



## EMPLOYMENT INTERMEDIARIES: TEMPORARY WORKERS – RELIEF FOR TRAVEL AND SUBSISTENCE EXPENSES

ICAEW welcomes the opportunity to comment on the discussion document [Employment Intermediaries: Temporary workers – relief for travel and subsistence expenses](#) published by HMRC on 16 December 2014.

This response of 10 February 2015 has been prepared on behalf of ICAEW by the Tax Faculty. Internationally recognised as a source of expertise, the Faculty is a leading authority on taxation. It is responsible for making submissions to tax authorities on behalf of ICAEW and does this with support from over 130 volunteers, many of whom are well-known names in the tax world. Appendix 1 sets out the ICAEW Tax Faculty's Ten Tenets for a Better Tax System, by which we benchmark proposals for changes to the tax system.

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## MAJOR POINTS

### Introduction

1. We welcome the opportunity to comment on the proposals in HMRC's consultation document of 16 December 2015.

<https://www.gov.uk/government/consultations/employment-intermediaries-temporary-workers-relief-for-travel-and-subsistence-expenses>

2. We should be happy to discuss any aspect of our comments and to take part in all further consultations on this area.

### Key point summary

3. The increasing number of workers engaged through agencies, which may also use umbrella companies to employ these individuals, has highlighted the problem that different contracts for workers have different tax consequences which can change the take home pay of individual workers and makes understanding the tax and employment law implications very difficult. If any cost savings are retained by the agency, instead of being passed on to the worker, these can be used by the agency as part of the competitive tendering process and so will benefit the ultimate client instead.
4. The current proposals will add to the possible permutations and would be likely to have unintended consequences as business models are likely to be adapted to ensure cost savings are still achievable.
5. The problems which prevented a simple solution to this problem in 2008, continue to exist today. That more businesses are using these structures, indicates that a more robust solution is needed. We do not consider that piecemeal changes as proposed are the answer.
6. Unless tax law adopts one of two extreme positions, namely that either no travelling expenses should be allowed, or that all travelling expenses including private commuting should be allowed, then any attempt to draw a line between what is allowable and what is not, is bound to be arbitrary. This causes the problem that people in very similar circumstances will find themselves with different take home pay. Neither of these extreme solutions has been suggested and we have not considered them for this response.
7. The specific problem, which is estimated in para 2.1 of the consultation to be costing £400m a year, concerns a specific set of arrangements. If change is needed before the reports of BIS and the OTS, who are also undertaking work in this area, are published, the specific problem which could be addressed is to focus specifically on the rules for what defines a permanent workplace for agency workers.
8. Broad based reform is ultimately the only proper approach to deal with this problem. This will need to begin with a review by Ministers of the underlying principles they wish to follow for travel and subsistence tax relief, and be pursued in conjunction with employment rights of workers.

### General comments

9. The use of umbrella companies for employment law and tax purposes has grown rapidly in recent years, driven partly by the increasing number of workers in the UK who are in temporary employment. Many of these workers use employment agencies which may be required to make all payments to these workers through a payroll. Some agencies run their own payrolls, but others may outsource the requirement to a separate organisation, an umbrella company.
10. There are different permutations of these arrangements, the exact nature of which will dictate the employment rights of the individual workers and the tax position. The deductibility of travel

expenses incurred in getting from home to and from the workplaces, and of subsistence costs, will all depend on these arrangements.

11. This current consultation is a repeat of an earlier consultation on this subject in 2008. HM Treasury and HM Revenue & Customs then published a consultation, [Tax relief for travelling expenses: Temporary workers and Overarching employment contracts](#), to which we responded as [TAXREP 77/08](#). At that time, we concluded that changing the law was likely to have unintended consequences, and that the Government could achieve its aims by using existing law and by HMRC tightening up compliance.
12. We considered that any attempt to legislate in this area would merely replace one set of anomalies with another and would probably be open to circumvention. It also seemed possible that any change could impact on unintended targets such as professional firms who employ staff through service companies, outsourcing businesses and employers with staff on secondment.
13. We believed then that in a number of cases the nature of the contract (as an over-arching contract of employment) could be open to challenge and that in some cases, those using them might more properly be described as outsourcing contractors rather than agencies or umbrellas.
14. Our comments on the current consultation are very similar to those we made eight years ago. They are of a general nature and are not aimed at any specific questions in the document, as we consider the approach of HMRC is not the best way forward.
15. The specific problem which is estimated in para 2.1 of the consultation to be costing £400m a year, concerns a specific set of arrangements. If change is needed in advance of the other work being undertaken in this area, the specific problem which should be addressed is to focus specifically on the rules for what defines a permanent workplace for agency workers.
16. The Office of Tax Simplification is currently undertaking a review of benefits and expenses. It seems likely that this will make specific reference to travel and subsistence more widely and we recommend that any change affecting temporary workers should be made in conjunction with those proposals rather than in isolation. The outcome of the BIS review of employment status should also be considered simultaneously. A quick reaction to a perceived problem should be resisted.
17. We think that the discussion document fails to explain clearly the problem it seeks to solve. This is principally because it is aimed at assignment-based workers, but lacks a definition of an 'assignment'. This may be intentional, but if so, it illustrates all too clearly why this is a difficult area to legislate. To take a couple of examples:
  - 17.1. Gary, a meter reader is placed for a month with a company that reads gas meters for a large household gas supplier. Is this one assignment for one month, or does Bob have a separate assignment every time he calls at someone's house to read the meter? A natural interpretation of the word would probably suggest the latter meaning. The discussion document reads, though, as if it is the former that is intended.
  - 17.2. A part-time book-keeper works for a firm of accountants in Westminster but hardly ever goes to the office there and has no desk there. She spends most of her working time visiting the firm's clients (as well as one or two of her own which for the sake of convenience she has placed under the auspices of the firm). She neither needs nor receives any supervision, but the firm considers itself ultimately responsible for her work. She goes to a client in Islington for a couple of days. Is this an assignment, and indeed is the firm of accountants an employment intermediary? The general tenor of the document would suggest not (because the firm ultimately takes responsibility for her work), but this

must be very close to the borderline, and it is easy to see how little needs to be done to put it on the other side.

- 18.** In this context we take issue with the implication in paragraph 11, that under a direct contract of employment ‘the employer provides the temporary employee’s normal place of work’. There are plenty of direct employees (both temporary and long-term) that have no normal place of work. This much is recognised in HMRC’s booklet 490. One of the very first examples in the booklet (at the top of page 6) concerns Austin:

‘an installation engineer who works at the premises of his employer’s various clients throughout the United Kingdom. He has no permanent workplace and attends each temporary workplace for a short period only.’

This looks remarkably similar to what many people on OAC’s do. There are further examples of Barry (page 8) and Geraldine (page 19).

- 19.** We note also that the main reason for the rise of overarching contracts of employment (OACs), at least in our perception, is Government-sponsored legislation, frequently but not always in the tax field. This has made other business models less attractive and so enhanced the positive allure of OACs. Simply clamping down on OACs is likely to get the same reaction: to the extent that this problem is solved, other problems will appear somewhere else in the system.
- 20.** Furthermore, anecdotal evidence from our membership suggests that some of the cost to the public purse of the use of OACs is down to non-compliance with existing law and to weak enforcement of it, even where HMRC is engaged in compliance checks. Many employees on OACs never get on to their second assignment with the same umbrella company, or if they do, it involves a very similar travel-to-work journey to the first. In these circumstances the place of work would not usually be a temporary one, and so it would not be eligible for allowable travelling expenses. HMRC are widely regarded as a soft touch when it comes to enforcing this point.
- 21.** We also dispute the contention, at least as far as umbrella companies with OACs are concerned, that expenses are commonly paid instead of salaries, rather than on top of salaries, through salary sacrifices. One of our members reports to us of having recently undertaken an audit of 41 OAC templates provided by different umbrella companies, for an employment business that wished to see that the umbrellas that it was paying were compliant: there was not a single case in those 41 of salary sacrifice being used.
- 22.** Anecdotal evidence would suggest that salary sacrifice may be used as a means of circumventing minimum wage legislation, but we question whether it is compliant with that legislation and suggest that better enforcement of existing laws is the answer to this. We make a similar comment about paragraph 62, which states categorically that this practice (including expenses in National Minimum Wage pay) is not compliant: why does HMRC need new powers when they can use existing ones?
- 23.** While the assertion in paragraph 22, that for some the fee to the umbrella company is greater than the value of the travel and subsistence tax relief that the workers are able to claim, is undoubtedly correct, this ignores the fact that operating a payroll is a function of a business that has to be paid for (the principal obvious costs being staff, software and bad debts). The solution proposed in this discussion document would actually make matters worse, because if the employment businesses were to take the payroll in-house they would then have to find the money to pay for their payroll departments themselves, and would lower the rate of pay to the temporary worker accordingly. The worker would then lose the travelling expenses without any corresponding gain in the rate of pay.
- 24.** The current arrangements do at least have the merit of transparency when it comes to the costs of running a payroll. It appears to us that much of the opposition to these fees stems

from a disbelief in the idea that it could cost as much as £20 a week per person to run a payroll. We feel that the discussion would be better informed with some independent research into these costs, comparing umbrella companies with other businesses.

25. The model described in paragraph 37 looks to us like one of a managed service company, and so should be challenged by HMRC on that basis. We do not believe that very many people on the minimum wage are carrying out their functions as company directors in an independent way.
26. We are concerned that any new law may be a further complication to a set of rules which are already complex. Further complexity may even result in new “solutions” being created by the current purveyors of the umbrella companies. The overriding aim should be simplification.
27. We are also concerned that any changes which are made do not inadvertently create further hardship for the poorly paid and we commend the report by the Low Incomes Tax Reform Group (“LITRG”) published in November 2014, *Travel expenses for the low-paid – time for a rethink?*.
28. Unless tax law adopts one of two extreme positions, either that no travelling expenses should be allowed, which no-one is suggesting, or that all travelling expenses including private commuting should be allowed, which no-one is suggesting either, then any attempt to draw a line between what is allowable and what is not is bound to be arbitrary. This causes the problem that people in very similar circumstances will find themselves with different take home pay.
29. The Tax Faculty seeks to assess the impact of new tax policies using its Ten Tenets, see appendix 1.
30. We now consider the two options being proposed.

**Potential option 1 (paragraphs 69 to 74): forbidding travel expenses to individuals engaged under over-arching contracts of employment by employment intermediaries**

31. The most probable reaction of the employment intermediaries to this will be to make sure that they do not fall within the definition of employment intermediaries. Instead, the workers will work for them and they for the clients, rather like a consultancy firm.
32. The employment intermediaries would probably consolidate and specialise in particular industries, take responsibility for what they do and so become virtually indistinguishable from consulting firms. This was a model used by many firms in the construction industry until 2014.
33. By contrast, in cases where this is not possible the umbrella model would no longer be viable and we may see the situation reverting to where it used to be, with agencies putting people on their payroll and not paying travelling expenses. These workers would lose the employment rights that currently come from having over-arching contracts of employment.
34. We presume this is not what the Government intends, particularly as these workers are paying tax under PAYE anyway. The general public often believes that paying tax under PAYE automatically means they also have employment rights.

**Illustration**

35. Agency Ltd has been asked to find a dozen programmers for a project for a bank. It sources the labour and offers the workers a contract with Umbrella Ltd as their employer. Some agencies will insist that this contract is used.

36. If changes are made as proposed by option 1, Umbrella Ltd, instead of supplying labour to Agency Ltd which in turn supplies it to Bank plc, will rebrand itself as IT Consultancy Ltd. IT Consultancy Ltd will then supply an IT project to Agency Ltd which in turn supplies it to Bank plc. Both Agency Ltd and IT Consultancy Ltd will be taking on extra risks, but there will be ways of minimising those and in reality, Agency Ltd will hardly notice it as it will have passed all the risk on to IT Consultancy Ltd, thereby only facing the risk of IT Consultancy Ltd going bankrupt.
37. The individuals working on the project will no longer be named on the contracts. This will not be appropriate in all cases, but often will be. It will be very difficult to deny IT Consultancy Ltd the benefits of travelling expenses when it is now identical to other companies with similar business models, which have always had them and will continue to do so.

#### Other comments

38. Para 70 – This proposal is too broad and would be viewed as very unfair. Two types of placement that umbrella companies habitually make are for railway workers and meter readers, who by definition work in different places day by day and even within the day. These would all be temporary places of work if they had an employer for whom they were working directly. Denying tax relief for travel by deeming these each to be a permanent workplace just because a third party is involved, merely adds complexity to the system and the workers involved would not see the logic.
39. For the workers, this change is not simple, understandable and clear in its objectives, and is broad brush rather than being targeted at the avoidance highlighted in this consultation document.
40. Para 72 – Although we are pleased to note that secondments would not be included within the new rules, we are concerned that making such an exception could also give rise to avoidance opportunities. It would be possible to circumvent the rules by dressing up placements as secondments. Many OACs are already drawn up as secondments, although not using the word ‘secondment’ in them: it would probably not be difficult for their drafters to alter the terminology to fit whatever definition came into being. Drawing a reliable legal dividing line would be hard: the consultation says that it seeks to maintain travel and subsistence expenses ‘which can be claimed by individuals genuinely seconded to work temporarily away from their regular workplace by their permanent employer’, but this is precisely what umbrellas, who are permanent employers, do now.
41. Para 73 – We disagree strongly that ‘those who provide their services through PSC’s will (usually) have a single employment covering all their different assignments’. They almost certainly won’t. Such individuals are only in the PAYE net at all because they are office holders, and it is true that they hold a single office. It is hard to see how HMRC will be able to divide this directorship into different ‘employments’, without doing the same for every other company director.
42. If a definition could be found for a personal service company (PSC), such that the rules applied only to them, it could then be considered, but the added complexity would be a huge burden. We also note that, to date, the definition of a PSC has proved elusive.
43. The reaction to such a definition would be to take the same approach as umbrellas, see para 30, and become one-person consultancies.
44. Para 74 – We agree with the consultation when it suggests that if PSC’s are excluded from this regime, many more will appear. In many cases these will be for people for whom they are completely inappropriate. This adds complexity and cost to the tax system which is most certainly not what is intended.

**Potential option 2. Restrict the availability of tax relief for travel from home to workplace, and associated subsistence costs, where the individual was employed by an intermediary specifically under an OAC**

45. This would also cause a change in the nature of the umbrella companies offering such OACs, as already described above in the illustration in paras 34-36.

46. It could also result in the increasing use of PSCs.

47. Answers to specific questions

**Question 1: Do you agree with our description of an OAC?**

Yes

**Question 2: Do you agree with our description of how OACs are used, are there variations which we haven't covered here?**

Yes.

**Question 3: Do you agree with our description of why OACs are used? What is the main motivation for using an OAC? Are there any other reasons not described here?**

Yes. The main reason appears to be to reduce costs although whose costs seems to vary from business to business.

**Question 4: On which of these reasons would you place most weight in explaining the recent increase in the use of OACs?**

All the reasons given are valid and others besides. We believe that the main ones, in the order in which they began to be viewed as important, are: (i) the desire of businesses to avoid giving employment rights and their consequent insistence that they will only pay companies; (ii) IR35 making those companies unattractive where it applies, because of the accountancy costs associated with them; (iii) the managed service company legislation making more companies unattractive; and (iv) the migration of a large number of construction workers in umbrellas to PAYE as a result of the offshore intermediaries rules. It can thus be seen that their recent growth is largely a response to changes in legislation, although other reasons such as fact that the workforce has become more flexible, the convenience of having only one business do all one's compliance work, and employment businesses not wishing to run payrolls as they regard this as a distraction from their main business, have all played a part too.

**Question 5: Do you have any other comments? For example, do stakeholders agree that it is unfair that workers engaged through OACs with employment intermediaries get access to travel and subsistence relief whilst others in similar circumstances don't?**

This is merely an application of the law and is therefore not for us to judge. Whether the law for deductibility of expenses is fair is beyond the scope of this consultation.

**Question 6: Do you have any evidence on the extent of the usage of OACs by employment businesses?**

As a professional body member organisation, we do not have this type of information. Anecdotal evidence would suggest that it is not great; employment businesses by and large do not want to get involved with payroll work.

**Question 7: Do you have any further evidence of the recent trends in the use of OACs?**

As a professional body member organisation, we do not have this type of information.

**Question 8: Do these differ between umbrella companies and employment businesses?**



As a professional body member organisation, we do not have this type of information.

**Question 9: Do you expect the prevalence of OACs to increase in the near future?**

As noted above (question 4), much of the recent increase has been driven by legislation in other areas. Future increases will likewise depend to a large extent on future legislation.

**Question 10: Which income groups do you expect will be the greatest users of OACs in the future?**

As a professional body member organisation, we do not have this type of information.

**Question 11: Do you have any evidence on the extent of any competitive distortions created by misuse of the tax rules through OACs and other schemes noted in this document?**

We do not accept that this is a misuse of tax rules. As noted above, the distinction between a permanent and a temporary place of work is necessarily arbitrary and for that reason is bound to seem unfair at times.

**Question 12: Do stakeholders agree there is a strong case for the government legislating to restrict tax relief for travel and subsistence in these circumstances?**

We think that there would be a case if it could be done in a way that did not have knock-on effects or be prone to circumvention. As we cannot see any way of achieving the Government's aims without these two significant drawbacks, we think that the matter is better left alone.

**Question 13: Do you have any evidence on the likely impact of option 1? Do you think any particular sectors will be affected more than others?**

We do not have evidence on this and nor are we in a position to predict the impact on particular sectors. However it seems likely to us that the proposed idea if legislated will be only partially successful: there will also be a rise in the number of personal service companies, and also where umbrellas have a significant presence in particular industries, some of them will mutate into consultancies or service providers in the way described in paras 25 to 27 above.

**Question 14: Do you have any evidence on the likely impact of option 2? Do you think any particular sectors will be affected more than others?**

Again we have no direct evidence on this, but we do expect that it will force the end-client businesses' costs up as contractors seek to recover the money that they will lose out on through not being able to claim expenses. At a time of rising wages and a tight labour market there must be a significant risk of this.

**Question 15: Are there particular groups of people who will be significantly worse off if tax relief was restricted?**

In percentage terms the lower paid are likely to suffer most, as setting up personal service companies is a less attractive option for them.

**Question 16: Are there examples of where this may affect cases where it is fair that tax relief should apply?**

Fairness is very much a matter of people's perceptions and we would not expect there to be a uniform, or even widely-accepted, view as to what is and is not fair. Also, as noted above, the dividing line between what is allowable and what is not in the way of expenses is always going to be arbitrary and to cause unfairness in some cases. It is likely therefore that this will affect cases where it is fair that tax relief should apply, but we cannot say what people will think that they will be.

**Question 17: Do you think the removal of relief for travel expenses under option 1 should be extended to PSCs?**

No. We do not think this will work for the reasons given above.

**Question 18: Do you have any other suggestions, including broad based T&S reform as part of the T&S review announced at Budget 2014, for how the identified unfairness could be removed?**

Broad based reform is ultimately the only proper approach to deal with this problem. This will need to begin with a review by Ministers of the underlying principles they wish to follow for travel and subsistence tax relief, and be pursued in conjunction with employment rights of workers.

## APPENDIX 1

### ICAEW TAX FACULTY'S TEN TENETS FOR A BETTER TAX SYSTEM

The tax system should be:

1. Statutory: tax legislation should be enacted by statute and subject to proper democratic scrutiny by Parliament.
2. Certain: in virtually all circumstances the application of the tax rules should be certain. It should not normally be necessary for anyone to resort to the courts in order to resolve how the rules operate in relation to his or her tax affairs.
3. Simple: the tax rules should aim to be simple, understandable and clear in their objectives.
4. Easy to collect and to calculate: a person's tax liability should be easy to calculate and straightforward and cheap to collect.
5. Properly targeted: when anti-avoidance legislation is passed, due regard should be had to maintaining the simplicity and certainty of the tax system by targeting it to close specific loopholes.
6. Constant: Changes to the underlying rules should be kept to a minimum. There should be a justifiable economic and/or social basis for any change to the tax rules and this justification should be made public and the underlying policy made clear.
7. Subject to proper consultation: other than in exceptional circumstances, the Government should allow adequate time for both the drafting of tax legislation and full consultation on it.
8. Regularly reviewed: the tax rules should be subject to a regular public review to determine their continuing relevance and whether their original justification has been realised. If a tax rule is no longer relevant, then it should be repealed.
9. Fair and reasonable: the revenue authorities have a duty to exercise their powers reasonably. There should be a right of appeal to an independent tribunal against all their decisions.
10. Competitive: tax rules and rates should be framed so as to encourage investment, capital and trade in and with the UK.

These are explained in more detail in our discussion document published in October 1999 as TAXGUIDE 4/99 (see via <http://www.icaew.com/en/about-icaew/what-we-do/technical-releases/tax>).