

## **Travel expenses of workers providing services through intermediaries**

This draft guidance explains the operation of the proposed legislation which restricts the availability tax relief for of travel and subsistence expenses where a worker provides their services through an employment intermediary.

Any comments should be sent by email to: [intermediarist&s.review@hmrc.gsi.gov.uk](mailto:intermediarist&s.review@hmrc.gsi.gov.uk)

### **EIM80000 – Travel and subsistence expenses for employees employed by “employment intermediaries” (from 6 April 2016) – removal of travel and subsistence from home to workplace (ordinary commuting)**

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#### **Section 339A ITEPA 2003**

#### **Paragraph 3, Part 8, Schedule 3 Social Security (Contributions) Regulations 2001 (to be amended)**

The provisions in draft subsection 339A (4) specify that where the worker meets the criteria detailed below where they are employed on an overarching contract of employment and subject to supervision, direction or control then each engagement is regarded as a separate employment and each workplace will be treated as a permanent workplace.

As the NICs treatment for travel and subsistence expenses will mirror the tax position, there will be no NICs relief for any reimbursed expenses in respect of travel and subsistence incurred on journeys from home to a permanent workplace. Rather, any such payment will represent the costs of ordinary commuting for the purposes of s338 ITEPA and the NICs disregard for travelling expenses at paragraph 3 of Part 8 of Schedule 3 to the SSCR won't apply.

A deduction from earnings in respect of travel and subsistence expenses, is generally only available for travel in the performance of a worker's duties or for travel between a worker's home and a 'temporary workplace.'

No deduction is available for ordinary commuting, which is travel between home (or a place that is not a workplace) and a 'permanent workplace'.

There are a number of criteria for determining whether a workplace is temporary or permanent, but in general a workplace will be a permanent workplace if the worker:

- Goes to the same workplace in the course of a period of continuous work which lasts, or is likely to last, for more than 24 months (see EIM32080); or,

- Goes to the same workplace for all or almost all of the time for which the worker is likely to hold, or continues to hold, the same employment. This will normally be the case if the worker is employed to work at one place on a fixed term contract (see EIM32125).

Workers who are engaged through an employment intermediary, for example a personal service company or an umbrella company, under an over-arching contract of employment have been able to claim a deduction for journeys that would otherwise have been considered ordinary commuting if the worker had been engaged directly, or on a temporary agency contract. Workers were able to do this where the employment intermediary provided ongoing employment on the same terms and conditions, despite all the assignments being temporary contracts for different employers. This arrangement means each workplace falls within the statutory definition of 'temporary workplace' (if they are for a period less than 24 months) and a deduction for the cost of home to work travel and subsistence.

Section 339A ITEPA 2003 changes the treatment of travel and subsistence expenses for workers who provide their services through an employment intermediary, including recruitment agency, umbrella company, personal service company or other similar structure. From 6 April 2016 each assignment will be considered to be a separate employment. This will mean that workers regularly commuting to a permanent workplace for each assignment (ordinary commuting) will not be eligible for relief on travel and subsistence. This will bring the treatment of travel and subsistence for these workers into line with that of other temporary workers.

## **EIM80100 – Travel and subsistence expenses for employees employed by employment intermediaries (from 6 April 2016) – the legislation**

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### **Income tax - Section 339A ITEPA 2003**

#### **National Insurance Contributions - Social Security (Contributions) Regulations 2001 paragraph 3, Part 8 of Schedule 3 (to be amended)**

Section 339A applies where:

- A person (the worker) personally provides services to another person (the client) and these are not excluded services, and
- The services are provided not under a contract between the client and the worker but under arrangements involving an employment intermediary (see EIM80200)

Where these tests are satisfied each engagement undertaken by the worker will be treated as a separate employment (See EIM32125 temporary workers).

As a consequence where these tests are satisfied no deduction will be due under section 338 and both tax and NICs will be due on any reimbursed expenses where they are for travel from home to a workplace.

### **Exceptions**

There are some exceptions to the general rule above.

## **Supervision, direction or control**

The assumption is that unless it is shown otherwise all workers are under supervision, direction or control in the manner in which they provide their services (in general this is how an individual carries out the duties of their role). This section will not apply where the manner in which the worker provides their services is not subject to or to the right of the supervision, direction or control of any person . (see ESM2005 and detailed links.)

## **Personal Service companies and the intermediaries legislation (IR35)**

Where a worker is supplied through a company to which the intermediaries legislation (Chapter 8 ITEPA – IR35) applies then the section will only apply to the extent that the worker falls within the legislation and

- a Deemed Employment Payment is made, or
- a Deemed Employment Payment would have been made but for the fact that the worker received remuneration as employment income.

In these circumstances it is not necessary to consider the test of supervision, direction or control

## **Employment intermediary**

A business which is not an “employment intermediary” is not within these provisions.

## **“Excluded services”**

Where a worker provides “excluded services” the provisions of section 339A do not apply. “Excluded services” are those provided wholly in the client’s home.

## **Example**

Paul works away from home during the week only returning at weekends. As he is away so often he decides to get help with his domestic chores. During the summer he engages a gardener, George, Paul leaves instructions telling George how he wants the garden to be tended. George works via his own PSC which is subject to IR35.

Paul also has a cleaner Polly, who is supplied via an agency. The agency provide their cleaners with instructions about how they are to clean client’s homes.

Whilst both George and Polly are subject to control by another party, they are not covered by the provisions of section 339A as they are providing their services in Paul’s own home.

## **EIM80200 – Travel and subsistence expenses for employees employed by “employment intermediaries” (from 6 April 2016) – Definitions**

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### **Section 339A (8) and (9)**

“Arrangements” - this is defined for the purposes of section 339A (5), the targeted anti-avoidance rule . It includes any scheme, transaction or series of transactions, agreement or understanding, whether or not these are enforceable.

“Employment intermediary” – means a person other than the worker or the client who carries on a business (whether or not with a view to a profit and whether in conjunction with any other business) of supplying labour. This includes employment agencies and business, umbrella companies and other companies including personal service companies.

“Engagement” – this means the provision of services to the client by a worker personally under a contract or arrangement between an employment intermediary and the client.

“Excluded services” – means services provided wholly in the client’s home.

“Relevant person” – this applies for the purposes of 339A(6) and (&) and means – a person other than the client, the worker and a person who is connected with the client or the employment intermediary and is resident or has a place of business in the UK and is a party to a contract with the employment intermediary as a consequence of which the services are provided or the employment intermediary makes a payment in respect of the services.

## **EIM80300 – Travel and subsistence expenses for employees employed by “employment intermediaries” (from 6 April 2016) – application to intermediaries within the scope of Chapter 8, ITEPA (IR35)**

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### **Section 339A (3)**

Section 339A applies to all workers, working under the supervision, direction or control who are supplied through employment intermediaries including through agencies, umbrella companies and intermediaries within the scope of the intermediaries legislation at Chapter 8, Part 2 ITEPA 2003 (otherwise known as IR35) (see ESM3031 et seq).

Section 339A applies when:

- the IR35 legislation applies; or
- the IR35 legislation would apply, but for all the workers’ remuneration being taken as employment income

The test as to whether the manner in which the worker provides their services is under the supervision direction or control of any person does not apply in these circumstances.

### **Section 49 (1)**

The legislation applies where a worker provides personal services to a client under arrangements involving an intermediary in circumstances such that they are either an office-holder of the client or if the contract had been made directly then the worker would have been

- for income tax purposes, an employee or office-holder of the client
- for NICs purposes, employed in employed earner’s employment by the client.

### **Conditions in sections 51, 52 and 53**

#### **The conditions in section 51 (amended), 52 and 53 must also be satisfied**

Conditions of liability: where the intermediary is a company – see ESM3105. For the purposes of section 339A section 51 is amended (see EIM80400)

Conditions of liability: where the intermediary is a partnership – see ESM3115

Conditions of liability: where the intermediary is an individual - see ESM3120

## **EIM80400 – Travel and subsistence expenses for employees employed by “employment intermediaries” (from 6 April 2016) – application to companies within Chapter 8 (IR35) – conditions to be satisfied where employment intermediary is a company**

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The conditions which apply where the intermediary is a company are amended for the purposes of section 339A.

Where the intermediary is a company, the following conditions must be satisfied for the legislation to apply:

- the worker (or his or her associates) has a material interest in the company, or
- the payment or benefit arising from the relevant engagement is received or receivable by the worker directly from the intermediary and can reasonably be taken to represent remuneration for services provided by the worker to the client.

“Material interest” is defined as meaning:

- Beneficial ownership of, or the ability to control, directly or indirectly more than 5% of the ordinary share capital of the company; or
- Possession of, or entitlement to acquire, rights to receive more than 5% of any distributions made by the company; or
- Where the company is a close company, possession of, or entitlement to acquire rights to receive more than 5% of the assets available for distribution to participants in the event of a winding up of the company

The material interest test applies where a worker operates through company, including a one person service company. Typically in such cases the worker, or the worker and his/her spouse, will own all of the share capital. (NB the definition of associate also includes an unmarried partner - see [ESM3125](#)). It will also usually cover the situation where a composite service company is involved.

However, it is possible that the worker’s shareholding will fall below the 5% ordinary share capital. In such situations you will need to consider the second condition of liability shown above, which links the amount received or receivable by the worker to the amount paid by the client for the worker’s services. In such cases see [ESM3106](#).

There is an exception to this condition of liability where the client and the intermediary are associated companies, as defined at S 416 ICTA 1988. In such cases see [ESM3108](#).

For the purposes of the legislation, an unincorporated association is included within the definition of company.

## **EIM80500 – Travel and subsistence expenses for employees employed by “employment intermediaries” (from 6 April 2016) – employment intermediaries - examples**

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### **Example 1**

Jim lives in Brighton is employed through an umbrella company under an overarching contract of employment meeting the tests of supervision, direction or control outlined in EIM80100. He works at Crawley for 3 months in X Ltd’s warehouse and then in Portsmouth for a further 3 months for Y Ltd and then finally for Z Ltd at Eastbourne for 1 month. He is reimbursed for travel and subsistence costs from home to all three destinations, (Crawley, Portsmouth and Eastbourne). Jim is not entitled to tax or NICs relief for any of these journeys as section 339A now classes all three locations as permanent workplaces.

### **Example 2**

As in example 1 Jim is employed under an overarching contract of employment with X Ltd meeting the tests of supervision, direction or control outlined in EIM80100. During the three months Jim is working in Crawley in X Ltd’s warehouse he is asked to spend three days working at X Ltd’s other warehouse in Shoreham.

He is not entitled to relief for travel and subsistence in respect of travel to and from Crawley, but is entitled to a deduction under section 338 ITEPA for the travel and subsistence costs to go to Shoreham as this is travel to a temporary workplace and is not a new engagement.

### **Example 3**

As in example 1. For the three months he spends working in Portsmouth Jim decides to travel to the warehouse on Monday morning and stay in a bed and breakfast on Monday night to Thursday night before travelling back to Brighton on Friday afternoon. As the workplace in Portsmouth is a permanent workplace under section 339A Jim is not entitled to a deduction for any of his travel and subsistence costs.

### **Example 4**

Paula is a graphic designer and supplies her services through an employment intermediary but does not meet the tests of supervision, direction or control of another party. She lives in Bradford and works on various assignments, spending one week in York, two months in Glasgow, one week in London and two months in Exeter. As Paula’s services are not under the supervision, direction or control of any other party all of these workplaces are treated as temporary workplaces. Section 339A does not apply and she continues to be entitled to tax and NICs relief on reimbursed expenses for travel and subsistence costs from home to all of these locations.

**EIM80550 – Travel and subsistence expenses for employees employed by “employment intermediaries” (from 6 April 2016) – arrangements to avoid the application of section 339A**

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If arrangements have been put in place, the purpose of which, or one of the main purposes of which, are to ensure that section 339A of ITEPA, travel and subsistence expenses for employees employed by ‘employment intermediaries’ do not apply. Then these arrangements are to be disregarded for the purposes of deciding whether section 339A applies.

## **EIM80600 – Travel and subsistence expenses for employees employed by “employment intermediaries” (from 6 April 2016) – particular employments**

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### **District nurses**

John is employed as a district nurse. He is supplied to the Health Authority by an employment intermediary and works out of a hospital in Cambridge and meets the tests of supervision, direction or control in the manner he performs his duties. He travels from home to the hospital to get his appointments for that day then visits patients throughout the county and goes directly home after his last visit. Under the provisions of section 339A, the hospital is classed as a permanent workplace. There will be no tax or NICs relief on journeys from home to the hospital and from last appointment to home. Tax and NICs relief will be available on the journeys from the hospital to the first patients' house and between the patients' houses as each house is not a new engagement. This consistent with the existing rules for travel to temporary workplaces.

### **Site based workers**

**(See EIM32132)**

Site-based workers will continue to be able to claim relief on their travel and subsistence, where they are travelling to different sites as part of the same engagement. Where they are engaged through an employment intermediary, and the manner in which they undertake their role is under the supervision, direction or control of another party, then if they are travelling to the same site for all, or almost all, of the engagement, then they generally will not receive relief for their travel costs. This is currently the case for those temporary workers engaged directly, or through an agency.

Where a site based worker is under supervision, direction or control and is employed through an employment intermediary then the site will be treated as a permanent workplace. Consequently, there will be no tax or NICs relief on travel between home and the site.

### **Depots**

Martin is employed as a lorry driver and is engaged through an employment intermediary, meeting the tests of supervision, direction or control in the manner he performs his duties. He picks up his lorry from a depot each day. Attendance at that depot at the start and finish of each shift may be brief; however no deduction is due for the cost of travel between his home and the depot. The depot is the base from which the duties of his employment are performed and is a permanent workplace,

## **EIM80700 – Travel and subsistence expenses for employees provided by “employment intermediaries” - fraudulent documents (6 April 2016 onwards)**

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**Applicable from 6 April 2016**

### **Section 339A (6) and (7) ITEPA 2003**

HMRC recognise that an employment agency may be provided with a fraudulent document(s) intended to demonstrate the provisions of section 339A do not apply to a worker's arrangement, due to the worker not being subject to (or to a right of) supervision, direction, or control as to the manner in which they provide the services,

This provision does NOT apply where section 339A (3) applies so that the question of supervision, direction and control does not need to be considered in those circumstances. This is broadly workers within Chapter 8 ITEPA (the “IR35” intermediaries legislation) although certain special rules apply.

In such occurrences, where the employment intermediary has been unaware the document was fraudulent and it has acted upon that document in good faith, then that employment intermediary will not be held to be the employer of the worker for the tax and NICs due as a result of section 339A. The party that will instead be held to be the employer of the worker for tax and NICs purposes is explained below:

**(i) Fraudulent document provided by the client to demonstrate the worker was not subject to (or to a right of) supervision, direction, or control as to the manner in which they provide their services.**

If, either before or after the worker begins to provide their services, the client provides the employment intermediary with a fraudulent document to demonstrate the worker is not subject to (or to a right of) supervision, direction, or control as to the manner in which they provide their services, then after the fraudulent document is provided the worker will be treated as holding an employment with the **client** in respect of any payments made to which section 339A applies. This will apply for both income tax and NICs purposes; therefore the client will be responsible for the operation of PAYE and the payment of Class 1 employees/employers NICs.

This will also be the case if the fraudulent document is supplied by a “relevant person”

If that client is a limited company and it fails to pay HMRC the PAYE debt and accrued interest for which it has liability, then HMRC may hold the directors of that company personally liable for paying those amounts due (see EIM80800).

**Note:** “relevant person” means a person other than the client, the worker, or a person connected with the client or with the agency who is resident, or has a place of business in the UK and is party to a contract with the agency (or a person connected with the agency) under, or in consequence of which, the worker’s services are provided, or the agency (or a person connected with the agency), makes payments in respect of the services.

## **EIM80800 – Travel and subsistence expenses for employees employed by “employment intermediaries” – fraudulent documents – transfer of liability to directors (from 6 April 2016)**

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**Applicable from 6 April 2016**

**Statutory reference from primary....**

### **Statutory references**

If an employment agency is provided with fraudulent documents by another party to demonstrate that the worker was not under supervision, direction or control as to the manner in which they provided their services and they knew this was not the case then the responsibility for operating PAYE and paying Class 1 employees/employer's NICs on any remuneration received to which section 339A will be placed upon another party other than the agency. For further details, see EIM ... Fraudulent Documents.

If a limited company is treated as being the employer of the workers (via the provisions of the agency legislation applying) and that company fails to pay the relevant PAYE tax and Class 1 employees/employer's NICs over to HMRC, then HMRC may hold the directors of that company personally accountable for paying the tax and NICs, plus any penalties imposed and interest accrued.

**EIM80900 – Travel and subsistence expenses for employees employed by “employment intermediaries” – failure to confirm whether the worker is under supervision, direction or control - liability (from 6 April 2016)**

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In the first place liability will rest with the employment intermediary and will be determined by the issue of notices under Section 8 of the Social Security (Transfer of Functions) Act 1999 for NICs and determinations under regulation 80 PAYE Regulations (SI 2003/2682) for PAYE.

For individuals and partnerships there will be personal liability as with any other tax and NICs debt. For companies the liability will initially lie with the company. If this is not paid then liability may transfer to the directors of the employment intermediary, as it may to the directors of a client company where fraudulent documents have been provided (see EIM80700 and EIM80800).

## **EIM81000 – Travel and subsistence expenses for employees employed by “employment intermediaries” – failure to confirm whether the worker is under supervision, direction or control... director’s liability for PAYE debt (from 6 April 2016)**

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Applicable from 6 April 2016

Statutory reference

Section 339A applies to restrict access to travel and subsistence expenses for “ordinary commuting” (see EIM32055) in all cases where a worker is under the supervision, direction or control of the client or another person as to the manner in which they provide their services. Unless it is shown to the contrary tax and NICs relief for travel and subsistence expenses which are ordinary commuting are not available. It is the responsibility of the employment intermediary to confirm that this is the case. If the intermediary is misled by the provision of a fraudulent document by the client or a “relevant person” then the obligation to account for the PAYE and NICs which should have been deducted and or accounted for in respect of the amount paid for travel and subsistence can be transferred to the client or “relevant person”.

However, if the employment intermediary has not applied section 339A and not deducted tax and NICs and accounted for them on an amount of travel and subsistence then that liability may be transferred to the directors of the intermediary.

## **EIM81100 – Travel and subsistence expenses for employees employed by “employment intermediaries” – director’s liability for PAYE debt (from 6 April 2016)**

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**Applicable from 6 April 2016**

**Statutory provisions...**

### **Issuing a “Personal Liability Notice” to Company Directors**

The provisions of section 339A (6) to (7) of ITEPA 2003 - persons providing fraudulent documents (see EIM...), may dictate that a party, other than the employment agency, is to be treated as the employer of the workers for both tax and NICs purposes.

If that party is a company (which includes limited liability partnerships) and it fails or defaults from paying to HMRC the relevant PAYE debt by the required due date, then HMRC may hold the directors of the company personally responsible for paying that PAYE debt, plus any specified interest.

In such instances, HMRC may serve a ‘personal liability notice’ on any person who was a director of the company on the **relevant date** (see **Note**). The notice will specify the amount of PAYE debt owing and any interest accrued, and will require the person to pay those amounts over to HMRC within 30 days of the date the notice is served.

HMRC can serve a “Personal Liability Notice” to more than one director of the company in respect of the same PAYE debt, for which all directors are both jointly and individually liable to pay.

**Note:** The **relevant date** is in relation to a PAYE debt the date on which first payment is due on which PAYE is not accounted for.

Sections 97Z(L) and (M) TMA 1970 contain the relevant legislation under which HMRC will recover the sums due under a “Personal Liability Notice” and where appropriate, repay any surplus amounts collected plus interest accrued.

### **Appealing a Personal Liability Notice**

There are appeal rights for persons served with a Personal Liability Notice. Further details are contained at (EIM ...).

### **Withdrawal of a Personal Liability Notice**

A Personal Liability Notice may be withdrawn if it is quashed by a tribunal or an officer of HMRC considers it appropriate to withdraw the notice. In the event that an officer of HMRC withdraws the notice, then HMRC must give notice to the person upon whom the notice was served.

**EIM81050 Travel and subsistence expenses for employees employed by “employment intermediaries” – claiming false tax and NICs relief on travel and subsistence when engaged through an intermediary within the intermediaries legislation.**

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Where an employment intermediary falls within Chapter 8 ITEPA (the intermediaries legislation) then liability will sit with the employment intermediary in the first instance. If the employment intermediary does not apply section 339A correctly and deducted tax and NICs on an amount of travel and subsistence then that liability incorrectly, then amount that has been incorrectly deducted may be transferred to the directors of the intermediary.

## **EIM81200 – Travel and subsistence expenses for employees employed by “employment intermediaries” – director’s liability for PAYE debt (from 6 April 2016)**

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**Applicable from 6 April 2016**

**Statutory reference – Regulation 97ZJ (SI2003/2182) (PAYE regulations)**

### **Appealing a Personal Liability Notice.**

A person who is served a “Personal Liability Notice” in relation to an amount of relevant PAYE debt in respect of a company may appeal against the notice.

A Notice of Appeal must be submitted to HMRC within 30 days beginning on the day the personal liability notice is served and must contain the grounds for appeal which are:

- (i) all or part of the specified amount does not represent an amount of relevant PAYE debt of the company to which regulation 97ZJ Taxes Management Act 1970 applies, or
- (ii) the person who was served the personal liability notice was not a director of the company on the **relevant date** (see **Note**).

A person may not appeal a “personal liability notice” if it has already been determined on appeal by the company that (a) the specified amount is a relevant PAYE debt of the company, and (b) the company did not deduct, account for, or (as the case may be) pay the debt by the time the company was required to do so.

**Note:** “Relevant date” is defined at EIM...

HMRC can withdraw a personal liability notice. For details, see EIM ....

### **See also:**

- Directors liability for paying PAYE debt (see EIM80800)