

Question & Answers

Question	Answer
Who is liable for paying employers NI if the worker is employed under an umbrella company?	Umbrella companies typically employ the worker and put them on their payroll, retaining an amount to cover its administration fee, employer National Insurance contributions (NICs), and holiday pay. The remainder is the worker's gross pay from which the umbrella company deducts income tax and employee's NICs. Not all umbrellas are operating tax and NICs when they should. The Umbrella company that is not paying will normally be liable for any unpaid taxes and NICs owed
Scenario where staff are employees of the FT but contract for 'out of hours' service has been awarded to a consortium - same staff do the same work out of hours but paid by a another company for out of hours work. Some argue this is a contract for services and therefore IR35 is not relevant.	We need to look into this further and we will get back to you
The webinar has consistently referred to PSCs/ people operating through limited companies. However I want to confirm that this legislation does still apply to an individual who is self employed/ working as a sole trader?	IR35 off payroll does not apply unless there is an intermediary e.g. a Personal Service Company (PSC) through which a person offers their services. It does not apply to self-employed individuals. This does not mean that you should not consider status and here is the guidance: https://www.gov.uk/employment-status & https://www.gov.uk/guidance/check-employment-status-for-tax
Some agencies are overtly stating that Supervision, Direction and Control is not applicable for certain types of Drs. I suspect HMRC would disagree, but is there any chance of decisive, written advice on this?	Yes, that's right. We have not encountered any doctors who are not subject to a 'right' of supervision, direction and control. Some doctors are highly skilled and have to make lots of judgements on their own but crucially the client retains the right to supervision, direction and control. You can see this in the standard draw down terms in the framework for agencies. This was covered in slides 10 and 14 in the webinar. This is quite typical. In practice doctors have to be held to account for patient safety reasons. There are a handful of clinicians who are very senior and where supervision, direction and control is weak but we have found these tend to be office holders. Office holders are automatically deemed to be within the off payroll rules. We are very sceptical about this sort of claim over supervision, direction and control. https://www.gov.uk/employment-status & https://www.gov.uk/guidance/check-employment-status-for-tax
If Hired for future work for pay means you have mutuality of obligation, when would you not have mutuality of obligation? It is a test, not a given, in employment law is it not?.	It would rarely if ever be the case in public sector hiring. That is why we did not put questions into the tool about it.
Umbrella companies are saying you're okay due to mutuality of obligation being in point?	Yes we have seen people assert this in the past as if it were a magic bullet. But it is important to actually have regard to the terms under which NHS locums are engaged. They are offered work, in advance, a particular shift or series of shifts and they cannot simply walk away from that work without meeting their obligation. They are contractually entitled to pay for these shifts. So all the minimum elements are present.
Not all agencies are capable of assessing umbrella companies properly - why not insist on FCSA membership or similar?	Commercial reality needs addressing in the application of the rules and your assistance to trusts. We need to look into this further and we will get back to you.
If the Trust employ a medical locum through an Agency then if the locum travels visiting a patient whilst on business, then the Trust (through an authorised timesheet) paid through the Agency would reimburse the travelling costs. Accommodation costs and paying for a business premises outside of the worker's home is not relevant here. Should the "Other Expenses" box be ticked in the Assessment tool in this example please.	We need to look into this further and we will get back to you.
I have heard of some companies offering a service which is priced and paid by unit, requesting a worksheet is signed off at the end of the shift instead of a timesheet. Is this OK or would this still be considered the provision of a worker? S	Sounds like the provision of a particular worker.
Re: umbrella companies, how do we know which are the good ones and the dodgy ones- what investigation should we do?	HMRC cannot comment on any individual agencies or umbrella companies due to confidentiality. However, if an umbrella company states that a doctor or nurse can receive 96% or 97% of their gross pay because they are outside the off payroll rules, they should not be used. Doctors and nurses are likely to be within the off payroll rules.
Is it correct with payments to doctors re private patient work to say that they are outside IR35 as the arrangement is between the patient and the doctor?	Yes, if the doctor contracts with a private patient.
Regarding Private Patients - should consultants be paid gross or deduct NIC?e.g a Consultant has carried out private patient work for which a patient has paid £2,000 - do we pay the Consultant £2,000 or £2,000 less NIC?Thanks. If the doctor contracts with the private patient - it is outside the reform. If the NHS (the public body) contracts with a private patient it is inside the reform.	hanks. If the doctor contracts with the private patient - it is outside the reform. If the NHS (the public body) contracts with a private patient it is inside the reform.
We have struggled to get clarity about whether interpreters from agencies are in or out ?	They claim to be 'self employed' and have right of substitution but they come via a Framework agency and the agency provide the substitute. We need to look into this further and we will get back to you.
If we are employing management consultants with no opportunity for substitution but who incur significant expenses in delivering the contract, eg/ accommodation costs as they are away from home, would they be deemed as self employed?	It depends on the whole of the status tests. See our guidance: https://www.gov.uk/guidance/check-employment-status-for-tax
Is there a double charge for employers' NI as the NHS body will pay and the PSC would also pay on the salary paid to the individual?	No. If the PSC falls within the off payroll rules then the NHS body deducts the employer NI along with other taxes then pays the PSC a net amount. If the individual in the PSC is genuinely self-employed then there will be no employer NI deduction.
How about Drs billing for Waiting List initiatives etc? .	These are ad-hoc, and range in rates, are through PSC's and we wouldn't accept a substitute? We need to look into this further and we will get back to you.
What are the obligations on the public body if a worker is paid via an umbrella company and the public body suspects the umbrella company may not be compliant with employment tax law? Should the public body be looking at whether umbrella companies are compliant?	The public body should not use the umbrella company if they suspect the umbrella company may not be compliant. The tax liability lies with the umbrella company but the public body could be subject to treasury fines or further action from HMRC.
Self-employed, what requirements should the Trust put in place for this group of suppliers?	If the worker is a window cleaner, hairdresser, bricklayer or carpenter doing occasional jobs they will often be self-employed. If it not as clear cut then the Trust would need to consider the worker's status. If they are genuinely self-employed then the Trust would engage them as normal. https://www.gov.uk/guidance/check-employment-status-for-tax
What engagement will HMRC be doing with professional bodies directly to ensure they are aware of your Myth Busters?? NMC, GMC etc.	HMRC has already undertaken a lot of work with NHS bodies. We have spoken to Trusts and other Healthcare providers and will look to talk to more, to get the message across. Obviously, the idea of the webinar was to reach a wider audience.
Where a doctor is being paid to see a private patient at a separate private wing at the hospital what is the approach?	If the doctor contracts with the private patient - it is outside the reform. If the NHS (the public body) contracts with a private patient it is inside the reform.

The example talked about where there are a group of Doctors doing Diagnostic work at a private wing is a real example. They all work for the Trust in a substantive role - so we are happy in theory with any one of them coming along - as long as one of them does. So is this real substitution? and how should we proceed?	They are operating as a partnership.
How does this impact self employed individuals contracted to public companies?	IR35 off payroll does not apply unless there is an intermediary e.g. a Personal Service Company (PSC) through which a person offers their services. It does not apply to self-employed individuals. This does not mean that you should not consider status and here is the guidance https://www.gov.uk/employment-status & https://www.gov.uk/guidance/check-employment-status-for-tax
How does a Trust know if an umbrella company is above board or under your investigation?	There is a programme of work aimed at them. Most, if they are known about, are under enquiry. We are adding more to the list all the time. They will be liable to tax, interest and penalties. We are working with NHS Improvement to publicise that 'people' should not be using them and what the risks are if they do.
Would you assess an individual who is brought in to review a service or to provide specialist business support who then provides a report within an agreed timescale as in scope of IR35 - so they are not filling a defined role in the organisation but they are working with it to support the business. e.g. a review of how outpatient services is delivered or to project manage a review of transforming service.	Highly unlikely to be in scope.
Supervision suppliers, i.e. when for a specialist service the Trust has no-one to provide clinical supervision as is required. This often means a supplier provides a one hour supervision session. There is no equipment involved and if the Trust had someone internal to do it then we would. It feels like employment for that 'role' but the small number of hours means the engagement feels like it shouldn't be treated as employment but the tool indicates employment.	The tool is right in this case. This also feels like employment to us. The fact that the Trust would normally treat the individual as an employee is important. The length of contract does not matter. A contract of a few hours can be employed. If the hours are completed on a regular basis then it can be employed.
Just to clarify re:umbrella companies. Our liability is to inform the umbrella company to make statutory deductions and then they are liable for the deduction (as per an agency really). Is this correct?	That is correct. If you have used the tool and based it on the facts and given the decision to the agency or the umbrella company then they are then liable. However, this does not mean that there are not consequences if you knowingly use an agency or umbrella company that is non-compliant.
Are you able to share which umbrella companies you have found to be non compliant so far?	HMRC cannot comment on any individual agencies or umbrella companies due to confidentiality. However, if an umbrella company states that a doctor or nurse can receive 96% or 97% of their gross pay because they are outside the off payroll rules, they should not be used. Doctors and nurses are likely to be within the off payroll rules and should be treated as such.
Where Trusts are engaging a worker via an agency does the Trust face any penalties if the agency does not deduct the tax?	It depends on the structure being used by the agency/umbrella company and the workers as they can face tax, interest, and penalties if they don't deduct the right tax. There can be consequences for Trusts who knowingly use an agency/umbrella company who have not deducted tax as they should. There will be reputational damage and possible Treasury fines. This is more serious than a tax penalty. When the structure collapses there will be significant disruption which can have an effect on the Trust. It is not just a tax risk.
What is HMRC doing to stop the non-compliant umbrella companies in the market place?	HMRC cannot comment on any individual agencies or umbrella companies due to confidentiality. However, if an umbrella company states that a doctor or nurse can receive 96% or 97% of their gross pay because they are outside the off payroll rules, they should not be used. Doctors and nurses are likely to be within the off payroll rules and should be treated as such.
In the last interim role I did, it was only 2 months as the Trust was merging with another and the role I was in did not exist in the structure, but they insisted it was in scope. It was in another part of the country, as interim roles often are, and I had to spend quite a lot on alternative accommodation whilst I was there and obviously long commutes. Previously I would have offset these wholly and exclusively incurred business expenses against my corporation tax liability so I am assuming I can still allocate them to my trading accounts when I come to do them for 2017/18, even though the income will not be entered as its already been subject to PAYE and will be Ltd Company income? Also, it was always my view that an 8 week contract to help with a closure/ merger should not have been in scope, so are there any routes for me to challenge the tax at source and claim it back and for any corporation tax liability to be part of the year end accounting process and protocols?	Thank you, we need to look into this further and we will get back to you.
Would you advise Trusts to ask all agencies to provide a list of the umbrella companies they use and the Trust do their own checks on these umbrella companies?	This is a matter for the Trusts. I know that NHS Improvement themselves are aware of the problem and are looking at a solution. HMRC cannot comment on individual agencies or umbrella companies due to issues around confidentiality.
Retired 70 year old individual who no longer pays tax and NI but comes into the Trust and is paid for providing the odd counselling session for breast cancer patients - would this worker fall outside based on the fact of their age and no longer pay tax and NI. Earns less than £2000 per year.	Not in scope.
We have a standard agency checklist we ask all agencies to complete for all workers prior to arriving on site, it ask them to confirm that the worker is IR35 compliant - is this sufficient to protect the Trust when hiring workers through agencies?	No. You need to tell the agency whether you think the role is inside or outside off-payroll working rules (IR35). You can use HMRC's tool - although as we have said, we believe hospital doctors and nurses to be in.
How do we know which Umbrella companies are ok to use?	HMRC cannot comment on any individual agencies or umbrella companies due to confidentiality. However, if an umbrella company states that a doctor or nurse can receive 96% or 97% of their gross pay because they are outside the off payroll rules, they should not be used. Doctors and nurses are likely to be within the off payroll rules and should be treated as such.
The training example is that similar for a single handed consultancy?	Thank you, we need to look into this further and we will get back to you.
When will the ESS tool be finalised? We received an exemption for clinical supervision providers as the old ES1 incorrectly deemed them to be employed. HMRC Helpline said to wait until the ESS was out of Beta stage and re-do the assessment and that it should hopefully determine them to be self-employed.	The tool is live, although all our products go through routine review and are updated if we identify an improvement or change that needs to be made. We need to look into this further and we will get back to you.
Once a PSC worker is deemed to be self-employed, do additional checks need to be done (I'm thinking of the old IR35 Business Test questionnaire where we verified the backing documents to each of the IR35 questions, eg. indemnity insurance docs, separate business bank accounts, etc)	Thank you, we need to look into this further and we will get back to you.
Who are the 'naughty' Agencies - so we are aware?	There is a programme of work aimed at them. Most, if they are known about, are under enquiry. We are adding more to the list all the time. They will be liable to tax, interest and penalties. We are working with NHS Improvement to publicise that 'people' should not be using them and what the risks are if they do. They usually advertise stressing that tax and NIC is not deducted or you can keep 97% of take home or something similar.
What do we say to a nurse who insists on being paid to their limited company without deduction of any tax?	You should not pay a nurse through a limited company without deducting tax. They will be within the off payroll rules. As an agency you will be liable for tax and National Insurance. You are taking a risk by not following the rules and may lose your business with the NHS. You will face significant action from HMRC. We can now attach penalties to a nurse's company. They can end up paying double the amount they initially owed.
Mark, you mention that there are good and bad Umbrella companies. What work is being done by HMRC to deal with the bad ones?	There is a programme of work aimed at them. Most, if they are known about, are under enquiry. We are adding more to the list all the time. They will be liable to tax, interest and penalties. We are working with NHS Improvement to publicise that 'people' should not be using them and what the risks are if they do.
What about contracting to individuals operating a service, eg. pathology tests, which involves individuals either working independently or through an intermediary, when they are taking samples away from site and working on their own premises and then subsequently return results to the Trust?	Thank you, we need to look into this further and we will get back to you.

<p>You mentioned that there were some group area workshops that were happening, can you please provide details of these as if there is one in the North East of England we may possibly be able to attend?</p>	<p>Hi, there will be one up your way, we will be in touch shortly.</p>
<p>When it comes to GPs from surgeries, I've have been advised that as long as they provide confirmation that the GP service is deducting TAX and NI that we do not need to deduct from the GP surgeries invoice. This being the case the advice mentioned making regulry reviews of this and obtaining evidence, how frequent should we do this and what evidence should be requested and provided to show we have made the appropriate level of due diligence and we can show we have made reasonable care when dealing with these transactions.</p>	<p>If the surgery deducts PAYE tax and NICs and your fee is paid to the surgery then that is fine.</p>
<p>Umbrella companies not only deduct tax and employees' NI, they also deduct employers' NI making the worker worse off than directly employed staff. How is this equitable?</p>	<p>Umbrella companies typically employ the worker and put them on their payroll, retaining an amount to cover its administration fee, employer National Insurance contributions (NICs), and holiday pay. The remainder is the worker's gross pay from which the umbrella company deducts income tax and employee's NICs. Where a worker is employed through an umbrella company, there are rules in place to protect individuals. They must be given information in writing which sets out: who is providing the services they are being charged for, how much it will cost (or how any fee will be calculated), and what exactly is being provided by the umbrella company. If umbrella companies are set up and operated correctly, they comply with tax, NICs and National Minimum Wage legislation</p>
<p>Do the rules apply to individuals working as a sole trader or through a partnership?</p>	<p>The HMRC online employment status check tool has a question regarding this but individuals do sometimes come out as being classed as an employee when they work as a sole trader. The IR35 rules only apply to people working through an intermediary - for example a PSC. However, you do still need to get the tax right for workers hired directly. If the tool says someone is employed, not self employed then you may have tax liabilities under other tax rules. https://www.gov.uk/guidance/check-employment-status-for-tax</p>
<p>Is there online status check tool for sole traders? If not what steps should we be taking to review their tax status?</p>	<p>IR35 only applies when working through a Personal Service Company (PSC). Some cases can apply to some partners. I take it you are talking about people you contract with directly. You still need to get the status right. Traders such as these are likely. CEST will also give you an answer for people hired directly. https://www.gov.uk/guidance/check-employment-status-for-tax</p>
<p>Is there an available list of compliant Umbrella companies we can use to check with our Trusted agencies?</p>	<p>There is not a list of compliant umbrella companies as HMRC cannot make recommendations of a commercial nature. If we make a list this will be seen as HMRC endorsing one company over an other. There is a possibility that NHS Improvement might to give more guidance on this.</p>
<p>I'd be grateful for clarity regarding sole traders - as an example, where would we stand with an individual who provides a service, eg, window cleaning or hairdressing, who could be employed by the Trust but isn't and is working as a sole trader.</p>	<p>IR35 off payroll does not apply unless their is an intermediary (e.g. Personal Service Company) through which a person offers their services. It does not apply to self-employed individuals. This does not mean that you cannot consider status and we advise you to do so by checking the CEST tool. https://www.gov.uk/guidance/check-employment-status-for-tax</p>
<p>How are individuals assessed if they don't have their own company but want to provide a 'service'?</p>	<p>If you are a doctor or a nurse you are highly likely to be employed. It is not a choice but based on the terms and conditions of the contract which means you are an employee if you are engaged directly.</p>
<p>Would a screenshot of the CEST report show that a Trust has taken reasonable care?</p>	<p>It will go along way to doing so, although you need to have taken reasonable care about how you answered the questions!</p>
<p>Do the regulations apply to Sole Traders?</p>	<p>IR35 off payroll does not apply unless there is an intermediary e.g. a Personal Service Company (PSC) through which a person offers their services. It does not apply to self-employed individuals. This does not mean that you cannot consider status and here is the guidance https://www.gov.uk/guidance/check-employment-status-for-tax</p>
<p>Can you go over substitution requirements again?</p>	<p>All agreements are personal between the client and the worker covering that named individual. Individuals are not allowed to send a substitute. An agency being able to send a substitute of one worker engaged through a PSC for another worker on its books does not mean there is no requirement for a personal service. Legislation is concerned with whether the WORKER sends a substitute. Almost all doctors and nurses cannot send a substitute. If the agency sends the substitute that is a replacement contract not a substitution.</p>