

Travel Expenses and Tax

The Finance Bill 2016 means that temporary or agency workers, including some supply teachers, who used to be able to claim tax relief on travel and subsistence expenses to and from work, are no longer eligible to do so.

This briefing sets out the revised legal position and the impact it will have on some supply teachers, and offers advice on factors to be taken into account when determining who may be affected by the changes.

The new provisions

Section 14 of the Finance Bill 2016 inserted a new provision, s.339A, into the Income Tax (Earnings and Pensions) Act (ITEPA) 2003.

This states:

‘(1) ...where an individual (“the worker”) –

- a) personally provides services (which are not excluded services) to another person (“the client”), and
- b) the services are provided not under a contract directly between the client or a person connected with the client and the worker but under arrangements involving an *employment intermediary*.’

‘(3) This section does not apply if it is shown that the manner in which the worker provides the services is not subject to (or to the right of) *supervision, direction or control* by any person.’

Section 1 of the Bill stipulates that any worker providing services through an employment intermediary can no longer claim tax relief on travel or subsistence expenses.

Reason for the change

The Government’s stated aim was to clamp down on the perceived misuse of tax relief on travel and subsistence expenses by employment intermediaries.

Section 97ZG (11) of the Act describes an employment intermediary as ‘a person, other than the worker or client, who carries on a business (whether or not with a view to profit and whether or not in conjunction with any other business) of supplying labour.’

Briefing

This means that an employment intermediary is not only limited to umbrella companies but also all suppliers of labour.

If the worker is not under the supervision, direction or control (SDC) of the end-user school, the provisions will not apply.

However, it is difficult to envisage a time when the supply teacher will not be under the SDC of the end-user school or the agency itself.

Most agreements between the agency and the supply teacher will normally contain a contractual provision that the supply teacher has to obey the client of the agency. There is legal precedent for this [Adecco v HMRC 2015].

Given this, the new provisions will affect supply teachers who may previously have claimed tax relief on their travel expenses.

Determining if a supply teacher is entitled to claim tax relief

The NASUWT is aware that umbrella companies (through some recruitment agencies) largely sold their business on the basis that supply teachers could earn more in wages by claiming work-related expenses because they were employees of theirs but worked elsewhere.

The umbrella companies claimed that travel between home and a temporary workplace was considered a business journey and so the employee was entitled to deduct the cost of travel from their earnings, i.e. apply for tax deduction from work-related expenses (emphasis on 'the employee').

In terms of a supply teacher, if he or she worked under an 'overarching' contract (i.e. an employment contract between the employment agency and the employee which links a series of separate engagements into a single ongoing employment) for an employment agency for less than 24 months, then he or she may well have been eligible for tax relief on travel and subsistence. Accordingly, the umbrella company could pay travel expenses free of income tax and National Insurance (NI) contributions.

However, in the majority of agreements between umbrella companies and supply teachers, there is no evidence of an employer/employee relationship between the two, and, therefore, there will be no 'overarching employment contract'. This position was reinforced by the case of Reed Employment Plc & Others v HMRC [2014], where the Tribunal found that employees were not employed under 'overarching contracts of employment' and so the expenses were taxable. In this situation, Her Majesty's Revenue

and Customs (HMRC) would look for payment from the agency first, but it is certainly not unknown for HMRC to then switch its attention to the individual who made the claim.

The impact of the new legislation on supply teachers

The financial impact on supply teachers has been estimated as, on average, a loss of £3,252 a year in take-home pay (according to PRISM).

Some unscrupulous employment intermediaries encourage supply teachers to set up a limited company with their assistance. For example, the RACS DSC (Direction, Supervision or Control) product, which is sold to supply teachers, agencies and hirers, was implemented on the same date the legislation was enacted.

RACS claims:

- a) it will set up a limited company for the supply teacher (consultant);
- b) the supply teacher will be the 'sole owner', director and employee of the new company;
- c) it will act as the company's agent and manage all documents and administrative responsibilities;
- d) the supply teacher can decide to register for VAT. The RACS will calculate and submit quarterly VAT returns on the supply teacher's behalf, in addition to paying any liabilities;
- e) the supply teacher will benefit from RACS comprehensive public and employer liability, plus professional indemnity and insurance (where applicable);
- f) the supply teacher will take home more pay than Agency PAYE or new umbrella models with all tax liabilities and NI contributions paid at source;
- g) this flexible product allows contractors to leave whenever they choose, taking their company with them, plus a full set of accounts illustrating no outstanding liabilities to HMRC.

If an attempt is made to circumvent the SDC by a simple contractual clause, the HMRC would merely look at the reality on the ground and consider whether the SDC test (see above) is met. The new legal provisions were introduced to clamp down on unscrupulous employment intermediaries with the aim of ensuring that genuine self-employed individuals, who are not necessarily under the SDC of somebody else, can claim such relief.

Furthermore, by setting up a limited company, a supply teacher would lose all statutory rights provided for agency workers under the Agency Workers Regulations.

Additionally, as director and employee of the limited company, the supply teacher/director has a duty to comply with the legislative framework relating to employment law, and as set out in the Companies Act 2006.

What should a supply teacher do if their agency tells them the new legislation does not impact on them?

If the employment agency tells a supply teacher that the new legislation does not change the way their travel and subsistence expenses are treated for tax purposes, they should ask the agency to set out in writing why it believes this is the case.

If the agency continues to give a supply teacher tax relief on their travel and subsistence expenses which they are not entitled to, the supply teacher is at risk of being contacted by HMRC for unpaid tax.

If NASUWT supply teacher members have any concerns or queries regarding this issue, they should contact the NASUWT for advice and support.

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