

Agency workers: changes to treatment of workers supplied through UK based agencies, employment businesses or other intermediaries

Who should read this?

- those involved directly or indirectly in the provision of workers to end clients
- end user businesses provided with workers through agencies or intermediaries
- temporary or other workers supplied through agencies, employment businesses or other intermediaries

What are the changes?

From 6 April 2014 new rules apply to the treatment of workers supplied through agencies or other intermediaries. The new rules affect workers who have previously been provided to end clients through an agency, to work on a self employed basis. The changes apply where

- a worker personally provides their services - this prevents the use of a standard substitution clause to avoid the Agency legislation,
- there is a contract between an end client (or someone connected with them) and any third party (ie:- the agency), and
- as a result of that contract the services of the worker are provided, or the client pays for the services to be provided.

The changes to the Agency legislation do not apply if

- the manner in which the services are provided mean that the worker is not, subject to (or to a right of) supervision, direction or control by any person **or** the monies the worker receives for providing their services is already treated as employment income for income tax/NIC purposes.

From 6 April 2014 the agency must decide whether the way in which the worker does their work is subject to (or to a right of) supervision, direction or control by the end client or someone else. If it is then the worker will fall to be treated for income tax and National Insurance Contributions as an employee and the worker's pay will be subject to PAYE and Class1 employees/employers National Insurance Contributions.

What is supervision, direction or control?

Broadly speaking:

Supervision is someone overseeing a person doing work, to ensure that person is doing the work they are required to do and it is being done correctly to the required standard. Supervision can also involve helping the person where appropriate in order to develop their skills and knowledge.

Direction is someone making a person do his/her work in a certain way by providing them with instructions, guidance or advice as to how the work must be done. Someone providing direction will often coordinate how the work is done, as it is being undertaken.

Control is someone dictating what work a person does and how they go about doing that work. Control also includes someone having the power to move the person from one job to another.

Detailed guidance on the changes to the Agency legislation, effective from 6 April 2014 onwards, is contained within the HMRC Employment Status Manual (ESM2029 to ESM2068 [ESM2029 - Agency and temporary workers: agency legislation - provisions from 6 April 2014: contents](#)), which includes further guidance to explain the meaning of "supervision, direction and control" for the purposes of the Agency legislation.

Should a worker de-register from self assessment?

A worker who has been classed and taxed as self employed and then permanently ceases to be self employed would generally only make a self assessment return for the years in which there was some income from self employment. So if the self employment stopped in May 2014 they will need to complete a 2014-15 self assessment return.

Should a worker notify HMRC that self employment has ceased if PAYE and NICs are being deducted?

If the worker believes that they will be working as a self employed person during the tax year (ending 5 April 2015) then they would not normally notify HMRC that they have ceased to be self employed.

Should a worker de-register from the Construction Industry Scheme?

Where a construction worker is placed directly or indirectly with an end client by an agency or other type of intermediary, unless they are employed under an employment contract, then whether they are subject to PAYE or CIS deductions will depend on whether they are subject to (or if someone has a right to subject them to) supervision, direction or control in the job they are doing. So, with some contracts or jobs, the worker may be taxed as if they were an employee whilst in others, if they are not subject to supervision, direction or control they should properly have deductions under CIS.

If the agency says the worker is to be taxed as an employee they can remain registered in CIS, but whilst they are being paid as an employee they will have PAYE deducted under the new rules. If a worker has some jobs under PAYE and some jobs within CIS, they will still have to complete an annual SA return, and must do so in all cases where a return has been sent.

Whether a worker is under supervision, direction or control is always a question of fact, dependant on the arrangements in place and is not merely decided by the views of the worker, agency or end client, or **any statement within a contract between the agency and the worker, or other documentation that does not represent the true position.**

Does an agency need to register in the Construction Industry Scheme (CIS)?

The position is not changed by the new rules.

Where a worker is supplied to a contractor by or through an agency and the worker carries out construction operations under the terms of a contract they have with the agency, the agency supplying the worker will be a subcontractor as far as the contractor is concerned. The contractor must always apply the

scheme when making payment to the agency. Accordingly the agency needs to register in CIS and, if appropriate, apply for gross payment status.

Where a worker is merely introduced to the contractor by an agency and subsequently carries out construction operations, and is paid under the terms of a contract they have directly with the contractor, the agency is not a subcontractor in this case. If these are the only relationships the agency has, in terms of construction workers, the agency does not need to register in the CIS.

Note that if an agency, or other intermediary, contracts and pays a worker's Personal service Company (PSC) then it is the PSC and not the individual which must be registered in CIS. In determining whether to pay the PSC gross or net it is the company's CIS status that needs to be considered. This is particularly important where the worker previously provided their services directly and not through the PSC. The individuals CIS status is not relevant.

If the new rules do not apply to a worker in the construction industry, so that they are self employed, what is the position of the agency?

The agency will be a contractor and should fulfil all its obligations under the Construction Industry Scheme.

Does an umbrella company need to register in the Construction Industry Scheme (CIS)?

If payments to the umbrella company from the agency relate to construction operations then the umbrella company must be registered with HMRC under the CIS and the paying contractor or agency must ascertain the payment status of the umbrella company and pay it gross, deduct 20%, where the company does not have gross payment status, or in cases where umbrella company is not registered 30%.

Have the rules changed for workers working through an umbrella company?

No. Provided that workers are employed under an employment contract by the umbrella company the new agency rules do not apply because the income is already subject to PAYE and National Insurance Contributions.

As an “employee” then, subject to qualifying conditions, the worker will be entitled to statutory payments; sick pay, maternity pay and adoption pay. Whether or not they are entitled to holiday pay will be subject to the precise terms under which they are engaged.

If an umbrella company is employing construction workers under an employment contract then the workers do not need to be registered in CIS (for the purpose of that contract with the umbrella company) and the umbrella company does not have to consider the workers' CIS status. CIS only applies to individual workers who are paid on a self employed basis.

If I work in the construction sector through my personal service company (PSC) does my company have to register in the Construction Industry Scheme (CIS)

Yes. The PSC needs to be registered in CIS and the contractor or agency should pay the PSC gross or net depending on the PSC's CIS status. This is irrespective of whether you have gross payment status as an individual.

How do the new rules interact with the intermediaries legislation (commonly known as IR35)?

The proposed new legislation will apply, as the current Agency legislation does, where a worker is supplied by or through a third party. The third party (described in the legislation as the ‘agency’) is any structure interposed between the person in receipt of the worker's services (the engager) and the worker. The third party therefore includes employment businesses and personal service companies (PSC). Those persons working through PSC's will need to consider the Agency legislation in the same way as they do now, both where the PSC engages directly with an engager and where the PSC is engaged through other parties such as employment businesses.

For the proposed new Agency legislation to apply to a worker providing their services through a PSC, all of the following qualifying conditions need to be met:

- the worker personally provides services to a client as a consequence of a contract between that client (or a person connected to that client) and a third person (the agency);
- the manner in which the worker provides the services is subject to (or to the right of) supervision, direction or control by any person.
- remuneration is received by the worker in consequence of providing the services; and
- that remuneration does not constitute employment income apart from when the provisions of the Agency legislation are applied.

The Agency legislation, (pre and post 6th April 2014 onwards), will not generally apply where a worker is engaged via a PSC, as all the above criteria will not normally be met. This is because:

a) As set out above, the Agency legislation will only apply when remuneration is received by the worker as a consequence of providing the services. Therefore dividends paid to the worker as a genuine consequence of their shareholding in the PSC will not normally constitute as being “remuneration” for the purposes of the Agency legislation.

b) Similarly, the Agency legislation only applies when the worker receives remuneration which is not employment income before the provisions of that legislation are applied. Any salary paid to the worker by the PSC is already employment income and so the new Agency legislation would not apply to that remuneration.

c) Loans are made by reason of the person’s employment with the PSC. Beneficial or written off loans are chargeable to tax/NICs as earnings but do not normally arise as a consequence of the worker providing the services. As such, they would not count as being remuneration for the purposes of the Agency legislation.

If neither the Agency legislation nor the Managed Service Company legislation applies then anyone working through a PSC needs to consider the Intermediaries legislation, more commonly known as IR35. This will continue to be the case under the proposed new legislation. IR35 applies where the relationship between the worker and the engager would be one of employment, if the PSC and any other party in the contractual chain did not exist.

What happens if an agency treats a worker as self employed when they should have been taxed as an employee?

With certain exceptions the agency will have to account for PAYE and Class 1 employee and secondary employer National Insurance Contributions.

The only exceptions are if:

- the client provides the agency with a fraudulent document which is intended to evidence that the worker is not subject to (or to a right of) supervision, direction or control, or
- another person provides the agency with a fraudulent document which is intended to evidence that PAYE has already been applied to payments the worker received.

In these cases the liability to pay PAYE falls upon either the client or the other person. If either of these two parties is a limited company and that company fails to pay the relevant PAYE owing, then HMRC may hold the directors of the company personally liable for paying the PAYE owing, plus any interest accrued.

Further details covering the circumstances under which the PAYE liability may be transferred to company directors is contained within the Employment Status Manual at (ESM2045 to ESM2047 - [ESM2045 - Agency and temporary workers: agency legislation - provisions from 6 April 2014: transfer of PAYE and secondary employers NIC liabilities \(6 April 2014 onwards\)](#)).