

So what's the problem?

HMRC considers that some businesses have participated in arrangements whereby:

- some of their employees are transferred to an agency (so any responsibility for PAYE and NIC passes to the agency)
- the employees contract with the agency on a self employed basis
- the agency decides that the agency rules do not apply (as the contract between the agency and the worker is not an 'agency contract')
- no PAYE and NIC is therefore accounted for.

An agency contract was defined as a contract between the worker and the agency under the terms of which the worker is obliged to personally provide services to the client. The agency in this scenario sidestepped the test by inserting a clause in the contract which stated that the worker had a right to send a substitute to the end client.

Exclusions from the agency rules

Some workers to whom the agency legislation would otherwise apply are specifically excepted. They are workers who render services:

- as an actor, singer, musician or other entertainer
- as a fashion, photographic or artist's model
- wholly in the worker's own home or wholly at other premises which are neither controlled or managed by the client nor prescribed by the nature of the services.

Provision of personal services to a client - example

A company requiring some typing work, which is beyond the capacity of its regular staff, could:

- engage an independent contractor to do the work, or
- ask an agency to provide some extra typists.

In the first scenario, the contractor undertakes to do the typing work using its own staff, who may be either employed or self-employed depending on their terms and conditions of engagement. In this case the agency legislation does not apply because the contractor is providing a typing service. They are not providing typists. The position is the same as, for example, a plumbing firm that undertakes some plumbing work for a client. The plumber who actually does the work is working for the plumbing firm, not rendering personal services to the client.

In the second scenario, the agency does not undertake to do the typing work itself. What it does is to provide typists who do the required work under the direction and control of the client company. Personal services are being supplied to the client company.

Supervision, direction and control

One of the conditions of the agency legislation is that the worker must be subject to (or to a right of) supervision, direction or control as to the manner in which they provide their services. Anyone can hold that right of supervision, direction or control over the worker; it is not limited to the client for whom the worker is providing their services.

When determining if this condition applies to a worker's arrangement it is necessary to establish if the worker has the freedom to choose how they provide their services or instead, does someone have the power or authority over the worker to dictate how this is done.

For the purposes of the agency legislation HMRC consider supervision, direction and control can be defined as follows:

Supervision is someone overseeing a person doing work, to ensure that person is doing the work they are required to do and it is being done correctly to the required standard. Supervision can also involve helping the person where appropriate in order to develop their skills and knowledge.

Direction is someone making a person do his/her work in a certain way by providing them with instructions, guidance or advice as to how the work must be done. Someone providing direction will often coordinate the how the work is done, as it is being undertaken.

Control is someone dictating what work a person does and how they go about doing that work. Control also includes someone having the power to move the person from one job to another.

Recordkeeping and Returns

Advanced guidance has been issued by HMRC about recordkeeping and returns.

Selected extracts are:

'From 6 April 2014, you must be able to prove to HMRC, if asked, why the worker wasn't treated as an employee. You should work with the client and worker to get suitable evidence to demonstrate this.'

'From 6 July 2015 onwards you'll have to send HMRC reports that contain details of all workers where you, or your payroll operator, didn't operate PAYE.'

The guidance can be viewed at: <http://goo.gl/4rvyx7>