

Labour Market Intermediaries

A technical report outlining how umbrella companies and other intermediaries operate in the labour market and the implications for workers who use them



Contents

Preface	Umbrella company facts and figures	3
Chapter 1	Introduction	7
Chapter 2	The basics	12
Chapter 3	Travel expenses	27
Chapter 4	Benefits of umbrella arrangements to workers	40
Chapter 5	Complexities with umbrella arrangements	52
Chapter 6	Recent issues	64
Chapter 7	Umbrella company regulation	72
Chapter 8	Construction industry	83
Chapter 9	Personal service companies	90
Chapter 10	Non-compliant umbrella company models	101
Chapter 11	Disguised remuneration	107
	Glossary of terms	121
Appendix 1	Breakdown of umbrella companies	124
Appendix 2	LITRG's umbrella company factsheet	127
Appendix 3	Key information document	132
Appendix 4	Sample payslips	135
Appendix 5	HMRC Mini umbrella bulletin	138
Appendix 6	Option Grant Agreement	141



Umbrellas and agencies - overview

Estimated number of agencies in the UK
40,000

Estimated number of umbrella company employees in 2021
600,000

Estimated proportion of agency workers handed to umbrella companies to be paid
50%

Estimated number of umbrella companies in 2021
500



Who uses PAYE umbrella arrangements

- Freelance contractors
- Agency workers

Main reasons why agencies hand workers to umbrella companies

- Removal of HR / payroll costs
- Additional income stream from referrals



Typical amount paid to agencies by umbrellas for referrals

£15 per timesheet



Different ways umbrella companies can be described in official data

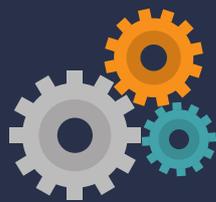
- Bookkeepers
- Temporary employment agency activities
- Consultancy
- Business support activities

Number of main trade accreditation bodies in the umbrella sector

2

Employer NIC saving from traditional umbrella travel expense service

13.8%



Other services typically offered by umbrellas

- Construction Industry Scheme
- Limited company accounting

Umbrella queries to LITRG since 2017

Loan charge 17
Coronavirus 18
Other 13

(inc 4 press queries)



Umbrella queries to TaxAid since 2019

Loan charge 131
Coronavirus 8
Other 19

4

Umbrella regulation



Those showing itemised expenses costs in their accounts

3

Expenses costs to salary costs ratio

0.81%

Promoting mileage expense service

13



Not promoting mileage expense service

12

Those we found operating PDPD

0



Charging extra for a P87 'expense claiming' service

0

5

Coronavirus Job Retention Scheme



Date furlough scheme announced

20 March 2020

Date government issued guidance on 'Holiday entitlement and pay during coronavirus'

13 May 2020

Recent NASUWT stats

70%

of supply teachers who were furloughed by umbrella companies were furloughed on 80% of full wages, rather than 80% of the NMW

Umbrellas sampled rated on 'handled Covid fairly' site



Disguised remuneration



Amount we were told we could 'take home' on salary of £52,000

£42,640



Typical take-home pay on salary of £52,000

£38,801.80



Number of employers involved DR arrangements in 2018-2019

≈ 2,000

Number of individuals involved in DR arrangements in 2018-2019

≈ 30,000



Elements used in DR schemes to pay people for their services

- Loans
- Annuities
- Fiduciary receipts
- Credit facility
- Shares
- Capital payments
- Advances or annuities





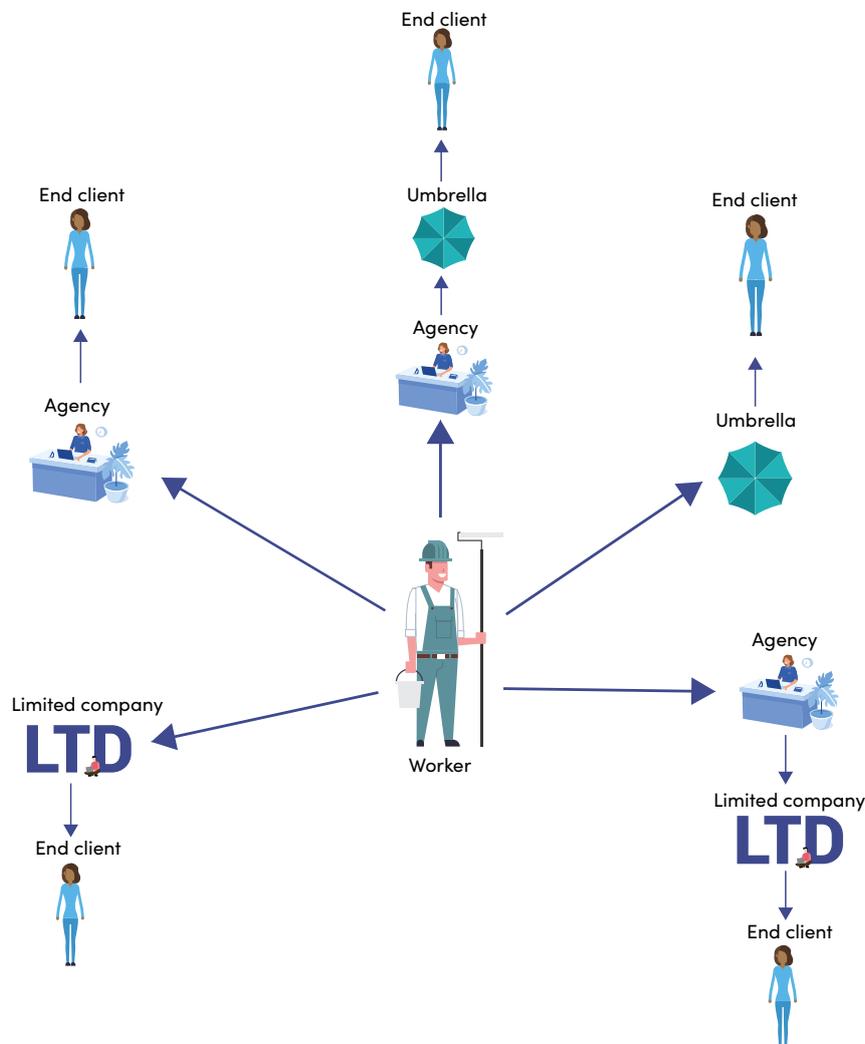
Labour market
intermediaries: timeline
of legislative changes
discussed in this report

6 April 2000	IR35 introduced
Finance Act 2004	Disclosure of Tax Avoidance Scheme rules introduced
6 April 2014	Onshore intermediary rules introduced (agency required to apply PAYE if a worker is under 'supervision, direction or control')
Finance Act 2014	Promoters of Tax Avoidance Scheme rules introduced
6 April 2015	Agencies must report information to HMRC about themselves and the supply of workers paid outside the scope of PAYE
6 April 2016	Relief for home to work travel and subsistence expenses restricted where work is done via an employment intermediary and the worker is under 'supervision, direction or control'
	Relief restricted on reimbursement of workers' expenses where made in connection with salary sacrifice
6 April 2017	Off-payroll rules introduced in the public sector
	Optional remuneration arrangements (OpRA) rules introduced
5 April 2019	Disguised remuneration loans brought into charge as income (the 'loan charge')
6 April 2020	Agencies required to provide Key Information Documents (KIDs) to new workers
6 April 2021	Off-payroll rules introduced in the private sector (delayed from 6 April 2020)

Introduction

There has been a well-documented shift within the labour market in recent years, away from permanent employment, towards contingent working arrangements. This has resulted in the increased use of labour market intermediaries.

Labour market intermediaries are entities within a supply chain that sit between the worker and the ultimate beneficiary of the worker's services, such as agencies, personal service companies and umbrella companies. Intermediary structures take various forms, so that there may be more than one intermediary in each supply chain. Many different permutations are possible – we show some of the different chains that exist in the diagram below.



About this report

The purpose of this report is to look at two areas:

- The nature and scale of the use of labour market intermediaries, for the large part focusing on better understanding the use of umbrella companies.
- The nature and scale of the use of disguised remuneration schemes that are used to pay workers instead of traditional wages.

8 Chapter 1 – Introduction

Why have we focused most on umbrella companies?

Existing research has tended to focus on the use of agencies¹ and personal service companies². Given there is a perception that umbrella companies exist to manufacture tax relief to lower-paid workers, we have a longstanding interest in them and wanted to address the fact that they are under-researched.

Increasingly, umbrella companies are involved in supply chains of lower-paid workers, with some employment businesses (temporary work agencies) preferring to outsource their pay and tax functions to them. The number of people using umbrella companies is likely to increase further when the April 2021 off-payroll working rules come into force. We suspect that these changes will prompt a move from limited companies to umbrella companies, so the timing of this report is apt.

Headlines about umbrella companies in recent years have included:

‘Unscrupulous’ firms targeting key workers³

MPs to investigate ‘umbrella companies’ after worker complaints⁴

Government ‘washes hands’ on umbrella company misery, says Unite⁵

Umbrella companies: the latest way to exploit Britain’s temporary workers⁶

TV show reveals ‘umbrella con-trick exploiting construction workers’⁷

1 For example, The good, the bad and the ugly, Resolution Foundation report, November 2018, available at <https://www.resolutionfoundation.org/app/uploads/2018/11/The-good-the-bad-and-the-ugly.pdf>

2 For example, Personal service companies & IR35, House of Commons Library, 9 February 2021, available at <https://commonslibrary.parliament.uk/research-briefings/sn05976/>

3 ‘Unscrupulous’ firms targeting key workers, BBC News article, 6 June 2020, available at <https://www.bbc.co.uk/news/business-52935252>

4 MPs to investigate ‘umbrella companies’ after worker complaints, BBC News article, 24 February 2017, available at <https://www.bbc.co.uk/news/uk-england-39058166>

5 Government ‘washes hands’ on umbrella company misery, says Unite, Unite press release, 6 August 2018, available at <https://unitetheunion.org/news-events/news/2018/august/government-washes-hands-on-umbrella-company-misery-says-unite/>

6 Umbrella companies: the latest way to exploit Britain’s temporary workers, Guardian article, 21 October 2016, available at <https://www.theguardian.com/money/2016/oct/21/temporary-workers-umbrella-companies-extra-costs-dodging-ni-cutting-rights-supply-teachers>

7 TV show reveals ‘umbrella con-trick exploiting construction workers’, Project Scotland article, April 2015, available at <https://projectscot.com/2015/04/tv-show-reveals-umbrella-con-trick-exploiting-construction-workers/>

9 Chapter 1 – Introduction

HMRC had a recent opportunity to consign umbrella companies to history when a drafting error in the Off-Payroll section of Finance Act 2020 implied that the role of umbrella companies may become redundant after the April 2021 private sector IR35 rollout. However, HMRC rapidly published a clarification on the matter, making it clear that it was not the intention of the legislation to effectively cut umbrella companies out of the supply chain.⁸

This suggests that the poor reputational view of umbrella companies is not entirely shared by HMRC. So, in this report, we also try to reconcile the very bad press that umbrella companies get with the fact that the authorities appear to consider them a legitimate part of the modern labour market.

This report commences by considering the umbrella company business model and how a compliant umbrella company should work.

We take stock of the current umbrella marketplace and set out both the benefits and the complexities to workers of working through an umbrella company, including those that have arisen from the recent COVID-19 situation.

We move on to provide an overview of the current regulatory landscape. Then, umbrella company service offerings for the construction industry and professional contractors are explored. We develop our analysis of umbrella companies by looking at the non-compliant models that we are aware of.

Disguised remuneration

The report concludes with a discussion of disguised remuneration (DR) arrangements such as contractor loan schemes (where individuals are paid in purportedly non-taxable 'loans'), in which lower-income agency workers may become entangled.

Despite the 'loan charge', HMRC's recent research states that about 30,000 individuals were involved in DR arrangements in 2018 to 2019⁹ and suggests that some 'umbrella companies' were involved.

Non-tax law referred to in the report

Although we are well placed to discuss tax technical matters, we are not employment law experts. However, we wanted to present a full picture, necessarily including certain employment law issues, to give a flavour of where the real issues with umbrella companies lie. Without doing this, we would have overlooked important considerations.

8 Off payroll working stakeholder update, October 2020, available from the CIPP website at <https://www.cipp.org.uk/uploads/assets/0d52043c-8e32-4830-a292bc8ce0f4a06c/Off-payroll-working-stakeholder-update-on-s61Q-October-2020.pdf>

9 See Use of marketed tax avoidance schemes in the UK (para 2.2), 26 November 2020, available on GOV.UK at <https://www.gov.uk/government/publications/use-of-marketed-tax-avoidance-schemes-in-the-uk/use-of-marketed-tax-avoidance-schemes-in-the-uk>

10 Chapter 1 – Introduction

The research we carried out for this report

Our research, which was mainly carried out in November 2020, consisted of:

- talking with contractors and sector experts in both industry and government
- reviewing umbrella company offerings (25 of which in detail – see breakdown in Appendix 1) and other publicly available information such as that lodged with Companies House, Trustpilot reviews¹⁰ and posts in contractor forums¹¹
- mining our query database (and that of TaxAid¹²), and speaking with other worker representative bodies, including unions, for evidence of workers' experiences with umbrella companies.

This research, coupled with our own insight and observations of the sector, has led us to produce this technical and factual report.

We aimed for the sample of umbrella company websites we looked at in our research to be representative (for example including both small and large, accredited and non-accredited¹³ umbrella companies), and we have tried to ascertain a full and accurate picture of the current marketplace. However, we recognise that reviewing website information has its limitations and that some of the information drawn together is anecdotal. While this report should help to increase the 'evidence base' around umbrella companies, it should be viewed in this context.

The report text was finalised before the Budget on 3 March 2021, so does not take account of any announcements on that day or thereafter.

10 <https://uk.trustpilot.com/>

11 For example, Contractor UK website: <https://www.contractoruk.com/forums/umbrella-companies/index2.html>

12 The charity TaxAid advises people on low incomes whose problems cannot be resolved with HMRC: <https://taxaid.org.uk/>

13 There are two main accreditation bodies – the Freelancer & Contractor Services Association (FCSA) and Professional Passport – more on these throughout the report

11 Chapter 1 – Introduction

About us

The Low Incomes Tax Reform Group (LITRG) is an initiative of the Chartered Institute of Taxation (CIOT) to give a voice to the unrepresented. Since 1998, LITRG has been working to improve the policy and processes of the tax, tax credits and associated welfare systems for the benefit of those on low incomes. Everything we do is aimed at improving the tax and benefits experience of low-income workers, pensioners, migrants, students, disabled people and carers.

LITRG works extensively with HM Revenue & Customs (HMRC) and other government departments, commenting on proposals and putting forward our own ideas for improving the system. Too often the tax and related welfare laws and administrative systems are not designed with the low-income user in mind and this often makes life difficult for those we try to help.

The CIOT is a charity and the leading professional body in the United Kingdom concerned solely with taxation. The CIOT's primary purpose is to promote education and study of the administration and practice of taxation. One of the key aims is to achieve a better, more efficient, tax system for all affected by it – taxpayers, advisers and the authorities.

Acknowledgements

We would like to acknowledge the financial support received from the TUC in commissioning this report.

We would like to thank the many experts who have shared their insight and comments, freely and candidly including Anna Meisel, Crawford Temple, Samantha Mann, the Employment Agency Standards Inspectorate (EAS), The Pensions Regulator (TPR), Paul Watkins, Julia Kermode, Keri Stanbridge, Joanne Harris, TaxAid and Lucy Smith.

Any errors or omissions remain our own.

The basics

What are umbrella companies?

Umbrella companies are employment businesses whose sole purpose is to employ and pay people (as opposed to ‘employment businesses’ in the sense of a business regulated by the Employment Agency Standards Inspectorate (EAS) which finds and supplies temporary work-seekers to hirers). Umbrella companies do not source work for people.

There is no statutory definition of an umbrella company. HMRC’s definition¹⁴ of an umbrella company is:

‘A UK limited company which acts as an employer to a number of individuals, meeting PAYE and other requirements, where operating legitimately. It signs contracts to provide the individual’s labour to engagers, either directly or through another intermediary such as a recruitment agency.’

The EAS’s definition¹⁵ is:

‘A payroll company, which might charge or deduct a fee from a work-seeker’s payment that has been passed to them by an employment business to process the work-seekers’ wages earned through the agency. In some cases, the work-seeker will become an employee of the umbrella company.’

As there is no statutory definition of an umbrella company, the term is often used very widely to describe a variety of different arrangements and activities.

Who uses umbrella companies?

We understand that umbrella companies have existed for around 20 years, essentially since ‘IR35’ was introduced¹⁶ (we look at IR35 in Chapter 9). Initially, they tended to cater for white collar professionals who opted to be employed through an umbrella company rather than operating as sole traders or through a limited company of their own. These individuals typically work on a succession of assignments, perhaps in IT, finance, banking or engineering where their skills are highly valued and are required for specialist projects. For the purpose of this report, we call these people ‘freelance contractors’.

Over time, as the government has strengthened their commitment to a ‘flexible’ labour market and as temporary and flexible working has increased, the umbrella company market has widened. Umbrella companies now proliferate in all areas of the temporary

14 Per HMRC publication, Use of marketed tax avoidance schemes in the UK, 26 November 2020, available on GOV.UK at <https://www.gov.uk/government/publications/use-of-marketed-tax-avoidance-schemes-in-the-uk>

15 Per Employment Agency Standards Inspectorate: a brief guide for agencies, June 2020, available on GOV.UK at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/936515/eas-brief-guide-for-agencies.pdf

16 We look at the origins of umbrella companies in our 2014 report, Travel expenses for the low paid – time for a rethink?, available at <https://www.litrg.org.uk/latest-news/reports/141117-travel-expenses-low-paid-%E2%80%93-time-rethink>

13 Chapter 2 – The basics

labour market – from locum nurses and supply teachers in the public sector¹⁷, to young, lower paid ‘temps’ who, for example, have not been successful at finding long term work, or who are between jobs. Such people often find their work through agencies and for the purposes of this report we call these people ‘agency workers’.

Why do people use umbrella companies?

Many engagers do not want to have the fixed costs and obligations of an employer and look for a temporary, flexible workforce.

Umbrella employment supports this flexible workforce by taking on responsibility for these costs and obligations, which include:

- Paying salary, including ensuring payment of at least the national minimum wage
- Employers’ National Insurance contributions (NIC)
- Holiday pay
- Auto enrolment for workplace pensions
- Statutory sick pay
- Other statutory payments, such as statutory maternity pay
- Operating Pay As You Earn (PAYE), including collection of student loan repayments
- Reporting PAYE information and paying HMRC at regular intervals (Real-Time Information)
- Issuing pay documents to workers

Freelance contractors

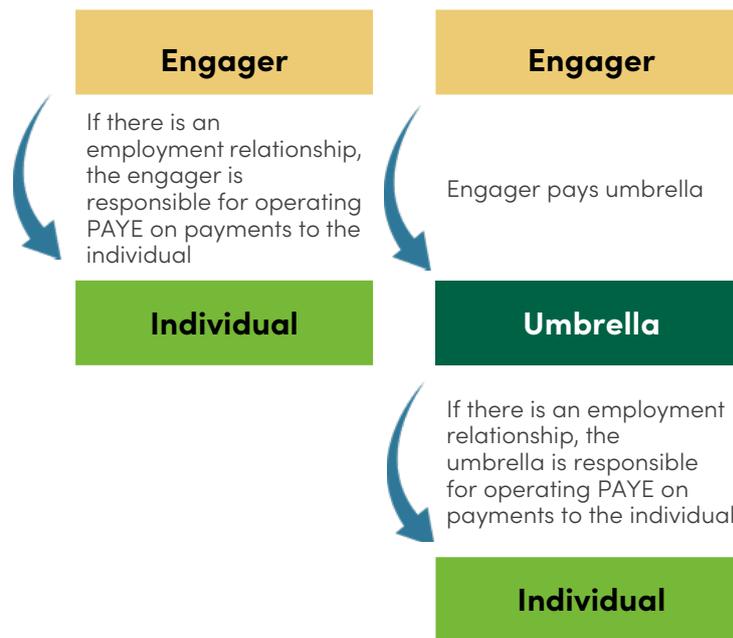
As stated above, there are costs and obligations of taking someone on as an employee, which many engagers do not want. Yet at the same time, an engager may be hesitant to take on someone as a self-employed sole trader.

This is because under general tax law principles it is the responsibility of the engager to look at the arrangements and decide on someone’s ‘employment status’ (that is, whether someone is employed or self-employed) to determine whether they should pay tax and NIC under PAYE (and the person’s eligibility for certain employment law rights).

Where employment status is unclear or borderline, by asking the person to work through an intermediary, such as a limited company or an umbrella company, the hirer is protected from liability (for example, should HMRC raise a PAYE enquiry and find that the individual should have been treated as an employee), as our diagram on the next page helps demonstrate.

¹⁷ See page 137 of National Institute of Economic and Social Research report, Use of Agency Workers in the Public Sector, February 2017, published on GOV.UK: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/592131/NIESR_agency_working_report_final.pdf

14 Chapter 2 – The basics



As we shall see later, a limited company can be a very complex way of trading. If a limited company is not suitable for the freelance contractor or if they would be 'within IR35' (we look at what this means in Chapter 9), an umbrella company can be used to act as the intermediary between the freelance contractor and the end client. Where this happens, the umbrella company becomes the freelance contractor's employer.

Agency workers

Some temporary workers (including freelance contractors) use agencies to source work assignments, as opposed to finding work directly.

Where people do this, even though strictly the worker is not an 'employee' of the agency, the law says an agency must operate PAYE unless the worker is **not** subject to (or to a right of) the supervision, direction or control (SDC) of any person (or unless the remuneration is already treated as employment income).¹⁸

Not being under SDC (or the right of SDC) of any person is a difficult test to pass.¹⁹ Only one element of the test needs to apply – for example, someone can be under supervision, but not direction or control, for SDC to apply.

Furthermore, where a worker is engaged by or through an agency, there will be a presumption that there is (or there is the right of) supervision, direction, or control over the worker.²⁰ Most agency workers would therefore be caught by the SDC rule. The burden of operating PAYE is one of the key reasons that agencies pass workers to umbrella companies to be paid.

¹⁸ As explained in HMRC's internal ESM manual at ESM2032, available on GOV.UK at <https://www.gov.uk/hmrc-internal-manuals/employment-status-manual/esm2032>

¹⁹ Any person includes, but is not limited to: the client to whom the worker provides the services to, the agency, project managers, consultants, site managers, etc.

²⁰ As explained in HMRC's internal ESM manual at ESM2037, available on GOV.UK at <https://www.gov.uk/hmrc-internal-manuals/employment-status-manual/esm2037>

15 Chapter 2 – The basics

More on why agencies pass workers to umbrella companies

Figures suggest there were around 40,000 agencies in the UK in 2018, with a 200% increase reported in 2019.²¹

Temporary worker agencies are experts in sourcing work and workers. They are not experts in terms of managing a temporary workforce from a payroll or HR perspective. It is often too daunting for these businesses to keep up to date with ever-changing and complex tax and employment law legislation as it applies to temporary workers – especially when there are penalties for mistakes.

It is also expensive to have the systems and controls in place to handle HR or payroll issues for large numbers of staff – the cost is perhaps manageable for a large agency but is disproportionate for small, specialist agencies. The competitiveness of the temporary labour market is also a factor – many end clients (who may be under pressure themselves from shareholders/consumers) want the cheapest possible price for labour, which creates pressure in supply chains.

The result is that many agencies do not have their own in-house PAYE and essentially outsource this function to umbrella companies. Even where agencies do have a PAYE facility, they may discourage people from using it for the reasons set out above, as we can see from this ContractorUK forum post²²:

CASE STUDY

'I've been contracting and consulting in banking for over 20 years via my own limited company. I have just been offered a contract via a well-known recruitment agency at a well-known bank.

Now that the banks refuse to engage with limited companies because of IR35, the recruitment agency has offered me two PAYE options:

Be employed by one of their choice of umbrella companies... who will deduct their fee, employer's NI and an apprenticeship levy from my daily rate, before calculating my PAYE in the conventional way. This is confirmed by illustration documents.

Be a temporary worker under a contract for services with the agency, who will make no deductions from my daily rate before calculating my PAYE in the conventional way.

This is confirmed in an illustration and the contract, which is ready for signature.

21 See articles: Recruitment industry edges closer to 40,000-agency mark, Talint International, 22 May 2018, available at <https://www.recruitment-international.co.uk/blog/2018/05/recruitment-industry-edges-closer-to-40000-agency-mark>; and 200%+ increase in new recruitment agencies in 2019, Recruiter, 16 January 2020, available at <https://www.recruiter.co.uk/news/2020/01/200-increase-new-recruitment-agencies-2019>

22 Extracted from post made on ContractorUK forum, 6 October 2020, available at <https://www.contractoruk.com/forums/umbrella-companies/140316-huge-difference-take-home-pay-between-umbrella-payee-agency-payee.html>

16 Chapter 2 – The basics

The agency is trying to push me towards umbrella companies, and even discouraged me from using the agency's own PAYE, saying it was rubbish. Gaining sight of the agency's PAYE contract and illustration was like getting blood out of a stone.

Why would anyone choose an umbrella company and suffer three hefty deductions, causing such a large reduction in take-home pay, instead of using agency PAYE? Am I missing something? Why is there a difference in which party funds the employer's NI cost between umbrella company PAYE and agency PAYE? Should I consider any other options?'

This state of affairs means that in order to take up work and get paid, agency workers may, in reality, have no other choice but to use an umbrella company even if they don't want to.

In particular, we need to consider the position of those claiming certain benefits (such as jobseeker's allowance and universal credit) which have work-seeking requirements attached to them. The Department for Work and Pensions (DWP) can sanction claimants for refusing to apply for, or accept, a job that is offered to them. DWP guidance states that decision-makers should take into account certain circumstances, like whether the terms of a job on offer break the laws on working conditions or tax, when deciding if there is a 'good reason' for the worker's actions.

Although working through an umbrella company does not, of itself, break any laws, at various points in this report, we identify practices by non-compliant umbrella companies that might do so, or might at least be questionable or create problems for workers. However, when such practices arise, it seems unlikely, given the complexity of intermediary arrangements, that Jobcentre Plus staff would be able (in practice) to apply the guidance in considering 'good reason'²³ as a defence to a sanction, justifying the individual's refusal to accept an offer of work.

The following extract from an Employment Agencies Standards Inspectorate (EAS) guide for agencies seems to confirm that although agencies cannot in principle force people to use an umbrella company, by not offering any other option, people are effectively forced into it if they wish to engage and take up work with a particular agency:²⁴

'Regulation 5 states that you may not make your work-finding services conditional upon the work-seeker using other goods or services provided by you or someone else.

Regulation 13 requires both employment agencies and employment businesses to notify work-seekers of the particulars of goods or services for which they may be charged a fee before providing or arranging the provision of any goods or

23 See para K2171 and K2172 in Department for Work and Pensions, Advice for decision making: staff guide, Chapter K2 - Good reason, available on GOV.UK at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/843716/admk2.pdf

24 Page 15 of Employment Agency Standards Inspectorate: a brief guide for agencies, June 2020, available on GOV.UK at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/936515/eas-brief-guide-for-agencies.pdf

17 Chapter 2 – The basics

services for the first time by you or by someone else. Work-seekers can withdraw from such goods and services without being subject to a detriment.

This would include a situation where work-seekers are introduced to umbrella companies. You should be mindful that work-seekers cannot be forced to work through or be paid by umbrella companies, however if this is the only route that you use to pay work-seekers you must inform them of this before engaging with them and they can choose whether or not to engage with you.'

Uplifted pay rate

It isn't against the law for agencies to pass workers to umbrella companies, but when they do, they must make sure they hand over the correct amount of money. This includes the gross pay rate advertised to the worker ('the agency rate') plus all of the umbrella company's costs. These two things together make the 'umbrella company rate' (the rate paid by the agency to the umbrella company).

KEY INFORMATION

Example of how agency rate turns into umbrella company rate:

Gross pay rate +
Employers' NIC
Holiday pay
Auto enrolment costs
Umbrella margin
Apprenticeship levy, although only umbrella companies with an annual pay bill (total earnings of all employees) of more than £3 million need to pay the levy

Even though having an umbrella company in the supply chain means that the agency has to share the margin between what is paid by the end client and what is paid to the worker with the umbrella company, the umbrella's economies of scale often mean it is still more cost effective for the agency to do this, than doing the HR and payroll functions in-house.

It is up to the agency as to which umbrella companies they enter into contracts with – many will have a 'preferred supplier list' (PSL) – a list of pre-approved umbrella companies that workers can choose from. A few agencies will also operate an 'approved supplier list' (ASL), where workers with existing relationships with umbrella providers can continue that relationship if that provider is on the agency's ASL.

We look at how umbrella companies might make it on to an agency's PSL in Chapter 7.

How many people use umbrella companies?

There appear to be no real statistics on the numbers of umbrella companies or the number of umbrella company workers in the UK. All employers have to declare a type of business when they register with HMRC, so although HMRC should in theory have this data in their systems, umbrella companies are difficult to measure because they do not have their own category of type of business.

18 Chapter 2 – The basics

The fact that umbrella companies may register their type of business as one of a number of different categories can be seen in this recent breakdown by HMRC of employment types implicated in disguised remuneration usage.²⁵

EXTRACT

‘Figure 6: Most common employment types for people who used avoidance schemes during 2018 to 2019

Top 10 most frequent employment types for people who used avoidance schemes in 2018 to 2019 and are either on PAYE or filed a Self Assessment return.

Employment type	%
Bookkeeping activities	19%
Temporary employment agency activities	11%
Management consultancy activities other than financial management	10%
Other business support activities n.e.c	9%
Combined office administration activities	9%
Hospital activities	7%
Other professional, scientific and technical activities n.e.c.	7%
Other activities of employment placement agencies	4%
Human resource provision and management of human resource functions	3%
Accounting and auditing activities	2%

‘n.e.c.’: ‘not elsewhere classified’

Note: Sectors are extracted from HMRC’s Real Time Information PAYE and Self Assessment data. A relevant code from the International Standard Industrial Classification is associated to each employment. Whenever someone had more than one employment on record, the sector associated with the highest paid employment was selected.

About a fifth of the people who used avoidance schemes during 2018 to 2019 had an employment categorised as ‘Bookkeeping activities’. Most of the employers in this group have been identified as umbrella companies. These are intermediaries who provide workers to other organisations. Where someone works through an umbrella company HMRC data does not show what type of business they are ultimately working for. Our data doesn’t give us a further breakdown of professions. Temporary employment agency activities, consultancy and business support service activities are the most common sectors within this population.

²⁵ See para 2.4 in Use of marketed tax avoidance schemes in the UK, available on GOV.UK at <https://www.gov.uk/government/publications/use-of-marketed-tax-avoidance-schemes-in-the-uk/use-of-marketed-tax-avoidance-schemes-in-the-uk>

19 Chapter 2 – The basics

There is a notable level of use of avoidance schemes within the healthcare sector. HMRC has already stepped in where promoters have targeted NHS workers returning to the workforce to support the UK's COVID-19 response.'

The only estimate we have found comes from the FCSA (an umbrella trade organisation – more on the FCSA in Chapter 7) who said in 2015 that there were between 300,000 and 400,000 umbrella employees and around 200 umbrella companies in the UK. In 2020, they published an article suggesting the number of umbrella employees had increased to 625,000²⁶, while we understand there are now around 400 to 500 umbrella companies in the UK.

We have no way of verifying numbers of umbrella companies. However, one way of trying to understand the make-up of the employee numbers is by quantifying the marketplace for umbrella companies.

Agency workers

We can see from Office for National Statistics (ONS)²⁷ and Recruitment and Employment Confederation (REC) information that there has been a reduction in agency working.

Per the ONS, in the period from January to March 2015, there were 328,000 agency workers, whereas in the period from January to March 2020, there were 275,000 – a drop of 16.2%.

Per the REC, in 2015 there were 1.2 million agency workers.²⁸ On any given day in 2019, they say 985,300 workers were on temporary and contract assignments²⁹ – a drop of 17.9%.

Note – the ONS uses the Labour Force Survey to estimate the number of temporary agency workers in the UK. Agency workers are self-identified when surveyed by the ONS, and this may lead to underestimates, as some agency workers may think of themselves as working for their end client for example. Conversely, the REC report the number of agency workers on their books on a specified day as being much higher, but this may include multiple counting of agency workers as often they are signed up to more than one agency (and may also include some people we think of as 'freelance contractors'). The real number of agency workers is likely to be somewhere in the middle of these two figures. Nevertheless, the ONS and REC figures are a useful guide to trends.

26 FCSA article, Job retention scheme – will furloughed umbrella employees pay be calculated fairly?, 31 March 2020, available at <https://www.fcsa.org.uk/job-retention-scheme-will-furloughed-umbrella-employees-pay-be-calculated-fairly/>

27 See EMP07: Temporary employees, Office for National Statistics, latest version 23 February 2021, available on GOV.UK at <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/datasets/temporaryemployeesemp07>

28 See Written questions and answers, UK Parliament, UIN 32389, tabled on 23 March 2016, available at <https://questions-statements.parliament.uk/written-questions/detail/2016-03-23/32389>

29 See Recruitment industry grew its economic contribution to £42.3 billion ahead of pandemic – but saw business fall by over a fifth this summer, Recruitment & Employment Confederation, press release, 16 December 2020, available at <https://www.rec.uk.com/our-view/news/press-releases/recruitment-industry-grew-its-economic-contribution-gbp423-billion-ahead-pandemic-saw-business-fall-over-fifth-summer>

20 Chapter 2 – The basics

Despite this drop in agency workers, we think (with the help of some sector experts) that due to other changes in the labour market, the number of agency workers using umbrella companies will have actually increased, and that around 50% of agency workers now use umbrellas. The number of agency workers using umbrella companies is therefore likely to fall somewhere in the very broad range of 137,500 to 492,650 (applying this percentage to the ONS and REC figures respectively). Due to the likely multiple counting in the REC figures, and as it fits with the other data we have found, we have narrowed it down to around 150,000.

Freelance contractors

Numbers of freelance contractors are also difficult to arrive at from official data. This is because contractor is not a formal status and can be: a self-employed sole trader; someone working via a limited company; a directly employed, yet temporary PAYE employee; and so on. There may also be some overlap with the agency worker figures, given that some contractors use agencies to source contracts.

IPSE (the Association of Independent Professionals and the Self Employed) and Kingston University regularly issue reports on the numbers of freelancers in the UK. In 2015, they estimated there were 1.91 million freelancers in the UK. In 2019, this figure was 2.1 million – a 10% increase³⁰.

We have read from various sources³¹ that about 15% of freelance contractors use umbrella companies. However, we suppose this estimate was made before the off-payroll changes in the public sector in 2017³², which affected 30,000 contractors working through their own limited companies and (as we explain in Chapter 9) potentially saw some of those 30,000 contractors moving to umbrella companies.

Therefore, although it is difficult to be confident about the numbers, putting all of the above figures together, we think we can update the 400,000 estimate of umbrella employees the FCSA made in 2015 to:

	2015	2019
Contractors	286,000	325,000
Agency workers	114,000	150,000
Total	400,000	475,000³³

30 See: Exploring UK Freelance Workforce 2015, IPSE report, 1 April 2016, available at <https://www.ipse.co.uk/resource/exploring-uk-freelance-workforce-2015-report.html>; and The Self-Employed Landscape Report 2019, IPSE, available at <https://www.ipse.co.uk/policy/research/the-self-employed-landscape/the-self-employed-landscape-report-2019.html>

31 For example, Umbrella companies: key facts for contractors and freelancers, Informi, available at <https://informi.co.uk/finance/umbrella-companies-key-facts-for-contractors-and-freelances>

32 See Off-payroll working in the public sector: changes to the intermediaries legislation, 8 March 2017, GOV.UK, available at <https://www.gov.uk/government/publications/off-payroll-working-in-the-public-sector-changes-to-the-intermediaries-legislation/off-payroll-working-in-the-public-sector-changes-to-the-intermediaries-legislation>

33 15% of the 1.91 million freelance contractors in 2015 is roughly 286,000. The estimate of 325,000 is the 286,000 figure from 2015 inflated by 10% to capture the growth, with around 30% of the 30,000 contractors from April 2017, added on (as per Contractor Calculator report, IR35 reforms in the public sector, September 2017, available at <https://www.contractorcalculator.co.uk/docs/ContractorCalculatorIR35ReformsSurveyReport.pdf>). Our agency worker figures for 2015 are the difference between 400,000 and 286,000. They have been inflated for 2019, despite the reduction in the marketplace, based on our understanding that around 50% of agency workers now use umbrella companies

21 Chapter 2 – The basics

In April 2021, the off-payroll changes in the private sector come into force. This measure is expected to impact 170,000 individuals working through their own company and as a result we expect more people to move over to working through umbrella companies. This will probably be a higher percentage than in 2017, because with the public sector changes, people had the option to move to work in the private sector, which now they don't have. Also, due to cultural differences between the sectors, public sector employers are more likely to take people on directly via PAYE.

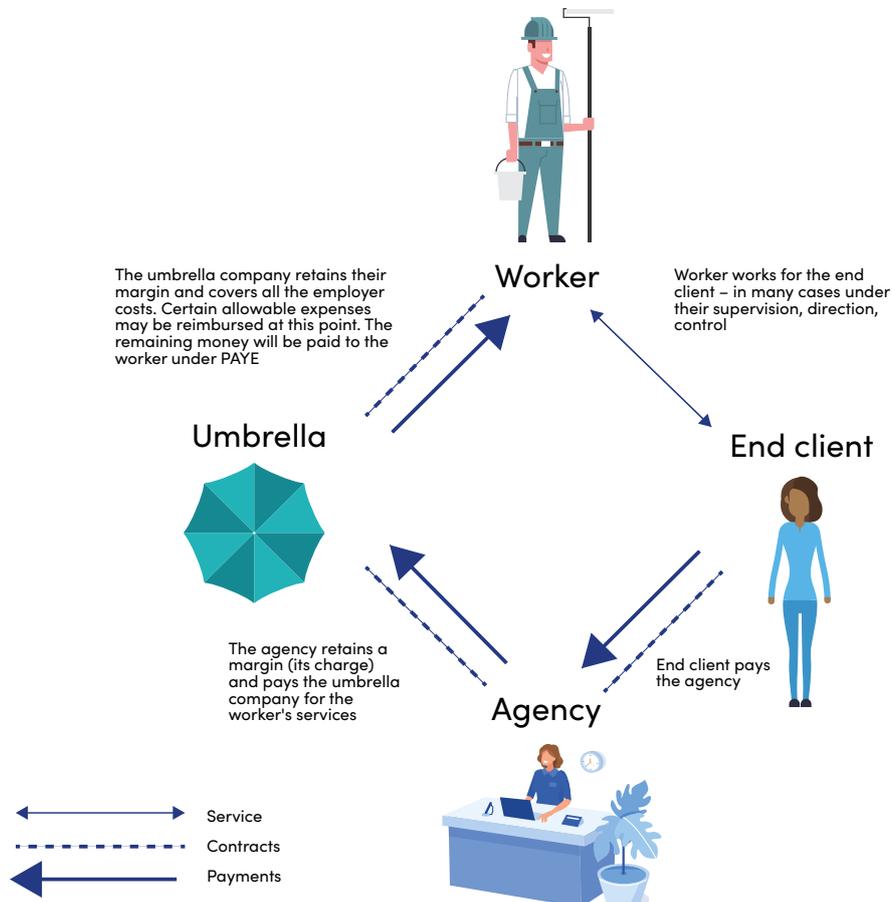
Although it is not particularly scientific, we therefore estimate that in the near future (if not already) there could be over **600,000** people working through umbrella companies. We say 'if not already' because some people will have already moved out of their own limited companies to meet the original April 2020 deadline of the off-payroll change in the private sector.

How do umbrella companies work?

We explain, in detail, how a compliant umbrella arrangement should work in our factsheet, attached as Appendix 2.

KEY INFORMATION

Illustration of typical agency worker/umbrella company supply chain



22 Chapter 2 – The basics

While the factsheet at Appendix 2 has been produced by LITRG in partnership with PRISM³⁴ – one of several umbrella trade body representative groups – it is our understanding that there is general consensus between all the bodies that umbrella companies should work to this standard.

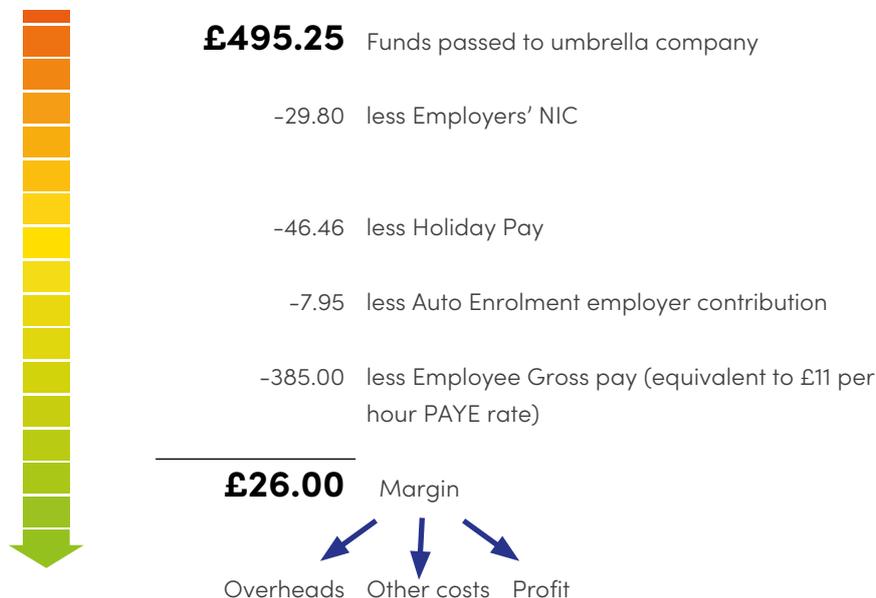
HMRC's explanation of how an umbrella company should work can be found in their internal ESM manual at ESM2390³⁵.

In addition to offering a standard 'umbrella' arrangement, many umbrella companies offer Construction Industry Scheme (CIS) payment arrangements to workers in the construction industry and also accountancy services for workers who want to work through their own limited companies. We look at these arrangements in Chapters 8 (Construction industry) and 9 (Personal service companies).

How do umbrella companies make their money?

In terms of traditional umbrella services, there will usually be a difference between the funds passed over to them from the end client or agency and the funds that they need to pay out – the margin – which the umbrella company keeps as payment for its services. This margin has to cover all of the umbrella company's overheads, as well as variable costs of employment that are not factored into the uplifted rate – e.g. Statutory Sick Pay. As they are commercial businesses, they will also be seeking to build a profit into their margin.

Example of how margin is carved out: weekly paid worker



Of the 25 umbrella companies we looked at in preparing this report, 13 clearly stated their margin on their website. Of these, the minimum margin we found was £7.50 per worker per week (although this was for a basic/online only service), the maximum margin was £30 per worker per week, with most charging around £20–£25 per worker per week.

34 See PRISM – Trade Body and Association of Umbrella Companies and employment intermediaries website: <https://www.prism.contractors/>. Note that PRISM does not offer accreditation services.

35 HMRC ESM2390, available on GOV.UK at <https://www.gov.uk/hmrc-internal-manuals/employment-status-manual/esm2390>

23 Chapter 2 – The basics

One umbrella company we found charged for extras on top, such as for copy payslips, payments outside of the regular schedule and confirmation of employment letters. It is not clear whether the other umbrella companies we looked at charge for extras. To the extent that they do charge extras, we assume that the extras will be paid directly by the worker to the umbrella, rather than coming out of the funds paid to the umbrella by the end client or agency (per the standard margin).

It would appear from the following query we received in July 2018 that some umbrella companies may also make extra charges for simply undertaking normal payroll functions, although as this is an isolated query, this would appear to be the exception rather than the norm.³⁶ (It is also possible that the charges this writer refers to are wrapped up in the umbrella company margin and are coming off of the calculation before his gross pay is arrived at rather than are being made from his own gross pay.)

CASE STUDY

'The Umbrella Company I am with make charges to process statutory payments such as my holiday pay or if I qualify for SSP. Are you able to clarify if they are allowed to do this? Thanks'

For freelance contractors who find their own work assignments (without using an agency), the umbrella company margin will essentially be a cost to them, because it will need to come out of the rate agreed by the contractor with the end client. However, they may factor this into the overall price they negotiate with the end client. Furthermore, because the margin is deducted before the umbrella company works out the contractor's taxable income, in real terms the cost of the umbrella's margin to the contractor will be less than the headline rate, because they are paying less tax. So, for example, if a monthly margin is £100, then this would cost a higher rate taxpayer £60.

There would appear to be some concerns³⁷ that this may encourage some umbrella companies to misrepresent their margin by quoting net fees instead of gross fees. This could confuse people who are 20% taxpayers but where the margin is quoted net of 40% or 45% tax.

For agency workers, if the amount passed to the umbrella company by the agency has been uplifted sufficiently, the presence of the umbrella company margin should be completely cost neutral as far as the worker is concerned (essentially the agency is footing the bill).

³⁶ Although it may be a questionable practice, it is our understanding that there is nothing to stop an employer charging an employee like this where permission for the deduction is given (provided it does not take the person's pay below the NMW), as per the rules which allow employers to charge £1 towards their administrative costs for Attachment of Earnings Orders, see GOV.UK guidance, Making debt deductions from an employee's pay, available at <https://www.gov.uk/debt-deductions-from-employee-pay/deductions-for-priority-order>

³⁷ See, for example, Contractor umbrella company fees – how much to pay, Contract Eye, available at https://www.contracteye.co.uk/contractor_umbrella_fees.shtml

24 Chapter 2 – The basics

Not for profit umbrellas

In 2020, the first 'not for profit' umbrella was launched by the British Association of Social Workers (BASW) to provide PAYE, payroll and employment services to agency social workers.³⁸ It has been created in direct response to their members' request for an umbrella organisation they can trust, which is both professional and ethical, and understands the challenges and complexity of the industry. The umbrella company has been set up as a separate organisation to BASW – costing participants £15 per week – with excess cash being donated to BASW's own membership services.

This is an interesting intervention and, depending on how things develop, could provide the blue-print of an approach that other worker representative bodies could follow.

Companies House

For completeness, we have looked at the independently audited accounts from ten of the biggest and longest established umbrella companies in our sample.³⁹ For seven of these, the gross profit margin is around 2-3%, with operating profit much lower.

Gross profit - last edited accounts	Gross profit margin %
373,291	2.95
1,204,875	2.11
1,433,173	5.07
13,126,065	6.12
2,141,940	2.42
1,202,761	9.00
2,933,089	2.48
7,639,106	2.66
1,856,820	2.89
3,097,320	1.98

Previous years' audited accounts show similar pictures.

38 See BASW launches umbrella company for agency social workers, Community Care article, 14 August 2020, available at <https://www.communitycare.co.uk/2020/08/14/basw-launches-umbrella-company-employ-agency-social-workers/>

39 Smaller or newer umbrella companies will not have full accounts available to view.

In the course of our research, we found that 10 of the umbrella companies in our sample of 25 do not publish their company registration number on their website – even though this is a legal requirement. We also found that some umbrella companies had multiple entities set up in Companies House, with similar sounding names, which meant that it was not easy to match umbrella companies with Companies House records where there wasn't a registration number given. Often the entities were dormant or dissolved. Although there may be solid commercial reasons for this (for example, many dormant entities could be explained by the bulk purchasing of 'off the shelf' limited companies for future freelance contractor clients), this perhaps warrants further exploration. This is, however, outside the scope of this report.

KEY INFORMATION

Illustration of typical umbrella company profit and loss statement

	Notes	30.9.19	30.9.18
Turnover	(1)	£100,000	£95,000
Cost of sales	(2)	£98,000	£94,000
Gross profit		£2,000	£1,000
Administrative expenses	(3)	£1,000	£1,000
Operating profit		£1,000	0

Notes

1. Turnover is largely made up of income received from agencies in respect of workers
2. Cost of sales are the salaries and employment costs of the workers on their books, and will include wages and salaries, social security costs and pension costs.
3. Administrative expenses typically include things like payroll costs of in-house staff, rent and marketing.

Too small margins...?

Some umbrella companies operate on quite small margins which may not appear to be sustainable. However, umbrella companies have historically been able to access a range of devices to displace some of their 'employer' costs and run a profitable business model.

In particular, savings were often made on a worker's home to work travel expenses, due to the special type of employment contract they offered workers – an 'overarching' contract of employment (or an 'umbrella' contract).

26 Chapter 2 – The basics

Essentially, these contracts provided a framework within which an agency worker's successive work locations could be turned into 'temporary workplaces', supporting the payment of non-taxable and non NICable home to work travel expenses to them by the umbrella company. To the extent that these expenses were paid to workers in lieu of ordinary taxable salary (as opposed to on top of it), there was also an employer NIC saving of 13.8% on the value of the expenses.

Undoubtedly, this situation, in the absence of tighter policing of the rules by HMRC, encouraged questionable practices on the part of some umbrella companies. We looked at some of the issues in our earlier report on umbrella companies.⁴⁰

KEY INFORMATION

Travel expenses for the low paid – time for a rethink?

In 2014, we issued a report looking at the evolution of umbrella companies and the birth of a variant of 'traditional' umbrella arrangements, commonly referred to as 'Pay Day by Pay Day' (PDPD).

HMRC's view was that 'the model... does not comply with the Taxes Acts or Social Security Acts and associated Regulations'⁴¹ – yet they appeared to flourish. In the report, we explored why this was and in particular, HMRC's approach to tackling them. We look at PDPD later in this report in Chapter 10.



Travel expenses for the low-paid – time for a rethink?

A research report by the Low Incomes Tax Reform Group of The Chartered Institute of Taxation

November 2014

Rather than HMRC stepping up targeted enforcement activities at those umbrella companies who were acting outside of the legislation, from April 2016, the government changed the rules around relief for home to work travel for those working through an umbrella company. This affected all umbrella companies – even those that were acting compliantly. We look at the effect of this change, and how umbrella companies reacted to the new legislation, in the next Chapter.

40 LITRG report, Travel expenses for the low-paid – time for a rethink?, 17 November 2014, available at <https://www.litr.org.uk/latest-news/reports/141117-travel-expenses-low-paid-%E2%80%93-time-rethink>

41 Per HMRC statement, Pay day by pay day tax relief models, now found in the National Archive at <http://webarchive.nationalarchives.gov.uk/+/http://www.hmrc.gov.uk/news/relief-models.htm>

Travel expenses

Traditionally, umbrella companies use overarching contracts. These used to enable their workers to claim the cost of ordinary home to work travel as an expense – relief not usually afforded to permanently employed workers or agency workers who did not work through an overarching contract. This is explained further in the following few paragraphs.

Tax deductibility of travel expenses

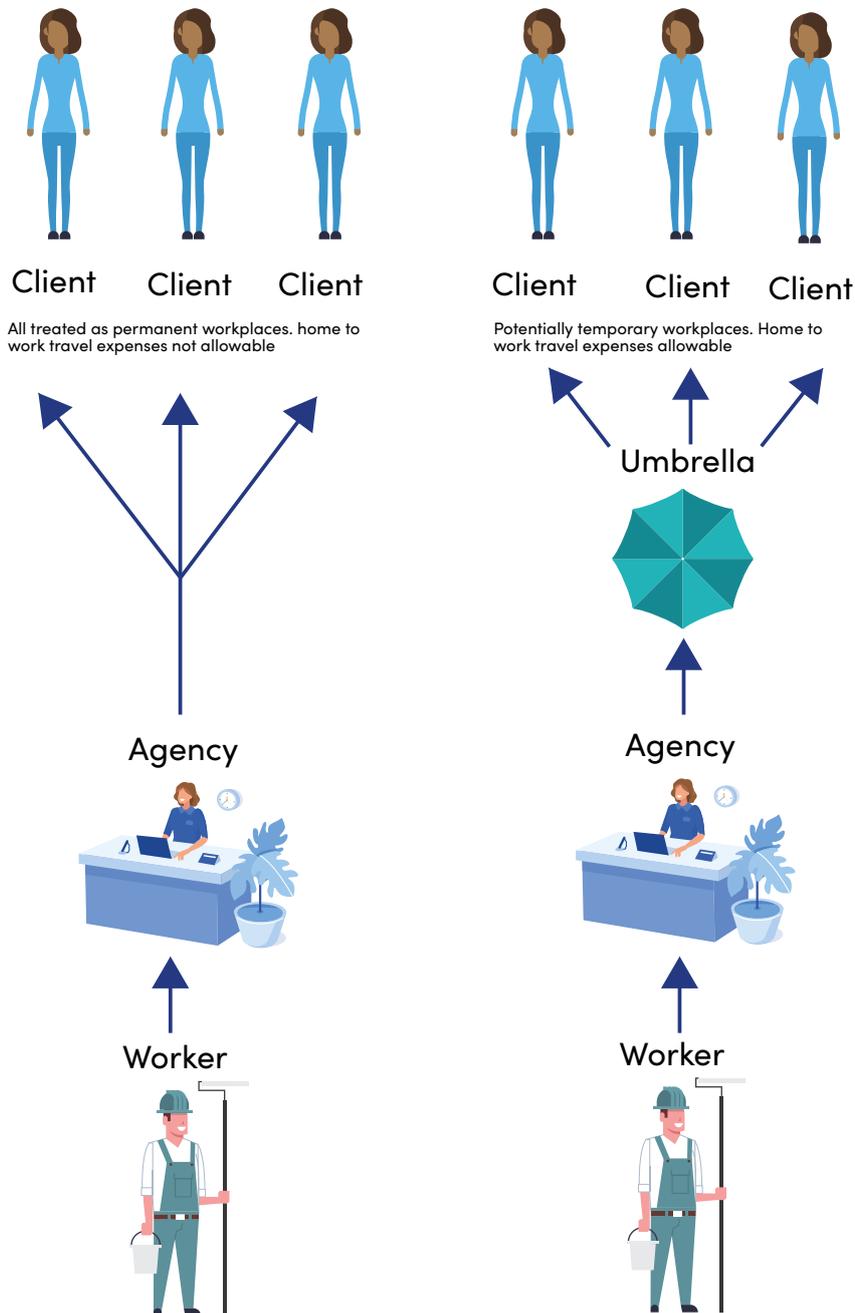
Travel expenses are tax deductible where they are necessarily incurred in travelling in the performance of the duties of the employment or for ‘necessary attendance’ at any place in the performance of duties of the employment which are not ordinary commuting or private travel.⁴² Therefore the costs of travelling to one’s permanent workplace are not allowable but the costs of travelling on business, either direct from home or from the permanent workplace, are allowable. So if, for example, an employee travels direct from home to a client’s premises for a meeting, the full expense of getting there is allowable. But if the employee goes to the office first, then travels to client premises, only the element from the office to the premises is allowable.

In addition, if a worker is sent temporarily from their normal workplace to a different workplace for up to 24 months, returning to their normal workplace thereafter, they are allowed tax relief for the related travelling, accommodation and subsistence expenses (the ‘temporary workplace’ rules), as are site-based employees (employees without any fixed workplace whatsoever). Freelance contractors who have a core employment with their own limited company can often fall within these rules when undertaking different assignments for end clients.

Agency workers are different. Although agency workers may be contracted to work on different engagements through the same employment agency, the tax rules say each engagement is treated as a separate employment for tax purposes. A temporary worker would normally attend only one workplace for all (or almost all) of an engagement, therefore where there is only one workplace per agency placement, that workplace will be a permanent workplace for that employment. This means that agency workers are not entitled to tax relief on the travel and subsistence expenses they have incurred – unless they work through an umbrella company.

⁴² Sections 337 – 340 Income Tax (Earnings and Pensions) Act 2003 (with further rules relating to overseas employment and performance of duties abroad in sections 341 and 342).

Illustration showing the effect of an umbrella company



The expenses of travel to a temporary workplace from home are allowable against tax for a worker, so – to the extent they are reimbursed by their employer – are exempt from tax and NIC. As an umbrella company only has the funds from the agency out of which to pay the worker, any resultant travel and subsistence expenses were only rarely reimbursed over and above the worker's pay. Instead, the worker entered into a salary sacrifice scheme and agreed that an amount of ordinary pay would be replaced with travel and subsistence payments, free of income tax and NIC.

This saved the worker tax and employees' NIC and also reduced the umbrella company's costs as there was no employers' NIC to pay on the expense element of someone's pay.

KEY INFORMATION

Very simplified example showing the effect of the salary sacrifice mechanism:

Wages	£325.58	Tax	£17.11
		NIC	£17.10
Total Gross for Tax/NIC	£325.58		
Tax code 1250L		Total payable to employee: £291.37	

Wages	£275.58	Tax	£7.11
		NIC	£17.10
Total Gross for Tax/NIC	£275.58		
Expenses	£50		
Tax code 1250L		Total payable to employee: £307.37	

The top payslip shows someone outside of a salary sacrifice scheme – although this person incurred £50 of travel expenses, there is no relief given by the employer. The employee can apply for £10 of tax relief from HMRC at the end of the year, assuming they are a basic rate taxpayer.

The bottom payslip shows someone inside of a salary sacrifice scheme – this person has given up £50 of normal salary and has had it reimbursed as expenses. The £16 saving that they have made is a result of the £50 not being taxed nor charged to NIC (32% saving in total – basic rate tax of 20% plus 12% employee NIC).

The salary sacrifice mechanism will also have saved the employer £6.90 in employer NIC as they are saving 13.8% on the £50.

As we showed in our 2014 report⁴³, this caused certain umbrella companies to adopt practices that many, including HMRC and some other umbrella companies, did not consider compliant.

Although these practices were probably quite distinctive and segmented, new rules were introduced on travel expenses, which affected the entire sector.

43 LITRG report, Travel expenses for the low-paid – time for a rethink?, 17 November 2014, available at <https://www.litrg.org.uk/latest-news/reports/141117-travel-expenses-low-paid-%E2%80%93-time-rethink>

30 Chapter 3 – Travel expenses

The rules from April 2016

The rules introduced from April 2016⁴⁴ say that relief for home to work travel and subsistence expenses is restricted where a worker:

- personally provides services to another person
- is employed through an employment intermediary (such as an umbrella company)
- is under the supervision, direction or control (SDC) of any person in the supply chain (or the right thereof).

If all of 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 and the same approach is taken as already applied to agency workers.

As we have already stated in Chapter 2, most agency workers will be under SDC (although we talked about this in Chapter 2 in the context of the rule about whether agencies have to operate PAYE as opposed to whether the travel expenses provisions apply, note that the SDC element of the rules is the same in both cases). This is because most agency workers have little autonomy over their work and so will probably be under someone's SDC. Agency workers are also caught under these rules where someone has the right of SDC over them, even if it is not exercised. Furthermore, HMRC consider everyone working through an agency or umbrella company as being under SDC unless it can be proved to the contrary.

What is SDC?

HMRC's guidance on SDC can be found on GOV.UK⁴⁵ and this includes examples of how the SDC test may apply to agency workers like factory workers, construction workers, home tutors, supply teachers and social workers. In four out of the five examples in that guidance (ESM2069), HMRC's view is that the workers will fall under SDC.

Even if, exceptionally, an agency worker did have complete autonomy over their work, of relevance to many professional, highly skilled agency workers is the following paragraph in the guidance:

'Regulatory environments

As a general rule HMRC considers that workers who personally provide services to work in industries where the manner in which they work is governed by regulations or some other statutory framework or standards, will be subject to the right of SDC, and it is likely that in practice, they will be subject to SDC. That is because somebody will have the right to check that their work complies with those standards. To check that the workers are complying somebody will need

44 Income Tax (Earnings and Pensions) Act 2003 (ITEPA) section 339A – Travel for necessary attendance: employment intermediaries

45 See HMRC guidance, Employment intermediaries: personal services and supervision, direction or control, 6 April 2016, available on GOV.UK at <https://www.gov.uk/government/publications/employment-intermediaries-personal-services-and-supervision-direction-or-control>

31 Chapter 3 – Travel expenses

to have the right to supervise their work and, if appropriate, direct or control how the worker does their work. The types of workers will include but are not limited to health care workers such as doctors, nurses, social care workers such as social workers and social work assistants, teachers and teaching assistants.’

Debt transfer

It is up to the umbrella company to prove that the SDC test isn’t met, and if the evidence is deemed unsatisfactory, HMRC will recover any PAYE due from them. Debt transfer rules mean the umbrella company directors will be deemed liable if the company itself is unable to pay.⁴⁶

All of this means that umbrella companies need to ensure that they are carrying out thorough SDC assessments and are gathering substantial evidence to satisfy HMRC in cases where they think there is no SDC.

Umbrella companies’ response to the April 2016 changes

Many people thought that widely-drawn rules, along with the need to have proper compliance processes in place and the financial risk imposed upon umbrella companies and their directors, would spell the end for the traditional umbrella model.

That prediction did not transpire. Instead, the changes forced umbrella companies to re-evaluate their business model and operations.

Some umbrella companies, including (as we will see in Chapter 10) most PDPD providers as far as we can tell, left the marketplace.

Some of the remaining umbrella companies seemed to accept the situation and stepped away from offering travel and subsistence expense models. Instead, they concentrated on improving or diversifying their offering to gain competitive advantage over their peers and increasing their volume (with sights firmly set on the April 2017 off-payroll changes in the public sector, and the move of many limited company freelance contractors to umbrella companies). There was also some consolidation within the marketplace to help streamline costs and some umbrella companies may have put up their margins slightly to compensate for the loss of profits as a result of the changes to the travel and subsistence rules.

Current expense practice

From our research, it seems some umbrella companies continue to offer travel expenses-based arrangements – adapting their models and processes to fit with the new legislation.

For example, even though HMRC’s guidance indicates to us that a worker being outside of SDC is likely to be the exception rather than the norm, some umbrella companies continue to process reimbursed home to work expenses for those workers who they

46 Under section 688B ITEPA 2003 and PAYE Regulations (SI 2003/2682) Chapter 3B

32 Chapter 3 – Travel expenses

believe are not subject to SDC – of which there will be a few (for example, some skilled professionals, operating outside of regulatory environments).

Some of those that do this clearly take their SDC-assessing responsibilities seriously. We have seen one umbrella company for example that has secured independent quarterly reviews of their SDC process by a 'big 4' accountancy firm (and this is distinct and in addition to the annual FCSA compliance audit – see more about the FCSA in Chapter 7).

However, it is also clear from our review of umbrella company websites that there are different views of the SDC test – with the problem being that the tests are largely subjective. For example, we have seen different umbrella companies saying:

- That all those below £12 an hour will be determined as being subject to SDC
- That all those below £10 an hour will be determined as being subject to SDC
- That what is important when considering SDC is **how** the work is done (as opposed to where the work is done, what is to be done and when it is to be done)
- That a skilled worker who is engaged to complete a particular task is not the intended target of the SDC restriction
- That SDC will be determined by the worker completing an assessment form
- That SDC will be determined by contacting the agency/end client

It does therefore seem possible, based upon the above examples showing different interpretations of the SDC test, that some workers are being incorrectly assessed as being outside of its scope. This means that such workers may be erroneously receiving relief for home to work travel and subsistence expenses.

Another layer of legislation – also introduced in April 2016

Even where home to work travel and subsistence expenses can still be allowed, for example because a worker is outside SDC, another set of rules⁴⁷ also introduced from April 2016 – restrict an umbrella company from reimbursing a worker's expenses on a tax-free basis where they are in connection with 'relevant salary sacrifice arrangements'. We have set out the relevant legislation in the box below:

EXTRACT

'289A Exemption for paid or reimbursed expenses

(1) No liability to income tax arises by virtue of Chapter 3 of Part 3 (taxable benefits: expenses payments) in respect of an amount ("amount A") paid or reimbursed by a person to an employee (whether or not an employee of the person) in respect of expenses if –

(a) an amount equal to or exceeding amount A would (ignoring this section) be allowed as a deduction from the employee's earnings under Chapter 2 or 5 of Part 5 in respect of the expenses, and

47 ITEPA 2003, section 289A – Exemption for paid or reimbursed expenses

33 Chapter 3 – Travel expenses

(b) the payment or reimbursement is not provided pursuant to relevant salary sacrifice arrangements.’

The rationale behind S289A ITEPA 2003

For tax years up to and including 2015/16, if an employer paid or reimbursed an employee’s expenses, the starting point was that there were various P11D reporting requirements⁴⁸ which meant that they counted as taxable income on the employee in the first instance.

To the extent that they were allowable business expenses, the employee would then be able claim a deduction from their earnings to cancel out the tax charge; or the employer could apply to HMRC for a dispensation to remove the obligation to report (and the employee to subsequently deduct) the expenses.

Since 6 April 2016 (under s289A ITEPA 2003), the business expense rules have been simplified and the deduction/dispensation approach has been replaced with an outright exemption for employers (from reporting) – but only where the payment or reimbursement is not provided pursuant to relevant salary sacrifice arrangements.

These rules were meant to make life easier for employers and employees. However, in the context of an umbrella company relationship they were problematic, as they meant that an umbrella company should not be replacing (or salary sacrificing) a worker’s normal taxable salary with tax and NIC free reimbursed expenses, as they had previously.

As they cannot benefit from the exemption conferred by s289A ITEPA 2003, umbrella companies should instead be operating PAYE tax and NIC on any salary sacrificed expense payments and the worker should be reclaiming tax relief for their allowable expenses through the P87⁴⁹ process or by filing a tax return. This result is the same as for those who do not get their expenses reimbursed.

Rechargeable expenses

An umbrella company employee can sometimes bill expenses on to an agency or end client, who is able to and has agreed to reimburse them **over and above** their agreed rate of pay. This might be, for example, where an end client requires the worker to go on a business trip, although this is likely to be more common where higher paid, higher skilled workers are involved.

There is no ‘relevant salary sacrifice’ here, so the expenses paid from the end client or agency to the umbrella company can be reimbursed to the worker by the umbrella company on a tax and NIC-free basis. This is on the proviso that they are wholly, exclusively and necessarily incurred in the performance of duties (remembering that technically anything can be expensed, but only legitimate business expenses can be processed by the umbrella company on a tax and NIC-free basis).

48 The P11D form is used by employers to report benefits in kind provided and expenses payments made to workers and HMRC

49 HMRC form, Claim income tax relief for your employment expenses (P87), available at <https://www.gov.uk/guidance/claim-income-tax-relief-for-your-employment-expenses-p87>

34 Chapter 3 – Travel expenses

Given there is a need for employers to have a checking system in place, umbrella companies should be asking employees to submit a separate expense claim (to the one they made to the agency or end client) rather than automatically paying out the extra money received on a tax and NIC-free basis based on the initial expense claim to the agency or end client. In effect, the worker is required to put in the same expenses claim twice so that the umbrella company can itself verify that it can legitimately pay out the expenses on a tax and NIC-free basis.

Fixed pot expenses

To be able to continue to deal with non-rechargeable expenses, some umbrella companies initially attempted to work around the new salary sacrifice restrictions by introducing a 'fixed pot' model which allowed workers to continue to get relief on their travel expenses at the point of pay without it being deemed a salary sacrifice. They appear to have seized on this wording in HMRC's EIM manual⁵⁰:

'If an employee is paid under an arrangement where each month they receive a payment of salary based on hours worked, expenses payments and a bonus payment, and the amount of that bonus payment is dependent on the expenses payments that they've received, then that arrangement would be a 'relevant salary sacrifice arrangement' for the purposes of the exemption. This means that the exemption would not apply to those expenses payments, and the employer would need to operate PAYE and deduct class 1 NICs from those payments. The employee would still be entitled to claim a tax deduction from HMRC for any allowable expenses that they've actually incurred.

This restriction only applies where part of an employee's pay depends on the expenses payments, or where expenses payments are made under a traditional salary sacrifice arrangement.

If another employee is paid under an arrangement which is not a traditional salary sacrifice arrangement, and also receives a salary based on hours worked, expenses payments and a bonus payment each month, but their bonus payment does not depend on the amount of the expenses payments (e.g. it was instead a fixed percentage of the basic salary) then this would not be a 'relevant salary sacrifice arrangement'.

⁵⁰ As set out in EIM30230, HMRC Employment Income Manual, available on GOVUK at <https://www.gov.uk/hmrc-internal-manuals/employment-income-manual/eim30230>

The fixed pot model is explained further in this old article on ContractorUK website⁵¹:

EXTRACT

‘Contractor’s Question: In April, my umbrella company introduced a fixed expense for subsistence – £40 per week, which I agreed to. But it never explained to me that when I claim less than the £40, the unutilised amount is subtracted from my net pay. Isn’t this unlawful? It certainly feels like unreasonable practice.

Expert’s Answer: In April 2016, ‘salary sacrifice’ restrictions were [introduced](#) which prevent [umbrella companies from sacrificing taxable salary and substituting it with tax-free expenditure](#).

Some umbrella providers have attempted to work around these new restrictions by introducing new models that allow contractors to gain tax relief on [expenses](#) without it being deemed a salary-sacrifice. This is done by the umbrella company and the worker agreeing to a fixed expenses/salary ratio up-front. These values are written into the contract such that providing tax relief on any portion of the fixed expenses amount doesn’t result in the umbrella company sacrificing the worker’s taxable salary component.

For example, a worker earning £20.00 per hour might agree with their umbrella company that their salary is £15.00 per hour and their expenses ‘pot’ is £5.00 per hour. In this example, the worker is able to offset up to £5.00 per hour in expenses, without it ever reducing the amount of salary that they receive, since their salary always remains constant at the agreed rate of £15.00 per hour.

Unfortunately, this model does have a major flaw which is that in those instances where the worker cannot demonstrate expenditure levels exactly equal to the value of the expenses ‘pot’, then the worker loses out. The expenses ‘pot’ can only be fully utilised [if the worker can demonstrate the expenses](#), and any shortfall cannot be reclassified and paid out as salary if the salary component is already being maximised (i.e. is at the full £15.00 per hour as per the example above).

Our umbrella company does not believe that this sort of model is reasonable practice. While it might technically be a legal way in which to operate, it places far too much risk on the worker/contractor by expecting them to be able to accurately calculate their expenditure values before they’ve even started the work assignment. And because of its rigidity, the model offers no scope for reassessment during the contract.’

⁵¹ See Contractors’ questions: Can brollies take unused expenses out of pay?, ContractorUK Q&A article, 25 August 2016, available at https://www.contractoruk.com/umbrella_company/can_brollies_take_unused_expenses_out_pay.html

36 Chapter 3 – Travel expenses

From this article we can see that some umbrella companies view this model as difficult, although we understand that this is more likely to be because of the practicalities of trying to judge the correct pot level, rather than because they view it as straining to fit within the law.

Mileage payments

The salary sacrifice restrictions from April 2016 also do not apply to AMAP⁵² reimbursements for business mileage in a worker's own vehicle. This is because the s289A ITEPA 2003 rules only apply to paid or reimbursed expenses that employees would be allowed to personally claim tax relief for under Part 5 of ITEPA 2003 (expenses that can be deducted if not reimbursed). There was no need for the rules to apply to AMAP mileage payments which sit under Part 4 ITEPA 2003 (expenses that are exempt if paid or reimbursed by an employer), as they already enjoyed an employer reporting exemption.

This means that some umbrella companies (including some of the ones we looked at during our review for this report), continue to promote their ability to process salary sacrificed reimbursed mileage expenses at the point of pay as before.

KEY INFORMATION

General disparities relating to reimbursed expenses versus unreimbursed expenses

There are differences in the tax system for those who have their expenses paid or reimbursed by their employer and those who don't, which includes the fact that Part 4 ITEPA 2003 is basically far longer than Part 5 ITEPA!

This means some expenses are permitted tax relief in instances of reimbursement, but are denied a corresponding deduction in instances of non-reimbursement. An example is passenger payments. If an employee travels 100 miles in his own car to a work conference carrying a fellow employee, then he can be reimbursed 5p per mile (£5) on a tax and NIC-free basis by his employer. However, another employee in exactly the same circumstances who is not reimbursed, cannot claim a £5 deduction from his taxable/NICable wages.

52 Approved mileage allowance payments (AMAP) is a statutory system of tax-free approved mileage allowance for business journeys in an employee's own transport. Where the employer pays a mileage allowance, provided the amounts paid do not exceed the AMAP rates, they are not subject to PAYE tax or NIC and do not need to be reported to HMRC. If an employer pays less than the AMAP amounts, the employee can claim tax relief for the unused balance of the approved amount (this is known as the Mileage Allowance Relief (MAR) system). However this relief is also given under Part 4 ITEPA 2003 and not Part 5 ITEPA 2003.

Table showing main differences between reimbursed and unreimbursed expenses

	Reimbursed	Unreimbursed
Meaning	Employee pays or reimburses employee expenses	Employee pays for own expenses
Cost borne by	Employer	Employee
Tax relief	Yes	Yes
NIC relief	Yes	No
Relief administered by	Employer	HMRC
Timing	Instantaneous	End of tax year
Tax relief mechanism	Exemption – employer does not need to report expenses	Employee applies for deduction from taxable earnings
Expenses allowed	Numerous – those allowed for unreimbursed and more, including work-related training, incidental overnight expenses, mobile phones, eye tests, passenger payments etc	Few – travel expenses, professional subscriptions and expenses wholly, exclusively, necessarily incurred

Optional remuneration arrangements – the rules from April 2017

The Optional Remuneration Arrangement ('OpRA') rules took effect from 6 April 2017. These had the effect of stopping the tax and NIC advantages where benefits in kind are provided through salary sacrifice or flexible benefit arrangements.⁵³

Broadly speaking, the rules will be in point any time a worker has the option to receive cash or benefits. Although there are some specifically excluded benefits in kind like pension saving and cycle to work schemes (which means that employees can continue to enter into a salary sacrifice arrangement for them and enjoy the tax and NIC benefits), it is important to note that benefits in kind for this purpose also can include where an employer pays or reimburses otherwise exempt Part 4 ITEPA 2003 expenses, such as mileage or passenger payments.

On the face of it, OpRA would therefore appear to catch mileage expense reimbursements (even though the rules in s289A ITEPA 2003 didn't).

⁵³ HMRC guidance, Employment income manual EIM44010 – optional remuneration arrangements: definition, updated 9 April 2020, available from GOV.UK at <https://www.gov.uk/government/publications/optional-remuneration-arrangements/optional-remuneration-arrangements>

38 Chapter 3 – Travel expenses

However, it seems some umbrella companies are operating on the basis that OpRA does not apply, given the statement we found below on the Professional Passport's website (Professional Passport are another umbrella trade body – we discuss their role in more detail in Chapter 7):⁵⁴

'The Finance Act of 2017 saw a further change with the introduction of the Optional Remuneration Arrangements [OpRA]. This broadened the impact of the previous relevant salary sacrifice test and further limiting the payment of expenses.

Extremely specific contractual wording is required in the umbrella providers contract of employment to fall outside the OpRA test and where this is not present the provider will be unable to reimburse any expenses, including mileage.

As a result of these changes the umbrella providers expense claim forms changed and contractors are now required to provide much more information on the claims to allow the providers to meet their obligations and demonstrate to HMRC, where required to do so, that they have correctly assessed the workplace status and applied the rules correctly.'

We have not been able to ascertain exactly what the 'specific contractual wording required' refers to – unsurprising perhaps, as there would be a degree of commercial sensitivity around this. However this very restricted 'opening' has, no doubt, been seen as an opportunity by some in the industry to continue reimbursing tax and NIC free expenses across the board.

We have also been unable to work out exactly how the 'fixed pot' model fits with OpRA – it may be the case that it doesn't comply, but it has not been properly tested yet.

In our experience, the problem with low levels of HMRC engagement with umbrella companies and a lack of PAYE compliance and enforcement action at engager level (as we saw with PDPD), is that in the meantime there is a perception in the industry of presumed compliance. This is particularly the case where the umbrella company is openly marketing arrangements and has been for a long time. The unspoken challenge is 'If there was a problem, wouldn't HMRC have taken action?'

The upshot

As explained in Chapter 2, although the number of umbrella companies currently operating is difficult to ascertain, there is clearly a significant number of umbrella companies out there and so the marketplace is very competitive. Given the employer NIC saving for the umbrella company that comes from swapping otherwise taxable salary for tax and NIC free reimbursed expenses, it is not surprising that some umbrella companies are reluctant to let go of the mechanism.

⁵⁴ Professional Passport, Contractor mileage expenses, available at <https://www.professionalpassport.com/Hot-topics/Contractor-Mileage-Expenses>

39 Chapter 3 – Travel expenses

We have seen that a number of umbrella companies are therefore continuing to process salary sacrificed home to work expenses at the point of pay where they are in respect of mileage reimbursements. Indeed, for the 25 in our sample, we can provide the following breakdown:



Even where workers are assessed as being under SDC (or the right thereof), umbrella companies may also be continuing to process other salary sacrificed mileage expenses – those incurred while working (e.g. travelling from client to client if you are a community care nurse), as opposed to getting to work. These expenses are ‘allowable’ for tax purposes even if people are working under SDC (or the right thereof), although, as discussed, there are questions as to whether the relief should be processed by the umbrella company if they are reimbursed salary sacrificed expenses. It does occur to us that these rules could be manipulated to allow increased expense claiming, although we have no evidence that this is currently happening.

If they are using the fixed pot model, umbrellas may well be processing other types of travel expenses (in addition to mileage), e.g. train fares and associated subsistence costs. Of the 13 umbrella companies that are actively promoting the claiming of mileage expenses, 8 were also indicating they could process other types of reimbursed travel expenses.

Given the lack of clarity around how the mileage or fixed pot models sit with OpRA, the continued processing of travel expenses may be seen as carrying some risk for the umbrella company, although if the SDC rules are being properly applied, the risk could be limited. Indeed, in three of the ten Companies House records that we looked at, we can see the expenses costs to salary costs ratio is 0.81%, so less than 1%. This would indicate that even if umbrella companies are continuing to process travel expenses, they would tend to be for lower value claims.

We look at what the potential implications are of this risk for workers in the next Chapter.

Benefits of umbrella arrangements to workers

For freelance contractors who cannot work for their clients on a sole trader or limited company basis (or who, indeed, do not want to), the option to be able to work through an umbrella can be very valuable.

Here is a quote from a 'career contractor' we interviewed as part of our research who clearly views working through an umbrella company as a positive choice, essentially enabling her to work:

CASE STUDY

'I work in finance and move around every few years – banks, airports... I've had my own limited company for 20 years but for some assignments I'm inside IR35 and can't really use it. I can't imagine in a million years ever being taken on directly by a client under their PAYE... I'm not even sure I would want that, as I like being my own boss. Using an umbrella company means that I can keep doing what I love in the way I love it. I've heard of problems, but to be honest, I've only ever come across good ones. My experiences have been positive and I've never had any problems with my pay. It just kind of ticks along in the background and I can get on with my day job. Maybe I'm lucky – or maybe the people who get stung by umbrellas are unlucky, I don't know.'

For agency workers, where there is the alternative of agency PAYE, there are also benefits of working through an umbrella company although these are not so clear cut. However, as we have seen, many agencies do not offer in-house PAYE, so many workers have no choice but to use an umbrella company if they want to engage with a particular agency.

Employment rights

As an employee of an umbrella company, an agency worker working through an umbrella company has the same rights as any other employed person⁵⁵.

We have seen some umbrella companies emphasising these benefits to sell their services. However, it is not always made clear that agency workers that don't use an umbrella company will usually have 'worker' employment rights anyway (the category that sits somewhere between employees and the self-employed). Therefore, they are entitled to basic protections from the agency, such as being paid at least the NMW, auto enrolment (if they meet the earnings threshold) and working time entitlements like paid annual leave. Furthermore, 'workers' paid under the PAYE system have access to sick and maternity pay, provided they meet the relevant criteria.

55 Official guidance on employment status can be found on GOV.UK at <https://www.gov.uk/employment-status/employee>

41 Chapter 4 – Benefits of umbrella arrangements to workers

It is therefore important for workers to understand that if they get paid directly from their agency (if that is an option), they would get the main employment rights even if they did not work through an umbrella company.

Working through an umbrella company can, however, potentially help smooth the process for workers around auto enrolment and maternity rights. Further commentary on this, can be found below.

Theoretical rights?

It also needs to be understood that the 'extra' rights that come with employee status by working through an umbrella company, as compared to a 'worker', may not be all that valuable to an itinerant worker who moves around from umbrella company to umbrella company – for example, unfair dismissal or a redundancy payment are only available after two years' service.

Even where an individual does accrue two years' service with a particular umbrella company, because of the unconventional way in which the individuals work, the value of such rights is questionable. This as we understand it, is because it is often the worker who leaves an umbrella company (on the completion of an assignment, for example to move to another assignment via an agency that has a different umbrella company PSL), rather than the umbrella company terminating an employee.

On the completion of an assignment, if a worker does not leave the umbrella company, the employment contract will continue. It is not automatically terminated. In situations where an umbrella company does not hear from a worker for a period of time after an assignment has ended, we understand a pre-termination communication would be sent. This asks them to get in touch with the umbrella company to update them on their situation. If the worker fails to come back within a set timeframe, it will be seen as a resignation and a P45 would be issued. This dovetails with HMRC's guidance that unless an 'irregular payment' indicator is set on an employer's payroll system for a particular employee,⁵⁶ there will be an automatic cessation of the individual's employment record should the employer stop sending payroll information for a period of time.

So, would there ever be a situation where unfair dismissal or redundancy comes into play? It is hard to think of a situation where an employee would be let go by the umbrella company (and thus could claim unfair dismissal) or would be made redundant because the umbrella company needed to reduce its workforce (except where the umbrella company went bust for example, in which case redundancy pay might be claimable from the Insolvency Service). A more likely scenario would be where the assignment is terminated early by the end client – but in that case the individual is still employed by the umbrella company. They do not have any direct contractual relationship with the end client they are placed with during the assignment, even though they work for them during that period and not for the umbrella company.

⁵⁶ HMRC PAYE manual, PAYE63025, available at <https://www.gov.uk/hmrc-internal-manuals/payee-manual/payee63025>

42 Chapter 4 – Benefits of umbrella arrangements to workers

For completeness, here is a typical termination process outlined in an umbrella company employment contract that we have seen published on the internet:

TERMINATION

- 1.1. There is no probationary period associated with your employment. Your employment is not for a fixed term and is not of a temporary nature. It may be terminated by notice, as set out in this clause (or, where we are justified in so doing, for example as a result of gross misconduct, without notice and without making payment in lieu of notice).
 - 1.2. Termination of a Client Assignment does not terminate your contract of employment.
 - 1.3. You may not terminate your employment until any current Client Assignment can also be lawfully terminated by us. You may not terminate a Client Assignment without also terminating your contract of employment, without our written agreement. Subject thereto, this employment may be terminated by written notice as follows:
 - 1.3.1. During the first month, either by you or by us with immediate effect
 - 1.3.2. Until you have achieved two years continuous employment, either (a) by you giving us one week's notice, or (b) by us giving you three weeks' notice
 - 1.3.3. Thereafter, either (a) by you giving us one week's notice, or (b) by us giving you notice of two weeks, plus one additional week for each year of continuous employment, up to a maximum of twelve (maximum notice fourteen weeks);
 - 1.4. Your employment will automatically terminate, without any requirement for notice, if continuation of your employment would become unlawful, whether by reason of the expiry of any required work permit, or otherwise.
 - 1.5. If on termination you have taken more or less than the amount of paid leave to which you are entitled (calculated to the date of termination), an adjustment calculated in accordance with the Working Time Regulations 1998 (as amended) will be made to your final pay.
 - 1.6. On termination of your employment for whatever reason, you will forthwith return all property belonging to us or to any Client which is in your possession or under your control. You will if so required by us, confirm in writing that you have complied with your obligation under this term.'
-

43 Chapter 4 – Benefits of umbrella arrangements to workers

Pay between assignments

Historically, to be able to claim home to work travel expenses, the umbrella company had to be a worker's 'permanent workplace'. To meet the rules to be a permanent workplace, there needed to be an 'overarching' contract of employment.

In order to be an overarching contract of employment, the umbrella company must usually pay workers for 336 hours of work per year (equivalent to one day a week), at the minimum wage⁵⁷. Beyond the 336 hours, workers are not guaranteed any hours, meaning that when workers are between assignments, they may still be an employee of the umbrella company, albeit with no hours and no pay. They are effectively on zero-hour contracts – which, although can have negative connotations and cause problems for workers in certain contexts, are the only way umbrella companies can facilitate the arrangements when a person's employability is outside of their control.

Our understanding is that these 336 hours clauses are still in the employment contracts of most umbrella companies, even though not all offer a home to work travel expense service anymore.

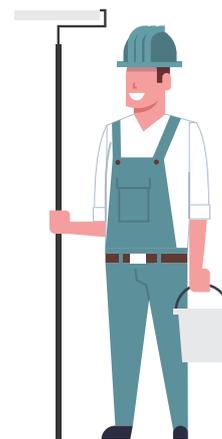
But what if the worker is within the 336 hours? Will they get paid between assignments?

From what we have seen by looking at umbrella company contracts available freely on the internet, the employment contract will usually provide that there is no entitlement to any of the 336 hours of work in any particular week or month nor to have them spread evenly or at particular intervals over the year. Rather, the umbrella companies simply test after a year (or upon a person leaving, if sooner), whether any of the contracted hours remain unpaid.

EXAMPLE

Take an example of Ted. Ted is engaged for 40 hours work for ten weeks at the start of his employment with an umbrella company. He then has a week's break when he is between assignments (and when he is not taking any accrued annual leave). As Ted has already worked 400 hours for the umbrella company, technically, there are no unpaid hours left.

Only if Ted worked for an umbrella company that prorated the 336 hours evenly over the year (of which there are a few) is it possible that he would be paid for one day of the week when he was between assignments. In reality however, we would expect that Ted would want to find a new assignment as soon as possible, as opposed to relying on small minimum hours payment. As placing workers on assignment is the way that agencies make money, we assume they would rather that Ted be placed in a new assignment too.



⁵⁷ 336 hours (equivalent to one day a week) is the minimum HMRC accept as creating an 'overarching' contract of employment: see HMRC guidance, ESM2350, available at <https://www.gov.uk/hmrc-internal-manuals/employment-status-manual/esm2350>

44 Chapter 4 – Benefits of umbrella arrangements to workers

Maternity leave and pay

Agency workers are entitled to statutory maternity pay (SMP), provided they meet the relevant criteria, but not statutory maternity leave. Umbrella company workers are entitled to SMP, again provided they meet the relevant criteria, **and** leave.

Contrary to popular belief, maternity pay is not an employment law right. It is tied to whether PAYE is paid. In both cases, being paid under PAYE means that there is a secondary contributor (someone who is liable to pay class 1 secondary National Insurance Contributions). Secondary contributors are responsible for administering and potentially part-financing statutory payments – like SMP.

To qualify for SMP, a worker must:

- have been employed for at least 26 weeks by the 15th week before the week the baby is due, and
- still be employed in all or part of the 15th week before the baby is due (the ‘qualifying week’), and
- earn at least £120 per week (in 2020/21) on average in the eight weeks up to the last payday before the end of the 15th week before the baby is due.

Much, if not all, SMP is reclaimable from the government by employers, but payments can be complicated to understand and thus expensive to administer.

Within an agency setting there may be difficulties, where, for example, an agency worker has not worked for the agency in all of the 26 weeks. Although this does not necessarily mean that their continuity of employment is broken for the purpose of these rules, it is foreseeable that some agencies may not understand the complex rules around how to count relevant weeks properly.

The rules are probably much easier to use and apply in the context of an umbrella company employment, where there is a continuous contract of employment, even between assignments. In order to demonstrate whether the ‘smoothing’ effect of an umbrella company actually results in tangible benefits for workers, it would be necessary to look at some umbrella company data, for example, how many people in were paid SMP in any particular tax year. This is outside of the scope of this report, although when we mooted the idea with one of the biggest umbrella companies in the UK, we understood they would be happy to share such data with us.

Statutory maternity leave is an employment law right⁵⁸, so it is only conferred on employees (not ‘workers’). Although agency workers can still take time off (and then re-register with the agency when they want to return to work), we can see that official messages like ‘You may be able to get [Statutory Maternity Pay](#), but you cannot get [Statutory Maternity Leave](#)’⁵⁹ could cause uncertainty and worry for agency workers. Working through an umbrella company could therefore be beneficial in this respect.

58 Employment Rights Act 1996, Part VIII, available at <https://www.legislation.gov.uk/ukpga/1996/18/part/VIII/enacted>

59 Official guidance, Your rights as an agency worker: Maternity rights, available at <https://www.gov.uk/agency-workers-your-rights/maternity-rights-for-agency-workers>

45 Chapter 4 – Benefits of umbrella arrangements to workers

There may be other benefits for umbrella company employees as compared to agency workers related to pregnancy and maternity⁶⁰, however we do not go into further detail in this report.

Auto enrolment into workplace pensions

Moving around from job to job and agency to agency every few months can cause problems with auto enrolment into workplace pensions for agency workers working outside of an umbrella company. This is because in-built into auto enrolment is the ability for an employer to legitimately 'postpone' assessing someone for auto enrolment purposes for up to three months⁶¹, which we assume some agencies use.

As an umbrella company is an employer, it has an obligation to auto enrol eligible staff, just like any other employer. Furthermore, as an umbrella company links one period of agency working to the next, workers should face only one period of postponement, meaning a greater number of agency workers should be being auto enrolled if they work through an umbrella company, as compared to those who don't.

Of course, some workers will not be paid via a given umbrella company for a period of more than three months before they move onto another employment agency and another umbrella company, so there is still a risk of not being auto enrolled into a workplace pension. However, workers whose auto enrolment has been postponed by their employer can choose to opt in to the pension scheme during the postponement period.

Recent research from the Resolution Foundation⁶² seems to indicate that, even after factoring in postponement, up to one in ten agency workers have not been auto enrolled. As there may be some small savings to be had for employers from ignoring their auto enrolment obligations completely, it is possible that umbrella companies are implicated in this statistic. However, The Pensions Regulator does not seem to have promoted this as a significant issue (for example, we cannot find any mention of umbrella companies in the quarterly Compliance and Enforcement bulletins⁶³ or in any other publications).

We have, however, recently received a website query from someone who was not auto enrolled into a pension scheme by an umbrella company until the umbrella company was prompted by the worker. This may therefore be an area worth exploring further. In line with The Pensions Regulator's Compliance and Enforcement Strategy⁶⁴, we assume

60 Maternity action, Maternity and parental rights for agency workers, available at <https://maternityaction.org.uk/advice/maternity-and-parental-rights-for-agency-workers/>

61 More information on postponement is available on The Pensions Regulator's website at <https://www.thepensionsregulator.gov.uk/en/business-advisers/automatic-enrolment-guide-for-business-advisers/7-assessing-and-enrolling-staff/postponement>

62 As discussed in the Resolution Foundation's Enrol-up report, August 2020, available at <https://www.resolutionfoundation.org/app/uploads/2020/09/Enrol-up.pdf>

63 The Pensions Regulator, Enforcement bulletins, available at <https://www.thepensionsregulator.gov.uk/en/document-library/enforcement-activity/enforcement-bulletins>

64 The Pensions Regulator, Compliance and enforcement strategy – for employers subject to automatic enrolment duties, June 2016, available at <https://www.thepensionsregulator.gov.uk/-/media/thepensionsregulator/files/import/pdf/pensions-reform-compliance-and-enforcement-strategy.ashx>

46 Chapter 4 – Benefits of umbrella arrangements to workers

that to the extent any specific intelligence or trends on umbrella company employers present, the Regulator will act accordingly (as they do for all employers).

Umbrellas going further – offering more than the minimum on pensions

Some umbrella companies appear to be offering more on pensions to make themselves stand out. For instance, a number of umbrella companies that we looked at offer pension provision over and above the minimum they are obliged to offer under the auto enrolment regime.

There appear to be a number of options available in the marketplace, including for workers to be able to contribute to pre-existing pension schemes via salary sacrifice (which is acceptable for pension saving, provided a worker's pay isn't reduced to below the NMW), which can save them tax and NIC. It also saves the umbrella company employers' NIC. We noticed that one of the umbrella companies we looked at in our sample of 25, said that they passed this saving on in full to the employee.

This development in the marketplace may be to attract professional freelance contractors entering the umbrella marketplace for the first time since the off-payroll reforms, from their own limited companies, who may have been making significant pension contributions. It is of note that a large number of queries posted on to contractor forums recently have been about umbrella company pension saving options.⁶⁵

Continuous payroll link

Working through an umbrella company can be beneficial as it can provide a continuous payroll link from one assignment to the next. This can help make workers a more attractive proposition for banks and other lenders as they have only one employer as compared to many different agency employers. It can also help prevent problems like 'emergency tax' when an individual starts a new assignment through a new agency, which not only saves the worker trouble but may also reduce administration for HMRC.

PAYE and agency workers

PAYE usually works best when an employee has a single, stable job that lasts a complete tax year. Agency workers, who often change agencies in quick succession, sit uneasily with the operation of PAYE so having an umbrella company acting as a single employer through which to channel all their pay and tax from one agency to the next, can be helpful in preventing things like 'emergency tax'.

Nevertheless, 'emergency tax', if not avoidable altogether, is usually only a temporary problem and agency workers can do several things to help ensure PAYE operates as smoothly as possible for them throughout the year, without using an umbrella company.⁶⁶

65 For example, ContractorUK post, available at <https://www.contractoruk.com/forums/umbrella-companies/140290-umbrella-pension-salary-sacrifice-adjustments.html>

66 Further information is available in LITRG's Agency Worker factsheet, May 2020, available at <https://www.litrg.org.uk/sites/default/files/files/LITRG-Factsheet-agency-workers-2020.pdf>

47 Chapter 4 – Benefits of umbrella arrangements to workers

In addition, it should be appreciated that different agencies have different 'preferred' umbrella companies, so if a worker finds a new assignment through a new agency, it is not guaranteed that they can take their umbrella company with them and they may face emergency tax anyway.

Other perks

Sometimes umbrella companies also provide things like shopping discounts and an online portal where people can transact with the umbrella company and track their pay as part of their overall employment package.

Some of the perks we have seen advertised include:

- High street discounts for retailers and restaurants
- Online classes for mental and physical health
- Leisure and travel discounts
- Expert advice with regards to mortgages and financial planning
- 24/7 access to a GP, counselling, support and fitness resources
- Same day bank transfers for wages
- SMS text alerts when payments are made
- Being able to view timesheets, payslips and assignments 24/7 via an online portal

Whether these are really benefits will depend on whether they are included in the 'margin' the umbrella company deducts from the gross income or whether they charge workers extra to provide them.

We think it would be fair to say that some of the things that are sold as 'extras' may be worth very little, e.g. same day, faster payments bank transfers (which are reasonably standard these days).

Benefits like tailored deals or discounts for umbrella company employees on things like income protection, life assurance, income protection, mortgages and private medical cover may be more helpful, depending on the individual's circumstances.

Expenses

Travel expenses

As we have seen, it used to be the case that if an agency worker worked through an umbrella company and was given an overarching contract of employment, then they could claim tax and NIC relief on the costs of getting to and from their assignment locations, something not available to them if they worked through an agency. The salary sacrifice mechanism that they were then paid under meant that they could save both tax and NIC – far preferable to the default position of being able to claim only tax relief and no NIC relief, and then only at the end of the year. This opportunity for workers has now been severely curtailed, although some umbrella companies seem to think they have found a workaround.

48 Chapter 4 – Benefits of umbrella arrangements to workers

For those umbrella companies that are no longer reimbursing travel expenses under a salary sacrifice arrangement, employees will have to put in a claim for tax relief to HMRC via the form P87. From the umbrella companies we have looked at, this seems to be quite well explained to employees, with simple signposting to GOV.UK for more information.

Although it would potentially be easy money for umbrella companies to provide assistance to employees with low value, high volume P87 claims (as per the business model of tax refund companies⁶⁷), this does not appear to be an area that they wish to get involved in. None of the umbrella companies we looked at offered any kind of 'tax refund' service.

Other expenses

The expenses rules for umbrella company workers, where their expenses are not reimbursed, are exactly the same as for every other worker and are very tightly drawn, meaning there may be few other expenses eligible for relief. Other than specific expenses, like professional subscriptions, the key is that the expenses must be 'wholly, exclusively, and necessarily' incurred in the performance of the employment. Basically, this means that the employee must need to incur the full expense in order to do their job.

This rule can be quite harsh and can be misunderstood, as we explain in our website guidance for workers on home working expenses during coronavirus⁶⁸:

'Office equipment: a warning about expense claims

We have read in the media suggestions that you can claim tax relief from HMRC using [form P87](#) if you buy home office equipment to use while you are working from home, such as an extra computer screen or a desk and office chair. This is not correct – HMRC will not allow tax relief for these items via an expense claim (although [capital allowances](#) may be available to claim via a tax return) and no relaxation to their position on this has been published.

Why? You might ask. The reason is that expenses you incur in connection with your job have to meet a test to qualify for tax relief. This test is that the expense is incurred 'wholly, exclusively and necessarily in the performance of your duties'.

The bit in bold above stops you from getting tax relief via a P87 claim for buying a desk or chair, for example. You may have bought these items to put you in a position to do your job, or – quite literally – a better or more comfortable position to do your job. This is the subtle but important difference – whether the purchased item enables you to do your job, rather than the expense being incurred while doing your job.

67 We explain more about tax refund companies on the LITRG website, Should I use a tax refund company?, available at <https://www.litr.org.uk/tax-guides/tax-basics/how-do-i-claim-tax-back/should-i-use-tax-refund-company>

68 LITRG website guidance, Office equipment: a warning about expense claims, available at: <https://www.litr.org.uk/tax-guides/coronavirus-guidance/coronavirus-employees-work-changes#toc-office-equipment-a-warning-about-expense-claims>

49 Chapter 4 – Benefits of umbrella arrangements to workers

Things like printer cartridges and paper are different, as these are items you use while doing the job itself. For example, your work might involve writing a letter that you need to print out and post. The cost of the ink, the paper, the envelope and the stamp are all necessarily incurred by you in doing the job. These items would normally be reimbursed by your employer, but if they were not, you could make a claim for tax relief.⁶⁹

There are varying degrees of guidance put out by umbrella companies explaining the rules on expenses, some of which we have seen is inaccurate and misleading.

For example, we have seen lists of ‘claimable’ business expenses that include those expenses that only qualify for an exemption where they are paid or reimbursed by an employer (such as training costs and costs of an eye test), alongside those that can be deductible if not reimbursed (for example, professional subscriptions and travel).

Because this is such a complex area, we tend to think the conflation of exempt and deductible benefits and expenses is likely to be down to a genuine misunderstanding on the part of the umbrella company rather than a deliberate act. It is however conceivable that umbrella company workers are seeing such lists and are over-estimating what they can claim personal tax relief for in terms of their unreimbursed expenses.

Further confusion over exempt expenses

The 2016 rules that restricted ‘relevant salary sacrifice arrangements’ do not apply to expenses that are dealt with under Part 4 of ITEPA 2003 (expenses that are exempt if paid or reimbursed by an employer) and only to Part 5 of ITEPA 2003 (expenses that can be deducted if not reimbursed) as explained in Chapter 3. This fact seems to be behind some umbrella companies saying they can continue to reimburse ‘business costs’ such as training costs and costs of an eye test (which fall under Part 4 ITEPA 2003) – on a tax and NIC free basis at the point of pay, even though we assume they are being funded by the worker through some kind of salary sacrifice mechanism.

This is where an umbrella company is unique – the ability to make this type of arrangement wouldn’t be so readily available to other employees (and it is not a given that employers will fund such ‘perks’ out of their own pockets). On the face of it at least, this will be of benefit to employees of umbrella companies as they will be receiving tax and NIC relief at the point of pay on expenses that they would otherwise have to fund out of their own net pay.

Two of the umbrella companies we reviewed include computer equipment as business costs that can be reimbursed on a tax and NIC-free basis by them. There is a problem however, in that under normal conditions, there doesn’t appear to be an exemption in Part 4 ITEPA 2003 for electronic equipment. There is an exemption where electronic equipment, like a computer, is provided by an employer, but this requires the employer to retain ownership and simply make the asset available. The exemption does not, ordinarily, extend to the reimbursement of the cost of the equipment.⁶⁹ A recent extension has been made to this rule to allow employers to make reimbursements of

⁶⁹ HMRC’s EIM21613, Employment Income Manual, available at <https://www.gov.uk/hmrc-internal-manuals/employment-income-manual/eim21613>

50 Chapter 4 – Benefits of umbrella arrangements to workers

equipment costs to employees, but this is specific to the coronavirus pandemic and is only temporary.⁷⁰

Another problem, as discussed in Chapter 3, is that it is not clear how the continued processing of reimbursed expenses by umbrella companies fits with OpRA, which could leave workers exposed as we explain below.

Risk to employee of incorrect expense claiming

Even if a worker thinks they are within SDC, what is the risk to them of letting the umbrella company process their home to work expenses? What happens if the worker is enjoying other expenses that are being processed for them at the point of pay but HMRC ultimately take objection to the measures put in place by the umbrella companies to facilitate this?

Well, to the extent that a loss is caused by umbrella companies incorrectly assessing workers as being outside of SDC (which should be the case where umbrella companies have continued to process tax and NIC free home to work travel expenses through the payroll), workers themselves should not be liable for any debt due to the incorrect assessment, unless they are found to have deceived their umbrella company through the provision of incorrect information.

It is important however, that workers take care where umbrella companies do not process the tax and NIC free mileage themselves but offer to collate the expenses information for workers to make their own claims via the P87 process. Tax relief on expenses should only be claimed personally by the worker in instances where they meet the correct rules – if an employee personally claims tax relief for home to work expenses on their P87 because they consider themselves outside of SDC for example, HMRC may well say that any error is the employee's problem and not the umbrella company's.

Should HMRC ultimately take issue with umbrella companies continuing to reimburse other types of expenses through the payroll, any action taken as a result should generally be taken against the employer. This is because, in reality, what lies behind this scenario is a failure to operate PAYE correctly and the correct response to a failure to operate PAYE is a Regulation 80 determination issued to the employer.⁷¹

Only if the employer satisfies HMRC that the PAYE under-deduction falls within a number of limited circumstances⁷² does the liability shift to the employee, and then only if HMRC serve a direction formally requiring the employee to pay the outstanding tax, against which the employee can appeal.

70 HMRC's policy paper, Income tax and National Insurance contributions: exemption for home-office expenses, 22 May 2020, available at <https://www.gov.uk/government/publications/income-tax-and-national-insurance-contributions-exemption-for-home-office-expenses/income-tax-and-national-insurance-contributions-exemption-for-home-office-expenses>

71 The Income Tax (Pay As You Earn) Regulations 2003, Regulation 80

72 HMRC's PAYE90020, PAYE Manual, available on GOV.UK at <https://www.gov.uk/hmrc-internal-manuals/paye-manual/paye90020>

51 Chapter 4 – Benefits of umbrella arrangements to workers

However, as we set out in our 2014 report on travel expenses⁷³, it appears that HMRC sometimes simply send demands to the employees when that is more convenient to them, regardless of these regulations. There is also an issue in that one of the limited circumstances referred to above in which the individual can be directed to pay the PAYE that should have been deducted from their earnings, is where: the employer cannot pay the liability (for example due to insolvency, ceased trading); and HMRC are of the opinion that the employee has received relevant payments knowing that the employer wilfully failed to deduct the amount of tax which should have been deducted from those payments.

This appears to leave quite a lot of scope for employees to end up being chased for the tax due, not least because it depends on a subjective assessment by HMRC.

Warning

In a case where HMRC chase an umbrella company worker for the tax, there would be little chance, certainly in the case of 'business costs', for workers to reduce the resultant tax bills by submitting a P87 claim (for actual expenses incurred 'wholly, exclusive and necessarily'), because these are types of expenses that only qualify for an employer exemption and not an employee deduction.

In the case of computer equipment, which may not actually qualify for an employer exemption, the worker would need to show HMRC that the strict 'wholly, exclusively and necessarily' rule applies in order to qualify for a tax (not NIC) deduction. We think this would be very hard given the expense is being incurred to put the person in the position to do their job rather than in the actual performance of their job.

73 LITRG report, Travel expenses for the low paid – time for a rethink, 17 November 2014, available at <https://www.litrg.org.uk/latest-news/reports/141117-travel-expenses-low-paid-%E2%80%93-time-rethink>

Complexities with umbrella arrangements

As we have seen, umbrella companies can be of significant benefit to freelance contractors. They may be of less benefit to agency workers, and their presence in a supply chain may even be considered irksome sometimes. However, if they are run properly, in most cases their impact should be benign.

Unfortunately, not all umbrella companies are compliant and there have been a number of issues over the last few years which have demonstrated this. We consider these issues in turn below. In some cases, it has been the umbrella company that has created the problem but as we shall see, some of these issues will have been agency-led.

Lack of rate transparency

A problem that can be faced by workers who work through an umbrella company is that the rate advertised by the agency often does not reflect the fact that they will be passed to an umbrella company, who will deduct the costs of employment before defining their gross pay.

Agencies have to follow strict rules when advertising jobs, however there is nothing to force them to set out the different pay routes (for example, 'The agency PAYE rate for this job is £10 an hour, the uplifted umbrella company rate for this job is £12.50 an hour')⁷⁴. This means that often, they only advertise the uplifted umbrella company rate rather than both the agency PAYE rate and the uplifted rate, so that people are not able to compare and contrast. As we have seen, some agencies don't offer PAYE themselves at all and so are not able to advertise an agency PAYE rate.

The following query to our website (received October 2016) illustrates that it isn't always explained clearly to workers that the rate advertised by the agency is uplifted to account for the umbrella company costs and this isn't the gross pay rate for the workers:

CASE STUDY

'I am an (overseas) Agency Worker, contracted to teach for a full year in the UK. My agency was very reluctant to provide a written confirmation of daily rate of pay and details on the number of days I was supposed to work. Once this was provided I was happy to carry on with moving to England, but once I've arrived I was hounded by an umbrella agency to register. I was shocked that the agency expected me to pay a fee out of my salary to be paid and demanded that they pay me directly. They explained that they could pay me under the PAYE provisions but my salary would be reduced by 15 pounds a day.'

⁷⁴ Guidance Employment agencies and businesses: Job advertisements on GOV.UK, available at <https://www.gov.uk/employment-agencies-and-businesses/job-advertisements>

53 Chapter 5 – Complexities with umbrella arrangements

They justified this by telling me the original pay rate in my contract included the employers' NIC payment as well as the umbrella margin. This adds up to a substantial reduction in my take home. I have been looking through the tax code and the terms of engagement contract they provided me and it looks as though they were required to outline the deductions for me in advance of me accepting this position.'

It is possible that some agencies may be purposefully deceiving workers, who may not be well versed in the intricacies that exist around umbrella companies, that the work advertised is going to be paid at the rate they pay to the umbrella company. It is an obvious ploy to get more workers in the door – after all, if you saw the same job advertised at £10 and it advertised elsewhere at £12.15, you would want the one paying the highest.

However, while the worker rightly then expects to get £12.15 an hour, the employment costs must first be funded by the sum paid to the umbrella company, leaving the worker far short of what they were expecting and feeling as if they have been charged for receiving their wages and paying their own employer's NIC.

Uplift

The key thing that workers need to appreciate is that an 'uplift' is supposed to be applied to their pay rate if they work through an umbrella company. They also need to understand whether the uplift they have been offered is sufficient to cover the employment costs and deductions made by the umbrella company – i.e. leaving them no worse off than if they had been paid by the agency directly.

No uplift applied

In cases where workers have been under the impression that a properly uplifted rate is their own pay rate, even though they may not have received the pay rise they thought they were getting compared to what they might have been on previously, they should ultimately be no worse off than if they had been paid by the agency directly, using a non-uplifted rate.

EXAMPLE

Take for example John, who works through an agency in a factory for £10 an hour – around the market rate for this type of work. He finds his next factory assignment through an agency which insists he uses an umbrella. The pay rate quoted is £12.50, which he thinks is brilliant! This, however, turns out to be the uplifted umbrella rate. Although John is disappointed that the £12.50 isn't his own pay rate, this isn't the market rate for the factory job and he actually ends up receiving something more akin to £10 an hour, which is what he could have realistically expected.



54 Chapter 5 – Complexities with umbrella arrangements

We understand that in some cases the required uplift is only partially applied by agencies (who then keep the difference). In some extreme examples, typically at the lower paid end of the scale, no uplift is applied at all, meaning only the agency PAYE rate is handed over to the umbrella company. These practices are very concerning from a worker's perspective.

A good example of the impact of this, is contained within PRISM's 'A case for Structural Reform' document⁷⁵:

'Agency 1 offers an assignment at £12 per hour with Agency 2 offering exactly the same role, with the same end client at £13 per hour. On first glance, it would be reasonable to assume you would take the role through Agency 2, however Agency 1 is offering it as a PAYE rate with the worker being engaged on the agency payroll and the agency bearing all the employment costs on top. Agency 2 is offering it as an umbrella rate, which includes the employment costs within the rate. Assuming average charges by an umbrella the equivalent umbrella rate for the worker to remain neutral would be £15.30. So in the example above the worker would be worse off on the £13 per hour rate compared to the agency PAYE rate of £12.'

This can leave workers materially worse off as our simplified illustration helps demonstrate:

Agency PAYE				
Mr A Smith	NI Number: QQ 12 34 45 Q Tax code: 1250L		Pay by: BACS Date: 2020/21 W1	
DESCRIPTION	RATE (£)	HOURS	AMOUNT (£)	THIS YEAR (£)
Salary	10.00	40.00	400.00	400.00
Tax			32.00	32.00
National Insurance			26.04	26.04
		NET PAY	341.96	
Agency costs: Employer NIC: £31.87				

Umbrella correct uplift				
Mr A Smith	NI Number: QQ 12 34 45 Q Tax code: 1250L		Pay by: BACS Date: 2020/21 W1	
DESCRIPTION	RATE (£)	HOURS	AMOUNT (£)	THIS YEAR (£)
Salary	10.00	40.00	400.00	400.00
Tax			32.00	32.00
National Insurance			26.04	26.04
		NET PAY	341.96	
Uplifted amount passed to umbrella - Employer NIC: £31.87 and £20 margin = £451.87				

⁷⁵ PRISM report, The case for structural reform: a review of the reviews on modern employment, available at https://www.prism.contractors/prism/images/The_World_of_Modern_Employment.pdf

55 Chapter 5 – Complexities with umbrella arrangements

Umbrella no uplift				
Mr A Smith	NI Number: QQ 12 34 45 Q Tax code: 1250L		Pay by: BACS Date: 2020/21 W1	
DESCRIPTION	RATE (£)	HOURS	AMOUNT (£)	THIS YEAR (£)
Salary	8.86	40.00	354.41	354.41
Tax			22.88	22.88
National Insurance			20.57	20.57
		NET PAY	310.96	
Uplifted amount passed to umbrella – £400 – Employer NIC: £25.59 and £20 margin				

In our example above, the worker is £31 a week worse off as a result of his pay rate not being uplifted correctly. This is a significant sum of money for a low-income worker – the very workers who are probably most vulnerable to this type of exploitation, given the competition for jobs in lower-paying sectors and the inevitable availability of other workers who are prepared to work for less.

While the worker may notice the discrepancy by the time they get their first payslip (as they will have received less than expected), by then they may be left with little option but to accept the situation, on the basis they need the work.

Legal position

Whilst the law is clear that an employer must not make unlawful deductions such as employers' NIC from their own employee's gross pay⁷⁶, the legal position as to what happens where there is no uplift applied as between the agency and umbrella company is not so clear, as this would appear to be a contractual issue between the two parties, rather than an employment law issue between the umbrella company and the worker.

However, we wondered if the EAS might have some concerns where there is no uplift applied by the agency, if for no other reason than, indirectly, this could mean the worker is paying a fee for the agency's services (which on the face of it may be against the rules set out for employment agencies⁷⁷). However, from speaking with the EAS, their position seems to be that agencies are only prohibited from charging (directly or indirectly) for work finding services, and having to pay a fee to an umbrella company is not a work 'finding' service.

⁷⁶ For example, the Social Security Contributions and Benefits Act 1992, Schedule 1, para 3(2)(a) states: 'No secondary contributor shall be entitled to make, from earnings paid by him, any deduction in respect of his own or any other person's secondary Class 1 contributions.' Available at <https://www.legislation.gov.uk/ukpga/1992/4/schedule/1/enacted>

⁷⁷ Employment agencies and businesses, GOV.UK guidance, available at <https://www.gov.uk/employment-agencies-and-businesses>

56 Chapter 5 – Complexities with umbrella arrangements

A recent initiative, Umbrella Reclaim⁷⁸, has set out to test whether umbrella companies have been making deductions unlawfully where no uplift is applied. This would appear to be as a result of a legal judgment in this area in *Weldon v 6Cats*⁷⁹, in which the appellant successfully claimed back unauthorised employer NIC and apprenticeship levy deductions of £864.01 and £40.11 respectively from an umbrella company.

However, the judgment doesn't detail any of the facts of the case, therefore the exact circumstances are unknown – or even if the judgment was entered in default – that is, a decision made by a judge who hasn't heard both sides of the case (it may have been more expensive for the umbrella company to defend the action).

Better practice

More recently, perhaps as part of general improvements in the umbrella company marketplace, some umbrella companies have realised that a worker may only have part of the picture when they are passed to them by an agency and that remaining indifferent as to whether the agency-umbrella contract contains a correctly uplifted rate isn't helpful to anyone in the supply chain.

It may even be counter-productive for umbrella companies, because under the Agency Worker Regulations⁸⁰ (which came into force on 1 October 2011 and under which umbrella companies fall) workers are entitled to the same basic employment and working conditions (including equal treatment on pay) as if they had been recruited by the end client directly, if and when they complete a qualifying period of 12 weeks in the same job.

Usually workers will be given a 'matched pay' employment contract by an umbrella company which provides for equal treatment once they've been on assignment for 12 weeks. In the main, lower-paid workers tend to be on similar pay rates across the board so they are unlikely to see much difference to their pay after 12 weeks because of the Agency Worker Regulations. However, if a worker is placed in an assignment on an artificially low pay rate because of uplifting issues, this is unlikely to match a comparable worker's pay, meaning Agency Worker Regulations issues arise after 12 weeks. These will need to be dealt with one way or another, causing disruption and management costs for the umbrella company.

Our understanding from discussions with industry representatives is that some umbrella companies are now investing a lot of time and effort 'on-boarding' new joiners and explaining the terms and conditions of their employment and their pay and rights,

78 Umbrella companies: Lawyers pursue unlawful deductions, article in Personnel Today, 9 October 2020, available at <https://www.personneltoday.com/hr/umbrella-companies-contractors-claim-unlawful-deductions/>

79 Employment tribunal decision - Mr P Weldon v 6CATS UK Ltd: 2410288/2019, available on GOV.UK at <https://www.gov.uk/employment-tribunal-decisions/mr-p-weldon-v-6cats-uk-ltd-2410288-2019>

80 Under the Agency Worker Regulations 2010 (see GOV.UK guidance, available at <https://www.gov.uk/government/publications/agency-workers-regulations-2010-guidance-for-recruiters>), from day one, workers will become entitled to receive access to certain collective facilities and amenities and information relating to vacancies, as is available to a comparable worker. When the qualifying 12-week period has been completed, they will also become entitled to 'basic working and employment conditions' as if they had been recruited directly. Such rights include equal treatment on pay, duration of working time, night work, rest periods, rest breaks and annual leave.

57 Chapter 5 – Complexities with umbrella arrangements

including providing illustrations of pay. Indeed, we understand that both the FCSA and Professional Passport (see Chapter 7) have compliance standards around this.

As part of the underlying research for this report, we have seen many news articles and blog posts on individual umbrella company websites as well as general industry websites, trying to explain this concept of uplifting to workers, with titles such as:

- Understanding the Need for an Uplift in Umbrella
- What Rate Am I Asking For?
- Umbrella Company vs. Pay As You Earn (PAYE). What's the difference?
- Why do I have to pay Employers' National Insurance?
- What is Uplifting? And how would it/should work?

It seems this push towards greater clarity and transparency might be working, but as there are still a trickle of queries to our website on this issue (one example below, received in November 2018) there is no doubt more that can be done by both agencies and umbrella companies working together to improve how pay rates are communicated to workers:

CASE STUDY

'I am working through an agency of which I am being paid by an umbrella company, can you tell me why they are deducting employers NI contribution off my wages.'

Key information documents

From 6 April 2020, agencies are required to provide new agency workers with a document known as a 'key information document' (KID) prior to signing them up for an assignment.⁸¹

There is guidance on GOV.UK⁸² to help agencies understand how to comply with this requirement, which has seven sections:

- format, timing and frequency of key information documents
- information to include for a standard employment business: agency worker relationship (that is Pay As You Earn (PAYE))
- when additional information is required for the key information document
- information to include when an intermediary or umbrella company is involved
- key information documents for workers signing on as personal service companies
- changes to key information documents
- enforcement of the new regulation

⁸¹ This requirement is set out in regulation 13A of the Conduct of Employment Agencies and Employment Businesses Regulations 2003 (as amended by Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2019).

⁸² Providing a 'Key information document' for agency workers: guidance for employment businesses, available on GOV.UK at <https://www.gov.uk/government/publications/providing-a-key-information-document-for-agency-workers-guidance-for-employment-businesses>

58 Chapter 5 – Complexities with umbrella arrangements

There are also templates to assist agencies with the process, including the case where agency workers are paid via an umbrella company (although it is likely the umbrella company will have to provide information to the agency in order that it can be completed).

We enclose a government-produced template of the KID that should be given to agency workers who are passed to umbrella companies, at Appendix 3. These templates have been provided for illustrative purposes and are not to be taken as mandatory templates – employment businesses are free to lay out key information documents according to the processes that suit them, provided that the requirements of the regulations are met.

The legislation that introduces the KID is prescriptive, even down to the length of the document, which must be no longer than two A4 pages and easy to understand. The purpose of the KID is not to outline all the terms of the contract, but instead to outline key information – provided the KID is completed correctly, the worker should be better able to fully track the difference between the gross amount paid by the agency to the umbrella company and the net sum that the worker receives, for example:

Providing a ‘key information document’ for agency workers

An example statement for a multi-party relationship may look like this:

Representative example statement	Umbrella income	Worker income
Example gross rate of pay to intermediary or umbrella company from us:	£328.40 weekly	x
Deductions from intermediary or umbrella income required by law: (Employer’s NI, apprenticeship levy, etc.)	£17 tax £22 employer’s NI	x
Any other deductions from intermediary or umbrella’s income (Administration fee, margin, etc.)	£15 margin weekly	x
Example rate of pay to you:	x	£274.40 weekly
Deductions from your pay required by law: (Tax, NI, etc.)	x	£10 income tax £15 NI
Any other deductions or costs from your wage: (Private healthcare, etc.)	x	£13 pension contribution
Any fees for goods or services and their frequency: (Training, DBS check, etc.)	x	£26 DBS check (one-off)
Example net take home pay: (Following all estimated deductions, costs and fees)	x	£225.40 weekly

The extract above is taken from the government’s official guidance⁸³, however it is worth noting that we can’t understand what the £17 tax figure relates to in the umbrella deduction box (as there should be no tax deductions at that point) and we cannot

83 Page 20, Providing a ‘key information document’ for agency workers – Guidance for employment businesses, October 2019, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/865808/key-information-document-for-agency-workers-business-employer-guidance.pdf

59 Chapter 5 – Complexities with umbrella arrangements

reconcile the £225.40 weekly net take home pay figure (as £274.40 less the deductions listed isn't £225.40). This is a downside, we suppose, of the fact that the figures only need to be illustrative (which could confuse workers). Despite this, overall the KID should be regarded as a further positive move for the industry and should help reduce any remaining confusion as to what is included in uplifted rates and how this compares with gross pay rates.

It is unclear to what extent agencies are giving out this document to workers and whether it is given at the appropriate time (which is before each new assignment, if there is a material change). It is also unclear as to whether they are giving out multiple documents in the event of multiple potential pay routes to allow workers to compare and contrast. It should also be noted that it only needs to be given to new agency workers from April 2020 (not existing ones) and there is only a requirement to issue one for each new assignment if there is a material change, meaning it is not a complete solution currently.

Despite the introduction of the KID, it is interesting to note that there is no real information available to agency workers on GOV.UK⁸⁴ explaining or even acknowledging the presence of umbrella companies in most agency supply chains (except for the information buried in HMRC technical manual, referenced earlier). This leaves individuals with no central, official information that they can use or apply to enable them to understand and self-check their position, beyond the KID and what they are told by the agency/umbrella company.

Holiday pay issues

All employees, including those of umbrella companies, have the right to a minimum of 28 days' paid leave including bank holidays.

EXAMPLE

Most workers' holiday entitlement will probably be calculated as a percentage of their hours. 28 days is equivalent to 12.07% hours.⁸⁵ The 12.07% figure is 5.6 weeks' holiday, divided by 46.4 weeks (being 52 weeks – 5.6 weeks). Teachers and workers with other holiday patterns might have a slightly different percentage figure.

Take for example, Marla. Marla works 17 hours one week, 20 hours the next week, and then 15 hours for next two weeks.

After a month of working, she has built up entitlement to approximately 8 hours of paid leave (67 hours x 12.07%).



84 For example, Your rights as an agency worker, GOV.UK, available at <https://www.gov.uk/agency-workers-your-rights>

85 Holiday pay is a complex and ever changing area of law. A recent case (The Harpur Trust v Brazel [2019] EWCA Civ 1402, 6 August 2019, available at <https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Civ/2019/1402.html>) has muddied the water yet further. In this case, the Court of Appeal ruled that it was not correct for an employer to base a zero hour contract teacher's holiday pay on 12.07% of the term's accrued earnings at the end of each term. However, this judgement is in the context of a 'part-year' worker and may be appealed.

60 Chapter 5 – Complexities with umbrella arrangements

Historically, umbrella companies based holiday pay on the ‘salary’ element of a worker’s pay only (so typically based on the NMW – see later for discussion about the NMW plus discretionary bonus model). More recently, umbrella companies seem to have moved to a position where the holiday pay is calculated on the gross taxable pay (in the preceding 52 weeks, up from 12 weeks since April 2020) in line with the judgement in *Lock v British Gas*.⁸⁶

Indeed, this clause is in a standard umbrella company contract we have recently seen referred to in a presentation given to agency workers by a representative of one of the umbrella trade bodies (where LITRG were also presenting):

‘The amount of a week’s pay for the purposes of paid leave will be calculated in accordance with the Working Time Regulations 1998 (as amended), and based on an average of your gross pay (disregarding paid leave itself, and any advances we may have made against your annual paid leave reserve fund) calculated over the applicable reference period (generally 12 weeks until 6th April 2020, thereafter 52 weeks).’

Both of the main umbrella company trade bodies have compliance standards that require providers to calculate the holiday pay on all elements of gross taxable pay.⁸⁷ Recent threads that we have seen on contractor forums⁸⁸ seem to suggest that umbrella companies are indeed basing holiday pay on full gross pay rather than just the NMW element.

Rolled up holiday pay

Because of problems inherent in very short-term agency work when it comes to calculating holiday leave and pay, workers used to get extra pay on top of their hourly rate instead of being given paid holiday leave (a system known as ‘rolled up’ holiday pay). Strictly this is incorrect⁸⁹, as the law says that it should be paid out at the time annual leave is taken, but many workers prefer the ‘rolled up’ system and indeed the following recommendation came out of the Matthew Taylor Good Work report⁹⁰:

‘We also believe individuals should have greater choice in the way in which they

86 The implications of which for umbrella companies were set out by the specialist industry law firm Lawspeed in their article, Holiday pay must include commission following ET’s decision in *Lock v British Gas*, 26 March 2015 available at <https://lawspeed.com/news/holiday-pay-must-include-commission-following-ets-decision-in-lock-v-british-gas/>

87 See: Professional Passport website, Umbrella holiday pay, available at <https://www.professionalpassport.com/Hot-topics/Umbrella-Holiday-Pay>; and entry B10 in the FCSA Codes of Compliance – Umbrella employers, available at <https://www.fcsa.org.uk/resource/fcsa-code-of-compliance/>

88 See thread on ContractorUK forum, My first payslip with IR35 and I don’t get it!, available at <https://www.contractoruk.com/forums/umbrella-companies/140109-my-first-payslip-ir35-i-dont-get-2.html>

89 In the decision of the Court of Justice of the European Union (CJEU) case of *Robinson-Steele v RD Retail Services Ltd* 2006 C-131/04, it was decided that rolled-up holiday pay schemes are contrary to the Working Time Directive. This means rolled-up holiday pay schemes are considered to be unlawful and Member States should take ‘appropriate steps’ to ensure they are discontinued. The Court held that rolled-up holiday pay defeats the object of the Working Time Directive as it could deter workers from taking holidays, because the worker would be financially worse off for doing so.

90 Page 47, Good work – The Taylor review of modern working practices, July 2017, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/627671/good-work-taylor-review-modern-working-practices-rg.pdf

61 Chapter 5 – Complexities with umbrella arrangements

receive paid annual leave. As a general rule, annual leave entitlement equates to 12.07% of hours worked. We believe individuals should have the choice to be paid for this entitlement in real time – known as ‘rolled-up’ holiday pay. This would result in dependent contractors receiving a 12.07% premium on their pay. So in the case of someone being paid the NLW of £7.50 their actual remuneration would be £8.41 an hour. Additional safeguards would have to be built in to ensure individuals did not simply work 52 weeks a year as a result, but we believe giving individuals this kind of choice will suit many working in casual arrangements and in the on-demand economy.’

Government should do more to promote awareness of holiday pay entitlements, increasing the pay reference period to 52 weeks to take account of seasonal variations and give dependent contractors the opportunity to receive rolled-up holiday pay.

However, in their ‘Increasing Transparency’ consultation document, the Government say that they cannot proceed with this recommendation⁹¹ because it defeats the object of the Working Time Directive. As this stems from EU law, the UK’s exit from the European Union may mean further thought will be given to the implementation of this recommendation whilst ensuring the protections offered by the Working Time Directive are not lost.

In the meantime, as there would appear to be accepted conventions around this issue, and as some workers may prefer it, umbrella companies do continue to offer rolled up holiday pay as we can see from this Professional Passport publication⁹²:

EXTRACT

‘Accrued or Rolled up Holiday Pay

Accrued, which means retaining the holiday pay and the worker claiming this when they are on holiday, is the technically correct process however, many workers want their holiday pay each week and processed at the same time as their wages, known as rolled up. Matthew Taylor commented on this in his report and made the suggestion that rolled up holiday pay should be allowed although the Government has subsequently said they will not look to change the rules.

What has become accepted is that so long as holiday pay is transparently paid there is little, if any risk, to the provider in the event of challenge.

Where a provider operates rolled up holiday pay as an option we recommend that in all cases, where the worker wishes to take the option of rolled up, they send a formal request/confirmation of their wishes before rolled up is applied.

91 Department for Business, Energy and Industrial Strategy, Consultation on measures to increase transparency in the labour market, February 2018, available on GOV.UK at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/679849/Consultation_-_Increasing_Transparency_-_070218_3_.pdf

92 Professional Passport, Making holiday pay for AWR, available at <https://www.professionalpassport.com/Hot-topics/Matching-Holiday-Pay-for-AWR>

62 Chapter 5 – Complexities with umbrella arrangements

Having a worker formally confirming this reduces the risks of challenge to the provider as it was the workers request. This confirmation is now an important part of the process.

The rolled-up holiday pay paid each week/month should be clearly documented on the payslip as an individual item and clearly stating that it is holiday pay.

Where the worker remains on an accrued basis, we require providers to highlight to workers, in a transparent way, the amount of holiday pay available to them.

We also require that any holiday pay held at the point a worker leaves should be processed and paid as part of their final payment.

Employment contracts now also contain clauses specific to holiday entitlement. They will state a holiday year, often January to December, and that any unused holiday will not be carried forward and lost. In these instances, we require providers to notify workers of this providing enough time for them to take the holiday. Relying on the clause in the contract we do not feel is transparent enough.

Contractors on 'accrued' are the exception as opposed to the norm so the instances of these cases will be extremely limited.'

Accrued holiday

There has been a problem for some umbrella company employees in that, if they are not on a rolled up system and leave the employment having taken fewer holidays than they are entitled to, they should be paid in lieu of the untaken holiday. But this hasn't always happened. There have also been problems with umbrella company employees losing any holiday entitlement accrued but not taken at the end of a holiday year.

It now seems to be a requirement of accreditation by one of the umbrella trade bodies at least (as per the extract from Professional Passport above), to write to any employee who has a positive balance in their holiday fund, each month in the 3 months leading up to the holiday year end to specifically state that if the holiday is not taken before the end of the period it will be lost.

Confusing payslips

Undoubtedly, umbrella company payslips are more confusing than usual payslips, but this is often down to the inclusion of the 'contractor statement' as well as the actual payslip.

This is a legacy issue from when umbrella companies were the domain of higher paid, higher skilled freelance contractors, who needed to understand and reconcile how their actual pay was shaped out of the overall funds paid to the umbrella company by their clients.

This contractor statement starts with the contractor's overall invoiced amount and then

63 Chapter 5 – Complexities with umbrella arrangements

lists all of the employer deductions, including the umbrella company's margin and employers' NIC etc. It is then difficult to calculate employers' NICs without knowing the employee's gross salary, because the employee's gross salary can't be determined until the value of the employer's NICs is known. The solution to this circular conundrum lies in an umbrella company's internal software systems, which use formulae to work out the unknowns.

Once familiar with the purpose of the contractor statement, it usually becomes clearer as to where the numbers on the subsequent payslip come from (as they are driven by the contractor statement).

We enclose, as Appendix 4, a couple of anonymised examples of umbrella company payslips that have recently been shared with us by an umbrella trade body, from companies that are currently going through their accreditation process. One is for a worker on accrued holiday pay and one is for a worker on rolled up holiday pay, as the different approaches can result in different presentations on payslips.

We have no reason to suspect that these payslips are anything other than genuine sample payslips and, while there may be room for improvement, we have been able to reconcile both payslips fairly easily. This has probably been helped by the fact that neither of these payslips contain expenses (which are usually deducted from the overall contract income and then set aside to be reimbursed as part of the payslip) – although this is a good sign given that the incidence of expense claims should be much reduced.

Discretionary bonus payment

As can be seen from the payslips at Appendix 4, both umbrella companies in question use the NMW plus bonus or commission structure to pay their workers.

As we explain in our umbrella company factsheet⁹³, umbrella companies often adopt this model to protect against instances where the agency or client defaults on payment. Where late payment occurs, the umbrella will pay the worker their basic rate while withholding the 'commission' or 'bonus' payment until the sum is received from the agency or client. We have also heard it explained that this model provides contractual continuity for workers – it means umbrellas can adjust the pay rate of workers for new assignments, up or down (depending on what is on offer), without having to change contracts each time.

This seems to have worked for the majority of umbrella companies and at least been tolerated by workers, although workers may often feel a measure of dissatisfaction at contractually only being entitled to NMW. However, the recent coronavirus situation exposed weaknesses in this pay structure as far as workers were concerned and we look at this in the next Chapter.

93 LITRG factsheet, Working through an umbrella company, May 2020, available at <https://www.litrg.org.uk/sites/default/files/files/LITRG-Factsheet-working-through-an-umbrella-company.pdf>

Recent issues

While there may be pockets of questionable practice by some umbrella companies in the umbrella marketplace, if there were still endemic problems for workers with umbrella companies with things like travel and subsistence schemes, holiday pay or rate transparency, we think we would be seeing significant numbers of queries, which we are not.

Having checked through our database, we are seeing only a few queries about umbrella companies, aside from furlough queries which we look at below and loan charge/disguised remuneration queries which we discuss in Chapter 11. Of 48 queries received on umbrella companies since 2017, only 13 are 'other' queries, of which 4 are press queries and 2 are queries from workers just seeking general information.

Type of query	Number received
Loan charge	17
Coronavirus	18
Other	13
Total	48

Indeed, of the 'other' queries we have received, the following 'problem' stands out:

CASE STUDY

'Can you help urgently please. Just been told that an agency I worked for (Sept 16th 2019 - Jan 26th 2020) didn't deduct tax from my gross salary. They stopped NI but no tax. When joining them I was directed to integrate under an Umbrella Company, who asked me to complete a Starter Sheet. I declared to them that I had not been working that tax year: April (actually from January) 2019. Aged 62 and without having access to any form of Benefits, the only way of financially supporting my wife and I was to draw down from our private pension. Having drawn up to the free Allowance, the recent pension draws had been taxed, hence my desire to now seek work. A financial advisor friend has brought the underpaid tax to my attention. I contacted the umbrella company who say that i was still 'on their books' until 27th March (just in time to react to the Chancellors Statement on the 28th March - re furloughing etc) and that my tax code (supplied by HMRC) was/is 1375M. Who is responsible for the potential underpayment of tax: my employer (umbrella co) or HMRC? or me????? Please help as I am unable to claim any benefits and we are in dire financial stress.'

65 Chapter 6 – Recent issues

It stands out because it helps illustrate, that these days, employees within an umbrella company setting may just be dealing with same PAYE issues as those in a 'normal' employment situations, such as coding errors leading to underpayments and so on. In the above query, it appears that the umbrella company may have operated PAYE correctly and that it was the taxpayer who completed the starter checklist incorrectly.

We asked the charity TaxAid⁹⁴, who help those on low incomes deal with tax problems, about their experience and they seem to say the same thing (based on data extracted from their systems since August 2019):

Type of query	Number received
Loan charge	131
Coronavirus/Furlough	8
Other	19
Total	158

Our understanding from TaxAid is that there are no real trends within the 'other' queries – however, they tend to be about pure PAYE failures etc, rather than anything more egregious.

Our contact within a union that represents workers often in umbrella companies, said:

'Just to let you know that our membership support team have not detected or picked up much traffic in regards to umbrella companies from our... members.'

Coronavirus (Covid-19) pandemic

Having had a quiet spell in terms of queries from umbrella company workers, the coronavirus pandemic caused a flurry of queries to our website. There were various problems being presented to us which we consider below.

Furlough based on 80% of NMW

Based on the official scheme rules (para 7.4)⁹⁵ and initial GOV.UK guidance, it looked like only the NMW part of an umbrella company worker's remuneration would be allowed in the calculation of payments under the Coronavirus Job Retention Scheme (CJRS). This was because 'discretionary payments' **were not** to be taken into account when calculating furlough pay.

94 The charity TaxAid advises people on low incomes whose problems cannot be resolved with HMRC, <https://taxaid.org.uk/>

95 CJRS Treasury Direction, 15 April 2020, available on GOV.UK at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/879484/200414_CJRS_DIRECTION_-_33_FINAL_Signed.pdf

At a much later date, despite pleas (including from LITRG) for earlier clarity on this issue, HMRC indicated via an update to the guidance that they **could** be taken into account:

'Non-discretionary payments

When you're working out if a payment is non-discretionary, only include payments which you have a contractual obligation to pay and to which your employee has an enforceable right.

When variable payments are specified in a contract and those payments are always made, then those payments may become non-discretionary. If that is the case, they should be included when calculating 80% of your employees' wages.'

Although it is still not 100% clear, this seems to be saying that if the payments are de facto not discretionary, because they are always made, then they will be treated as non-discretionary. At that point, it seems that umbrella companies 'tested' the discretionary nature of their pay and concluded that their 'bonuses' were not really discretionary at all and were therefore able to be included in the calculation of the CJRS grant payment.

For example, from some survey results published by the NASUWT⁹⁶, over 70% of supply teachers who were furloughed by umbrella companies were furloughed on 80% of full wages, rather than 80% of the NMW.

Professional Employment Organisation arrangements

As a consequence of the discretionary pay problem, we understand from articles in the trade press that some umbrella companies are moving away from having a one size fits all traditional umbrella contract and are looking at more bespoke options.⁹⁷ For example, where the flexibility that the NMW plus discretionary payment structure provides is not required, workers might be put on a Professional Employment Organisation (PEO) type arrangement.

We understand from our research on PEOs that under these arrangements a worker is quoted their actual gross pay rate which does not vary (and is not split between NMW and a bonus or commission). Employer costs are agreed separately between the PEO supplier and the agency. Prima facie, the arrangements could potentially be much easier to follow, however they require further research which is outside the scope of this report.

Other furlough problems

There were other issues with umbrella companies not furloughing their workers, even though they may have otherwise qualified.

96 75% in England and 71% in Wales according to NASUWT, Annual Supply/Substitute Teacher Survey, 2020, available at <https://www.nasuwat.org.uk/advice/supply-teacher/annual-supply-teacher-survey.html>

97 For example see article, What is a Professional Employment Organisation (PEO)?, ContractorUK, 8 December 2020, available at https://www.contractoruk.com/successful_contracting/what-is-a-professional-employer-organisation-peo.html

For instance, initially it was unclear whether holiday pay would accrue for workers on furlough, given there was a continuing employment relationship throughout the period of furlough. It was important for umbrella companies to understand this, because if it did continue to accrue, they could well have had costs and obligations that they needed to fund in excess of the CJRS grant – at a time when they wouldn't have been generating any other income.

Many umbrella companies waited to receive government clarification on this issue so that they could assess their overall position, before deciding whether to furlough workers. They did nothing in the meantime (which they were in an economic position to do, as many umbrella company workers are on zero-hours contracts) as this website query highlights:

CASE STUDY

'I work for an umbrella company that is refusing to put me on the job retention scheme even though they have no work for me. They say they have to wait for clarification on 2 questions. The first one being whether the 80% is based on national minimum wage or normal pay. The second being that the government haven't made it clear if holiday pay is still getting taken into account. Can you help me with any advice as I am getting nowhere speaking to my employer.'

An answer on holiday pay – eventually

The industry came together to ask for urgent clarification from HMRC⁹⁸, as did LITRG.

Finally an answer came: employees continue to accrue holidays as per their employment contract. Most umbrella company workers are essentially on zero hours contracts, so would usually accrue holiday entitlement based on the 12.07% of hours worked basis. However, as umbrella contracts usually contain 336 minimum contractual hours, some umbrella workers can get paid (and accrue holiday on that pay) even if they aren't working.

The key point clarified was that even if workers did accrue holiday during furlough, employers could ask workers to take any accrued holiday that they had prior to being furloughed, along with any that subsequently accrued during furlough, during their furlough leave (provided they gave adequate notice). This meant they could then claim the 80% subsidy from the government.

The CJRS was announced on 20 March 2020, with the first tranche of guidance issued on 26 March 2020. The government issued guidance on 'Holiday entitlement and pay during coronavirus (COVID-19)' on 13 May 2020.⁹⁹

98 Calculation of umbrella employees furlough pay and holiday accrual clarity urgently needed, FCSA, 8 April 2020, available at <https://www.fcsa.org.uk/clarity-still-needed-on-the-calculation-of-furlough-pay-and-holiday-accrual-for-agency-and-umbrella-workers/>

99 Holiday entitlement and pay during coronavirus (COVID-19), available on GOV.UK at <https://www.gov.uk/guidance/holiday-entitlement-and-pay-during-coronavirus-covid-19>

68 Chapter 6 – Recent issues

This left a long period between the furlough scheme being announced and the guidance coming out which had a negative impact on workers, although we understand that when the guidance eventually came out, some umbrellas did move forward with furloughing their workers.

Further lack of clarity on CJRS

Outside of the issues around the discretionary bonus and holiday pay, there were other uncertainties in terms of how the CJRS applied to umbrella company workers that may have left workers confused and in difficulty, as we can see from this query to our website:

CASE STUDY

“Can you clarify for me some questions regarding the COVID-19 and compensation (job retention scheme - JRS) specifically for someone who is... In an umbrella company. They are a freelancer and they are therefore an employee of the umbrella company (the umbrella company invoices the end-clients for the freelancer and then the umbrella company pays the freelancer under PAYE).

1 – Is it the umbrella company that will furlough the employee or is it the end-clients who will furlough the person and then let the umbrella company know?

2 – Is it correct for the umbrella company to ask the freelancer to request the end-client confirm that the freelancer should be furloughed? (If this is so this does not make sense to me as the freelancer is an employee of the Umbrella company and not the end-client)?

3 – Might you be able to point to the quotes on the govt guidelines that answer the two questions above?

4 – Does the umbrella company employee aka the freelancer need to have been in a recent contract in order to be able to get on the JRS? I.E. Could the freelancer have not had a contract since November and still get on the JRS (after all they are still an employee of the umbrella company by rights)? – If the answer is ‘no, not if they’re last contract was in November’, is there therefore a cut off date where they should have had their last contract...December? January? February? March? 5 – What does ‘on Payroll’ mean exactly with regards to ‘on Payroll on 28th Feb’? Does it mean being on a specific BACS payment/BACs run on the 28th February? Or does it mean simply having been on the Umbrella companies books since before the 28th of Feb?”

Initially some umbrella companies interpreted the official scheme rules¹⁰⁰ (at para 6.1 – reproduced below) as meaning that in order to qualify, their workers needed to have been on a ‘live’ assignment that was suspended or terminated as a result of the

100 CJRS Treasury Direction, 15 April 2020, available on GOV.UK at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/879484/200414_CJRS_DIRECTION_-_33_FINAL_Signed.pdf

69 Chapter 6 – Recent issues

coronavirus and were then only considering the period up until their assignment was going to come to a natural end. As a person must have been furloughed for a period of at least three weeks to qualify, if the assignment was scheduled to finish within those three weeks anyway, the umbrella company may still have said they didn't qualify.

Umbrella companies may have felt it was too risky to furlough people if they fell outside these circumstances, because if they made the wrong decision as to the government's intention, there could have been serious consequences for them (in that the umbrella company would have been claiming against the intention of the CJRS).

As an umbrella company does not have day to day management over a worker, they needed to get confirmation of a person's assignment situation from agencies and/or end clients (that is, whether the assignment had been cancelled, for example). This might have been easier said than done if the staffing levels or operations in those business were affected. This might have resulted in delays, even if furlough was ultimately possible.

EXTRACT

'Para 6.1 of the CJRS Treasury Direction

6.1 An employee is a furloughed employee if –
(a) the employee has been instructed by the employer to cease all work in relation to their employment,
(b) the period for which the employee has ceased (or will have ceased) all work for the employer is 21 calendar days or more, and
(c) the instruction is given by reason of circumstances arising as a result of coronavirus or coronavirus disease.'

The lack of official confirmation from HMRC and consequent inaction by the umbrella companies clearly left workers in a lot of difficulty:

CASE STUDY

'Hi. I saw your webpage and the comment 'It is currently not clear whether the intention is that temporary workers can only benefit from the Job Retention Scheme if they were in an assignment that has been curtailed or were booked in for an assignment that has been cancelled because of the coronavirus, or whether it will apply to people who were simply on the books as at 19 March 2020.' You followed this by saying you thought it would be the latter.

My Umbrella company is saying HMRC have now given advice that it is the former. They say HMRC have criteria that says a worker can only be furloughed if their assignment was terminated due to covid-19. Are you able to confirm if this correct please? I have told them I think it is not correct and that as I am their employee and they have no work for me they can and should furlough me. They are refusing to do this and have suggested I resign and claim universal credit.'

70 Chapter 6 – Recent issues

LITRG asked HMRC whether the government intended for the scheme rules to be interpreted more widely – for example to support people: who were looking for an assignment and who might have found one, but for the coronavirus; or who were in an assignment that was scheduled to end – but that might have been extended, but for the coronavirus.

It was eventually confirmed to us by HMRC that these situations did fall within the intended scope of the scheme. But the confirmation came very close to the 10 June 2020 deadline for employers to be able to furlough workers for the first time and although we tried to cascade the message out to the sector via our contacts, it may have come too late for some workers.

But it wasn't all bad news – many workers were furloughed

Despite all this, and even though there was no obligation on umbrella companies to furlough workers, it seems many workers were furloughed as we can see from an online forum¹⁰¹ (where 48 out of 79 achieved a 'green' rating – CJRS paid fairly) and from the selection below of just some of the queries received by LITRG.

To be clear, although some of the writers below are querying the umbrella company's furlough pay calculation, the calculations may well be correct (and we responded to such workers with information on how to check this).

CASE STUDIES

'I was very lucky to have been put on furlough right from day 1 by my Umbrella Co. They have paid me throughout the lockdown, incl. the Summer Holiday and took me off furlough on Aug 30th. They have never sent me details of any calculation used to calculate my furlough pay, and to be fair, I didn't ask. My question is; even though my furlough has ended, can I ask them to go back and look at my pay and ask them to, a. check their calculations, and b. send me copies?'

'I started a new job in February 17 2020. Payments are made through an Umbrella company. I was furloughed on 13 April 2020. I was paid furlough based on 80% of payments I received since I started work with this umbrella company. My question is, should my earnings from my previous work be taken into account? Should it not be based on 80% average earnings from tax year 2019 - 2020 ? Thanks in advance.'

'I work as a teaching assistant and get paid by an umbrella company. I have a feeling that they are not being honest about my furlough payments. Between 13th Feb and 20th March I earned £1656.00 and they used that figure to work my pay out. They used another 20 days up the end of the tax year to make the calculations. My gross is around £393 a week but I have received £165 per week which put me in debt. This is obviously nowhere near 80% can you help?'

'I am an agency worker and have been for the last three years using an umbrella

101 OffPayroll.org.uk, Contractor umbrella company reviews – find umbrellas who handled CV19 fairly, available at <https://www.offpayroll.org.uk/umbrella>

company and I have been furloughed, however I am unsure as to the calculation and how it was calculated. I finished a placement last March 2019 and did not work until the last week in June until the last week of August 2019 and nothing until Dec for 1 week only. I then started a new placement on Jan 6, 2020 and have been furloughed since the last week of March 2020. In total 24 weeks of work what should my furlough be based on? Many thanks.'

Lockdown 2021

Furloughing comes at a cost to umbrella companies, as not only are there usually additional costs not covered by the furlough grant (including employer NIC and auto enrolment contributions, at a time when they have no income from end clients or agencies), they also have to keep functioning to process furlough payments, yet are unable to charge a margin from the CJRS funds¹⁰².

A clear picture has not emerged yet of how umbrella companies are handling furlough in the 2021 lockdowns, although we have heard anecdotally of some workers offering to fund the umbrella companies' employer NIC and pension contribution amount, which suggests more umbrella companies may be not be willing to furlough staff.

CJRS – the bottom line

There were always going to be inherent risks for certain workers in terms of making their employers gatekeeper to COVID-19 support under the CJRS, however this problem is by no means constrained to the agency and umbrella company sector.

What was worse for workers was that official guidance about the extent to which agencies and umbrellas could use and apply the CJRS (and how they should deal with certain intricacies that exist¹⁰³) was lacking, and indeed, non-existent initially. Some of this is due to the speed at which the various schemes were implemented. However as time elapsed, better and clearer government guidance for agencies and umbrella companies might have enabled them to make decisions and thus might have facilitated many more agency and umbrella workers getting furloughed, and more quickly.

For completeness, we should state that while we have been contacted by workers who suspect their employers of committing CJRS fraud (claiming grants and not passing them on to workers, for example), none of these queries appear to be related to umbrella companies. To the extent there are serious issues like this within the marketplace, we suspect that they will be connected to some of the non-compliant, unethical and unscrupulous behaviour we identify in Chapters 10 and 11.

102 Government criticised for banning furloughing umbrella companies from charging a margin, ContractorUK, 18 November 2020, available at http://www.contractoruk.com/news/0014830government_criticised_banning_furloughing_umbrella_companies_charging_margin.html

103 We discuss some of these in LITRG guidance, Umbrella workers: have you only recently been furloughed?, 2 June 2020, available at <https://www.litrg.org.uk/latest-news/news/200602-umbrella-workers-have-you-only-recently-been-furloughed>

Umbrella company regulation

Although agencies are regulated by the EAS, umbrella companies (outside the Gangmasters and Labour Abuse Authority (GLAA) sector), are not regulated.

Although there may be recourse for workers via an employment tribunal for some issues, lower-paid workers have limited access to recourse through the courts (due to, for example, a lack of confidence or prohibitive costs), and so they must rely on effective state enforcement to help protect them.

Current enforcement bodies

GLAA

The GLAA is a non-departmental public body, set up after the Morecambe Bay cockle picking tragedy.¹⁰⁴ Since 2006, the Gangmasters Licensing scheme sets out requirements for businesses supplying labour into the agricultural, horticultural, shellfish-gathering and associated processing and packing industries. This includes umbrella companies. From April 2017, the GLAA was given a wider remit to tackle labour abuse across all aspects of the labour market, in addition to its licensing scheme.

Their licensing standards set out the conditions that labour providers must meet to get a GLAA licence. They cover issues such as working hours, training, terms and conditions, the national minimum wage and transport to ensure labour providers meet the basic safety and welfare standards.

There are also conditions attached to the licence holder and Principal Authority to check they are 'fit and proper' to hold a licence. Their licensing regime¹⁰⁵ also covers tax, as set out below:

EXTRACT

'Licensing Standard 2: Pay and Tax Matters 2.1 Critical: PAYE, NI and VAT

A licence holder who employs workers under a contract of employment, contract of service, engages them under a contract for services or where the provisions of Chapter 7 of Part 2 of the Income Tax (Earnings and Pensions) Act 2003 apply must:

- be registered with HMRC and have a valid PAYE number, and

¹⁰⁴ On February 5th 2004, 23 Chinese cockle pickers drowned as a result of the behaviour of a criminal gangmaster.

¹⁰⁵ GLAA, Licensing standards, available at <https://www.glaa.gov.uk/i-am-a/i-supply-workers/do-i-need-a-glaa-licence/licensing-standards/>

73 Chapter 7 – Umbrella company regulation

- accurately calculate and deduct tax and National Insurance from all workers' pay and pay the correct amount to HMRC in a timely manner.

A licence holder who exceeds the VAT threshold must be registered with HMRC and charge and pay the correct amount of VAT in a timely manner.

Please note: Failure against this standard will lead to the licence being revoked without immediate effect.'

HMRC

HMRC are the authority tasked with administering the tax system and with ensuring compliance with tax law, including PAYE. HMRC are a non-ministerial government department. To the extent that problems with umbrella companies are to do with tax and their operation of PAYE, they fall within HMRC's remit. HMRC also have compliance and enforcement responsibilities in respect of national minimum wage.

In our experience, HMRC do not have a good record of policing umbrella companies. Indeed, as we showed in our first report¹⁰⁶, rather than primarily targeting the employers for PAYE failure as the PAYE regulations imply, HMRC can sometimes direct their compliance activity too readily at the worker.

In 2018, the Director of Labour Market Enforcement (despite tax not being part of his formal remit) highlighted that there were significant issues around non-compliant intermediaries and that there was a gap in enforcement, both for protecting worker employment law rights and around tax avoidance.¹⁰⁷

However, we do recognise that in some instances, it has not been easy for HMRC to take action against non-compliant umbrella companies, given the relative ease of access to the insolvency regime (put simply, if/when HMRC approach, the umbrella company folds). This is perhaps evident in the failure of the below umbrella company (per the liquidator's report¹⁰⁸):

'HM Revenue & Customs Investigation

- 2.18 Prior to the Company's liquidation it was disclosed by the director and the shareholders that the Company was subject to a HM Revenue & Customs investigation in respect to its employees and respective expense costs.

On the 30 August 2018 my predecessor received confirmation from HM Revenue & Customs that their investigation had been concluded and that they had found

106 LITRG report, Travel expenses for the low-paid – time for a rethink?, 17 November 2014, available at <https://www.litr.org.uk/latest-news/reports/141117-travel-expenses-low-paid-%E2%80%93-time-rethink>

107 LITRG press release commenting on the Director's recommendation, LITRG welcomes strategy to help low-paid workers, 17 May 2018, available at <https://www.litr.org.uk/latest-news/news/180517-press-release-litr-welcomes-strategy-help-low-paid-workers>

108 Para 2.18, Liquidators' statement of receipts and payments to 1 August 2019, 1 December 2020, available at <https://find-and-update.company-information.service.gov.uk/company/07329095/filing-history>

74 Chapter 7 – Umbrella company regulation

significant disparities within the Company's records in relation to the provision of expense costs – subsistence.

As a result of their findings the Company was found to be negligent in respect to its record keeping, as required by law and the Company was subsequently issued with Regulation 80 Tax determinations for the tax years 2014/15, 2015/16, 2016/17 and 2017/18 These determinations total £755,463.20.

Initially the director, along with the Company's former financial advisor requested that my predecessor challenge HM Revenue & Customs decision, however after review this suggested course of action was deemed not to be appropriate.

I would further confirm that full details of this matter were included in my predecessor's report on the director's conduct to the Secretary of State.'

More broadly, in terms of engagement with the umbrella company sector as a relatively new model within the labour market, HMRC, to date, have appeared reluctant to work with responsible, compliant umbrella companies on 'what good looks like'.

We recently recommended in our submission to HMRC's consultation on tackling disguised remuneration¹⁰⁹ that HMRC build contacts and relationships with umbrella companies, saying:

'We think that HMRC working with responsible providers would take us a further step forward better standards within the sector and, hopefully in time – fewer troublesome providers.'

Further regulation still seems to be a long way off

In July 2017, Matthew Taylor in his Good Work report¹¹⁰, said:

'The new Director of Labour Market Enforcement should consider whether the remit of EAS should be extended to cover policing umbrella companies and other intermediaries in the supply chain.'

In February 2018, the government issued a consultation¹¹¹ looking at how umbrella companies or intermediaries could be brought within the scope of the EAS as well as how to increase transparency of contractual arrangements for agency workers.

109 LITRG response to call for evidence, Tackling DR tax avoidance, 22 September 2020, available at <https://www.litr.org.uk/sites/default/files/200922-LITRG-response-Tackling-DR-tax-avoidance-Call-for-evidence-2328.pdf>

110 Good work: the Taylor review of modern working practices, 11 July 2017, available on GOV.UK at <https://www.gov.uk/government/publications/good-work-the-taylor-review-of-modern-working-practices>

111 BEIS and EAS consultation, Agency workers recommendations, 2018, available on GOV.UK at <https://www.gov.uk/government/consultations/agency-workers-recommendations>

75 Chapter 7 – Umbrella company regulation

In December 2018, the government issued the Good Work Plan¹¹², which drew on submissions made to the consultation and confirmed that the remit of the EAS would be extended.

In July 2019, rather than follow up on this intention to expand the remit of the EAS to include umbrella companies, the government launched yet another consultation on the creation of a single enforcement body, which encompasses the EAS.¹¹³ This consultation ended in October 2019.

At the time of writing this report, the government are still analysing feedback, in part this is likely to be due to the diversion of resources to the UK's exit from the European Union and the coronavirus pandemic. We note that some umbrella companies have been urging the government to take urgent action to regulate the sector for some time¹¹⁴ and it is disappointing that no further steps have been taken by government in this area.

Self-regulation

The barriers for operators to enter into the 'umbrella' industry are low – it is relatively easy to set up an umbrella without a significant capital outlay. This means there is a wide spectrum of operators.

In the absence of any statutory regulation of the sector, there is some attempt to self-regulate.

In addition to bodies like PRISM and All Umbrella Companies Are Equal¹¹⁵ (who try and raise standards by campaigning/providing information), there are two main trade 'accreditation' bodies for the sector – Professional Passport¹¹⁶ (PP) and the Freelancer and Contractor Services Association¹¹⁷ (FCSA).

There appears to be a third accreditation body recently set-up – TABUC, the Trade Association of British Umbrella Companies¹¹⁸. As this is a new body, not yet open to members, we have been unable to ascertain many details. The TABUC website states that they are working in partnership with Employment Rights Assessment (ERA) Services¹¹⁹ who assess for compliance and provide relevant certification for its members. ERA Services is a Community Interest Company which is currently undergoing independent third party assessment by United Kingdom Accreditation Services (UKAS).

112 Page 40, Good work plan, BEIS, 17 December 2018, available on GOV.UK at <https://www.gov.uk/government/publications/good-work-plan>

113 Good work plan: establishing a new single enforcement body for employment rights, BEIS, 16 July 2019, available on GOV.UK at <https://www.gov.uk/government/consultations/good-work-plan-establishing-a-new-single-enforcement-body-for-employment-rights>

114 Regulate now to clean up umbrella company market, Onrec article, 1 August 2013, available at <https://www.onrec.com/news/news-archive/regulate-now-to-clean-umbrella-company-market-%E2%80%93-parasol>

115 AUCAE, About All Umbrella Companies Are Equal, <https://allumbrellacompaniesareequal.com/>, Professional Passport, <https://www.professionalpassport.com/>

116 Professional Passport, <https://www.professionalpassport.com/>

117 FCSA, <https://www.fcsa.org.uk/>

118 TABUC, Trade Association of British Umbrella Companies, <https://tabuc.co.uk/>

119 ERA Services, The new gold standard for Employment Excellence, <https://www.eraservices.org/>

Per its website, UKAS is recognised by government to assess against internationally agreed standards organisations that provide certification, testing, inspection and calibration services.

KEY INFORMATION

Professional Passport

Professional Passport was formed in 2007 to carry out compliance due diligence checks on umbrella and accountancy service providers. They say ‘our compliance standards go further and are designed to not only ensure that providers we recommend operate compliantly within HMRC tax rules but also across the many other areas of legislation that apply. We require the highest level of transparency in their operations to ensure workers are clear on any arrangements entered in to.’¹²⁰

At the time of writing, Professional Passport have approved 74 providers, over six services. A list of their approved providers is available from their website.¹²¹ It is our understanding that Professional Passport accredit smaller providers.

FCSA

The FCSA was formed in 2008 ‘with the objective of setting standards for the umbrella workforce in order to support and sustain the industry’.

FCSA’s compliance standards are openly available from their website.¹²² Their independent review process is undertaken by accountants and lawyers.

FCSA have accredited 62 providers, over three models. A list of their approved providers is available from their website.¹²³

It could be viewed as unhelpful that umbrella companies have to make a choice between accreditation bodies, as there is the risk that the overall compliance message is diluted. However, some umbrella companies are both FCSA and Professional Passport accredited (for example, several of the umbrella companies we looked at were) which indicates that there may be some synergy and consistency between the bodies.

A complete solution?

Commenting on the technical aspects of the different bodies’ compliance standards is outside the scope of this report and we are unable to test how rigorous their processes are.

120 Professional Passport : Our Compliance Standards, available at <https://www.professionalpassport.com/Approved-Providers/Our-Compliance-Standards>

121 Professional Passport, Approved Providers, available at <https://professionalpassport.com/Approved-Providers/Approved-Providers>

122 FCSA, Codes of Compliance, available at <https://www.fcsa.org.uk/resource/fcsa-code-of-compliance/>

123 FCSA, Directory of Accredited Members, available at <https://www.fcsa.org.uk/members/>

77 Chapter 7 – Umbrella company regulation

Our research indicates that both bodies have good intentions in respect of regulating the umbrella company market and that their offerings are far more than just a tick box exercise. However, there are inevitably limitations in their approach. For example:

- The review they carry out of their members is a snapshot of a moment in time and there would appear to be at least a year between reviews – a lot can change in a year.
- It may be hard to ensure in-year changes/updated compliance standards have been understood and processed by umbrella companies, even if they are encouraged to proactively follow new compliance standards until the next renewal process.
- Some umbrella companies may have patchy compliance histories, potentially under phoenixed companies¹²⁴ – it is not clear how much of this history is unearthed or is deemed relevant by the bodies in terms of what is before them today.
- For commercial reasons, we understand most umbrella companies will have a group structure with a holding company and then individual services offered under subsidiary companies – it is not clear whether the review processes will pick up all the associated companies of a particular entity and if they do, what scope there is for delving into them all.
- It is unclear the extent to which either body interviews workers to check whether the contractual terms match what happens in practice.
- It seems difficult for either body to stop umbrella companies being purposefully obfuscatory in terms of trying to cheat the review.
- It also seems possible that umbrella companies might try and piggyback other offerings under different brands off of the main accreditation – this might not matter if the brands are used to target different market segments all using the same backend systems and services, but some may well have different operating systems.
- It is not possible for the FCSA or PP to monitor how umbrella companies apply subjective tests, such as the SDC test, on a daily basis.
- There are also things that fall into the commercial area they are unable to comment on or change as they are not compliance issues per se – for example, around fees. The most the accreditation bodies can do is encourage transparency and educate workers on what to look for.

This is not an exhaustive list. Nevertheless, these observations should not detract from the fact that both bodies seem to have had a positive impact in terms of campaigning to raise standards and stamping out bad practice where it exists.

Limitations

Any voluntary accreditation process can only provide a framework and methodology to assess compliance and so can never be one hundred percent effective. However, in our experience and from what we understand from other worker representative groups, it is positive that both bodies seem to welcome external feedback and being challenged.

¹²⁴ Phoenixing, or phoenixism, are terms used to describe the practice of carrying on the same business or trade successively through a series of companies where each becomes insolvent in turn. Further information is available in Parliamentary briefing paper CPB4083, Phoenix trading and liability of directors, 5 December 2019, available at <https://researchbriefings.files.parliament.uk/documents/SN04083/SN04083.pdf>

Do FCSA and PP have a monopoly?

From conversations with umbrella company representatives, we understand that roughly 25 to 30% of the current umbrella marketplace is accredited by either FCSA or PP or both. Our understanding is that those umbrella companies that are accredited are not just the domain of higher skilled, higher paid freelance contractors but can also be used by lower skilled, lower paid agency workers. Due to the costs of accreditation (£18,000 for FCSA accreditation for example¹²⁵), there may be a price differential however, which means that they are less likely to be used by lower paid workers.

Historically, agencies did not really have to worry about supply chain compliance, beyond the concern over reputational damage, but now – for reputable agencies at least – handing workers over to umbrella companies they can rely on is essential.

Given the penalties for non-compliance that can now exist for agencies (for example, in terms of the non-operation of PAYE by umbrella companies for workers under SDC – more on this later) and the more general scrutiny that agencies are now under in terms of securing their supply chains¹²⁶, it is unsurprising that many agencies choose to put accredited umbrella companies on their preferred supplier lists. In fact, some agencies stipulate the use of an accredited umbrella companies, as we can see from this ContractorUK forum query¹²⁷:

CASE STUDY

'I have a new contract which pays a fairly modest day rate and I have found an Umbrella company that will charge £15 a week and pay holiday pay each time I'm paid...

My agency is insisting I use an FCSA Umbrella and so far the ones I have spoken to are wanting almost £100 a month from me which is £40 more than the one I have chosen for exactly the same service.

I've looked at the FCSA I thought it was something official like the FCA its not and £40 a month is a big difference to me.

What can I do... any advice?

Thank you'

It would appear that situations like this may have promoted certain groups to voice concerns, such as 'FCSA: Compliance or Cartel Monopoly'.¹²⁸

125 FCSA, Accredited membership, available at <https://www.fcsa.org.uk/membership/accredited-membership/>

126 Under the Criminal Finance Act 2017, penalties can arise for agencies where a worker evades tax and the commissioning of that offence is facilitated by a third party (e.g. an umbrella company) who is 'associated' with the agency. Agencies are required (if they want to have a defence) to have reasonable procedures in place to prevent the facilitation of tax evasion.

127 ContractorUK forum post, available at <https://www.contractoruk.com/forums/umbrella-companies/139781-expensive-fcsa-accredited-umbrella-company.html>

128 For example, Save NHS workers, website available at <https://savenhsworkers.org/>

79 Chapter 7 – Umbrella company regulation

It may be that members of such groups are genuinely aggrieved about the loss of choice and accrued employment rights if and when they are 'forced' to move umbrella company. We can also see that it could be inconvenient to have to move umbrella companies as it would mean the worker having to request their P45 then completing a Starter Checklist in their new job and going through another on-boarding process. However, it may be that some of the workers who object to being forced to use FCSA/PP umbrella companies feel attached to their non FCSA/PP umbrella companies for other reasons, such as that they are bending the rules in a way that is benefiting the worker.

Some umbrella companies go further

Some umbrella companies may have additional internal safeguards, over and above FCSA or PP accreditation. For example, one group we looked at as part of our research, which houses several umbrella company brands, has a specialist technical commercial manager, who we understand is a member of a professional accountancy body. And clearly those umbrella companies offering limited company accountancy services will often have professional in-house expertise (although it is important to be clear that anyone can call themselves an accountant – as accountancy is not a regulated area).

A number of FCSA/PP accredited umbrella companies we have reviewed have strategic memberships and affiliations with a wider group of bodies, such as recruitment industry trade bodies like REC¹²⁹ and APSCo¹³⁰ and business representatives such as IPSE, the CBI¹³¹ or FSB¹³².

But... many umbrella companies are not accredited at all

The reasons for umbrella companies not being accredited are many.

Some may have tried but failed to gain accreditation – we understand from speaking with umbrella company representatives that some umbrella companies' applications for accreditation fail at their first attempt, although the reasons for failures may be fairly minor.

Given the cost associated with accreditation, there may be some smaller or newer umbrella companies who would like to gain accreditation but do not have the time, money or wherewithal to put themselves through the process.

Others may already have good compliance standards in place (for example, one umbrella company that we have seen that is neither PP or FCSA accredited pays for full annual compliance audits to be carried out by 2 of the big 4 accountancy practices) and may question the value of the accreditation – given limitations exist like those we have identified.

129 Recruitment and Employment Federation, website available at <https://www.rec.uk.com/>

130 Association of Professional Staffing Companies, website available at <https://www.apsco.org/>

131 Confederation of British Industry, website available at <https://www.cbi.org.uk/>

132 The Federation of Small Businesses, website available at <https://www.fsb.org.uk/>

80 Chapter 7 – Umbrella company regulation

To be clear – there may be nothing wrong with an umbrella company that is not accredited.

There are probably a range of umbrella companies in this bracket – from those that are completely or largely compliant with the very complex rules even though they do not have the verification, to those that may take more limited steps to ensure they are compliant (but who do not actively try to breach the legislation), to those that run models like those we discuss in Chapter 10 and who actively seek out new schemes to try and protect their profitability.

On the reverse, it is possible there are umbrella companies on the PP/FCSA lists that shouldn't be there.

It is extremely important that workers always do their own research into an umbrella company.

There is of course the possibility that some umbrella companies simply don't want to be accredited because they want to remain in the shadows. In particular, some of those using disguised remuneration schemes (see Chapter 11) are unlikely to ever have any of these third-party assurances in place.

So, if they are not accredited, how else do umbrella companies end up on an agency's preferred supplier list?

For many reasons, agencies should be undertaking due diligence in terms of the umbrella companies they contract with. Using a PP/FCSA accredited umbrella company may be the easiest way for them to do this.

But agencies also pass workers over to non-accredited umbrella companies. These may be agencies who feel they have done all they need to secure their supply chains and are happy with the quality of the non-accredited umbrella they have chosen, or who simply don't understand the need for due diligence.

Referral fees

There is also the well-known practice of umbrella companies making incentive payments to individual recruitment agents, which can be a deciding factor in terms of where the workers are referred to.

As an agency can decide which umbrella companies they are prepared to work with, this puts them in a position of relative power, with the consequence that referral fees are commonplace. We have recently read¹³³ that some agencies look for anything between £5 and, at the extreme, £12-£15 per timesheet, to refer workers to certain umbrella companies.

¹³³ Agency kickbacks: when contractors use their recruiter's PSL umbrella company, ContractorUK article, 2 December 2020, available at https://www.contractoruk.com/agencies/agency_kickbacks_when_contractors_use_their_recruiters_psl_umbrella_company.html

81 Chapter 7 – Umbrella company regulation

We understand that some agencies have a business-to-business relationship with umbrella companies and prevent individual recruitment agents from accepting these rebates directly, for example seeking instead a single financial settlement for an umbrella company to be on a PSL. We also understand that these sums can be many thousands of pounds.

Whatever form the payments take, it is a very powerful tool for umbrellas to gain business and agencies to potentially earn income. It could also incentivise agencies to move workers around from umbrella to umbrella purely to generate income for the agency/recruitment consultant.

Perhaps with concerns over contravention of the Bribery Act¹³⁴, within the agency industry, trade bodies have introduced codes of conduct to ensure that their members do not fall foul of the rules. APSCo for instance include the following statements in its code of conduct¹³⁵:

'4.3 Referral Fees

Members shall have a procedure in place to ensure that any referral fee or other financial incentive paid to or received from any other staffing company, umbrella company, intermediary, or any other business in the supply chain is not in breach of the Bribery Act 2010.

APSCo expects members to adhere to the following best practice with regard to such fees to ensure that:

4.3.1 they are not disproportionately high in relation to the value of the service provision;

4.3.2 all employees adhere to the member's referral fee policy;

4.3.3 when entering into referral fee/financial incentive arrangements all parties have complete transparency with regard to the payments made and/or received; and

4.3.4 members never apply undue pressure to any other staffing company, umbrella company, intermediary or other business in the supply chain to offer a referral fee or any other financial incentive and all such communications shall be transparent at a corporate level within all businesses involved.'

134 Bribery Act 2010, available at <https://www.legislation.gov.uk/ukpga/2010/23/contents>

135 Codes of Conduct & Rules of Membership, APSCo, available at <https://www.apsco.org/about-us/codes-of-conduct-and-rules-of-membership.aspx>

82 Chapter 7 – Umbrella company regulation

We can also see from openly published information¹³⁶ that at least one of the umbrella company accreditation bodies have tried to put in place some safeguards (in recognition that although sometimes problematic for their members, referral fees are a commercial reality):

‘Key principles

For our part, we recognise that these arrangements are commercial agreements between the parties and therefore they fall outside general compliance standards. However, there are some important guiding principles that should be adhered to which contractors may be interested in:

1. The preferred position for any agreement should be between the two businesses directly -- with formal invoicing for the agreed amounts.
2. The amounts should be ‘commercial,’ by which we mean leaving a provider enough surplus income to fund their costs in delivering the services.
3. If a recruitment company agrees that consultants can receive incentives, then in all cases;
 - the recruitment company must confirm this to the provider in writing
 - any incentive must be paid with the provider covering the costs of basic rate tax and National Insurance
 - the consultant must report their income on a self-assessment tax return and pay any high rate tax liabilities on the money received
 - the recruitment company should implement adequate processes to confirm this to avoid potential future liabilities under [The Criminal Finances Act.](#)

Despite these interventions, this practice raises very worrying questions about whether some agencies are taking the welfare of the workers seriously and handing them over to umbrella companies that will offer them the best service, or whether they are simply referring people to the umbrella company that pays the most in referral fees.

There is also a question over where the money for referral fees is coming from – the umbrella company will have to find this money from somewhere against already very tight profit margins. It could be that the payment of referral fees in an attempt to keep afloat, as opposed to profiteering or other motivations, are driving some of the non-compliant behaviour seen in some umbrella companies.

It also occurs to us that as non-compliant providers (of the type we discuss in Chapter 11 specifically) make much higher margins and as a result could potentially offer significantly higher rebates (indeed, we have heard examples of around £400 per worker), this could be further distorting behaviour in the marketplace.

¹³⁶ Agency kickbacks: when contractors use their recruiter’s PSL umbrella company, ContractorUK article, 2 December 2020, available at https://www.contractoruk.com/agencies/agency_kickbacks_when_contractors_use_their_recruiters_psl_umbrella_company.html

Construction industry

Many umbrella companies have a construction industry offering alongside a standard PAYE umbrella arrangement.

The construction industry is generally characterised by mobile, transient people who, due to the seasonality of work and nature of projects, often work on successive short-term assignments.

Historically, the main problem in the construction industry has been false self-employment, rather than use of umbrella companies. However, in the last decade these two issues started to overlap, leading to where we are today. False self-employment has been a concern for workers and their representatives for many years and is a very important part of the labour market landscape to understand, so for context, we will explain it.

KEY INFORMATION

What is the Construction Industry Scheme (CIS)?

CIS was originally devised by HMRC in the early 1970s as a reaction to the amount of tax being lost as a result of 'self-employed' workers in the construction industry not paying the tax due on their income.

CIS is a HMRC scheme under which if a person works for a contractor in the construction industry (so not as an employee but for example as a self-employed individual), then the contractor is usually obliged to withhold tax on its payments to the person, at either 20% if they are 'registered' or 30% if they are not. Although the worker will fully reconcile their position through the completion of a tax return at the end of the year, meaning they pay the same amount of tax overall as any other self-employed person, this is different from other self-employed individuals, who normally receive their payments gross, which means no tax is deducted.

There are two components of the Construction Industry Scheme (CIS), one is being a 'contractor' and one being a 'subcontractor'. If a person is engaging other self-employed workers doing construction work then they are a contractor and must register under the CIS.¹³⁷ If a person is engaged, or taken on, by a contractor to perform some construction work, they are a subcontractor.

A contractor has a wider meaning than just a construction company and can cover many other businesses included in the construction world, including labour providers.

137 Guidance, What you must do as a Construction Industry Scheme (CIS) contractor, available on GOV.UK at <https://www.gov.uk/what-you-must-do-as-a-cis-contractor/how-to-register>

84 Chapter 8 – Construction industry

There are two types of registration for subcontractors – registration for gross payment and registration for payment under deduction of tax at 20%. To be registered for payments to be made gross, subcontractors must comply with detailed conditions. The subcontractor must operate in the UK and be run ‘to a substantial extent’ through a bank account. They must have complied promptly with certain tax obligations for the previous year and meet certain turnover thresholds. Contractors may pay unregistered subcontractors, but tax must be deducted from payments at 30%.

False self-employment

The question of whether someone is employed or self-employed is an important one, both in relation to tax, and to an individual’s rights in employment law. For many years, and long before the advent of umbrella companies, there have been concerns about the scale of ‘false self-employment’ in the construction industry.¹³⁸

False self-employment (treating a worker as self-employed when the true nature of his/her engagement is that of employment) is often foisted upon workers, in order to drive down the engager’s costs (including employers’ NIC) and responsibilities.

Engagers can often get away with false self-employment because many workers think that self-employment is a choice rather than something decided by fact. Even where workers have more knowledge and think they should be an employee, workers may be told that they are self-employed because: they are skilled tradesmen with a certain amount of autonomy over their work; they have a Unique Taxpayer Reference (UTR) from previous periods of self-employment; their position is temporary; or they provide their own small tools. All of these things are incorrect.

Worryingly, there are likely people who are falsely self-employed in the construction industry who do not even realise that they are being treated as self-employed – until something goes wrong (for example, they needed to claim a coronavirus SEISS grant and couldn’t because they put their self-employment income in their tax return as employment income). Certain factors in the construction industry – self-billing invoices and the Construction Industry Scheme (being given ‘payslips’ with ‘Employer’s Tax reference’¹³⁹) and having tax (but not NIC) deducted at source – mean engagers can, if they so wish, easily disguise false self-employment. We explain more about CIS above.

On the other hand, false self-employment can often be worker-led due to the tax savings that can be made (as the self-employed pay a lower amount of NIC), although they may be unaware of the benefits they will lose from not being classed as an employee (such as their right to sick pay). The worker may also want the ability to deduct expenses from the gross income as the rules governing such deductions are more generous to the self-employed than those applied to employment income.

138 Mark Harvey and Felix Behling, *The Evasion Economy*, available at <http://ucatt.info.co.uk/files/publications/UCATT%20Report%20Evasion%20Economy.pdf>

139 Construction Industry Scheme (CIS), Payment and deduction statement template, 1 September 2018, available at <https://www.gov.uk/government/publications/construction-industry-scheme-payment-and-deduction-certificate>

So, there are financial incentives on both sides to portray employment as self-employment.

Many engagers of CIS workers in the past would perhaps have had little fear of HMRC enforcing employee status for PAYE purposes, as there is at least some tax being paid via CIS. However, in 2012, a report¹⁴⁰ found that some umbrella companies were marketing themselves as being able to help some construction companies with PAYE employees, who wanted to reduce their costs, by ‘flipping’ workers from directly employed PAYE to self-employed CIS workers. In this model, the umbrella company took on the role of the ‘engager’ of the labour and completely assumed the (very low) risk of a PAYE audit by HMRC.

KEY INFORMATION

Main differences between employment and self-employment for construction industry workers – engager perspective

	Employed	Self-employed
Contracts	An employee has a contract of service, which may include an obligation to pay for a minimum amount of work	A self-employed person has a contract for services, which has no such obligation
Payment	Via payroll	On production of invoice
Tax	An employer has to operate PAYE	CIS tax withheld at source at flat rate. Individual files a tax return each year, reconciling their position, under the Self-Assessment system
NIC	Employees pay class 1 primary NIC on their earnings. These are deducted and paid to HMRC by the employer. The employer may also have to pay class 1 secondary NIC which is an extra cost for the employer	Self-employed people are responsible for their own NIC. They pay class 4 NIC based on their profits and class 2 NIC based on the number of weeks of self-employment, usually alongside their income tax after the end of the tax year
Risks of incorrect operation?	Unpaid PAYE tax and NIC (employee and employer amounts) and penalties ¹⁴¹	Unpaid CIS tax (although probably rarely applied) and penalties ¹⁴²
NMW and holiday pay	Yes	No (unless individuals have ‘worker’ status)
Statutory payments	Yes	No
No more work?	Give at least statutory notice and pay notice pay	No notice required (unless provided for in contract)

140 The great payroll scandal, a report for UCATT by Jamie Elliott, available at <http://classonline.org.uk/docs/greatpayrollscandal.pdf>

141 See PAYE54000 - PAYE Manual - HMRC internal manual, available at <https://www.gov.uk/hmrc-internal-manuals/payee-manual/payee54000>

142 See Construction Industry Scheme: a guide for contractors and subcontractors (CIS 340), available at <https://www.gov.uk/government/publications/construction-industry-scheme-cis-340/construction-industry-scheme-a-guide-for-contractors-and-subcontractors-cis-340>

Against the backdrop of increasing employment costs and obligations (and it is of note that in 2012, both the Real Time Information system of reporting PAYE¹⁴³ and auto enrolment into workplace pensions were rolled out, which may together have been the last straw for many of the remaining construction companies with PAYE employees), the umbrella companies may well have been playing to a captive audience. Although umbrella companies may have helped lubricate the ‘switching’ process, ultimately the final decision will have been taken by the construction companies.

Agency worker false self-employment

Until 2014, just as it was common for there to be lots of directly hired ‘self-employed’ workers on a construction site, it was also common for there to be lots of ‘self-employed’ agency workers on a construction site (and for largely the same reasons).

Although agency workers (where properly engaged) should have been treated as employees for tax purposes under the agency legislation (meaning PAYE should have been operated), substitution clauses (the ability to send someone else in the workers place) were widely used in an attempt to circumvent the agency legislation¹⁴⁴ and avoid those PAYE obligations.

As such, agencies were easily able to avoid PAYE. Instead, the worker was paid under CIS and could claim tax relief on expenses. This was mutually beneficial and therefore, in our experience, common practice.

From 6 April 2014, due to concerns over the false self-employment of agency workers, the scope of the agency legislation was changed to clarify that the ability (or inability) to send a substitute was irrelevant.¹⁴⁵

The onshore intermediary rules

From 6 April 2014, workers who are supplied through intermediaries, if they personally provide services and are subject to (or to a right of) supervision, direction or control (SDC) by any person, are treated as employees for tax purposes and the agency is required to apply PAYE. These rules mean that it is no longer possible to use a standard substitution clause to avoid being treated as an employee under the agency rules.

As the SDC test (which is the same test that is applied for travel and subsistence purposes) is only one part of the common law test of employment, it means it catches more people as employed than the common law test.

143 Real time information (RTI) is a system of payroll reporting which means that employers have to send information about their employees and their pay each time they are paid, as opposed to once a year, which used to be the case.

144 Under the original ITEPA 2003, s44 an agency worker was only treated as an employee for the purposes of income tax where they personally provided, or were under an obligation personally to provide, services (which are not excluded services) to another person (“the client”). If a substitution clause was inserted in the contract, this was taken to mean a worker could send someone else in their stead, and there was no obligation to personally provide services. Often the substitution clauses were a sham.

145 HMRC guidance on the revised agency rules can be found in their Employment Status Manual at ESM2034, available on GOV.UK at <https://www.gov.uk/hmrc-internal-manuals/employment-status-manual/esm2034>

87 Chapter 8 – Construction industry

In conjunction with the onshore intermediary rules, other rules for employment intermediaries, effective from 6 April 2015¹⁴⁶, set out procedures which require an agency to report specific information to HMRC about themselves and the supply of any workers to an end client who have been treated as self-employed for tax and National Insurance purposes and paid outside the scope of PAYE.

There was perhaps an expectation that, as a result of these legislative changes, construction companies would take on the workers directly when the self-employed agency worker option became, effectively, unworkable. In practice, this didn't appear to happen. Equally, agencies could have absorbed the increased costs of having to operate PAYE or they could have tried to pass them on to the end client. Neither of these things seem to have occurred either. Instead, the agencies seem to have circumvented the legislation by moving many thousands of workers 'en bloc to umbrella company contracts'¹⁴⁷ without any kind of consultation or explanation.

This guise ensured workers were paid under PAYE but came hand in hand with the ability to continue to manage costs in the supply chain, just in different ways to the use of false self-employment (such as by not uplifting pay rates sufficiently, holiday pay infringements and through the use of travel and subsistence schemes).

The situation after 2014

In many ways, the fact that workers got taken on by an umbrella company as an employee could have been seen as a positive, given the historic backdrop of false self-employment.

Instead, umbrella companies became the sharp focus of unions, with accusations that they:

- 1) Took unreasonable fees from workers
- 2) Hid behind confusing payslips
- 3) Charged workers for employers' NIC
- 4) Paid below the rates that had been agreed
- 5) Rolled-up holiday pay

all of which left workers 'impoverished, demoralised and confused'¹⁴⁸.

Workers not getting their rates of pay uplifted sufficiently when they were passed to umbrella companies by agencies (that is, the problem that we set out in Chapter 5) would account for bullet points 1, 3 and 4.

In 2016, the travel and subsistence rules changed and as we have explained previously, this seems to have prompted some in the umbrella marketplace, which will include some of those servicing the construction sector, to change their practices for the better.

146 HMRC guidance, Employment intermediaries reporting requirements, available on GOV.UK at <https://www.gov.uk/government/publications/employment-intermediaries-reporting-requirements>

147 As expressed in The umbrella company con-trick, a report for UCATT by Jamie Elliott, available at http://classonline.org.uk/docs/141023_Umbrella_Company_Con-Trick_Report.pdf

148 As expressed in The umbrella company con-trick, a report for UCATT by Jamie Elliott, available at http://classonline.org.uk/docs/141023_Umbrella_Company_Con-Trick_Report.pdf

The current situation

To recap on the situation, as described in Chapter 2 - the agency legislation says that the only time an agency worker can work outside of PAYE is if he is not subject to SDC (or the right thereof). So, if a bricklayer, say, gets work on a construction site through an agency, then the agency legislation applies (meaning PAYE applies) unless the worker is **not** under SDC (or the right thereof) of any person. SDC (if assessed properly) will catch most people in this position as being under PAYE.¹⁴⁹

If the worker is under SDC but, rather than operate PAYE themselves, the agency passes the worker to an umbrella company, then the situation becomes more complicated.

The agency legislation does not apply if the remuneration the worker receives in consequence of providing the services is otherwise chargeable as employment income.¹⁵⁰ Therefore, although the umbrella company itself is not under the agency legislation because there is no contract between it and the end client (and so could operate CIS for the worker if it considered the worker to be self-employed under the normal employment status test), if it does not operate PAYE then the 'employment income' exemption does not apply meaning the agency would still be caught by the agency legislation to operate PAYE.

Because of this, we understand from speaking with industry representatives, that agencies often now request payslips so that they can check that PAYE is being operated. The umbrella may also be subject to indemnities from the agencies in the event they cause loss to the agency.

Construction workers – PAYE or CIS?

So, even though the umbrella company is not under the agency legislation itself, per se, it will normally use the SDC test to work out if they can operate CIS or not, to protect the agency. Where there is no agency in the supply chain, the umbrella company could be the 'agency' for the purposes of applying the SDC test.

As few people will be outside of SDC (provided it is assessed correctly), in reality a 'CIS umbrella solution', is very often actually a PAYE model. The reference to CIS is often included to demonstrate that the umbrella company has gross payment status. This is needed because the CIS rules strictly apply to all payments made in a construction supply chain by a contractor to a subcontractor. The umbrella company, as the subcontractor, will need gross payment status¹⁵¹ in order to be able to receive the funds gross from the agency (rather than under deduction of CIS) and will then pay the workers under PAYE.

149 Only if the worker is not under SDC can the agency itself operate CIS, as the agency legislation takes precedence over CIS.

150 As explained in HMRC's ESM2032, Employment Status Manual, available on GOV.UK at <https://www.gov.uk/hmrc-internal-manuals/employment-status-manual/esm2032>

151 GOV.UK guidance, What you must do as a Construction Industry Scheme (CIS) subcontractor, available at <https://www.gov.uk/what-you-must-do-as-a-cis-subcontractor/gross-payment-status>

89 Chapter 8 – Construction industry

Most umbrella companies we looked at that offer a CIS solution say they will need to undertake a comprehensive analysis of the SDC position. Although it is possible that there are some workers who continue to be incorrectly treated as self-employed, we have not received any worker queries from umbrella company workers under CIS. Most problems that we see around CIS are to do with directly-engaged construction workers not having the confidence or resources to seek professional advice with their tax position as a self-employed person or their Self-Assessment tax returns, meaning that they become non-compliant.

More broadly, we frequently receive website queries from workers who appear to be in false self-employment, but this is outside of an agency/umbrella context.

Personal service companies

A limited company is a way of running a business. As discussed in Chapter 2, many professional freelance contractors work through their own limited companies (often called personal service companies, or PSCs) which sit between them and their client (either as an alternative to, or in addition to, an umbrella company).

However, as we explain later in this chapter, limited companies are not only used by highly paid professional contractors: often lower-paid agency workers find themselves working through their own limited company.

KEY INFORMATION

Recent limited company statistics from Companies House¹⁵²

- At the end of December 2020, there were 4,674,672 companies on the Companies House register
- Between October and December 2020, there were 201,820 new incorporations
- The number of incorporations in the fourth quarter of 2020 increased by 45,870 (29.4%) compared with the same quarter of the previous year.

Freelance contractors

Freelance contractors who work through their own limited company form their own contracts and pay their own tax. This will generally be a combination of corporation tax paid by the company and income tax on the salary and dividends received from that company.

There are a variety of reasons for working through a limited company. These include:

- ‘Limited liability’ protection in the event of business failure.
- Having a limited company can help present a professional image, which may be important if the contractor has a business that they want to develop and grow.
- They may have lower overall tax and National Insurance (NIC) costs (but see below, regarding IR35). This is usually because they will receive income from the company in both salary and dividend form and dividend income is taxed more beneficially than salary as it is not liable to NIC (it is treated as a return on an investment and not employment income). Also, corporation tax rates are generally low as compared to income tax and to the extent that profits are not withdrawn, they can ‘roll-up’ inside a company and eventually be extracted as capital.

¹⁵² Companies House, official statistics, Incorporated companies in the UK October to December 2020, 28 January 2021, available at <https://www.gov.uk/government/statistics/incorporated-companies-in-the-uk-october-to-december-2020/incorporated-companies-in-the-uk-october-to-december-2020>

91 Chapter 9 – Personal service companies

- As discussed previously, some end clients may be hesitant to work with someone who is just a sole trader, as HMRC may do a PAYE enquiry and find that the individual should have been treated as an employee of the end client. Inserting an intermediary (such as a limited company or an umbrella company) between them and the individual worker provides them with some protection against this.

When a person incorporates a business, they usually become a director and employee of their own limited company, and also the sole or main shareholder in the company. Contrary to popular belief, those who work through limited companies are not self-employed, even though they may have previously been a sole trader and may carry on doing their work in a similar way to that which they have always done.

The administrative considerations of running a limited company are considerable.¹⁵³ As a director/shareholder, the contractor will usually also need to prepare a Self-Assessment tax return in their personal capacity each year. The limited company will also have to register as an employer with HMRC, because to the extent that they pay themselves a normal salary from their own limited company, this should also be paid via the PAYE system.

VAT

Most freelance contractor limited companies are VAT registered.

Whilst registration is not compulsory until the VAT registration threshold is reached (which basically means that taxable sales¹⁵⁴ exceed £85,000¹⁵⁵ per rolling 12-month period), most freelance contractors will wish to register voluntarily in order to recover input VAT on expenses incurred, e.g. professional fees, IT costs and other expenses on which VAT is charged.

As a VAT registered trader, they should add VAT at 20% to their invoices for standard rated taxable supplies (other rates may apply depending on the service provided). This VAT is then paid by the agency or client (who, however, can usually recover this as input tax so it is not usually an additional cost overall). The difference between the 20% and the input tax that the VAT registered trader has suffered is usually paid to HMRC on a quarterly basis, giving their company a cash flow benefit.

Benefits can also be gained by utilising the VAT flat rate scheme¹⁵⁶, which, perhaps counter intuitively, can sometimes mean that some businesses can end up in 'profit', depending on the nature of the business itself.

153 As set out in the Running a limited company guidance, available on GOV.UK at <https://www.gov.uk/running-a-limited-company>

154 Taxable sales include subject to the standard, reduced or zero rate of VAT. Taxable supplies do not include VAT exempt supplies or supplies that are outside the scope of VAT.

155 The threshold is reviewed annually in the Budget.

156 VAT flat rate scheme guidance, available on GOV.UK at <https://www.gov.uk/vat-flat-rate-scheme>

92 Chapter 9 – Personal service companies

VAT flat rate scheme (FRS)

Under the FRS, a business charges VAT on its taxable supplies at 20% as usual but instead of paying over this 'output tax' less any recoverable 'input tax', the business pays over a flat rate percentage of the total (VAT inclusive) amount received from the customer, though input VAT recovery is largely restricted.

If the flat rate is, say, 10%, then the business gets to keep of the rest of the 20% VAT they have collected for themselves. This is theoretically to compensate them for input tax that they have suffered on buying in goods or services in the course of their business, but often, small businesses will not have suffered much actual input tax.

EXAMPLE

Dave and Roshan are freelance contractors working through their own PSCs. Dave is voluntary registered for VAT under the FRS; Roshan is not registered for VAT. Their flat rate percentage is 10% (although it is possible to get a 1% discount on the usual rate in the first year of a VAT-registered business).

Roshan invoices his client for the agreed rate of £125. Dave invoices his client for the £125 rate plus standard rate VAT at 20% to make £150 in total. The flat rate for his business is 10%, so the amount he needs to pay to HMRC is 10% of £150, or £15. Of the £150 that Dave receives from the client, he therefore gets to keep £135 – or £10 more than Roshan.

Say Dave has only spent the equivalent of £1 per day on actual 'input tax' (for example, VAT on some stationery supplies), he will 'make' £9 a day by being in the FRS. The FRS can therefore sometimes be of benefit, essentially offering a small amount of additional income for a worker.

In April 2017, rules were introduced whereby a 'limited cost' business which has very little input tax (because it does not have many expenses) has to apply a rate of 16.5% under the FRS and not the rate for its particular business sector. If a contractor falls in this category, there may be virtually no benefit in being in the FRS – or indeed being voluntarily VAT registered at all.

Accountancy services

Given the vast administrative considerations, including VAT, most freelance contractors will need to use an accountant to manage their PSC affairs for them. Most umbrella companies offer limited company accountancy services either in house, or via a partner organisation.

As there are so many considerations, a good umbrella company should help freelance contractors decide if an umbrella or a limited company is the correct way to trade rather than push them one way or another. It is important that people understand the pros and the cons as it is in no-one's interest to incorporate those businesses that are unsuitable to be a limited company. We have seen, for example, umbrella company websites that provide interactive tools to help people decide on the right option for

93 Chapter 9 – Personal service companies

them, by answering a series of questions. Although there can be no substitute for seeking independent, professional advice on matters such as this, some people may find such tools helpful.

Umbrella companies can also help smooth things for freelancers who can switch in and out of either their limited company arrangements or PAYE arrangements depending on the nature of the assignment.

For those workers who choose to set up and run a limited company, umbrella company accountants often offer a comprehensive package of support. From the websites we have looked at, the prices for these services seem to start just over £100 a month.

These prices obviously generate significant revenue for the umbrella company accountants, however on an annual basis, they probably compare quite favourably to the prices of traditional 'high street' accountants.

We are unsure as to the type of service that you might get from an umbrella company accountant, in terms of it being personalised or enduring. However, a limited company contractor we spoke to said the following about her umbrella company accountant:

CASE STUDY

'I pay £140 a month, but I get everything for that Company tax & accounts filing, Annual self-assessment tax return, VAT returns, Director's salary setup and management, a dedicated contact, with unlimited phone & email support and guidance on IR35 and other legislation. To be honest, I arrange my own contracts so can flex my price to take into account all these costs. I wouldn't be able to operate without them, they are worth their weight in gold.'

IR35

Although an individual working through a limited company may be essentially doing the same job as an employee, they can pay a lower amount of tax and NIC by taking dividends instead of salary.

The IR35 and the off-payroll rules have been introduced to negate some of the tax benefits associated with dividends. Basically, these rules say that if a worker looks like an employee for the end client who they work for¹⁵⁷, then they should pay the same tax as an employee.

Under IR35, a person's limited company should calculate a 'deemed' payment of earnings, on up to 95% of the contractor's contract income, which will then be subject to tax and NIC, including employers' NIC. This then largely equalises the position as between the limited company contractor and an employee (apart from perhaps the 5% 'allowance' that is given in the calculation of deemed earnings).

¹⁵⁷ By applying the general employment status rules. A tool, Check employment status for tax, is available on GOV.UK at <https://www.gov.uk/guidance/check-employment-status-for-tax>

94 Chapter 9 – Personal service companies

Historically, IR35 has not been complied with or enforced consistently (because the test to see whether someone looks like an employee for the end client essentially sits with the worker's limited company) and so there has continued to be considerable financial benefit to working through a limited company with little risk. HMRC say that there is 90% non-compliance with IR35¹⁵⁸, which will include people who have umbrella company accountants, not paying tax on their deemed earnings.

However, the recent off-payroll rules have changed the landscape considerably.

Off-payroll rules

From 2017, if an individual works via a limited company in the public sector, and is 'inside' IR35 (that is, looks like an employee), under the off-payroll working rules, their company invoices have to be paid after deduction of PAYE tax and NIC by the person paying the limited company.

These rules are being introduced into the private sector from April 2021 (for those limited companies that work for medium or large clients in the private sector).

Under these rules, the end client that a person works for is responsible for determining whether they look like an employee. This makes it much more likely that the person will be found to be inside IR35 as opposed to outside IR35 and that the correct tax will be paid because the decision now rests with a different party in the supply chain with consequences for them if they get it wrong.

The cost savings that freelance contractors may have received until now will therefore disappear (even the 5% allowance has been removed), so working through a limited company therefore becomes much less attractive, especially when you consider the administration that usually goes with running one.

In addition, the end clients have to do the employment status determination, which many may not want to do (including, it seems, the client of the contractor below who posted a query in the ContractorUK forum¹⁵⁹), contributing to the inevitable shift of workers out of their own limited companies and into umbrella companies:

CASE STUDY

'Hi All.

First of all, I need to apologise if this question has been covered a million times. I have read the posts, but it appear everyone's case is different and I would like to ask questions for my unique case.

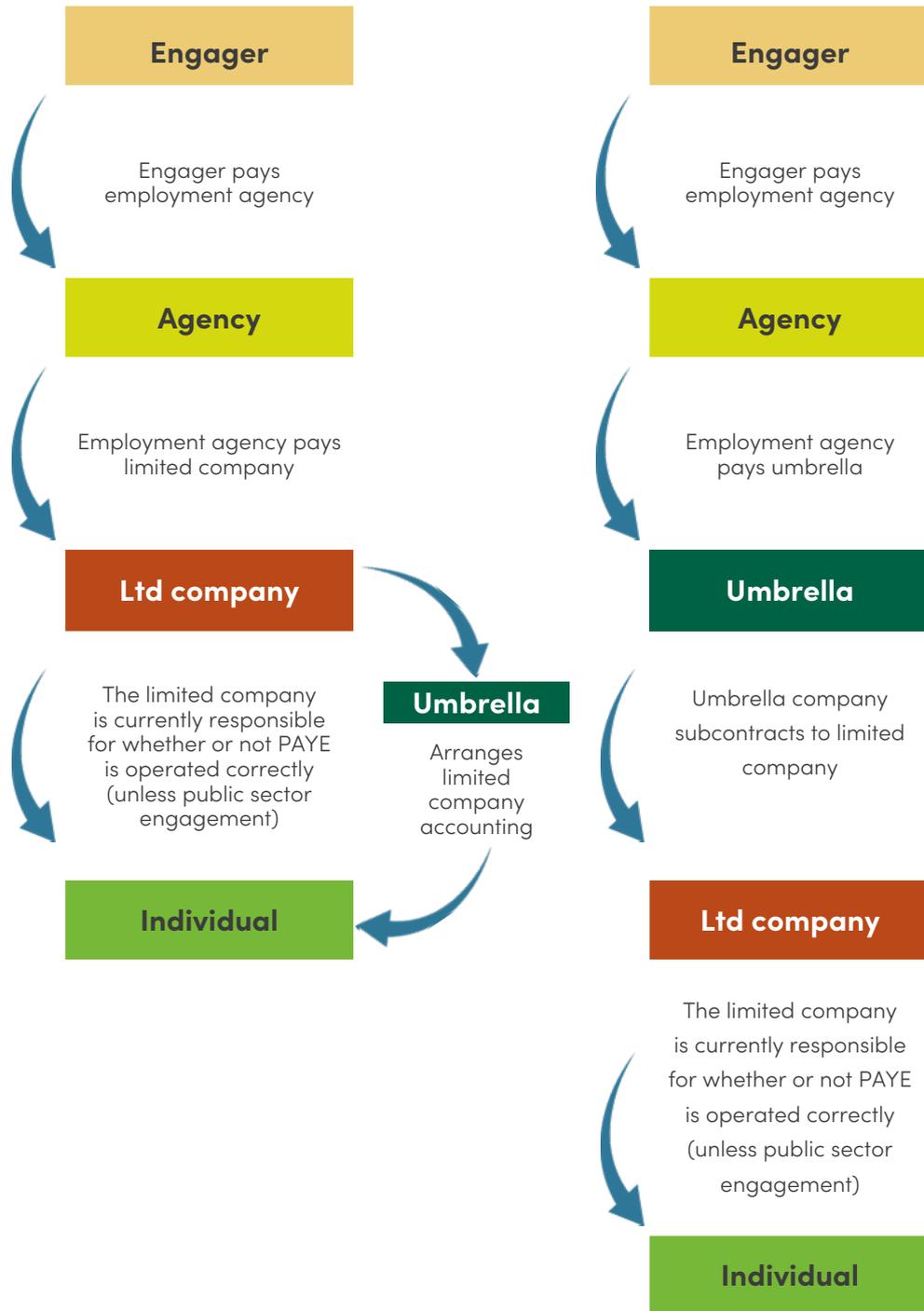
I have been contracting for over 10 years, and only going brolly for the first time as the clientco refuses to engage with contractors using a PSC....'

158 HM Treasury, HMRC Factsheet, Consultation on off-payroll working in the private sector, available on GOV. UK at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/707809/IR35_Factsheet.pdf

159 From forum post Newbie to Umbrella, ContractorUK, available at <https://www.contractoruk.com/forums/umbrella-companies/140673-newbie-umbrella.html>

Movement of lower-paid workers into and out of limited companies

There has always been something of a problem with lower paid workers being encouraged or put into limited companies inappropriately at the behest of agencies or umbrella companies. In some cases, a limited company may be used as an alternative to an umbrella company in a supply chain, but in other cases it may be used by an umbrella company, forming another level in the supply chain between the engager and the worker.



In the first model, often workers may not fully understand the implications of having a limited company, which can sometimes have devastating consequences.

This article, from the BBC¹⁶⁰, helps illustrate this:

EXTRACT

'More than 1,000 lorry drivers have been left owing large sums of tax after claims the accounting company they used disappeared with the money.

They say they were encouraged by agencies to set up as limited companies and use the services of the now-defunct Lincoln-based firm Think Accounting.

An HMRC inquiry is under way after drivers were hit with unpaid tax bills.

Company owners Lee Wilson and Symon Williams Cooke did not respond to BBC requests for a comment.

It is alleged the pair, who were not qualified accountants, worked with HGV driving agencies, paying agency staff commission if they encouraged the drivers to set up as limited companies with Think Accounting.

HMRC said there were about 1,400 drivers represented by Think Accounting facing issues.

These limited companies and the tax they were liable for were administered by the firm on the drivers' behalf.

Drivers were given a small weekly wage plus expenses and dividends and say they believed the firm was paying the correct level of tax owed.

One of the affected drivers, Ian Hannon, said he received a tax bill for £11,500 after dealings with the company.

"My national insurance, my corporation tax, my VAT - Think Accounting had not forwarded anything on to the relevant parties to the tune of £11,500."

In the second model, some lower paid workers may not even realise or fully realise that a limited company has been established on their behalf, as we can see from the case study at the end of this chapter.

The reason lower paid workers may find themselves in limited companies

Before 2014 and the agency legislation changes, one of the ways that agencies could escape paying PAYE for workers (other than by use of substitution clauses) was to pay another corporate entity rather than an individual (because it was classed as a business-to-business transaction – there is no PAYE obligation or employer NIC).

¹⁶⁰ Lorry drivers stung over accounting firm 'tax dodge', BBC News, 9 October 2017, available at <https://www.bbc.co.uk/news/uk-england-lincolnshire-41483046>

97 Chapter 9 – Personal service companies

Agencies would therefore pass workers to umbrella companies and, where a PSC was set up (with help from the umbrella company), the uplifted rate would be paid to the PSC rather than the umbrella company.¹⁶¹

This suits umbrella companies as it relieves them of having to put workers on their payroll, yet at the same time they can charge for providing limited company set up and accounting services – including VAT services. In some cases, the tax ‘advantage’ accruing as a result of working through a PSC (including where that tax advantage is as a result of non-compliance with IR35 and from the flat rate VAT scheme), may be largely swallowed up by the accountancy fees paid to the intermediary.

2014 onshore intermediary legislation

As we saw earlier, in 2014 the agency legislation was tightened up to help prevent the false self-employment of agency workers via the use of substitution clauses.

However, nothing really changed for agency workers who might otherwise be put in PSCs as a consequence of the 2014 legislation – per HMRC’s guidance, it will not generally apply where a worker is engaged via a PSC, as all the criteria will not normally be met.¹⁶²

There was an obvious risk of agencies using PSCs rather than substitution clauses to avoid PAYE. Although the legislation did give HMRC a targeted anti avoidance rule (TAAR) to use in the most egregious cases where, for instance, an agency requires all of their workers to set up PSCs to avoid the agency legislation¹⁶³, we have not heard of this being used.

2016 changes

In 2016, there were the travel and subsistence changes for employment intermediaries which impacted on many umbrella company workers. Limited companies are employment intermediaries too, however, the rules contain an exception¹⁶⁴ – workers operating through a PSC are still able to claim home to work travel and subsistence relief for those contracts where they are outside IR35.

Although there are some related anti-avoidance provisions¹⁶⁵, some workers were encouraged to incorporate to mitigate the restriction in travel and subsistence – with a view to claiming that their assignments were outside IR35 (and perhaps having little fear of IR35 arrangements being investigated).

¹⁶¹ We also assume in some instances the uplifted rate would be paid to the umbrella who then subcontracted out to a PSC – we consider this no further in this report, other than to note that one of the umbrella trade bodies does not accredit such a model.

¹⁶² HMRC’s explanation, Interaction of Personal Service Companies with the Proposed Changes to Chapter 7 S44-47 ITEPA 2003 (The Agency Legislation), available on GOV.UK at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/275993/Interaction_of_Personal_Service_Companies_with_the_Proposed_Changes_to_Chapter_7_S44-47 ITEPA_2003.pdf

¹⁶³ As explained in ESM2041, HMRC Employment Status Manual, available on GOV.UK at <https://www.gov.uk/hmrc-internal-manuals/employment-status-manual/esm2041>

¹⁶⁴ ITEPA 2003, s339A(4)

¹⁶⁵ ITEPA 2003, s339A(10)

2017 changes

From 6 April 2017, the public sector off-payroll changes came in, removing much of the ‘incentive’ of working through a limited company in the public sector. This meant that many workers who were encouraged into a PSC after the April 2016 changes were encouraged back into umbrella arrangements.

For example, it has been widely reported that a significant number of nurses, found themselves working inside IR35 as a result of the 2017 changes and switched to umbrella employment.¹⁶⁶

Limited companies are still in use by agency workers in the private sector however. This query, which was received by us in early 2020, helps demonstrate this:

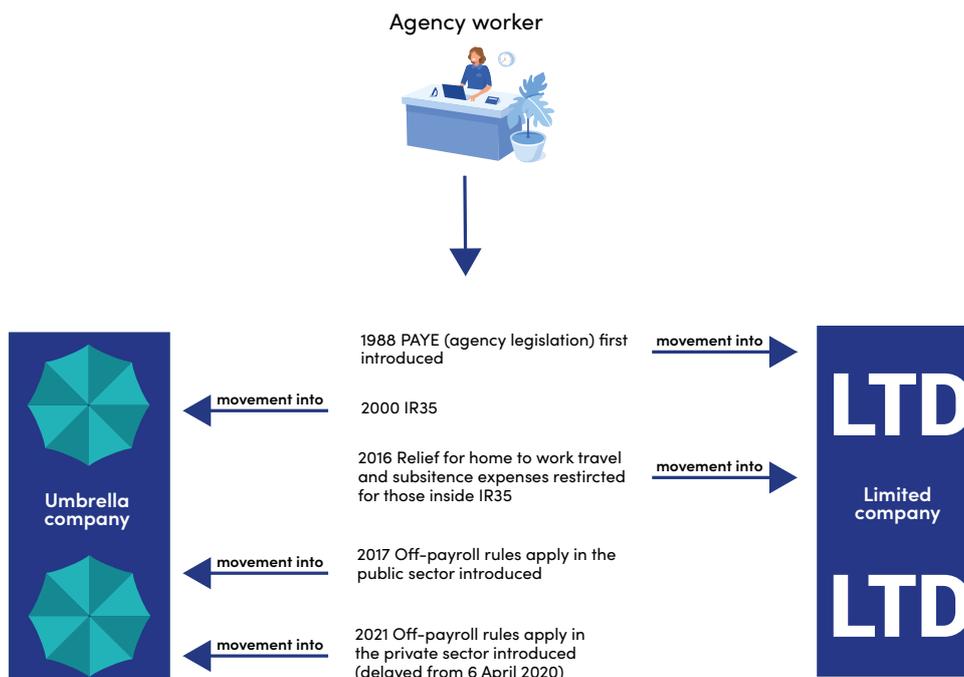
CASE STUDY

‘I am an agency worker and was getting paid through umbrellas now have set up LTD company for this to be paid so am I self employed as a temporary worker.’

In 2021, when the private sector changes come into effect, we are expecting another large movement of workers out of limited companies and into umbrella arrangements.

KEY INFORMATION

Table explaining main tax changes affecting limited companies



166 See for example, Contractor UK article, 1 February 2018, available at https://www.contractorcalculator.co.uk/nurses_agencies_umbrella_loan_schemes_5%2038610_news.aspx

Problems for workers in PSCs

For many higher paid, higher skilled workers, having their own PSC works well. Most queries we see are from people in PSCs that they have set up themselves as a limited company on their own initiative (with no involvement of an agency/umbrella company) and who are struggling to deal with the administrative complexities correctly.

The coronavirus pandemic has exposed that within an agency/umbrella company context, the problem perhaps isn't so much that the administrative complexities aren't being dealt with properly (as usually there will be an accountant in the picture), but more that people in PSCs are often there quite passively (or unknowingly) and simply have no real idea of the set up as everything is done for them.

CASE STUDY

The below writer refers to himself as an agency driver, yet we discovered through further correspondence that he had been handed to an umbrella company, who in turn, had set up a limited company:

'I am a agency lorry driver last 9 years have had only one day driving in last 3 weeks all firms are closing down who I drive for due to covid 19, I have all previous wages and tax returns on file, thanks.'

This writer, who viewed himself as an agency worker/an employee of his umbrella company, could not understand why his umbrella company would not furlough him and claim support with his wages through the Coronavirus Job Retention



Scheme. The answer is they could not furlough him, as they had set up a limited company for him and as a director of his own limited company, he had to furlough himself (because he was employed by his own limited company not the umbrella company).

Furthermore, he had absolutely no personal relationship with the umbrella company accountants who did his books and did not know how to get hold of the information he needed to make the CJRS claim on behalf of his limited company, such as references, salary versus dividend split etc., let alone be able to do complex calculations. In the end, with guidance from LITRG to help unlock the situation, we were told that the umbrella company accountants helped him prepare a CJRS grant claim, for a further fee.

100 Chapter 9 – Personal service companies

The future?

Our main concern for people like the individual in the case study, is what happens when the April 2021 off-payroll changes in the private sector come into effect, and this is something we have been discussing with HMRC.

Most low-paid workers working through a PSC in the private sector will be within IR35 as they have little autonomy. As stated above, a large movement of workers out of limited companies and into umbrella arrangements is expected. There are potentially very messy compliance issues stemming from the mass abandonment of PSCs.

Not only might there be costs involved for workers in terminating the relationship with the limited company accountant (particularly if they have signed up to pay for a 'package' of services on an ongoing basis), it seems unlikely that the accountants will be prepared to deal with the winding up of the company as part of their normal fee.

There are difficulties for those workers that cannot or will not pay. Those at the low-income end of the income spectrum often have very little understanding of how PSCs operate. In our experience, they often cannot separate out their own affairs from those of the PSC and stand very little chance of closing down the PSC's tax affairs correctly, let alone dealing with the Companies House requirements.

While our experience is that Companies House are really helpful in striking off a company, things can get complicated where a creditor or HMRC object to the striking off – which may well happen in these cases, if there are outstanding corporation tax (or VAT) issues. If the PSC is not closed down correctly, the worker could be left with messy limited company tax compliance issues that they do not understand, and which could follow them for years.

Non-compliant umbrella company models

There are a number of non-compliant umbrella company models in the marketplace. By non-compliant, we mean models that are not based on the generally accepted view of how umbrella companies should work, as set out throughout this report.

In this chapter we explore some of these models – and highlight some of the main impacts as far as the exchequer and workers are concerned. It is our understanding that neither the FCSA nor Professional Passport accredit any of these models.

Mini umbrella

This model sees the fragmentation of an umbrella company workforce into lots of individual companies, often with a director based out of an overseas country (which can hinder HMRC's ability to investigate and recover taxes).

On the face of it, all is well as the worker will be having PAYE operated. However, in the background, workers are being put into mini companies, where the employment allowance (EA) is being claimed inappropriately (the EA cuts a small employer's NIC bill and was designed to help businesses create more jobs or increase wages). The schemes also exploit the VAT flat rate scheme.

A graphic we found in a Guardian article¹⁶⁷ entitled 'Revealed: temp agencies' tax avoidance scheme costs 'hundreds of millions' explains the model well.

Despite an HMRC spotlight, and media attention, we have recently heard of someone seemingly in a mini umbrella, or rather, a series of mini umbrellas – the key giveaway being that each of their payslips had a different PAYE reference.

This indicates that people can be moved through mini umbrellas as much as every week – with obvious impacts to the exchequer but also the workers – as they will never be with any one employer long enough to accrue any rights. They will also have an unusual and fragmented employment record, which could impact on them in many ways.

HMRC's most recent publication on mini umbrellas is included in Appendix 5, in which they call this a 'fraud'.

167 Revealed: temp agencies' avoidance scheme costs taxpayers 'hundreds of millions', The Guardian, 15 November 2016, available at <https://www.theguardian.com/uk-news/2016/nov/15/revealed-temp-agencies-avoidance-scheme-costs-taxpayers-hundreds-of-millions>

102 Chapter 10 – Non-compliant umbrella company models

Payday by payday

As we explain in our earlier umbrella company report, payday by payday (PDPD) models were born out of changes to the NMW regulations in 2010 which stopped workers being able to sacrifice salary below the NMW and having their pay made back up by reimbursed expenses. The effect of these rules was that if umbrella companies reimbursed any travelling and subsistence expenses, they would have to do so in addition to a gross salary equalling the NMW, meaning the end of those paid at or around the NMW being able to sacrifice salary in order to receive a portion of their pay in tax and NIC free expenses.

In response, some umbrella companies started administering unreimbursed travel expense relief (for both tax and NIC purposes) at source, for expenses that employees had personally incurred in that pay period, that the umbrella company had not reimbursed – hence the name ‘payday by payday’. The umbrella company also benefited from paying reduced employers’ NIC, and usually deducted a fee from workers’ pay packets for operating the scheme (which could potentially reduce the amount of ‘pay’ they are taken to have received from their employer for NMW purposes).

The scheme providers said that the relief-at-source mechanism was technically underpinned by the tax and social security legislation and was backed by QC opinion. However, in accordance with the more generally accepted interpretation of the law, which we set out in the table in Chapter 2 showing the main differences between unreimbursed and reimbursed expenses, these schemes failed to properly account for the correct tax (because tax relief was being given by the employer through the payroll) or employee and employer NIC (because unreimbursed expenses do not qualify for NIC relief).

Yet, rather than pursue the engagers for either NMW or PAYE breaches, as we showed in our report¹⁶⁸, involvement in such a scheme saw the workers being pursued later for underpaid tax by HMRC. There was a mismatch between the amount of gross income reported to HMRC by the umbrella companies and the amount of tax deducted (caused by the employer administering tax relief) which HMRC’s automatic reconciliation process at the end of the tax year picked up – meaning a tax bill was sent out to workers.

Shortly after publishing our report looking at PDPD in detail, one of the biggest providers of PDPD, Zeva, left the GLAA arena. The GLAA issued a press release¹⁶⁹ explaining that the two umbrella companies operating under the Zeva brand had withdrawn their appeals against the decision to revoke their licences to trade in the GLAA sector. Although one of the umbrella companies concerned set out its ‘firm intention to continue to operate a “Pay Day by Pay Day” model outside of the sector’, we understand the 2016 changes to travel and subsistence relief more or less sounded a death knell for PDPD.

168 LITRG report, Travel expenses for the low-paid – time for a rethink?, 17 November 2014, available at <https://www.litrg.org.uk/latest-news/reports/141117-travel-expenses-low-paid-%E2%80%93-time-rethink>

169 Further successes against “payday by payday” models – Apus and Vela withdraw appeals, GLAA press release, 17 December 2014, available at <https://www.glaa.gov.uk/whats-new/press-release-archive/171214-further-successes-against-payday-by-payday-models-apus-and-vela-withdraw-appeals/>

103 Chapter 10 – Non-compliant umbrella company models

We have not heard of or found any current PDPD offerings during the course of our research for this report.

Elective deductions model (EDM) – sometimes called the ‘hybrid’ model

Under the ‘elective deductions model’ (EDM), which was first seen after the 2014 onshore intermediary changes helped stop the false self-employment of agency workers (but only for tax purposes), a person is treated as an employee for tax and NIC purposes but as self-employed for all other purposes.

This model exploits the fact that employment law and tax law are different. In employment law there are three categories of person: employee, self-employed or worker (workers sit somewhere between employed and self-employed).

In tax law, there are only two categories: employed and self-employed. Usually, people have the same status for both employment law and tax law (where the employment status tests are being considered properly), however this isn’t always the case. For example, it is legitimately possible for someone to be self-employed for tax purposes but a worker for employment law purposes.

Under the EDM, an agency worker who is purportedly self-employed for employment law purposes elects to have employee taxes deducted from their income and paid over via PAYE. This means that, as far as HMRC are concerned, everything is fine (although our understanding is that at the end of the tax year, workers are told they should put in a tax return with self-employment pages onto which they insert self-employment expenses, claiming a credit for the PAYE deducted¹⁷⁰).

At the same time, by incorrectly denying the agency worker any rights for employment law purposes (due to the nature of the arrangements, most of these workers would likely have at least worker rights), the business is saving money – just in different ways (e.g. by not having to pay them the NMW, holiday pay etc).¹⁷¹

At the time that EDM first appeared in 2014, it seemed that these schemes might have a short shelf life given many of the compliant umbrella companies were highlighting it (and if nothing else, HMRC could challenge them on the basis of NMW infringements).¹⁷²

170 Note, we are unsure what happens with regards to the NIC position, as presumably putting in a tax return with self-employment pages would generate a class 2 and class 4 liability – but the worker has already paid class 1 NIC through PAYE.

171 On another view, it would be extremely unlikely for such a clear division to exist between employment law status and tax law status, so assuming the ‘elected’ PAYE status for tax purposes is actually correct (indicating some kind of master-servant relationship), it would seem that the individuals concerned would have at least ‘worker’ status.

172 EDM tries to avoid false self-employment rules, HMRC told, Contractor UK article, 2 April 2014, available at https://www.contractoruk.com/news/0011498edm_tries_avoid_false_self_employment_rules_hmrc_told.html

104 Chapter 10 – Non-compliant umbrella company models

However, it would appear that EDM infiltrated the sector (see, for example, this query we received January 2017):

CASE STUDY

'I'm after a little advice please, I am classed as self employed...I think, I work for a sub contractor in the [...] delivery network as a delivery driver, in about August my route got took over by a new sub contractor who I now deliver for, my wages used to be paid directly to me by my old employer who did not deduct any tax and NI and I had to sort that out which was fine. I didn't... have any holiday pay pension sick pay etc which I accepted as I was self employed, now this new company I work for use some sort of company called [...] who pay me my wages with tax and national insurance deducted so it seems I am employed but with no benefits ie no pension holiday pay etc. My question is are they allowed to do this? Basically am I employed or self employed as I keep getting told different things by my friends?'

Indeed, they still seem to be in operation (see, for example, this query we received March 2020):

CASE STUDY

'I have just started working for an employment agency (end client is XXX) and have been told I am self-employed and will be paid via a payroll company (£17.00 per week admin fees) and I am paying PAYE deductions. Am I entitled to holiday pay please. its a 12 week temp to perm contract and I have been told I will be taken on by XXX after the 12 weeks. Is it possible to claim back the £17.00 p/w charges and will I have to complete a self assessment in April for my 12 week term of employment. Thanks'

Even though PAYE is being paid, this type of arrangement must be impacting considerably on gross wage levels (through denial of otherwise taxable holiday pay, NMW, etc.) meaning lower receipts for the exchequer.

There are also obvious disadvantages for the worker of this model of engagement – particularly at the lower-paid end of the market where workers rely on employment rights for protection.

In many ways, contractors inside IR35 (who under the off-payroll working rules have to pay tax under PAYE deduction from their end clients, but who have none of the employment rights to go with that status) would appear to be in a similar position. However, these people are likely to be higher up the income scale with greater bargaining power, so the provision of basic employment rights is possibly less important to them.

105 Chapter 10 – Non-compliant umbrella company models

Nurse VAT models

Generally, all registered businesses pay VAT on their taxable purchases (known as input tax) and charge VAT on their taxable sales (known as output tax), paying the difference over to HMRC, so that the cost of the tax is ultimately borne by the final consumers (who cannot be VAT registered).

Thus, usually, umbrella companies charge VAT when they supply their employees to an agency. For example, if an agency has agreed to pass £12 an hour to the umbrella company for Worker A and Worker A does 40 hours work in a week, the umbrella company would invoice the agency for $40 \times £12 + \text{VAT}$.

However, this is effectively cost neutral to the agency as the agency can recover the VAT it pays to the umbrella company.

Agencies must also charge VAT when they supply staff to an end client. Depending on the nature of the work the end client does, they may or may not be able to fully recover input VAT. A business making VAT exempt supplies does not charge output tax but as it is not making taxable supplies, it cannot reclaim input tax incurred on the costs of making VAT exempt supplies – in effect, it must absorb the VAT charged to it by its suppliers.

The nursing agencies concession¹⁷³ exempts agencies from charging VAT where the staff supplied are registered nurses, unregistered nurses working under the supervision of registered nurses or nursing auxiliaries, where the services provided form part of patient medical care, such as administering drugs or taking blood pressures. Where the agency qualifies for the concession, the agency doesn't have to charge VAT, which will save the customer money if they are not in a position to recover VAT incurred on some of or all of their costs, for example care homes for the elderly.

However, the concession only applies to the supply of nursing staff to an end client by the agency, not to the agency by a third party (for example an umbrella company) – essentially umbrella companies are too far removed from the end client to be eligible for the concession. This means that an umbrella company supplying nursing staff to an agency must charge VAT, even if the agency does not need to charge VAT to the end client due to the concession.

This may lead to a position where VAT should be charged by an umbrella organisation supplying staff to a nursing agency, but if that nursing agency is choosing to use the nursing agencies concession for its onward supply of nursing staff, it may not be able to recover the input tax charged, which means it is a cost to them.

This creates strong incentives for umbrella companies in the health care sector to find a way of cutting VAT off their bills – a commercial advantage can therefore be had by umbrella companies applying the VAT exemption themselves, incorrectly. But this can lead to penalties, interest and a cost to the business of the missing VAT once the error is identified, particularly in situations where the contract is silent on VAT or if the customer has subsequently gone out of business.

173 As set out in HMRC's VAT Notice 701/57: health professionals and pharmaceutical products, available on GOV.UK at <https://www.gov.uk/guidance/health-professionals-pharmaceutical-products-and-vat-notice-70157>

106 Chapter 10 – Non-compliant umbrella company models

The nursing agencies' VAT concession is currently a 'hot topic' in healthcare recruitment, due partly to the April 2017 public sector off-payroll working reforms and the subsequent increase in umbrella employment amongst NHS staff.

Although we can't see any immediate impacts on workers of this model, if an umbrella company is non-compliant for VAT purposes, it perhaps is a red flag for other non-compliance, as it is demonstrating a lack of technical knowledge in an area where compliance is key. There is also the risk that if the umbrella company is accruing VAT debt (and the risk of penalties and interest), then it will increase the insolvency risk, with potential consequences for workers.

One to watch – joint employment

A new model is in use which purports to deal with the nurse VAT issue¹⁷⁴ – joint employment, where a worker is employed by two employers, both of whom have joint responsibility for the employee. This is different to co-employment, which is the business model of Professional Employment Organisations (where certain functions are fully outsourced – see page 66).

As there is no supply (of staff services) for VAT purposes between joint employers, many organisations use a joint employment model for VAT purposes – in situations where employees are genuinely jointly employed, their work benefits both organisations in the same sort of way, and costs and control are shared.

If a worker was jointly employed by both an agency and an umbrella company, the umbrella company would not have to apply VAT on its invoices to the agency. However, there are questions over whether this works given the 'employers' are actually at different points and playing different roles in the supply chain. HMRC are likely to carry out thorough checks in respect of any contractual arrangements to determine if the worker is actually jointly employed by both parties. Some further consideration of this model seems like it would be worthwhile.

174 See HMRC VAT guidance update for the recruitment sector from RSM UK, available at <https://www.rsmuk.com/ideas-and-insights/hmrc-vat-guidance-update-for-recruitment-sector>

Disguised remuneration

Disguised remuneration (DR) schemes are artificial arrangements that pay workers in non-taxable elements, often loans, instead of ordinary employment income, to avoid tax and NIC.¹⁷⁵ There are highly aggressive promoters of such schemes in various areas of the labour market (promoters are those who design or market the schemes).

It is impossible to know exactly how many there are, but a recent HMRC report¹⁷⁶ cites 20 to 30 promoters who are behind most of the tax avoidance schemes that are marketed to the UK public.

DR schemes may involve an umbrella company to channel payments to workers. From our research, we believe that most traditional umbrella companies don't get involved in these types of schemes. However, in some cases, promoters of such schemes may work with existing non-compliant umbrella companies, who then use these schemes to pay their workers.

Some promoters of the schemes have gone a step further and set up new 'umbrella companies' specifically in order to operate their DR schemes. As explained in Chapter 2, setting up an umbrella company is relatively easy and phoenixism is common. In such cases, these entities have the same role as traditional umbrella companies in terms of their place in a supply chain (becoming the worker's employer), but they then use DR schemes to pay their workers.

By setting up 'umbrella companies' in this way, the DR scheme promoters appear to be aiming to profit from a combination of the huge sums of money that flow through agency worker supply chains, the complex way the tax system works and the general confusion and suspicion that exists around umbrella companies.

The HMRC report referred to above, cites 2,000 employers being involved in avoidance schemes in 2018 to 2019 (99% of which were DR schemes).

Loan arrangements

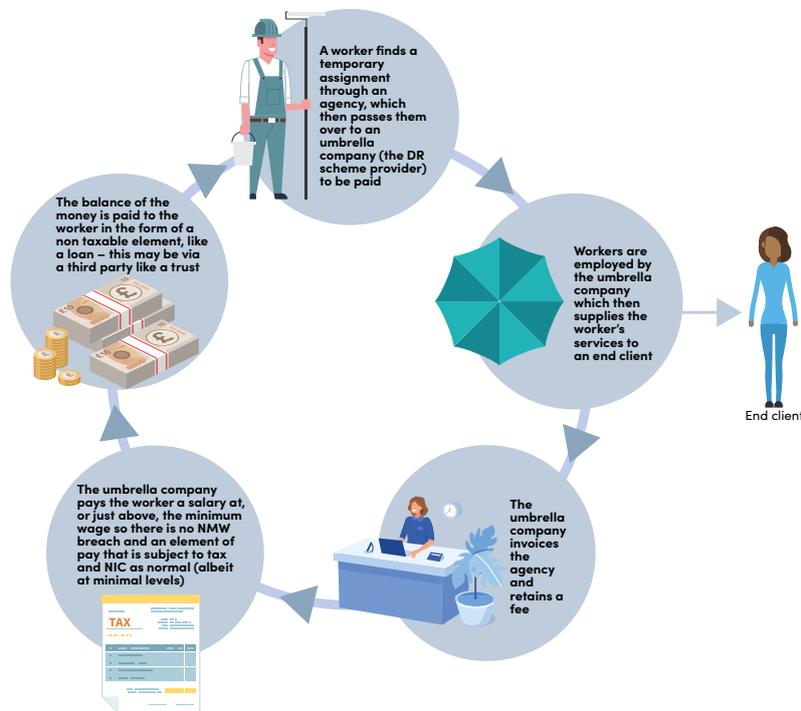
Loan arrangements are a type of DR scheme. Most loan schemes seek to pay an individual for work done in the form of an interest free, 'non-repayable' loan that is not subjected to income tax or NIC, rather than ordinary salary, which would be so chargeable.

175 Some employment income elements are legitimately not taxable – we are not talking about things like business expenses or tax-free benefits provided in the ordinary course of an employment.

176 HMRC corporate report, Use of marketed tax avoidance schemes in the UK, 26 November 2020, available on GOV.UK at <https://www.gov.uk/government/publications/use-of-marketed-tax-avoidance-schemes-in-the-uk/use-of-marketed-tax-avoidance-schemes-in-the-uk>

108 Chapter 11 – Disguised remuneration

They are very complex and come in all sorts of shapes and sizes, but for contractors/ agency workers they generally work something like this:



While, nominally, the loan is repayable, in reality, the worker doesn't pay the loan back. Tax benefits therefore arise, in theory at least, because the loan does not count as part of the worker's employment income and thus provides the worker with the money tax-free.

Importantly, this also makes the umbrella company money. At the very least, they will not be paying employers' NIC on the loan element of the person's pay, which saves them 13.8%. Some umbrella companies simply frame things in terms of workers receiving a specific amount of take-home pay or a percentage – 78%, 80% etc. – meaning that they may make even more out of a person being in such a scheme (as they can potentially keep the difference).

In our recent submission to HMRC on tackling DR schemes, we shared the following example which helps explain this better:

EXAMPLE

It is April 2017. Jenny accepts an assignment at £10 per hour pay rate, over 35 hours per week. Ordinarily, this would result in gross taxable pay of £350. The amount that Jenny would actually receive in her pocket from this £350 after deductions of tax, NIC and pension contributions is £299.15.

In order for an umbrella company to deliver gross pay of £350 under normal conditions, it would actually cost them a minimum of £424.75. If they want to take a £20 fee, then the minimum amount that they should receive in funds from the agency (who will onward bill this to the end client, along with their markup) is £444.75.

109 Chapter 11 – Disguised remuneration

Suppose the umbrella company continues to receive £444.75 as per the agreed contract rate, but instead of using this to deliver a £10 an hour base rate to Jenny and take a £20 fee, it only delivers a base rate of £7.50 per hour to Jenny (the main minimum wage rate in April 2017). On a weekly gross salary of £262.50 (7.50 x 35 hours), their employment costs are reduced to £312.20 – leaving £132.55 from the received £444.75, for the umbrella company to play with.

Of course, Jenny, who is expecting something like £299.15 in her pocket, isn't going to accept £240.35 (that is, £262.50 less deductions). But if the umbrella company frames Jenny's overall weekly pay as a 'net' amount of earnings (say 90%), it only has to channel an additional £74.65 to Jenny through a loan arrangement (received by Jenny 'gross' in addition to her £240.35) in order to make her pay up to £315 (90% of £350).

Thus, through using a loan arrangement, the umbrella company has made £57.90 rather than its usual £20 (£132.55 less £74.65). Jenny is £15.45 better off than she would have otherwise been if she had of simply received a gross pay of £350 (£315 less £299.15).

This example helps demonstrate that often what drives the use of schemes involving agency workers is PAYE avoidance behaviour on the part of the umbrella company, not a personal avoidance motive on the part of the worker.

Why did workers use loan schemes?

Some workers, aware of the risks, will have actively sought out loan schemes as they wanted to reduce their tax bill – using a loan scheme may see a worker being able to turn their take home pay from around 55% to 65% perhaps, to say, 80% or 90%. Some may have been induced into using the loan arrangements by friends, colleagues or even paid advisers, by payments of incentives or exaggerated promises of 'legality' or a 'QC opinion'.

However, there are a number of people who got caught up in loan arrangements inadvertently – for example those who were passed by agencies to umbrella companies providing these schemes, where there was no agency PAYE alternative and the choice was one of finding an umbrella company to be paid through themselves or choosing one from a PSL.

In some cases, it seems that workers may simply not have known that loan arrangements were being operated in the background by their umbrella company nor have had the necessary knowledge or skills to spot them. This can be demonstrated by these two recent examples sent to our mailbox:

CASE STUDIES

'To whom it may concern; I have received an email claiming that I have been involved in a Loan Tax avoidance scheme at some point in my working life within IT a few years ago. I will state for the record that to the best of my knowledge this is erroneous as I have used recruitment/employment agency recommended

payroll services of which I have paid for to administer and settle my legal tax and NI obligations. I have since receiving the email been both disgusted and aghast at how such a scheme could even exist within an organised and regulated society. I was recommended quite a few years ago whilst working on a contract by the recruitment agency a specific payroll service. If this organisation has misled me and taken advantage of my trust then I want to know what my options are as this is clearly unacceptable and unprofessional business practice of indeed HMRC's claim has any validity. Please contact me at your earliest convenience as this is now worrying me and I don't believe I should have any worry inflicted upon me through other peoples pre-conceived, premeditated deceit.'

'I left my permanent job in 2015 and started working through a recruitment agency as a locum in 2015. They said I needed an umbrella company and recommended one to join- who have since shut down. I left them in 2018 when my recruitment agency rang me and said they had failed an audit and i couldn't use them anymore. I have just found out (Jan 31st by letter) that I apparently have to pay the DR loan. Its the first I'd heard of it. I'd already done my tax return and paid my tax for the year. Is the recruitment agency responsible as they recommended the umbrella company? My weekly payslips show PAYE and NI deductions, there's nothing implying an advance or loan. I believed they were doing their job and managing my taxes. I sent weekly timesheets and received single weekly payments. Your website suggested contact regarding this for guidance. I'd be grateful for guidance.'

This is unsurprising to us. Certainly, our experience is that people become very passive under PAYE and they often don't question figures because they trust their employer, who administers everything for them. They may also have struggled to reconcile their net pay back to their gross pay, as not everyone has ready access to payslips anymore (often they are only provided online/are password protected etc.).

What is the loan charge?

As HMRC did not always investigate usage of schemes contemporaneously using their ordinary compliance functions, the government gave HMRC powers to impose a second taxing point for historical schemes, in the form of the April 2019 'loan charge'.

Originally (in the absence of any action taken to 'settle' beforehand), the loan charge was going to treat an amount equal to the value of all outstanding 'disguised remuneration' loans made since 6 April 1999, as income arising on 5 April 2019.¹⁷⁷

Following concerns raised about the impact of disguised remuneration loan charge, the government commissioned an independent review of it. As a result of the review, the loan charge now applies to loans made on or after 9 December 2010, and outstanding on 5 April 2019.

¹⁷⁷ There is an exception to for loans made on or after 9 December 2010 and before 6 April 2016, if the avoidance scheme use was fully disclosed to HMRC and, as at 5 April 2019, HMRC had not taken action to protect their assessing position – for example, by opening an enquiry or issuing a tax assessment.

Originally the loan charge meant that an individual would have all their outstanding loans treated as income in the 2018/19 tax year. Another major outcome of the review is that there is the option to make an irrevocable election to spread the remaining loan income over three years.

Despite these changes, the loan charge will leave tens of thousands of workers owing HMRC life-changing sums of money (HMRC originally estimated 50,000 workers were impacted by the loan charge). And in general, it will be the workers that will need to pay. This is because even though HMRC consider the loan charge as employment income (and where there is a PAYE obligation HMRC should seek to collect the tax from the employer in the first instance), in most cases the employer is located outside the UK ('offshore') and they have no UK tax presence, or the employer has been dissolved or no longer exists.

As part of making the loan charge rules, HMRC decided the tax liability should be passed to individual workers in all instances¹⁷⁸ (over and above the scenario we looked at previously where the employer cannot pay the liability and HMRC are of the opinion that the employee has received relevant payments knowing that the employer wilfully failed to deduct the amount of tax which should have been deducted from those payments).

Current DR arrangements

Despite the fact that many workers who used loan arrangements are now facing the life-changing loan charge, loan arrangements and other disguised remuneration arrangements would appear to still be in existence.¹⁷⁹

As we stated in our introductory chapter, HMRC's recent research states that about 30,000 individuals were involved in DR arrangements in 2018 to 2019, which is a significant number in comparison to the 50,000 affected by the loan charge (given the 30,000 is for one year and the 50,000 arose over many years).

A recent BBC Moneybox programme¹⁸⁰ outlined how an umbrella company was offering to pay salary under PAYE plus 'investment payments'. A BBC reporter's call to the company included the following explanation of how the scheme works:

'You receive one payment which is a PAYE [pay as you earn] salary payment, that's taxed and you receive a payslip – and the residual balance is then paid as an investment payment.'

'You receive your second amount into your account...and because it's done that way there is no tax liability on the second proportion'

178 HMRC guidance, Tackling disguised remuneration, available on GOV.UK at <https://www.gov.uk/government/publications/disguised-remuneration-transfer-of-liability-technical-note/tackling-disguised-remuneration#transfer-of-liability>

179 As highlighted by HMRC in their report, Use of marketed tax avoidance schemes in the UK, 26 November 202, available at <https://www.gov.uk/government/publications/use-of-marketed-tax-avoidance-schemes-in-the-uk/use-of-marketed-tax-avoidance-schemes-in-the-uk>

180 'Unscrupulous' firms targeting key workers, BBC News article, 6 June 2020, available at <https://www.bbc.co.uk/news/business-52935252>

112 Chapter 11 – Disguised remuneration

A further Moneybox episode¹⁸¹ highlighted other umbrella companies paying people in non-taxable ‘advances’:

“HANNAH: I told Paul I was an occupational therapist who was looking at jobs that would pay me around £850 a week, just over 40 grand a year. He told me the payroll companies he could hook me up with would help me get a higher return by splitting my earnings up. For example, £400 of what I earn could be paid as normal, taxed salary, and the rest would be paid through what he called an employee advance.

PAUL [READ BY ACTOR]: And the reason why they do that is because an employee advance is not a taxable income, it’s only the first part which is classed as your taxable income, so they’re allowed to send the remaining sums to you without taking any further tax deductions, without reporting that on your payslip, because that’s the legislation by HMRC. An employee advance is not a taxable income.”

A quick search on the internet will provide countless other potential examples where workers are offered a higher-than-normal take home pay because part of their pay is given to them without tax deducted.

In the following query recently received to our website, part of the pay seems to be given as capital payment, without any income tax deducted on it:

CASE STUDY

‘I have a question about this highly aggressive Umbrella companies that pay most of your monthly salary through a growth share scheme, the interesting thing is that they are going to issue certificates about this capital gains and I am going to declare this growth share return to HMRC and paying taxes on it... I am really puzzled and tempted, what can be wrong with this, what can I check, what shall I ask to find if this is fraud?’

A growth share plan, if properly set up and administered, can be a legitimate way of incentivising employees to help grow a business. However, it is hard to see how this might work in the context of umbrella companies. This company may be seeking to reward our above enquirer with ‘growth shares’ to take advantage of the capital gains tax annual exemption and lower tax rates applicable to the returns. But if this is simply instead of giving him normal taxable employment income, HMRC would be highly likely to view this as disguised remuneration.¹⁸²

We have also recently been sent some documentation via a third party (included as Appendix 6) sent out to a worker by a scheme provider, offering to pay the worker partly in a normal salary at NMW and partly in a non-taxable payment.

181 BBC Radio 4 transcript, File on 4 – Taxing situations, Current affairs group, transmission 20 October 2020, available at http://downloads.bbc.co.uk/rmhttp/fileon4/PAJ0561PG17_taxing_situations.pdf

182 For example, ContractorUK forum post, available at <https://www.contractoruk.com/forums/umbrella-companies/139619-umbrella-company-advice.html>

113 Chapter 11 – Disguised remuneration

It would appear that this is some kind of reverse annuity type arrangement – in exchange for getting a tax-free payment every month, the worker has to enter into an option agreement whereby if the employer exercises his rights under it, the worker must basically pay back all the funds he has received (plus some interest) by way of an ‘annuity’.¹⁸³

All of these arrangements are basically a variation on the theme of being paid a minimal amount of taxable income, topped up with a purportedly non-taxable element (whether it be investment payments, advances, grants, loans, credits etc.). It strikes us that they do not seem to involve particularly sophisticated or convoluted planning.

The scheme providers simply seem to be designating a portion of otherwise taxable earnings as a non-taxable payment. We would have thought that most qualified and professional tax advisers¹⁸⁴, HMRC, the courts, the General Anti Abuse Rule (GAAR) panel¹⁸⁵ etc., would all agree the ‘planning’ (that is, simply calling one thing something else) is hopeless! Indeed, it might be so hopeless, that some commentary we have seen¹⁸⁶ suggests that it is actually closer to fraud than tax avoidance.

What are HMRC doing to tackle DR arrangements?

There are rules in place to make it harder for the promoters to sell or market avoidance schemes like DR – for example the Disclosure of Tax Avoidance Schemes (DOTAS) and Promoters of Tax Avoidance Schemes (POTAS) provisions.¹⁸⁷

Under DOTAS, promoters who market certain tax avoidance schemes are required to make a disclosure of information about them to HMRC. HMRC registers all such schemes and give each a reference number, which promoters must provide to their clients. There are penalties for failure to disclose a scheme (and HMRC have recently had some successes in respect of schemes that weren’t disclosed under DOTAS¹⁸⁸) or to provide a client with a reference number.

Under POTAS, certain high-risk promoters may be issued with a conduct notice for a period of up to two years, if they have triggered a ‘threshold condition’ such as that they have been charged with a specific tax offence or the promoter has failed to disclose a tax avoidance scheme or to provide details of clients to HMRC. Breach of a conduct

183 The website of the scheme provider is ‘down’ so we are unable to do any further research on this arrangement.

184 There is a code of conduct (the ‘Professional Conduct in Relation to Taxation’ – PCRT) which apply to all those who are members of the main professional bodies, which explicitly forbids members from promoting tax planning arrangements that ‘are highly artificial or highly contrived and seek to exploit shortcomings within the relevant legislation’, available on the CIOT website at <https://www.tax.org.uk/professional-standards/professional-rules/professional-conduct-relation-taxation>

185 The GAAR provides for the counteraction of tax advantages arising from arrangements that are abusive.

186 BBC condemns umbrella company fraud article, AccountingWeb, 11 June 2020 available at <https://www.accountingweb.co.uk/community/blogs/philip-fisher/bbc-condemns-umbrella-company-fraud>

187 HMRC publication explaining DOTAS, POTAS and the enablers regime, published 23 April 2020, available at <https://www.gov.uk/government/publications/independent-loan-charge-review-summary-of-evidence/section-8-powers-to-tackle-tax-avoidance>

188 For example Revenue and Customs Commissioners v EDF Tax Ltd (in creditors’ voluntary liquidation)[2019] UKFTT 598 (TC)

114 Chapter 11 – Disguised remuneration

notice that may be issued may lead to the promoter being monitored by HMRC. A monitored promoter will be subject to penalties of up to £1 million.

There are also penalties for the ‘enablers’ of tax avoidance. Each person that ‘enables’ abusive tax arrangements is liable for a penalty of 100% of the fees they earn when HMRC defeats a taxpayer who used those arrangements. An enabler is broadly defined as anyone who plays a part in designing, marketing, managing or financing a tax avoidance scheme.

Despite the threat of hefty penalties, our understanding is that the remaining hardcore of promoters have little fear of these regimes as they find ways of getting around them, or they perpetually obfuscate and use delay tactics (for example not responding to requests for information or appealing every request). HMRC have also not, thus far, been able to get behind the protection that the ‘limited liability’ companies that they trade through offer. Whilst we recognise that often HMRC face a painstaking game of ‘cat and mouse’, HMRC need to find a way to tackle these issues if this is going to change.

To this end, HMRC have recently issued two consultations dealing with tax avoidance, ‘Tackling promoters of tax avoidance’¹⁸⁹ and ‘Call for evidence: Tackling Disguised Remuneration tax avoidance.’¹⁹⁰ At the time of writing, HMRC are ‘analysing feedback’.

HMRC have a vast array of other weapons in their DR arsenal, including the General Anti Abuse Rule (GAAR) mentioned above.¹⁹¹ The GAAR provides for the counteraction of tax advantages arising from arrangements that are abusive. HMRC do seem to be referring cases regularly to the panel and as far as we know, the panel has never concluded that a scheme referred to it has actually ever been approved as ‘reasonable’.

Beyond these, HMRC could also take action against the employer entity within the DR arrangement supply chain (the umbrella company). The employer may itself fall within the definition of a promoter or enabler, but HMRC could also use their ordinary employer compliance and enforcement powers against them for the PAYE failures that go hand in hand with DR schemes.

However, it can be time consuming and difficult for HMRC to investigate PAYE failures at employer level. Even if they get to the point where they are able to send a bill to an employer (that is, assuming the employer hasn’t liquidated in the meantime), the employer can appeal it.

Often legislation can be open to interpretation. HMRC administer the tax law, they do not make it. While HMRC may issue descriptions of how they view the law and intend to apply particular legal provisions, taxpayers (including umbrella companies) are free to interpret the law in a different way.

189 HMRC, Tackling Promoters of Tax Avoidance, consultation document, 21 July 2020, available on GOV.UK at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/902352/Tackling_Promoters_of_Tax_Avoidance_-_consultation.pdf

190 HMRC, Call for evidence, Tackling disguised remuneration tax avoidance, 21 July 2020, available on GOV.UK at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/902667/Tackling_disguised_remuneration_tax_avoidance_-_call_for_evidence.pdf

191 Tax avoidance: General Anti-Abuse Rule, HMRC guidance, available on GOV.UK at <https://www.gov.uk/government/collections/tax-avoidance-general-anti-abuse-rule-gaar>

115 Chapter 11 – Disguised remuneration

So, in the case of an ‘investment payment’ paid directly from an umbrella company to a worker for example, the umbrella company may think that they have a good argument that it is not caught under the definition of earnings. HMRC may think that because it is ‘a payment of money that stems from an employment’¹⁹², it is very clearly caught.

Ultimately, such different interpretations will only be resolved if they are tested in the courts, which then must interpret the words in the statute and decide what they mean.

It can take a very long time for cases to be heard in court, and (even if the case is bound to fail) in the meantime, there is a cash flow benefit for the DR scheme provider.

What is the risk to a worker?

We would have thought it very likely that a court would reject an argument from an umbrella company that something like an investment payment does not count as employment income.

In the event that HMRC were to win such a case, even though the PAYE regulations say that in most circumstances an employer should remain liable for the tax that should previously have been accounted for to HMRC, sometimes HMRC pursue the worker instead.

This is because HMRC are sometimes not able to follow their own normal approach, as the company is based offshore or goes into liquidation, leaving the worker potentially liable for what is owed (if, for example, HMRC are of the opinion that the employee received relevant payments knowing that the employer wilfully failed to deduct the amount of tax which should have been deducted from those payments).

Furthermore, where usage of certain schemes becomes widespread, rather than try and tackle schemes through the courts, HMRC can also ask the government to tighten up the legislation to address the tax loss. It is extremely important to note that this can be done with retroactive effect which is what happened with the loan charge.

The upshot is that if a worker uses a scheme, one way or another, they will likely end up with a bill for any back taxes owed, including interest on tax paid late and possibly a penalty. Remember that HMRC can often go back and look at a person’s tax position for many years so it can be very, very expensive. Having HMRC pursuing them for tax can be intrusive, lengthy and stressful and can have a devastating impact on them and their family.

End up paying twice

Regrettably, workers in loan or other DR schemes may actually end up paying twice. In a sign of just how unscrupulous the DR scheme providers are, we have recently heard about taxpayers who used loan arrangements in the past (but who have settled their affairs with HMRC) being approached by the current loan owners and being asked to repay the loans.

192 Description of ‘general earnings’ from EIM00610, HMRC’s Employment Income Manual, available on GOV.UK at <https://www.gov.uk/hmrc-internal-manuals/employment-income-manual/eim00610>

116 Chapter 11 – Disguised remuneration

This is a very difficult situation – in a nutshell, the effect of the disguised remuneration rules/loan charge is that the loans are taxed as income, however for other purposes, it is quite possible they are still loans. Depending on the legal position, it is also quite possible that the current loan owners are within their rights to make the demands (although whether the demands are enforceable is another matter).

HMRC say they can't do anything about it as it is outside their remit (as it is a dispute between lender and borrower) and people need to take legal advice. The risk is that people will not be able to afford to take legal advice and feel so scared by the demands/letters that they end up paying twice.

This is a query that we received in November 2020 from someone being pursued by the current loan owners:

CASE STUDY

'Not sure you can help but I am finding it difficult to get answers. I used tax avoidance schemes in 2013, I have agreed HMRC settlement terms and have already paid a large proportion of what I owe. My problem is and not many seem to know about this but I have just received a fourth letter from (redacted) a company who claim they now own the original "loans" I took out in 2013. This fourth letter is a demand that I repay the £20,000 loan I supposedly took out with (redacted) in 2013. I am now a pensioner on a state pension with little savings and the only way I can repay is to sell my house!!! As everyone knows these loans were sold to us as never having to be repaid, can you recommend anyone who can help put my mind at rest as this is driving me mad with worry. Everyone I turn to either ignores my plea or says get expert legal advice but as this appears to be a specialist subject who should I trust.'

Contact to LITRG has not only been from individuals, but from union representatives (whose members are affected), tax advisers (whose clients are affected) and other voluntary sector organisations who field queries (such as the MoneyAdviceTrust). TaxAid also estimates having received at least 20 calls, or cases, to date where this question has been raised. Having had the issue raised to them as part of a recent loan charge inquiry, recommendations from the House of Lords Economic Affairs Finance Bill Sub-Committee¹⁹³ may mean HMRC, perhaps working with other parts of government, will now have to consider the matter further.

Why are people still getting caught up in DR schemes?

People will be getting caught up in other DR schemes for the same reasons they got caught up in loan schemes, as outlined earlier, including that they are put into DR arrangements by umbrella companies that they have been referred to by agencies, without their knowledge.

193 Letter to the Financial Secretary to the Treasury from the Economic affairs Finance Bill sub-committee, 22 January 2021, available at <https://committees.parliament.uk/publications/4402/documents/44492/default/>

Additionally, some contractors and agency workers may also simply fall into the hands of a DR scheme provider through trying to find a legitimate umbrella company to use via an umbrella comparison site – many such sites have cropped up in the last few years.

Comparison sites

There would be little point for any bona fide, compliant umbrella companies to be featured on a comparison website – because other than their margin, and some small differences in offerings – a worker’s take-home pay should be exactly the same regardless of the umbrella company, because the same tax and employment law rules apply to all of them.

Having tested a few of these sites (we signed up as a contractor on £200 a day looking for an umbrella company), they appear to use various tactics to get workers to sign up with them.

For example, on 20 November 2020, we used the umbrella comparison site www.umbrellasupermarket.co.uk. We were asked to enter some details and then were presented with a list of several providers – none of whom are FCSA/PP accredited. The information presented was quite confusing, so we clicked out of the site.

However, immediately after doing that, we were sent the following email.

Thank you for submitting your information via Umbrella Supermarket.

You're just one step away from finding the perfect provider.

Hi

We'd love to give you a more bespoke illustration because finding out how much tax you'll be paying and what money will be left in your bank account isn't as straight forward as a simple calculator.

In order to get your illustration spot on we need to know some more details about your tax code or if you're caught by IR35 false self employment rules.

To do this all you need to do is verify your email by clicking on the link below, then you'll be taken to our website to fill out some short additional questions.

Verify My Email

After that you'll either get a bespoke illustration there and then, or we'll phone you if it gets a bit more complicated.

Happy Scouting x

Note that the email comes from Contracting Scout – the name of the comparison site highlighted by the BBC in their Moneybox programme mentioned earlier¹⁹⁴ – who, from what we can see on Companies House¹⁹⁵, are in the process of folding.

Over the next week we were sent many more emails, such as that below with an interesting 'illustration' of what our take home pay could be – it is interesting because on

194 'Unscrupulous' firms targeting key workers, BBC News article, 6 June 2020, available at <https://www.bbc.co.uk/news/business-52935252>

195 Entry for CONTRACTING SCOUT LIMITED - Overview (free company information from Companies House), available at <https://find-and-update.company-information.service.gov.uk/company/08252941>

118 Chapter 11 – Disguised remuneration

a salary of £52,000, we might expect to see a standard calculation of take-home pay arising at £38,801.80.¹⁹⁶

Following your request for an umbrella calculation, I called today to get some additional information in order to give you your bespoke illustration, but was unable to make contact.

When would be the best time to touch base and get some key information such as tax code? It literally takes 2 minutes to get the extra information we need. I have attached the below illustration based on £200.

£52,000	Employed Umbrella
ACTV	Maximum Rewards
After deductions	£42,640
Monthly	£3,553
Weekly	£820

We also had multiple missed calls, voice messages, and even text messages and WhatsApp messages.

I hope you're well?

I was just looking to get in touch with you after you left your details on the Umbrella Supermarket website in regards to your contractor needs

If you could let me know when the best time to speak is we can look to arrange a chat and assist you getting the best returns.

I look forward to hearing from you.

Thanks
Graham

In the end, we replied STOP!

It is worth noting that not only might workers cave into pressure like this and sign up with a particular umbrella company, but they might be swayed to join up, because of the incidence of referral fees or joining bonuses.



Refer Your Friends

Receive up to £500 for every successful recommendation to Contracting Scout.



Once you have received your first payment, we'll send you £250!*

¹⁹⁶ Your estimated take-home pay - Estimate your take-home pay, available on GOV.UK at <https://www.tax.service.gov.uk/estimate-pay-take-home-pay-your-pay>

Particularly for lower-paid workers, financial inducements like large promises of cash could naturally influence their behaviour. We would imagine that many people are introduced to DR schemes through friends and family referring them, as research has shown this to be a major factor.¹⁹⁷

We note that most legitimate, compliant umbrella companies do not seem to offer incentives like this, or if they do are more modest in nature. For example, one of the umbrella companies we looked at offer 4 weeks free to people if they recommend a friend. Another offers some shopping vouchers – but only after the person has been with them for 12 weeks.

What next on DR schemes?

HMRC say that they are taking action at various levels of the avoidance supply chain (for example at promoter level) to stamp out DR schemes at source.

We understand that HMRC may also be considering what more can be done by agencies and end clients to help secure their supply chains, which is very sensible (and we make a number of suggestions to this effect in our submission to HMRC on tackling DR schemes¹⁹⁸ – for example, that the scope of the Criminal Finance Act 2017 be reviewed so that it definitely catches DR arrangements).¹⁹⁹

HMRC are trying to warn people about the risks of such schemes including through its ‘Spotlight series’, for example:

- Tax avoidance promoters targeting returning NHS workers (Spotlight 54)²⁰⁰
- Comparison and broker websites marketing umbrella companies are not always what they seem (Spotlight 55)²⁰¹

HMRC have also recently issued a campaign²⁰² to try and get workers to think twice about ‘taking up’ such schemes.

197 HMRC research report 400, Understanding individuals’ decisions to enter and exit marketed tax avoidance schemes, 2015, available on GOV.UK at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/496906/Understanding_individuals_decisions_to_enter_and_exit_marketed_tax_avoidance_schemes-2.pdf

198 LITRG response, Tackling DR tax avoidance: call for evidence, 22 September 2020, available at <https://www.litrg.org.uk/sites/default/files/200922-LITRG-response-Tackling-DR-tax-avoidance-Call-for-evidence-2328.pdf>

199 Under this Act, penalties can arise for agencies where a worker evades tax and the commissioning of that offence is facilitated by a third party (e.g. an umbrella company) who is ‘associated’ with the agency. Agencies are required (if they want to have a defence) to have reasonable procedures in place to prevent the facilitation of tax evasion. (If DR issues are not already covered under ‘tax evasion’, this would obviously require a change in the wording of the Act to ensure it covers tax avoidance.)

200 Comparison and broker websites marketing umbrella companies are not always what they seem (Spotlight 55), HMRC, 27 April 2020, available on GOV.UK at <https://www.gov.uk/guidance/comparison-and-broker-websites-marketing-umbrella-companies-are-not-always-what-they-seem-spotlight-55>

201 Tax avoidance promoters targeting returning NHS workers (Spotlight 54), HMRC, 30 March 2020, available on GOV.UK at <https://www.gov.uk/guidance/tax-avoidance-promoters-targeting-returning-nhs-workers-spotlight-54>

202 Don’t get caught out by tax avoidance – learn what it is and how to spot it, HM Government, available at <https://taxavoidanceexplained.campaign.gov.uk/>

120 Chapter 11 – Disguised remuneration

All of this is useful to some degree, but it is possible that workers will not see these publications, buried as they are on GOV.UK. More importantly, HMRC seem, in our view, to miss the point that many workers may not have a personal avoidance motive and are simply pawns in a bigger game, so may not self-identify as the target audience.

HMRC are also writing to workers, who, from the RTI payroll data submitted by the employer, they can see are in schemes, to advise them of the concerns and to 'help them to understand what they need to do to pay the right amount of tax'.²⁰³ It is unclear to us whether HMRC are also writing to the employers where they are aware from an employer's payroll data that there are irregularities. We would hope so, given the employer has the primary liability for operating PAYE correctly and by not doing so, HMRC are sending out completely the wrong message to DR scheme providers.

Finally, we would like to take the opportunity to set out some possible warning signs of DR schemes for workers to be wary of:

- arrangements that offer to let them keep more of their pay than they normally would
- a contract of employment showing that they'll only be paid the national minimum wage, when they know they'll be paid more than that
- an agreement where they get payments that they are told are not taxable
- perhaps receiving more than one payment into their bank account each pay period
- perhaps paying a hefty fee – which they won't be able to get back if the arrangements don't work
- confusing or unclear paperwork (contract/payslips etc.) – or none at all
- information in their Personal Tax Account about the pay and tax details being submitted to HMRC by the DR scheme provider that does not match what they are being paid

Until HMRC become more systematic in recognising that DR schemes are no longer always, or mainly, an issue of 'traditional' tax avoidance but often more about exploitation of the economics of supply chains and the nature and scale of the temporary worker labour market more generally, individual workers to be extremely vigilant about the risks of being exploited in this way.

²⁰³ Use of marketed tax avoidance schemes in the UK, HMRC corporate report, 26 November 2020, available at <https://www.gov.uk/government/publications/use-of-marketed-tax-avoidance-schemes-in-the-uk/use-of-marketed-tax-avoidance-schemes-in-the-uk>

Glossary of terms

Term	Explanation
Agency worker	For the purpose of this report, we use this to mean 'temp' workers such as supply teachers, locum nurses and blue-collar workers in short-term posts
AMAP	Approved mileage allowance payments – a statutory system of tax-free approved mileage allowance for business journeys in an employee's own transport
APSCo	The Association of Professional Staffing Companies
ASL	An agency's 'approved supplier list' – workers with existing relationships with umbrella providers can continue that relationship if that provider is on the agency's ASL
BASW	British Association of Social Workers
BEIS	Department for Business, Energy and Industrial Strategy
CBI	Confederation of British Industry
CIS	Construction Industry Scheme
CJRS	Coronavirus Job Retention Scheme
DOTAS	Disclosure of tax avoidance schemes – legislation requiring the disclosure to HMRC of tax avoidance arrangements
DR	Disguised remuneration – arrangements seeking to re-designate taxable pay as non-taxable amounts
DWP	Department for Work and Pensions
EA	Employment allowance – this allowance reduces a small employer's NIC bills
EAS	Employment Agency Standards Inspectorate
EDM	Elective deductions model
End client	The person or company for whom the agency worker or freelance contractor is ultimately working (also known as engager or hirer)
Engager	Same as 'end client'
ERA Services	Employment Rights Assessment Services
False self-employment	Treating a worker as self-employed when the true nature of his/her engagement is that of employment
FCSA	Freelancer Contractor Services Association
Freelance contractor	For the purpose of this report, we use this to mean white collar professionals who typically work on a succession of assignments

122 Glossary of terms

FRS	Flat rate scheme (for VAT)
FSB	The Federation of Small Businesses
GAAR	General anti-abuse rule – legislation seeking to counter arrangements designed to abuse the tax system
GLAA	Gangmasters and Labour Abuse Authority
Hirer	Same as ‘end client’
HMRC	HM Revenue and Customs
IPSE	The Association of Independent Professionals and the Self-Employed
IR35	Where an individual is essentially working as an employee but via an intermediary, the IR35 rules deem contract income to be equivalent to PAYE income, with tax and NIC being charged accordingly
ITEPA	Income Tax (Earnings and Pensions) Act 2003
KID	Key information document – from 6 April 2020, agency workers must be provided with this document prior to them signing up for an assignment
NASWUT	Teachers' Union
NIC	National Insurance contributions
NMW	National minimum wage
ONS	Office of National Statistics
OpRA	Optional remuneration arrangements – legislation under which the value of benefits in kind may be taxed and charged to NIC as ordinary salary if the employee has chosen to receive benefits in lieu of salary
P87	HMRC form for claiming tax relief on employment expenses
PAYE	Pay As You Earn
PDPD	Payday by payday – a model used by umbrella companies to pay travel expenses
PEO	Professional Employment Organisation – under these arrangements, a worker is quoted their actual gross pay rate, which does not vary and employer costs are agreed separately between the PEO supplier and the agency

123 Glossary of terms

POTAS	Promoters of tax avoidance schemes – legislation which requires promoters of tax avoidance schemes to disclose details of their products and clients to HMRC
PP	Professional Passport
PSC	Personal service company – a limited company through which someone works (often freelance contractors supplying professional/skilled services)
PSL	An agency's 'preferred supplier list' – a list of pre-approved umbrella companies that workers can choose from
REC	Recruitment and Employment Confederation
RTI	Real Time Information – under RTI, information about tax and other deductions under the PAYE system is transmitted to HMRC by the employer every time an employee is paid
Salary sacrifice	Arrangement under which a worker agrees to have less salary in exchange for some other benefit – for example, pension contributions
SDC	Supervision, direction or control – whether an engager has the right to supervise, direct or control an individual's work
SEISS	Coronavirus Self-Employment Income Support Scheme
SMP	Statutory maternity pay
SSP	Statutory sick pay
TAAR	Targeted anti avoidance rule – legislation allowing HMRC to counter arrangements they feel are set up with a tax avoidance motive
TABUC	Trade Association of British Umbrella Companies
TPR	The Pensions Regulator
UKAS	United Kingdom Accreditation Services
UTR	Unique Taxpayer Reference – the identification number used for each taxpayer filing Self-Assessment tax returns
VAT	Value Added Tax

Breakdown of umbrella companies

125 Appendix 1 – Breakdown of umbrella companies

Umbrella	Professional Passport / FCSA approved?	Registered Company number visible?	Companies House check	Expense breakdown given in accounts?	Margin clear on website?	Promoting mileage expenses service?	Promoting other expenses?	Computer equipment?	Offering P87 service?
1	FCSA (accountancy, umbrella, CIS)	No	No (registered number unknown)	N/A	No	Yes	Yes	No	No
2	FCSA (umbrella, CIS)	No	No (registered number unknown)	N/A	No	Yes	Yes	No	No
3	PP (umbrella)	No	No (registered number unknown)	N/A	No	No	No	No	No
4	None	Yes	No – micro accounts only	No	Yes	No	No	No	No
5	FCSA (umbrella, CIS) and PP (CIS Gross Umbrella Joint Employment PEO Umbrella Services)	Yes	Yes	No	Yes	Yes	No	No	No
6	FCSA (accountancy, umbrella, CIS)	No	No (registered number unknown)	N/A	No	No	No	No	No
7	FCSA (umbrella, accountancy)	No	No (registered number unknown)	N/A	No	No	No	No	No
8	None	Yes	No – new company	No	Yes	No	No	No	No
9	FCSA (umbrella)	Yes	Yes	No	Yes	No	No	No	No
10	FCSA (accountancy, umbrella, CIS)	No	No (registered number unknown)	N/A	Yes	Yes	No	No	No
11	PP (CIS Gross Umbrella Joint Employment Umbrella Services)	Yes	No – micro accounts only	No	No	No	No	No	No
12	PP (umbrella only)	Yes	Yes	Yes	Yes	No	No	No	No

Continued on next page ►

126 Appendix 1 – Breakdown of umbrella companies

Umbrella	Professional Passport / FCSA approved?	Registered Company number visible?	Companies House check	Expense breakdown given in accounts?	Margin clear on website?	Promoting mileage expenses service?	Promoting other expenses?	Computer equipment?	Offering P87 service?
13	PP (umbrella and joint employment)	No	No (registered number unknown)	N/A	No	Yes	No	No	No
14	FCSA (accountancy, umbrella)	No	No (registered number unknown)	N/A	Yes	Yes	Yes	No	No
15	FCSA (accountancy and umbrella only)	Yes	Yes	No	No	No	No	No	No
16	FCSA (umbrella, CIS)	Yes	Yes	Yes	No	No	No	No	No
17	FCSA (accountancy, umbrella)	Yes	Yes	No	Yes	Yes	Yes	No	No
18	FCSA (accountancy, umbrella, CIS)	Yes	Yes	No	Yes	Yes	Yes	No	No
19	None	Yes	No – micro accounts only	No	No	No	No	No	No
20	FCSA (umbrella only)	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No
21	FCSA (umbrella only) and PP (overseas services)	No	No (registered number unknown)	N/A	No	Yes	No	No	No
22	FCSA (umbrella, accountancy)	Yes	No – micro accounts only	No	Yes	No	No	No	No
23	FCSA (accountancy, umbrella)	Yes	Yes	No	Yes	Yes	Yes	No	No
24	FCSA (accountancy, umbrella, CIS)	Yes	Yes	No	No	Yes	No	No	No
25	None	No	No (registered number unknown)	N/A	No	Yes	Yes	Yes	No

Note: The above table summarises information we have found on a selection of umbrella company websites. We aimed for the sample of umbrella company websites we looked at in our research to be representative (for example including both small and large, accredited and non-accredited umbrella companies), and we have tried to ascertain a full and accurate picture of the current marketplace. Although we have tried to be thorough in our investigations, we recognise that reviewing website information has its limitations.

LITRG's umbrella company factsheet

Working through an umbrella company

Umbrella companies can be confusing, particularly for lower-paid workers. Often they aren't very transparent about what they do, but there is also a lot of misinformation which gives them a bad name – even the ones that take the welfare of their workers very seriously. Here we give you some clear and independent information to help you understand more about working through an umbrella company and some tips on what to look out for so you can avoid any problems. This leaflet has been produced by the Low Incomes Tax Reform Group (LITRG), part of an educational tax charity and PRISM, an umbrella company representative body. We tell you where you can get more help and information at the end of this factsheet.

What is an umbrella company?

Umbrella companies are businesses that take on agency workers and other types of temporary workers as their own employees with continuous contracts of employment. Their sole purpose is to employ people like you (often called 'contractors'). To meet the rules to be a 'continuous' employment, the umbrella company must usually pay you for 336 hours of work per year at the minimum wage.

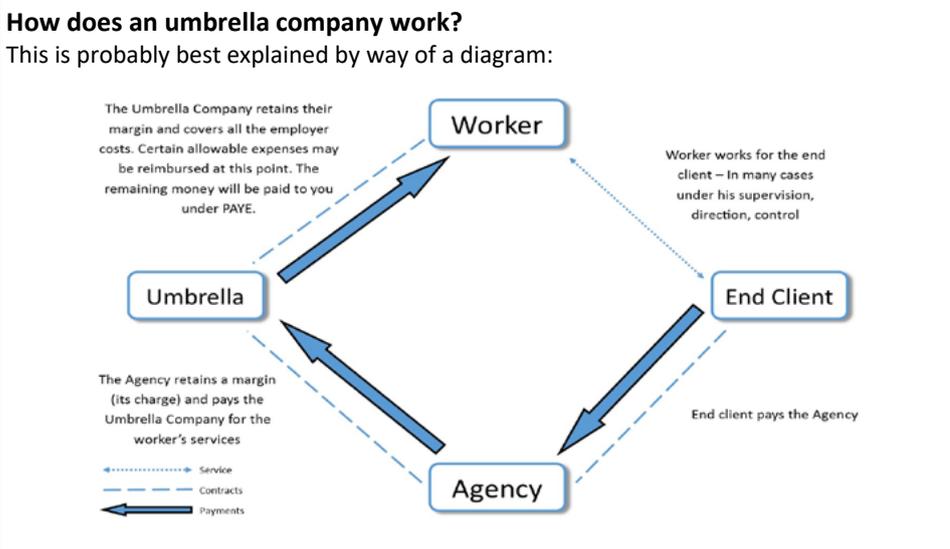
TIP: If you have been employed by an umbrella company for more than a year, ask them if any of the 336 hours remain unpaid.

Why have I been told to use an umbrella company?

Historically, if you found work through an agency, they would normally deal with your pay themselves. However these days, agencies prefer not to do this as it saves them time and money and means they can concentrate on matching workers with available work. As such, they usually suggest that people use an umbrella company. It isn't against the law for them to do this, although when they pass you over to an umbrella company they should make sure they also hand over sufficient funds to cover all the employment costs that the umbrella company will now have. This should include an amount to cover the umbrella company charge (more on this later).

Because the umbrella company becomes your employer, they will deal with your pay and other employer obligations instead of the agency. This includes paying you your wages with tax and National Insurance (NIC) deducted as required by the Pay As You Earn (PAYE) system.

TIP: If you feel very strongly that you want to be paid by the agency and not an umbrella company then you should try talking to the agency. However you should be aware that not all agencies run PAYE schemes themselves anymore.



What are my employment rights if I use an umbrella company?

You are an employee of the umbrella company and so have the same rights as any other employed person. These include the right to be paid the minimum wage, the right to paid holiday (more on this later), the right to be auto-enrolled into a pension (if you meet the earnings threshold) and to statutory benefits such as sick pay and maternity pay (provided you meet the relevant criteria). You can find more information about employee rights on GOV.UK: <https://www.gov.uk/employment-status/employee>

It is worth noting that as an agency worker, you would get the main employment rights even if you did not work through an umbrella company. Working through an umbrella company can be beneficial in other ways, however. For example, it can provide a continuous payroll link from one assignment to the next, preventing problems like ‘emergency’ tax when you start a new assignment through a new agency. Sometimes they also provide things like shopping discounts and an online portal where you can track your pay.

TIP: Different umbrella companies will advertise different ‘perks’, sometimes at a cost. Some of these may be worth very little, e.g. Faster Payments bank transfers (which are pretty standard these days), or may not be relevant to you, e.g. childcare vouchers, so you should weigh things up carefully before choosing an umbrella.



Do the Agency Workers Regulations still apply?

The Agency Workers Regulations (AWR) mean that agency workers should receive equal treatment compared to the end client’s own employees. Umbrella company employees are still classed as agency workers for the purposes of AWR. For example, you should be allowed to use any shared facilities (e.g. a staff canteen or childcare) from the first day you work in an assignment location. After 12 weeks’ continuous employment in the same role, you should get the same terms and conditions as the end client’s own employees, including pay and any annual leave above the minimum 28 days required by law (more on this later). There are rules in place which mean that your assignment cannot just be stopped as you get near 12 weeks of continuous work. You can find out more about AWR on the ACAS website: <http://www.acas.org.uk/index.aspx?articleid=1873>

TIP: Some umbrella companies used to use ‘pay between assignments’ contracts instead of giving you equal pay after 12 weeks. From April 2020 these contracts are no longer allowed.

WARNING! Non compliant models

There are lots of umbrella companies out there and the marketplace is very competitive. All umbrella companies should apply the same tax and employment law rules (although their margins may differ) and therefore what you are offered should broadly be the same from one umbrella company to the next. Any umbrella company that appears to offer higher than expected take home pay should be avoided as it is likely that they are doing something that is just not right to try and reduce their costs.

TIP: You need to be extra vigilant about being offered payment in the form of loans, grants, advances etc. (even if it has a ‘QC’s opinion’ or appears to have been ‘approved’ by HMRC). Entering into such arrangements will likely cause you huge problems in the future.

I heard I can claim some relief on my travel expenses?

It used to be the case that if you worked through an umbrella company then you could claim tax and NIC relief on the costs of getting to and from your assignment locations. However since April 2016, has been closed to anyone working under ‘supervision, direction or control’. This catches most people.

However you may still qualify for relief on travel expenses incurred *while* working (e.g. going to a client meeting), as opposed to getting to work. Where you use your own car for such travel, you may be able to claim tax and NIC free ‘mileage’ from the umbrella company. As the umbrella only has the funds received from the agency to pay you out of, this is unlikely to be paid to you *on top* of your normal pay, but rather you will be asked to swap some of your normal taxable pay for the tax and NIC free mileage payment—this should still leave you better off. For any other type of expenses (e.g. train fares) you will have to put in a tax claim to HMRC.

TIP: Be wary of any umbrella companies that say they can still process home to work travel expenses. While it is the umbrella’s responsibility to ensure that only correct expenses are claimed (and they should ask you questions to ensure this), if they get things wrong, there may be consequences for you.

How will my holiday pay be calculated?

The starting point is that full time workers have the right to a minimum of 28 days’ paid leave including bank holidays (although you could be entitled to more under the Agency Workers Regulations, as explained previously). If you work on a casual basis or very irregular hours, your holiday entitlement will probably be calculated as a percentage of your hours. 28 days is equivalent to 12.07% hours. *Example: Mary works 17 hours one week, 20 hours the next week, and then 15 hours for next two weeks. After a month of working, she has built up entitlement to approximately 8 hours of paid leave (67 hours x 12.07%).*

Many umbrella companies offer to include an amount for holiday pay in your wages on an ongoing basis (a system known as ‘rolled up’ holiday pay). Strictly this is incorrect, as the law says that it should be paid out at the time annual leave is taken, but many workers prefer the ‘rolled up’ system.

If you are not on a rolled up system and you leave the employment having taken fewer holidays than you are entitled to, you should be paid in lieu of the untaken holiday. So carrying on Mary’s example, if her employment ended before she could take the leave she had built up, she would be entitled to be paid in place of taking the leave. If she usually earned £9 an hour, she would be entitled to £72 (holiday pay is calculated based on your average pay rate in the preceding 52 weeks including bonuses, overtime, commission where relevant). There is lots of information about holiday pay on the GOV.UK website: <https://www.gov.uk/holiday-entitlement-rights>.

TIP: Check how the umbrella company will deal with your holiday pay – if it is not on a ‘rolled up’ basis ask them to confirm that all outstanding holiday pay will be paid to you with your final payment.



How much will I be paid if I work through an umbrella company?

This is where things can get quite complex – so much so, that people often think they are being ‘scammed’ by an umbrella company when they get their first payslip. But let us explain once and for all how things should work.

If you are paid by an agency directly, then the rate they offer you (commonly known as the PAYE rate) is the amount, before your tax and NIC, that you should receive. So if you have a PAYE rate of say, £9.50 per hour and work 35 hours you will be paid $£9.50 \times 35 = £332.50$ as gross taxable pay. You will then have your PAYE tax and employee NIC deducted from this, in the same way as all other employees. But £9.50 is not the true cost to the agency of paying you. In addition, they may have to pay things like employers’ NIC, holiday pay, apprenticeship levy and contributions into a workplace pension. As such, the cost to them of taking you on may be something more like £12.15 an hour. But you are not entitled to be paid the full amount of £12.15 – you are only entitled to the £9.50. Hopefully you are familiar with this concept from any other employments you have been in.

When an agency hands you over to an umbrella company, they should pass the umbrella company the full costs of your employment – that is, the £12.15 an hour (from the funds they themselves have received from the end client). This is commonly known as the limited company rate. They may explain to you that you can get £9.50 an hour if you are paid through them, or £12.15 an hour if you are paid through an umbrella company. The ‘headline’ rate of £12.15 an hour can sound like a great deal if the agency do not properly explain to you that it is intended to cover the total costs of employment and is not the amount you are going to personally earn! As such it can be very tempting to go with the £12.15 an hour – but you may then get a shock when you get your payslip and see things like employer NIC being deducted.

The bottom line however is that the limited company rate should be sufficiently more than the PAYE rate, so that once all the additional employment costs have been deducted, and the umbrella company charge has been deducted, you are in no worse a position than if you had just received the PAYE rate in the first place. This can be very hard to work out unless you are a tax expert or have some special computer software to do the maths for you, so to help you we have prepared a table (over the page) that shows, approximately, what the **minimum** equivalent limited company rate should be for some common PAYE rates.

TIP: Ask your agency for both their PAYE rate and limited company rate when looking at a potential assignment.

PAYE rate v Limited company rate – Ready reckoner

PAYE rate	£8.20	£8.50	£8.72	£9.00	£9.50	£10.00	£11.00	£12.00
Limited company rate	£10.45	£10.85	£11.12	£11.51	£12.16	£12.81	£14.12	£15.43

Please note that this is just a ‘ready reckoner’ but should help you understand whether what you are being offered to work through an umbrella company is *roughly* right. For the purposes of this table, we have assumed that a worker is working 35 hours per week and that the umbrella is making a £20 ‘margin’ a week (that is, the charge for their services). This margin should be factored into the limited company rate – if the umbrella company charges more, the equivalent rate will be slightly higher and if they charge less the equivalent rate will be slightly lower.

This table is based on the 2020/21 rates and allowances for things like employer’s NIC and auto-enrolment. For anyone with a technical interest in the figures, they can be found on GOV.UK.

TIP: If your circumstances do not fit neatly within this table then give the umbrella company the PAYE rate and the limited company rate you have been quoted by the agency. A good umbrella company should help you understand what the rates mean and which one works out best for you.

Example

Henry sees a job advertised through an agency, paying £9 an hour. He gets the job but the agency then tells him that he should find an umbrella company to work for. Using the table above, Henry knows that he needs to be offered a rate of about £11.51 to work through an umbrella company. When he gets his first payslip, he sees that the £11.50 rate offered to him has resulted in him getting paid roughly the same amount as if he was paid £9 an hour from the agency (£402.50 less Company Deductions = £315.20 and 35 hours multiplied by £9 an hour = £315).

Umbrella Company Ltd

Employee No	Name		Ni Number
12345	Henry	16-Aug-20	QQ123456A

Saying that, Henry is a bit confused as to why his pay contains a salary element and a bonus element. The umbrella company explains that it is to protect them should they not be paid by the agency. In such cases they have to pay you out of their own pocket – but by structuring your pay like this, this only needs to be for the salary amount.

Contractor statement

Agency receipts	Units	Rate	Amount	Company Deductions	Amount
Normal Time	35	11.50	£402.50	Workplace pension (er)	£5.87
Re: Services to Agency Ltd				Holiday Pay	£41.24
				Employer NIC	£20.19
				Margin	£20.00

Payslip

Employee Payments	Units	Rate	Amount	Employee Deductions	
Salary	35	8.72	£305.20	Tax	£15.05
Bonus	35	.28.5	£10.00	Employee NIC	£15.86
				Workplace pension (ee)	£7.80
Total Gross Pay for tax			£315.20	Net Pay	£276.49
Tax Code			1250L	Payment method	BACS

TIP: If you are not sure what your payslips mean – ask! It will be important to a good umbrella company that you have 100% peace of mind and they will not mind you asking questions.



Where can I get more help?

www.litrg.org.uk – Everything LITRG does is aimed at improving the experiences of the low-paid. LITRG’s website is full of general, helpful tax information, including more on agency workers, umbrella companies, travel expenses, auto-enrolment and more!

<http://www.prism.contractors/> – PRISM is a not for profit professional trade association that represents umbrella companies. You can find out more about PRISM’s work and can make a complaint about any of their members through their website.

This factsheet is intended to provide general information only and does not constitute advice. We have done our best to ensure that the information in this factsheet is up to date as of May 2020.

Key information document

133 Appendix 3 - Key Information Document

Key Information Document

This document sets out key information about your relationship with us and the intermediary or umbrella company used in your engagement, including details about pay, holiday entitlement and other benefits.

Further information can be found at [\[for Employment Business to insert here\]](#)

The Employment Agency Standards (EAS) Inspectorate is the government authority responsible for the enforcement of certain agency worker rights. You can raise a concern with them directly on 020 7215 5000 or through the Acas helpline on 0300 123 1100, Monday to Friday, 8am to 6pm.

GENERAL INFORMATION

Your name:	
Name of employment business:	
Name of intermediary or umbrella company:	
Your employer:	
Type of contract you will be engaged under:	
Who will be responsible for paying you:	
How often the umbrella company and you will be paid:	

INTERMEDIARY OR UMBRELLA COMPANY PAY INFORMATION

You are being paid through an intermediary or umbrella company: a third-party organisation that will calculate your tax and other deductions and then pay you for the work undertaken for the hirer. We will still be finding you assignments.

The money earned on your assignments will be transferred to the umbrella company as part of their income. They will then pay you your wage. All the deductions made which affect your wage are listed below. If you have any queries about these please contact us.

Your payslip may show you as an employee of the umbrella company listed below.

Name of intermediary or umbrella company:	
Any business connection between the intermediary or umbrella company, the employment business and the person responsible for paying you:	

134 Appendix 3 - Key Information Document

Expected or minimum gross rate of pay transferred to the intermediary or umbrella company from us:	
Deductions from intermediary or umbrella income required by law:	
Any other deductions from umbrella income (to include amounts or how they are calculated)	

Expected or minimum rate of pay to you:	
Deductions from your wage required by law:	
Any other deductions or costs taken from your wage (to include amounts or how they are calculated):	
Any fees for goods or services:	
Holiday entitlement and pay:	
Additional benefits:	

EXAMPLE PAY

	Intermediary or umbrella fees	Worker fees
Example gross rate of pay to intermediary or umbrella company from us:		
Deductions from intermediary or umbrella income required by law:		
Any other deductions or costs taken from intermediary or umbrella income:		
Example rate of pay to you:		
Deductions from your pay required by law:		
Any other deductions or costs taken from your pay:		
Any fees for goods or services:		
Example net take home pay:		

Sample payslips

136 Appendix 4 - Sample payslips

Pay Advice – Umbrella

Employee No.	Employee Name	Process Date	National Insurance No.	Tax Period
000000	Your Name	20/11/2020	AB123456A	Week 23

Payments	Units	Rate	Amount
Hours worked in period	36		
Salary Paid	36	£8.72	£313.92
Bonus/Commission Paid	1	£414.07	£414.07

Deductions	Amount
Tax	£97.40
NI Contribution	£65.40

Employee
Your Name
Dummy Address 1
Dummy Town
Dummy County
Dummy Postal Code

Payments this period	
Total Gross Pay	£727.99
Gross for Tax	£727.99
Gross for NI	£727.99
Total deductions	£162.80
Employer NI	£77.14
Tax Code	1250L
Payment Method	
Tax Basis	Week 1/ Month 1

Year to Date	
Gross for Tax	£727.99
Gross for NI	£727.99
Tax Deducted	£97.40
Employee NI	£65.40
Employer NI	£77.14

NET Pay £565.19

Comments

137 Appendix 4 - Key Information Document

Income Statement for G G						
Company Income received		Assignment Rate(s)				
		Units	Rate	Total	Agency/Description	Weekend Date
Company Income and Costs	543.75					
Employer's NI	43.63	37.50	14.50	543.75		06/12/2020
Company Margin	14.99					

PAYSLIP					
Employee Name	Employee Number	NI Number	Tax Code	Pay Date	Periods
G G		xxxxxxx	1250L	11/12/2020	1

Payments				Deductions	
Description	Units	Rate(£)	Amount(£)	Description	Amount(£)
Basic Rate	37.50	8.72	327.00	Employee's NIC	36.26
Holiday Pay	1.00	52.25	52.25		
Additional Taxable Wage	1.00	105.89	105.89		
Total Payments			485.14	Total Deductions	36.26

		This Period		Year to Date	
PAYE Reference		Total Taxable Pay	485.14	Total Taxable Pay	5,548.16
Tax Period	36	Earnings for NICs	485.14	Total NIable Pay	5,548.16
Period Ending	06/12/2020	Expenses	0.00	National Insurance	402.29
Pay Frequency	Weekly	Net Payment	448.88		
		Total Payment (£)	448.88		

Address:
Mr G Gr

Message:

HMRC Mini umbrella bulletin



Every business which either places or uses temporary labour should be aware of the potential dangers posed to their business by Mini Umbrella Company (MUC) fraud in their supply chain. Not only can a fraudulent supply chain lead to reputational and financial damage to your business, but your workers may not receive all they're entitled to. MUC fraud also significantly reduces tax payments to HMRC including PAYE, National Insurance and VAT.

As an end user or provider of temporary labour it is your responsibility to be clear about who ultimately pays the workers and how they are paid. This is the only way to protect your business from becoming entangled in MUC or other supply chain frauds. Most MUC arrangements are considered to be fraudulent, so make sure you spot the warning signs to protect your business.

What is Mini Umbrella Company Fraud?

The MUC model is an employment intermediary model which presents an organised crime threat to the UK Exchequer. The fraud is primarily based around the abuse of two Government incentives aimed at small businesses – the VAT Flat Rate Scheme and the Employment Allowance. But this type of fraud can also result in the non-payment of other taxes such as PAYE, National Insurance and VAT. This is reducing vital funding for the public services we all rely on. MUC fraud is not limited to specific trade sectors and can be found in supply chains whenever temporary labour is used. In its simplest form the MUC fraud model involves splitting up a workforce into hundreds or thousands of small limited companies set up solely to enable the fraud. The workforce is generally a temporary workforce who historically would have been paid by an employment agency or an umbrella company. The structuring of the MUCs is facilitated by a promoter business (sometimes also known as an outsourcing business) which may have other linked businesses to support the operation. The creation of the MUCs and the complex layers of businesses within the supply chain help to facilitate the fraud.

For employees, who are often oblivious to these arrangements, the use of this model can result in the loss of some employment rights. Workers in MUCs are usually unaware of who their employer is and they can be moved regularly between MUCs to help maximise profits from the fraud.

How you can spot Mini Umbrella Company fraud and protect your business

There isn't a standard MUC fraud model and arrangements are constantly evolving as organised criminals are trying to hide their fraudulent activities from HMRC. However, there are some common features which businesses might come across during their regular Due Diligence checks. Information from sources such as the Companies House register might help to spot warning signs when completing the quarterly [Employment Intermediary Reports](#) or the [Key Information Document for Workers](#).

- **Unusual company name** - Often multiple companies are set up around the same time which have a similar or unusual name. These companies will often be registered at an address which does not seem suitable for the types of business activities.
- **Unrelated business activity description** - Do the nature of the business activities described in the Companies House entries seem compatible with the services provided by the workers?



HM Revenue
& Customs

- **Directors being foreign nationals** – Often foreign nationals are appointed as directors when an MUC is formed or they can replace a temporary UK resident director after a short period of time. Usually the directors will have no prior experience in the UK labour supply industry.
- **Unusually high movement of workers** - Are workers moved between different employers who meet the above criteria for being MUCs on a fairly frequent basis?
- **Very short-lived businesses** - The individual MUCs have a fairly short lifespan (often less than 18 months) before being allowed to be dissolved by Companies House as a result of their failure to meet their filing obligations. New MUCs will then take their place in the supply chain. You should notice this as you may find that you need to issue a new Key Information Document to workers on a fairly regular basis.

As the MUCs sit low down in the supply chain it may be challenging to spot them. HMRC advises businesses to remain vigilant, especially where the employer of the worker is not the Umbrella Company they may have a contract with.

It is important for businesses to consider the credibility of the supply, payment arrangements and other surrounding circumstances to help safeguard themselves from financial, operational and reputational risks. Guidance on undertaking robust Due Diligence can be found here: [The supply chain due diligence principles](#).

What is HMRC doing about Mini Umbrella Company fraud?

Mini Umbrella Company fraud creates an uneven playing field for those employment agencies and businesses who follow the rules. HMRC's Fraud Investigation Service is using both its civil and criminal powers to challenge those who are involved and facilitating this type of fraud. HMRC has recently made a number of arrests in relation to MUC fraud and has also taken steps to deny the right to recover input tax in cases where it has established that a business in the supply chain knew, or should have known, that there was fraud.

HMRC is working with trade bodies and other Government Departments to raise awareness of the MUC fraud model and its risks more widely. HMRC is also currently undertaking a programme of activity to establish the levels of Due Diligence being undertaken by employment agencies and end users who use temporary labour. As part of this programme HMRC plans to issue advice on the levels of due diligence expected by businesses to help prevent them becoming a victim of the fraud.

Reporting concerns

If you have concerns about a supplier or engager of Labour, or associated activities, contact the HMRC hotline on: 0800 788 887 (open 8am to 8pm every day). For more details see how to [report fraud to HMRC](#).

You can also report someone if you think they're [evading tax](#).

Option Grant Agreement

Option Grant Agreement

THIS DEED is made the 10/11/2020

BETWEEN:

- 1)
("the Grantee")
- 2)
("The Grantor")

Collectively referred to as 'the Parties' in this document

WHEREAS

- A) The Grantee wishes to make an investment at arm's length terms with a party with which it has a working relationship and has therefore agreed with the Grantor to enter into the transaction described below.
- B) In particular, the Grantee shall pay the Grantor and the Grantor shall grant to the Grantee the option in accordance with this Deed.

It is hereby agreed by the Parties:

1. Definitions

1.1 In this agreement

- 1.1.1 "Grantor's Grant" refers to the immediate grant by the Grantor to the Grantee of the Option.
- 1.1.2 "Grantee's Payment" refers to the payment by the Grantee to the Grantor on each monthly anniversary of the date of this Agreement though not including any monthly anniversary which falls either
 - a) After the date on which the Grantor is first no longer required (for whatever reason) to provide services to _____ under the terms of the service agreement entered into between them on ('The Service Agreement'): 10/11/2020
 - Or
 - b) The date of exercise of the Option (in accordance with the terms of the Option).
- 1.1.3 "Option" refers to the right as described in Schedule 1 of this Deed (and subject to the terms and conditions contained there) and references to the Grantor in that Schedule are to be to the Grantor and those to the Grantee there are to be to the Grantee;

143 Appendix 6 - Option Grant Agreement

expression "Option Grant Agreement" refers to this Agreement.

Grant (and the Grantee hereby accepts the Grantor's Grant) by way of consideration to the Grantee for the Grantee's Payment; and

the Grantee undertakes to make the Grantee's Payment by way of consideration for having received the Grantor's Grant.

deed by

Nov 10, 2020

SIGNED and DELIVERED as a deed by
the Grantor

Nov 10, 2020

(Nov 10, 2020 15:19 GMT)

SCHEDULE 1: The Option

- 1.1 the Option refers to the right hereby conferred by the Grantor to the Grantee, upon exercise of which by the Grantee in accordance with the following paragraphs of this Schedule 1, the Grantee shall be entitled to require the Grantor to enter into the Annuity Agreement (and subject to the terms and obligations there in) as the Obligor and on the basis that the Grantee shall be the Annuitant;
- 1.2 No right whatsoever shall accrue to the Grantee under the Annuity Agreement until and unless it exercises the Option in accordance with the terms of this schedule.

Exercise of the Option

- 2.1 The Option shall only be exercisable by the Grantee upon it:
- i) Giving notice in writing to the Grantor; and
 - ii) It paying to the Grantor the Further Consideration within 14 days of it giving such receipt.
- 2.2 The Further Consideration shall be paid by the Grantee to such bank account as shall be particularised by the Grantor in writing at the time of the exercise (such time not to exceed 7 days after the receipt by the Grantor of the notice of exercise under sub-paragraph 2.1i) by the Grantee.
- 2.3 Any notice, communication or demand to be given or made pursuant to this Schedule 1 shall be in writing and shall be deemed duly served if delivered personally or sent by telex or facsimile transmission or by pre-paid registered post to the address given above or at such other address (or telex or facsimile number) as the party to the served may have notified for the purposes of this Schedule 1.
- 2.4 Any notice sent by telex or facsimile shall be deemed served when despatched and any notice served by pre-paid registered post shall be deemed served 72 hours after posting. In proving the service of any notice, it will be sufficient to prove in the case of a letter that the letter that such letter was properly stamped, addressed and placed in the post or delivered or left at the current address if delivered personally and in the case of a telex or facsimile that such telex or facsimile was duly despatched to the telex or facsimile number of the addressee.
- 2.5 The Option shall be exercisable by the Grantee only once.

Effect of the Exercise of the Option

- 3.1 In the event of the Option being exercised by the Grantee in accordance with paragraph 2 above, the Parties will enter into the Annuity Agreement;
- 3.2 The Parties shall do so within 7 days of the date on which the payment of the Further Consideration is made (or within such further time as the Grantor might reasonably require, such time not to exceed 21 days from the date on which the payment of Further Consideration is made).

Time Limited and Time-Barring of Option

145 Appendix 6 - Option Grant Agreement

4.1 There shall be no time limit within which the Option must be exercised;

4.2 Until such time as the Option is exercised, the Grantee shall be entitled to require the Grantor to take such steps from time to time as is reasonably necessary to prevent the option from becoming time-barred through operation of the law.

Meaning of Annuity Agreement

5.1 In this Schedule 1, 'Annuity Agreement', subject to the following, refers to the agreement (in relation to which the Grantor is to be the Obligor and the Grantee is to be the Annuitant) laid out in Schedule 2 to the deed of which this Schedule constitutes Schedule 1.

5.2 In circumstances where the payment of Further Consideration by the Grantee is on or after the date stipulated at sub-paragraph 1.1 of the Annuity Agreement, then;

a) the date stipulated in sub-paragraphs 1.1 and 1.2 of the Annuity Agreement shall be substituted with the date on which that agreement is entered into or, in cases where the Parties so agree, such other date (provided that such date shall not be later than 6 months from the date on which the Annuity Agreement is entered into);

b) The amount of yearly payments in sub-paragraph 1.2 of the Annuity Agreement shall be substituted with $[YP * (EYD-CY)/(EYD-YO)]$:

Where:

YP or 'Yearly Payments' represents the yearly payments to be made under paragraph 2.1 of the Annuity Agreement (setting aside this sub-paragraph of this Schedule 1):

CY or 'Commencement Year' represents the year on which annuity payments are to first commence under the Annuity Agreement (setting aside this sub-paragraph of this Schedule 1);

EYD or 'Expected Year of Death' of represents the year to which the Grantor has been presumed, for the purposes of the calculation of the yearly payments under the Annuity Agreement, to live until, such year being;

YO represents the year in which the Option is exercised by the Grantee;

And the 'Annuity Agreement' will accordingly be entered into subject to such amendments.

Definitions

6 In this Schedule 1, the expression:

- a) 'Annuity Agreement' is defined at sub-paragraph 5.1 of this Schedule 1
- b) 'Further Consideration' refers to the amount of £1,000; and
- c) 'Option' is defined at sub-paragraph 1.1 of this Schedule 1.

Assignments

7.1 The Grantor may not assign any of his rights under this Schedule 1 without the consent of the Grantee.

146 Appendix 6 - Option Grant Agreement

7.2 The Grantee may assign all or any part of its rights or benefit, under this Schedule 1 without the consent of the Grantor.

SCHEDULE 2: Annuity Agreement

THIS ANNUITY AGREEMENT records the terms of the deferred private annuity as agreed between the parties on XXXXXX 2020

[Date to be inserted on the date of the exercise of the Option, the date on which it is exercised and the parenthesis and the text within to be left as it is until then].

BETWEEN:

- 1) (" the Annuitant"); and
- 2) ("the Obligor")

IT IS AGREED as follows:

1. The Annuity

- 1.1 The Obligor grants the Annuitant, upon the terms and subject to the conditions of this Agreement, yearly payments, which shall be calculated as follows:

$$PV \left[\frac{r}{1 - (1 + r)^{-n}} \right] \times \frac{1}{(1 + r)}$$

Where:

PV = the present value of the total amount of the Grantee's Payments made prior to the exercise of the Option by the Grantee

r = rate per period, being 1.5% above the base rate of the Bank of England on the date on which the Option is exercised

n = XX, being the number of years between 1 January 2025 and the expected date of death of the Obligor

- 1.2 Such payments will commence on the 1st day of January 2035 and will continue to be paid annually on this date for the life of the Obligor.
- 1.3 Any costs associated with the Annuity including all bank costs and charges are the exclusive responsibility of the Obligor.
- 1.4 Notwithstanding anything said in this Agreement, the Obligor shall be regarded as having discharged the entirety of the Obligor's obligations under sub-clause 1.2 above on the date on which the aggregate of payments made by the Obligor under that sub-clause by that date exceed the aggregate of Grantee's Payments by more than the Appropriate Rate. The expression 'Grantee's Payments' has the same meaning here as it

147 Appendix 6 - Option Grant Agreement

does in the Option Grant Agreement which was entered into between the Obligor and the Annuitant on 10/11/ 2020. The expression 'Appropriate Rate' refers to an amount equalling 3 percent of the aggregate of the Grantee's Payments multiplied by the number of years which both fall after the date on which the Option Grant Agreement is entered into and which also end before the said date. 'Year' here refers to any period of 365 consecutive days.

2 Event of Default

2.1 There shall be an Event of Default if:

- a) The Obligor fails to pay the yearly payment on the due date when such obligation has commenced; or
- b) The Annuitant requests early payment of the Annuity, prior to the commencement date of^{11th} day of¹¹2035.

2.2 Upon the occurrence of an Event of Default at any time thereafter the Annuitant may be notice in writing to the Obligor opt to encash the Annuity which shall at that time be valued on a reasonable basis taking into account, in particular, the year to which the Grantor has been presumed, for the purposes of the calculation of the yearly payments under this Agreement, to live until, such year being 20³⁴ and sub-clause 1.4 of this Agreement above. Upon receipt of such notice payment will be required within 21 days thereof.

3 Assignments

3.1 The Obligor may not assign any of his rights under this Agreement without the consent of the Annuitant.

3.2 The Annuitant may assign all or any part of its rights or benefit, under this Agreement without the consent of the Obligor.

4 Notices

4.1 Any notice, communication or demand to be given or made pursuant to this Agreement shall be in writing and shall be deemed duly served if delivered personally or sent by telex or facsimile transmission or by pre-paid registered post to the address given above or at such other address (or telex or facsimile number) as the party to the served may have notified for the purposes of this Agreement.

4.2 Any notice sent by telex or facsimile shall be deemed served when despatched and any notice served by pre-paid registered post shall be deemed served 72 hours after posting. In proving the service of any notice, it will be sufficient to prove in the case of a letter that the letter that such letter was properly stamped, addressed and placed in the post or delivered or left at the current address if delivered personally and in the case of a telex or facsimile that such telex or facsimile was duly despatched to the telex or facsimile number of the addressee.

148 Appendix 6 - Option Grant Agreement

5 Governing Law

5.1 This Agreement shall be governed and construed in all respects in accordance with the laws of England. The parties shall hereto submit to the exclusive jurisdiction of England.

THE ANNUITANT HAS EXECUTED this agreement as a deed and the Obligor has signed, sealed and delivered this deed on the date first before written.

EXECUTED and DELIVERED as a	}
Deed by	}
	}
Being the Annuitant	}
Acting by: -	}
	Director/Secretary
In the presence of:-	

Low Incomes Tax Reform Group
30 Monck Street
London
SW1P 2AP
www.litr.org.uk

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