Employment Intermediaries and Tax Relief for Travel and Subsistence
Response to Consultation Document
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Aspire Business Partnership LLP ("Aspire") is a specialist advisor to the recruitment and intermediary sectors. Our response incorporates feedback we have received from our client base. We also attended a roundtable stakeholder event at which we provided additional comments.

Proposal

HM Revenue and Customs' ('HMRC') proposal is to remove home to work travel and subsistence tax relief where a worker is engaged through an employment intermediary and under the supervision, direction or control ('SD&C') of any person.

Foreword

In his forward, the Financial Secretary to the Treasury set out his key aims being;

- To ensure the tax system reflects the key role flexible labour now plays in the UK and how businesses and labour markets are now operating.
- To ensure that the tax system provides no individual or business with an unfair disadvantage.
- To ensure that the tax system is not exploited by businesses and individuals seeking to pay less tax.
- To bring individuals working through employment intermediaries "in line" with others "as tax relief for home to work travel and subsistence expenses is not generally available to other workers".
- Workers under SD&C "akin to an employee" will be treated equally whilst protecting the genuinely self-employed.
- To create a "level playing field" for all workers and businesses paying tax and National Insurance Contributions.

Our view is that the proposal does not meet any of the stated Treasury objectives and will only succeed in creating inequalities for temporary workers travelling to a "temporary workplace" (which Government sought to address through the introduction of the Agency Worker Regulations) and an increase in false self-employment.

We consider that to deny a temporary worker the right to claim tax relief for travel to a temporary place of work would create unfairness (employees who travel to a temporary workplace will still be able to make a claim). This may lead to "regionalisation" with agency workers declining to "get on their bike" and find work in other geographical locations.

SD&C is a wholly inappropriate test to apply to travel expenses as it is subjective and open to interpretation (despite the available guidance). A more appropriate test would be an objective qualification criteria as set out in the Agency Worker Regulations.

Overview

Impact Assessment

We are disappointed that the responses to the discussion document have not been published in full and access was denied via an application under the Freedom of Information Act ("FOIA"). Whilst HMRC wishes for business to be transparent, it is somewhat disingenuous to deny the public access to information which would be used to inform the debate and support or challenge the case for change.

The same could be said for the Impact Assessment ("IA") and, in particular, the economic impact of the measure. In the IA, the stated impact would be a positive £155m. In the HMRC presentation (at the stakeholder event), it was stated that the cost to the taxpayer is £265m. The difference can be put down to those who will not comply with the new legislation and HMRC will be unable to catch.

We are also disappointed that access to the data supporting these figures has been denied following a further request made under the FOIA.

Maladministration

We consider that HMRC is open to a charge of Maladministration of the Consultation Process by denying the public access to information which is vital to understanding the case for change. Evidence can also be presented that the proposal re-introduces an unfairness which was identified and eradicated by the 1998 Finance Act (see below).

It has been stated that Government is anxious for individuals to fully understand how or what they are paid in order to make an informed decision. It is equally important for business to understand the case for change which will have a dramatic effect on the flexible labour market.

HMRC has not fully explained why it seeks to re-introduce an unfairness, other than referring to perceived non-compliance, a perception which has not been supported with facts.

Our view is that the process should be suspended immediately and full information be made available upon which the public could provide appropriate comment.

The role of the Flexible Labour Market

Government recognises that the flexible labour market plays an important role in the UK economy. It also acknowledges that having access to "individuals, skills and services" is a requirement to "encourage growth and rapidly respond to new demands".

We consider that this proposal will restrict the movement of flexible workers, leading to regionalisation. After all, a temporary worker based in Leeds whose skills are required in London, is likely to look for something locally on the basis that travel (and subsistence) expenses will eat into his earnings.

On the basis of the importance of the flexible labour market, it is difficult to envisage a set of circumstances which would warrant the introduction of a tax treatment aimed specifically at temporary workers which puts them at a distinct disadvantage to those who have permanent employment?

Creating Unfairness

As part of the Explanatory Note to the Finance Bill 1998, it was specifically noted that;
"In recent years the legislation had come under increasing criticism from outside bodies, notably because no relief was available for site-based employees, that is, people who have no permanent workplace but who, in the course of their employment, work at successive sites for short periods of time".

In April 1998 tax legislation was amended for site-based employees, to remove the perceived unfairness and enable tax relief on the full cost of travel to and from a temporary workplace. This measure was designed to assist those engaged to work at a series of different site

locations and also, employees with a permanent place of work who were required to attend a temporary workplace.

Some 17 years later, on the basis that an increased number of workers have become eligible for relief (due to the expansion of the flexible labour market caused in part by the recession and a return to work by stay at home parents), Government intends to re-introduce the unfairness.

HMRC has proffered an explanation that the availability of tax relief is costing Government more than expected and has cited rogue employment practices as the result of the unexpected increase. It is easy for Government to jump on the "rogue operator bandwagon" to justify change, rather than undertake a fully informed and transparent impact assessment.

Government has failed to recognise is the increase in the temporary labour market can be directly placed at the door of the economic recession, together with a general change in working patterns through necessity and a freedom of choice.

Employee v Employee

The consultation document dwells upon the perceived disparity between the current ability of a temporary worker to claim home to site travel expenses which are not available to a permanent employee. Our view is that this approach is overly simplistic.

Firstly, in order to claim relief the temporary worker has to be an employee who is travelling to a temporary workplace within the confines of s338 to s339 ITEPA 2003. He/she would be expected to travel to wherever the work is located and would encounter uncertainty surrounding the length of the assignment. The temporary worker is unable to budget for his/her travel costs due to the flexible nature of the assignments which may be offered and accepted.

A permanent employee has the opportunity to build his/her life with the knowledge that he/she will travel to the same location and can budget for the expenses of travel i.e. he/she has a choice which will inform the decision to take up the offer of employment.

The temporary worker has a greater exposure to financial risk in getting to work because of the peripatetic nature of his assignments.

A permanent employee will have a contract of employment which is continuous and affords him a regular salary payment each month.

A temporary employee has no guarantee of the continuation of any assignment and will often be unpaid (depending on his/her contract) for short periods whilst awaiting a new assignment.

A permanent employee will travel to the same location each day. He/she will be entitled to relief for expenses when travelling to a temporary workplace.

Rather than creating equality, the proposal creates inequality and unfairness. For example,

Ted, a permanent employee, lives in Leeds and travels to Bradford each day. Bill, a temporary worker is engaged to work alongside Ted also lives in Leeds. Ted is asked to undertake a project in Wakefield which will last three months. Bill is recruited (via an agency) to work alongside him in Wakefield after being engaged across the Yorkshire area on a series of assignments.

Ted receives a payment for his travel expenses. Bill's agency does not reimburse travel costs.

Ted is not "out of pocket". On the other hand, Bill pays tax and National Insurance on his expenses which he has to meet out of his remuneration.

Agency Worker Regulations ("AWR")

The Agency Workers Regulations 2010 sought to give equal rights on terms and conditions (including pay) after a temporary worker had worked for the same client in the same role for a period of at least 12 weeks. Under Bill and Ted's journey example, the proposed change will introduce a significant disparity;

- Two workers attend the same workplace
- Both are there in the course of a period of continuous work
- Both are there for a temporary purpose
- Both expect to be there for a maximum period of three months
- Both provide a personal service
- Both are subject to control in the provision of their services

    - Bill is the temporary employee of an employment intermediary
      ✗ He is not entitled to tax relief on the expenses he incurs in getting to work

    - Ted is a permanent employee seconded to this site by his employer
      ✓ He is entitled to tax relief on the expenses he incurs in getting to work

Unless the rules are changed for all employees, under this proposal agency workers will not be treated equally to their permanent employed colleagues.

Travel and Subsistence Discussion Paper

We are at a loss to understand the rationale for the proposal to amend the legislation affecting agency workers in a much shorter timeframe than that proposed by the HMRC Travel and Subsistence Discussion Paper published on 23rd September 2015 with a closing date of 16th December 2015.

A number of aspects directly relate to matters within this consultation i.e. Temporary Workplace Rules, the Intention Test, Complexity and Day Subsistence.

Our view is that this proposal should be subsumed into the recently published discussion paper and the entire subject of travel and subsistence be reviewed in a holistic manner.

Squeezing the Balloon

The effect of tightening the grip at one end of the labour market will only succeed in squeezing workers into alternative arrangements which are open to interpretation.

The umbrella company sector has developed over the years into one which should now be subject to regulation rather than wrestled into submission. There is a code of conduct for agencies regulated by BIS – this should be extended to the umbrella sector? This code of conduct should also govern the relationship between agencies and umbrella companies in connection with fees and compliance.

HMRC has readily admitted that the proposal is "unsophisticated". A far more sophisticated proposal would be to introduce objective eligibility criteria similar to that introduced by the AWR.

We consider that the decision to change legislation for a sector with insufficient consideration of the impact is fundamentally wrong and should be re-considered. Our view is that there are a range of alternative options which should also be subject to consultation.

Our responses to the specific questions are set out below.

Question 1: Do you agree that the structure of the proposed legislative changes will achieve the policy objectives?

We do not consider that the structure of the proposed legislation will achieve the policy objective of "fairness". Those who are in an employment relationship will not be taxed on a "fair and consistent" basis.

The arbitrary exclusion of the ability of temporary workers to claim tax relief on expenses which would otherwise be available to a standard employee would potentially recoup significant funds for the Treasury. However, the figures included in the consultation "Summary of Impacts" are unsubstantiated and without foundation.

There is no reliable evidence of the numbers of employees who are currently employed via an intermediary arrangement. Also, where payments of expenses are made via a dispensation there is no reporting mechanism to establish the current amount of tax relief allowed or available. As such, the figures used in the IA are without foundation.

Our view is that the proposal will undoubtedly cause a shift to self-employment (we are already seeing examples of this) which would significantly reduce Exchequer yield and increase the compliance burden on both HMRC and the tribunal service.

Our view is that the proposal may well create a level playing field in the agency sector but it will create an unfairness to those who operate within it. Agency workers will be placed at a disadvantage and will pay more tax than that of their permanent counterparts. There will not be a level playing field for workers which the proposal seeks to establish.

Question 2: Will there be any consequential difficulties in administrating each engagement as a separate employment?

It is likely that direct employment in the temporary labour sector will cease to exist in favour of a return to "worker" contracts and an eradication of additional rights associated with employment. This is against Government's stated policy of promoting direct employment.

Many temporary workers are engaged under overarching contracts of employment which guarantee a fixed number of hours work per annum. This type of contract creates continuity of employment, an expectation of future work and pay between assignments.

Under the proposal, we envisage that administration difficulties will be restricted to the amendment to employment contracts, staff handbooks, disciplinary and grievance procedures and dealing with claims under the AWR for "pay parity".

Question 3: Are there any particular professions who will be significantly affected by these proposals?

The greatest impact is likely to be focussed on sectors which rely on temporary labour to meet "peaks and troughs".

We consider that the sector workers who are likely to see an adverse impact are as follows;

- Care
- Construction
- Driving
- Food and Agriculture
- Education
- Industrial
- Health
- IT
- Rail
- Retail

All workers in the above sectors incur travelling expenses and often work through agencies and intermediary companies.

Return to self-employment

Changes to the Agency Legislation in April 2014 have already had significant effect on the construction sector with thousands of subcontractors moving away from self-employment and into employment arrangements. This was primarily due to SD&C which created "deemed employment". In the main, this change has been accepted due to the opportunity to claim expenses as an employee travelling to a series of construction sites although many are financially worse off as a result.

These workers now face the prospect of no longer being able to claim tax relief on travel expenses although they continue to work at a series of temporary workplaces.

We envisage that these workers will demand to be re-engaged in a self-employed capacity either through a third-party or direct to the end user where the SD&C "rule" does not apply. A return to self-employment is inevitable.

Working Rule Agreements ("WRA")

Construction workers have historically benefitted from negotiated WRA's in relation to travel and lodging allowances. This group of workers would see all negotiated taxation rights under each agreement eradicated on 6th April 2016.

Typically construction workers engaged under WRA's are on long term contracts and could be adversely affected mid-contract. To consider this we have produced a financial comparison to demonstrate the effect on the pay of a worker engaged by an intermediary where a WRA applies;

Worker with WRA tax advantage	£		Same worker with WRA tax advantage removed	£
Weekly pay from hours worked	367.20		**Weekly pay from hours worked**	367.20
WRA Fare Allowance	21.40		**WRA Fare Allowance**	21.40
WRA Travel Allowance	5.05		**WRA Travel Allowance**	5.05
Total (1)	393.65		**Total (1)**	393.65
Tax	33.65		**Tax**	37.93
NIC	26.07		**NIC**	28.64
Total gross pay	333.93		**Total gross pay**	327.08

This is likely to cause hardship for individuals who are likely to favour a move to self-employment in order to mitigate the additional cost.

Labour relations are likely to become strained as agency workers become the "poor relations" of their directly employed peers. Whilst the consultation states that these individuals would retain the right to relief under the statutory rules, many would fail to qualify as they work via an intermediary and are subject to control.

We consider that the operation of the WRA should be removed from the scope of the consultation.

Tax Credits

Any worker who claims Working Tax Credit/Universal Credit will be negatively affected. This is due to the fact that expenses which have historically been deducted from the total of employment income to be taken into account (Universal Credit Regulations 2012, regulation 51 ~ "expenses that would be allowed as a deduction under Chapter 2 (deduction of employees expenses) of Part 5 of ITEPA;"….) would no longer be deducted.

As a consequence, the full amount of employment income (without any allowance for expenses) would fall to be taken into account, reducing his/her Tax Credit/Universal Credit entitlement.

For a single, 25 year old who works 37 hours per week at the NMW;

Weekly Wage	Expenses Incurred	Employment Income for Tax Credit Purposes	Tax Credit Award
£248.00	£50.00	£198.00	£22.77
£248.00	£50.00	£248.00	£2.27

As a result, if expenses could no longer be deducted from the total employment income taken into account for Tax Credit purposes, the individual would lose £20.50 per week in tax credits.

Discrimination

The Impact Assessment states that Government does not have any evidence to suggest that the proposal will have any significant or disproportionate impact on groups with legally protected characteristics other than gender.

We do not agree. Black and minority ethnic (BME) people are over-represented in the agency population and will be negatively impacted by this proposal.

Government should undertake a consultation in conjunction with the Runnymede Trust to determine the effect of the proposal which, in our view, will increase racial inequality.

In addition, the Low Incomes Tax Reform Group (LITRG) commented that the proposals will have a direct effect upon low paid workers. Many such workers will be foreign nationals who have chosen to work in the UK.

In their response to the consultation document[1] LITRG raise very relevant points about the disadvantage that low paid workers face, factors such as the difficulty in budgeting for the expenses that they incur in travelling to a temporary workplace and the difficulties faced by some low paid workers who travel as an intrinsic part of their duties and yet, are expected to meet the costs out of their normal remuneration.

Where such practices happen it is unfair to remove all access to tax relief.

1 http://www.litrg.org.uk/Resources/LITRG/Documents/2015/09/150928-LITRG-response-Employment-Intermediaries-tax-Relief-Travel-Subsistence-FINAL.pdf

Question Four: Will these changes result in a significant shift in the way those affected are employed? If so, what would this shift be and what would be the impact for those workers concerned?

The proposal is likely to result in a shift towards self-employment, limited company structures and alternative contracting methods which have already been highlighted by Government.

Under this proposal, umbrella companies could withdraw from the employment market, leaving temporary workers exposed to "forced self-employment". This move will result in the loss of holiday pay and sick pay and, in some instances, self-employed workers will not be paid the National Minimum Wage.

Working through an umbrella company, an employee has assurances surrounding employment rights and Exchequer revenue is protected.

Question Five: Would the definition of employment intermediary as proposed cause any practical difficulties? Please provide details and examples.

The definition of employment intermediary introduces some ambiguity in regard to the requirement for the business to be "substantially in the supply of labour services". We would question precisely what the definition of "substantially" means as this interpretation will be crucial to the correct operation of any amended legislation.

In addition, there could be further confusion regarding whether the supply to the engager is for a complete service or rather for the supply of labour services. Such factors will be significant in deciding if a company is caught within the description of an employment intermediary.

We would point out that the consultation uses the following terms to determine whether a labour supply exists – "substantially", "mainly" and "primarily" in the supply of labour - all of which have different meanings.

Question Six: Do you agree with the definition of the terms supervision, direction and control and will these definitions cause any practical or commercial difficulties? If so, what will these difficulties be?

We consider that the definition of SD&C remains unacceptably subjective and has little to do with qualification and eligibility to receive tax relief on travel and subsistence expenses. There is little doubt that workers engaged under overarching contracts are employees – so why is HMRC using a test which determines employment over self-employment to determine tax relief for expenses.

The level playing field will eventually be determined by an attitude to risk together with an interpretation of complex guidance. We consider that there will be many companies who will be able to take advantage of the subjective nature of the test in favour of awaiting a challenge from HMRC and lodging an appeal to the tax tribunal. The case of *Gabriel Oziegbe v HMRC (2014) UKFTT 608 (TCC)* in connection with security guards is a case in point.

Instead of simplifying the situation, the proposal merely adds another layer of complication.

Question Seven: Which option for a transfer of liability would work best to ensure future compliance, Option 1 or 2?

We consider that the introduction of a transfer of liability for identified non-compliance (involving end-user clients) would act as a significant deterrent. As a result, the intermediary sector would need to self-regulate due to the fact that poor compliance would be an unacceptable risk to all parties to the supply chain including the end-used client.

This option would be useful if HMRC decided to introduce it in isolation as an alternative to a change in legislation. Whilst this option would not "swell the coffers" to the same extent as a denial of tax relief under the SD&C rule, it would help to regulate an industry which is often accused of being non-compliant.

In the event that the proposal is enacted into legislation, the end user client may prefer to use alternative directly engaged contracts such as "zero hours" to avoid the risks. This would have a detrimental effect on the flexible labour market.

We consider that Option 2 would be more appropriate in these circumstances. However, we do not consider SD&C to be an appropriate test due to its subjective nature.

Aspire Business Partnership LLP
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