

EXPLANATORY MEMORANDUM TO
THE SOCIAL SECURITY (CATEGORISATION OF EARNERS) (AMENDMENT)
REGULATIONS 2014

2014 No. 635

1. This explanatory memorandum has been prepared by Her Majesty's Revenue & Customs (HMRC) on behalf of Her Majesty's Treasury and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

This instrument amends the Social Security (Categorisation of Earners) Regulations 1978 (SI 1978/1689) ('the principal Regulations') and the Social Security (Categorisation of Earners) Regulations (Northern Ireland) 1978 (SR (NI) 1978 No. 401) ('the principal NI Regulations') to:

- apply employer's and employee Class 1 National Insurance Contributions ('NICs') to workers who are engaged through an agency where the worker is subject to direction, control or supervision or a right of direction, control or supervision;
- reform the host employer rule, to assist enforcement and ensure a clear hierarchy between the host employer rule and the agency rule;
- apply employer's Class 1 NICs to certain UK agencies who are involved in the supply of UK workers when the worker is engaged or employed outside of the UK; and
- revoke the regulations applying to entertainers, that is persons engaged as an actor, singer, or musician, or in any similar performing capacity ('entertainers'), removing them from employers and employee Class 1 NICs.

3. Matters of special interest to the Select Committee on Statutory Instruments

None.

4. Legislative Context

Agency Workers

4.1 The instrument amends the principal Regulations and the principal NI Regulations that apply to agency workers. The principal Regulations and the principal NI Regulations already classified agency workers as being employed earners and therefore liable to Class 1 primary and secondary NICs where the worker is under (or the right of) direction, control or supervision as to how they carry out their duties. The regulations currently require the worker to be obliged to provide their service personally. There are a number of businesses that are setting up structures where the contracts purport that the worker is self-employed as the worker is not obliged to provide their services personally. The intention in amending these regulations is to prevent workers from being falsely engaged as self-employed workers.

Host employers and Agency Workers

4.2 This instrument amends the principal Regulations and the principal NI Regulations to prevent people from avoiding NIC by setting up a company outside of the UK employing or engaging people who are working in the UK. There are existing regulations aimed at preventing this behaviour, known as the host employer rules.

However, some people are seeking to avoid the existing regulations by claiming that either the worker is self-employed or that there is no obligation for the worker to provide their services personally, so argue the legislation does not apply. The instrument amends the regulations to prevent this behaviour. The instrument also clarifies which UK company has responsibility for paying Class 1 employers NICs and deducting employee NICs by creating a clear hierarchy where the worker is engaged or employed offshore.

Entertainers

- 4.3 This instrument amends the principal Regulations and the principal NI Regulations which provide, for the purposes of the Social Security Contributions and Benefits Act 1992 and the Social Security Contributions and Benefits (Northern Ireland) Act 1992, for persons in employments of certain descriptions to be treated as falling within a different category of earners, and specify the person who is to be treated as the secondary contributor in respect of payments to certain description of earners. The amendments made by these Regulations mean that with effect from 6 April 2014 the principal Regulations and the principal NI Regulations will no longer apply to entertainers, so that these individuals will pay Class 2, and if applicable Class 4 NICs as self-employed earners.

5. Territorial Extent and Application

This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

- *What is being done and why*

Agency Workers

- 7.1 The principal Regulations and the principal NI Regulations classify certain people as being employed earners meaning that they are liable to class 1 employer and employee NICs as if they were an employee. They can also classify employees as not being employed earners meaning that they are not liable to Class 1 employers and employee NICs.
- 7.2 People working through agencies, whilst they would not meet the definition of an employee, have been classed as employed earners for a number of years. In recent years there has been growing avoidance aimed at sidestepping the principal Regulations and the principal NI Regulations in respect of agency workers. This instrument brings in changes to who is responsible for paying employer NICs and deducting employee NICs. The existing Regulations place this with the agency with the contract with the worker. This instrument will mean that the agency with the contract with the end client will be responsible for the paying employer NICs and administering employee NICs. It also removes the obligation for the worker to provide their services personally and applies where the worker is actually personally providing their services.
- 7.3 The instrument also introduces a provision to protect the secondary contributor where they have been provided with fraudulent documents. This provision means that the end

client or another agency in the contractual chain is the secondary contributor if they have provided fraudulent documents. This means that they are liable to pay employer NICs and deduct employee NICs in respect of that worker.

Host Employers and Agency Workers

7.4 The principal Regulations and the principal NI Regulations also make UK workers who are employed offshore employed earners in the UK. It makes the UK company for whom they are providing their service responsible for paying employer NICs and deducting employee NICs. This instrument clarifies that where a UK agency is placing a UK worker with a UK end client but the worker is employed or engaged offshore that it is the UK agency that is responsible for paying employer NICs and deducting employee NICs. Where there is no UK agency it is the end client who the worker is providing their services to that is responsible.

7.5 These Regulations clarify who the secondary contributor is for the existing host employer rules, creating a clear hierarchy. They also create a new test that where the worker is involved in the provision of services the Regulations apply. These Regulations apply to the UK host that makes arrangements with an offshore company. This ensures that where the worker provides services to customers of the host employer remains the secondary contributor.

Entertainers

7.6 Under the principal Regulations and the principal NI Regulations entertainers who are as a generality self-employed earners, are deemed to be employed earners for the purpose of NICs notwithstanding that their engagements are generally under contract for services (i.e. self-employment). Where the principal Regulations or the principal NI Regulations apply, an entertainer pays employees' primary Class 1 NICs. The producer of the entertainment from which the entertainer's earnings derive is responsible for the employer's secondary Class 1 NICs.

7.7 In more recent years, changes in the way in which entertainers are engaged and paid for work, has caused uncertainty about the strict application of the legislation. Specifically determining when the Regulations apply; and which party is responsible for their operation, has presented an often insurmountable obstacle in recovering sufficient Class 1 NICs for entertainers to maintain an ongoing qualification for contributory benefits.

7.8 This uncertainty increasingly results in Class 1 NICs not being deducted where the principal Regulations and the principal NI Regulations require them to be. Consequently some entertainers find themselves unable to access contributory benefits due to lack of Class 1 NICs. For these individuals the policy intention of the Regulations of providing contributory benefit protection is fatally undermined

7.9 Following extensive engagement with representatives of entertainers and engagers over the past two years, HMRC has concluded that the ongoing uncertainty over the correct Class 1 NICs position of individual entertainers is placing at risk the commercial wellbeing of the UK film, television, music and corporate communication industries, and the UK's place as a global market leader in these industries.

7.10 Full details of the precise difficulties presented by the Regulations for both entertainers and their engagers can be found in the public consultation document detailed in paragraph 8.5.

- ***Consolidation***

7.11 There are currently no plans to consolidate the instruments that are being amended

8. Consultation outcome

Agency Workers

8.1 The consultation on onshore intermediaries ran from 10 December to 4 February. This was a shortened consultation period on this basis that it was a technical consultation into anti-avoidance legislation.

8.2 HMRC held 18 stakeholder meetings and received 106 written responses during the consultation period. All respondents supported the Government's aims of stopping avoidance of NICs through falsely presenting people who work under conditions that would be considered as employment as self-employed. There were some concerns about the way the Government was implementing the changes to the legislation. As such the Government has made some changes to take these issues into account. A copy of the consultation document can be accessed at: <https://www.gov.uk/government/consultations/onshore-employment-intermediaries-false-self-employment>. A formal summary of responses to this consultation will also be published on the same website.

Host Employers and Agency Workers

8.3 The consultation on offshore employment intermediaries ran from 30 May to 8 August 2013. HMRC received 50 written responses during the consultation period. Copies of the consultation documents, the proposed draft legislation, and a formal summary of responses to the consultation can be accessed at: <https://www.gov.uk/government/consultations/offshore-employment-intermediaries>

Entertainers

8.4 HMRC consulted from 15 May 2013 to 6 August 2013 on four possible options for simplifying the NICs treatment of entertainers going forward. 11,814 responses were received with 99.1% of these (including entertainers themselves) supporting the option to repeal the relevant parts of the current Regulations, and for HMRC to treat entertainers engaged under a contract for services (i.e. self-employment) as self-employed for both tax and NICs purposes.

8.5 The summary of responses document to the consultation was published on 23 October 2013 and is available via the central Government website at: <https://www.gov.uk/government/consultations/national-insurance-and-self-employed-entertainers>

9. Guidance

Agency Workers and Host Employers

9.1 HMRC is developing detailed guidance taking into account the comments made by respondent to both the off shore and onshore intermediaries consultations. This will be published on the HMRC website.

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9.2 From 6 April 2014 HMRC's existing guidance for self employed earners will also apply to entertainers. A Revenue and Customs Brief 35/13 providing detailed guidance for entertainers and engagers on the actions they need to take in order to be ready for the changes was published on 23 November 2013. Additional guidance for those customers currently using the Real Time Information System to report Class 1 NICs

deducted from entertainers will also be published. Both these guidance products are accessible via HMRC's internet website www.hmrc.gov.uk

10. Impact

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- 10.1 A Tax Information and Impact Note covering this instrument was published on 10 December 2013 alongside the draft legislation and is available on the Gov.uk website at <https://www.gov.uk/government/collections/tax-information-and-impact-notes-tiins#finance-bill-2014-10-december-2013>. An updated Tax Information and Impact Note will be published on that website.

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- 10.2 A Tax Information and Impact Note covering this instrument will be published on the HMRC website at <http://www.hmrc.gov.uk/thelibrary/tiins.htm>.

11. Regulating small business

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- 11.1 The legislation changes will apply to all employment businesses equally irrespective of their size. There is therefore no impact that is specific or unique to small businesses

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- 11.2 The legislation changes the NICs position of entertainers and so will remove the current regulatory requirements placed upon those small businesses engaging them after 6 April 2014.

12. Monitoring & review

HMRC will continue to work closely with the Department for Works and Pension and the Department for Social Development (Northern Ireland) to monitor the impact of the changes being effected.

13. Contacts

Agency Workers and Host Employers

Sarah Radford at HM Revenue and Customs (telephone number: 03000 586474 or email: sarah.radford@hmrc.gsi.gov.uk) can answer any queries regarding the Agency Workers provisions in the instrument.

Entertainers

Gill Standen at HM Revenue and Customs (telephone number: 03000 536786 or email: gill.standen@hmrc.gsi.gov.uk) can answer any queries regarding the entertainers' provisions in the instrument.