



i-paye



**Agency Guide to  
Intermediaries and  
Risk**



# FOREWORD

---

On 6 April 2014 the Agency Legislation was amended to prevent the use of

- **Offshore Employment Intermediaries** to avoid the payment of Employment Taxes (Income Tax and NI).
- **Onshore Payment Intermediaries** that paid individuals on a self employed basis.

Payments to Offshore Employment Intermediaries must be made net of Employment Taxes and a failure to do so would result in the Employment Taxes being due from the Agency that has the contract with the end user client or Engager. Only if a certificate has been issued by HMRC, to exempt the payments from deduction, can the payments be made gross. This can be particularly tricky when a non-UK PSC is involved in the supply chain.

Payments to Onshore Employment Intermediaries, that falsely pay a worker on a self employed basis, ensures that whenever a loss of Employment Taxes arises, the Agency who has the direct relationship with the engager is responsible for the loss.

On 6 April 2016 the Travel and Subsistence (T&S) Regime was amended to prevent the perceived abuse of the existing Travel and Subsistence rules that had been in place since 1998.

New Legislation was added to ensure that workers who are 'akin' to being an employee of the engager could no longer claim for T&S to be paid free of Employment Taxes. Only individuals that are caught by the new rule are denied the T&S relief, and not, as widely reported, all individuals employed by Employment Intermediaries.

Unlike the Agency Legislation, the responsibility for evidence rests with the Employment Intermediary that Employs the worker, and the ultimate responsibility for any unpaid Employment Taxes rests with the Employment Intermediary and its Directors.

Only in the event that the Employment Intermediary has been provided with a Fraudulent Document by either the Agency or the Engager can the debt be transferred to the relevant party that provided the document.

On 30 September 2017 a new **Corporate Criminal Offence of Failing to Prevent the Facilitation of Tax Evasion** became Law in the United Kingdom, applying both to the Evasion of UK Taxes and Taxation anywhere else in the World.

This guide is written to educate Employment Agencies on their legislative obligations and also to provide them with knowledge to mitigate their own, and their end user clients, risk both financial and reputational.

# Contents Page

---

## CHAPTERS

	<b>Page</b>
1. Relevant Legislation.....	4
2. Supervision, Direction or Control.....	6
3. Intermediaries Offshore .....	7
4. Intermediaries Onshore.....	8
5. Due Diligence.....	9
6. Models Explained.....	10
7. Agency Reporting Requirements.....	15
8. Interaction with IR35 and Personal Service Companies.....	16
9. Construction Agencies Roadmap.....	17
10. Providing Workers to Work Outside of the United Kingdom.....	18

## OTHER INFORMATION

A. Simple Action Plan to make sure you are safe.....	20
B. Professional Passport - Ensuring Compliance within your Supply Chain.....	21
C. Managed Service Company.....	22
D. Managed Service Company Tax Case.....	23

# 1: Relevant Legislation

---

## Agency Legislation

### HMRC Statement:

"The proposal is to strengthen existing legislation relating to employment agencies by removing the obligation for personal service.

The legislation will focus on whether the worker is subject to, or the right of, supervision, direction or control as to the manner in which the duties are carried out.

The concept of an agency contract has also been removed from the legislation.

Control for the purposes of the new legislation will mean that anyone able to exercise control, or have the right to exercise control, about how the work is carried out.

Where a worker is engaged by or through an intermediary then there will be a presumption that there is control over the worker.

Where an intermediary does not think that there is control, direction, supervision, or the right of control direction or supervision over the worker, there will a requirement for them to keep or have access to evidence of this.

If the intermediary is unable to produce satisfactory evidence when requested by HMRC, then HMRC may recover tax and NICs from the intermediary."

## Employment Intermediaries

### HMRC Statement:

"For Employment Intermediaries the proposal is to remove the relief currently available for workers travelling from home to a workplace by requiring an additional test to be satisfied.

The test in question is the same as the test within the agency legislation, which is whether anyone has the right of supervision, direction or control over the manner in which the services are provided.

Where an Employment Intermediary reimburses travel costs free of Tax and National Insurance then they must hold sufficient evidence to support their opinion that no one has a right to supervision, direction or control over the manner in which the worker provides the services.

For Personal Service Companies the position is that if IR35 applies, then no Travel and Subsistence deduction is given in the Deemed Employment Income Calculation."

# 1: Relevant Legislation

## Corporate Criminal Offence of Failing to Prevent the Facilitation of Tax Evasion (CFA 2017)

### HMRC Statement:

*"The Government believes that relevant bodies should be criminally liable where they fail to prevent those who act for, or on their behalf, from criminally facilitating tax evasion.*

*The new offences will be committed where a relevant body fails to prevent an associated person criminally facilitating the evasion of tax, and this will be the case whether the tax evaded is owed to the UK or foreign country."*

### I-PAYE Comment:

It is important to note that **tax evasion is already a criminal offence**, whereas tax avoidance is not.

Before applying the legislation, someone must have actually undertaken a criminal act to evade taxation (**Step 1**). Non-compliance is not by definition Tax Evasion.

Tax Evaded in the context of this guide would be (Social Security (NI) and Income Tax (IT), Corporation Tax (CT) and Value Added Tax (VAT).

*"Tax evasion involves, under existing laws the deliberate misrepresentation of a business's or an individual's financial affairs to the tax authorities to reduce tax liabilities by:*

- deliberately not declaring all income.*
- claiming expenses that are not due.*
- creating false documents to support the understatement of income or over claiming of expenses."*

Once Step 1 has been found to apply HMRC will then look to see has anyone (Associated Person (AP) / Representative (R)) of the relevant body assisted the taxpayer in Evading Tax (**Step 2**).

Once Step 2 has been found to apply HMRC will then look to see whether a relevant body (Company or Partnership) failed to prevent its AP or R from assisting in the Evading of the relevant Tax (**Step 3**).

### Defence

Prevention is the best form of defence and agencies should seek to ensure that they have a robust process that ensures that all their suppliers are not undertaking any form of Tax Evasion, anywhere in the world, and that their own employees are aware of the new legislation and not inadvertently engaged in facilitating Tax Evasion.

The remainder of this booklet concentrates on the UK rules, but comment is made whether the scheme poses a low or high risk of triggering liabilities because:

- there is the facilitation of UK Tax Evasion (**UTE**); or
- there is the facilitation of Foreign Tax Evasion (**FTE**)

## 2: Supervision, Direction or Control

Before looking at which sectors are most affected by the changes in 2014 and 2016 it is important to understand the **SDC Test**.

HMRC guidance on the SDC Test states "when considering if the provisions of the agency legislation apply to a persons job, we are looking at whether that person has the freedom to choose how they do their work, or instead does someone have the power or authority over the worker to dictate how the work is done, by imposing control over them, subjecting them to supervision or giving them directions."

This is slightly misleading as HMRC's own internal guidance suggests that when considering the above that someone must be be capable of exercising the right that is meant to exist and this position was confirmed in a First Tier Tribunal ruling in 2014 (See later in this guide).

It is clear that it would be difficult to argue that the following are not subject to the SDC Test and HMRC confirm as much in their guidance.

- Healthcare Professionals and Assistants.
- Teachers and Teaching Assistants.
- Social Workers and Assistants.
- General Construction Operatives.
- Warehouse Workers.
- Call Centre Staff.
- Administration and Office Personnel.
- Workers Covered by the GLA.
- Workers involved with the Extraction of Oil and Gas.
- HGV and Delivery Drivers.
- Individuals involved in Maintenance and ongoing support of the engagers business.

Inevitably there may be exceptions to general rules and HMRC have accepted that, for example, a Drama Teacher that is brought in to organise the Christmas Play, would probably not be caught by the SDC Test.

HMRC manuals provide some assistance on whom they believe that the Control Part of the SDC Test is unlikely to apply based upon established case law.

"Many employees are professional or skilled workers where control over how they work is not really appropriate and they do not work under direct supervision of the employer. Examples include the master of a ship, an engine driver, a head chef and a consulting engineer.

Clearly superintendence and control cannot be the decisive test when dealing with professional man or a man of some particular skill.....a professional architect....in such cases there can be no question of the employer telling him how to work"

Additionally they also consider the SDC Test for Project based workers and they state.

"It is important to distinguish between engagements where the contract will end upon completion by the worker of the specific task, assignment or project identified in the contract(s) and those in which the worker is engaged on the company project for a set period.

In the former, it is likely that, as the worker is engaged to complete a specific task or assignment, he/she cannot be moved onto other tasks and in that respect there will be an absence of (right of) control by the client over 'what' work to do."

**Reading these HMRC Manual extracts together it would be reasonable to conclude that a skilled worker that is engaged to complete a particular task or project is not the intended target of the SDC restriction.**

### 3: Intermediaries:

## Offshore: Employment, Self Employment and PSC

---

Whilst the use of offshore companies (a company based outside the United Kingdom) had been on the wane in recent years we have seen the use of these companies increase. Many hide their the offshore identity behind a UK facade, which may be a PSC or other intermediary type.

When deciding whether the Offshore Intermediaries legislation applies it is important to consider where the work is being performed, who it is performed on behalf of and who it is performed by.

Any payment made by a UK Recruitment business to a NON UK based Business, where the worker is providing services to a UK based business, must be made under the deduction of Employment Taxes, including Employers National Insurance. If a UK Recruitment business pays the money to a UK Based business that in turn makes a payment to a Non UK Business then the UK Recruitment business who has the contract with the end user client in the UK, who will be held responsible for any unpaid Employment Taxes, including Employers National Insurance.

The only exemption from National Insurance would be if the NON UK business furnished the UK Recruitment business with a certificate of continuing liability to Social Security in their home country (A1). This would mean that no Employers NI or Employees NI would be due.

Unfortunately, for Income Tax purposes there is no similar certificate and unless HMRC issued a 'NT' no tax coding then the agency would be responsible for retaining PAYE at source, even if the worker also pays tax in their home country.

**In a nutshell, it is clear that the Offshore Intermediaries Legislation has been designed to prevent the use of Offshore Intermediaries for all workers working in the United Kingdom.**

Agencies should also be careful when engaging UK workers to work overseas for a UK Client, as the Agency Legislation may mean that the agency is responsible under the Onshore Employment Intermediaries for any unpaid Employment Taxes, if the worker remains Tax resident in the UK and they had been in the UK immediately before going overseas and is not covered by the EU Social Security Legislation or a Reciprocal Social Security Agreement. **Obviously, only if caught by the SDC Test.**

There are separate rules for the Oil and Gas Sector that has a certification process, where the NON UK based business can prove that they are correctly accounting for UK Employment Taxes.

#### **CFA 2017 Risk: UTE Low**

The Offshore Employment Intermediaries only applies to assignments in the United Kingdom and this legislation has limited the scope for the use in the United Kingdom.

#### **CFA 2017 RISK: FTE High**

If we look at the use of Offshore, including UK Intermediaries, that operate without correctly reporting the income then there is a high risk of any tax loss resulting in an unlimited fine being levied on the agency.

# 3: Intermediaries:

## Onshore: Employment, Self Employment and PSC

The following comments relate solely to the provision of workers by UK based intermediaries working on UK Assignments.

### Employment Intermediary

CFA 2017 Risk: Low\*

A company that pays all income out as Remuneration that has been subject to Income Tax, Employees NI and on which Employers NI arises.

Expenses are reimbursed Tax Free out of a separately identified allowance for travel to and from a Temporary Workplace.

### Hybrid Model

CFA 2017 Risk: Low\*

A company that engages the worker on a self employed basis, avoiding employer responsibilities, but deducts employment taxes, including Employers NI from the worker.

### Partnership

CFA 2017 Risk: Low\*

A Partnership is a type of intermediary in which the individual partners are assessed on a self-employed basis.

The main Partnership Model used is a Limited Liability Partnership.

### Personal Service Company

CFA 2017 Risk: Low\*

A Personal Service Company often called a “one person” Limited Company is a company that is owned by, controlled and operated by owner, who is the Director and Shareholder.

The Director withdraws Remuneration which is subject to UK Employment Taxes and on which Employers NI arises.

The Director claims expenses from the company incurred in performing his or her duties.

Any profits arising are subject to UK Corporation Tax and the remaining money is distributed to the shareholders.

### Payment Intermediary

CFA 2017 Risk: Low\*

A Payment Intermediary pays the worker on a self-employed basis, accounting for Tax if within the Construction Industry or paying the worker Gross if not.

A Payment Intermediary is not an Umbrella Company, although many advertise themselves that way, causing confusion for workers and their representatives.

The onshore employment intermediaries legislation does not apply to Employment Intermediaries, Personal Service Companies and Hybrid Models as all remuneration paid is subject to Employment Taxes at source. Dividends paid by the PSC to its shareholders are not remuneration payable to a worker.

Due to the structure of the legislation any payments made to a partnership could result in the agency being liable for Employment Taxes if the worker is subject to the SDC test and the partnership fails to account for Employment Taxes at source. This is because the onshore legislation is considered before IR35. So a worker might be outside of IR35, but because they are being paid as a self employed partner of the partnership he could be caught by the SDC test.

The agency must hold evidence that it has considered the SDC test when making a payment to a Payment Intermediary that subsequently pays the worker on a self employed basis.

**\*The risk under CFA 2017 of UTE is considered low for the above if they are working on assignments in the UK, as existing tax legislation prevents avoidance, but an agency should be careful if expenses are being reimbursed without verification, expense claims are completed by an Associate or representative of the agency.**

The risk under CFA 2017 of FTE is considered high if any of the above models are used for overseas assignments and are not accounting for the income fully in country or are applying deductions that are not due under local law.



## 5: Due Diligence

---

Under all existing Anti-Avoidance legislation, agencies had been excluded from any compliance or due diligence requirements. In fact it would be fair to say that the 2007 MSC Legislation inadvertently encouraged agencies not to ask any questions or else run the risk of getting any debt transferred to them.

Under the **Offshore Employment Intermediaries** Legislation any agency that does not undertake the required due diligence and unknowingly pays an Offshore Intermediary, or pays a UK based Intermediary that then pays the worker on any basis that results in a loss of employment taxes, will be liable for any shortfall.

Under the **Onshore Employment Intermediaries** Legislation any worker that is paid on a self employed basis and either no SDC test has been done or the SDC test applies would result in the agency, who has the contract with the engager, being liable for any loss of employment taxes.

Under the **CFA 2017** Legislation agencies **must know** what is going on once they have paid the invoice to the relevant intermediary and should seek confirmation that all relevant taxes have been paid and to whom.

Under the legislative change to the Travel and Subsistence rules, no agency will be liable for any underpaid Employment Taxes on expenses incorrectly reimbursed, unless the Agency has provided the Employment Intermediary with a fraudulent document.

At present the only obvious way forward for agencies would seem to be:

1. Ensure you have full visibility of the money trail, ensuring that money does not leave the supply chain, except to cover known costs, and that the Taxes are paid to the correct relevant authority.
2. If you hold evidence that the **SDC Test does apply** then those workers shouldn't be paid through a Payment Intermediary or be allowed to claim expenses through an Employment Intermediary, who you should inform.
3. If you hold no evidence then the worker must be paid on a Employment Only Income Model or through a UK PSC.
4. Rely upon third party audits to verify that the company you are engaging with is doing exactly what they say they are doing or undertake your own due diligence.
5. If your workers are picking up an unusually high percentage of net income, then ask why.
6. Don't take things on face value, check out the Directors, shareholders and that the business is actually based in the UK.

### Fraudulent Documents

In our opinion for the **Onshore Employment Intermediaries** a fraudulent document is any document provided by the client to the agency that misleads the agency for the purpose of forming a false conclusion that the SDC test does not apply. If that is the case then the legislation suggests that the Employment Taxes due would be collected from the engager instead of the agency.

For individuals that are having travel costs reimbursed because the SDC Test doesn't apply, then there is little risk to the agencies. However, we have seen attempts to circumvent the rules by implying that the workers visit several sites during their engagement, for the same client, and the contracts between the agency and the Employment Intermediary have been amended to present that particular picture. The expenses that have been allowed are not subject to the SDC Test because the worker is a mobile worker. However, in the event that HMRC find that the worker is not a mobile worker and no evidence is held that the SDC test did not apply, then the loss of Employment Taxes on the expenses may be subject to debt transfer to the agency, as the contract is the fraudulent document.

## 6: Models Explained:

# Employment Intermediary for UK Assignments

### ✓ Exempt from Offshore Intermediaries Legislation

An **Employment Intermediary** is a company that employs individuals under an 'over-arching' contract of employment and provides them to agencies that in turn provide them on to an engager. The Employee is employed on a permanent basis not on a temporary or agency contract.

All payments to the employee are made under the deduction of Employment Taxes (Income Tax, Employees National Insurance) and the Employment Intermediary accounts for Employers National Insurance.

The only payment made to the worker that is not subject to Employment Taxes and Employers National Insurance will be expenses allowable under Income Tax and NIC Legislation.



Must pay the worker at least NMW or NLW, comply with WTD and the Agency Worker Regulations.

Must operate within HMRC guidance and must reimburse expenses out of a fixed expense allowance. The Allowance must be set for each new client assignment.

Expenses can only be reimbursed tax free if worker is working at a temporary workplace and is either not caught by the SDC test or a mobile worker.

Must be able to prove that they are operating correctly and compliant with all legislation that applies.

Expense Claims **must be** completed by the workers themselves and supported by legitimate receipts.

If the Employment Intermediary is paying all the income out as employment income only and has a robust process for verifying the SDC Status of the worker and expenses they submit, then **there is no risk to the agency under the agency legislation (onshore / offshore) MSC Legislation of CFA 2017.**

## Employment Intermediary for Overseas Assignments

Must be able to prove that they are operating correctly and compliantly with all legislation that applies in the relevant country, and that all income is being reported as required.

If they are not paying taxes to the overseas authority on all income. Do they have confirmation as to why not?

Whilst there is little risk under existing anti-avoidance legislation, there is clear risk if the Employment Intermediary is ignoring local rules and creating a tax loss and a FTE charge under CFA 2017.

## 6.1: Models Explained: UK Based Personal Service Company

✓ **EXEMPT FROM AGENCY LEGISLATION, USUALLY.**

A **Personal Service Company** is a Limited Company that is owned and managed by the individual providing the services to an end user client; typically an agency is also in the contractual chain.

All UK Personal Service Companies should be visible at Companies House at [www.gov.uk/government/organisations/companies-house](http://www.gov.uk/government/organisations/companies-house)

A typical PSC will be structured as follows:

- Director (Worker)
- Company Secretary (Spouse or civil partner of Worker)
- Shareholder (Worker)
- Shareholder (Spouse)

The income will in be one way or another paid to:



The Director who receives a Salary and Reimbursed Expenses.



The Company Secretary who receives a Salary.



The shareholders who receive dividends.

If the Directors and Company Secretary's remuneration has been subject to UK Employment Taxes and the Company has accounted for Employers National Insurance then the agency legislation will not apply, as this part of the income has been subject to Employment Taxes.

If the company profits, after accounting for UK corporation tax, are distributed to the shareholders as dividends, then this income is exempt from the new legislation as it only applies to remuneration paid in respect of the service provided.

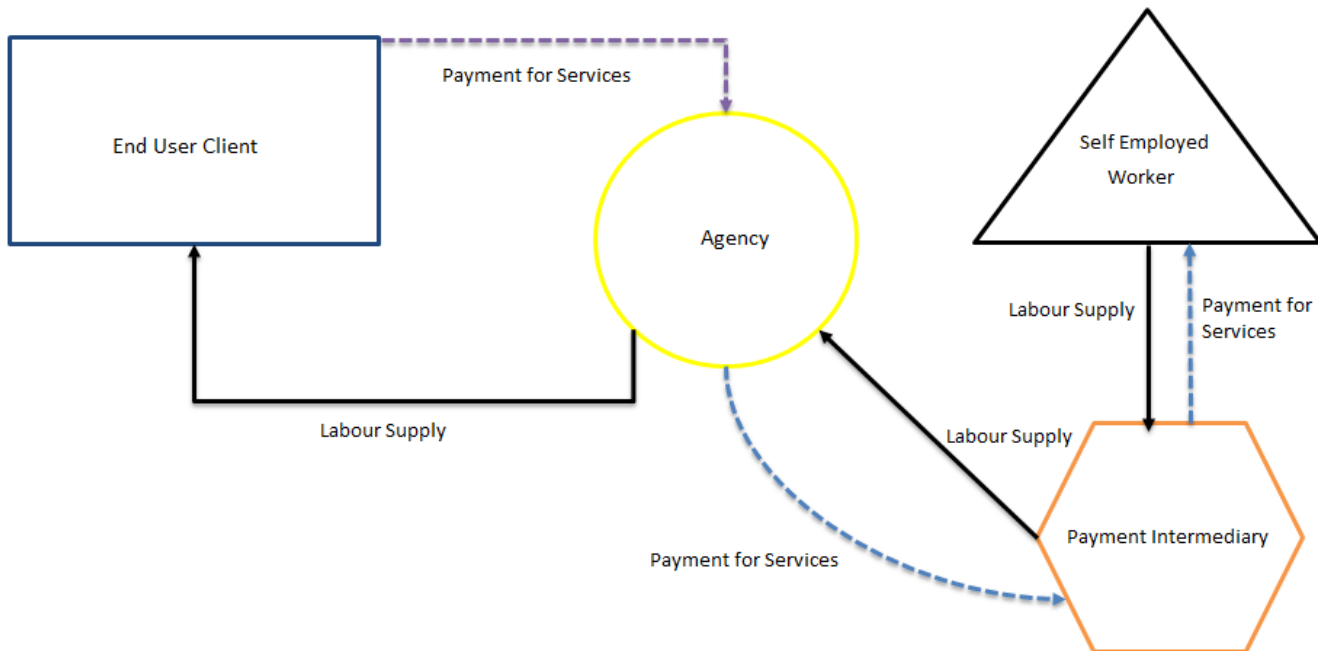
All PSCs must still take in to account IR35, but this is between the PSC and HMRC, even if dividends are re-categorised as employment income.

Any deviation in the above model may result in HMRC seeking to apply the onshore employment intermediaries and possible CFA 2017. If the PSC applies the standard model, then **there is no risk to the agency, even if the worker is subject to IR35.**

If a UK PSC is used to provide the services of a worker on an international assignment, then the main area of concern for any agency is that it will trigger a FTE charge under CFA 2017, if the PSC has failed to disclose income to the overseas tax authority resulting in a loss of taxation, even if the tax has been accounted for to the UK Tax Authorities on the same income.

## 6.2: Models Explained: Payment Intermediary - Self Employment

**SUBJECT TO AGENCY LEGISLATION IF SDC TEST APPLIES.**



The above is a typical payment structure for a Payment Intermediary. Under this model:



The Self Employed Worker is paid gross by the Payment Intermediary with no deduction for Income Tax and / or Employees National Insurance.



The Payment Intermediary has no responsibility to verify the identity of the Self Employed Worker. Only if the worker is providing services within the construction industry scheme is any verification is undertaken



If not within the CIS Scheme the only deduction made by the Payment Intermediary is the service fee.

One of the main areas of concern for HMRC in this model, when not applied to the construction sector, is the lack of visible compliance and the use of the model to convert an employed worker as they leave work on Friday to a self-employed worker when they return on Monday.

Any payments to a Payment Intermediary that in turn pays a worker self-employed must be supported by evidence that the worker is not caught by the SDC Test and this must be held by the agency. In the event that the Payment Intermediary has offered tax loss insurance to the agency then there is concern that this may trigger the MSC Legislation and / or never actually have the ability to be claimed against as the basis on which it is offered is that the worker is not subject to the SDC Test in the first place.

**A gross payment to a worker working on an assignment overseas by a payment intermediary on a self employed or gross basis should be considered as presenting a high risk of triggering a FTE charge under CFA 2017, unless clear evidence is held that local reporting has been undertaken.**

## 6.3: Models Explained: Hybrid Model

Hybrid Models engage workers on a self employed basis, this means that the workers are not entitled to many of the statutory benefits that most employees are entitled to.

The most aggressive models deny workers their entitlements to Holiday Pay, to participate in a workplace pension and to receive statutory entitlements (Sick Pay, Maternity and Paternity Pay).

The ability to claim other benefits may be severely restricted if and when they are out of work.

It is no surprise that **BEIS** are undertaking an urgent review in to such models and the UK Press are actively naming and shaming companies that use such schemes.

Typical Hybrid payment statements:

✓ Pay a Salary in line with National Minimum or Living Wage.

That's about it when it comes to compliance. They then

- × **Roll up** the Holiday Pay in to the Salary paid as NLW or NMW.
- × **Deduct** Employers NI deducted from the rate as a business cost.

If an employment tribunal found that the workers are falsely classified as Self Employed and that they are in fact workers then it is highly likely that they will make a claim for Holiday Pay from the agency involved under the Agency Worker Regulations as no protection will be available under the "self employed" exemption. Under AWR the potential cost of this could be paid for by the client utilising the services of the worker(s).

### Employment Maintenance Allowance Fraud

A slight variation of the above model has been developed and that involves the use of the Employment Maintenance Allowance (EMA). In these schemes two or three workers are bundled in to a company and as the income is paid out as employment income only, then the Agency and MSC Legislation does not apply. The EMA is offset against the Employers National Insurance arising on the earnings. The worker is then paid NLW / NMW for each hour worked, which includes Holiday Pay.

HMRC are adamant and have confirmed in a recent spotlight that these schemes do not work and are taking advantage of a deduction against the Employers National Insurance rightfully due.

These schemes also suggest that they get around the Apprentice Levy by utilising the AL Allowance, which clearly is not the case.

HMRC have put together a task force to locate and shut these types of structures that hide behind the "umbrella company" definition. However, in an attempt to hide from HMRC these schemes now are disguised as legitimate agencies, with the workers sub-contracted in via small companies.

Clearly CFA 2017 would apply as there is clear Tax Evasion by applying a deductions against the Employers NI and Apprentice Levy that legitimately are not due. The companies themselves go in to liquidation at the first hint of HMRC attention resulting in a Tax Loss that HMRC now seem to have a way of collecting, from any agency that utilise such schemes.

## 6.4: Models Explained: Other High Risk

We would put the following in the **High Risk** Category and we have stated the reason why.

### Partnerships

Partnerships do not pay income out as employment income. Profits earned are drawn by the partners who are taxed on a self-employed basis.

As the Agency Legislation is applied before IR35 then any liability can be collected from the agency.

### Limited Liability Partnerships

As Partnerships above, although typically the Partnership is provided by a third party who is also a partner.

### Employee Loan Schemes

Most of the schemes in the market place replace money payable to the worker as remuneration with a loan which is provided at a commercial rate of interest. The loan is ultimately repayable at some future date, but in reality probably never.

There are triggers within the taxation legislation, and when a loan is written off it becomes employment income subject to Employment Taxes and Employers NI.

New Disguised Remuneration rules to be brought in suggest that any loan, no matter who loaned it, that remains outstanding as at 6 April 2019 will be subject to an immediate tax charge.

For schemes that HMRC have identified the workers using them are now receiving advance payment notices requesting payment of unpaid taxation within 30 days.

### Managed Employment Company (MEC)

There are a number of variations for these types of structure and they rely upon the fact that under the Agency, MSC and IR35 Legislation the rules fall away if all the income is paid out as employment income only. This is generally accepted as correct, but there are other risks.

If the Managed Employment Company is to reimburse expenses then it must apply the SDC Test.

If the MEC is claiming the EMA or the Apprentice Levy Allowance, without dividing it across all the MEC then there will be a Tax Loss, when the company is unable to settle what is rightfully due, which may trigger fines under CFA 2017.

### Managed Service Company

Similar to the above, but the worker withdraws some of the company after tax profits as dividends.

Please see page 22 on identifying whether you are dealing with a managed service company and the consequences of doing so for both workers and agencies.

### Absent Trader Fraud (ATF)

Under an ATF a company invoices for the services of a worker and is actively trading charging VAT on the invoices. The company reports to HMRC that it is dormant and files dormant accounts with HMRC and Companies House.

Generally, it is a scheme administrator that controls the company and not the workers who are oblivious to the fact that no tax is being paid.

Clearly CFA 2017 would give HMRC the powers to penalise all involved, including the agencies that engage with such schemes.

# 7: Real Time Reporting

---

At the core of HMRC Compliance is the requirement to disclose to HMRC every worker that has been hired in to an end user client and not reported on the agencies own Real Time Information (RTI) submission to HMRC. So everyone that has not been PAYE by the agency will need to reported as part of a quarterly return.

Payments to Offshore Employment Intermediaries should not be reported as they should have been subject to PAYE and reported on the PAYE Real Time Information submission on the date of payment.

HMRC at present would wish to see the following:

- Worker full Name
- Workers National Insurance Number
- Workers Address
- Workers Date of Birth
- Workers Gender
- If the Worker is not a UK Citizen their passport Number or ID Card
- **Reason why they have not been reported on the Agencies RTI submission.**
- Name and Address of the business who is supplying the worker to the Employment Business.
- Hours worked by the worker

HMRC have commenced using the reports submitted to identify those agencies utilising self-employed workers, in the construction and driving scetors and we would expect Targeted Compliance activity. HMRC do state that they are looking to assist agencies in complying with the requirement to apply the SDC Test.

The starting point seems to be a letter sent by a specialist unit, the letter states that they are following up on the submission made that indicates that the agency has provided workers to an engager that have been paid on a self-employed basis and then asks the agency to confirm why. The options being

- A. that the agency are happy that the SDC Test does not apply.
- B. that they have made an error and the worker has or will be paid under PAYE from .....
- C. Some other reason.

Agencies have 14 days to respond to the letter and it is not clear what the next step is, but we would assume that no response would trigger a visit from a specialist task force next time they are in the area.

## CFA 2017

It is unclear whether HMRC would have a light touch approach when applying CFA 2017, but the first an agency may hear of a problem is when a letter arrives suggesting that HMRC are investigating a suspected UTE or FTE case and requesting information of the steps that the agency applied to ensure that there was no tax loss.

If no evidence is forthcoming then the next step maybe a fine, which might just be equal to the tax loss.

## 8: Interaction with IR35

---

### HMRC STATEMENT

This note sets out HMRC's view on the way the proposed changes to the agency rules interact with the Intermediaries Legislation (commonly known as IR35). We are publishing it in response to concerns that have been raised during the consultation on Onshore Employment Intermediaries: False Self-Employment. We hope it will provide useful clarification alongside the consultation.

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 working through PSCs 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, or is personally involved in the provision of, services to another person as a consequence of a contract between that person and a third person;
- 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 under the Agency legislation.

**As is currently the case, the proposed Agency legislation will not generally apply where a worker is engaged via a PSC, as all the above criteria will not normally be met.**

### TAAR

Within the legislation is a Targeted anti-Avoidance Rule (TAAR) to deter the emergence of new models designed to circumvent the agency legislation and HMRC have confirmed that should an agency insist that all the workers they provide on to end client operate through PSCs that they may seek to apply the new TAAR and seek to recover the lost Income Tax and National Insurance from the agency. Therefore, the use of a PSC should not be perceived as a silver bullet to the Agency Legislation and may also trigger the Managed Service Company Legislation.



# 9: SDC Testing for Employees of Employment Intermediaries

---

## HMRC have confirmed

"There is nothing in the legislation that sets out that evidence of a lack of supervision, direction or control over the manner work is carried out needs to come from the end client. Although in most cases, evidence will need to come from the client to ensure that appropriate evidence has been obtained that supervision, direction or control is not present in how a role is carried out, in order to prevent liability being transferred to directors, it could be possible that some or all of the analysis which would form proof of a lack of supervision, direction or control could come from the worker themselves if they were suitably informed." **Philip Horswill HMRC**

It is vital that any Employment Intermediary has in place a robust process that allows them to form a reasonable conclusion as to whether the worker is subject to the SDC Test and from that whether the worker can have expenses reimbursed free of Income Tax and National Insurance.

It is also clear that a simple statement signed by the worker would not suffice and also that a yes / no questionnaire on its own would not sufficient evidence.

## Robust Process

The starting point for any robust process must be to assess whether a worker would qualify under the rules that had been in place from 6 April 1998, namely that the workplace is a temporary workplace. Assuming that they could be working at a temporary workplace then it is the appropriate to test whether the SDC Test applies or not.

We believe key characteristics must be present to even consider that the SDC Test would not apply and they are:

1. The employee is a skilled worker or Professional person who would not need someone overseeing what they are doing or require instruction on how to perform their.
2. Be working on a Specific Project or Task after its completion the contract they will move on to a new project with a new client.
3. That their rate of pay is reflective of the above. So an individual could be a qualified electrician, but in quiet periods he might do more menial tasks.
4. That the services provided are not inherently essential to the engagers business / organisation for instance a school could not operate without teachers.

It is our view that the above are key in defining a Professional Contractor who is not being 'Akin' to being an employee of the client. However, any assessment must be based upon many factors not just the above.

## What can be Ignored

HMRC have confirmed that when considering the SDC Test that we can ignore the requirements under the Health and Safety Legislation plus the requirements under Insurance.

# 10. Providing Workers to Work Outside of the United Kingdom

## Agency Legislation

It is often assumed that the agency legislation only applies when “boots are on the ground” in the United Kingdom, but this is not quite true.

- It is true that the Offshore Employment Intermediaries rules do have a geographical limited to Great Britain and its Continental Shelf.
- It is true that for Mariners (Ships Crew as defined) the legislation will not apply unless the individual is working within Category A, B, C or D Waters.
- It is true that if you are providing a worker to an end user client with no business in Great Britain that the Agency Legislation will not apply for National Insurance purposes.

Despite the above being true, when considering the Onshore Employment Intermediaries it is important to consider:

- Are you providing a Worker to an End Client in United Kingdom or does that client have a business in the UK.
- Is the worker habitually resident in United Kingdom?
- Was the worker in the United Kingdom prior to posting overseas?
- Does the worker remain Tax Resident in the United Kingdom?

The answer to these questions may very well decide whether there is any risk under the National Insurance and Income Tax Agency Legislation as, in deciding the liability to National Insurance, you are looking at the end client and worker and for Income Tax purposes you are considering the workers position.

## NATIONAL INSURANCE

HMRC have confirmed in their internal manuals that when considering the agency legislation for National Insurance purposes it is only relevant when a worker is provided by an agency to a UK Employer.

For this definition HMRC confirm that the definition of the UK Employer “is not the contractual employer but someone in the UK (the end client) to whom the worker provides services.

So if there is no UK End Client then the Agency Legislation cannot apply for National Insurance purposes. This would seem to follow the logic, that HMRC are simply trying to put themselves in the position that they would have been had the agency not been involved.

This may be of particular interest to agencies placing workers in emerging markets.

## INCOME TAX

The amendment to ITEPA 2003 mean that for Income Tax purposes the agency closest to the end user client is considered to be the Employer and responsible for the retention and payment of Income Tax.

The Taxation status of each worker is unique and it must be understood that there are mechanisms in place in both the PAYE process and Self-Assessment system to ensure that workers who are not resident for Income Tax purposes can be paid free of Income Tax or are able to offset the Income Tax paid locally.

Particular care must be taken when dealing with Seafarers, who have their own rules when it comes to Tax Residency.

If you simply opt to pay a worker free of income tax, then the liability may fall on the agency, even if the worker has signed a disclaimer that they are responsible for their own taxation.

# 10. Providing Workers to Work Outside of the United Kingdom

## CFA 2017

Whilst there is little task of triggering a charge under CFA 2017 in respect of UK Tax Evasion, that is not the end of the story. Many agencies fail to consider whether there is a loss of tax to the country in which the work is undertaken. From 30 September 2017 this has changed.

If an agency has, knowingly or not, been involved in the facilitation of a Tax Evasion, anywhere in the world, then they could face a charge under the FTE part of the legislation.

**Ignoring local rules is no longer an option.**

## EUROPE AND SOME OTHER COUNTRIES

The United Kingdom has agreements with EU, EEA and some other countries that mean that Social Security is payable only in that country unless the employee and employer opt to pay it in the United Kingdom.

For these countries then 52 week rule for National Insurance does not apply, but National Insurance or its local equivalent will be due where the duties are performed.

### EU and European Economic Area countries including Switzerland

Austria	Belgium	Bulgaria	Croatia
Cyprus	Czech Republic	Estonia	Finland Hungary
France	Germany	Greece	Latvia
Ireland (Eire)	Iceland Lithuania	Italy	Malta
Liechtenstein	Norway	Luxembourg	Portugal
Netherlands	Slovakia	Poland	Spain
Romania	Switzerland	Slovenia	United Kingdom
Sweden		Gibraltar	

### Reciprocal Agreement Countries

Barbados	Bermuda	Bosnia-Herzegovina	Canada
Chile	Croatia	Guernsey	Israel
Jamaica	Japan	Jersey	Macedonia
Mauritius	Montenegro	New Zealand	Phillipines
Korea	Serbia	Turkey	USA

# A. Action Plan to make sure you are safe...

## OFFSHORE REGULATIONS

- 1) Ask your Umbrella Company to confirm whether they subcontract the supply or payment of your workers.

If the answer is yes, they will need to provide you with the following information for each one of the contractors involved:

- Name of the worker
- Name of the End Client
- Name of Third Party Provider
- Confirmation of Status (e.g. employment business, umbrella, etc.)

- 2) You will need to know whether your Umbrella Company engages (or will engage at any time in future), directly or indirectly, with any organisation where a worker is employed through a non UK company.

If yes, they will need to provide you with the following information for each one of the contractors involved:

- Name of the worker
- Name of the End Client
- Name of Offshore Provider
- Address of Offshore Provider

## ONSHORE REGULATIONS

Further to the information provided under point 1, ask your Umbrella Provider to confirm the means under which they are engaging the workers.

### You will need to know:

- Name of the worker
- Name of the End Client
- Name of the Employment Intermediary and their PAYE reference.
- How the worker is engaged (Employed, Self-Employed, Limited Company Contractor)
- Are PAYE and NI contributions deducted from the worker's pay?

## EMPLOYMENT INTERMEDIARIES

There is no specific additional information required to be provided to the Agency to satisfy the rules under Travel and Subsistence.

## CFA 2017

The legislation effectively gives any agency the option to:

- A. Stop the Tax Evasion at source, by only dealing with suppliers who do participate in Tax Evasion; or
- B. Ensure that Associates or representatives are not facilitating Tax Evasion by referring workers to unknown third parties; or
- C. Ask all suppliers to confirm, on an assignment by assignment basis, how they are paying the workers supplied, the shareholder dividends and that no income is being diverted by a third party.

## B. Professional Passport - Ensuring Compliance

### ABOUT PROFESSIONAL PASSPORT

Professional Passport was formed in 2007 as a direct result of The Managed Service Company Legislation. The simple idea was to carry out the most comprehensive compliance due diligence checks on umbrella and accountancy service providers and allow recruitment companies to rely on these whilst at the same time protecting them from potential liabilities.



At outset it was recognised that with potential liabilities being so large more than a verbal reassurance would be required by recruitment companies which is why Professional Passport provides £5,000,000 insurance to all their recruitment company members against debt transfer under Managed Service Company Legislation. Today Professional Passport are still the only insurance backed compliance verification in the market.

As the market has grown and many changes have been introduced Professional Passport has remained the leader in service provider compliance and sets the standards across the sector.

#### Professional Passport:

- The leading independent specialist service provider compliance company
- The only insurance backed compliance accreditation - £5,000,000 cover for our recruitment company members
- The largest range of approved umbrella and accountancy service providers to select for your PSL
- Author of The Compliant Umbrella Providers Operational Handbook – the first book to fully document all the processes and procedures that are required by an umbrella company to achieve compliance. This book has created the benchmark standard of operational processes for the sector.
- Recognised by Government as experts in the sector and invited to sit on The Office of Tax Simplification Committee to advise the Chancellor on simplifying the tax system for small businesses.
- Web portal with up to date news and information for all sectors of the market.

[Contact us directly to find out how we can help you with your provider due diligence and meeting your obligations for due diligence to the Offshore Employment Intermediaries and Onshore Employment Intermediaries.](#)

Telephone: 0845 838 888 7

Email: [info@professionalpassport.com](mailto:info@professionalpassport.com)

Web: [www.professionalpassport.com/Agencies](http://www.professionalpassport.com/Agencies)

## C. Managed Service Company

---

The Managed Service Company Legislation (Chapter 9, ITEPA 2003) came in to force on 6 April 2007 and was designed to capture Managed Composite Companies and Managed Personal Service Companies that, per the consultation, had been avoiding the Intermediaries Legislation more commonly known as IR35.

If the service company is classed as a Managed Service Company then all the income must be treated as employment income subject to the appropriate rates of National Insurance and Income Tax, with deductions only for the income that has already been reported as Salary, Employers NI and Workplace Pension.

In order to decide whether a company is a Managed Service Company there are four tests that must be satisfied.

1. The company must provide the services of individuals.
2. The individual providing the service must receive the majority of the amount billed.
3. Part or all of the income received, is not employment income.
4. A MSC Provider is involved with a client company.

**Employment Intermediaries generally would be subject to the first two tests, but not test 3 and 4 as the income is all paid out as employment income and there is no client company to be involved with.**

**Payment Intermediaries, generally, had been exempt from the MSC Legislation as there was no client company to be involved with.**

Indicators that you are in fact dealing with an MSC and a MSC Provider (don't forget only one activity needs to apply).

### **First Activity**

The Service Provider benefits financially on an ongoing basis from the provision of the individuals services through the MSC. This typically would mean that a fee is charged for each invoice raised or each week worked. This could also be that any money due to the Tax Authorities are held in a central account by the Service Provider and any bank interest is credited to the Service Provider.

Agencies and consultants that receive a timesheet rebate for each week worked may be caught by this activity, which may mean that the service company is considered an MSC.

There may also be an argument, that in the case of sectors where IR35 is clearly an issue, the agency supplying the workers benefits financially on an ongoing basis by utilising service company workers, receiving dividends, as opposed to employment income.

### **Second Activity**

The provider influences or controls the provision of the workers services. This generally means that a standard contract between the agency and the service company is required, that would be IR35 neutral or IR35 friendly.

### **Third Activity**

The provider influences or controls the way in which payments are made to the worker. If each company has a similar or identical remuneration structures then it is almost certain that the Service Provider is influencing or controlling the company.

### **Fourth Activity**

The provider influences or controls the service company finances. This could be that the company must use a client account of the Service Provider or a particular bank must be used.

### **Fifth Activity**

The service provider gives or promotes tax loss insurance.

If any of the above activities are undertaken by an Associate of the Service Provider then they will be treated as undertaken by the Service Provider.

If a MSC is established then it can have dire consequences for the Director or the MSC, the Service Provider and its Officers and the Agency supplying the worker to the client, as each could ultimately be responsible for the Tax and National Insurance subsequently due.

## D. Managed Service Company - Tax Case

---

The first Managed Service Company Tax Case Appeal against the application of the MSC Legislation was determined in the First Tier Tax Tribunal. Whilst this case is not binding it will be persuasive for future cases.

The case involved a sample of five Service Companies that had been the clients of the Service Provider i4 Group / Costelloe Business Services (CBS) based at the time in the Isle of Man.

The key point that led the judge to conclude that there was an MSC Provider involved with client companies was:

- the service companies were only charged a fee when the worker worked.
- the tax monies were held in the bank account controlled by CBS and on which CBS earned bank interest.
- each service company had a standard set up, including a minimum wage salary.
- each service company banked with the same bank, as directed by CBS.
- dividends were not voted by the owners of the service companies, as and when, they were paid with each payroll.

The above means that the service companies, now face bills for unpaid Tax and National Insurance of circa £75,000, but the final amount now due to the exchequer, for all the companies involved, is circa £9,000,000.

**This also demonstrates the order in which Tax Legislation is applied and in particular that the MSC Legislation in Chapter 9 ITEPA 2003 overrides the Intermediaries Legislation (IR35) in Chapter 8 ITEPA 2003.**



e [info@i-paye.com](mailto:info@i-paye.com)

t +44 (0) 0151 449 3500

w [www.i-paye.com](http://www.i-paye.com)

f +44 (0) 0151 203 3130

