Finance Bill may affect the self-employed

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The Finance Bill has been subject to much speculation since it was announced in Autumn 2013. As part of the legislation contained within the bill, the 'False' Self-Employment (Onshore Employment Intermediaries) legislation will come into effect on 6th April 2014. It will affect self-employed people who are employed via intermediaries such as employment agencies, payroll or umbrella companies (any business that supplies labour) who currently only pay taxes as a self-employed person.

The Government have introduced the legislation to clamp down on the use of 'false' self-employment models where workers and employers avoid tax and where the employer also avoids their other employment responsibilities.

From 6th April 2014, workers in this situation will have tax and employee National Insurance Contributions (NICs) deducted at the source from their pay by the agency. The agency will also have a new liability to pay employer NICs.

The Government estimate that the new legislation will affect around 250,000 people and will increase tax and NIC intake by around £520m next year – some commentators, however, doubt these figures!

This new legislation will not affect:

- Agency workers who work though an 'over-arching' employment contract with the intermediary, which covers every separate assignment they get and are already subject to PAYE and NIC deductions – e.g. 'normal' agency workers.
- Contractors with their own Personal Service (Limited) Company who are legitimately self-employed.
- Workers who provide their services wholly in their own home.
- Workers who provide their services wholly at a premises which is not controlled or managed by the client.
- Workers who provide their services as an actor, singer, musician or other entertainer or as a fashion, photography or artist's model.

This new legislation will affect:

- Temporary workers who are self-employed and are supplied by the employment agency, as long as that temporary worker personally carries out the work and is involved in the provision of services to a client and if they are under the control, direction and supervision of one of the parties in the 'supply' chain of the labour (or one of the parties in the supply chain has a 'right' to subject the worker to supervision, director or control even if in practice this has not happened).
- The staffing company/agency who holds the contract with the end client (hirer) will be liable for tax and NICs of workers who are supplied by them, or by an intermediary in the 'supply chain, on a sole-trader/self-employed basis. Unless the agency can prove to HMRC that those workers are not under the supervision or control of anyone.

This means the temporary worker will pay 3% more NIC than they do as a self-employed person and the employing agency has a new liability of 13.8% Employer NIC contributions.

If there is evidence to show that these contributions have been deducted elsewhere in the ‘supply’ chain, and/or if an agency can show there is an ‘absence of control’ in the worker’s relationship with the client, then the worker and intermediary will fall outside of the legislation.

Criticisms of the legislation:

There has been much debate and criticism of the changes. These include:

- The short period of time to implement the changes.
- The increase in costs to employ workers - the construction, oil and gas sectors who rely heavily on contractors are expected to be hardest hit which could impact on job creation.
- The Recruitment and Employment Confederation (REC) voiced concerns over whether the proposed legislation will succeed in what it sets out to do as there are flaws in the proposed legislation.
- There has also been criticism that there is nothing in the legislation to allow agencies to defend themselves when they have done everything they possibly could to make sure the intermediary in the supply chain is compliant and acting properly or truthfully.

The Government ran a consultation period on their proposals up until 4th February 2014 and have published the responses in a document called ‘Onshore Employment Intermediaries: False Self-Employment’.

The Government’s response to the Consultation confirms:

- While the requirement for agencies to deduct and pay PAYE and NIC to self-employed workers or employees of offshore companies will start from 6th April 2014, the reporting system and penalties for non-compliance will not come into force until April 2015 (with first return due by 5th August 2015).
- The Government have confirmed that the legislation will not affect payments to contractors working through their own Personal Service (Limited) Company’s as they will remain liable under IR35 legislation and because they withdraw profits from their Limited Company as salary and Tax and NIC will already be deducted.
- It will also not affect workers whose income is taxed under other provisions, e.g. workers who are employees of an intermediary who employ them on an ‘over-arching’ contract of employment with minimum guaranteed hours a year and an obligation on the worker to accept work offered to them (e.g. ‘normal’ agency workers).
- The reporting requirements are – that agencies who place workers for who they are not deducting income tax and NIC, will be required to hold detailed information about those workers including the name and address of the intermediary and why NIC was not deducted.
- Where an agency has been provided with fraudulent documents by another party in the ‘supply’ chain (which say that PAYE and NIC has already been deducted), including the Contractor, another intermediary or the end-hirer/client, providing they are based in the UK – then liability to pay NIC and PAYE will sit with the body providing these documents if they have a direct contractual relationship with the 1st Agency. Therefore anyone in the ‘supply’ chain who provides fraudulent documents will be liable for unpaid tax and NIC.
- HMRC have published guidance on how to define genuine self-employment using the measures of supervision, direction or control and this is here https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/290051/Definition_of_Supervision_Direction_or_Control_with_supporting_examples.pdf

What are the indicators in this guidance that suggest the legislation applies to a worker/intermediary?

- Someone else has authority to dictate how the work is carried out or co-ordinates how the work is carried out.
- The worker is given instructions, guidance or advice as to how the work must be carried out
- The services the worker provides are subject to a detailed specification/he is given a specific procedure to follow throughout
- The work is overseen by the hirer or intermediary’s manager
- The worker is regularly supervised by calls or in person or the work is checked by someone
- The worker’s manager steps in to provide guidance and assistance
- The worker works alongside the hirer or intermediary’s team and reports to the team supervisor
- The worker works on a specific shift/rota
- The worker wears an ID badge, polo shirt and jacket with the hirer or intermediary’s logo on
- The manner in which the worker carries out the work was planned for him.
- The work is performed in accordance with a schedule that the worker is given each day (for example, the schedule contains the names and addresses of all customers and the specified times of each customer visit)
- The worker calls the manager after each matter and regularly reports back
- The worker is contacted regularly to establish his progress and to check work is being undertaken in accordance with the specified order

What are the indicators in this Guidance that suggest the legislation does not apply?

- The worker has freedom to choose how he does the work
- No-one is able to intervene to decide what the worker must do and how he must do it
- The worker is free to prepare the work and his own creations as he sees fit
- Someone approves the work sample and then leaves the worker to carry out the work without any interference
- The worker is given a list containing the names and addresses of customers and time slots for each visit but is not supervised or directed on how to do his job when at the visit nor does he seek guidance from anyone
- The worker has the freedom to decide how he will make the delivery in that he can choose his delivery route
- Nobody is present to supervise or direct the worker while he works nor is anyone doing this from afar

Possible outcomes of the legislation?:

Recruitment agencies may not wish to take on any workers being paid as self-employed in the chain as it will be difficult for them to know whether the worker is genuinely self-employed or not.

Impact on jobs – to absorb the new costs employers will use fewer staff or will contract with the workers directly, removing the role of the intermediaries.

Self-employed workers may need to set themselves up as Personal Service (Limited) Companies to avoid the legislation. However, 'anti-avoidance' measures will be introduced in the legislation to stop intermediaries forcing Contractors into becoming PSC's just to avoid PAYE and NIC's (where the only reason the PSC is being set up is to avoid tax).