

Following the release of [HMRC's response](#) to the *Onshore Employment Intermediaries: False Self-Employment* consultation on 13 March 2014, not to mention the rather [lengthy leaflet that gives examples](#) setting out exactly what "supervision, direction or control" actually means, the Chancellor of the Exchequer delivered the Budget. Whilst we still await the details of the final legislation that will be subject to Parliamentary debate (namely the Finance Bill), we do now have [the Budget Resolutions](#) which have legal effect as though they were contained in an Act of Parliament (albeit they will, eventually, be superseded by the Finance Act). Crucially, these Resolutions contain the amended agency legislation.

What does the rewritten legislation contain and are there any useful concessions? And, given the time to reflect on the guidance, what should companies be doing?

As demonstrated by the examples released by HMRC on 13 March, the legislation only applies to workers who personally provide services to a client:

- where the client has a contract with an intermediary (referred to as an "agency" in the legislation); **and**
- where the **manner in which** the worker provides those services is subject to supervision, direction or control by any person (or the right of supervision, direction or control).

Solely using "supervision, direction or control" as the trigger for the legislation does seem to drive a coach and horses through the well-established employment (and tax for that matter!) hallmarks of employment vs. self-employment. However, as is clear from the guidance, HMRC's intention is that if the **manner in which** the worker provides those services is subject to control (or supervision or direction), this is a "false self-employment" and the legislation will therefore apply.

Do not forget that the proposed amendments to HMRC's own internal manuals state that "the agency legislation will not apply... when the worker is legitimately self-employed", so perhaps the new rules will not be operated as widely as first feared (although only time will tell).

HMRC's guidance talks through some of the cases that have seen the courts deal with what constitutes "control". It is clear from the guidance that it is not the *ultimate objective* (it's not *what* you do) that is under scrutiny in considering whether this legislation will apply, but instead *the way in which that objective is achieved* (it's the *way* that you do it). **It is the means, not the ends** that will bring a worker's services within the agency legislation. Companies should therefore look to ascertain whether the workers they provide to clients (who are not part of their payroll (or anyone else's)) are subject to any supervision, direction or control in terms of the *manner* in which they provide those services.

Simply directing that a particular task is achieved will not see those services fall foul of the legislation. However, the more detail you specify as to how that objective is to be achieved the more likely you are to bring the worker's services within this legislation.

As noted in [our previous publication](#), the examples show how fact specific this test is likely to become and, without ensuring that a particular worker's situation exactly mirrors that set out in the examples, it may be difficult to be absolutely certain as to whether the services fall within the legislation or not. HMRC's response did state that "compliance officers will also help customers to make considered decisions in relation to the new legislation" – quite exactly what this means is yet to be confirmed by HMRC.

Much has been made of the Consultation Response's reference to a statutory defence for intermediaries. The legislation confirms this by including a subsection that disapplies the PAYE/NIC provisions where either the end client has provided the agency with a fraudulent document (which is intended to evidence that the manner in which the worker provides the services is not subject to supervision, direction or control) or where any other person provides the agency with fraudulent documentation (which is intended to constitute evidence that the payments receivable by the worker for the provision of the services already constitutes income that is subject to PAYE/NICs).

Companies that use "self-employed" workers to deliver their services to clients, be they staffing agencies, delivery firms, manual labour or even IT companies or market research organisations, are probably best advised to use the short time before 6 April 2014 to assess whether **the manner** in which the workers provide those services is controlled, supervised or directed. Only when this analysis is carried out can an intermediary make an informed judgment as to whether the legislation will even affect their business.

Should you have any questions on any of the above, please contact any member of our Tax Strategy & Benefits or Labour & Employment Practice Groups.

Contacts



Bernhard Gilbey
Partner
T +44 20 7655 1318
E bernhard.gilbey@squiresanders.com



Aredhel Johnson
Senior Associate
T +44 20 7655 1530
E aredhel.johnson@squiresanders.com



Phillippa Canavan
Senior Associate
T +44 20 7655 1689
E phillippa.canavan@squiresanders.com