



HM Revenue
& Customs

Onshore Employment Intermediaries: False Self-Employment

Consultation document

Publication date: 10 December 2013

Closing date for comments: 4 February 2014

Subject of this consultation:	The use of employment intermediaries to facilitate false self-employment and avoid National Insurance Contributions and income tax.
Scope of this consultation:	This consultation a technical consultation into the policy and legislation.
Who should read this:	We would like to hear from individuals and businesses who are affected by the measure, particularly anyone involved in the supply of workers within the UK, their representative bodies or other interested parties.
Duration:	The consultation will run for 8 weeks starting from 10 December 2013 and closing 4 February 2014.
Lead official:	Robert Burton
How to respond or enquire about this consultation:	<p>Written responses should be submitted to: Robert Burton HMRC 1E/10 100 Parliament Street London SW1A 2BQ Or by email to: consultation.intermediaries@ hmrc.gsi.gov.uk</p> <p>Please contact Robert Burton on 03000 526 659 or email consultation.intermediaries@hmrc.gsi.gov.uk for enquiries about the content or scope of the consultation, requests for hard copies, information about consultation events, or any other enquiries.</p>
Additional ways to be involved:	We will also be holding roundtable stakeholder events. If you would like to be involved with these please contact Robert Burton on 03000 526 659 or email consultation.intermediaries@hmrc.gsi.gov.uk
After the consultation:	A summary of responses will be published after the consultation closes. Tax legislation will be introduced in Finance Bill 2014. The changes to NICs legislation will be made through regulations.
Previous engagement:	HMRC regularly meets with stakeholders to understand developments in the temporary labour market.

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Foreword

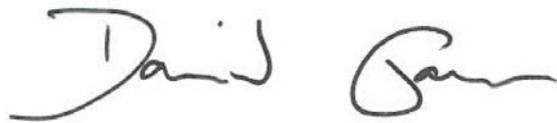
This Government strongly supports enterprise and those who chose to work for themselves. We believe that the tax system should continue to recognise the additional risk someone who is self-employed takes on. However, there is increasing evidence that some companies and Employment Businesses are using employment intermediaries to disguise the employment of their workers as self-employment primarily to avoid employer National Insurance and reduce the costs associated with workers employment rights.

These practices are not right and by engaging in them some businesses are gaining an unfair advantage over competitors. Often workers are unaware that they are self-employed and losing out on employment rights such as the National Minimum Wage and access to Statutory Payments like sick pay. Equally, there are cases where workers are aware of these arrangements, but have little choice but to accept them or lose the job. Workers are often obliged to pay a fee to the employment intermediary which can be as much as £25 per week.

This consultation document sets out the Government's plans to level the playing field so that businesses that are playing by the rules cannot be undercut by those avoiding their tax and National Insurance obligations. Employers and employment intermediaries will have to fulfil their duties and ensure workers have the protections and benefits they are entitled to. This will not affect those who are genuinely self-employed. However, we intend to ensure that where someone should be an employee but contrived arrangements are put in place to hide this, the right amount of tax and National Insurance is being paid.

Employment intermediaries are increasingly the preferred way to disguise employment as self-employment. Although this was initially a problem within the construction industry, these arrangements are spreading to other sectors as marketing by employment intermediaries has become increasingly aggressive. I believe the proposals set out in this consultation document are the best way of tackling avoidance through false self-employment without impacting on the genuinely self-employed.

This Government has time and again demonstrated its commitment to tackling areas of the tax system where avoidance behaviour is widespread or there are opportunities to level the playing field for compliant businesses. We have made a great deal of progress in preventing the avoidance of employment taxes including by introducing the disguised remuneration rules, the employee benefit trust settlement opportunity and action to tackle the use of offshore employment intermediaries announced at Budget 2013. This is the next step in creating a level playing field for all businesses and stopping unfair arrangements.

A handwritten signature in black ink, appearing to read 'David Gauke'. The signature is written in a cursive, flowing style with a large initial 'D' and a long, sweeping tail.

David Gauke

1. Introduction

About this consultation

- 1.1. At Budget 2013 it was announced that the Government would be strengthening legislation to prevent the use of offshore employment intermediaries to avoid Income Tax and National Insurance Contributions (NICs). The Government set out that HMRC would continue to gather evidence about other forms of avoidance of employment tax to inform future policy and operational decisions.
- 1.2. HMRC has evidence of a substantial and growing number of people who are falsely self-employed. Much of the growth in false self-employment can be attributed to employment intermediaries who are facilitating it.
- 1.3. The Government announced at Autumn Statement that they would tackle the use of employment intermediaries facilitating false self-employment of workers to avoid employment taxes. The Autumn Statement text said:

‘The Government will legislate in Finance Bill 2014 to prevent employment intermediaries being used to avoid employment taxes by disguising employment as self-employment. The Government will consult on strengthening existing legislation to ensure the correct amount of tax and NICs are paid where the worker is, in effect, employed, with effect from April 2014.’
- 1.4. This consultation is a technical consultation. It sets out the Government’s intended changes to the legislation and how these will interact with existing legislation. The draft legislation can be found in annex C.

The issue

- 1.5. There are many legitimate reasons why a worker is engaged on a self-employed basis. The Government strongly supports enterprise and welcomes the contribution these entrepreneurs make to the economy. They recognise the additional financial risks someone who is genuinely self-employed takes and believe this should be recognised in the tax system.

- 1.6.** However, there are times when someone who should be an employee is engaged on a self-employed basis. There are a number of benefits of engaging someone on a self-employed basis to the engager. The engager does not have to pay 13.8 per cent employer NICs and has none of the other costs associated with being an employer, including those associated with employment rights such as pensions contributions, redundancy pay and sick pay. The worker may benefit from a small increase in pay in the short term but this is at the expense of longer term benefits and protections such as employment rights.
- 1.7.** The use of intermediaries to facilitate false self-employment started in the construction industry as a way to reduce the risk to engagers of incorrectly engaging workers on a self-employed basis. However, this type of avoidance facilitated through intermediaries is now widespread in a number of other sectors including driving, catering and the security industry. In those other sectors, there is evidence of existing permanent employees being taken out of direct employment and being moved into false self-employment arrangements involving intermediaries. These intermediaries often require the worker to pay a fee of between £10 and £25 per week, further reducing any benefit to the worker of these arrangements.
- 1.8.** There are a number of ways which intermediaries are exploiting the legislation to facilitate the avoidance of employment taxes. Sometimes the worker is simply labelled as self-employed. In other cases the intermediary will set up the contract with the worker so it allows that the worker could send someone else to do their job. In reality this could not, and does not, happen.

The proposal

- 1.9.** The proposal is to make the long standing agency legislation work in the way it was always intended. By making a simple change to the agency legislation the Government intends that it will put someone who is engaged by or through an intermediary in the same position as someone who is engaged directly.
- 1.10.** The Government proposes closing the loophole that is currently being exploited in the agency legislation by removing the obligation for the worker to provide their

services personally. Instead the proposal is that the agency legislation will apply where the worker is:

- subject to (or to the right of) control, supervision or direction as to the manner in which the duties are carried out;
- providing their services personally;
- remunerated as a consequence of providing their services; and
- receiving remuneration not already taxed as employment income.

1.11.Where a worker is engaged by or through an intermediary and meets the conditions above they will be deemed to be employed for tax purposes.

1.12.It is proposed that this change will be supported by a statutory returns requirement. There will also be an evidential requirement on the intermediary where they consider the worker not to be under control, direction or supervision to be able to provide evidence of this.

2. The Issue

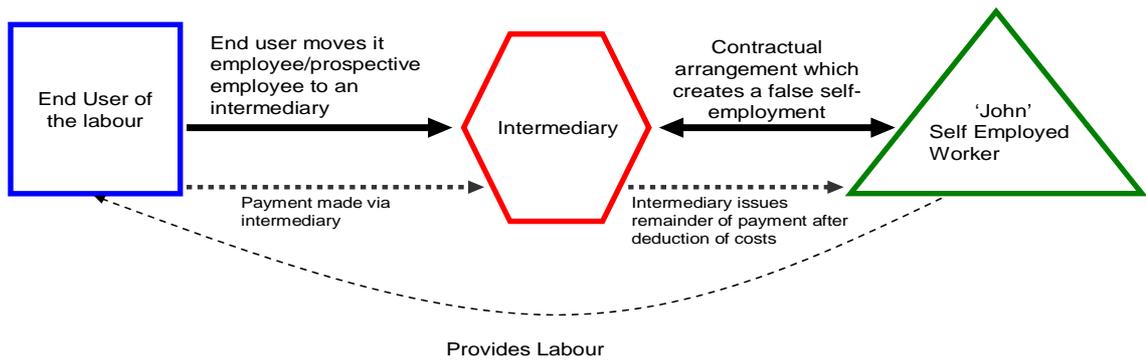
- 2.1.** In recent years there has been a rapid growth in the number of intermediaries being used to facilitate false self-employment by exploiting weaknesses in the existing legislation. This model initially started in the construction industry and grew rapidly there, before moving into other sectors. Unsuccessful challenges by HMRC using the existing legislation, alongside aggressive marketing of these schemes, has increased the rate of growth of these models.
- 2.2.** Whether someone is an employee or self-employed is determined by using a number of tests laid down over the years by the courts. The tests take into account factors such as the level of control over what, where and how the worker undertakes their work, whether the worker is able to send someone else to do their work and whether the worker provides their own equipment. These case law tests are the same for both tax and employment rights.
- 2.3.** There are a number of benefits to the engager where a worker is engaged on a self-employed basis rather than as an employee:
- The engager does not have to pay 13.8 per cent employer NICs;
 - The engager does not have to administer PAYE; and
 - The engager avoids other costs associated with employment such as holiday pay, sick pay, redundancy pay or pension contributions.

The worker benefits from being self-employed by paying a slightly lower level of NICs and being able to claim more generous tax and NICs free expenses but this rarely compensates for the benefits the worker loses. These include employment law rights such as redundancy pay, National Minimum Wage protections, Statutory Payments such as sick pay, employer's pension contribution and holiday pay.

- 2.4.** Where the engager pays an intermediary for the services of the worker it is not the ultimate engager's responsibility to determine whether the worker should be

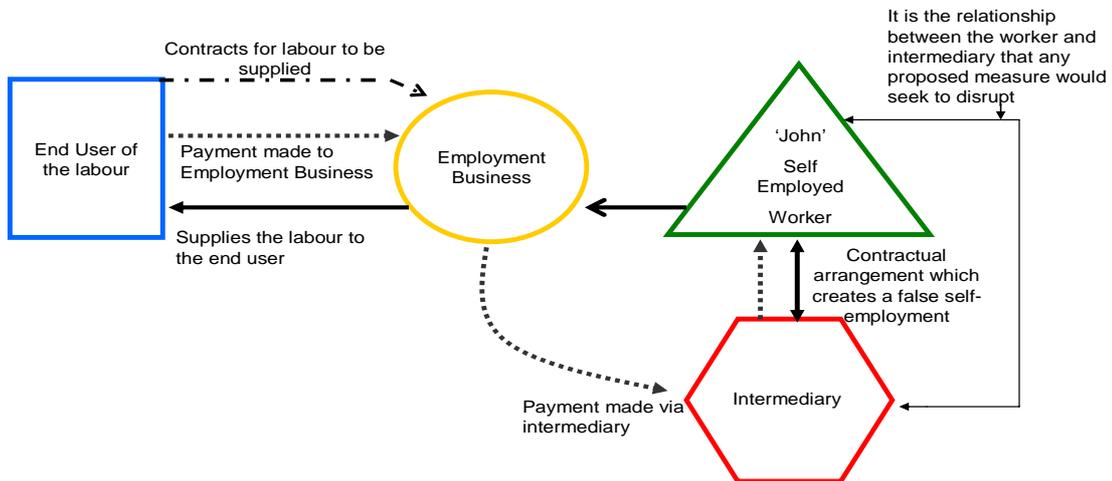
employed or self-employed. Workers are engaged through an intermediary for many reasons, most of these are legitimate. However, HMRC has evidence of a growth in employment intermediaries set up to engage workers on a self-employed basis solely to avoid employment taxes and obligations when in reality the workers should be employed.

- 2.5.** There is existing legislation that should ensure workers engaged through an intermediary are in the same position of those engaged directly, known as the agency legislation. More detail about the existing legislation can be found at Chapter 3 of this document. This legislation places the responsibility for paying employer NICs and deducting income tax and NICs, and returning it through Real Time Information (RTI), on the intermediary that has a relationship with the worker. However, for this legislation to apply a number of criteria need to be met.
- 2.6.** One of these tests is that the worker is obliged to provide their services personally. This test in particular is being exploited. The intermediaries, that are the focus of this consultation, attempt to sidestep this test by claiming that there is no obligation for the worker to provide their services personally. This may be done by including a clause in the contract that states the worker is able to send someone else to do their work. In fact this is often not the case because in reality the engager wants that specific worker. There is often collusion between the parties, as they all benefit from presenting the worker as being self-employed. In such cases it can be difficult for HMRC to prove that the reality of the situation is different from that presented in the contracts.
- 2.7.** There are a number of different ways that employment intermediaries can be used to facilitate the type of false self-employment described above.



2.8. In the first scenario the employer of the worker moves a number of their existing employees from being employed directly to engaging them through an intermediary on a self-employed basis. The duties that the workers undertake remain the same; it is only the employment status of the worker that changes.

2.9. In the second scenario a new worker may agree terms with the engager including pay but the engager then stipulates the worker must be paid by a specific employment intermediary or they will not be engaged.



2.10. A third scenario involves the supply of temporary labour to an end client by an Employment Business. The Employment Business sources the labour, (possibly via other intermediaries) but will give the worker no choice other than to be self-

employed. This happens even where the worker is clearly under the control of the end user and has to perform the work personally.

2.11.In all of these scenarios the worker may be unaware that they are engaged on a self-employed basis and may only discover they are not employed when they attempt to claim holiday pay, sick pay or redundancy pay. In such circumstances the worker will not register with HMRC as self-employed and may have a large unexpected tax bill at the end of the year. In other cases the worker is aware that they are being engaged as self-employed and are incentivised to do so for a small increase in pay. This rarely makes up for the important benefits that the worker has given up. On other occasions the worker is given little choice but to accept the engagement terms as this is the only way they are able to find work.

2.12.The worker is usually charged a fee by the intermediary of between £10 and £25 per week. This is charged even where the worker is only working for one day a week; meaning the worker takes home very little for their day's work. HMRC have seen examples where workers have mistaken the fee to the intermediary for a deduction at source for tax.

2.13.The engager and employment intermediary often share between them the employer NICs and employment rights savings, with the worker receiving very little, if any, financial benefits from these arrangements.

3. Existing Legislation

Introduction

- 3.1** The existing legislation in this area comprises separate legislation which applies to Income Tax and NICs. The existing legislation concerning employment agencies can be found in annex A of this document.
- 3.2** For Income Tax, the relevant legislation is known as the Agency Legislation and is found at Chapter 7 Part 2 of the ITEPA 2003. This legislation places the responsibility for deducting Income Tax and paying this to HMRC through RTI, on the agency that has a contractual relationship with the worker. However, for this legislation to apply a number of criteria need to be met, including an obligation for the worker to provide their services personally.
- 3.3** For NICs, the relevant legislation is contained within The Social Security (Categorisation of Earners) Regulations 1978 and The Social Security (Categorisation of Earners) (Northern Ireland) Regulations 1978. These regulations dictate that a person, the worker, will be treated as being an “employed earner” for the purpose of NICs when all of the stipulated conditions are met, including that the worker provides (or is under obligation to provide) their services personally.

Income Tax Legislation

- 3.4** The income tax legislation is contained at sections 44-47 ITEPA. For the legislation to apply to a person’s engagement, four conditions (under s44(1) (a) – (d) of the legislation) **all** must be met:
- (a). The worker personally provides, or is under an obligation personally to provide, services to another person. This is where an intermediary supplies a worker to an end client;
 - (b). The services are supplied by or through an intermediary or third party under the terms of an agency contract;
 - (c). The worker is subject to (or to the right of) supervision, direction or control as to the manner in which the services are provided; and
 - (d). Any payments are not already taxed as employment income.

3.5 The worker must be providing their services under the terms of an agency contract. The legislation defines an agency contract as being:

“A contract made between the worker and the agency under the terms of which the worker is obliged to personally provide services to the client.”

3.6 Where the above conditions are met, the payment received by the worker is treated as being in consequence of an employment between the intermediary (agency) and worker. This means that the intermediary (agency) must deduct Income Tax at source from the worker. Similar provisions apply for National Insurance.

National Insurance Legislation

3.7 The relevant National Insurance legislation is contained within The Social Security (Categorisation of Earners) Regulations 1978:

- Schedule 1, Column (A) paragraph 2 and Column (B) paragraph 2; and
- Schedule 3 Column (A) paragraph 2 and Column (B) paragraph 2.

and the Northern Ireland equivalent (The Social Security (Categorisation of Earners) (Northern Ireland) Regulations 1978).

3.8 These Regulations dictate that a person (the worker) will be treated as being an “employed earner” for the purpose of NICs when they meet the conditions in the Regulations. When someone is an employed earner for NICs then employer NICs is payable by the employer (or deemed employer for NICs purposes i.e. the intermediary) and the worker has to pay Class 1 employee NICs rather than Class 2 and Class 4 NICs that apply to the self-employed.

3.9 The tests in the NICs legislation are very similar to those in the tax legislation. They require the worker to be subject to, or the right of, direction, supervision or control and that the worker provides their services personally.

3.10 For further detail, please consult HMRC’s online guidance for the tax and NICs, as well as the legislation itself. The guidance can be found on HMRC’s website at www.hmrc.gov.uk/manuals/esmmanual/esm2000.htm

4. The proposal

- 4.1** The Government expects the use of intermediaries facilitating false self-employment to continue to grow rapidly unless they take action to stop it. The Government considers that the impact on particular sectors will be smaller if action is taken before the practice spreads more widely. Tackling the use of intermediaries across the board will level the playing field for compliant businesses in all sectors.
- 4.2** The proposal is to strengthen existing legislation relating to employment agencies by removing the obligation for personal service. Instead the legislation will focus on whether the worker is subject to, or the right of, supervision, direction or control as to the manner in which the duties are carried out. The concept of an agency contract has also been removed from the legislation. A copy of the draft legislation is contained at annex C of this document.
- 4.3** Control for the purposes of the new legislation will mean that anyone is able to exercise control, or have the right to exercise control about how the work is carried out. Other factors will also be considered such as the worker being able to decide when to carry out the work or where but these on their own will not be sufficient to bring someone within the legislation. So if a worker has to carry out their work between certain hours because, for example, this is the only time that the site is open, and has to carry out the work on site but can decide how to do their work and beyond complying with the specification there is no checking of the work then they would be outside of the legislation. However, if someone is able to supervise and could ask for the work to be done in a different way or different work to be done then the worker would be within the legislation. More examples about what does and does not constitute control can be found at annex B.
- 4.4** Where a worker is engaged by or through an intermediary then there will be a presumption that there is control over the worker. This will mean that the

intermediary contracting with the end client to whom the worker provides their services will need to deduct income tax and NICs at source and pay it to HMRC through the RTI. The same intermediary will also be responsible for paying employer NICs. Where an intermediary / third party does not think that there is control, direction supervision, or the right of control direction or supervision over the worker, then they will need to keep evidence of this. If the intermediary is unable to produce satisfactory evidence when requested by HMRC, then HMRC may recover tax and NICs from the intermediary.

4.5 It will be the responsibility of the intermediary that contracts with the end client to operate PAYE and NICs in respect of workers they place with the end client. This will only apply where the worker is not already an employee of another company. Where they are an employee the PAYE regulations and NICs legislation will apply in the usual way to the employer. The new legislation proposed as part of this measure will not prevent the intermediary that pays the worker from operating PAYE or making NICs payments, but failure to do so will mean that the intermediary directly supplying workers to the end client will be liable.

Question 1: Would the definition of intermediary as proposed in the draft legislation cause any practical difficulties e.g. to genuine commercial arrangements? Please provide details and examples.

Question 2: Are there likely to be any commercial difficulties with the proposed definition of employment intermediary? If so please say what they are likely to be and provide examples.

Question 3: Do you have any general comments on the legislation as drafted and if it will achieve the stated policy objectives? If so please provide reasons

Interaction with the intermediaries legislation (IR35) and the Managed Service Company Legislation

4.6 The Government does not intend that the proposed strengthened legislation applies to personal service companies (PSCs) differently to the way it does

currently. The interaction between, and the order in which, the agency legislation, managed service company legislation and intermediaries legislation (IR35) apply will remain as it is currently.

4.7 The proposed new legislation will apply, as the current Agency Legislation does, where a worker is supplied by or through an intermediary. Intermediaries are any structure interposed between the engager and the worker including Employment Businesses and personal service companies (PSC). Those working through PSCs will therefore need to consider, as they do now, the agency legislation.

4.8 However, for the proposed new legislation to apply to a PSC all of the qualifying conditions need to be met. So the worker would need:

- to be subject to (or to the right of) control, supervision or direction as to the manner in which the duties are carried out;
- to provide their services personally;
- for all remuneration to be in consequence of providing services; and
- for the remuneration not to constitute employment income apart from this under the agency legislation.

This means that, as is currently the case, the Agency Legislation will not generally apply to PSCs as they will not meet all of these criteria.

4.9 Historically, when anti-avoidance legislation has been introduced, there have always been those who seek to circumvent the legislation. The Government is therefore aware that there is a possibility that intermediaries that currently facilitate false self-employment may attempt to sidestep the new legislation. These attempts may use marketed controlled service companies in which case HMRC would seek to challenge these using the Managed Service Company (MSC) legislation.

4.10 Unlike PSCs which are fully controlled and run by the person providing their services, MSCs are controlled and run by a third party: a Managed Service Company Provider. Such companies are avoidance structures which attempt to recharacterise employment income as dividends by making workers members of

a company over which they have no financial or operational control. Although historically MSCs have comprised multiple workers/shareholders, equally the MSC legislation would apply where companies comprising a single worker/shareholder are set up and controlled by a promoter for the purpose of avoidance.

4.11 If the MSC legislation does not apply then anyone working through a PSC would need to consider the Intermediaries Legislation, more commonly known as IR35. IR35 applies where, if you look through the PSC (and any other third party in the contractual chain), the relationship between the worker and the engager would be one of employment.

4.12 The Government is also considering, as part of this measure, introducing a Targeted Anti-avoidance Rule (TAAR) to ensure that the legislation works as intended. Although this is not currently included in the draft legislation the Government thinks that this may be needed to address a number of potential scenarios where people may seek to avoid this strengthened legislation.

Question 5: Is the interaction with IR35 likely to cause any issues? If so please state what they are likely to be.

Question 6: Would ensuring the intent of this legislation is maintained; such as with a TAAR, be helpful in preventing attempts to avoid this legislation?

5. Previous action to tackle false self-employment in construction

5.1 False self-employment has long been prevalent in the construction industry. Considerable effort has been made to help construction engagers to get the employment status of their workers right. Alongside this HMRC has also used traditional compliance investigations to tackle the issues of false self-employment. However, this has not resulted in a sustained reduction in false self-employment in this sector.

Construction Industry Scheme

5.2 The Construction Industry Scheme (CIS) is a compliance scheme for those operating on a self-employed basis in the construction industry. Set up in 1972, it monitors payments to and from subcontractors. Registration within the scheme is not HMRC agreeing that a worker should be engaged on a self-employed basis. HMRC accepts that the majority of those working within the scheme are genuinely self-employed but has evidence to suggest a large minority are falsely self-employed.

5.3 Throughout 2004/05 and 2005/06 the Inland Revenue attempted to encourage voluntary compliance with employment status by sending targeted letters to contractors reminding them of their responsibility to determine the correct employment status of workers. This exercise had a limited positive long-term impact.

Declaration on the Construction Industry Scheme (CIS) Return

5.4 In 2007, when the new CIS was launched, a statutory declaration was included on the monthly return. This requires the contractor to confirm the subcontractors on the return are genuinely self-employed. The purpose of this declaration is to remind the industry of their obligations as employers

and to encourage self-regulation. There is some evidence of a positive effect on engagers. However, it has also been a driver for the use of intermediaries within the construction industry as a way of insulating contractors from the consequences of incorrect status declarations.

False self-employment in construction: taxation of workers July 2009

5.5 The previous Government consulted on proposals to tackle false self-employment more widely in the construction industry. The consultation document '*False self-employment in construction: taxation of workers*' was published in July 2009. The consultation document can be accessed at: http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/consult_false_selfemployment_construction.htm

5.6 The proposal outlined in the consultation document was to introduce legislation which moved away from the case law approach. This was to tackle the issue of false self-employment within the construction industry. It proposed that construction industry workers would be deemed to be in receipt of employment income unless one of three statutory criteria applied. These were that they provided:

- plant and equipment; or
- all materials; or
- other workers.

Where one of the criteria was not met the person paying the worker would be responsible for paying employer NICs, deducting Income Tax and NICs from the worker and paying it to HMRC.

5.7 It was recognised in the consultation that the proposed solution could lead to additional administrative burdens and have a negative impact on labour market flexibility. It was also acknowledged that, at the time of the consultation, the construction industry was experiencing the effects of the

recession and advised that measures would not be introduced until recovery was underway.

Response to the 2009 Consultation

5.8 As set out in the summary, the responses reflected a wide range of views. While some stakeholders were supportive of the proposals, others were strongly against the introduction of the proposed deeming test.

5.9 A number of stakeholders agreed that false self-employment was a problem but there was no consensus on the tests that should be included within a legislative solution or that there should be a legislative solution of the nature proposed. The main concern was that employment status was too complicated to be resolved by the three criteria set out. There were also concerns about the practical application of the criteria which could undermine legitimate commercial practice and run the risk of capturing genuinely self-employed individuals, as well as the additional administrative burdens such tests would impose.

5.10 The main concern for those who commented on the impact on the labour market was the impact of the proposals on adaptability and flexibility. Comments were also made that it would not be appropriate for the deeming test to be introduced at the time given the economic outlook.

5.11 A summary of responses was published in October 2009 setting out views and comments put forward by stakeholders. This can be found at: http://webarchive.nationalarchives.gov.uk/20100407010852/http://www.hm-treasury.gov.uk/d/consult_construction_responses090310.pdf

The difference between the 2009 proposals and the current proposals

5.12 Since 2009 engagement practices in the construction industry have changed. Intermediaries are now used on an industrial scale to facilitate

false self-employment, although some is still by direct engagement. The proposal in the 2009 consultation addressed false self-employment facilitated by intermediaries and direct engagement but only in the construction industry, whereas this consultation deals with the discrete issue of intermediaries being used to facilitate false self-employment but across all sectors of the economy.

5.13 The Government believes there is a strong justification for this approach to the problem of false self-employment. Where absolute tests provide no flexibility and run the risk of capturing large numbers of genuinely self-employed workers (particularly in sectors such as construction where the difference between the employed and self-employed can be complex), a more targeted proposal will be less likely to negatively affect the genuinely self-employed. Those people who are genuinely self-employed will not be subject to (or the right of) direction supervision and control.

5.14 Furthermore, the intermediary model which facilitates false self-employment is a 'mass marketed' type of avoidance scheme with workers often having little choice but to accept these terms and conditions. In recent years HMRC has seen evidence of a rapid growth in the use of these types of intermediaries. Evidence suggests that about two thirds of the falsely self-employed in construction are engaged via intermediaries therefore a large proportion of the avoidance in the construction industry will be targeted by this measure.

5.15 There has also been a growth in the use of intermediaries to facilitate false self-employment in other sectors. There is evidence of traditional large employers moving their employees to being falsely self-employed through intermediaries.

6. Statutory returns and record-keeping requirements

Records that currently need to be kept by employment businesses

6.1 Employment Businesses in the UK are currently subject to statutory legislation governing the way they operate their business. In order to comply with the legislation, Employment Businesses are required to keep records relating to those workers for whom they have undertaken activity to find them work, and the end users who are hiring these workers. These records must be kept for at least 1 year from when the Employment Business last provided its services for the worker or hirer. The exception to this is entertainment and modelling agencies, for which the statutory period for retaining records is six years.

6.2 A full list of the information records that Employment Businesses are currently required by law to keep can be found on the employment agency information pages on the central Government website at: <https://www.gov.uk/record-keeping-for-employment-agencies-and-businesses/overview>.

Proposed reporting requirements to HMRC

6.3 Proposed reporting requirements for this measure will be the same as those proposed to inform compliance to tackle offshore employment intermediaries. In paragraphs 3.68 to 3.69 of the summary of consultation responses to HMRC's consultation "*Offshore Employment Intermediaries*" HMRC explained its proposal to place a record keeping and return requirement on the onshore employment intermediary that is placing the worker with the end user. The requirement will be to submit a simple quarterly electronic return containing details of any workers it has placed who are not already accounted for through HMRC's Real Time Information (RTI) System. The summary of responses can be accessed at: <https://www.gov.uk/government/consultations/offshore-employment-intermediaries>.

6.4 HMRC proposes using the same information contained in the quarterly reporting requirement in respect of the offshore employment intermediaries measure, to

identify possible cases of non-compliance with the new legislation by those intermediaries still facilitating false self-employment.

6.5 As explained above, there is already a legal requirement for much of this information to be kept by Employment Businesses. This significantly reduces the administrative burden of the reporting requirement.

What information will Employment Businesses be required to record and/or report to HMRC?

6.6 In respect of the workers they place, for whom they are not deducting income tax and NICs and making returns through RTI all employment intermediaries will be required to hold the following records:

- Worker's full Name
- Worker's National Insurance Number
- Worker's address
- Worker's date of birth
- Where the worker is not a UK citizen their passport number or I.D card number
- Worker's gender
- Reason why income tax and NICs has not been deducted by the employment intermediary
- Name and address of the business who is supplying the worker to the employment business and the number of hours the payment relates to.

6.7 All of these information requirements are the same as HMRC has proposed in relation to offshore employment intermediaries. This list of information requirements is not finalised. Those employment intermediaries with the contract with the end-user will be required to complete the quarterly electronic return in which they will report those workers they have placed with end client and not accounted for via RTI.

Implementation – soft landing

- 6.8** As with our proposals for offshore intermediaries, we recognise that this is a new record keeping and reporting requirement from HMRC. Therefore whilst those intermediaries with a reporting requirement will be expected to make returns to HMRC through RTI from April 2014; they will not be required to submit the first quarterly return until 31 October 2014. This will allow them additional time to put in place the systems to comply with this additional requirement.
- 6.9** As there is only one return the same penalties will apply for late or incorrect returns relating to both onshore and offshore employment Intermediaries. However, in recognition of stakeholders' concerns that April 2014 is less than six months away, the Government will delay the penalties for late or incorrect returns until April 2015. This will allow businesses time to adjust and correct any process errors internal to their businesses. HMRC will commence targeted compliance activity from the start of 2014/15.

7. Impact of the proposal

Employers/intermediaries

- 7.1** The strengthened agency legislation will mean that those intermediaries (including Employment Businesses) who are placing workers who are deemed to be employed for tax and NICs purposes with end clients will have to pay employer' NICs at 13.8 per cent, unless the workers are already employees of another organisation. They will also be responsible for administering the deduction of income tax and employee NICs and paying this to HMRC through RTI.
- 7.2** In many instances they will also be employers for the purposes of employment rights either directly or because of the rights conferred on agency workers by virtue of the Agency Workers Regulations (AWR). In such cases the intermediary will need to ensure that the worker is paid at least National Minimum Wage (NMW), make Statutory Payments and, where eligible, make employers' contributions into pension schemes.

Workers

- 7.3** Many workers will no longer suffer a weekly charge currently levied by those employment intermediaries facilitating false self-employment. Some will be eligible for NMW so the amount that they are paid may increase.
- 7.4** All qualifying workers within this measure will gain entitlement to Statutory Payments such as sick pay and maternity pay. In the majority of cases the worker will also gain the benefits of being an employee for employment rights purposes, although this will depend on them being within the case law tests set out by the courts. Alternatively, some these workers may gain rights as a result of the AWR legislation.
- 7.5** Some workers may see a reduction in their take home pay as a result of this measure as they will have income tax and employee NICs deducted from their wages at source.

- 7.6** The deeming proposals for tax and NICs are based on case law: the exercise of control over the worker. This means that, in many cases, these workers would be employees under the tests for employment rights or the AWR legislation. The proposals will mean in the majority of cases employers will fulfil their duties and that workers receive the protection and benefits to which they are entitled. For example, workers will be entitled to be paid at least national minimum wage hourly rates. The current rate for workers aged 21 and above is £6.31 per hour.
- 7.7** By a worker and their employer paying Class 1 NICs the worker gains entitlement to certain state benefits including Statutory Sick Pay and Statutory Maternity Pay depending on their National Insurance record (or in some cases their spouse or civil partner's). The rate paid depends on the amount of their earnings (currently these contributions are paid when earnings reach £149 per week) and whether they are a member of their employer's contracted-out pension scheme.
- 7.8** By being registered correctly as employees, workers will benefit from employers' contributing to their pension. Recent legislation means employers must gradually enrol all eligible workers into a workplace pension between 2012 and 2018. A workplace pension is a way of saving for retirement arranged by an employer. A percentage of the worker's pay is paid into the pension scheme every payday and usually the employer and the government also add money into the scheme. To qualify workers must work in the UK, be aged between 22 and State Pension age and currently earn more than £9440 a year.
- 7.9** From April 2014 full time employees being paid at national minimum wage rates will be above the threshold for auto-enrolment (£10,000 in 2014/15). Although workers will be required to make contributions from their salary, if they decide to remain enrolled in a pension scheme, their employer must also contribute an additional 3% of salary to their pension pot.

Labour market

- 7.10** Analysis indicates the magnitude of the additional cost to end clients will be small. Any reduction to earnings and profits would be marginal with no change in labour demand.

8. Summary of Impacts

Table of Impacts

This table represents the Government's current understanding of False Self-Employment via Onshore intermediaries.

Exchequer impact (£m)	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19
	-	+520	+425	+380	+415	+445
	<p>These figures are set out in Table 2.1 of the Autumn Statement and have been certified by the Office for Budget Responsibility. More details can be found in the policy costings document published alongside the Autumn Statement.</p> <p>This measure supports the Exchequer in its commitment to protect revenue.</p>					
Economic impact	<p>The measure will increase NICs liabilities for employment intermediaries whose workers are registered as falsely self-employed by a small amount, with the impact expected to be focused on the construction sector.</p>					
Impact on individuals and households	<p>Around 200,000 workers in the construction sector, and 50,000 in other sectors, are reckoned to be engaged with and through onshore employment intermediaries.</p> <p>By virtue of being treated (correctly) as employees, all qualifying workers within this measure will gain Statutory Payments such as statutory sick pay and maternity pay and some will be eligible for National Minimum Wage (NMW). In the majority of cases the worker will also gain the benefits of being an employee for employment rights purposes, although this will depend on them being within the case law tests set out by the courts.</p> <p>These workers will face higher tax and NIC liabilities, but will no longer be paying service charges (which can be as high as £1,250 per year) to an intermediary company. Some workers will gain overall although for others there will be a net loss.</p>					
Equalities impacts	<p>No equality groups have been identified as being impacted differently from this change.</p>					
Impact on business including civil society organisations	<p>As the status of false self-employed workers will change to employees the onshore employment intermediaries will have to pay Class 1 employer NICs. The measure is not expected to have a significant impact on other businesses or civil society organisations.</p> <p>There are known to be approximately 10,000 Business Services companies and it is expected that most of these are likely to be affected in a small way by this measure. There are no expected impacts, either one-off or ongoing in terms of requiring new IT or</p>					

	training as these businesses are expected to already be employers and thus will be already operating PAYE.
Operational impact (£m) (HMRC or other)	The operational impact of this measure is expected to be negligible.
Other impacts	<u>Small and micro business assessment</u> : the impact on small or micro businesses is expected to be negligible. Other impacts have been considered and none have been identified.

9. Summary of Consultation Questions

Question 1: Would the definition of intermediary as proposed in the draft legislation cause any practical difficulties e.g. to genuine commercial arrangements? Please provide details and examples.

Question 2: Are there likely to be any commercial difficulties with the proposed definition of employment intermediary? If so please say what they are likely to be and provide examples.

Question 3: Do you have any general comments on the legislation as drafted and if it will achieve the stated policy objectives? If so please provide reasons

Question 4: Is the interaction with IR35 likely to cause any issues? If so please state what they are likely to be.

Question 5: Would ensuring the intent of this legislation is maintained, such as with a TAAR, be helpful in preventing attempts to avoid this legislation?

10. The Consultation Process

- 10.1** The tax consultation framework envisages consultation at policy and legislation stage but allows for a different approach to be taken where appropriate. This consultation is being conducted on the policy and draft legislation at the same time over an 8 week period building on the outcomes from the offshore employment intermediaries consultation. The Government is aware that there is a large and growing avoidance risk posed by employment intermediaries facilitating false self-employment; they think that it is therefore appropriate to legislate in Finance Bill 2014. Additionally, because of the offshore employment intermediaries legislation, due to take effect on 6 April 2014, there is a risk of acceleration in the avoidance of employment taxes by onshore employment intermediaries facilitating false self-employment and so it is necessary to legislate to the same timetable. We are therefore providing the opportunity to comment on the technical aspects of the policy and legislation. The 8 week consultation time period will allow the proposed measure to be brought in at FB14.
- 10.2** The purpose of the consultation is to seek views on the detailed policy design and the draft legislation in order to confirm, as far as possible, that it will achieve the policy objective with no unintended effects.

How to respond

- 10.3** A summary of the questions in this consultation is included at chapter 9.
- 11.4 Responses should be sent by [date], by e-mail to consultation.intermediaries@hmrc.gsi.gov.uk or by post to: Robert Burton, 1E/10 100 Parliament Street, London, SW1A 2BQ.
- 10.4** Telephone enquiries 03000 526 659 (from a text phone prefix this number with 18001)
- 10.5** Paper copies of this document or copies in Welsh and alternative formats (large print, audio and Braille) may be obtained free of charge from the above

address. This document can also be accessed from [HMRC Inside Government](#). All responses will be acknowledged, but it will not be possible to give substantive replies to individual representations.

- 10.6** When responding please say if you are a business, individual or representative body. In the case of representative bodies please provide information on the number and nature of people you represent.

Confidentiality

- 10.7** Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes. These are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004.

- 10.8** If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals with, amongst other things, obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on HM Revenue and Customs (HMRC).

- 10.9** HMRC will process your personal data in accordance with the DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

Consultation Principles

- 10.10** This consultation is being run in accordance with the Government's Consultation Principles. The consultation will be run over a 9 week period to

allow for views on both the proposed policy and draft legislation. A number of round table events will be held during this period to facilitate the gathering of views from external stakeholders. Where the round table dates offered are not convenient we will try and arrange one to one events where possible.

10.11 The Consultation Principles are available on the GOV.UK website:

<https://www.gov.uk/government/publications/consultation-principles-guidance>

10.12 If you have any comments or complaints about the consultation process please contact: Amy Burgess, Consultation Coordinator, Budget Team, HM Revenue & Customs, 100 Parliament Street, London, SW1A 2BQ.

Email: hmrc-consultation.co-ordinator@hmrc.gsi.gov.uk. Please do not send responses to the consultation to this address.

11. Glossary

End client

An end client is the entity which uses the labour or services provided by the worker. The end client may be the employer of the worker or may be the entity that the intermediary ultimately supplies the worker to.

Employment Business

An Employment Business provides staffs who do not become employed by the Hirer but who are seconded or supplied to a 'client employer'. (Employment Agency Act 1973 (amended in 2004))

False self-employment

False self-employment is where someone whose engagement terms would dictate should be treated as an employee falsely presents their terms and conditions as though they would be self-employed.

Intermediary

An intermediary is an entity which interposes itself between a worker and the engager. This includes personal service companies and Employment Businesses

Personal Service Company

A personal service company (PSC) is a small limited company thorough which a owner/director provides there own personal services.

Annex A: Relevant (current) Government Legislation

Income Tax (Earnings and Pensions) Act (ITEPA) 2003

44 Treatment of workers supplied by agencies

(1) This section applies if—

- (a) an individual (“the worker”) personally provides, or is under an obligation personally to provide, services (which are not excluded services) to another person (“the client”),
- (b) the services are supplied by or through a third person (“the agency”) under the terms of an agency contract,
- (c) the worker is subject to (or to the right of) supervision, direction or control as to the manner in which the services are provided, and
- (d) remuneration receivable under or in consequence of the agency contract does not constitute employment income of the worker apart from this Chapter.

(2) If this section applies—

- (a) the services which the worker provides, or is obliged to provide, to the client under the agency contract are to be treated for income tax purposes as duties of an employment held by the worker with the agency, and
- (b) all remuneration receivable under or in consequence of the agency contract (including remuneration which the client pays or provides in relation to the services) is to be treated for income tax purposes as earnings from that employment.

45 Arrangements with agencies

If—

- (a) an individual (“the worker”), with a view to personally providing services (which are not excluded services) to another person (“the client”), enters into arrangements with a third person (“the agency”), and
 - (b) the arrangements are such that the services (if and when they are provided) will be treated for income tax purposes under section 44 as duties of an employment held by the worker with the agency,
- any remuneration receivable under or in consequence of the arrangements is to be treated for income tax purposes as earnings from that employment.

46 Cases involving unincorporated bodies etc

(1) Section 44 also applies—

- (a) if the worker personally provides, or is under an obligation to personally provide, the services in question as a partner in a firm or a member of an unincorporated body;
- (b) if the agency in question is an unincorporated body of which the worker is a member.

(2) In a case within subsection (1)(a), remuneration receivable under or in consequence of the agency contract is to be treated for income tax purposes as income of the worker and not as income of the firm or body.

47 Interpretation of this Chapter

(1) In this Chapter “agency contract” means a contract made between the worker and the agency under the terms of which the worker is obliged to personally provide services to the client.

(2) In this Chapter “excluded services” means—

(a) services as an actor, singer, musician or other entertainer or as a fashion, photographic or artist's model, or

(b) services provided wholly—

(i) in the worker's own home, or

(ii) at other premises which are neither controlled or managed by the client nor prescribed by the nature of the services.

(3) For the purposes of this Chapter “remuneration”—

(a) does not include anything that would not have constituted employment income of the worker if it had been receivable in connection with an employment apart from this Chapter, but

(b) subject to paragraph (a), includes every form of payment, gratuity, profit and benefit.

The Social Security (Categorisation of Earners) Regulations 1978 and The Social Security (Categorisation of Earners) (Northern Ireland) Regulations 1978

SCHEDULE 1

Regulation 2

Part 1

Column (A)

Column (B)

Employment in respect of which, subject to the provisions of regulation 2 and to the exceptions in column (b) of this Part, earners are treated as falling within the category of employed earner

Persons excepted from the operation of column (A)

[1. Employment - (a) as an office cleaner or as an operative in any similar capacity in any premises other than those used as a private dwelling-house; or (b) as a cleaner of any telephone apparatus and associated fixtures, other than of apparatus and fixtures in premises used as a private dwelling-house.¹⁹]

2. Employment (not being employment in respect of which a person is, under the provisions of paragraph 1, 3 or 5 of this Schedule, treated as falling within

1. None
2. Any person in employment described in paragraph 2 in column (A)-(a) where the service of the person employed is rendered in his own home or on other

the category of an employed earner) in which the person employed renders, or is under obligation to render, personal service and is subject to supervision, direction or control, or to the right of supervision, direction or control, as to the manner of the rendering of such service and where the person employed is supplied by or through some third person (including, in the case of a body of persons unincorporate, a body of which the person employed is a member) and - (a) where earnings for such service are paid by or through, or on the basis of accounts submitted by, that third person or in accordance with arrangements made with that third person; or (b) where payments, other than to the person employed, are made by way of fees, commission or other payments of like nature which relate to the continued employment in that employment of the person employed.

premises not under the control or management of the person to whom the person employed is supplied (except where such other premises are premises at which the person employed is required, by reason of the nature of the service, to render service); or (b) who is employed as an [*actor, singer, musician or other*²⁰] entertainer or as a fashion, photographic or artist's model; or (c) in a case where earnings are not paid by or through, or on the basis of accounts submitted by, that third person - (i) where the person employed has obtained that employment through a third person as part of that third person's activities in which persons seeking employment are introduced to persons requiring their services; and (ii) where as a result of such an introduction the person employed and the person to whom he has been introduced have entered into a contract with each other for the rendering of such service; and (iii) where only the person employed and the person to whom he has been introduced have a direct financial interest in the continued employment in that employment of the person employed.

3. Employment of a person by his or her spouse for the purposes of the spouse's employment.

3. None.

4. Employment (not being employment described in paragraph 2 in column (A) of this Schedule) as a lecturer, teacher, instructor or in any similar capacity in an educational establishment by any person providing education being employment in which - (a) ²¹ (b) the person employed gives the instruction in the presence of the persons to whom the instruction is given except where the employment is in the Open University,

[4. Any person in employment described in paragraph 4 in column (A) where - (a) the person employed has agreed, prior to giving the instruction, to give it on not more than three days in three consecutive months; or (b) the instruction is given as public lectures²².]

and (c) the earnings in respect of the employment are paid by, or on behalf of, the person providing the education.

5. Employment as a minister of religion, not being employment under a contract of service or in an office with emoluments chargeable to income tax under Schedule E.

Para 5A in force from 17.7.98. S.I. 1998/1728 and 1999/3 refer. 5A.

Employment as an entertainer, not being employment under a contract of service or in an office with emoluments chargeable to income tax under Schedule E.

5. Any person in employment described in paragraph 5 of column (A) whose remuneration in respect of that employment (disregarding any payment in kind) does not consist wholly or mainly of stipend or salary.

5A. Any person in employment described in paragraph 5A in column (A) whose remuneration in respect of that employment (disregarding any payment in kind) does not consist wholly or mainly of salary.

SCHEDULE 3

Regulation 5

EMPLOYMENTS IN RESPECT OF WHICH PERSONS ARE TREATED AS SECONDARY CLASS 1 CONTRIBUTORS

Column (A)

Employments

[1. Employment - (a) as an office cleaner or as an operative in any similar capacity in any premises other than those used as a private dwelling-house; or (b) as a cleaner of any telephone apparatus and associated fixtures, other than of apparatus and fixtures in premises used as a private dwelling-house.²⁸]

2. Employment, whether or not under a contract of service (not being employment described in paragraph 2 in column (B) of Schedule 1 to these regulations or an employment to which paragraph 1, 4, 5, 7 or 8 of this Schedule applies) in which the person employed renders, or is under an

Column (B)

Persons treated as secondary Class 1 contributors

1.(a) Where the person employed is supplied by, or through the agency of, some third person and receives his remuneration from, or through the agency of, that third person, that third person; (b) in any other case, except where the employment is also one described in paragraph 4 in column (A) of this Schedule, the person with whom the person employed contracted to do the work.

2.(a) In England and Wales where the person employed is supplied by or through the agency of a body of persons unincorporate and the person employed is a member of that body, the other members of that body, and, in any other case, the third person by whom or through whose agency the person

obligation to render, personal service and is subject to supervision, direction or control, or to the right of supervision, direction or control, as to the manner of the rendering of such service and where the person employed is supplied by or through some third person (including, in the case of a body of persons unincorporate, a body of which the person employed is a member) and - (a) where earnings for such service are paid by or through, or on the basis of accounts submitted by, that third person or in accordance with arrangements made with that third person; or (b) where payments, other than to the person employed, are made by way of fees, commission or other payments of like nature which relate to the continued employment in that employment of the person employed.

3. Employment of a person by his or her spouse for the purposes of the spouse's employment.

4. Employment (not being employment in respect of which a secondary contributor, in any particular case, is prescribed in paragraph 1(a) in column (B) of this Schedule, and not being employment described in paragraph 2 in column (A) of that Schedule) by a company, being a company within the meaning of the Companies Act 1948³¹ and in voluntary liquidation but carrying on business under a liquidator.

5. Employment in chambers as a barrister's clerk.

6. Employment (not being employment described in paragraph 4 in column (B) of Schedule 1 to these regulations or an employment which paragraph 2 of this Schedule applies) as a lecturer, teacher, instructor or in any similar

employed is supplied; (b) in Scotland, the third person by whom or through whose agency the person employed is supplied; (c) where the other members of the body or the third person specified in sub-paragraph (a) or, as the case may be, the third person specified in sub-paragraph (b) of this paragraph do not fulfil the conditions as to residence or presence in Great Britain prescribed in [regulation 119(1)(b) of the Social Security (Contributions) Regulations 1979^{29 30}], the person to whom the person employed is supplied (and in that case sub-paragraph (a) or, as the case may be, sub-paragraph (b) shall not apply).

3. The spouse.

4. The person who at the time of the employment holds the office of liquidator.

5. The head of chambers.

6. The person providing the education.

capacity in an educational establishment by any person providing education being employment in which - (a) ³²(b) the person employed gives the instruction in the presence of the persons to whom the instruction is given except where the employment is in the Open University; and (c) the earnings in respect of the employment are paid by, or on behalf of, the person providing the education.

7. Employment as a minister of the Church of England, not being employment under a contract of service.

8. Employment as a minister of religion not being employment - (a) as a minister of the Church of England; or (b) under a contract of service; or (c) described in paragraph 5 in column (B) of Schedule 1 to these regulations.

7. The Church Commissioners for England.

8.(a) Where the remuneration in respect of the employment is paid from one fund, the person responsible for the administration of that fund; (b) where the remuneration in respect of the employment is paid from more than one fund and - (i) remuneration is also paid from one of those funds to other ministers of religion, the person responsible for the administration of that fund;(ii) remuneration is also paid from two or more of those funds to other ministers of religion, the person responsible for the administration of the fund from which remuneration is paid to the greatest number of ministers of religion who carry out their duties in Great Britain;(iii) no person falls to be treated as a secondary contributor by virtue of sub-paragraph (b)(i) or (ii) of this paragraph, the person responsible for the administration of the fund from which the minister of religion first receives a payment of remuneration in the tax year.

³³9. Employment by a foreign employer where - (a) in pursuance of that employment the personal service of the person employed is made available to a

9. The host employer to whom the personal service of the person employed is made available.

host employer; and (b) the personal service is rendered for the purposes of the business of that host employer; and (c) that personal service for the host employer begins on or after 6th April 1994. ^{34]}

Para. 10 in force from 17.7.98 until 31.1.99 only. S.I. 1998/1728 refers. 10. Employment as an entertainer (not being employment under a contract of service or in an office with emoluments chargeable to income tax under Schedule E) except where the earner is a person to whom paragraph 5A in column (B) of Schedule 1 to these Regulations applies.

10. The person who has engaged the entertainer under a contract for services for the provision of the entertainment which constitutes that employment

Annex B: Case examples for the proposal – where control is and is not exercised

Example 1 – Control Exercised

Worker A works as a computer programmer. He contracts with a high street employment business (EB1) and signs a self-employed contract with the employment business to provide services to a bank.

Worker A has to report to a manager in the bank where he is told he is required to work during the normal bank hours 8:30am to 5pm Monday to Friday until the project is complete. Any time off has to be agreed and authorised by the manager. Worker A is to work alongside the banks own IT employees. He is given detailed instructions as to the specific project he is required to work on, what is required and is told this must be completed in accordance to the banks specifications. Each stage of the project must be authorised and signed off by the banks in house IT manager.

In this scenario whilst the contract signed between the worker and the employment business is purporting to be a self-employed contract, there is clearly extensive control exercised by the end user, the bank, in relation to the work worker A is undertaking. The employment business (EB1) obtains/is notified as to the level of control over worker A and as there is clearly control being exercised over worker A EB1 is required to operate PAYE.

Example 2 – No control exercised

The scenario is as in Example 1. Worker B contracts registers with the high street employment business (EB1) and signs a self employed contract. Worker B's services are supplied to a bank where the requirement is for a specific IT programme to be written. Worker B has been engaged on this project as the bank does not have an IT specialist who can perform the task required. The work is for a specific task which was

contractually agreed between EB1 and the bank. Worker B is only engaged to work on and complete that task and he cannot be asked to work on or provide any input into other IT matters the bank may have, unless there is a revised contract drawn up. Whilst worker B attends the bank to work on its computer system, he can and does work on his own computer programming systems at home as part of the development process. Worker B is not required to attend the bank at specific times and can come and go as he pleases in accordance with the normal bank opening hours.

In this scenario there is no control exercised by either the bank or EB1 so worker B is undertaking the duties on a self-employed basis. There is no requirement for PAYE to be operated or for Income Tax and NICs to be deducted at source.

Example 3 – Control Exercised

Worker C approaches a high street employment business (EB1) who is advertising for painters to work on a major refurbishment scheme. EB1 inform worker C that he can start work but he must contract through a further company (Intermediary EB2) which will deal with the payroll issues and make payment to worker C. Worker C contracts on a self-employed basis with EB2 and EB2 contracts with EB1 to supply worker C to the end user.

Worker C reports to the end user as he is required to provide painting services as directed by the end user. During the first week worker C paints rooms on the ground floor of one of the office buildings. The end user then moves worker C to another building during the second week where work is falling behind. In the third week worker C is told to return to the original office building where decorating work can now start on the second floor. The end user has control over what worker C does and can direct him at any particular time as to the work and the order in which the work had to be done. The end user dictated the manner in which the work was undertaken.

The payment route is from end user to EB1 then to EB2 then to worker C. EB1 & EB2 deduct their fees and EB2 pays worker C.

In this scenario control is clearly being exercised by the end user. EB1 is therefore required to operate PAYE and deduct income tax and NICs in relation to payment received for work done by worker C.

Example 4 – No control exercised

Worker D contracts as described in example 3. However, the contract between EB1 and the end user is to paint floor 3 of a specific office block. The work is to be completed within 3 weeks but it is up to worker C to decide what work he is going to do in order to fulfil this contract. He can undertake painting the floor in any order he chooses and can come and go as he chooses so long as the work is completed by the deadline in 3 weeks. The end user cannot tell worker C to stop work on floor 3 and paint another part of the building or to go and paint a different building instead as that is not within the contractual agreement.

In this scenario there is no control being exercised over worker C. This means that there is no requirement for PAYE to be operated.

Annex C

1 Treatment of agency workers

- (1) Chapter 7 of Part 2 of ITEPA 2003 (income tax treatment of agency workers) is amended as follows.
- (2) For section 44 (treatment of workers supplied by agencies) substitute—

“44 Treatment of workers supplied by agencies

 - (1) This section applies if—
 - (a) an individual (“the worker”) personally provides, or is personally involved in the provision of, services (which are not excluded services) to another person (“the client”),
 - (b) there is a contract between the client and a third person (“the agency”) under or in consequence of which—
 - (i) the services are provided, or
 - (ii) the client pays, or otherwise provides consideration, for the services, and
 - (c) remuneration receivable by the worker in consequence of providing, or being involved in the provision of, the services does not constitute employment income of the worker apart from this Chapter.
 - (2) But this section does not apply if it is shown that the manner in which the worker provides the services, or (as the case may be) the manner of the worker’s involvement in the provision of the services, is not subject to (or to the right of) supervision, direction or control by any person.
 - (3) If this section applies—
 - (a) the worker is to be treated for income tax purposes as holding an employment with the agency, the duties of which consist of—
 - (i) the services the worker provides to the client, or
 - (ii) the worker’s involvement in the provision of the services to the client, and
 - (b) all remuneration receivable by the worker (from any person) in consequence of providing, or being involved in the provision of, the services is to be treated for income tax purposes as earnings from that employment.”
 - (3) In section 45 (arrangements with agencies)—
 - (a) in paragraph (a), after “providing” insert “, or being personally involved in the provision of,” and
 - (b) in paragraph (b), after “provided)” insert “or the worker’s involvement in their provision”.
 - (4) In section 46 (cases involving unincorporated bodies etc)—
 - (a) in subsection (1)(a), for “or is under an obligation to personally provide” substitute “or is personally involved in the provision of”, and
 - (b) in subsection (2), for the words from “under” to “contract” substitute “by the worker in consequence of providing, or being involved in the provision of, the services”.
 - (5) In section 47 (interpretation of Chapter 7), omit subsection (1).

-
- (6) In Chapter 3 of Part 11 of that Act (PAYE: special types of payer or payee), in section 688 (agency workers) –
- (a) for subsection (1) substitute –
- “(1) Subsections (1A) and (1B) apply if the remuneration receivable by an individual in consequence of providing, or being involved in the provision of, services falls to be treated under section 44 (agency workers) as earnings from an employment.
- (1A) The relevant provisions have effect as if the individual held the employment with or under the agency.
- (1B) For the purposes of sections 687, 689 and 689A, if –
- (a) a person other than the agent or an intermediary of the agent makes a payment of, or on account of, PAYE income of the individual, and
- (b) the payment is not within subsection (2)(b),
- the person is to be treated as making the payment as an intermediary of the agent.”
- (b) in subsection (2)(a), for “under or in consequence of any contract” substitute “in consequence of providing, or being involved in the provision of, services”.
- (7) The amendments made by this section are treated as having come into force on 6 April 2014.

EXPLANATORY NOTE

Treatment of Agency Workers

SUMMARY

This clause amends existing agency legislation (treatment of workers supplied by agencies) in the Income Tax (Earnings and Pensions) Act (ITEPA) 2003.

DETAILS OF THE CLAUSE

1. Sub-section 1 provides that Chapter 7 of Part 2 of ITEPA is amended.
2. Sub-section 2 substitutes a new section 44 ITEPA 2003 :
 - New 44 (1) if the conditions in 44(1) (a), (b), and (c) apply then the this section applies. Those conditions are where:
 - (a) a worker personally provides their services or is personally involved in a service that is being supplied, such as a composite service;
 - (b) there is a contract between an end client (the person who the worker is providing their services to) and a third party (known as the agency in this legislation but could be any third party) as a result of which either services of the worker are provided, or the client pays, or otherwise provides consideration, for services to be provided; and
 - (c) payments receivable by the worker under or in consequence of the contract is not chargeable elsewhere as employment income for example the worker does not have income tax deducted because they are an employee of another company.
 - New 44 (2) provides that new section 44 will not apply where the manner in which the service is provided or the involvement in the provision of a service (such as a composite service) by the worker is not subject to (or the right of) control, direction or supervision by any person.
 - New 44 (3) (a) & (b) provides that where the worker is providing services personally or as part of a composite service (a service made up of a number of services) they must be treated as an employee of the agency for income tax, and all income receivable by the worker in consequence of providing a service is to be treated for income tax as earnings to have come from said employment.

3. Sub-section 3 amends section 45 ITEPA 2003: New 45 (a) & (b) extends this subsection to include a composite service (as defined above).
4. Sub-section 4 amends section 46 ITEPA 2003:
 - in (1) (a) the obligation to personally provide is removed and replaced by “personally involved in the provision”, which applies it to composite services.
 - in (2) removes the reference to an agency contract and instead inserts a reference to the remuneration being received by the worker as a consequence of providing, or being involved in the provision of, the services.
5. Sub-section 5 amends section 47 ITEPA 2003: 47 (1) has now been omitted, removing the definition of an agency contract and the obligation for personal service.
6. Sub-section 6 amends Chapter 3 Part 11 of ITEPA. It substitutes sub-section (1) of section 688 for new sub-section (1). New subsections 1A and 1B apply if the income receivable by the worker would be treated as employment income under the new section 44.
7. New subsection 1A that the worker is treated as being an employee of the agency (third party)
8. New sub-section 1B is that for the purposes of sections 687, 689 and 689A if:
 - a. Someone other than the third party (agency) or their intermediary makes a payment on account of PAYE income of the worker, and
 - b. the payment is not within subsection (2)(b) – a payment of, or on account of PAYE income of the worker is made by the client (the person whom the worker is providing their services to) or at the expense of the client.

(b) substitutes ‘under of in consequence of any contract’ with ‘in consequence of providing, or being involved in the provision of services’. This changes the wording to reflect the amended wording of new section 44.

BACKGROUND NOTE

9. This change has been introduced to prevent the avoidance of employment taxes by UK agency engaging UK workers via non-UK agencies. It supports the Government’s anti-avoidance policy.
10. If you have any questions about this change, or comments on the legislation, please contact Sarah Radford on 03000 586 474 (email: sarah.radford@hmrc.gsi.gov.uk.)

2014 No. 0000

SOCIAL SECURITY

**The Social Security (Categorisation of Earners) (Contributions)
(Amendment) Regulations 2014**

(i) *Made* - - - - -

Laid before Parliament ***
Coming into force - - - *6th April 2014*

The Treasury make the following Regulations in exercise of powers conferred by sections 2(2), 7(2), and section 175(4) of the Social Security Contributions and Benefits Act 1992⁽¹⁾ and sections 2(2), 7(2) and 171(4) of the Social Security Contributions and Benefits (Northern Ireland) Act 1992⁽²⁾ and now exercisable by them⁽³⁾.

The Secretary of State concurs with the making of Regulation 5.

The Department for Social Development⁽⁴⁾ concurs with the making of Regulation 7.

PART 1

General

2.Citation, commencement and effect

3.—(1) These Regulations may be cited as the Social Security (Categorisation of Earners) (Contributions) (Amendment) Regulations 2014 and come into force on 6th April 2014.

(2) These Regulations have effect in relation to payments made on or after 6th April 2014.

(1) 1992 c.4.

(2) 1992 c.7.

(3) The power to make regulations under section 2 of the Social Security Contributions and Benefits Act 1992 (“the 1992 Act”) was transferred to the Treasury by paragraph 2 of Schedule 11 to the Welfare Reform and Pensions Act 1999 (c.30). (“the 1999 Act”) Section 7(2) of the 1992 Act was amended, and the power to make regulations under it transferred to the Treasury, by paragraph 7 of Schedule 3 to the Social Security (Transfer of Functions, etc) Act 1999 (c.2). The power to make Regulations, with the concurrence of the Department for Social Development, under section 2(2) of the Social Security Contributions and Benefits (Northern Ireland) Act 1992 (“The Northern Ireland Act”) was transferred to the Treasury, by paragraph 10 of Schedule 11 to the 1999 Act. Section 7(2) of the Northern Ireland Act was amended, and the power to make regulations under it transferred to the Treasury, by paragraph 8 of Schedule 3 to the Social Security (Transfer of Functions, etc) (Northern Ireland) Order 1999 (S.I. 1999/671)

(4) The functions of the Department of Health and Social Services for Northern Ireland under the Social Security Contributions and Benefits (Northern Ireland) Act 1992 were transferred to the Department for Social Development by article 8(b) of, and Part 2 of Schedule 6 to, the Departments (Transfer and Assignment of Functions) Order (Northern Ireland) 1999 (S.R. (NI) 1999 No 481).

PART 2

Employment intermediaries

4. Amendment of the Social Security (Categorisation of Earners) Regulations 1978

5.—(1) The Social Security (Categorisation of Earners) Regulations 1978⁽⁵⁾ are amended as follows.

(2) In regulation 1 (citation, commencement and interpretation) in paragraph (2)—

(a) after the definition of “the Act” insert—

““an agency” in paragraph 2 of Schedule 1 and paragraphs 2 and 9 of Schedule 3 to these regulations means either a UK agency or a foreign agency;”

(b) after the definition of “category A, B, C or D waters” insert—

““the client” in paragraph 2 of Schedule 1 and paragraphs 2 and 9 of Schedule 3 to these regulations means a person (including any member of a group of companies) to whom the worker personally provides, or is personally involved in the provision of, services;”

(c) after the definition of “entertainer” insert—

““foreign agency” in paragraph 2 of Schedule 1 and paragraphs 2 and 9 of Schedule 3 to these regulations means a person (including a body of persons unincorporate of which the employed person is a member) who does not have a place of business, residence or presence in Great Britain, ”;

(d) in the definition of “host employer” after “place of business” insert “, residence or presence”;

(e) in the definition of “remuneration” before “paragraph 8” insert—

“—

(1) paragraph 2 of Schedule 1 and paragraphs 2 and 9 of Schedule 3 means—

(a) every form of payment, profit, gratuity or benefit, but

(b) does not include anything that would not have constituted employed earners earnings if it had been receivable in connection with an employment but for those paragraphs; and

(2) ”.

(f) after the definition of “remuneration” insert—

““UK agency” in paragraph 2 of Schedule 1 and paragraphs 2 and 9 of Schedule 3 to these regulations means a person (including a body of persons unincorporate of which the employed person is a member) who has a place of business, residence or presence in Great Britain;

““worker” in paragraph 2 of Schedule 1 and paragraphs 2 and 9 of Schedule 3 to these regulations means the person providing services under or in consequence of the contract;”;

(3) In Part 1 of Schedule 1 (prescribed employments treated as employed or self-employed)—

(a) for paragraph 2 of column (A) (employments in respect of which earners are treated as falling within the category of employed earner) substitute—

“2. Employment (not being an employment in which the employed earner is treated as an employed earner under the provisions of paragraph 1, 3 or 5 of this Schedule) where—

(a) the worker personally provides, or is personally involved in the provision of services, to the client;

(b) there is a contract between the client and an agency under or in consequence of which—

(i) the services are provided, or

(ii) the client pays, or otherwise provides consideration for the services, and

(c) remuneration is receivable by the worker (from any person) in consequence of providing, or being involved in the provision of, the services.”.

(5) S.I. 1978/1689; relevant amendments made by S.I. 1994/726, 1990/1894, 2003/2420. There are other amending instruments, none of which are relevant.

(b) for paragraph 2 of column (B) (persons exempt from the operation of column (A)) substitute—

“2. Any employed person in paragraph 2 of column (A)—

- (a) where the worker carries out the employment wholly in their own home or on other premises not under the control or management of the client (except where the other premises are premises at which the employed person is required, by reason of working for the client, to work); or
- (b) who works for the client as an entertainer, or as a fashion, photographic or artist’s model; or
- (c) where it is shown that—
 - (i) the manner in which the worker provides the services, or
 - (ii) the manner of the worker’s involvement in the provision of the services,is not subject to (or to the right of) supervision, direction or control by any person.”.

(4) In Schedule 3 (employments in respect of which persons are treated as secondary class 1 contributors)—

(a) for paragraph 2 of column (A) (employments) substitute—

“2. Employment (not being an employment described in paragraph 2 of column (B) of Schedule 1 to these regulations or an employment to which paragraph 1, 4, 5, 7 or 8 of this Schedule applies) where—

- (a) the worker personally provides, or is personally involved in the provision of services, to the client;
- (b) there is a contract between the client and a UK agency under or in consequence of which—
 - (i) the services are provided, or
 - (ii) the client pays, or otherwise provides consideration for the services, and
- (c) remuneration is receivable by the worker (from any person) in consequence of providing, or being involved in the provision of, the services.”.

(b) for paragraph 2 of column (B) (persons treated as secondary contributor) substitute—

“2. The UK agency who is party to the contract with the client.”.

(c) in paragraph 9 of column (A) (employments), for the text from “Employment” until “1994.” substitute—

“Employment—

- (a) by a foreign employer where the employed person provides, or is personally involved in the provision of services, to a host employer, or
- (b) under or in consequence of a contract between a foreign agency and a client in Great Britain where the worker provides, or is personally involved in the provision of services, to that client; or
- (c) by a foreign employer where the worker provides, or is personally involved in the provision of services, to a client in Great Britain under or in consequence of a contract between that client and a UK agency; or
- (d) by a foreign agency where the worker provides, or is personally involved in the provision of services, to a client in Great Britain under or in consequence of a contract between that client and a UK agency; or
- (e) by a UK employer where the worker provides, or is personally involved in the provision of services, to a person outside the United Kingdom under or in consequence of a contract between that person and a UK agency and the worker is eligible to pay contributions in the United Kingdom in relation to that employment; or
- (f) by a foreign employer where the worker provides, or is personally involved in the provision of services, to a person outside the United Kingdom under or in consequence of a contract

between that person and a UK agency and the worker is eligible to pay contributions in the United Kingdom in relation to that employment”.

(d) for paragraph 9 of column (B) (persons treated as secondary contributor) substitute—

“9. Where the employment is—

- (a) employment within paragraph 9(a) of column (A), the host employer;
- (b) employment within paragraph 9(b) of column (A), the client;
- (c) employment within paragraph 9(c) of column (A), the UK agency who has the contractual relationship with the client;
- (d) employment within paragraph 9(d) of column (A), the UK agency who has the contractual relationship with the client;
- (e) employment within paragraph 9(e) of column (A), the UK employer or UK agency who has the contractual relationship with the person outside the United Kingdom; or
- (f) employment within paragraph 9(f) of column (A), the UK agency who has the contractual relationship with the person outside the United Kingdom.”.

6. Amendment of the Social Security (Categorisation of Earners) (Northern Ireland) Regulations 1978

7.—(1) The Social Security (Categorisation of Earners) Regulations 1978(6) are amended as follows.

(2) In regulation 1 (citation, commencement and interpretation) in paragraph (2)—

(a) after the definition of “the Act” insert—

““an agency” in paragraph 2 of Schedule 1 and paragraphs 2 and 7 of Schedule 3 to these regulations means either a UK agency or a foreign agency;”

(b) after the definition of “category A,B,C,D waters” insert—

““the client” in paragraph 2 of Schedule 1 and paragraphs 2 and 7 of Schedule 3 to these regulations means a person (including any member of a group of companies) to whom the worker personally provides, or is personally involved in the provision of, services;”

(c) after the definition of “entertainer” insert—

““foreign agency” in paragraph 2 of Schedule 1 and paragraphs 2 and 7 of Schedule 3 to these regulations means a person (including a body of persons unincorporate of which the employed person is a member) who does not have a place of business, residence or presence in Northern Ireland, ”;

(d) in the definition of “host employer” after “place of business” insert “, residence or presence”

(e) in the definition of “remuneration” before “paragraph 8” insert

“—

(1) paragraph 2 of Schedule 1 and paragraphs 2 and 9 of Schedule 3 means—

- (a) every form of payment, profit, gratuity or benefit, but
 - (b) does not include anything that would not have constituted employed earners earnings if it had been receivable in connection with an employment but for those paragraphs; and
- (2) ”.

(f) after the definition of “remuneration” insert—

““UK agency” in paragraph 2 of Schedule 1 and paragraphs 2 and 7 of Schedule 3 to these regulations means a person (including a body of persons unincorporate of which the employed person is a member) who has a place of business, residence or presence in Northern Ireland;

“worker” in paragraph 2 of Schedule 1 and paragraphs 2 and 7 of Schedule 3 to these regulations means the person providing services under or in consequence of the contract;”.

(6) S.R. 1978 No. 401; relevant amendments made by S.R. 1990 No. 339, 1994 No. 92, 1998 No. 250, and S.I. 2003/2421 There are other amending instruments, none of which are relevant.

(3) In Part 1 of Schedule 1 (prescribed employments treated as employed or self-employed)—

(a) for paragraph 2 of column (A) (employments in respect of which earners are treated as falling within the category of employed earner) substitute—

“2. Employment (not being an employment in which the employed earner is treated as an employed earner under the provisions of paragraph 1, 3 or 5 of this Schedule) where—

- (a) the worker personally provides, or is personally involved in the provision of services, to the client;
- (b) there is a contract between the client and an agency under or in consequence of which—
 - (i) the services are provided, or
 - (ii) the client pays, or otherwise provides consideration for the services, and
- (c) remuneration is receivable by the worker (from any person) in consequence of providing, or being involved in the provision of, the services.”.

(b) for paragraph 2 of column (B) (persons exempt from the operation of column (A)) substitute—

“2. Any employed person in paragraph 2 of column (A)—

- (a) where the worker carries out the employment wholly in their own home or on other premises not under the control or management of the UK client (except where the other premises are premises at which the employed person is required, by reason of working for the client, to work); or
- (b) who works for the client as an entertainer, or as a fashion, photographic or artist’s model; or
- (c) where it is shown that—
 - (i) the manner in which the worker provides the services, or
 - (ii) the manner of the worker’s involvement in the provision of the services, is not subject to (or the right of) supervision, direction or control by any person.”.

(4) In Schedule 3 (employments in respect of which persons are treated as secondary class 1 contributors)—

(a) for paragraph 2 of column (A) (employments) substitute—

“2. Employment (not being an employment described in paragraph 2 of column (B) of Schedule 1 to these regulations or an employment to which paragraph 1, 4, or 6 of this Schedule applies) where—

- (a) the worker personally provides, or is personally involved in the provision of services, to the client;
- (b) there is a contract between the client and a UK agency under or in consequence of which—
 - (i) the services are provided, or
 - (ii) the client pays, or otherwise provides consideration for the services, and
- (c) remuneration is receivable by the worker (from any person) in consequence of providing, or being involved in the provision of, the services.”.

(b) for paragraph 2 of column (B) (persons treated as secondary contributor) substitute—

“2. The UK agency who is party to the contract with the client.”.

(c) in paragraph 7 of column (A) (employments)—

(i) for the text from “Employment” until “employer where” substitute—

“Employment—

- (a) by a foreign employer where the employed person provides, or is personally involved in the provision of services, to a host employer, or
- (b) under or in consequence of a contract between a foreign agency and a client in Northern Ireland where the worker provides, or is personally involved in the provision of services, to that client; or

- (c) by a foreign employer where the worker provides, or is personally involved in the provision of services, to a client in Northern Ireland under or in consequence of a contract between that client and a UK agency; or
- (d) by a foreign agency where the worker provides, or is personally involved in the provision of services, to a client in Northern Ireland under or in consequence of a contract between that client and a UK agency; or
- (e) by a UK employer where the worker provides, or is personally involved in the provision of services, to a person outside Northern Ireland under or in consequence of a contract between that person and a UK agency and the worker is eligible to pay contributions in Northern Ireland in relation to that employment; or
- (f) by a foreign employer where the worker provides, or is personally involved in the provision of services, to a person outside Northern Ireland under or in consequence of a contract between that person and a UK agency and the worker is eligible to pay contributions in Northern Ireland in relation to that employment.

Where ”;

(ii) for the text after “A, B, C, or D waters” substitute “.”.

(d) for paragraph 7 of column (B) (persons treated as secondary contributor) substitute—

“7. Where the employment is—

- (a) employment within paragraph 7(a) of column (A), the host employer;
- (b) employment within paragraph 7(b) of column (A), the client;
- (c) employment within paragraph 7(c) of column (A), the UK agency who has the contractual relationship with the client;
- (d) employment within paragraph 7(d) of column (A), the UK agency who has the contractual relationship with the client;
- (e) employment within paragraph 7(e) of column (A), the UK employer or UK agency who has the contractual relationship with the person outside Northern Ireland; or
- (f) employment within paragraph 7(f) of column (A), the UK agency who has the contractual relationship with the person outside Northern Ireland.”.

name

name

Date

Two of the Lords Commissioners of Her Majesty’s Treasury

The Secretary of State concurs as indicated in the preamble.

Signed by authority of the Secretary of State for Work and Pensions.

name

Minister of State

Department for Work and Pensions

Date

The Department for Social Development concurs as indicated in the preamble.

Sealed with the Official Seal of the Department for Social Development on []

name

A senior officer of the Department for Social Development

EXPLANATORY NOTE

(This note is not part of the Regulations)

The Social Security (Categorisation of Earners) Regulations 1978 (“the 1978 Regulations”) make provision, amongst other things, for the prescription of secondary contributors for certain categories of earners including earners employed by a foreign employer.

The Social Security (Categorisation of Earners) (Northern Ireland) Regulations 1978 (“the 1978 NI Regulations”) make provision, amongst other things, for the prescription of secondary contributors for certain categories of earners including earners employed by a foreign employer.

These Regulations amend the 1978 Regulation and the 1978 NI Regulations to make provision in relation to the secondary contributor for certain workers.

Regulation 2 amends regulation 1(2) of the 1978 Regulations to insert relevant definitions and also amends Schedule 1 and Schedule 3 to make prescription treating certain types of employment as employed earners employment and to prescribe the relevant secondary contributors for the purposes of class 1 national insurance.

Regulation 3 amends regulation 1(2) of the 1978 NI Regulations to insert relevant definitions and also amends Schedule 1 and Schedule 3 to make prescription treating certain types of employment as employed earners employment and to prescribe the relevant secondary contributors for the purposes of class 1 national insurance.