Travel and subsistence and employment intermediaries – a year on

Employment Tax **General Features**

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April 2016 saw new rules limiting home to work travel and subsistence expense relief for workers employed through an intermediary, such as an umbrella company. Even where such expenses could be allowed, other new rules restrict the ways in which umbrella companies can reimburse workers' expenses. LITRG reviews how the April 2016 rules are operating in practice. Umbrella companies have had to adapt and you may start to see some interesting issues in practice as a result.

Background

Umbrella companies take on temporary workers such as contractors or agency workers as their own employees with overarching contracts of employment. Having a 'core' employment with the umbrella company turns the worker's various end user client sites into 'temporary workplaces'. Rarely are any resultant travel and subsistence expenses paid over and above the worker's pay; instead the worker enters into a salary sacrifice scheme and agrees that an amount of ordinary pay is replaced with income tax and National Insurance Contribution (NIC) free expenses payments.

The change in rules

From April 2016, Income Tax (Earnings and Pensions) Act 2003 (ITEPA) section 339A – Travel for necessary attendance: employment intermediaries – restricts access to relief for home to work travel and subsistence where a worker:

- personally provides services to another person;
- is employed through an employment intermediary (such as an umbrella company); and
- is under (the right of) the supervision, direction or control of any person, in the manner in which they undertake their work.

If the above apply, each engagement the worker undertakes will be a separate employment for the purposes of obtaining relief for travel and subsistence; that is the overarching contract is ineffective. Travel and subsistence expenses will only be deductible if it is ‘travel in the performance of duties’ or if the assignment itself involves visits to other work locations.

Even where travel and subsistence expenses could still be allowed, for example because of multi-site visits or because the worker is outside the supervision, direction or control of any person, ITEPA section 289A – Exemption for paid or reimbursed expenses (also introduced from April 2016) – restricts the ways in which an umbrella company can reimburse a workers’ expenses. This is because the exemption only applies where the payment or reimbursement is not provided pursuant to relevant ‘salary sacrifice arrangements’. Consequently, many umbrella companies should now be paying any expenses subject to income tax and NIC through the payroll and the worker should be reclaiming tax relief for their allowable expenses through the P87 process or by filing a tax return.

The reaction

Many people thought that these changes would spell the end for umbrella companies. However from our own research and from talking to a number of advisers in practice, this does not appear to be the case. Umbrella companies have found ways of dealing with the new rules, meaning that they are still a feature of the temporary worker landscape. As a result, if you have contractor/ agency worker clients, here are a couple of things to watch out for.

Workers moving into limited company structures

By virtue of ITEPA s 339A(4), workers operating through a personal service company will no longer be able to claim home to work travel and subsistence relief for those contracts where they are required to operate IR35, or they would otherwise be

operating IR35 if they were not receiving all their remuneration as employment income.

Despite this, and despite a related anti-avoidance provision in ITEPA s 339A(10), it seems that some umbrella companies have been encouraging workers to incorporate – possibly with a view to claiming that their assignments are outside IR35 (and perhaps having little fear of IR35 arrangements being investigated).

On the other hand, the impact of the new ITEPA Part 2 Chapter 10 (Workers' services provided to public sector through intermediaries) must be considered. This new chapter was introduced in the shortened Finance Act 2017. From 6 April 2017, the responsibility for deciding whether the IR35 legislation should be applied shifts from the worker's intermediary to the public authority to which the worker is supplying their services. These new rules remove much of the 'incentive' of working through a limited company in the public sector and mean that workers who were encouraged into a personal service company after the April 2016 changes may since have been encouraged back into umbrella arrangements! There may be outstanding corporate compliance issues lurking in a worker's background – be on the lookout (more on this on pages 11 and 20).

Home to work expense reimbursements continuing

The rules in ITEPA s 289A do not apply to mileage reimbursements (this is because mileage reimbursements are not an ITEPA Part 5 deduction but an ITEPA Part 4 exemption). This means that umbrella companies can continue to process salary sacrificed expenses at the point of pay as before where they are in respect of mileage reimbursements. Given the employer NIC saving that comes from doing this, it is unsurprising that we hear that some workers are being arbitrarily assessed by umbrella companies as being outside of their supervision, direction or control in order to take full advantage of this difference in treatment.

HMRC's guidance on supervision, direction and control indicates that a worker being outside of supervision, direction and control is likely to be the exception rather than the norm. So what should you do if you come across a situation where you think a client has received income tax and NIC free home to work mileage reimbursements from an umbrella company incorrectly?

It is worth noting that provisions associated with ITEPA s 339A, namely ITEPA s 688B and PAYE Regulations (SI 2003/2682) Chapter 3B, transfer incorrectly assessed supervision, direction and control debt to the directors of the umbrella company.

If you are preparing tax returns for clients affected by these changes you should discuss the impact with them and consider whether you may need to draw HMRC's attention to the situation, perhaps via the completion of a white space note in the tax return. Further guidance on the completion of tax returns and what to do if a client refuses to make a full and accurate return can be found in Professional Conduct in relation to Taxation (see Chapters 3-5 in particular).

If you are presented with any unusual issues that you feel may be connected to the April 2016 changes, particularly those affecting low-income workers, please do feed them to us via litrg@ciot.org.uk. While we may not be able to comment on individual cases, such evidence can be helpful in informing our work