and this is because the self-employed model is not that common in the professional sector. Although we have seen a rise in the use of this model in recent years, by far the most common routes are still through PSCs or umbrella companies. Therefore, we think it is less likely that our market will see non-compliant behaviour.

**Indemnities**

APSCo’s members are already seeing indemnities flow down from further up the supply chain, as intermediaries with no control over the relationship with the worker, try to limit their liability. This is an understandable reaction, as Intermediary 1 in the supply chain is being given liability for an unquantifiable risk over which it has little real control. Intermediaries can try to limit these indemnities as far as possible, and pass on indemnities where appropriate. However, most importantly if the intermediary is undertaking reasonable compliance checks, with a good level of vigilance this should reduce the likelihood of a breach arising.

The unquantifiable nature of this risk may also cause intermediaries problems in terms of availability and cost of insurance for such risks, and the associated indemnities.
Dealing with umbrella companies

Although probably not unintended by HMRC, one of the consequences of these new provisions will be that recruitment firms will be much more careful about the umbrella companies that they engage with. An increasing number of APSCo members are looking to put umbrella company preferred supplier lists ("PSL") in place, reducing the number of umbrella companies they deal with, and introducing further due diligence in the selection process.

APSCo affiliate member umbrella companies must undergo an annual compliance review, which may provide recruitment firms with a good base to start from.

Will there be a growth in PSCs?

An intermediary may come to the conclusion that its business would be much safer if all of its current "self-employed model" workers were engaged through PSCs in future, and then take action to move workers into PSC models. We would urge extreme caution in taking such action.

Workers need to make their own decisions about which supply model to use, and intermediaries should not coerce them into what could be an inappropriate model. If a worker is in fact employed for tax purposes, it could be considered an avoidance mechanism moving that worker into a PSC. Further, moving large numbers of workers into PSCs is even more likely to fall foul of the TAAR (targeted anti-avoidance rule), as described in the legislative changes section of this guidance.

Having said that, should a worker be supplied through a model that the intermediary doesn't think is appropriate, the intermediary should take action to require that worker to move to a more appropriate supply model. This may involve moving workers to PSCs, and in such cases the intermediary may need to justify this action to HMRC.

What should you be doing?

Workers have their part to play in ensuring that they pay the correct level of tax and NICs, and there are certain issues that workers should be aware of and take into consideration with the advent of this new legislation.

- Consider whether your employment status (for tax purposes) would be that of "employed" or "self-employed". In other words, do you behave, or are you treated like an employee of the end-user client, or is there little or no control over the way in which you undertake your work, and therefore you believe yourself to be truly self-employed
- Consider the supply model through which you are working, and whether this is appropriate bearing in mind employment status
- Consider whether the deal you are being offered by the company engaging you is appropriate in terms of the ratio of net and gross pay – if the deal seems too good to be true, it’s possible that it isn’t compliant to UK tax and NIC law.
- If the intermediary above you, or the company engaging/employing you requests information relating to the nature and geography of your engagement or employment, provide accurate documentation as soon as possible – if you delay or provide inaccurate or misleading information then this could have the effect of terminating your assignment, and could in serious cases lead to legal action