

Contractor umbrella companies face huge burden checking for SDC

Umbrella companies face a heavy burden with the responsibility of determining which contractors are eligible for travel and subsistence (T&S) expenses tax relief, according to new rules on 'supervision, direction or control' (SDC).

Recent revisions to HMRC's guidance on SDC offer little in the way of clarification, whilst experts at a recent compliance seminar could offer no assurance to umbrella companies, only reaffirming the extent of the extra responsibility intermediaries are now faced with.

"When you're drafting out legislation it's easy to lose sight of those in the middle ground who are trying to do the right thing," notes Robert Burton, tax manager at Ernst & Young and former HMRC tax investigator, who concedes that the newly implemented policy may have been drafted out with compliant umbrella firms as little more than an afterthought.

Why have the changes come into effect?

"HMRC deemed the SDC changes necessary because National Insurance Contributions (NICs) were appearing to be seen as optional and it was difficult for HMRC to win tribunal cases based on the agency legislation," explains Burton.

Up until recently, contractors were able to sidestep the possibility of being caught by the agency legislation and being subject to Pay As You Earn (PAYE) income tax by implementing a right of substitution into their contract. HMRC has since removed this clause in an attempt to 'level the playing field'.

Within its latest guidance, HMRC has sought to clarify the definition of 'personally providing services', which was seen as another source of abuse. As a result of the updated legislation, intermediaries are now required to be especially diligent concerning SDC.

Umbrellas advised to 'swim with the tide'

"Intermediaries can make one of two choices," adds Ernst & Young executive director John Chaplin. "You can swim with the tide, or you can swim against it. But be warned, if you decide to swim against it you should know you'll have a battle on your hands."

Worryingly, HMRC has made it almost as difficult to swim with the tide, thanks to the ambiguity of its guidelines. With its recent revisions, HMRC confirms that the onus is on the intermediary to prove that a contractor is not subject to SDC, but fails to define what evidence it would consider sufficient.

Several highly regulated sectors are seen as high risk by default. However, there is an implication within the fifth worked example in HMRC's updated SDC guidance that a construction worker is subject to SDC because he is obliged to abide by site rules, suggesting that HMRC may be widening the goalposts. This is likely to lead to further uncertainty, and ultimately more umbrellas adopting a risk-averse approach.

Burton attributes the lack of clarity to a desire from HMRC not to "draw a line in the sand" and lend a helping hand to umbrella companies who linger on the edge of compliance. However, in doing so, it appears to have considerably increased the burden on compliant organisations.

Constant monitoring expected of umbrella companies

Burton also highlights problems posed by a lack of engagement between the agency and client, and similarly between agency and contractor. Little or infrequent engagement makes it impossible to gather evidence proving the non-existence of SDC, and so umbrellas are urged to continually check up on contractors to ensure they're prepared for HMRC challenges.

This looks like an impossible task for large umbrella companies who oversee hundreds – or even thousands – of contractors. These companies will be faced with a huge administrative burden in order to remain compliant.

With the expectation that SDC status can continually change, the implication is that SDC testing should be carried out regularly to guarantee continued compliance. As Burton points out, how regularly is open to the umbrella provider's interpretation, although it does come with a risk:

"Umbrellas are expected to continually check on your contractors' status, although how frequently they do so is up to them. It will ultimately depend on how risk-averse they are and how much certainty they want."

Is it worth it for umbrella firms?

The excessive compliance requirements and the risk posed by the lack of clarity have been major causes of contention from umbrella firms. With the commercial viability of processing expenses called into question, it's up to the umbrellas to decide whether or not the costs outweigh the benefits.

Any HMRC compliance investigation is expected to be largely a formality, providing the intermediary appears to have carried out the necessary groundwork. This is what HMRC is trying to encourage, to speed up the process and ease its own administrative workload.

"It's about finding a balance," explains Burton. "Umbrellas are in business to provide a service to contractors as well as clients. But understandably they also want to limit the risk of financial liability coming back to them. So it's all dependent on where these companies feel comfortable."

The vague guidelines surrounding the requirements leave the fate of umbrellas in their own hands. Unfortunately, it appears to be a lose-lose situation. Either firms guarantee compliance by undertaking excessive administrative duties or they apply less rigid compliance procedures and place themselves at risk.

The alternative for the more risk-averse is to withdraw the option to claim expenses. This is an option which many are expected to take, despite the commercial damage it can cause.

New tool launched to help SDC compliance

ContractorCalculator and Qdos have built an online SDC Testing tool that enables umbrella companies to quickly and efficiently process thousands of workers to determine their SDC status, without the administrative burden. It also offers underwritten insurance for workers who pass the test and for whom umbrellas decide to process expenses.

If you are a contractor, please ask your umbrella company to contact us to discuss them joining our current Beta program. Or if you are an umbrella company and want a cost effective method of processing SDC compliance for all your workers then please get in touch.

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