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20 August 2012



To Chairs  
Chief Executives  
Finance Directors  
HR Directors

Sir David Nicholson  
NHS Chief Executive

Of:  
Strategic Health Authorities  
NHS Trusts  
Primary Care Trusts

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Gateway reference: 17993

Dear Colleague

## **IMPLEMENTING THE RECOMMENDATIONS OF THE HMT REVIEW OF TAX ARRANGEMENTS**

On 23 May 2012, HMT published their review of tax arrangements for public sector appointees. The review was informed by a survey of Board members throughout the NHS. The review outlined a number of key recommendations which are set out below.

Government departments are required to implement the recommendations from 23 August 2012. NHS organisations should seek to do so as soon as realistically possible following this date.

### **Recommendation 1**

*Board members and senior officials with significant financial responsibility should be on the organisation's payroll, unless there are exceptional circumstances – in which case the Accounting Officer should approve the arrangements – and such exceptions should exist for no longer than six months.*

The requirement for Board members to be on the payroll of organisations applies to both executive and non-executive directors. However, the requirement is aimed at preventing avoidance of payment of income tax and national insurance contributions – it is not intended to interfere with arrangements where it has been agreed that employers should be reimbursed directly as compensation for releasing employees to serve as non-executives in the NHS. Such arrangements can continue, subject to the approval of the Chief Executive. Where Board members are seconded from other organisations, employers should satisfy themselves that they are on the pay roll of that organisation.

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HMT have not defined “senior” or “significant financial responsibility”. Each NHS organisation’s chief executive should decide whether any staff, in addition to Board members, should be included. It would be reasonable to expect that anyone taking major financial decisions on behalf of the organisation should be on the organisation’s payroll.

### **Recommendation 2**

*Engagements of more than six months in duration, for more than a daily rate of £220, should include contractual provisions that allow the department to seek assurance regarding the income tax and NICs obligations of the engagee – and to terminate the contract if that assurance is not provided.*

HMT and HMRC have produced two guides, which are annexed, to help with the implementation of this recommendation.

The *Assurance Guide* sets out the steps employers should take (a) to establish the employment status of workers; and (b) to obtain evidence about the tax and NICs obligations of workers engaged by or seconded from a company (including personal services companies).

From 23 August, all new contracts and contract renewals meeting the criteria should include clauses ensuring that employers have the ability to seek assurances about workers’ tax and NICs obligations and to terminate the contract if that assurance is not provided. HMT/HMRC have produced *Illustrative Contractual Clauses* which can be adapted for use in contracts. Please note that Government Procurement Service (GPS) agreements will include similar clauses. Employers should ensure that the correct clauses are present when letting new contracts through the GPS. Where a contract is terminated under these provisions, notice in accordance with the contractual provision should be given.

Employers should retain copies of the evidence provided by workers as part of the assurance process.

Employers are not expected to seek assurance in every case but in enough to provide an effective disincentive to avoiding tax. HMT have not specified a minimum figure but 20% should be adequate for this purpose.

### **Recommendation 3**

*These measures should be implemented within three months – and implementation will be monitored after one year, reporting back to the Chief Secretary to the Treasury and the Minister for the Cabinet Office.*

HMT will be conducting a compliance check in April 2013. Details of this and how it will be applied in the NHS are awaited. From 23 August, employers should record, as a minimum:

- the number of off payroll engagements for more than £220 per day and for more than 6 months

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- the number of those from whom assurance has been requested
- the number of those who have successfully provided assurance
- action taken against those who have not provided assurance.

**Recommendation 4**

*Employers should also seek to apply these principles to existing contracts - subject to ensuring value for money for the taxpayer.*

Employers should review existing contracts meeting the criteria and contracts should be varied to include the new provisions where it appears this can be done on a cost-effective basis (i.e. the individual consents to the contract change, or contract termination does not attract an additional cost). Where individuals do not agree to such a change, employers should contact HMRC.

**Recommendation 5**

*If it emerges that any departments have not abided by these rules, sanctions will apply – with departmental resource budgets reduced by up to five times the payment in question.*

Although it is not intended that HMT will apply financial sanctions to NHS employers, all NHS employers should nevertheless seek to implement the recommendations as fully as possible.

**Scope**

All organisations subject to the HMT Guidance “*Managing Public Money*” come within the scope of these recommendations. This includes NHS Foundation Trusts and (in future) clinical commissioning groups (CCGs). Following its strong advice to NHS Foundation Trusts to comply with the review, Monitor will issue guidance to NHS Foundation Trusts shortly. PCTs should apply the recommendations to staff engaged to work on CCGs until 1 April 2013 when CCGs will become responsible for implementing the recommendations themselves.



**Sir David Nicholson KCB CBE**  
**NHS Chief Executive**

## Annex A

### Tax Arrangements of Public Sector Appointees – Model Contractual Provisions

#### Please Note

**These Clauses have been drafted on an illustrative basis and are not intended to be implemented in to any Contract without a thorough review involving a) the individual Department's governance and (where applicable) information sharing practices and b) a review of the contracting parties in the particular circumstances (including tripartite arrangements) and termination provisions.**

Generic Clauses for Individual Worker [Department contracts with Worker, or obligation in Header Contract to be flowed down to worker\*]

1. Where [Worker\*] is liable to be taxed in the UK in respect of consideration received under this contract, it shall at all times comply with the Income Tax (Earnings and Pensions) Act 2003 (ITEPA) and all other statutes and regulations relating to income tax in respect of that consideration.
2. Where [Worker] is liable to National Insurance Contributions (NICs) in respect of consideration received under this contract, it shall at all times comply with the Social Security Contributions and Benefits Act 1992 (SSCBA) and all other statutes and regulations relating to NICs in respect of that consideration.
3. [Name of Contracting Authority/Agency] may, at any time during the term of this contract, request [Worker] to provide information which demonstrates how [Worker] complies with Clauses 1 and 2 above or why those Clauses do not apply to it.
4. A request under Clause 3 above may specify the information which [Worker] must provide and the period within which that information must be provided.
5. [Name of Contracting Authority/Agency] may terminate this contract if-
  - (a) in the case of a request mentioned in Clause 3 above-
    - (i) [Worker] fails to provide information in response to the request within a reasonable time, or
    - (ii) [Worker] provides information which is inadequate to demonstrate either how [Worker] complies with Clauses 1 and 2 above or why those Clauses do not apply to it;
  - (b) in the case of a request mentioned in Clause 4 above, [Worker] fails to provide the specified information within the specified period, or
  - (c) it receives information which demonstrates that, at any time when Clauses 1 and 2 apply to [Worker], [Worker] is not complying with those Clauses.
6. [Name of Contracting Authority/Agency] may supply any information which it receives under Clause 3 to the Commissioners of Her Majesty's Revenue

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and Customs for the purpose of the collection and management of revenue for which they are responsible.

*\* - Where there is no 'direct' contract between the Worker and the Contracting Authority, the Contracting Authority will need to ensure that these provisions are contained in the 'Header' Contract/Framework agreement and that the 'supplier' is legally obliged to flow these terms down to the Worker with whom it contracts. One way to do this would be to include the provision as an annexe to the 'Header' Contract/Framework Agreement and confirm that it must be included in any terms between the 'supplier' and the worker. There will also need to be information provisions in the Header contract to ensure that the information supplied by the worker can be provided directly to government departments to carry out any necessary assurance, and make the decision to terminate if necessary (through the correct contractual route).*

## Annex B

### Assurance Guide for Departments

*This guide is to help departments seek assurance regarding the income tax and NICs obligations of their appointees, as recommended by the CST Review of Tax Arrangements of Senior Public Sector Appointees.*

The department must have the contractual right to seek assurance that the worker is meeting their income tax and National Insurance obligations if an individual (the “worker”) is engaged by the Department for 6 months or longer and being paid £220 per day or more – but not being paid through the departmental payroll (with PAYE and NICs deducted at source).

In line with the recommendations of the CST review, departments should decide when to seek the assurance. For example, they may wish to seek the assurance for some contracts only. They may seek the assurance at the start of the contract, if they know it will last for 6 months or longer; alternatively they may seek the assurance at the 6-month or some other point. Workers should be responsible for the information provided, even if it comes from their accountant or professional adviser, and given a reasonable time (e.g. 20 working days) to provide information requested.

#### Worker engaged directly

Where the worker is engaged directly (not through a limited company or other body) it is the responsibility of the engaging Department to ensure that they correctly classify the status of the worker as employed or self-employed. They must do this prior to the engagement starting; this is a requirement for every UK employer. The status and tax treatment is determined by the terms and conditions under which a worker is engaged. Departments may seek assurance about the tax obligations of workers engaged directly by following **step one** below.

#### Working through a limited company or other body operating PAYE on their whole salary

Where a worker is not on the department payroll but is working through a limited company or other body and on the payroll of that body there is no requirement for the department to operate PAYE and NICs. The Department may seek assurance by following **step two** below.

#### Worker working through their own limited company

Where someone is working through their own limited company (a “personal service company” PSC) there is no requirement for the department to operate PAYE and NICs. Instead, the worker must consider

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the intermediaries' legislation known as IR35. The IR35 legislation prevents people who would be classed as an employee if the company was not in place from paying less tax by operating through a PSC than by being engaged directly by the engager (the department). It says that if the relationship between the worker and the engager (the Department) would be employment if it weren't for the interposition of the company, then the worker must treat the money from that contract as earnings and pay PAYE tax and NICS on the money. Departments may seek assurance in these circumstances by following step three below.

#### Step One – employment status

The Department should use HMRC's online Employment Status Indicator (ESI) tool (<https://esi2calculator.hmrc.gov.uk/esi/app/index.html>) to determine if the worker is classed as self-employed or an employee for tax purposes. Then:

- if the worker is classed as self-employed – the Department should confirm that the worker is registered to pay tax. For example if the worker has been working on a self employed basis for a number of years they might provide their previous year's business accounts and filed tax return, or if they are newly self employed they will be able to provide form SA250 as evidence that they have registered as self employed with HMRC. Once the evidence has been provided, the department need take no further action. This evidence can be provided at the 6-month point.
- if the worker is classed as an employee – they should be put onto the departmental payroll. (As explained above, if they are working through a limited company, seek assurance as set out at step two or step three below.)

#### Step Two – engaged by (or seconded from) a company or other organisation

If the worker is engaged through a limited company (or other organisation e.g. a partnership or a university) and is on the payroll of that company and having PAYE and NICs deducted at source by the limited company then the worker can provide evidence that all of the money they are paid by the Department is put through that body and they are receiving/withdrawing it with PAYE/NICs deducted at source. This can be evidenced by the production of their payslips which will show the salary, and PAYE and NICs deductions. (The company may deduct a small percentage for administrative costs.) The person may be the director of the company, working for a personal service company or one of many employees. This test also applies to those on secondment whose parent organisation is reimbursed for their salary. It will be possible for the worker to provide payslips at the 6 month point for the previous 6 months.

Step Three – engaged through a personal service company

Where the worker is engaged through their own limited company (a personal service company) and not withdrawing all their income from the department under PAYE (as set out in step two) they will need to provide evidence of one of the following:

- a) The worker should be able to show that their service company is low risk for IR35 according to HMRC’s “business entity” tests described in HMRC guidance published May 2012 <http://www.hmrc.gov.uk/ir35/guidance.pdf>. This means that they are a low risk of HMRC checking whether they need to operate the IR35 legislation described in step three. The worker will be able to provide this at the 6 month point. Provided the terms of the engagement remain the same, the service company will remain low risk for the duration of the contract.
- b) If the worker is medium or high risk according to HMRC’s “business entity” tests but feels that they are outside the scope of IR35, then they will need to provide assurance in a different way – for example, following a contract review by HMRC’s independent IR35 helpline. The worker will be able to provide evidence of a contract review to say that they are outside the scope of the IR35 legislation at the 6 month point. If the terms of the contract remain the same the assessment of the service company will not change for the duration of the contract.
- c) If the contract is within the scope of IR35, the worker can provide evidence that they are operating the IR35 legislation on the payments received from the Department. This can be evidenced by the worker providing a “deemed calculation”. This is a calculation that requires the worker to consider all the income for the year from a particular contract that is within IR35, make a ‘deemed payment’ to HMRC for employer NICs and pay employee NICs and PAYE on the remainder of the income. The deemed payment calculation can be accessed online at <http://www.hmrc.gov.uk/ir35/ir35.xlt>. The legislation only requires the individual to make this payment at the end of the tax year, so it will not be possible to provide assurance until this point – the individual will need to indicate that they are intending to do this when assurance is sought and commit to meeting this requirement at an agreed later date.

If the department is not satisfied with the evidence they receive they may send details to their CRM or customer coordinator in HMRC to be considered alongside other intelligence to support HMRC’s work to tackle non-compliance. Taxpayer confidentiality means that HMRC will not be able to share the results of any follow-up action with the department.