

Carolyn Walsh – Written evidence (OPR0020)

I am a director of an umbrella company/payroll bureau which for almost 20 years has assisted companies and agencies to manage their responsibilities as employers or hirers of workers, and more recently worker/directors, under PAYE.

For me an intermediary business (umbrella company) should be like any other outsourced service where the expertise and resources of the outsource company meets the needs of another business which does not have access to this in house.

This does not happen in the majority of cases where umbrella companies are seen to save employer costs under PAYE regulations and to allow hirers to treat employed workers as though they were freelancers, i.e. with little or no employment rights.

As accountants were not warning clients that the legislation known as IR35 was being reformed and probably already applied to many of their client's contracts, I set up a Facebook group, Business, Sole Trader and IR35 Information in 2016 to pass on that missing information to contractors, and to explain the guidance being provided by HMRC in a format that taxpayers could better understand.

The group now has over 5,700 members such is the need for clearer advice, with around one half having joined since the IR35 reform came into force this April. This is partly due to many having been forced into using an umbrella company as a replacement for their own personal service company which few find beneficial to them.

I will therefore answer the questions as the administrator of the group on behalf of nearly 6000 contractors and workers, as my business and the contractors and workers who engage with us are not representative of the whole.

Questions

Has the recent extension of the off-payroll working rules to the private sector made it more difficult for engagers (the business the contractor ultimately works for) to hire people with the right skills and expertise? To what extent has its introduction contributed to job vacancies?

Where engagers have properly assessed the status of contracts and have liaised with contractors to come to a mutually acceptable arrangement, there has been little or no impact on the ability to source people. The protection provided by the correct use of the CEST tool allows a safe environment for the engagement of contractors with the required skills for the first time in 20 + years. This recognition should see any job vacancies reducing as a natural result of the IR35 reform.

However, an issue arises where hirers, generally using an agency, attempt to pay people who are now deemed to be employed workers at their old contractor rate via an umbrella company. This misleads workers into believing that, although they will now pay taxes under PAYE regulations, that this will be deducted against their old contractor rate. In fact, contractors will be paid less per hour/day as an employed worker to allow for pay parity with existing employed staff in the hirer's business, and the cost of providing their protected employment rights, such as holiday pay.

The advice from HMRC was that hirers should renegotiate contractor rates but few did. Instead, paying contractors via an umbrella company at the same old rate was to assess that the cost of a contractor to a business versus the cost of an employed worker, was simply defined as the statutory employer costs plus holiday pay and nothing more.

Therefore, while tax rules were immediately complied with, the recognition of the true cost of employing a workforce was not and this has largely still not been recognised. This action, or reaction to the rule change, has caused angst and a feeling that 'contractors have been conned' among hundreds of thousands of workers.

The question is does anyone, including the government, want to see an effective 20%+ reduction in wages during these troubled times, this being the natural result of employed workers who were paid 20% more in terms of gross pay as contractors or self-employed workers over the last 20 years, who are now returning to the employment market due to the increased focus on employment status by HMRC?

For those engagers (and their advisers) who use the CEST (Check Employment for Tax Status) tool to assess employment status, how effective do you consider it to be? Do you have confidence in its results? If not, what further improvements need to be made to it?

I certainly do have confidence in the tool, it receives bad press from providers of IR35 insurance and other services that had grown from an unreasonably high contractor market, and also people who believe they are self-employed or 'in business' for unsupportable reasons ('I can be laid off without any notice', 'I don't get sick pay' etc).

HMRC provides proof that the CEST tool is not 'loaded' against an inside IR35 decision, and that it does closely match the results of recent Employment Tribunals, even given there is a difference between the definition of an employed worker under employment law and tax law.

A big improvement could be made by providing a link to guidance on what to do where an undetermined result is provided. Sometimes a simple clarification of one or more of the questions will give a definite result, because the 'opinion cannot be provided' result could lead people to think the tool does not actually work.

I helped HMRC when it created the original Employment Status Indicator tool and when I use the CEST tool, I have an expectation of the result which is always borne out by the CEST tool.

I have seen the results provided by the main third-party status tool. It loads the result heavily on the lack of personal service, whether or not the right to substitution is a factor or not, and also the lack of mutuality of obligation, which can be a factor in deciding worker status, but not whether a worker is self-employed for tax purposes or 'in business'. Therefore, the result provided by the third-party tool will often not match the CEST tool result and this is where the biased claims that the CEST tool isn't fit for purpose arise.

What changes have engagers had to make to apply the off-payroll rules to contractors, in terms of systems, personnel and training? By reference to your own experience, to what extent (if any) do you consider that compliance costs have increased because of the changes?

HMRC expects hirers to engage an employment status expert to manage the off-payroll working rules, which is completely unreasonable. Consider the increased costs per capita that a company would suffer when engaging contractors and then paying an expert member of staff for the sole purpose of managing compliance with the off-payroll working rules.

For companies that did not resort to paying contractors via an umbrella company, the IR35 reform has been a headache, mainly for the HR and payroll departments of the hiring companies, nevertheless from what I have seen companies have stepped up and made the resources available.

How well has HMRC supported engagers, contractors, and their advisers with the implementation of the new rules and is any further or different type of assistance needed

HMRC effectively disappeared during the run up to the reform due in part to the pandemic, confusing contractors and hirers by delaying the introduction, howsoever unavoidable that decision was. The department now seems to be more focused, rightly or wrongly, on tax avoidance, leaving companies that have complied, even if that is by using an umbrella company now, to fend for themselves, presumably because they are the majority who no longer represent a risk to HM Treasury.

HMRC will never adequately get the message across, nor has it the resources to help contractors or hirers, in fact the IR35 reform was brought about in part to cancel the cost of providing the IR35 unit to the taxpayer.

The department has embarked on a process of making things painful for wrong doers, i.e. companies which bend or break the rules, so there is perhaps no room for support for people who are trying to 'get it right' which is actually one of HMRC's stated aims.

Perhaps more widespread and targeted publication of data/advice may help, as opposed to information and guidance being hidden in voluminous announcements published on the Gov UK website.

To what extent has the introduction of the new rules generated disputes between engagers and contractors concerning the status of contractors vis à vis the rules and how successfully or otherwise have these been resolved?

Where an umbrella company has been used to smooth the transition from contractor to employed worker, disputes abound as contractors aren't being told that not only will they pay taxes under PAYE, but the underlying pay rate will likely reduce by over 20% to account for the increased employment costs of the hirer. In this case the question of the true status of the contract becomes a non-issue and the true level of dispute over status handling and the management of the off payroll working rules hasn't become evident and probably never will.

This process gives rise to a different and very real dispute leading to fruitless claims to employment tribunals over loss of holiday pay and unfair deductions. This is because an amendment to the Conduct Act requires agencies/umbrella companies to provide a Key Information Document before workers accept a contract of employment. This provides the minimum pay rate the worker can expect, but the document leads with the rate paid to the umbrella company, which being a contractor's old rate, is likely to lead workers into thinking they haven't suffered a reduction in gross pay rate but are suffering excess

deductions under PAYE. A court may or may not decide this misinterpretation of the rules amounts to a breach of those rules.

Only where an umbrella company provides a proper KID, as my company does, and highlights the pay rate that is derived from the umbrella pay rate which is expressed as an hourly or daily rate, is there no dispute. Workers can and do go back to their hirers to renegotiate pay rates and this is both fair and reasonable.

The majority of umbrella companies provide a KID that expresses the minimum rate expected as a gross amount, which is then paid as National Minimum Wage, holiday pay and 'commission' which means the worker is prevented from gaining a clear understanding of the true pay rate on offer.

What behavioural effects have resulted from the introduction of the new rules in the private sector in terms of the arrangements adopted in hiring contractors?

Behaviours range from knee jerk reactions and plumping for the easiest possible solution to actively avoiding the rules by seeking an avoidance arrangement.

Neither extreme is a sustainable solution fortunately, but in the middle are companies which are taking their responsibilities seriously and are doing their best to manage the rules. These companies in the middle ground will find benefit down the line as the companies operating at the two extremes lose ground, and possibly their businesses.

The Government is proposing a new employment body with powers to enforce employment rights, including for those engaged by agencies and umbrella companies. How effective do you think such a body will be in ensuring workers, particularly the lower paid, are treated fairly?

If the rules that require an accurate pay offer via a Key Information Document were stoutly enforced, many of the issues that have resulted in calls for umbrella companies to be regulated would disappear. In fact, many umbrella companies would disappear as agencies would have more workers insisting on being paid direct by agencies, and agencies would see no value in using umbrella companies, where the only value was falsely inflating the pay offer.

Umbrella companies are re-inventing themselves and are likely to become more an outsourced payroll and credit financing service, which reduce the administrative and regulatory burden on hirers, while also financing the payroll and assisting companies that have a cash flow issue. In that respect, where hirers do not need a recruitment service, umbrella companies will perform the function that many agencies now provide.

Understanding the future of umbrella companies is key and bringing umbrella companies within the governance of the Employment Agency Standards inspectorate is therefore essential.

How successful will the draft Finance Bill proposals for earlier publication of information about promoters and avoidance schemes be in protecting individuals from being drawn into such schemes?

No-one looks at the name and shame list. The process of engaging an umbrella company, which may or may not be a provider of a tax avoidance arrangement, or an agency that uses such an umbrella company to pay agency workers, is often down to the benefits that have offered, e.g. less employment risks, tax

saving (while claiming to be 100% compliant), credit facilities etc, not their compliance history.

HMRC will soon have more power to restrict the company at Companies House and close the business account of companies proven to be involved in tax avoidance, and that is the ONLY way to stop companies and agencies using providers of tax avoidance schemes - as long as HMRC moves quickly to close down the next provider used, as companies bent on avoiding the rules will sometimes seek another tax avoidance provider, sometimes even the same one that springs up under a different name.

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