

**Good work: The Taylor review of modern working practices
Consultation on agency worker recommendations
Response from the Low Incomes Tax Reform Group (LITRG)**

1 Executive Summary

- 1.1 We welcome the opportunity to put forward our views on two aspects of this consultation: how to increase the transparency of contractual arrangements for agency workers and how umbrella companies could be brought within the scope of the Employment Agency Standards Inspectorate (EAS).
- 1.2 Our overall impression is that these proposals are too narrow to fully address the problems faced by many agency workers in their day-to-day lives. In our view, fundamental structural changes are required to really make a difference to the plight of low-paid agency workers. We say this as tax specialists with an interest in and insight into the tax and related welfare issues of agency workers who find themselves caught up in certain arrangements designed to exploit weaknesses in the tax and employment law systems. While these arrangements may work to the advantage of the engagers, they can often be to the detriment of the workers.
- 1.3 Many agency workers use an umbrella company these days – even though one of the key benefits, involving the exploitation of tax/National Insurance contribution (NIC) rules around travel expenses, should now be largely defunct.
- 1.4 The resulting quadripartite arrangement can be very confusing, particularly for lower paid workers and we think it is this that is causing uncertainty around who is responsible for paying the agency worker and lack of clarity on rates of pay and any deductions made – not the agency work per se. Workers may only be given part of the picture when they are passed

to the umbrella company by the agency and indeed, it seems that the agency often then becomes indifferent to the worker's welfare after the umbrella company has assumed the 'employer' function.

- 1.5 There is a lack of official information for workers explaining or even acknowledging the presence of umbrella companies in most agency supply chains. This often results in workers trying to use and apply information (on GOV.UK, for example) that is just not relevant to them.
- 1.6 Many umbrella companies take the welfare of their employees very seriously, however certain models used by some umbrella companies make things even more opaque for low-paid workers and can lead to them being exploited. Yet in our experience there are some shortcomings in the way the authorities, particularly HM Revenue & Customs (HMRC), have policed umbrellas and implemented changes to the system. Often new reforms have fixed specific problems that have been identified only to create other, different, problems as a direct result.
- 1.7 We basically support any changes that help workers better navigate and protect themselves in the agency worker industry. On that basis we think the provision of a key facts document at the point of offer is a good idea, although we do have some concerns that implementing the requirement on agencies will be challenging against the backdrop of avoidance behaviour that can be prevalent in some parts of the sector.
- 1.8 We think the Government should work with trade bodies and representative groups to develop a standard template that must be used by agencies in order to avoid the inherent risks in having each and every worker provided with a different thing. This should also cut down on costs for the agency – as their business model is dependent upon supplying workers at a very small mark-up there is a high probability that any costs will just end up being passed to the worker otherwise.
- 1.9 As a minimum, any such document should include confirmation of whether the worker is to be passed to an umbrella company in the first place and what the true value of the 'umbrella rate' they are being offered is.
- 1.10 Alongside an individual key facts document outlining the detail, there is a definite need for some clear and independent 'central' information from Government about umbrella companies more generally. In particular, this needs to outline what a compliant umbrella company looks like. This would provide workers with important context and a background against which to analyse their work offer. This really is vital to ensuring more transparency within the sector and in the longer term, potentially levelling the playing field.
- 1.11 While empowering agency workers by giving them better information about working through an umbrella company could help address some of the problems that they face, this also needs to be backed up by an easy and accessible means for them to report issues if things go wrong – something that is lacking in the current system.

- 1.12 We therefore welcome the proposal to bring the EAS into the realm, although we find it difficult to see how the EAS could properly execute any additional functions without vast new resources and the right support and expertise in place.
- 1.13 We also question their ability to truly make a difference given that their proposed remit is quite limited. Much of the wrongdoing that goes on with umbrella companies is tax driven. As we noted in paragraph 1.6, in our experience there have been some shortcomings in HMRC's attempts to deal with this sector. This leaves some umbrella companies with an open space to carry on exploiting their workers.
- 1.14 The proposals here should therefore be just the start of the Government taking some further steps in this area to strengthen the position of vulnerable workers. This should include ensuring effective enforcement mechanisms are in place, which we think could potentially include a wider role for the Gangmaster's Licensing and Abuse Authority (GLAA).

2 About Us

- 2.1 The Low Incomes Tax Reform Group (LITRG) is an initiative of the Chartered Institute of Taxation (CIOT) to give a voice to the unrepresented. Since 1998 LITRG has been working to improve the policy and processes of the tax, tax credits and associated welfare systems for the benefit of those on low incomes. Everything we do is aimed at improving the tax and benefits experience of low income workers, pensioners, migrants, students, disabled people and carers.
- 2.2 LITRG works extensively with HMRC and other government departments, commenting on proposals and putting forward our own ideas for improving the system. Too often the tax and related welfare laws and administrative systems are not designed with the low-income user in mind and this often makes life difficult for those we try to help.
- 2.3 The CIOT is a charity and the leading professional body in the United Kingdom concerned solely with taxation. The CIOT's primary purpose is to promote education and study of the administration and practice of taxation. One of the key aims is to achieve a better, more efficient, tax system for all affected by it – taxpayers, advisers and the authorities.

3 General comments

- 3.1 In 2014, we published a report 'Travel expenses for the low-paid – time for a rethink?'¹ in which we looked in detail at agency workers and their use of a particular umbrella company scheme (pay-day-by-pay-day) to obtain tax relief for their travel costs. Typically, this resulted in some small tax/NIC savings for the worker, however cost advantages also accrued to the employers (particularly when one considered the fees levied) meaning that often workers

¹ <https://www.litrg.org.uk/latest-news/reports/141117-travel-expenses-low-paid—time-rethink>

were exploited for the employer's own gain. HMRC called the model 'non-compliant' yet it flourished with the businesses involved apparently having little fear of action being taken against them (see our report for detail).

- 3.2 From our research for this report we learned a lot about the ever-moving temporary worker industry and came to recognise that the proliferation of, and people's involvement with, umbrella companies is really very complex.
- 3.3 We found that agency workers are often vulnerable – they may be young, have limited education or have English as a second language. Even if they are not, for the majority, agency work will not be a matter of choice; rather, it will be something they are forced to turn to if they have not been successful in finding a permanent job or, alternatively, if they wish to gain experience and employability.²
- 3.4 On the opposite side, we discovered there are huge incentives for agencies to push workers into umbrella companies – denying them work if they do not agree – including (but not limited to): a commercial advantage ('tax efficiency' throughout the supply chain means that contracts with end clients can be negotiated at lower prices), reduced payroll and HR function costs and the receipt of commission if workers use a 'preferred' umbrella company.
- 3.5 In an unregulated marketplace, over time, bad practices have largely driven out good and we have seen more umbrella company models based on increasingly degraded terms. For an example of a particularly worrying model (the elective deductions model – more on this in para 4.1.9) see this worker query received into our website: *'hi im after a little advice please, i am classed as self employed..i think, i work for a sub contractor in the XX delivery network as a delivery driver, in about august my route got took over by a new sub contractor who i now deliver for, my wages used to be paid directly to me by my old employer who did not deduct any tax and ni and i had to sort that out which was fine, i didnt have any holiday pay pension sick pay etc which i accepted as i was sel employed, now this new company i work for use some sort of company called YY who pay me my wages with tax and national insurance deducted so it seems i am employed but with no benifits ie no pension holiday pay etc my question is are they allowed to do this basically am i employed or self employed as i keep getting told different things by my friends many thanks' (sic)*
- 3.6 That is not to say all umbrella companies are operating in this way, however, there seem to be few consequences for agencies if they push workers towards non-compliant/high return models, causing further distortions within the sector.
- 3.7 Ideally, we would prefer an employment landscape where workers were not 'forced' to use umbrella companies, and we think the law should be changed to stop agencies being able to 'outsource' like this. If this were to happen, many of the issues facing agency workers would start to melt away. Recognising that there are probably certain market and commercial forces at work that preclude this, making agencies take some joint responsibility for what

² If they are universal credit claimants, they may be forced to accept this type of work as part of their claimant commitment or face sanctions on their payments.

happens to their workers in an umbrella company is a decent second option in terms of helping to regularise some of the negative behaviour that currently occurs in the sector.

- 3.8 Asking them to make and hand out a 'key facts' document is a good start, but more could be done, for example, looking at how debt transfer provisions could be better used (e.g. where due diligence is not demonstrated). For example, agencies clearly risk debt transfer under the Managed Service Companies legislation.³ But under the provisions associated with s339A ITEPA⁴ (travel and subsistence expenses), incorrectly assessed 'supervision, direction and control' debt can be transferred to the directors of the umbrella company and also to other parties (in instances where it can be shown that the umbrella company has been misled by that party into believing travel and subsistence relief was allowable when in fact it was not) – but this will usually be the end client not the agency.⁵
- 3.9 The comments that we go on to make in the remainder of this submission must be set against the context of our belief that fundamental structural changes are required to really make a difference to the plight of low-paid agency workers.
- 3.10 We have answered questions where we feel we can add most value, namely 1, 2, 6, 7.

4 Questions

- 4.1 ***1) To what extent would you agree that a 'key facts' page would support work seekers in making decisions about work?***

2) What information would be important to include in a 'key facts' page?

- 4.1.1 We definitely think that more support needs to be given to all agency workers who work through an umbrella company.
- 4.1.2 The Matthew Taylor review found that agency workers generally do not understand who is responsible for paying their remuneration and are not clear about rates of pay or why deductions are made e.g. margins. It is the presence of the umbrella company in the picture that causes so much of this confusion. Umbrella companies are not always very transparent about what they do and there is also a lot of misleading information out there, which

³ We acknowledge that the Criminal Finance Act 2017 might be helpful here. Under this Act, penalties can arise for agencies where a worker evades tax and the commissioning of that offence is facilitated by a third party (e.g. an umbrella company) who is 'associated' with the agency. Agencies are required (if they want to have a defence) to have reasonable procedures in place to prevent the facilitation of tax evasion.

⁴ Namely ITEPA s 688B and PAYE Regulations (SI 2003/2682) Chapter 3B

⁵ <https://www.gov.uk/government/publications/employment-intermediaries-travel-expense-guidance/travel-and-subsistence-expenses-for-workers-engaged-through-employment-intermediaries-from-6-april-2016#ESM5660>

contributes to some of them having a bad name – which can tarnish even those who act more responsibly towards their workers.

- 4.1.3 This should come as no surprise to Government – we have certainly told them at every opportunity about the problems that occur for workers who find themselves in umbrella companies. They are also responsible for the provision of official information available on GOV.UK for agency workers,⁶ which in its current form is below-par and indeed looks like it is from a different era. Despite the fact that the vast majority of agency workers are now told by agencies to work through umbrella companies, umbrella companies are not mentioned once. The guidance is largely based on the concept of the old ‘tripartite’ arrangement, giving the worker nothing in the form of guidance or assistance that they can use or apply to the circumstances before them. Even if they are able to fathom what their situation is, often they lack the confidence or knowledge to be able to ask questions or assert their rights.
- 4.1.4 It is therefore a no-brainer that agencies should be tasked with providing clear information in a key facts document to workers. The agency should, as far as possible, ensure that the information in the document is read and understood (even if that is that they obtain a signed copy of the key facts document saying ‘I confirm I understand’).
- 4.1.5 Such a document needs to include confirmation of the contractual chain and the worker’s place within it, and give workers both the PAYE rate and umbrella rate (and a meaningful value of the ‘umbrella rate’ that workers can easily compare – for more on this, see section 4.2.2). It should include confirmation of their status and rights under the arrangements; what, if any, tax/NIC savings arrangements will apply to their travel and other expenses and what other costs/benefits there are – we explain the rationale behind including these items in section 4.2.3.
- 4.1.6 The Government should consider how the employment intermediary reporting system⁷ could be enhanced to capture information about the provision of key facts documents to workers. It is worth saying however that, in a sector characterised by avoidance behaviour, we have concerns that implementing the key facts requirement will be a challenging objective as agencies who use non-compliant umbrella companies may have a vested interest in keeping their workers in the dark.
- 4.1.7 To the extent that agencies can be persuaded to produce and hand out the documents – they should be based on a standard template. This should reduce the scope for inaccurate, misleading, or unreliable information being given out or disadvantageous terms hidden. Having a standard document will also make it easier for workers to compare and contrast work offers and will make the whole exercise administratively less burdensome and cheaper for the agency. It should be remembered that they work on very tight margins and any

⁶ <https://www.gov.uk/contract-types-and-employer-responsibilities/zero-hour-contracts>

⁷ <https://www.gov.uk/government/publications/employment-intermediaries-reporting-requirements>

increase in their static costs will likely just result in more pressure at the bottom end of the supply chain – with knock on effects for the workers.

4.1.8 An individual key facts document alone does not go far enough to dealing with the problems that workers face. To be effective, it needs to be accompanied by better ‘central’ information about what working through an umbrella company means and what a compliant model looks like in order to provide the worker with some context and allow them to understand and ‘apply’ the key facts information they have been given. Such information should be developed with trade bodies and representative groups. It should be well designed, well-publicised and written in a way that is meaningful to workers (remembering the likely makeup of the workforce – see para 3.3). Government must also ensure that information is available through more than one channel. We would be happy to discuss our ideas and offer our assistance with this.

4.1.9 It should also include appropriate consumer warnings about various models that low-paid workers should be wary of (remembering the knock on effects that arrangements can have on tax credit and universal credit (UC) claims), including:

- Travel and subsistence models – the rules were changed with effect from April 2016 by virtue of s339A ITEPA⁸ and s289A ITEPA,⁹ which, taken together, mean the exploitation of the tax/NIC free travel expenses rules should no longer really be possible. But the rules in s289A do not apply to mileage reimbursements as explained in section 4.2.5. This means that umbrella companies can continue to process salary sacrificed expenses at the point of pay where they are in respect of mileage reimbursements. Given the employer NIC saving that comes from doing this, it is unsurprising that we hear that some workers are being arbitrarily assessed by

⁸ From April 2016, Income Tax (Earnings and Pensions) Act 2003 (ITEPA) section 339A – Travel for necessary attendance: employment intermediaries – restricts access to relief for home to work travel and subsistence where a worker:

- personally provides services to another person;
- is employed through an employment intermediary (such as an umbrella company); and
- is under (the right of) the supervision, direction or control of any person, in the manner in which they undertake their work.

If the above apply, each engagement the worker undertakes will be a separate employment for the purposes of obtaining relief for travel and subsistence; that is the overarching contract is ineffective.

⁹ Even where travel and subsistence expenses could still be allowed, for example because of multi-site visits or because the worker is outside the supervision, direction or control of any person, ITEPA section 289A – Exemption for paid or reimbursed expenses (also introduced from April 2016) – restricts the ways in which an umbrella company can reimburse a workers’ expenses. This is because the exemption only applies where the payment or reimbursement is not provided pursuant to relevant ‘salary sacrifice arrangements’ – which most umbrella companies use.

umbrella companies as being outside of their ‘supervision, direction or control’ in order to claim home-to-work travel relief and take full advantage of this loophole.

- False self-employment – amendments were made to the agency legislation from April 2014¹⁰ to make it more difficult for umbrella companies to treat workers as ‘self-employed’, however we understand this is now starting to creep back into the landscape – particularly in the construction industry.¹¹
- Elective deductions model – created as a consequence of the April 2014 rules to deal with false self-employment amongst agency workers. Under this model, the individual is treated as an employee for tax purposes so that Pay As You Earn (PAYE) is operated as is required under law but treated as self-employed for all other purposes, meaning that they are not paid the minimum wage, not given paid annual leave, etc (see para 3.5 for an example). This means that as far as HMRC are concerned, everything appears to be in order. Operating such a scheme may save the business concerned money, but is unlikely to benefit the worker in any way at all. We are not aware that HMRC have taken widespread action against the elective deduction model from a minimum wage perspective, although they must certainly be aware of it having had it brought to their attention by several groups, including the Freelancer & Contractor Services Association, the Recruitment & Employment Confederation and the Association of Professional Staffing Companies.
- Using a personal service company – many low-paid agency workers often find themselves offered work in the private sector on the basis that they will structure their work through a limited company (Ltd). Because ‘IR35’ is not enforced consistently (which would ensure that individuals who effectively work as employees are taxed as employees, even if they choose to structure their work through a Ltd), this can help save tax for both them and their engagers.¹² But often the relationship between the worker and the umbrella company (who manages the administration of the Ltd) can trail off, leaving the worker with messy and expensive Ltd compliance issues to deal with that they do not understand.
- Mini umbrella companies – this model sees the formation of lots of individual companies, often with foreign nationals as directors, which seek to exploit the Employment Allowance and the VAT Flat Rate Scheme (FRS). Legislation was

¹⁰ <https://www.gov.uk/government/consultations/onshore-employment-intermediaries-false-self-employment>

¹¹ <http://www.unitetheunion.org/news/huge-rise-in-bogus-self-employment-demonstrates-urgent-need-for-radical-employment-reforms/>

¹² By virtue of ITEPA s 339A(4) ITEPA 203, from 6 April 2016, workers operating through a personal service company are also no longer able to claim home to work travel and subsistence relief for those contracts where they are required to operate IR35, or they would otherwise be operating IR35 if they were not receiving all their remuneration as employment income. Despite this, and despite a related anti-avoidance provision in ITEPA s 339A(10), it seems that some umbrella companies have been encouraging workers to incorporate – possibly with a view to claiming that their assignments are outside IR35.

introduced from 1 April 2017¹³ to restrict the VAT FRS rate for traders of limited costs, such as labour only businesses, however it is unclear as yet how far these new VAT rules are having the desired impact.

- 4.1.10 Given the lack of existing guidance on the issues that arise for workers using umbrella companies, as part of our remit as an educational tax charity, we have created a factsheet in conjunction with PRISM (a not-for-profit umbrella company representative body) to help workers inform, navigate and protect themselves.
- 4.1.11 It has been written with the low-paid in mind – recognising the specific risks that they may face when working through an umbrella company – but may certainly be useful more widely. We have included, as Appendix 1, a copy of it¹⁴ in case this is useful for Government in understanding the types of matters that need to be covered in the key facts document and their umbrella company guidance more generally.
- 4.1.12 While PRISM members, and some other responsible providers, have decided to voluntarily distribute this information to workers, and it is available freely on the internet, it probably has limited reach at the moment. The proposals in this consultation document therefore take us a further step forward to more transparency within the sector and, hopefully in time – fewer troublesome providers.
- 4.2 ***6) Do you know of any examples of the benefits and/or problems for agency workers of using an umbrella company or intermediary?***
- 4.2.1 What follows is a brief outline of what we see as the main problems of working through an umbrella company – even a largely sensible one. It is vital that any information to increase transparency for agency workers covers these issues so they can make a balanced and informed choice about whether to accept a work offer that involves working through an umbrella company (if indeed they have a choice – see our comments in para 3.4).
- 4.2.2 ***Problems***
- 4.2.2.1 The main problem faced by workers who work through an umbrella company is that the rate advertised by the agency often does not reflect the fact that the umbrella company will deduct the costs of employment before defining their gross pay. This leaves employees thinking that they are paying the costs of their own employment, e.g. employers' NIC.
- 4.2.2.2 However umbrella companies should actually work in the following way (as extracted from HMRC's ESM manual¹⁵):

¹³ <https://www.gov.uk/government/publications/tackling-aggressive-abuse-of-the-vat-flat-rate-scheme-technical-note>

¹⁴ It is also hosted on the home page of our website: www.litrg.org.uk

¹⁵ <https://www.gov.uk/hmrc-internal-manuals/employment-status-manual/esm2390>

'The umbrella company has the legal relationship with the agency and the legal rights to the payment due for the work carried out for the end client.

On receipt of payment from the agency, the umbrella company has its overheads to cover so will typically retain:

- *its margin*
- *an amount to meet their employer's National Insurance contributions (NICs) obligation*
- *holiday payment*
- *other amounts to cover other specific costs, such as auto enrolment*

The remainder of the payment is paid to the worker as gross pay which is then subject to PAYE tax and employee's NICs.

The payslip provided by the umbrella company will usually provide a breakdown of the payment received by the umbrella from the agency which itemises the umbrella company overheads, including employer's NICs. The payslip will also include a separate breakdown itemising the worker's gross pay and deductions to arrive at the net pay.

The inclusion of employer's NICs on the payslip often causes confusion with workers who believe they are paying the employer's deductions. This is not the case as employer's NICs is deducted from the payment the umbrella company receives from the recruitment agency which they have the legal right to.'

- 4.2.2.3 If this basic premise were better explained (and, very importantly, illustrated) to workers themselves, perhaps via GOV.UK, rather than buried in an obscure HMRC technical manual, many more individuals would be better able to understand and self-check their positions.
- 4.2.2.4 The key thing that workers need to appreciate in all of this is that they are supposed to receive an 'uplift' to their pay rate if they work through an umbrella company. They also need to understand whether the uplift they have been offered is sufficient to cover the employment costs and deductions made by the umbrella company – i.e. leaving them no worse off than if they had been paid by the agency directly.
- 4.2.2.5 However, we have heard that in some cases, the required uplift is being eroded by agencies (who then keep the difference) and, in some extreme examples typically at the lower paid end of the scale, no uplift is applied at all.
- 4.2.2.6 A good example of the impact of this, is contained within PRISM's 'A case for Structural Reform' document:¹⁶

¹⁶ https://www.prism.contractors/prism/images/The_World_of_Modern_Employment.pdf

'Example

Agency 1 offers an assignment at £12 per hour with Agency 2 offering exactly the same role, with the same end client at £13 per hour.

On first glance, it would be reasonable to assume you would take the role through Agency 2, however Agency 1 is offering it as a PAYE rate with the worker being engaged on the agency payroll and the agency bearing all the employment costs on top. Agency 2 is offering it as an umbrella rate, which includes the employment costs within the rate.

Assuming average charges by an umbrella the equivalent umbrella rate for the worker to remain neutral would be £15.30. So in the example above the worker would be worse off on the £13 per hour rate compared to the agency PAYE rate of £12.'

4.2.3 **Benefits**

- 4.2.3.1 There are many purported benefits of using an umbrella company, but from a worker's perspective they are not as attractive as the companies involved claim. While we have touched on these issues in our factsheet, more detailed information countering what we think are the most confusing or misleading messages (outlined below) should be made available by Government to build on our work.

4.2.4 **Employment rights**

- 4.2.4.1 There seem to be increasing numbers of umbrella companies majoring on their ability to provide 'employee rights' to agency workers:

*'If you join an umbrella company.... you'll receive the best of both worlds. Not only will you be able to benefit from all the perks contracting offers, you'll also have access to the same rights and benefits given to permanent employees. These include holiday, sick, and maternity & paternity pay.'*¹⁷

- 4.2.4.2 We think the implication here is that you have no basic rights as an agency worker – which of course is incorrect (as 'workers' paid under the PAYE system they will have access to all those things – albeit sick and maternity pay have qualifying conditions including an earnings condition¹⁸).

¹⁷ <http://www.parasolgroup.co.uk/help-me-decide/faqs/why-join-an-umbrella-company/>

¹⁸ The starting point for agency workers who do not work through an umbrella company is that they are 'workers' and therefore have rights to the basic employment law protections. However, the GOV.UK information on 'worker' status and rights is very confusing. It is also incomplete – the fact that 'workers' are entitled to auto-enrolment is missing from the list of rights, for example. The specific page for agency workers says that that agency workers are entitled to maternity pay but not maternity leave – while we understand what is meant here, it needs to be unpacked for the lay person – this seeming contradiction will surely be causing unnecessary worry.

4.2.4.3 There is no doubt in our minds that confusion over status and rights could be causing workers a huge headache. Any work on improving transparency for workers needs to tackle this. It also needs to explain that the 'extra' rights that come with employee status by working through an umbrella company, i.e. as compared to a 'worker' may not be all that valuable considering agency work is not always durable (unfair dismissal or a redundancy payment are only available after two years' service, for example).

4.2.5 ***Travel expenses relief***

4.2.5.1 As stated in para 4.1.9, despite the new rules from April 2016 supposedly restricting relief for home-to-work travel expenses, some umbrella companies have adjusted their practice and are now saying that their workers fall outside the new rules and continue to claim relief on the same basis as before.¹⁹ We are not aware of any systematic attempts by HMRC to tackle this new problem.

4.2.5.2 Even where they are not doing this, some workers may be swayed by claims that by working through an umbrella company they will still be eligible for relief on other expenses that they personally incur – just not those related to home-to-work travel. This sounds promising, but there are a couple of things they should know.

4.2.5.3 The expenses rules for workers are very tightly drawn, meaning there may be few expenses eligible for relief anyway. The key is that the expenses must be 'wholly, exclusively, and necessarily' incurred in the performance of the employment. Basically, this means that they have to incur the full expense in order to do their job.

4.2.5.4 In terms of travel expenses, allowable travel expenses post April 2016 can include trips from their assignment office or other work location to visit a customer or other workplace, and can also include travel directly from their home to visit a customer or to another workplace (unless the journey is practically the same as the journey from their home to their normal place of work, for example, because the customer lives near their office).

4.2.5.5 They should then be aware that even if they do have some qualifying expenses, the umbrella company should not be replacing (or 'sacrificing') some of their taxable salary with tax and NIC free reimbursed expenses, and giving them relief as part of their weekly/monthly payroll, as they have done previously.

4.2.5.6 Umbrella companies should be operating PAYE tax and NIC on any expense payments made to employees in connection with 'relevant salary sacrifice arrangements'.²⁰ Workers can then claim tax relief (but not NIC relief) at the end of the tax year on form P87 (or through a tax return if their expenses are more than £2,500 or they need to complete one for any other reason). It is important to note that this relatively straightforward process is available

¹⁹ [HMRC's guidance on supervision, direction and control](#) indicates that a worker being outside of supervision, direction and control is likely to be the exception rather than the norm.

²⁰ <https://www.gov.uk/hmrc-internal-manuals/employment-income-manual/eim30230>

to any person who has incurred allowable expenses – not just those working through an umbrella company.

- 4.2.5.7 The only exception to this ‘salary sacrifice’ restriction, as we alluded to in para 4.1.9, is for business mileage in a workers’ own car, meaning umbrella companies can continue to replace workers’ taxable salary with tax and NIC free mileage payments throughout the tax year. This is preferable to the default position of being able to claim only tax relief and no NIC relief, and then only at the end of the year, but it should be remembered that situations in which they can claim mileage will be quite limited.

4.2.6 ***Continuous payroll link from one assignment to another***

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

- 4.2.6.2 Saying that, ‘emergency tax’, if not avoidable altogether, is usually only a temporary problem and agency workers can do several things to help ensure PAYE operates as smoothly as possible for them throughout the year, without using an umbrella company. For example, if they have decided to finish with an agency, they should not just assume that the agency would know to close down their payroll record once their last assignment has finished. They should make sure they inform the agency they are leaving and request their P45²¹ (this will also mean HMRC/DWP have up-to-date information for tax credits/UC purposes). When they receive their P45, they should keep it somewhere safe so they are able to provide it to their new employer – this may sound obvious, but many will not be aware that it is not possible for employers to issue duplicate P45s in the event that the original is lost or destroyed.

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

4.2.7 ***Other ‘perks’***

- 4.2.7.1 Often umbrella companies will advertise other benefits like, shopping discounts, an online portal where workers can track pay or faster payments bank transfers. Whether these are really benefits will depend on whether they are included in the ‘margin’ the umbrella

²¹ Unless they do this, the agency may consider that they are available for work and will keep them on ‘the books’ until they carry out a database cleansing exercise. This means 1) that the worker will not be able to provide their new employer with a P45, meaning an emergency tax code will need to be used and/or that 2) HMRC will have a ‘live’ employment record for them, meaning that they may consider the worker’s new job a ‘second’ employment.

company deducts from the gross income or whether they charge workers extra to provide them. If they are included as part of the umbrella company 'margin' (and that, in turn, is included in the workers uplift) then fair enough, but if workers have to pay an add-on fee – then they would have to think more carefully.

- 4.2.7.2 Consideration also needs to be given as to whether any charges for 'extras' should come out of the umbrella companies' gross fee income or the worker's net pay. We are not aware of any provision which would allow these as a deduction from earnings for tax purposes, meaning that it should probably be coming out of net pay, however we understand that this may not be happening on the ground.

4.3 ***7) Should the extension of the remit of the Employment Agency Standards inspectorate to cover the regulation of certain activities of umbrella companies and intermediaries in the supply of work seekers to a hirer***

i. Be limited to the regulation of the key facts page and provision of information relevant to those facts as part of a work offer by the hirer or employer?

ii. Be aligned to the regulation of the types of employment rights already regulated by EAS under the current legislative framework such as non-payment of wages, deductions from wages which the work seeker has not agreed to, and failure to provide written terms and conditions before the assignment starts?

- 4.3.1 Arming workers with the background knowledge to improve their positions is a good starting point in tackling poor practices of some umbrella companies, but this also needs to be backed up by an easy and accessible means for them to report issues if things go wrong – something that is currently lacking in our view.
- 4.3.2 The barriers for operators to enter into the 'umbrella' industry are low – it is relatively easy to set up an umbrella without a significant capital outlay. This means there is a wide spectrum of operators. In the absence of any statutory regulation of the sector, there is some attempt to self-regulate²² but this is not a complete solution. We therefore do see some merit in the EAS's remit being extended to cover umbrella companies.
- 4.3.3 Our understanding is that the EAS is currently a very small body that enforces the Employment Agencies Act 1973 and the Conduct of Employment Agencies and Employment Businesses Regulations 2003 (Conduct Regulations).²³ According to these rules and regulations, recruiters must: not stop someone from working elsewhere; not make unlawful deductions from pay; not withhold payments or wages due; not charge a fee to anyone seeking a temporary or permanent job; and provide written contracts for their agency

²² <http://www.prism.contractors/>

²³ <https://www.gov.uk/government/publications/employment-agency-standards-eas-inspectorate-enforcement-policy-statement>

workers, including terms and conditions. There are also rules around record keeping, advertising, and ensuring that identity and suitability checks are carried out on work seekers.

- 4.3.4 This is a very specific remit and in 2016/17, the EAS had a budget of just £0.5million.²⁴ It is therefore hard to see how the EAS could regulate umbrella companies, even on a fairly superficial level, without vast new resources and the right support and expertise in place.
- 4.3.5 Furthermore, on the basis that many of the more abusive models, which are designed to exploit fundamental fault lines in the tax system (such as tax v NIC, temporary workplace v permanent workplace, employment v self-employment, PAYE v self-assessment), this still seems to leave much scope for problems to occur.
- 4.3.6 In our experience, HMRC have a poor record of policing the sector. Indeed, rather than target the employers, HMRC have tended to direct their compliance activity at the worker who often does not understand, or fully understand, what they have entered into. In terms of tackling employer non-compliance through changes to legislation, HMRC's approach has been to tackle specific problems they have identified in the market place, which has in some cases led to the creation of new issues as umbrella companies change and adapt. This piecemeal approach has been at the expense of real fundamental structural change that we believe is required to really make a difference to the plight of low-paid agency workers.
- 4.3.7 We fully appreciate that compliance work is difficult, complex and often fruitless because of issues like phoenixism.²⁵ We also know that HMRC are coping with fewer resources. However, there can be very little of the overriding framework left for HMRC to tinker with (except debt transfer provisions, perhaps, as mentioned in para 3.7). So unless HMRC start undertaking more enforcement activity in the agency worker industry – acting quickly, confidently and visibly – we fear efforts by the EAS to monitor and raise standards will be ineffective.
- 4.3.8 Of course, since 2006, the GLAA have set out requirements for businesses supplying labour into the agricultural, horticultural, shellfish-gathering and associated processing and packing industries. Their licensing regime covers areas like health and safety, accommodation, pay, transport – and tax, with the requirements for pay and tax set out below:²⁶

'Licensing Standard 2: Pay and Tax Matters

2.1 Critical: PAYE, NI and VAT

²⁴ <https://www.gov.uk/government/publications/employment-agency-standards-eas-inspectorate-annual-report-2016-to-2017>

²⁵ See the example of Legitas
http://www.heraldscotland.com/news/13110305.Edinburgh_firms_enter_liquidation_after_58m_tax_claim/

²⁶ <http://www.gla.gov.uk/i-am-a/i-supply-workers/do-i-need-a-glaa-licence/licensing-standards/>

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

- *be registered with HMRC and have a valid PAYE number, and*
- *accurately calculate and deduct tax and National Insurance from all workers' pay and pay the correct amount to HMRC in a timely manner.*

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

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

2.2 Critical: Paying Wages

A worker must be paid at least the National Minimum Wage (NMW) or, if applicable, in accordance with appropriate Agricultural Wages Order (AWO).

Sufficient records must be kept to prove payment of NMW or in accordance with the appropriate AWO.'

- 4.3.9 A labour provider must have a licence to work in the regulated sectors, and it is a criminal offence to supply workers without a licence or use an unlicensed labour provider. In addition, the recently introduced Labour Market Enforcement (LME) undertakings and orders further strengthen their powers. A breach of an LME order can, for the first time in terms of labour market sanctions, result in a sentence of up to two years' imprisonment. A sobering thought no doubt.
- 4.3.10 The Director of Labour Market Enforcement has recently suggested there might be a case for extending the GLAA's licensing system into sectors such as social care, car washing and construction. As agency work is another area characterised by vulnerable workers, there is an opportunity for the GLAA to take on more of a role in policing umbrella companies and provide more workers with an extra layer of protection from tax/NIC geared exploitation, as this is where the vast majority of problems lie. We recommend that this is explored further.