

The Government is about to introduce the onshore employment intermediaries legislation, which will directly affect intermediaries (such as recruitment companies) which do not apply PAYE and make the necessary NICs payments when supplying workers to hirers/clients. In summary, the legislation requires the intermediary that provides the worker to the hirer to assume that the person they have supplied is “supervised, directed or controlled” by someone (yes, anyone!) unless it has evidence to the contrary. Where an individual is supervised, directed or controlled by someone, the intermediary must apply PAYE and make the relevant NICs payments and deductions, unless it has evidence that these amounts are already deducted elsewhere. The intermediary will also be responsible for new and significant reporting procedures.

On 13 March 2014, the Government issued its [response to the December consultation](#) on its proposal, as well as [practical guidance on what is meant by “supervision, direction or control”](#). One senses that the response has been rushed out to meet demand (perhaps evidenced by the unusually large number of typos in the document).

So, what key things do you need to know?

• **When does the legislation come into force?**

Despite strong opposition, the amended legislation will come into force in just 3 weeks – on 6 April 2014. We understand that the Government has amended the definition of “intermediary” that will feature in the final legislation and has made it narrower. We should receive the final legislation as part of the Finance Bill, which is due to be published on 27 March 2014.

This will give companies just over a week from receipt of the final legislation until the time that it bites, meaning most companies will be faced with a near Herculean task to be ready to operate under the new rules. It makes the three and a bit weeks that intermediaries will have between the publication of the guidance on what “supervised, directed or controlled” means in practice and the enforcement date seem positively drawn-out..!

One saving grace is that intermediaries’ responsibilities for record keeping and submitting returns have been delayed, as the rules in respect of those aspects will not come into force until 6 April 2015 – the first return will be due on 5 August 2015.

• **Does this apply to intermediaries which engage PSCs?**

HMRC makes clear that in most cases this legislation will not apply to PSCs – they will remain liable under IR35. In addition, there have been suggestions that the returns requirement for intermediaries engaging with PSCs may be reduced. Intermediaries pushing workers into PSCs to avoid the new legislation, will (according to HMRC) be caught by the introduction of a targeted anti-avoidance rule (a TAAR).

• **What if an intermediary is provided with documentation which states that PAYE & NICs have been dealt with, but this turns out to be false?**

Instead of liability lying with the intermediary that engages with the hirer, it will, instead, lie with the entity which provided the fraudulent documentation (provided that entity is in the UK) – this could be the end-client or the next intermediary in the chain.

• **What does “supervision, direction or control” mean?**

Rather than dealing with the difficult scenarios raised during the consultation process, HMRC has set out a variety of examples to assist intermediaries with establishing whether the new rules apply. Somewhat self-evidently, the examples would be most useful if they described situations that might be expected to fall in the grey areas. Unhelpfully, HMRC’s examples all drop into the “obvious black and white” categories of what does or does not count as supervision, direction or control. The key principle is that it is not enough for someone to simply determine what a worker is to do for them to fall within the legislation. If someone supervises, directs or controls how a worker performs their work (*or could do so(!)*) then the legislation applies.

• **What are the indicators that suggest the legislation applies?**

- Someone else has authority to dictate how the work is carried out or co-ordinates how the work is carried out
- The worker is given instructions, guidance or advice as to how the work must be carried out
- The services the worker provides are subject to a detailed specification/he is given a specific procedure to follow throughout
- The work is overseen by the hirer or intermediary’s manager
- The worker is regularly supervised by calls or in person or the work is checked by someone
- The worker’s manager steps in to provide guidance and assistance
- The worker works alongside the hirer or intermediary’s team and reports to the team supervisor
- The worker works on a specific shift/rota
- The worker wears an ID badge, polo shirt and jacket with the hirer or intermediary’s logo on
- The manner in which the worker carries out the work was planned for him
- The work is performed in accordance with a schedule that the worker is given each day (for example, the schedule contains the names and addresses of all customers and the specified times of each customer visit)
- The worker calls the manager after each matter and regularly reports back
- The worker is contacted regularly to establish his progress and to check work is being undertaken in accordance with the specified order

- **What are the indicators that suggest the legislation does not apply?**

- The worker has freedom to choose how he does the work
- No-one is able to intervene to decide what the worker must do and how he must do it
- The worker is free to prepare the work and his own creations as he sees fit
- Someone approves the work sample and then leaves the worker to carry out the work without any interference
- The worker is given a list containing the names and addresses of customers and time slots for each visit but is not supervised or directed on how to do his job when at the visit nor does he seek guidance from anyone
- The worker has the freedom to decide how he will make the delivery in that he can choose his delivery route
- Nobody is present to supervise or direct the worker whilst he works nor is anyone doing this from afar

Beware – **these are indicators**. The facts, as a whole, will determine whether a worker is covered by the new rules or not. Just because one or more the indicators suggesting that a worker's situation is outside the rules are present doesn't mean that the new legislation won't apply.

- **What should intermediaries be doing now?**

- Analyse the workers supplied to hirers/clients, e.g. list those workers for whom the intermediary does not deduct PAYE and account for NICs
- Set out the fact pattern that applies to the workers and assess, using the factors shown above, the likelihood that a worker will be caught by the new regulations
- Obtain documentation from PSCs and other intermediaries in the chain which confirms that PAYE and NICs are dealt with
- Await the final legislation, which is due out on 27 March 2014

- **And then, depending on what the final legislation and fact patterns look like:**

- Raise further enquiries with hirers where appropriate about the structure of the arrangement to determine if the worker is supervised, directed or controlled by anyone
- Check client contracts to determine if an increase in fees is possible to reflect the additional NICs costs
- Negotiate with clients with respect to paying for/sharing the increased NICs costs
- Apply PAYE and NICs where necessary with effect from 6 April 2014

We will provide another update once we have received the final amended legislation. Should you have any questions on any of the above, please contact any member of our Tax Strategy & Benefits or Labour & Employment Practice Groups.

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