



Offshore Employment Intermediaries

Summary of Responses

14 October 2013

Contents

1	Executive Summary	3
2	Introduction	6
3	Responses	8
	A. Broad and common concerns	8
	B. The oil and gas sector	11
	C. Oil and gas workers and mariners	13
	D. Internationally mobile workers	14
	E. Interaction with other legislation	15
	F. Definition of roles in the employment chain	16
	G. Shell companies	16
	H. Calculation of liabilities	16
	I. The administrative burden of record keeping and returns	17
4	Next steps	19
5	Annex A: List of stakeholders consulted	20
6	Annex B: Worked examples	22

1. Executive Summary

Background

1.1 The Government has been clear in its commitment to reduce tax avoidance. In recent years there has been a growth in the use of offshore employers to employ UK workers, working in the UK, for UK based companies. Whilst many of these arrangements are in place for legitimate commercial reasons, such as international secondment, a significant number of businesses use these structures to avoid paying employment taxes for their UK-based workers.

1.2 Following HMRC's review of the use of offshore employment intermediaries, the Government announced at Budget 2013 that it would be strengthening the legislative obligations to ensure the correct income tax and NICs are paid by offshore employment intermediaries.

1.3 The consultation document 'Offshore Employment Intermediaries' was published on 30 May 2013 and closed 8 August 2013. The first part was a technical consultation on creating an income tax and National Insurance Contributions (NICs) charge on offshore employers and, if the employer fails to pay, moving this charge to an onshore engager of labour. The second was a policy consultation on the associated record keeping and filing requirements.

The original proposal

1.4 The Government originally proposed that the offshore employer would be responsible for accounting for the NICs and income tax of the workers it placed in the UK. In the case of a default by the offshore employer, the consultation proposed that the employer's obligations with regard to tax and NICs would move to the intermediary business closest to the end user of the labour (Intermediary 1). In the case of a default by Intermediary 1, or where there was no Intermediary 1, the tax and NICs liability would move to the end user.

1.5 To assist with HMRC's enforcement, relevant intermediaries would be required to have in their power or possession information about how the workers they placed with end users were ultimately paid and engaged. In addition, the consultation proposed that the relevant intermediary would be required to make a quarterly return to HMRC detailing information about all the workers, that are employed offshore, who they place or engage. In the case of no relevant intermediary, this responsibility would fall to the end user of the labour.

Responses

1.6 The Government is very grateful to the many businesses, representative and professional bodies and other organisations who engaged with the consultation process. The feedback has been invaluable to the Government. In light of the responses, the Government has revised the proposal to address many of the concerns raised by stakeholders.

1.7 This document summarises the responses received during this consultation and presents the Government's revised approach to preventing offshore tax and NICs avoidance.

1.8 In general, responses showed a broad support of the Government's objective to create a level tax playing field for businesses and prevent this type of avoidance. However, the responses also raised a variety of concerns with regards to the practicality of the proposals and foresaw difficulties for businesses and HMRC in operating the new legislation and improving compliance.

1.9 Common to a majority of the respondents, were three concerns in particular:

- a. Offshore employers might be encouraged not to comply with their tax responsibilities, knowing that they are outside UK jurisdiction and that their liability would pass to Intermediary 1 and/or the end user. This would leave Intermediary 1 and the end user with the risk of that liability passing to them at any time should the offshore employer choose to default.
- b. The record-keeping and return requirements would impose a heavy administrative burden on all businesses within the employment chain, particularly given the complexity of arrangements in some supply chains.
- c. The proposed legislation would add an extra layer of complexity on top of the existing legislation, which is contrary to the Government's aims of tax simplification.

The revised proposal

1.10 In response to the concerns raised by stakeholders, the Government has significantly simplified its proposal, whilst more effectively stopping the avoidance. As suggested by stakeholders, the revised proposal will amend and strengthen existing legislation to make it clearer and more effective, rather than creating new legislation.

1.11 A large proportion of stakeholders were concerned about the uncertainty facing Intermediary 1 and the end user with regards to a potential movement of tax and NIC liability under the original proposal. In the Government's revised proposal, the liability will not move. As HMRC's powers do not extend offshore, Intermediary 1 will be made wholly and immediately responsible for accounting for the tax and NICs obligations of all workers who are ultimately engaged by an offshore business.

1.12 The Government has listened to stakeholders' concerns about the administrative burden the original proposal placed on businesses. Most businesses are now excluded from any record keeping or return requirements. However, some information from Intermediary 1 will still be needed to help HMRC with its compliance investigations. This will take the form of accounting for any offshore workers through Real Time Information (RTI) and submitting a simple quarterly electronic return for all workers not already accounted for through RTI. As a large proportion of the information required for these returns is already legally required by other Government Departments, it is believed this will mitigate the administrative burden significantly.

Revised proposal for the oil and gas sector

1.13 The Government is aware of the complex nature of the oil and gas sector, and as such posed several questions in its consultation directly to that sector to help the Government fully understand the effect of new legislation. Responses to the consultation from the oil and gas industry further underlined particular difficulties in applying the original proposal to their sector. Chains of contracts and sub-contracts in this sector can be particularly complex. Furthermore, due to Joint Operating Agreements (JOAs) on oilfields, licensees of oilfields can in some circumstances be classed as both the end user and Intermediary 1. Almost all stakeholders in this industry suggested a certification scheme similar to the one which is already in place for corporation tax.

1.14 As a result of consultation with oil and gas stakeholders, the Government has developed a separate proposal for the oil and gas sector. Where the offshore employer has an associated company, body or agency based in the UK, that associated company, body or agency will be responsible for accounting for the NICs and tax of its offshore associate. Where the offshore employer has no associated company in the UK, then the oil field licensees will be responsible for accounting for the tax and NICs.

1.15 The majority of consultation responses from the oil and gas sector, particularly those representing companies in the sector, requested a certification scheme to reduce administrative burden for the sector. This would be similar to the one currently operating in the sector in respect of the payment of Corporation Tax. In recognition that the licensees are generally removed from the operation of the oil field and the complex chains of employment in the sector, the Government has agreed to set up a certification scheme. The scheme will allow the compliant offshore employer to apply to HMRC for a certificate. Whilst this certificate is in place it will remove HMRC's ability to enforce any unpaid employment tax and NICs against the licensees.

Next steps

1.16 The Government intends to introduce the legislation for the revised proposal in forthcoming Bills. The certification process for the oil and gas sector will form part of the NICs Bill in mid-October. The NICs regulations will be published in draft in November. The taxation, record keeping and return requirements, as well as related penalties will form part of Finance Bill 2014. Draft legislation, explanatory notes and guidance will be published in Autumn 2013. Subject to approval by Parliament, all the legislation will come into force on 6 April 2014.

2. Introduction

Background

2.1 In the last few years, the Government has committed considerable resource to tackling areas of the tax system where avoidance behaviour is widespread. Significant progress has been achieved in preventing the avoidance of employment taxes with the disguised remuneration rules, the employee benefit trust settlement opportunity and the changes to the intermediaries (IR35) legislation.

2.2 However, recent years have seen a growing use of offshore employers to employ UK workers working for UK based companies. Whilst this can be for legitimate commercial reasons, the use of these structures to avoid paying employment taxes, including National Insurance, for their UK-based workers has become prevalent in several industries. Often the workers and the ultimate end users of the workers' labour are unaware that these arrangements are in place. Not only does the use of offshore employers in this way undermine compliant business, it also puts employees' access to some benefits at risk.

2.3 At Budget 2013 the Government announced its plans to strengthen legislation preventing the use of offshore employment intermediaries to avoid tax and National Insurance Contributions. The Government wants to ensure that UK businesses that are playing by the rules are not undercut by those who are involved in avoidance arrangements.

2.4 The consultation document 'Offshore Employment Intermediaries', setting out the Government's plans for tackling this area of tax avoidance, was published on 30 May 2013. The first part of the consultation was a technical consultation on the mechanism for doing so. The second was a policy consultation on the record keeping and filing requirements required for this measure.

Responses

2.5 The consultation document invited responses and comments from individuals and businesses affected by the measure, particularly anyone involved in supplying workers to or within the UK, their representative bodies and other interested parties. The consultation closed on 8 August 2013. A number of roundtable events were held during the consultation period. The list of respondents is available at Annex A.

2.6 Fifty written responses were received to the consultation, including:

- 15 from accountancy firms
- 14 from representative bodies
- 6 from professional bodies
- 5 from recruitment businesses
- 3 from umbrella companies
- 3 from financial service companies
- 1 from an offshore employment intermediary
- 1 from an individual
- 1 from a drilling company

- 1 from a law firm

2.7 This document summarises the responses received during this consultation and presents the Government's amended approach to reducing tax avoidance through the use of offshore employment intermediaries.

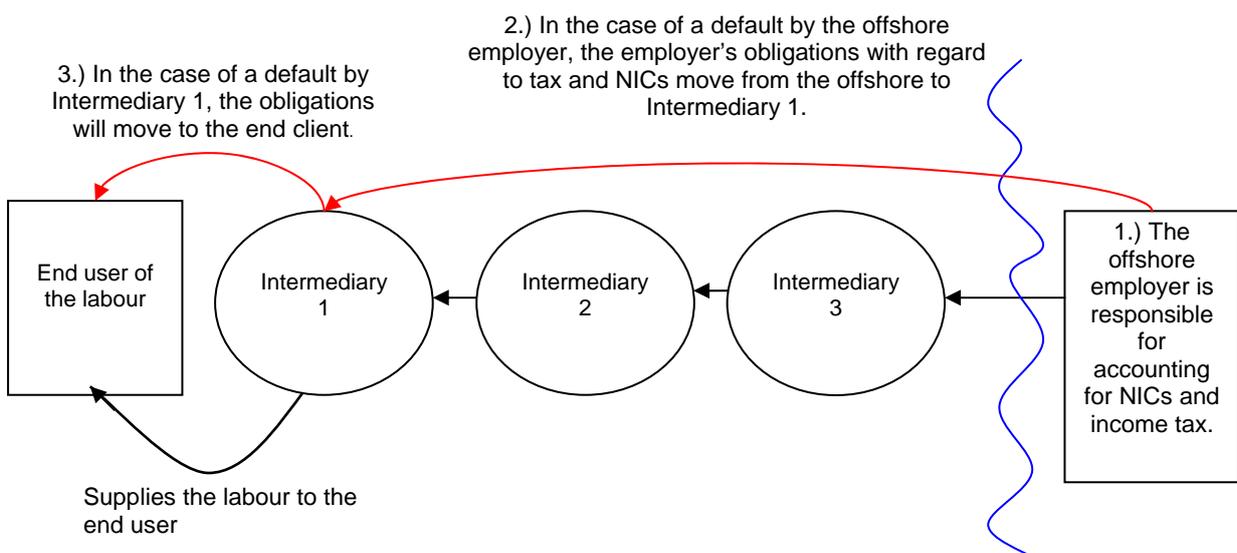
The original proposal

2.8 Where an employer is offshore and the worker is providing their services personally to an onshore end user, the current legislation requires the end user of labour to account for Pay As You Earn (PAYE) and National Insurance Contributions (NICs). They are also liable for secondary NICs. It is often difficult to enforce the existing legislation due to the difficulties of proving that the worker is providing their services personally.

2.9 The Government originally proposed that in the first instance, the offshore employer would be responsible for accounting for the NICs and income tax of the workers it places in the UK, in the same way that an employer in the UK would have this responsibility. In the case of a default by the offshore employer, the consultation proposed that the employer's obligations with regard to tax and NICs would move to the intermediary business closest to the end user of the labour (Intermediary 1). In the case of a default by Intermediary 1, or where there is no relevant intermediary, the tax and NICs liability would move to the end user.

2.10 For HMRC to be able to enforce this proposal effectively, relevant intermediaries would have been required to have in their power or possession information about how the workers they place were ultimately paid and engaged. They would have been required to make a quarterly return to HMRC detailing information about all the workers they place or engage that were employed offshore. In the case of no relevant intermediary, this responsibility would have fallen to the end user of the labour.

Image I: The original proposal



3. Responses

3.1 The consultation document asked respondents to answer thirteen questions. Most responded by commenting on the proposal as a whole, and only briefly addressed the questions. As a result, this document will be presented thematically, rather than by question asked. Where a particular question is relevant to a particular theme, responses to the question have been summarised under the relevant theme.

A. Broad and common concerns

3.2 Whilst some respondents believed that the proposal would achieve its aim and ensure offshore employers remitted the correct amount of tax and NICs, the majority of respondents thought that the Government's proposed approach would not improve compliance.

3.3 Three major concerns were raised:

i) The original proposal would not encourage offshore employers to comply with their obligations, leaving Intermediary 1 and the end user to account for an indeterminable liability.

3.4 A quarter of respondents thought the original proposal appeared to provide little or no incentive for the offshore employer to fulfil its obligations because liabilities would be transferred to the relevant intermediary in the case of non-payment. By legislating the transfer of any liability to Intermediary 1, the other intermediaries in the chain would not be incentivised to reveal the true nature of a worker's engagement as they would never be liable for any debts. This would leave Intermediary 1 and the end user in a precarious financial position, uncertain as to when a previously hidden tax and NIC liability might transfer to them and how large a liability this might be.

ii) The administrative burden

3.5 Of the 50 written responses received, 60 percent thought the proposal was too complex to be effective. It would simply increase administrative burdens, particularly for compliant businesses who would be likely to attempt to fulfil the new requirements.

3.6 The respondents judged that the proposals did not appreciate the complexity of arrangements concerning the supply of labour between intermediaries and end users. Whilst the proposal might work in the simplest cases, onerous and potentially impossible administrative and financial burdens would be placed on those having to keep track of these complex and numerous contractual chains. This would be particularly so in the oil and gas industry.

3.7 A small number of respondents thought that it would be easier if the liability was placed on the intermediary closest to the offshore employer, as they would be best placed to have correct information about arrangements.

3.8 Twenty percent of respondents were concerned about the implications for competitiveness. The level of administration and record keeping required would increase costs and slow down the usual activities of the temporary labour market. In

addition, a similar number of respondents thought the proposal would lead to inflexible working practices, where end users would choose to contract only with large, established credible businesses. This would impact unfairly on small businesses and introduce barriers to new firms entering the sector.

3.9 Concerns were also raised by 10 respondents, mostly accountancy firms, that there is only a short time between the consultation and implementation of the legislation in April 2014. Ensuring compliance in such a short timeframe would be especially challenging for intermediaries and end clients who would need to undertake work such as renegotiating contracts, implementing suitable record keeping processes and adjusting budgets.

iii) The proposal would add further complexity to the tax system

3.10 Nine responses, mostly from bodies representing workers, supported the Government's detailed proposals to tackle the use of offshore employment intermediaries. One respondent proposed that the new legislation should go further than outlined in the consultation document and be retrospectively applied to recognise past adverse practices by offshore employment intermediaries.

3.11 Some respondents noted that the existing legislation already works effectively, because either offshore employment intermediaries are remitting on a voluntary basis, or UK businesses are already remitting the relevant tax and NICs through the application of host employer, agency or intermediary legislation. Some also considered that HMRC already has the appropriate powers to challenge arrangements and recover tax where it is due; that the problem is one of enforcement not with the legislation.

3.12 The majority of other responses were critical of the Government's approach. In particular, the original proposal was criticised for further complicating the tax system in contradiction of the Government's wider objective of tax simplification. One respondent advocated reviewing the whole system of the tax treatment of contractors and intermediaries to achieve a simpler system.

3.13 These respondents also felt there were significant flaws in the practicality and complexity of the proposals and as such there would be difficulty in operating the new legislation and improving compliance. A quarter of respondents recommended the extension or amendment of existing legislation instead; in particular broadening the scope of the existing rules beyond 'personal service' to include some composite arrangements. Respondents argued this would achieve the desired outcome without imposing the level of burden of the original proposal.

The Government's response

3.14 The Government is grateful for all comments made and views expressed concerning its original proposals. The Government has carefully evaluated all issues raised in responses to the consultation and in roundtable discussions and subsequently revised its approach.

3.15 Whilst a good proportion of businesses are remitting PAYE and NIC on a voluntary basis, or through the application of host employer, agency or intermediary

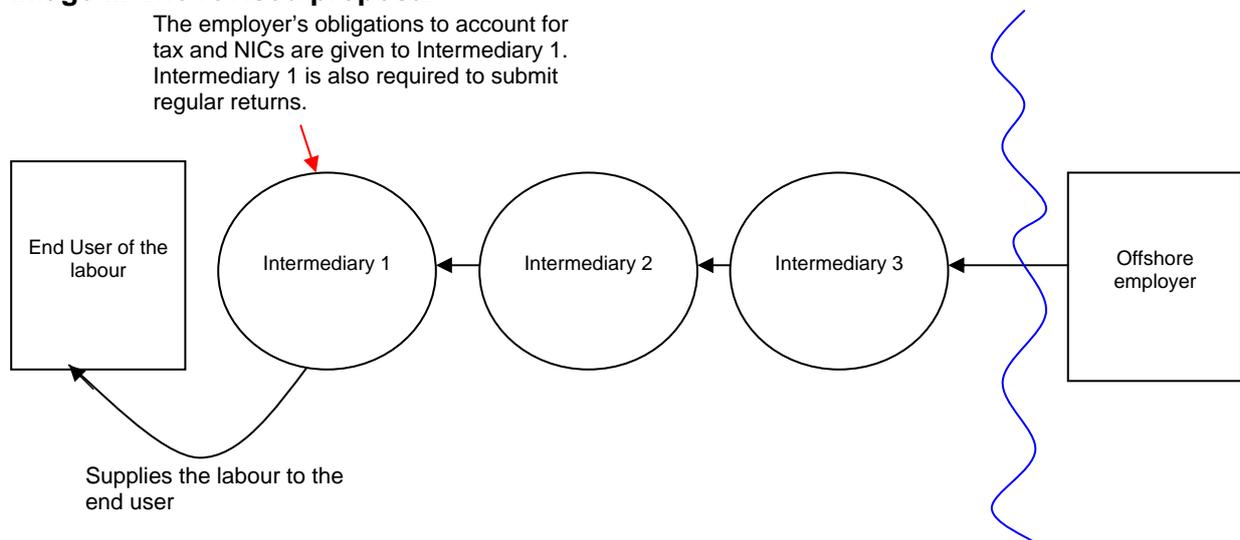
legislation, the Government's research has shown that at least £100m is still not being remitted. Furthermore, the current legislation makes it difficult for HMRC to enforce compliance due to the necessity of proving that a worker is providing their services personally. The Government is therefore convinced it must make some changes to the existing legislation. However, on consideration, the Government agrees with the suggestion of a significant proportion of stakeholders to strengthen and clarify the existing legislation rather than introduce a wholly new statutory framework. In doing so, the Government intends to remove many of the issues with the existing legislation, including the requirement for personal service.

3.16 The Government has also significantly simplified its proposal to clarify the processes for stakeholders. It has decided that, in a similar way to the existing legislation, Intermediary 1 will be responsible for accounting for tax and NICs for offshore workers. This will mitigate the uncertainty for Intermediary 1 and the end user as to when, and for how much, they might at some point become liable.

3.17 The Government has evaluated the role of employment businesses and agencies, and concluded that it is reasonable to expect employment businesses and agencies to undertake due diligence. Their role is supplying temporary labour to businesses and the Government believes that it is reasonable for the end client to expect that the appropriate amount of tax and NICs has been paid in respect of those workers. This is why obligations will fall immediately and wholly to Intermediary 1, and in the case of a default, will not be passed on to the end user. Where there are no onshore intermediaries, in a similar way to the existing legislation, the end user of the labour will be liable for the accounting and payment of employment taxes. Intermediary 1, or in certain cases the end user, will be responsible for making returns in respect of these obligations through Real Time Information (RTI).

Image II: The revised proposal

The employer's obligations to account for tax and NICs are given to Intermediary 1. Intermediary 1 is also required to submit regular returns.



3.18 The Government has also listened to stakeholders concerns about the administrative burden that the original proposal would have placed on businesses. Most businesses in the chain are now excluded from any additional record keeping or returns. However, it is unrealistic to suppose that this type of avoidance can be tackled without imposing some administrative checks and burdens. Some information will still be required from Intermediary 1 to aid HMRC with its compliance investigations. This

will take the form of accounting for any offshore workers through Real Time Information (RTI) and submitting a simple quarterly electronic return for all workers not already accounted for through RTI. As employment businesses are already legally required to keep a large proportion of the information required for these returns, the administrative burden will be significantly reduced. Penalties will be applied for failing to make or making an incorrect return.

3.19 This revised proposal will not apply to the oil and gas sector, for which specific legislation will be enacted in order to address the additional complexities and challenges that sector presents.

B. The oil and gas sector

3.20 The Government noted in the consultation document that its proposals would particularly affect the oil and gas industry and posed questions 5, 6 and 8 to the sector. Of the fifty responses received, thirteen responses were from oil and gas companies or their representative bodies and accountancy firms. A number of roundtables were also held to discuss the oil and gas industry specifically.

3.21 The sector broadly accepted that employer NICs is going to be payable on workers on the UK Continental Shelf. One union particularly welcomed the proposal, commenting:

“Using OELs to avoid NICs is a particularly egregious form of tax avoidance in terms of its impact on wider society. Unlike corporation tax avoidance, the avoidance or reduction of NICs liabilities directly impacts on the UK’s social security system, specifically depriving the welfare system and the NHS of valuable funding.”

3.22 Two particular issues were brought to the Government’s attention:

i) The difficulty of applying the definitions of end user and Intermediary 1 to the sector.

3.23 A number of respondents commented on the problems in applying these two definitions to oil and gas contractual chains due to the prevalence of Joint Ventures (JVs) for the operating of oilfields. Joint oilfield licensee holders will sign a Joint Operating Agreement (JOA) to regulate the organisation of an oilfield between them.

3.24 As one respondent explained:

“The principal aim of a JOA is to regulate the relationship between the two main classes of parties to the JV: the operator and non-operator. Traditionally, the operator is responsible for performing the day to day operations on behalf of the consortium, while the non-operators are responsible for contributing to the financial commitments and expenses of the joint venture ... In the case of a typical JOA, the operator will be simultaneously a joint principal along with the other parties to the JOA as well as acting agent.”

3.25 As a result, it is possible, using the definitions in the original proposal, that an oilfield operator could be viewed as both the end user and Intermediary 1, making it difficult to apportion responsibility. Different views were expressed about appropriate

definitions and approaches to implementation. It was also suggested that the date legislation would be effective should be delayed for the sector to allow time for further discussion.

ii) The complexities of contractual chains in the sector.

3.26 The majority of those responding specifically from, or on behalf, of the oil and gas sector thought the original proposals would be almost unworkable given the complexity of the sector's contractual arrangements. Hundreds of contracts and sub-contracts can be needed to operate a single installation. Furthermore, the international aspect of the work increases the likelihood of using offshore employers. It was felt that these factors would increase the administrative burden of the original proposal's record keeping requirements. This complexity also increased the risk of unknown liabilities being suddenly transferred to Intermediary 1 and the end user.

3.27 Over half of the responses from oil and gas stakeholders requested some kind of certification system should be created to ensure the licensees are not overly exposed to the risk of liabilities being transferred to them. Four of those responses, largely from the representative bodies of oil and gas companies, requested a certification system similar to the one currently operated for this sector for Corporation Tax, saying:

“the oil and gas industry proposes that HMRC adopts a similar process to that at Section 77F TMA 1970” (Taxes Management Act)

and

“We consider that such a scheme would be attractive for all parties and could encourage compliance with the proposed rules by offshore employers and relevant intermediaries”.

3.28 A small number of the responses considered that the administrative obligations originally proposed would make UK employees more expensive and potentially affect labour market opportunities. A few respondents also predicted that the increase in costs and liabilities would distort wider economic activity in the industry, particularly investment.

The Government's response

3.29 As a result of the many consultation responses detailing the unique and complex nature of the oil and gas sector, the Government has developed a separate proposal for the sector.

3.30 A large proportion of offshore employers in the oil and gas sector retain a presence or have an associated company in the UK. The Government has therefore decided that where the offshore employer has an associated company, agency or branch based in the UK (within the meaning of section 449 of the Corporation Tax Act 2010), that associate will be liable for the NICs and tax of their associate offshore employer.

3.31 In the infrequent cases where there is no associated company, branch, agency or presence in the UK for the offshore employer, the licensees will be responsible for

accounting for tax and NICs. The majority of consultation responses from the oil and gas sector, particularly those representing companies in the sector, requested some kind of certification scheme to reduce the administrative burden. This would be similar to the one currently operating in the sector in respect of the payment of tax (under Part 7A, Section 77B-77K, of the Taxes Management Act (TMA) 1970). In recognition that the licensees are generally removed from the operation of the oil field and that complex chains of employment would significantly increase the administrative burden on the sector, the Government has agreed to implement a certification scheme.

3.32 Therefore, where the licensees are responsible, they will be able to ask the offshore employer to fulfil these obligations on their behalf. Where the offshore employer is properly paying and accounting for all tax and NICs obligations, including Secondary Contributions, for its workers, they will be eligible for a certificate from HMRC. Whilst there is a certificate in place the licensees will not be held liable for any failure by the offshore employer. However, HMRC will be able to revoke the certificates by notifying the offshore employer, or their agent, and the licensee in writing. Certificates will be renewable on an annual basis. Once the certificate has been withdrawn the licensee will be responsible for accounting for tax and NICs, including all relevant payments from the date of withdrawal.

3.33 Certificates will only be issued for those offshore employers without an associated company, branch, agency or presence in the UK.

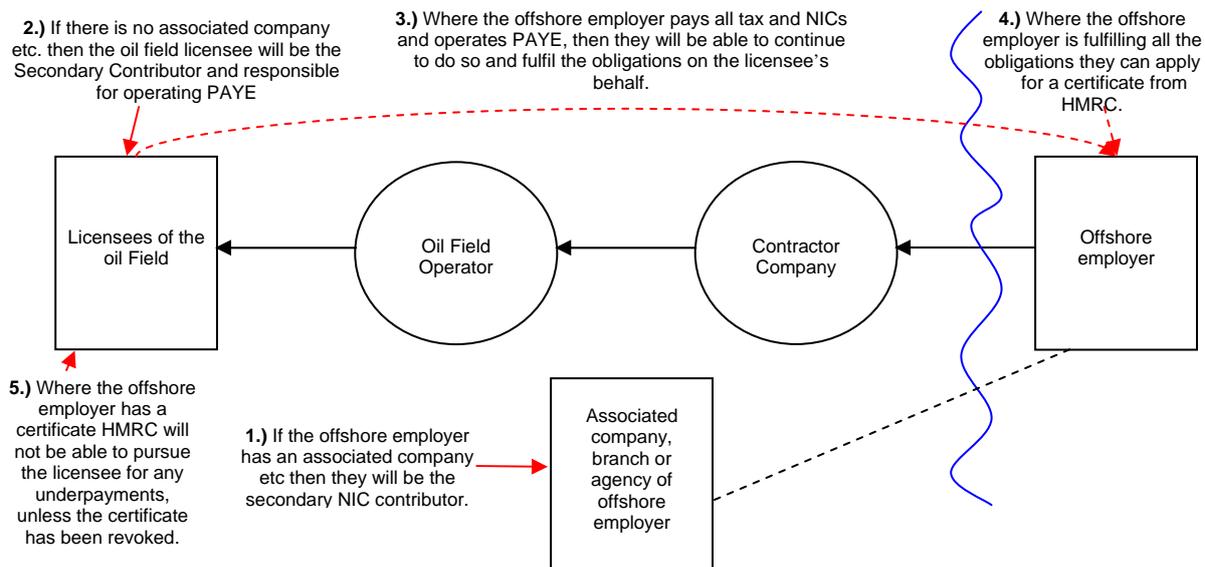


Image III: Revised proposal for the oil and gas sector

C. Oil and gas workers and mariners

3.34 Questions 5, 6 and 7 of the consultation document addressed how the proposed changes would affect mariners. Answers to these questions were broadly supportive of the Government's plans to maintain the mariners' exemption for social security contributions.

3.35 Ten responses raised concerns with regard to the Government's intention to reverse the effects of the *Oleochem (Scotland) Ltd v HMRC (SpC 731)* decision and

bring all oil and gas workers, whether on fixed or floating platforms, within the new legislation. They believe the change would result in some genuine mariners being inappropriately charged primary National Insurance Contributions.

3.36 In particular, a mariners' representative body highlighted fears that if a significant number of genuine mariners were caught by the proposal, this would:

“greatly increase the costs of employing UK personnel in highly competitive markets, making them less attractive to employ than lower-cost seafarers from overseas who have no connection with the UK – and may themselves be outside of the scope of UK legislation pertaining to NICs.”

3.37 A small number of respondents also questioned what the effects of the legislation would be for workers on renewable energy installations.

The Government's response

3.38 The Government has carefully considered all comments and met separately with mariners' representative bodies and unions. Whilst the Government appreciates the concerns raised, it still believes it is vital and fair to unify the treatment of oil and gas workers, where they work on installations on the UK Continental Shelf (UKCS).

3.39 However, the Government intends that existing arrangements in respect of mariners will largely remain, to secure the future of the UK maritime industry. The legislation will be carefully drafted to exclude recognised mariners from its effects. In particular, those working on vessels wholly for the transport of supplies or safety purposes will be entirely excluded from the legislation. Many of the concepts about who is not eligible for Seafarers Earnings Deductions will be used in defining those oil and gas workers that are within scope of the new legislation. This will provide greater clarity over the tax and NICs treatment of mariners and who is and who is not within the definition of mariner.

3.40 The Government can confirm that workers working on offshore renewable energy structures in the UKCS will not be affected by these changes to the legislation.

D. Internationally mobile workers

3.41 There was general agreement amongst most respondents that the current legislation works very well with regards internationally mobile workers, and is extremely clear as to who is responsible for applying PAYE and NICs.

3.42 Five respondents disagreed with the Government's statement that the new legislation would not disrupt these arrangements. The main criticism of the proposed changes was the lack of clarity as to who would be responsible for applying PAYE and NICs, making it harder and more administratively burdensome for both businesses and HMRC to enforce. In particular, two responses set out instances where the proposal would cause difficulties in the cases of short term business visitor agreements or seconded employees who pay social security in their former country of residence.

The Government's response

3.43 The Government has always been clear that it does not want to disrupt current arrangements that work well. Under the revised proposal presented in this summary of responses, section 689 Income Tax (Earnings and Pensions) Act (ITEPA) 2005 will not be repealed and both the “host” regulations and section 689 ITEPA 2005 will be clarified and strengthened. The obligation to account for the tax and NICs of an internationally mobile UK-based worker will remain with the UK-based end user business. There will therefore be no changes or disruption to current arrangements.

E. Interaction with other legislation

3.44 As was covered earlier in this summary document, a large proportion of respondents expressed concern at the proposal of applying another layer of legislation over the existing legislation.

3.45 A number of respondents stressed that the proposed legislation could also, as one respondent expressed it,

“be seen as discriminatory in respect of entities operating in the EEA because there will be significantly different treatment for entities in the EEA to those outside it”.

3.46 Furthermore, the proposed 1 month time limit before liabilities are transferred onshore becomes problematic when it is considered that:

“double tax treaties may prevent overseas employees from being charged PAYE, and it is frequently not known whether PAYE will be payable until a late stage in the tax year (or even sometimes after it is finished).”

3.47 With regards to other legislation, three respondents asked how the new legislation would interact with IR35 and Personal Service Company (PSC) legislation. In the case of offshore PSCs, it was unclear which legislation would take precedence, and whether the new offshore employment intermediaries legislation would even affect offshore PSCs. A different three respondents also suggested that if the new legislation did not affect offshore PSCs, then the use of such entities would no doubt increase.

3.48 Finally, one respondent questioned who the offshore employee would receive Statutory Sick Pay and Statutory Maternity Pay from, if they are paid by the offshore employer, but their tax and NIC are accounted for by Intermediary 1 or the end user when the offshore employer defaults on that particular obligation.

The Government’s response

3.49 The Government has taken into account the respondents’ concerns in these areas. The revised proposal addresses these concerns, as the obligation to account for offshore employees’ tax and NIC will no longer be placed on the offshore employer; it will be assigned to the UK-based Intermediary 1. Employees will thus draw their Statutory Sick Pay and Statutory Maternity Pay from Intermediary 1.

3.50 With regards to the use of PSCs, and whether IR35 legislation takes precedence over this legislation, the Government is currently still exploring the issue and will provide more detail on this point in due course. Guidance for such cases will be published in the autumn.

F. The definition of roles within employment chains

3.51 In response to questions 1 and 2 posed in the consultation document, at least ten percent of responses elaborated on the practical difficulties of defining end users and intermediaries. A number of scenarios were raised that would require further analysis and further guidance from HMRC. A number of respondents also found the use of the term “works for” problematic.

3.52 Furthermore, several respondents noted the adverse effect the definitions of end user and Intermediary 1 would have on corporate groups, where one company that is part of the corporate group enters into contracts for the benefit of the wider group. The current definitions would impact these commercial structures disproportionately to others, which is not desirable. One respondent added that:

“the service company structure is adopted by a number of corporate groups for sound commercial purposes and this should not be allowed to be compromised by these proposals (especially within the context that such structures are not themselves created for tax benefit).”

The Government’s response

3.53 The Government found comments helpful in designing this response; especially when respondents provided examples of these types of scenarios where the definitions of Intermediary 1 and the end user are difficult to apply. HMRC will use these scenarios to inform its approach to guidance when implementing the new legislation.

3.54 With regards the implications of the proposal for corporate groups, the Government intends that the legislation is drafted in such a way as to ensure that inter-supply of staff between corporate groups will not be adversely affected. There will be an opportunity to comment on the detailed drafting of the legislation when the draft legislation is published for consultation in autumn 2013.

G. Shell companies

3.55 A number of respondents thought that new avoidance structures would evolve to circumvent the new obligations. It was suggested that a ‘shell’ intermediary would appear, put in place to then immediately become insolvent so that the debt would be transferred to the end client.

The Government’s response

3.56 The Government acknowledges this is a valid concern. Under the revised proposal, if a shell company is set up as Intermediary 1, the end user is not at risk of the debt being transferred to them. The Government is currently considering different ways of reducing the risk of shell companies being used and will provide stakeholders with further details on this in the autumn.

H. Calculation of liabilities

3.57 Responses acknowledged that it was necessary for HMRC to have powers to estimate payments of tax and NICs where the actual amount is unknown. However, 66

percent of responses noted that payments made between end clients and intermediaries do not solely comprise workers' wages. They are likely to include non-labour costs, including a mark-up. The extent of mark-ups is increased the longer the chain of contracts.

3.58 It was generally thought to be very difficult to obtain details of workers' pay and the amount of mark-ups for a variety of reasons, such as data protection and commercial sensitivity. Without such details being easily available to them, for example by statute, respondents argued that Intermediary 1 and the end user might have potentially large liabilities, which would likely be incorrect and result in significant overpayment of tax and NICs to HMRC. One respondent stated the original proposal gave HMRC "*excessive discretion*" in estimating payments. A number of respondents suggested there should be some appeal rights for intermediaries or end users against such estimates.

3.59 Finally, several respondents questioned how the proposed legislation would interact with Universal Credit, if an overpayment or underpayment of tax and NIC was made.

The Government's response

3.60 Under the Government's revised proposal, the risk of overpayments is substantially reduced. Intermediary 1 will be responsible for paying and accounting for the tax and NICs, including secondary NICs, of all workers originating from offshore employers. Intermediary 1 will have to make returns to HMRC using Real Time Information (RTI), and it is anticipated that Intermediary 1 will make several contractual changes to its processes to allow it to fulfil these obligations. As a result of these changes, there will be no need for a separate appeal process. In the case that intermediary 1 is unable to find out how much they should deduct, HMRC will have the power to make an assessment in the same way that they currently do in the existing host regulations and Section 689 ITEPA 2005.

I. The administrative burden of record keeping and returns

3.61 The Government's consultation posed questions 9-13 in the consultation document in order to understand the administrative burden the proposal would place on businesses. The majority of respondents expressed concerns with regards to the administrative burden the necessary record keeping and returns requirements would engender. Several respondents provided estimates of the subsequent financial costs of such an administrative burden, which ranged from £500 a year to £30,000 a year, depending on the size of the business.

3.62 A number of respondents thought that the administrative burden would be most onerous when trying to establish the veracity of the information received from further down the contractual chain. Five responses suggested information about wages and tax payments would be better obtained from workers themselves rather than intermediaries or end clients. Two responses called for legislation obliging the offshore employment intermediary to give the relevant, correct information to the relevant intermediary, potentially with a penalty for non-compliance.

3.63 One of the main concerns expressed was that Intermediary 1 or the end user would not be able to ascertain the correct details within the contractual chain. Clarification was sought by a number of organisations about what the appropriate level of verification would be, especially given the potential for the inaccurate supply of information from other intermediaries in the chain. There was broad support for additional protections where relevant intermediaries and end clients had been supplied with inaccurate information. Just under a third of respondents requested that some form of reasonable excuse test be added to the proposal.

3.64 Respondents also suggested that the administrative and legal burden of renegotiating contracts and ensuring compliance in time for April 2014 would be large. Ten responses requested consideration for this burden and suggested a grandfathering period or soft touch compliance period. Two respondents were unhappy with this concept, and approved immediate, as well as retrospective, enforcement of the law instead.

3.65 Question 10 of the consultation document asked about the preferable frequency of making returns. Respondents were divided in opinion and equal numbers supported a quarterly return and an annual return.

The Government's response

3.66 The Government understands the concerns that have been raised by respondents. Nonetheless, it is clear that the Government is not able to bring forward an anti-avoidance measure without creating some additional burden for business.

3.67 However, by changing the way in which the legislation will apply, the burden for most businesses will be significantly reduced. Most businesses in the chain are now excluded from any additional record keeping or return requirements. In eradicating the possibility of a debt transfer from the defaulting offshore employer, a significant part of the administrative burden of tracking all businesses in the chain is also removed.

3.68 However, some information will still be needed from Intermediary 1 to aid HMRC with its compliance investigations. This will take the form of accounting for any offshore workers through Real Time Information (RTI) and submitting a simple quarterly electronic return for all workers not already accounted for through RTI. There is already a legal requirement for much of this information to be kept by businesses, so the administrative burden will be significantly reduced. In recognition of the new record keeping requirements, whilst Intermediary 1 will be expected to make returns to HMRC through RTI from April 2014, they will not require the first quarterly return until October 2014. This will allow Intermediary 1 businesses a year to put in place the systems to comply with this requirement.

3.69 The Government intends for there to be a penalty system in place for late or incorrect returns. However, in recognition of stakeholders' concerns that April 2014 is less than six months away, the Government will delay the penalties for late or incorrect returns for a year. This will allow businesses time to adjust and correct any process errors internal to their businesses.

4. Next steps

Publications

4.1 The legislation to implement the certification scheme will form part of the NICs Bill. The NICs Bill will be introduced into Parliament on 14 October 2013. The draft regulations for the National Insurance legislation will be published for comment during November.

4.2 The draft taxation, record keeping, return requirements and penalties legislation will be introduced in Finance Bill 2014. Draft legislation, explanatory notes and guidance will be published in autumn 2013.

Guidance

4.3 To help address concerns over the proximity of the publication date HMRC plan to publish draft guidance for the legislation in the autumn. Publicity will be provided via the HMRC website prior to the measure coming into force. Additions and amendments will be made to HMRC guidance, and to relevant website content.

Implementation

4.4 Subject to approval by Parliament, the legislation will come into force on 6 April 2014. HMRC will be working closely with relevant intermediaries to advise on process. In addition, HMRC will be working with the oil and gas industry to refine the details of the certification process and ensure it is in place for April 2014.

5. Annex A: List of stakeholders consulted

Accountancy firms

Baker Tilly
BDO LLP
David Gill & Co
David Kirk & Co
Deloitte
EY
Exceed
Harwood Hutton
Johnston Carmichael
KPMG
Lyness
PwC
Sullivans
1st Option Group Limited

Representative bodies

APSCo (Association of Professional Staffing Companies)
BALPA (British Airline Pilots Association)
Brindex
CBI (Confederate of British Industry)
FCSA (The Freelancer & Contractor Services Association)
IMCA (International Marine Contractors Association)
Low Incomes Tax Reform Group
Nautilus
Oil Taxation Action Committee
PCG (Professional Contractors Group)
REC (Recruitment and Employment Confederation)
RMT (National Union of Rail, Maritime and Transport Workers)
UK Chamber of Shipping
UKOITC (UK Oil Industry Taxation Committee)

Professional associations

AAT (Association of Accounting Technicians)
ACCA (Association of Chartered Certified Accountants)
ATT (Association of Taxation Technicians)
CIOT (Chartered Institute of Taxation)
ICAEW (Institute of Chartered Accountants in England and Wales)
London Society of Chartered Accountants

Recruitment businesses

Adecco Group
Hays
Impellam Group
Randstad

Volt

Umbrella companies

Contractor Umbrella
Liberty Bishop Contractor Services
360 Group Ltd

Financial service companies

Aviva
EDF Tax
Legal & General Group

Offshore employment intermediaries

ISS

Drilling companies

Odfjell Drilling

Law firms

Osborne Clarke

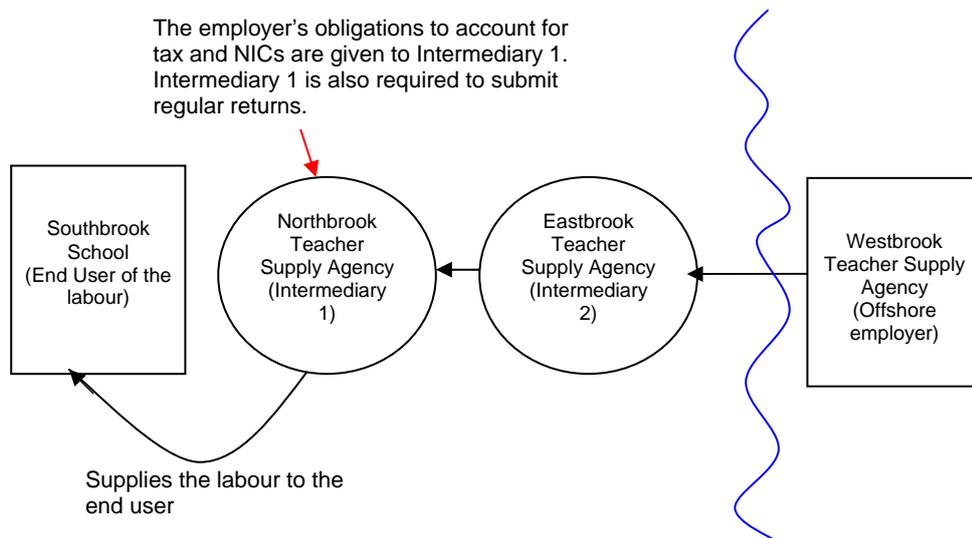
Others

1 individual

6. Annex B: Worked examples

6.1 All named organizations and people appearing in these examples are entirely fictitious. Any resemblance to real organizations or persons, living or dead, is purely coincidental.

Example 1



6.2 Southbrook School needs a Latin supply teacher. They go to Northbrook Teacher Supply Agency, who do not currently have any available Latin teachers on their books. Northbrook Teacher Supply Agency therefore approach Eastbrook Teacher Supply Agency, who also don't have any Latin teachers available, so Eastbrook Teacher Supply Agency approach Westbrook Teacher Supply Agency, who are based offshore, who do have a Latin teacher, Matthew Latinus, available.

6.3 Matthew Latinus, an employee of Westbrook Teacher Supply Agency, is supplied to the school by Northbrook Teacher Supply Agency.

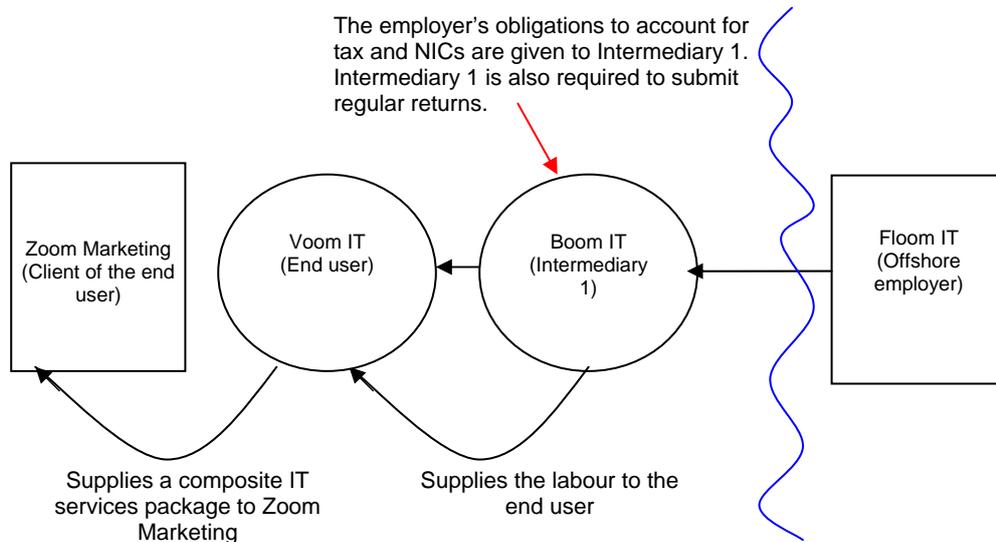
6.4 In this scenario, the end user is the school. Intermediary 1 is Northbrook Teacher Supply Agency. The offshore agency is Westbrook Teacher Supply Agency. Intermediary 2 is Eastbrook Teacher Supply Agency.

6.5 As a compliant and diligent employment business, Northbrook Teacher Supply Agency enquires of Eastbrook and then Westbrook as to where they are based, discovering that Westbrook is an offshore agency. Northbrook Teacher Supply therefore realises it is responsible for the tax, primary and secondary and NICs for the Latin teacher, and accounts for Matthew Latinus' PAYE and NIC through RTI.

Example 2

6.6 Noom Marketing is a marketing company which is a client of Voom IT Business, who supply a package of IT services, including an IT helpdesk for the employees of Zoom Marketing. Voom IT Business needs 10 IT specialists to run the IT helpdesk for Zoom Marketing, so it turns to Boom IT Staff Supply Agency for staff. Boom IT has no

staff currently available, so turns to Floom IT Staff Supply Agency which is based offshore.

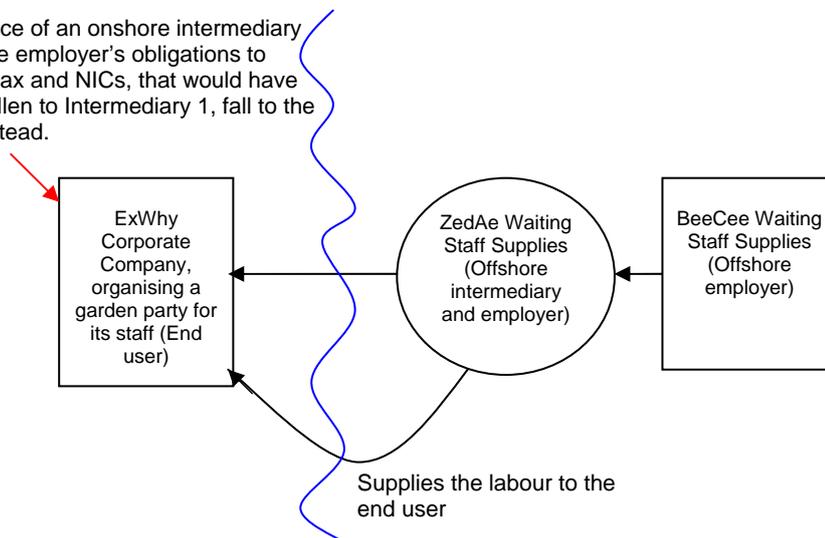


6.7 In this scenario, the end user of the engaged IT specialists is Voom IT. Zoom Marketing has engaged Voom IT for a clearly composite service, so it is not the end user of the workers. Boom IT is Intermediary 1. Floom IT is the offshore employer.

6.8 It is therefore the responsibility of Boom IT to account for the PAYE and both primary and secondary NICs in respect of the 10 IT specialists it supplies to Voom IT.

Example 3

In the absence of an onshore intermediary business, the employer's obligations to account for tax and NICs, that would have otherwise fallen to Intermediary 1, fall to the end user instead.



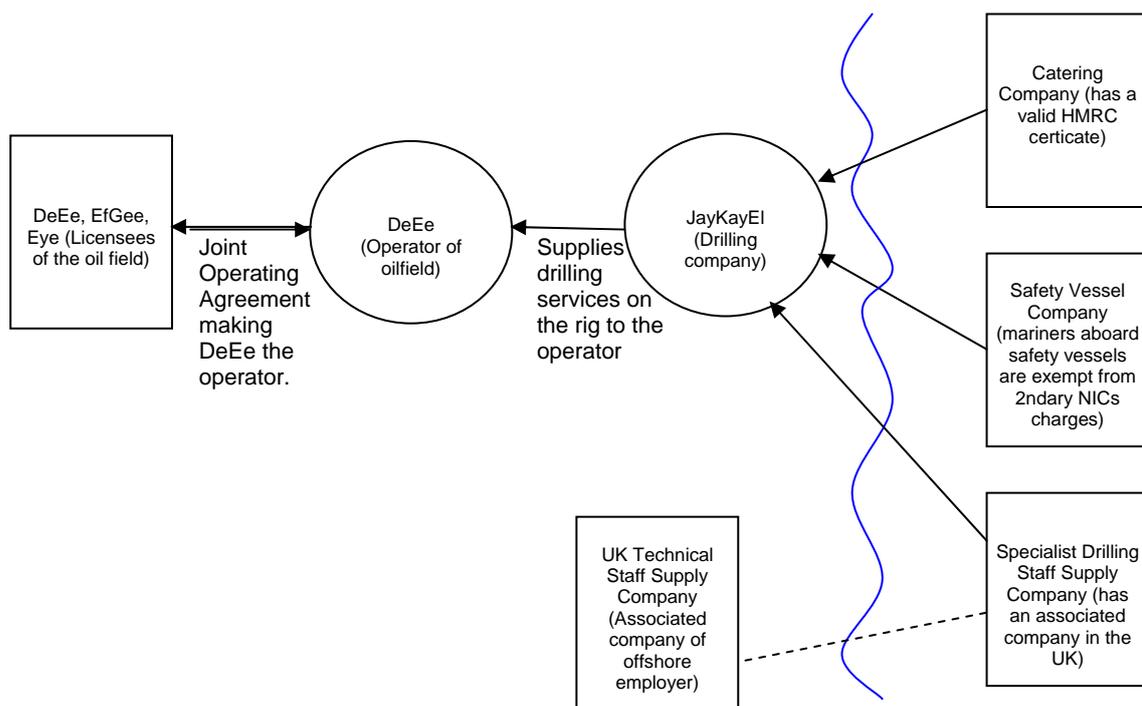
6.9 ExWhy PLC has decided to hold a garden party to celebrate its midyear profit forecasts with senior staff. Most of the necessary details for the garden party can be arranged internally. The internal catering service is able to upscale its usual operations and provide enough food for the six hundred expected senior staff, but the event planners decide they will need at least thirty more waiters to adequately meet demand on the night.

6.10 ExWhy approach ZedAe, an offshore waiting supply company for their needs. ZedAe has 10 available staff for the night, and approaches its offshore partner BeeCee for the rest. ExWhy duly receives 30 waiters for the night, (10 from ZedAe and 20 from BeeCee).

6.11 ExWhy is clearly the end user in this scenario. ZedAe is an offshore intermediary and employer, and BeeCee is an offshore employer. As there is no onshore intermediary between the end user and the offshore businesses (ZedAe is an offshore intermediary and employer), it is the end user, ExWhy, who is responsible for PAYE and NICs and must complete an RTI return for all 30 waiters.

Example 4

6.12 Licensees DeEe, EfGee and Eye undertake a Joint Venture together, signing a Joint Operating Agreement for a rig, assigning the role of operator to company DeEe. DeEe contracts with drilling company JayKayEI to drill on the rig for oil. JayKayEI contracts with a variety of companies, including the following offshore companies: a catering company, a specialist driller staff supply company and a safety vessel company.



6.13 Operating company DeEe knows that it and its fellow licensees could be liable for tax and NICs when dealing with offshore companies, so in its contract with the drilling company JayKayEI, it has specified that JayKayEI must ensure that offshore companies either have a certificate from HMRC stating they are already accounting for PAYE, primary and secondary and NIC in respect of the workers as if they were the licensee, or that they have a UK onshore associated company or presence.

6.14 As mariners on the safety vessel are employed on ships and those ships are not the types of oil and gas installation covered by the new measure, there is no obligation placed on DeEe. JayKayEI therefore only investigates the catering company and the

specialist driller staff supply company. The catering company shows a valid certificate from HMRC, and the offshore specialist driller staff supply company has an associated UK-based technical staff supply company, which is liable for its offshore associate's PAYE and NICs. The licensees are therefore currently not due to pay any PAYE or NICs.

Example 5

6.15 A nurse is employed by an offshore umbrella company and supplied to work for a UK nurse bank. The nurse bank supplies the nurse to a GP practice, which use the nurse to staff a composite vaccination service they are supplying under a contract with a local trust. The trust has engaged the GP practice to supply this vaccination service to patients, but it is paid by the Department of Health to provide that service.

6.16 In this scenario, the end user of the labour is the GP practice because it was they who needed the staff to run their composite vaccination service being supplied to the local trust and patients. Intermediary 1 is the UK nurse bank, and the offshore employer is the offshore umbrella company.

