

Association of Recruitment Consultancies – Written evidence (OPR0030)

Responses to the call for evidence:

Q.1 Members: Yes. Recruitment is now more difficult. Contractors in many cases are refusing to accept jobs inside IR35, particularly more specialist contractors. Increased rates are now to levels not acceptable to end user hirers. Delay over the process leaves roles unfilled for lengthy periods of time, so apparently adding to available job vacancies. **ARC/Lawspeed comment:** Too many legal challenges in the process, and the uncertainty of application of the status rules (whether or not hypothetical employment for tax purposes) result in blanket decisions not to use any company contractor, whether by the agency or the hirer, in order to avoid tax risk.

Q.2 Members/ ARC/Lawspeed comment: Too prescriptive and can be manipulated to give the answer you want, coupled with too many instances of undetermined assessments. The result cannot be relied upon where the risk is significant tax liability. The continuous evolution/changing of employment status case results means the system requires continuous updating to be accurate, leaving historical results potentially incorrect and outdated.

Q.3 Members/ ARC/Lawspeed comment: Most contractor supply agencies had not been using any form of worker PAYE system, and many had also avoided the use of umbrella companies. To stay in business changes to internal process have been made to improve understanding of the IR35 rules and for steering payment and process in the right direction, so adding to cost and risk on almost every basis. Agencies are unhappy to be forced to work with umbrella companies that pose risk (e.g. fraud, mini umbrellas, failure to pay workers etc.). At the same time contractors complain about being forced to use umbrella companies. Compliance costs (including legal training) have increased with a negative affect on profitability.

To offset risk many engagers have turned to so called IR35 experts to assess on a tick box basis (frowned on by the Courts) backed by insurance, so diverting cost to those areas and creating a false sense of security for hirers and agencies alike.

Q.4 Members comment: Very low levels of satisfaction over support. **ARC/Lawspeed comment:** HMRC provides a lot of resources and have introduced considerable effort to help. However, the resources provided are not specific enough and often do not answer the questions in much the same way that, save in the most obvious of cases, CEST fails to give a satisfactory clear outcome. The central problem in our view is that the employment test is too onerous and vague, and we have long argued that the CEST tool can at best only work as a temporary indication.

Q.5 Member comment: Many contractors have turned down job offers, leading to argument and wasted time. No disputes at all where the hirers have banned the use of PSCs. **ARC/Lawspeed comment:** We have been asked to help on many occasions where the hirer makes an assessment that the other party doesn't agree with. The hirer always has control leaving the agency or contractor suggesting that the assessment is wrong with no options.

Q.6 Member comment: Many hirings are classed as 'inside IR35' forcing the use of umbrella companies and accompanying risks or adopting PAYE.

ARC/Lawspeed comment: Adopting PAYE forces up payroll, bringing into play pension liability, apprenticeship levy, holiday pay and employment rights risk, none of which the agency would have been previously liable for. The alternative, use of umbrella companies, forces the use of independent businesses that may be detrimental to both the agency and the contractor, not least due to the lack of regulation of the umbrella sector.

Q.7 Member comment: This would be a waste of tax payers money in the absence of proper enforcement. **ARC/Lawspeed comment:** Many of the problems that exist in the recruitment and employment sector arise from a failure to enforce existing legislation (e.g. failure to eradicate sector fraud as in mini umbrella companies known about since 2015), lack of regulation (e.g. failure to regulate the umbrella sector), and failure to update rules (e.g. relating to rolled up holiday pay, and payment of holiday pay generally). A single enforcement body could obviate many tribunal claims and wasted time provided that there are suitable processes in place. We have long argued that claims that are vexatious or obviously unmeritorious (for example with no supporting material evidence) should not be allowed to proceed, and we believe that everyone would benefit from this approach. We support the idea of a single body in principle.

Q.8 Member/ ARC/Lawspeed comment: Early publication of information would be welcome, since it would counter the incorrect advice being given by some practitioners which leads both business and workers in the wrong direction. Within the umbrella company context members are concerned that more should be done in this area, making the rules for tax free expenses and tax avoidance schemes very clear, not wrapped in legalese or confusing language and examples. Warning to businesses that work with potentially risky umbrella companies should be clear, since the concern in the industry is that those prepared to take the risk undermine those that operate lawfully. In particular personal liability of directors operating unlawful schemes (whether criminally unlawful or otherwise) should be transparent. The draft measures in the Finance Bill relating to information should include an informative explanation as to the potential liabilities of those involved.

Conclusion – ARC.

In 2016/17 ARC argued that the new IR35 rules relevant to public authorities were not fit for purpose, and in particular that the use of the CEST tool was inappropriate given the level of reliance that would be placed on its use. CEST has been created by HMRC and thus technically should always be correct, when in fact it is simply a moving feast. Employment status is also a moving feast and understanding the legal rules are complex.

Our evidence was due to be heard by a Treasury Select Committee in April 2017; however this did not occur due to the snap election that June and so the rules were never reviewed by the Committee. The fundamental flaws highlighted at the time largely remain, the public authority rules forming the basis for the private sector rules the subject of this call for evidence.

Recommendation - ARC.

Our recommendation would be that an entirely different approach be taken. Abandoning the employment tests and the CEST tool the question should be

based on evidence of business structure activity, namely evidence over and above the simple provision of services by the individual concerned.

The central problem is the ease with which an individual can buy a company off the shelf with no evidence whatsoever of a business plan or structure, but merely to gain tax advantage. This applies as much to 'contractors' as it does to mini umbrellas. Businesses with a proper structure, investment and a plan do not provide personal services and by definition would fall outside of the 'working as an employee' approach. Evidence of business can be collated in advance of any deployment as opposed to the current position which assesses a hypothetical and requires reassessment throughout the period of any piece of work.

We support the principle that companies should not be able to be used purely for tax avoidance purposes, but the method in IR35 is wrong and leads to gross inefficiencies, cost and fear of liability, whilst at the same time playing into the hands of unscrupulous operators.

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