

# Agency Worker Regulations

## Factsheet 2 - Exclusions for Limited Company Contractors and self-employed workers

This Factsheet looks at the issues agencies need to look at when considering whether an individual who works through a limited company or who claims to be self-employed is inside or outside the scope of the Regulations.

### 1. What does the EU Directive say?

Article 5.1 of the final EU text says:

".....This Directive applies to workers with a contract of employment or employment relationship with a temporary work agency who are assigned to user undertakings to work temporarily under their supervision and direction".

Note that there is no express exclusion for limited company contractors in the Directive. Rather this is something which the Department for Business, Innovation and Skills (BIS) have sought to deal with within the Regulations.

### 2. How has the Directive been implemented in the UK?

The Government's initial position as outlined in the first consultation document (Summer 2009) was that the UK regulations should exclude "workers who are genuinely one of the following: the self-employed; those working through their own limited liability company; or those employed on managed services contracts" .

Despite trade union concerns over possible abuse and "bogus self-employment", the Government concluded in the second consultation (Oct – Dec 2009 "the Second Consultation") that the "underlying policy intention set out in the previous consultation is appropriate and that the Regulations should remain broadly as drafted". On the issue of "sham" self-employment, the Government concluded that "the courts and tribunals are capable of determining employment status and identifying such avoidance mechanisms"<sup>1</sup> .

In our response to the Second Consultation, REC proposed wording which would have specifically excluded limited company contractors working through their own limited companies. Unfortunately the Government has not accepted our text in full and Regulation 3 which defines who is an agency worker, and thus who is in scope of the Regulations, remains unclear. The Government argues that a general provision to automatically exclude "anyone who has a shareholding or holds office in a limited company could make it easier for unscrupulous parties to set up business models (...) to circumvent the protection of individuals under the Directive".

# Agency Worker Regulations

## Factsheet 2 - Exclusions for Limited Company Contractors and self-employed workers

### 3. What is the REC's interpretation?

Limited company contractors working through their own corporate vehicle:

The Government's stated intention is that workers who are genuinely in business on their own account will not be within scope of the Regulations. Similarly, the intention is that managed service contracts (i.e. those where the supplier rather than the hirer, manages or directs staff) are outside scope unless, in reality, the user, rather than the manager service, supervises and directs the staff. However, there is no express exclusion for agency workers working through their own limited company. Essentially any worker could be outside the scope of the Regulations if they are in business of their own account, regardless of whether they work through their own limited company or not.

Therefore the focus will be on the relationship which exists between the contractor's company and the end user client and or the agency.

The provisions contained in the Regulations mean that a contractor working through a personal services company will not be deemed to be within scope if:

- the contract that he or she has with the agency is such that the agency would be deemed to be a client or customer of the contractor's company; or
- under the terms of a contract ( for example the upper contract which exists between the agency and client or the lower contract which exists between the contractor's company and the agency), the end user client would be deemed to be a client or customer of the contractor's company.

Thus an agency will have to assess on balance whether the contractor will be deemed to have met these conditions in respect of each assignment. In the event that an agency worker makes a claim for equal treatment, which proceeds to the employment tribunal, the tribunal will have then also to weigh up on balance whether that individual is in business on his own account or not.

Most professional contractors will of course be familiar with the tests applied to determine whether or not they are likely to be caught by IR35. IR35 captures those contractors who, but for the existence of the intermediary would be deemed to have a contract of service with the end user client, i.e. an employee of the client. The Regulations in contrast not only apply to individuals who could be deemed to have a contract or employment but also individuals who might fall into the wider category of worker under any other type of contract which requires them to provide their services personally.

So the issues which will be relevant to limited company contractors are (i) whether or not there is an obligation of personal service and (ii) whether the contractor is deemed to be self-employed, i.e. whether the agency or end user client will be seen to be the contractor's client or customer.

# Agency Worker Regulations

## Factsheet 2 - Exclusions for Limited Company Contractors and self-employed workers

### 4. Self-employed or not?

In assessing the (self-) employed status of an individual an employment tribunal is likely to examine the following:

- the express terms agreed between the parties in both the upper and lower contracts;
- the degree of autonomy that the contractor has in determining how the work is undertaken;
- the degree of supervision, if any, that the end user client exercise over the contractor;
- whether the contractor prepares and submits his own accounts to HMRC;
- whether the contractor is entitled to be paid during periods where no work is being carried out;
- the level and degree of financial risk which the contractor is exposed to under the contract(s) and the extent to which the contractor is able to increase his own profit;
- whether there is a contractual requirement for the contractor to provide services personally (although the fact that this requirement exists will not in itself rule out that the hirer or agency are clients or customers of the contractor's company);
- whether the contractor supplies tools, equipment, materials for the purpose of the assignment;
- whether the individual is obliged to work exclusively for one client or whether they can in fact work for more than one client at a time;
- whether the individual has fixed hours of work or whether they can choose when they work.

### 5. Limited company contractors working through an intermediary which is not their own corporate vehicle:

Agency workers supplied via umbrella companies or other intermediaries are not prevented from being an agency worker (Regulation 3(5)). This means that Individual A, who is self-employed but who chooses to work through an umbrella (because for example, he does not wish to administer his own corporate vehicle), is not within the scope of the Regulations. Individual B, who is not self-employed but works through an umbrella (perhaps for perceived tax benefit reasons) is within scope of the Regulations.