SQUIRE PATTON BOGGS

ONSHORE EMPLOYMENT INTERMEDIARIES

The Tribunal Sheds Some Light on "Control"

Whilst we are still awaiting cases that may shed some light on how the Tribunals and courts will interpret HMRC's new onshore intermediaries legislation (in no small part because it has only been in force from April 2014), a First-Tier Tribunal decision has now been published which is based on the preceding version of the agencies legislation. If it concerns the old law, why is it relevant? It's relevant because the Tribunal's decision rested on whether the workers were subject to control (or the right of control) – the very thing that is now part of the "get out of jail free" aspect of the new legislation.

New Legislation

To recap (and as set out in our articles earlier this year, *Onshore Employment Intermediaries - Full Speed Ahead, Ready or Not!* and *Onshore Intermediaries Update - It's Not What You Do, It's The Way That You Do It*), the new agencies legislation applies where:

- a worker personally provides services to a client;
- there is a contract between the client and someone other than the worker (i.e. the "intermediary"); and
- the services are personally performed by the worker and paid for by the client pursuant to that contract.

If these facts arise, the intermediary that has entered in to the contract with the client could be liable to account for employers' national insurance contributions and operate PAYE on any remuneration received by the worker, regardless of the employment status of that particular individual. The only ways to escape from those onerous obligations are if the **manner** in which the worker provides the services is not subject to **supervision, direction or control** by any person, or if the remuneration received by the worker is already PAYE'd and NIC'ed.

Given the crucial importance that the words "supervision, direction or control" will now have, HMRC has added some guidance to its updated manuals in an attempt to make clear whether and when those circumstances are deemed to arrive. Helpfully, the First-Tier Tribunal has also now considered just what "control" means, albeit in the context of the old agency provisions.

New "Control" Guidance?

Oziegbe v HMRC concerned a security guard, Mr Oziegbe, who had supplied other security guards to construction companies. The case questioned whether Mr Oziegbe was liable to operate PAYE and account for NICs contributions in respect of those security guards, as HMRC alleged they were agency workers, which under the old legislation would have meant the workers were under Mr Oziegbe's supervision, direction or control.

Rather bizarrely, HMRC, having raised an assessment against Mr Oziegbe, failed to produce any evidence to assert that the workers were in fact supervised, directed or controlled by Mr Oziegbe. Upon reviewing the evidence presented by Mr Oziegbe as part of the hearing, HMRC "seemed to accept" that Mr Oziegbe's appeal against the assessment should be allowed... It's therefore unsurprising that the Tribunal found in the taxpayer's favour pretty quickly.

So while the case was therefore likely to have been a laborious and stressful waste of time for Mr Oziegbe, the Tribunal's comments, particularly on the interpretation of "control", will be of interest to those looking to establish whether their arrangements are able to benefit from the statutory exemption to the new legislation.

- The Tribunal noted that the most obvious situation where the provisions will be relevant is when the worker "*fulfils a role in which it is natural and obvious that the client will exercise control over how the worker performs his or her services*". By way of example, the Tribunal noted that in the case of secretaries being provided by an agency who perform an identical function to secretaries that the client might directly employ (and who will be expected to fit in with all the work practices of the particular client), the control requirement will "clearly" be satisfied. So, **if the worker does the same job as the client's employed workforce, you are likely to find there is "control"**.
- The Tribunal went on to say that the **most obvious situation in which the control test will not be satisfied is "*where the particular service being rendered is one that is extraneous to the basic activity of the client*,** *such that it is entirely natural that the client will have no control or right of control*". Again, the Tribunal gave an example, this time of a construction company that contracts for the servicing of its mechanical equipment.

If an independent entity is contracted to service the various dumper trucks and excavating equipment, the Tribunal would not expect a worker (i.e. not an employee) of the contracted maintenance firm to be regarded as working under the "control" of the construction company. Whilst the construction company would indicate which vehicles were to be serviced, or that a particular vehicle had suffered some defect, the worker would "*do the required maintenance work on his own account, and not remotely in accordance with the direction or control of the client*".

- The Tribunal emphasised that "*the question is not whether the client indicates the particular job to be done, but rather the issue of how it is to be done*" – as we've said, **it's not what you do, it's the way that you do it** that will bring a worker's services within the scope of the legislation.

It is likely to be some time before the Tribunals and courts are required to consider the new onshore employment intermediaries legislation, but, for now, this case provides a useful indicator of the attitude of the Tribunal (and HMRC for that matter) to the crucial question of control.

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