

## APSCo Global

### HMT HMRC DBT Tackling non-compliance in the umbrella company market.

August 2023

#### Introduction to APSCo Global

The Association of Professional Staffing Companies (Global) Ltd (APSCo) is an international trade body offering global services with local delivery to the international professional recruitment sector through its presence in Australia, Germany, Southeast Asia and the UK.

APSCo helps differentiate the professional recruitment market by raising standards and delivering expert support and market intelligence to members of APSCo around the world.

APSCo Global comprises APSCo Asia, APSCo Australia, APSCo Deutschland and APSCo United Kingdom as well as APSCo OutSource, the trade body for recruitment outsourcing providers.

APSCo members range from SMEs to the largest global, listed recruiters and outsourcers. Members recruit professionals into permanent and contract roles across STEM, accountancy, legal, finance, marketing, and media in addition to highly regulated sectors such as qualified social work, teaching and clinical healthcare.

Should you wish to discuss this response in further detail, please contact Tania Bowers, APSCo's Global Public Policy Director - [tania.bowers@apsco.org](mailto:tania.bowers@apsco.org)

#### Overview of Concerns

- Already a highly regulated marketplace, this might drive yet more end hirers to seek talent overseas.
- The options are not fit for the current marketplace, let alone anticipating future market innovation.
- They will not address the fundamental problems – there are no barriers to entry to the umbrella market, setting up a corporate entity and launching an umbrella company can be done in a matter of days. Licencing or registration is needed.
- The supply chain cannot have the same access to payroll data as HMRC, therefore no amount of due diligence will give the supply chain access to the information necessary to find and prevent tax avoidance. If a corrupt umbrella company sets up a shadow scheme, either with or without the worker's knowledge, then this will not be shown on any standard level of due diligence.

#### Recommendations

- Licencing or registration of umbrella companies – ownership by EAS (DBT), FCA or similar body, as financial malfeasance is the largest risk.
- Statutory compliance codes to replace industry self-regulation.
- Separation of employees' pay from umbrella companies own cashflow by mandating client accounts, as per other professional service sectors.

## Chapter 2: Key Information Document Evolution and Pay Calculators

Members note commentary at paragraph 2.8 of Chapter 2 on innovative tools to help provide pay calculators for workers to enable them to work out their gross pay from their assignment rate and the correct amount of tax. Members are very supportive of impartial pay calculators, which even if not HMRC owned, are accredited by HMRC as applying tax rates accurately.

However, these pay calculations get confused with Key Information Documents (KIDs). Members consider that the Employment Business should retain responsibility for the KID provided prior to working finding services, although continue to hold the view that this is not the most appropriate time for it within the process. However, members consider that the umbrella company is the most appropriate party to hold responsibility for issuing a KID once they have been chosen by the worker to be their employer – this will reduce confusion and increase transparency amongst workers. The KID could be required to be issued by the umbrella company alongside a pay calculation, and both should be updated if the worker's personal situation or the role changes, as per the current Regulations on KIDs.

It is a standard service that an umbrella company will produce a pay calculation for a worker, ahead of appointment or on appointment before their first payslip. This considers their specific financial circumstances as well as the anticipated gross to net of the assignment. It should also list additional costs, such as the cost of a P60 copy or express payment. As this, alongside a KID would be legal documents it can also be used as evidence if subsequently tax avoidance is found to be in the chain of the assignment.

## Chapter 3 Regulating Umbrella Companies for Employment Rights

### Chapter 3 - Defining umbrella companies

**Question 1: Which of the options would be the most effective way to define umbrella companies to ensure only they are brought in scope now and ensure future regulations/standards can be targeted to the right business in the supply chain?**

**Question 2: Which of the definitions would be the most future proof?**

**Question 3: Are there any unintended consequences of either option and/or are there alternative ways of defining umbrella companies the government should consider?**

In our members' respectful opinion, neither option is the most effective way of ensuring umbrella companies are in scope of current and future regulations/standards.

APSCo has considered existing definitions relevant to this consultation, listed below:

#### **Employment Agencies Act 1973 (Act)**

##### *Chapter 35*

*13 (3) For the purposes of this Act "employment business" means the business (whether or not carried on with a view to profit and whether or not carried on in conjunction with any other business) of supplying persons in the employment of the person carrying on the business, to act for, and under the control of, other persons in any capacity.*

**SI 2003 No.3319 The Conduct of Employment Agencies and Employment Businesses Regulations 2003 (Regulations)**

*"work-finding services" means services (whether by the provision of information or otherwise) provided—*

*(a)*

*by an agency to a person for the purpose of finding that person employment or seeking to find that person employment;*

*(b)*

*by an employment business to an employee of the employment business for the purpose of finding or seeking to find another person, with a view to the employee acting for and under the control of that other person;*

*(c)*

*by an employment business to a person (the "first person") for the purpose of finding or seeking to find another person (the "second person"), with a view to the first person becoming employed by the employment business and acting for and under the control of the second person;*

**SI 2010.No93 The Agency Workers Regulations 2010 (AWR)**

**4.—(1)** *In these Regulations "temporary work agency" means a person engaged in the economic activity, public or private, whether or not operating for profit, and whether or not carrying on such activity in conjunction with others, of—*

*(a) supplying individuals to work temporarily for and under the supervision and direction of hirers; or*

*(b) paying for, or receiving or forwarding payment for, the services of individuals who are supplied to work temporarily for and under the supervision and direction of hirers.*

*(2) Notwithstanding paragraph (1)(b) a person is not a temporary work agency if the person is engaged in the economic activity of paying for, or receiving or forwarding payments for, the services of individuals regardless of whether the individuals are supplied to work for hirers*

It is APSCo's view that the definition of "employment business" under Clauses 13 (1) and (3) of the Employment Agencies Act 1973 could be appropriate to encompass umbrella companies with the following modifications.

The definition needs to be renamed. One option for the sake of example is, "workforce supply chain principal". There would then need to be a new definition of "employment business" which could be along the lines of:

"for the purpose of this Act means a "workforce supply chain principal" providing "work-finding services".

The definition of "work-finding services" would be needed to transfer into primary legislation.

It is our view Clauses 4(1) (b) and (2) of the definition of "temporary work agency" in the AWR 2010 could be added to the new definition of "workforce supply chain principal", as this will make it clearer that it does not cover payroll agents. In the standard recruitment supply chain, the umbrella company and the recruitment company are acting as principals, not agents. Using the AWR wording in (2) may negate any need for consideration of principal and agent in the supply chain.

The Act and Regulations could continue to refer to "employment businesses" when regulating those businesses providing work-finding services.

We do appreciate government lawyers' superior expertise in statutory drafting and accept they may have considered this approach and discounted it. However, our members' primary concern is that these regulations need to not only encompass the current UK umbrella company supply chain variations, but also to be sufficiently flexible to regulate future models.

Members are confused by the term “corporate work-seeker”. APSCo are aware it is a term used in the Regulations, but nonetheless is confusing for workers and business alike as an umbrella company does not provide work-finding services.

Due to the necessity of an employment business in the chain of supply, neither options 1 nor 2 are sufficiently flexible to cover current supply models. Since the introduction of Off Payroll in the private sector Clients have been seeking ways of managing their flexible workforce, minimising risk.

Further, with the evolution of the outsourcing market, represented by APSCo OutSource, in house hiring is expanding, often with the white labelled support of an outsource provider. This has led to some larger corporates contracting directly with large, well respected, accredited umbrella companies, without an employment business in the chain of supply. The Client may carry out work finding services in its own name or use an umbrella company to employ its personnel for convenience (with no work finding services). Furthermore, government is aware of CIS self-employed, PEO and joint employment models in the market, but these seem to be out of scope. Limiting the definition will not prevent the spread of these models but will mean they remain unregulated.

APSCo appreciates that the Government, in option 1, is seeking to make supply options clearer to a worker, by defining four models. However, given the complexity and opaque nature of the law on employment status and in particular the nuances of employment rights and employment status for tax in the highly skilled sectors it is not always clearcut. The differentiation of when someone is an agency worker and thereby subject to the Act and Regulations, and when they have opted out as a PSC worker or are a consultant providing outsourced services, (both in business on their own account and out of scope) or working as an employee for a consultancy is simply not always clearcut.

The consultation does not mention the opt out, but fundamentally if a PSC worker is working on his own account, and genuinely self-employed, then the assignment is out of scope, opt out or not. This is also an opportunity to clearly differentiate the self-employed contractor and exclude the genuinely self-employed from the Act, Regulations and AWR 2010. Of course, there is the complexity of a separate status for tax.

If it is a stark choice between options 1 and 2, then our members’ preference is narrowly for option 2. although opinion is split. This is primarily as it is more relevant to umbrella companies and more clearly defines their basic operations. Option 2 reflects the reality of the engagement, and the narrow conditions create less scope for disguised set ups.

### **Chapter 3 – Umbrella company standards**

**Question 4: What aspect of the umbrella company’s role in the supply chain should the regulations cover?**

**Question 5: Is there a rationale for starting with limited regulations and reviewing them before potentially expanding them to cover other areas of umbrella company involvement?**

APSCo take comfort from the fact that Government recognises the value of the compliant umbrella market to the flexible workforce, and in its Call for Evidence response in 2022 explained how an umbrella PSL frees a recruiter to focus on work-finding services. However, there should be barriers to entry for umbrella companies, given they provide a fiduciary and employment service for individuals, and the sector must be forced to mature.

For a number of years and in last year's Call for Evidence APSCo called for licencing of the umbrella market, the mandatory use of client accounts as well as the introduction of statutory compliance codes for umbrella companies, similar to the accreditations awarded by the FCSA, Professional Passport or APSCo but with statutory force. There are precedents in other industries such as advertising to drive consistent, high standards, thereby protecting consumers, but it needs to be backed up with a greater budget for enforcement, which could be partially financed by a licencing or registration fee.

We appreciate the Government may prefer to consider "registration". Our members are keen to consider this option but fear that it could be toothless, if simply a registration of basic details. However, it could encourage a more robust corporate structure, greater financial stability and transparency around directors and their probity. Some members strongly believe that primarily umbrella regulation is a financial issue and umbrellas should be regulated by the FCA or a similar body. Members are keen to look more into this with Government and to consider other types of regulation such as that required of IDSPs, providing identity checking services.

Lastly, we consider that umbrella companies should be mandated to hold employee money separately in "client accounts" and indeed our members go further suggesting a system of pre-tax payment similar to the G account system operated successfully in the Netherlands. More information is provided at page 11.

### **Chapter 3 – Enforcement of umbrella company standards**

**Question 4: What aspects of the umbrella company's role in the supply chain should the regulations cover?**

**Question 6: Are there reasons that the Employment Agency Standards Inspectorate should not enforce umbrella company regulations? And if so, are there other bodies or approaches the government should consider?**

**Question 7: Does the Employment Agency Standards Inspectorate have sufficient enforcement powers to regulate umbrella companies or would changes need to be made?**

**Question 8: Should EAS mirror its current enforcement approach for employment agencies and employment businesses if it enforces umbrella company requirements?**

Members are concerned as to the lack of detail provided in Option 2. Umbrella companies are subject to existing employment and worker rights laws already, so regulation will be above and beyond existing statutory law.

Handling of pay and holiday pay: Members are not sure of the reason for the NLW /bonus (or commission) split still used in most umbrella company contracts – this unnecessarily complicates umbrella payslips. The consultation is silent as to whether the opt out can still apply to an umbrella company /worker contract. It is fair for the umbrella company to hold the same responsibility re payment as the recruitment business, although if they are on "pay when paid" terms with the recruiter then it may pass the financing responsibility down the chain to the umbrella company (it is currently the employment business with the contract with the umbrella company that finances the chain generally).

Use of Additional Services – this is fair if it is "conditional". Umbrella companies can and do offer other services to their employees, for example employee benefits.

It would also help to standardise the way in which an Employment Business or hirer must advertise an umbrella rate, to avoid the current confusion over employer deductions/holiday pay.

There is concern that if the Regulations are too specific then it will be easy to find loopholes, creating a need for anti-avoidance regulations.

Regulations beyond key areas: Members are concerned about duplicate responsibility between the Employment Business or Client and the umbrella company, but umbrella companies should be mandated to support Employment Businesses in their obligation to comply with the Regulations.

EAS should be proactive in providing better, more accessible education and guidance to umbrella workers. There is a lot on gov.uk, but it is not widely known. We are aware that HMRC are issuing an updated guidance.

In terms of enforcement, a similar approach must be taken to Employment Business enforcement, i.e. reactive and proactive. They must enforce civil wage penalties against umbrella companies as part of this Regulation, in order to have any power. However, members do not think the regulations go far enough. See the section above on Umbrella Company Standards.

Our members are concerned that EAS do not have the resources to enforce umbrella company regulation effectively and that regulation more akin to FCA standards would have more impact.

## **Chapter 4 Tackling Tax Non-compliance in the Contingent Labour Market**

### **Chapter 4 - Option 1: Mandating due diligence**

#### **Question 9: Do you agree that a requirement to undertake due diligence upon any umbrella companies which form part of a labour supply chain would reduce tax non-compliance in the umbrella company market, and to what extent?**

Option 1 Due Diligence enforcement is generally supported by all members across varying size and sectors. As HMRC has identified our members are already undertaking varying levels of due diligence and statutory regulation would create a level playing field. They are concerned that it must not be too prescriptive, and not so much of an administrative burden that it will make contracting non-viable for SMEs. The obligation must be accompanied by a statutory defence.

Generally, the level of due diligence recommended in current HMRC guidance is appropriate, subject to our concerns about access to full information and administrative burden. The tax heads should be limited to PAYE and NICs. As HMRC have identified there should not be a penalty for occasional administrative mistakes or omissions. The penalty should be targeted at those knowingly or carelessly failing to undertake appropriate due diligence, and the penalty should be accompanied by an investigation into their supply chain to target non-compliance effectively.

Members are extremely disappointed that no additional responsibility or liability is mandated on to the umbrella companies themselves. There is no attempt to drive the umbrella companies to mature as a sector, rather, as per other law such as off payroll, responsibility and liability is placed on the supply chain and Client. See the section above on Umbrella Company Standards.

**Question 10: Would a mandatory due diligence requirement focused on tax non-compliance also improve outcomes for workers engaged via umbrella company market, and to what extent?**

Members do not consider the options will materially achieve the government's aims to increase tax compliance, improve transparency and reduce the risk of rights abuses or tax failures for workers.

HMRC has issued extensive guidance to workers, recruiters and umbrella companies over the last few years suggesting recruiters or Clients should undertake in depth due diligence on umbrella assignments. Most of our members choose to work only with accredited umbrella companies who are members of FCSA, Professional Passport or APSCo Trusted Partner. These umbrella companies follow detailed codes of conduct and are audited. However, without significant investment in ad hoc audits on specific assignments, there are examples of umbrella companies passing the general accreditation, whilst then going on to run a non-compliant supply chain. The accreditation bodies are robust and investigate and will expel members when non-compliance is found, but it's very haphazard how these come to light – often via a complaint from the concerned worker or a request for clarity.

Unfortunately, on the Government's estimation there are 1000s of umbrella companies and 1000s of recruiters that choose not to be a member of an accreditation organisation or a trade body. Further, APSCo's members and clients are very concerned about the obligations of due diligence and risk of debt transfer, however for many recruiters, who choose not to be a member of a trade body, they may not be aware of or care about their obligations. With this in mind, the only sensible solution is a form of registration or licence regime for umbrella companies as discussed above.

**Question 11: Which parties in a labour supply chain should be required to comply with a due diligence requirement?**

**Question 19: Would this measure lead users and suppliers of temporary labour to move away from the umbrella company model of engagement? If so, how would end clients and employment businesses engage workers instead?**

Views differ on whether the party with the contract with the umbrella company or the party with the contract with the Client should be required to comply. Responsibility at client contract level, given the volume of assignments through outsourcers, may have greater impact on supply chains. Further, often these businesses have more capacity and expertise to perform effective due diligence than smaller recruiters. However, outsourcers are conscious that they rely on their 2<sup>nd</sup> tier suppliers to collate information effectively.

Members of all sizes and sectors are concerned by the additional potential liability on Clients. Given Clients' known response to off payroll it is likely they will refuse to use umbrella companies in their chains or enforce a very limited umbrella PSL on their supply chain. They may rely even more heavily on the larger recruiters and outsourcers, to the exclusion of SMEs, increasing the level of indemnities required. These indemnities and hold harmless are often self-insured (in breach often of the client's own agreement!) as third-party tax risks are not a recruiter's legal liability in law. This seriously disadvantages SMEs, who are already under extreme commercial pressure given the compliance and regulation in the UK contracting market and the prevailing economic climate.

Members are concerned that Clients will lose trust in the temporary worker supply chain. This will seriously undermine the UK's dynamic flexible workforce.

**Question 12: Which due diligence checks are most effective for identifying potential tax non-compliance in labour supply chains?**

Cross checking HMRC tax submissions with payments made to workers and their original payslips is the most effective way for identifying potential tax non-compliance.

**Question 13: What due diligence checks could end clients or employment businesses be reasonably expected to carry out upon umbrella companies within their labour supply chains? Which tax heads should the checks cover (e.g., employer duties, VAT, Corporation Tax, etc.)?**

It is reasonable to expect all employment businesses to carry out due diligence checks such as an umbrella company's registration with Companies' House, directors' check, VAT registration check, bank account details check, Intermediaries Reporting submissions, umbrella company's self-certification on compliance with employment and tax laws, ensuring umbrella companies agree to appropriate terms and conditions addressing employment and tax compliance before they are engaged to provide services. It is also reasonable to expect a level of more detailed audit on a selection of individual placements of payslips and transfers to HMRC and the individual concerned. This should be limited to PAYE and NICs.

However, whilst this drives more overall compliance, it is not the most effective way of finding tax non-compliance, see answer to question 12 above.

**Chapter 4 – Option 2: Transfer of tax debt that cannot be collected from an umbrella company to another party in the supply chain****Question 23: In what circumstances do you think HMRC should be able to transfer an umbrella company's tax debt?**

Members feel very strongly that debt transfer is not the right solution. Debt transfer would not change behaviour in the chain, thereby won't impact worker outcomes, as compliant businesses are already seeking to work with accredited bodies and do undertake due diligence, and businesses already prepared to take more supply chain risk are less likely to be deterred by debt transfer. SMEs are often not aware of the potential impact of debt transfer.

Members consider some form of **Option 1 (due diligence)** must be implemented if **Option 2 (debt transfer)** is introduced, as there must be a "reasonable steps" defence if recruiters or clients follow due diligence requirements. If debt transfer liability was imposed on the Client, then we anticipate they would limit their use of umbrella companies.

**Question 30: What safeguards, if any, do you think should be included if this option is taken forward?**

A debt transfer (if at all) should only apply to the employment business responsible for the prescribed due diligence checks (subject to the government defining it very precisely and prescriptively as opposed to providing general guidelines or ambiguous 'reasonable due diligence'). Should a government led registration/licensing scheme be introduced a requirement to only use licensed or registered umbrella companies could also serve as a safeguard.

**Question 32: How likely is it that the temporary labour market would move away from using umbrella companies entirely, were this option taken forward?**

As indicated in previous answers, should the liability sit with the Client we see risk that they would move away from allowing use of umbrella companies in their supply chain entirely and the latter could go out of business as a result. From the employment business perspective, particularly one not operating an in-house payroll, such option would undoubtedly drive use of preferred supplier lists with a limited number of umbrella companies engaged to be capable to carry out government prescribed due diligence. That in turn would limit workers' options and flexibility in the temporary labour market.

**Question 33: Are there any further risks that the government should consider before deciding whether to take this option forward?**

Debt transfer is an unreasonable burden on our members, it is difficult to quantify as a contingent liability risk, which can affect their value on a sale or VC transaction. HMRC is aware that it serves Schedule 80 determinations flowing out of the offshore intermediary rules many years after the tax year in question, and existing debt transfer liability under the managed service provisions and off payroll is a seemingly simple solution for HMRC, but unfair on the sector and can impact its economic growth potential.

**Chapter 4 – Option 3: Deeming the employment business which supplies the worker to the end client to be the employer for tax purposes where the worker is employed by an umbrella company, moving the responsibility to operate PAYE**

**Question 34: Do you agree that, were this option to be pursued, it would address tax non-compliance in the umbrella company market, and to what extent?**

HMRC recognise that recruitment businesses are not payroll experts, specialising in work-finding services, and anticipate that most recruitment businesses would need to outsource the deemed employer responsibilities, quite possibly to the umbrella company employing the worker. They correctly anticipate that it would result in more transparency of taxation payments, but a deemed employment tax calculation for an umbrella worker is complex and unintended errors are likely. It is very obviously not addressing the fundamental issue: HMRC do not have the capacity and/or the will to regulate and audit umbrella companies effectively. The sector is concerned that HMRC is aware that if responsibility for tax is forced on the supply chain, most will be sufficiently scared of the implications of not complying, that they will find the additional resource and expertise to manage the task effectively or find another solution( as has been the case with Off Payroll Chapter 10 leading to the increase in use of umbrella companies!).

Option 3 **deemed employment for tax purposes** would place a sizeable administrative and legal burden on the recruitment sector, even if outsourced. There are fundamental concerns:

- It brings into question the purpose of the umbrella company, as its remaining sole responsibility would be in respect of employment rights. Therefore, recruiters and end hirers may prefer an agency worker direct model. However, this would negatively impact the worker, as an umbrella worker has continuity of employment and employment rights.
- The PAYE calculation would be far more complex than the off-payroll calculation which is referred to as a comparison. Tax codes, deductions from earnings, employee benefits, pension

deductions and complexities such as salary sacrifice all need to be treated appropriately. The recruiter is likely to end up relying on the umbrella company to pass the right information up the chain, so it takes on all the liability and risk, currently held by HMRC.

**Question 37: Would businesses stop using umbrella companies as a result of this change? How many businesses would do this and what wider impacts would there be?**

Our members' views on Options 2 or 3 vary depending on the size of their business, their sector, and the number of contractors they run. Many SME businesses state that they could not afford the additional burden and liability of running a deemed employment payroll, they do not have the internal expertise and the additional administrative burden would make contracting work uncommercial.

Our larger members and OutSource members however think they could adapt to the additional responsibility if required, as they have large finance and compliance teams. With that in mind the administrative burden may be borne with more ease by the outsourcer (Managed Service Provider) with the contract with the Client, rather than the recruiter with the contract with the umbrella company.

**Question 38: How would the temporary labour market respond to this option being taken forward?**

Experience tells us that the contractor supply chain can adapt very quickly to legislative change, often in unanticipated ways. It's likely the number of active umbrella companies would reduce significantly as they'll no longer be able to justify their existence. More established ones are likely to adapt and retain some type of supply chain function, whether as payroll agent or umbrella employer, and are likely to focus more on the end client community. Outsourcers, e.g., MSPs may look to manage contractors themselves rather than facilitate and encourage neutral vendors, which would decrease opportunities for SME recruiters.

Workers are likely to be even more confused by their options, given their employer for tax purposes will be different from their worker for rights.

Recruiters would be forced to invest in their capability to run internal payroll and deal with complex PAYE/NICs matters, reducing time and resource available to invest in innovative, progressive projects to improve candidates' work finding experiences and to find those rare, technical experts hard to find through more generalist recruitment routes.

**Question 41: Are there any other options that have not been covered in this chapter that you think could reduce non-compliance in the umbrella company market?**

As indicated in answers to previous questions, more active involvement from the government bodies, introduction of a government led registration/licensing scheme for umbrella companies as well as placing more burden onto umbrella companies themselves would help balance out compliance responsibilities and liabilities, and as such reduce non-compliance in the market.

We compare the government's proposals with the situation in the Netherlands, where temporary labour continues to be popular with end hirers, despite onerous compliance. Over 50% of clients require umbrella companies (and recruitment businesses) to hold a national standard, called NEN 4400, which sets requirements in respect of payment of taxes, social security contributions and

employment rights. The aim is to limit the risk to workers and the risk to end-clients of unpaid taxation and penalties. The Dutch government are looking to make this certification compulsory, primarily to address labour abuse at the lower end of the labour market. Along with payments by end-clients directly into G-accounts, (which are bank accounts from which an employment agency can only pay VAT and wage tax to the taxation authorities), the NEN certification creates a stable, albeit heavily administrative compliance regime.

#### **Chapter 5 – Questions about the VAT flat rate scheme and MUC abuse**

Our members are keen for HMRC to address existing schemes and abuse, and act quickly with sufficient resource to quash new schemes as they arise. However, our members are not accounting or tax experts and therefore we have not addressed this Chapter in our consultation response.