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Onshore Employment Intermediaries: False Self-Employment

The new rules on self-employment in plain English

As we have reported over the last week or so, the new legislation on self-employment via intermediaries is set to come into force on 6 April 2014.

Questions are coming thick and fast. This is because of the short timescales involved, lack of awareness of the new rules (in some quarters), some last minute changes to the rules, and the radical measure of operating PAYE on self-employed operatives, which is highly counter-intuitive.

We have set out below some of the questions that are cropping up time and again. Although as it stands this legislation potentially affects any labour supply chain it is in the sector where agencies and umbrella companies are involved that most of the confusion arises.

Although there are some complex legal and technical issues involved we have tried to deal with this in plain English. Feel free to pass these on to your clients if you are facing questions yourself.

At the time of writing we still do not have the final legislation. There are still some unknown areas of the rules, and these FAQs are subject to the release of the Finance Bill next week and its passage through Parliament.

Some definitions

People use many different terms to describe the parties in a labour supply chain. Although not strictly accurate or helpful often the term 'payroll company' is used, as are the terms 'umbrella company' and 'commercial contractor' to describe employed and self-employed models respectively.

In these FAQs we will use the following terms:

Client: The end-user client or hirer, the customer of the Agency

Agency: The employment business sourcing the Operative for the Client

Supplier: The intermediary. This could be an umbrella company employing Operatives under PAYE, or a commercial contractor engaging Operatives on a self-employed basis under CIS or outside CIS. Often called a 'payroll company'.

Operative: The worker or candidate, however they are engaged.

Control: We have used this as shorthand for the test which is in the legislation, because the actual test is something of a mouthful. The full test that has to be proved is that: “the manner in which the worker provides the services, or (as the case may be) the manner of the worker’s involvement in the provision of the services, is not subject to (or to the right of) supervision, direction or control by any person”.

Frequently Asked Questions:

1. I’ve read that there is going to be a ‘soft landing’ on this legislation, is that true?

There is no soft landing on the PAYE/NIC legislation. There is however a soft landing on the reporting requirements for Agencies. See question 9.

2. My Operatives are genuinely self-employed; this only applies to false self-employment doesn’t it?

This is tax/NIC legislation only, and there are no exemptions even for those individuals who you might consider to be ‘genuinely self-employed’ for other purposes.

The new rules apply where it cannot be shown that there is no right of control by any person.

Therefore even a genuinely self-employed sole trader could be caught.

To take an example, a 20-years experienced sole trader with his own trading name, a van, tools and equipment takes a job working for an Agency. The Agency’s contract with the Client states that the Client has the right to supervise the manner of the work. Even if this supervision is not used in practice, the new rules apply and PAYE must be operated.

3. As an Agency is it true that I am not liable as long as the Supplier confirms that there is no control?

Although we do not have the detail yet, it was announced last week that the government intends to bring in a rule so that Agencies can rely on what the Supplier tells them.

From the detail that we do have, it seems that:

- the confirmation needs to be in writing,
- there must be fraud (not a mistake),
- the Supplier must be in the UK, and
- the Agency must have acted in good faith.

If this is the case, the Supplier will be liable for PAYE/NICs, not the Agency.

There could be other conditions attached to this new exception. Even if there are not, it almost certainly would not apply where there is a clause in the Agency’s contract with its Client saying that the Operative can be controlled by the Client. If the Agency knows that

there is a right of control, it will not 'have acted in good faith' when relying on the Supplier saying that there is no control.

It is also unlikely to apply where an Agency simply insists on a blanket declaration by the Supplier without any due diligence.

Although this is being seen by some as a 'get-out' of the new legislation, we think that the scope to rely on this exception will be much more limited than it appears.

4. I am an Agency. If my Client tells me there is no control over the operatives, am I OK?

As with the previous question, yes, there is an exception where an Agency relies on fraudulent documents, but there are several conditions attached to it.

Again, where there is a right of control by the Client written into a contract, this exception will not be of much use. The same will apply if there is a right of control in the contract between the Agency and the Supplier. An Agency cannot rely in good faith on a statement saying there is no right of control where it has signed a contract saying the opposite.

5. If the Operatives have to go PAYE, isn't this going to make them employees?

No, and it is important to remember that this is purely new legislation for tax and National Insurance purposes.

One of the difficult parts of these new rules that everybody has to get to grips with is that the legislation will tax self-employed individuals as if they are employees. The Operatives will remain self-employed for all other purposes unless their contract is altered.

This legislation is what is known as a 'deeming provision'. In other words it treats the Operatives as if they were employees just for tax/NIC purposes, even though they are not actually employees at all.

For all other purposes (e.g. employment rights) the normal rules set out by the Courts will still apply, as was made clear in the original consultation. Operatives will not qualify for general employment rights as a result of these rules.

6. Doesn't this new legislation make it virtually impossible to be self-employed?

The new rules make life very difficult for anybody who is self-employed and working through an intermediary. This is especially the case where an Agency is involved, because most Agency contracts include a clause saying that the Client has control over the worker.

However, where this is not the case and there is no control or right of control, PAYE/NIC will not be due.

7. If my Supplier confirms that PAYE is being operated, am I protected as an Agency?

Yes, but there are conditions attached. This is part of the new rule mentioned at question 3 above.

In most cases if the UK Supplier tells you that PAYE is being operated you should be able to rely on this, but if, for example, you knew that this was not actually the case then you would not have acted in good faith, the exception would not apply, and you would not be protected.

This is one of the areas where we are still awaiting the detailed rules.

8. Surely it's just a matter of changing the contracts?

These are new rules and there are some areas that will need to be settled by the Courts over the coming years (yes, years).

There are various arguments about the control test, but the generally accepted interpretation is that the Courts will have to be satisfied that:

- There is no right of control in any contract anywhere in the supply chain
- On a day to day basis, the Operative is not actually controlled

The Agency will have to prove both of these things, or else the new rules will apply.

9. I've read that the legislation has been delayed?

This is not strictly correct. Although it has been reported by some that the entire legislation has been delayed, this is wrong. The rules start from 6 April 2014 and from that date tax and National Insurance is due if you are caught by the new rules.

The confusion arises from the announcement last week that the reporting requirements and associated penalties will not start until 6 April 2015.

To summarise:

From 6 April 2014 – PAYE/NIC is due and the Agency is liable for National Insurance Contributions. If these are not paid, the Agency will get the bill, plus interest and possibly penalties.

From 6 April 2015 – The quarterly reporting requirements start, and if returns under RTI are not made, penalties will arise. The first return will be due by 5 August 2015.

10. Are Personal Service Companies (PSCs) safe from the legislation?

There is no specific exemption for PSCs, but there are a few points that do make them a safe option. Most PSCs pay money out as salary plus dividends. Genuine dividends are not caught by the new rules, neither is salary (which is already subject to PAYE/NICs).

There are some risks however, and once the new rules are announced in full Agencies will need to do some due diligence on PSCs to ensure they are safe. In particular there is going to be a Targeted Anti-Avoidance Rule (“TAAR”) which might apply where an agency forces all the Operatives to set up a PSC to get round the new rules. The full details have not yet been announced.

11. Does this all apply to CIS?

Yes, Operatives currently working under CIS are potentially caught just the same as everybody else. These new rules take precedence over the CIS rules.

12. As an Agency I’m being told by my Supplier that they can still pay Operatives as self-employed, is that correct?

It is essential to understand that if a Supplier pays Operatives on a self-employed basis, the Agency is liable for any PAYE/NIC that becomes due as a result of these new rules.

Contrary to what some people are saying, this has not been changed by the amendments to the rules that were announced last week. The only changes are the limited ones mentioned above at question 3.

If you are an Agency and considering keeping Operatives as self-employed, it is vital that you can meet the control test set out elsewhere in these FAQs. If you cannot, you will be liable.

13. My Operatives are the same as one of the examples in HMRC’s guidance on control, so am I OK?

Last week HMRC issued some guidance on the issue of day to day control. This might be useful to answer the second bullet point at question 8 above.

However, the first question should always be: is there a right of control in any of the contracts? If there is a right of control in a contract, it does not matter what happens on a day to day basis and the HMRC guidance is irrelevant: the new rules will apply anyway.

On a general point, it is always important to be careful with HMRC guidance – it can be changed by HMRC, and it is not binding on the courts.

14. My Operatives have to follow health and safety rules, so am I caught?

If there is no right of control in the contracts and no other day to day control, HMRC have confirmed their view that general health and safety rules will not mean an Operative is caught. There is also other case law to support this view.

15. My Operatives are skilled, so doesn't that mean they are not controlled?

It is less likely that a skilled Operative will be subject to day to day control. However if the Agency has a contract with the Client which says that the Client has a right of control, the new rules will still apply, even if the Operative is skilled and not controlled on a day to day basis.

This is a difficult area as many Agencies will consider skilled Operatives should be outside the legislation, but in fact their typical terms with their Clients will probably bring them within the new rules. It may be difficult for Agencies to change their terms of business as this will have implications for their liability and their insurance costs.

16. My Operatives are on price work – surely they are not caught by the new rules?

The new rules apply purely on the basis of the control test. It does not matter whether the Operative is engaged on price work or an hourly rate. The same can be said about raising an invoice, or providing tools, equipment or materials. The normal tests of self-employment do not apply any more.

17. I don't have time to comply with the new rules by 6 April 2014. Surely the short timescale is unreasonable and I won't get a bill?

The new rules will start on 6 April 2014. The timescale has been kept deliberately short by HMRC so that there is no time for avoidance (this was admitted by HMRC last week).

In practical terms many Agencies and Suppliers will find it impossible to comply with the PAYE requirements in time, but this does not mean they will escape liability or interest. It may however mean that there will be no penalty.

If compliance is delayed until after 6 April 2014 for any reason, the person responsible for operating PAYE is relying on HMRC not catching up with them, or on the goodwill and pragmatism of the Tax Inspector. Good luck with that.