

UMBRELLA COMPANY REGULATION – WHAT SHOULD THIS LOOK LIKE?

November 2021

Background

BEIS have set out to bring umbrella companies into statutory regulation, to be regulated by the EAS (or successor - e.g. the Single Enforcement Body). In this paper, we explain the likely process and the REC's recommendations to government. Our recommendations are focused on ensuring fairness for employment businesses, workers and all other parties in the supply chain.

First Stage

The first step is to provide a statutory definition by way of an amendment to the Employment Agencies Act 1973.

We have recommended to BEIS that they use the definition as in the Agency Workers Regulation. We see no advantage to using a new more complicated definition when one already exists in law.

Second Stage

Once the definition has been finalised, it can be used to amend the Conduct Regulations to regulate umbrella companies.

Timescales

When BEIS wrote to us with the draft definition they stated:

When Parliamentary time allows, our first step to do this is to use primary legislation to define umbrella companies - which is the subject of this email. After primary legislation has been passed, we propose to use secondary legislation to make the regulations for umbrella companies.

In the summer, the REC gave feedback to BEIS on an initial draft definition of what they called an 'Intermediary Umbrella Body'.

In our feedback, we made it clear that once the definition was finalised, a full consultation should be held to help establish how the definition would be applied, and how umbrella companies would be regulated.

Present position

BEIS have not yet formally responded to the REC submission (other than to acknowledge receipt), and they have not provided any further information about submissions from other stakeholders. However we have met with them to inform a future call for evidence where we had the opportunity to share our thoughts on the approach to regulation as set out in this paper.

The REC's main asks around regulating umbrella companies?

1. We are not advocating for a ban of umbrella companies.
2. But there should be reciprocal employment business/umbrella company obligations to enable more clarity for the worker

3. Umbrellas should be subject to some of the obligations that employment businesses have under the current recruitment industry legislation.
4. Regulation should create transparency around fees/payments taken by umbrella companies.
5. Regulation should take away the right for umbrella companies to opt out of the Conduct Regulations.

1. No banning of umbrella companies

The TUC have called for a ban of umbrella companies. However we agree with the BEIS assessment that the risks associated with banning umbrellas include a reinvention of umbrella companies or the creation of alternative entities which would mean that government/HMRC/REC and others would have to start contending with the unknown again.

2. Reciprocal employment business/umbrella company obligations

Employment businesses already have a number of obligations under the Conduct Regulations. In discharging some of those obligations, it is necessary to rely on input from umbrella companies where they are used.

For example, regulation 13A - obligation to provide the Key Information Document.

The KID must include (amongst other details) information confirming who will employ the worker, who will pay the worker and details about any deductions from pay (statutory or otherwise) as well as an indicative example showing the pay and deductions.

We will push for a reciprocal obligation to be placed on umbrella companies so that they have a similar legal obligation to provide all of the information that the employment businesses need to provide a compliant KID, and to update the information provided if it changes.

3. Mirroring some of the obligations that employment businesses have

It would make sense for umbrella companies to have similar obligations to those that employment businesses have in terms of the relationship with the individual worker. Examples listed below:

Regulation 5 - Restriction on use of additional services

An EB cannot require a worker to use a paid for service provided by the EB in order to access work-finding services.

Regulation 6 - Restriction on detrimental action in relation to work-seekers working elsewhere

EBs cannot take detrimental action against a worker if e.g. the worker resigns. Also post termination restrictions are not allowed.

Regulation 12 - Prohibition on withholding payment to work seekers on certain grounds

EBs cannot withhold payment from workers if, for example, they fail to submit a signed time sheet (although other evidence of hours worked can be requested).

Regulation 13 - Notification of charges and the terms of offers

Where an EB is permitted to charge workers, there are strict rules that require the EB to provide information in advance about the goods/services and a right to withdraw from those services.

Regulation 13A - Key Information Document

EBs must provide a KID. This obligation should principally remain with the EB to provide the KID as the first document that the worker receives prior to registration with the EB, but the umbrella company should also provide similar information regarding payment from the umbrella company when they engage the worker.

Regulation 14 - Requirement to obtain agreement to terms with work-seekers

EBs are required to agree the basic terms and conditions on which the worker will be engaged before any work-finding services are provided. Although this obligation is duplicated by the requirement to provide a written statement of particulars as per the Employment Rights Act, ideally this EB obligation should also fall on umbrella companies to enable the EAS to take action if terms are not provided to the worker. (The remedy for failure to provide Written Statement of Particulars under the ERA is ET action).

Regulation 15 - Content of terms with work-seekers: Employment businesses

Specifies the provisions which must be included in a work seeker's contract

Section 6 of the Employment Agencies Act

Prohibition on charging for work-finding services. EBs cannot charge direct fees for providing work-finding services. It is an offence under the Act.

Note on removing umbrella companies' ability to charge workers directly/indirectly for providing services.

As seen above, EBs are prevented from charging directly or indirectly for the provision of work-finding services.

Umbrella companies have not historically charged EBs for providing their services.

They make their money from some/a combination of the following:

- Charging workers a fee
- Taking advantage of 'tax solutions' to reduce the amount of tax (NI/VAT etc.) paid, thereby maximising the sums received from the EB.
- Using other measures to deduct sums for providing their services from the money received from the EB before paying the worker. E.g. using a NMW basic wage with a 'flexible bonus'.

They could also:

- Charge the EB a fee

BEIS has made it very clear that it does not intend to prevent umbrella companies from charging in a way that would make it difficult/impossible for them to continue to operate profitably.

If you take one of the fee streams listed above away then an umbrella is likely to use one of the others.

As umbrella fees are not always made obvious to workers, transparency and simplicity of pay slips is key to ensuring that workers are clear about the cost of umbrella company fees. This would need a tightening up of regulation 13A Conduct Regulations (KID).

In addition, workers should not see deductions from their pay for any charges that are the employer's responsibility, such as:

- Employer (auto enrolment) pensions contributions
- Employers NI
- Apprenticeship Levy

Introducing these provisions to the Conduct Regulations would give the EAS authority to regulate breaches of these restrictions.

4. Transparency of fees/payments in the supply chain

One of the issues that does threaten the reputation of the recruitment industry in the use of umbrella companies, is the lack of transparency in relation to fees and payments that may be received by employment businesses, umbrella companies, and potentially clients, when an umbrella company is selected.

We would like to see similar provisions that apply to consumers when buying financial products/services. This would mean a disclosure of referral fees, and any other incentives offered to EBs by umbrella companies.

Just as important is the need for an individual to understand what their take home pay will be - from the very beginning of the recruitment process. For most people, this will be when they engage with a job advert. Where an umbrella company is used by the EB /client, a calculation of minimum take home pay should be understood by all parties, most particularly by the work-seeker from the outset. We know that an EB and umbrella may have an agreed hourly rate that is inclusive of the worker's pay, fees charged for the service provided and potential future bonuses. The pay rates set out in any job advert issued by the employment business should be consistent with what a worker will be entitled to receive taking into account any umbrella/intermediary arrangements that will be offered to them.

5. Remove the opportunity for umbrella companies to opt out of the Conduct Regulations

Presently, it is possible to remove the application of all of the Conduct Regulations, with the exception of regulation 13A (the provision of the Key Information Document) from any supply chain.

This is because if a worker works through a limited company, the Conduct Regulations allow the limited company to give notice to the employment business that it does not want the Conduct Regulations to apply. This provision was intended to be used by contractors working through their own companies to reduce the administrative burden but is often incorrectly used by umbrella companies. The individual and the limited company each have to agree to opt out, but umbrella companies often seek to opt out on a worker's behalf. This exposes the employment business to a risk of non-compliance.

Once umbrella companies are brought into regulation they should not be allowed this choice. The opt out provision should only be retained for contractors who work through their own limited company (that they have majority control of and are a director of).

Next steps for REC members

- BEIS, HMRC and HMT have now published a [call for evidence on the umbrella company market](#). We encourage you to respond to that request and hope the policy positions outlined above will help you frame your response. The deadline for submitting evidence is February 22, 2022. The REC will also be organising a roundtable discussion with the relevant government departments to seek member feedback. We will share a date with you for that in the near future. If you have any questions about this paper please get In touch at policy@rec.uk.com