



## THE CONSTRUCTION INDUSTRY – important update

THE RESULTS OF THE 'FALSE SELF-EMPLOYMENT' CONSULTATION - 4.4.2014

### INTRODUCTION

Back in January we warned our construction industry clients of the Government's consultation aimed at 'onshore intermediaries' and the potential that the consultation had to have a negative impact on the construction industry and the engagement of self-employed subcontractors. The Government has been extremely slow in drafting the relevant legislation as it was only published at the end of last week despite the fact that it comes into force on 6 April 2014. Now that we have the final legislation we have provided some commentary below and would urge our construction clients to get in touch so we can discuss the precise scope of any applicability.

### THE LEGISLATION

The new rules apply from 6 April 2014 and affect both tax and National Insurance. For the legislation to take effect the following factors must be present:

- a) An individual provides services personally (it doesn't matter if a substitute can be sent any more)
- b) The individual provides the services to another person (called 'the client'),
- c) The client has a contract with another party (called 'the agency' in the legislation)
- d) The services are provided as a consequence of the contract or the services are paid for as a consequence of the contract.

Where the above elements are present you are potentially within the scope of the legislation. It is important that construction companies ignore the term 'agency' as this legislation is not limited to traditional employment agencies. This could quite easily be a contractor because the constituents above could quite easily be found in a supply chain in the construction industry.

For example it is common in the construction industry for a construction company to supply workers to a client, rather than to agree to provide services. If you have contracts where your client asks you to supply labour (rather than complete a job) – you are potentially at risk. This is especially so where you bill your client on an hourly or a day rate for the labour supply.

The next question to ask is whether the individual is controlled.

To be specific, the actual test is whether the individual is supervised, directed or controlled by any party (not just the party that has the contract with the individual) as to the manner in which they provide the services; or whether they are subject to the right of supervision, direction or control (by any party) as to the manner in which the services are provided. If there is some supervision, direction or control (or the right of it) as to the manner then the legislation will bite.

If the above scenario applies then the individual has to be treated as an employee for tax and NI purposes. This means PAYE, NI and Employer's NI. The CIS scheme will not be the appropriate tax treatment where the new legislation applies. It should be obvious by now the impact this legislation could have.

#### DOES THE LEGISLATION APPLY TO ME?

Clearly, the first thing for any construction company is to assess whether the legislation affects them. It is possible that it will affect parts of what a company does and not others. This will clearly be based on the particular facts of a scenario but construction companies should at least be aware of two main considerations:

##### Control:

This is not the same control test as is used for employment status. Therefore companies should not be resting on their laurels because they are satisfied the individual is not controlled for employment status purposes. Of course, it may be that the individual will not fall within the legislation because of control but this should be considered carefully because the test is not the same. In considering control the following should be born in mind:

- a) That the test is widened to 'supervision, direction or control'
- b) That the supervision, direction or control can be exercised by any party not just the construction company – for example; does your client supervise, direct or control the individual?
- c) There does not have to be control in practice, the right of supervision, direction and control is sufficient – for example; do any of the contracts in the contractual chain give anyone the right to supervise, direct or control the individual even if it is not exercised in practice?
- d) That the law now requires you to prove that there is no control – not the other way around. You are effectively guilty until you can prove your innocence.

Given the above construction companies should be reviewing the situation with regards to control.

##### The Services:

The other question that construction companies need to ask themselves is: who is the individual providing the services to? The legislation requires that the individual must be providing the services to the client. Therefore, if the construction company is merely engaging in labour supply then the new legislation will likely apply. However, if it can be argued that the individual is providing services to the construction company and not the client then the legislation will not apply. This will likely come down to a factual test based on the nature of the services the construction company is providing to the client with a view to proving that the construction company is providing services to the client not the individual.

#### SUMMARY

As we warned in our previous briefings this legislation has a potentially wide impact and companies should not simply rely on the fact that they are not 'agencies'.