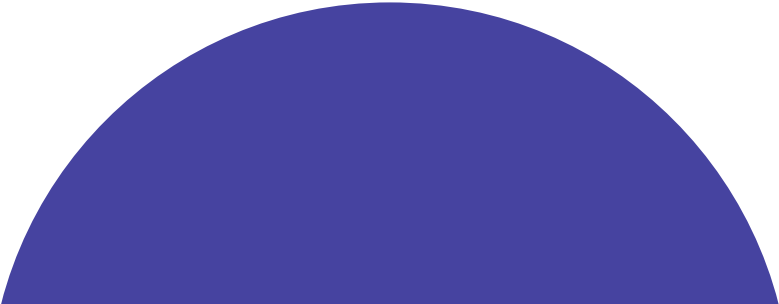




i-payee



**Supervision, Direction or  
Control - Agency Guide**



# Disguised Employment

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HMRC have confirmed that due to a drafting error in the legislation that Employment Intermediaries needed to consider whether a worker would be an employee of the client if they had been engaged directly, which is the same test that PSC's must apply, instead of the proposed SDC Test.

## HMRC Statement

"Travel and subsistence expenses for workers engaged through employment intermediaries

### Note on the effect of the legislation.

The government introduced legislation in clause 14 of the Finance Bill 2016 restricting relief on home-to-work Travel and Subsistence (T&S) expenses for workers engaged through an employment intermediary. The changes put those workers on the same terms as all others contracted directly, or through an agency contract. They took effect from 6 April 2016.

An unintended consequence has been identified affecting the application of these changes for most **employment intermediaries**, but not **personal service companies** and **managed service companies**. To resolve this, the legislation will be amended at the earliest opportunity. HMRC does not consider this change will affect the vast majority of workers currently engaged through employment intermediaries.

### Current Application

The government announced at Autumn Statement (AS) 2015 it would restrict tax relief on T&S expenses to workers who supply their services through an employment intermediary and carry out their work under supervision, direction or control. For individuals working through personal service companies, relief would be restricted where the intermediaries legislation (IR35) applies, or where the worker would be considered an employee if engaged directly with the client.

Due to a technical point in the legislation, the restriction that came into force on 6 April 2016 does not reflect the restriction that was announced at AS 2015. So, rather than consider whether a worker is under supervision, direction or control, employment intermediaries (including umbrella companies) need to consider whether the worker would be an employee if engaged directly by the client.

The only exception to this rule is workers who are engaged through managed service companies. The restrictions apply to these workers where they are under supervision, direction or control.

Where a worker's circumstances are such that they would be properly considered as self-employed if engaged directly, the new legislation will not apply.

Full guidance on these changes is being published on [gov.uk](http://gov.uk).

Although the test used in the current legislation is different to what was announced at AS 2015, those who are working under supervision, direction or control would, in the vast majority of cases, be considered an employee if engaged directly with the client. Therefore both tests should produce the same result and this change will have a minimal effect on the individuals concerned.

### Correcting the legislation

The government considers the use of a full test of employment status to determine eligibility for relief on T&S expenses to be disproportionate and burdensome for the businesses who will need to consider this legislation. It believes the simpler test of supervision, direction or control will help ensure compliance with these rules. For these reasons, the legislation will be updated at the earliest opportunity to reflect the announcement made at Autumn Statement 2015.

This amendment will ensure workers engaged through an employment intermediary will need to consider whether they are under the supervision, direction or control (or right thereof) of any person, in how they do their work. Those engaged through a personal service company will continue to be required to use the test used within the intermediaries legislation.

The amendment was made late June / early July 2016 as confirmed by HMRC.

# Disguised Employment

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Disguised Employment is the terminology used in determining the IR35 status of workers and this is explored by HMRC in their internal manuals and they pay particular attention to whether a worker is skilled and whether they are working on a specific project or task.

They state in ESM0528 **Guide to Determining Status: control over experts**

"Many employees are professionals or skilled worked workers where control over how they work is not really appropriate and they do not work under the direct supervision of their employer. Examples of such jobs cited by the courts include the master of a ship, an engine driver, a head chef and a consulting engineer....."

This applies also to workers who do not have professional qualifications, for example a skilled carpenter or plasterer will not need to be told how to do his job.

They state in ESM3363 **Considering the Evidence: Task or Assignment-based engagements**

"It is important to distinguish between engagements where the contract will end upon completion by the worker of a specific task, assignment or project identified in the contract(s) and those in which the worker is engaged on a company project for a set period.

In the former, it is likely that, as the worker is engaged to complete a specific task or assignment, he / she cannot be moved on to other tasks and in that respect there will be an absence of (right of) control by the client over "what" work to do. If the other aspects of control were also absent, that would indicate a hypothetical contract for services (Self Employed)."

It seems clear that in taking these two statements together that an individual who is engaged to work on a specific project and is suitably skilled, either by qualification, or time would not be considered in disguised employment with the client.

This is different from someone who would be allocated a number of tasks during their normal working day and would also apply to someone who worked on a number of projects for the same client at the same time or worked on a succession of projects for the same client,.

Common sense suggests that such individuals are employee's where as someone brought in for a specific task or to work on a specific project should not be.

Pending any future amendment we will continue to align our testing to the the SDC Test and whether a work place could be Temporary or not.

1. The worker is working on a one off project or task for the engager.
2. Are they subject to the SDC Test.

For those workers listed on page 5, unfortunately, they will continue to be denied Travel and Subsistence relief for Travel to and from the workplace, as the workplace will be considered Permanent.

I-PAYE would not support or advise agencies to put in place contracts that seek to circumvent the SDC Test by inserting clauses that do not reflect reality.

# Guide to Supervision, Direction and Control for Professional Contractor Employees.

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## Introduction

On 6 April 2016 the UK Government introduced an additional test that must be satisfied before an employee can claim and have Travel and Subsistence reimbursed Tax Free (Tax and National Insurance).

The additional test does not replace the existing tests that identify whether a workplace is temporary or permanent.

Per HMRC guidance the test is whether anyone has the right of supervision, direction or control over the manner in which you provide the services to the engager (client). This is referred to by HMRC as the SDC Test.

However, per HMRC internal manuals and established case law for the 'right' to be meaningful it **must** actually be capable of being exercised; and if not so capable, then it was not a right in the first place.

The changes will not affect those that are classed as mobile workers that attend several different work locations during a working week, such as Carers, Social Workers, Gas Fitters, Maintenance Engineers, and Council Workers, all of who may use their own vehicles. Drivers who attend a depot to pick up a vehicle before driving the vehicle elsewhere may be able to claim subsistence, including overnight allowances.

As part of the tidying up of the legislation it is our understanding that the concession that enabled working rule agreement workers to have tax free lodge, radius and travel reimbursed has been removed, unless it can be shown that:

1. For those engaged directly that they have already worked at a different workplace for the engager; or
2. For those engaged through an Umbrella Company, that they are working at a temporary workplace and are able to satisfy that the SDC test does not apply.

## What is the SDC Test?

In the guidance published on 6 April 2016 HMRC have confirmed their interpretation of the new legislation and that only one part of the three part test must be satisfied, whilst we do not accept HMRC's interpretation as it differs from other part of their internal manuals it is replicated below.

## Supervision

Is the action or process of watching or overseeing what a person does or **how something is to be done**. If a person checks or has the right to check the work that the worker is doing to make sure it meets a required standard, the manner in which the worker provides the services will be classed as subject to supervision.

Supervision can involve helping the worker develop their skills and knowledge.

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## Direction

Is making the worker doing their work in a certain way by providing them with instructions, guidance, or advice as to **how the work must be done**. Someone providing direction will often co-ordinate how the work is done as its being undertaken.

## Control

Is telling or instructing a worker about **how they do the work**. Control over how the person does work also includes someone having the power to move the person from one job to another. If someone can say "don't do it like that" or "do it like this" then they have a right of control as to the manner in which a person works.

## HMRC Clarification

HMRC are helpful in confirming the following:

Being required to comply with statutory requirement like Health and Safety procedures isn't indicative of a right of control as all workers (employed or self-employed) must comply with these requirements.

Where a worker is given a detailed job specification that simply sets out the desired outcome, then this on its own does not mean the SDC Test is met.

Workers working in a regulatory environment, as a general rule, will be considered as meeting the SDC Test as someone has the right to check that the work meets the required standards and the right to ensure that they comply with those standards. Whilst not exhaustive the types of workers would include healthcare professionals, social workers and assistants, teachers and teaching assistants.

## Testing the SDC Test

The legislation confirms that it is possible for the Umbrella to comply with the rules by applying the SDC test to its relevant employees. Whilst the legislation is not specific about how this can be achieved, it does state that a simple declaration signed by the worker is not sufficient.

Looking at the legislation we believe that it is important, for all current assignments and all future ones that we hold:

1. Sufficient evidence to satisfy the SDC Test; and
2. Copies of all certification to confirm relevant skills; and
3. An up to date work history.

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## Sufficient Evidence

It is important that we hold sufficient evidence to form an overall reasonable opinion whether the SDC Test is satisfied. Based upon the advice received that this can be achieved through the completion of a detailed questionnaire concentrating on.

- The service you provide.
- Who you work with, why and when.
- Where you work, why and when.
- Who checks your work, why and when to establish what has been checked, by whom, why and whether any remedial work was required.
- Whether you have been moved from one job to another, when, why and by whom.
- Who you report to, when and why.
- Whether you have to seek guidance from anybody to do the work and if you have what guidance was required, who gave it and when.

As a general rule we would not expect the following groups to provide answers that would lead us to the conclusion that the SDC Test would not apply:

- Call Centre Staff
- Factory Workers
- Individuals covered by the GLA
- General Operatives or Labourers
- Delivery Drivers
- HGV Drivers
- Oil and Gas Workers involved in the extraction of Oil and Gas
- Office Personnel

The above is not exhaustive, but in all cases we will look at what is our reasonable understanding of what services are to be provided.

## The Process

We have already transferred employees where we believe the SDC Test applies in to a model with no Travel and Subsistence expenses. Also workers who have little or no travel costs have also been migrated to the same model.

For all other workers we will start the process of applying the SDC test to all current assignments and all future assignments imminently, with the outcomes being relayed to the workers.

In the event that we conclude that the SDC Test applies, then a worker will have the right of appeal, but this will then be a one to one review by a specialist employment status expert and an additional charge may arise.

If the outcome is that the SDC test does not apply, then you will be able to claim for Travel and Subsistence as we will be happy to accept the risk.

If the outcome is that the SDC test does apply, in our opinion, if you disagree then you can look to make a claim for Travel costs on your self-assessment.(1)

In answering the questions, we will ask whether in your opinion the engager would confirm your statements.

It is hoped that over time we will be able to put in place a series of case studies, in addition to those supplied by HMRC, that will be specifically written based upon our employees and sectors they support.

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## Starting Point

In deciding whether to progress with a formal SDC Test we will look at four key aspects.

1. Does the worker satisfy the 'temporary' workplace rules.
2. Is the worker skilled or an expert in their field.
3. Is there scope for the the right of SDC to be apply in practice.
4. Is the worker task / assignment based or are they giving the client continuous support on project after project.

In addition whilst the legislation does not differentiate based upon rate we will be operating as follows:

1. Any worker that we bill a rate of £12.00 or less will not be entitled to claim for Travel and Subsistence.
2. Any worker that we bill a rate of £15.00 or more will be entitled to claim for Travel and Subsistence, but only when we are satisfied and hold sufficient information to support our conclusion that the SDC Test does not apply.
3. Any worker on rates between £12.00 and £14.99 will only be reviewed if their is a business case.

## Finance Bill is not the Finance Act

The Finance Bill is currently the subject of debate in the two Houses of Parliament and will not become law until it becomes the Finance Act.

## Change for All

This additional legislation, it is fair to say, will take some time to establish best practice and we hope that all will bear with us whilst we iron out the inevitable wrinkles in the proposed process.

## Change for the Future

Currently there are five potential outcomes to the simple question of whether the individual would be an employee of the client if they worked directly. In many cases the way in which the worker is engaged and who is engaging the worker dictates the outcome, even though fundamentally the worker may be undertaking the same task.

Directly Employed (Public or Private Sector) status dictated by Employment Status Tests.

Engaged through an Agency (Public or Private Sector) status dictated by SDC Test.

Engaged through an Employment Intermediary (Public or Private Sector) status dictated by SDC Test.

Engaged through a PSC (Public Sector) status dictated by Control Test (Proposed).

Engaged through a PSC (Private Sector) status dictated by Employment Status Tests.

It is quite possible for a worker to be classed as employed if engaged directly and self employed if engaged through an agency. Whilst it is equally as possible that a worker would be denied a claim for Travel & Subsistence if engaged through an Employment Intermediary, but allowed if engaged through a PSC.

HMRC are aware of these disparities and it is hoped that at some point they may listen to the calls for a series of Gateway Tests that means that the worker will be treated consistently and more importantly in a manner that is positive for the economy. I-PAYE will continue to push for this through its various associations.

1. If you make a claim then you will have to prove to HMRC that the SDC test does not apply. In the event that you submit a claim and receive a tax refund that at a later date HMRC confirm that the SDC test applies then you may have to repay the tax repayment back, plus interest and possibly penalties. You should speak to a qualified tax adviser before proceeding with a claim.



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