

**His Majesty's Revenue and Customs consultation on tougher
consequences for promoters of tax avoidance**

- 1.1 The NASUWT welcomes the opportunity to respond to His Majesty's Revenue and Customs (HMRC) consultation on tougher consequences for the promoters of tax avoidance.
- 1.2 The NASUWT – The Teachers' Union – represents teachers and headteachers across the United Kingdom.

GENERAL COMMENTS

- 1.3 The Union recognises that the questions in the consultation are significant and wide ranging and cover a number of areas associated with those who seek to promote tax avoidance.
- 1.4 The NASUWT submission seeks to address a range of issues, including those associated with the experiences of supply teachers working through supply agencies and umbrella companies.
- 1.5 The NASUWT welcomes the Government's commitment to tackle those who seek to promote tax avoidance, given that tax avoidance leaves taxpayers with significant tax bills.
- 1.6 It is right that action is taken by the Government, including providing and promoting advice and support to taxpayers, to ensure that everybody pays

the taxes they owe and contributes towards the public-funded services from which they benefit.

- 1.7 This includes tackling those that promote and enable tax avoidance, which deprives the Chancellor of the Exchequer of funds for public services, including schools, and has a detrimental financial impact on dedicated workers such as supply teachers.

2. SPECIFIC COMMENTS

A criminal offence for promoters for failing to comply with a Stop Notice

- 2.1 Changes in the UK labour market over recent years have had a significant impact upon pay, job security and conditions of employment, resulting in an increased disparity in the balance of power between employers and workers.
- 2.2 Whilst the Government values the dynamic nature of the UK's workforce,¹ the well-documented move away from permanent employees to a more complex and flexible labour market has resulted in the increased use of umbrella companies, including those wishing to expose the fragile job security and unfair conditions of employment of agency workers, such as supply teachers.
- 2.3 External analysis and HMRC data show that the umbrella company market has grown substantially since 20 years ago.²
- 2.4 The increased use of umbrella companies and the associated increased complexity in the labour market presents a challenge that may be contributing to the widening tax gap between what is expected to be paid and what is paid.³

¹https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1037093/Umbrella_Company_CfE_Final.pdf

² Ibid.

³ Ibid.

- 2.5 There are concerns that umbrella companies are used by some individuals and organisations to promote, market and facilitate tax avoidance schemes, often to the detriment of the worker.
- 2.6 As the recruitment sector has evolved, this has resulted in a situation where umbrella companies are now seen as a legitimate part of the modern labour market; an increasing number of agency workers now find themselves engaged through umbrella companies.
- 2.7 As a consequence, umbrella companies now proliferate in all areas of the temporary labour market. HMRC estimates suggest that there has been an increase in the number of individuals working through an umbrella company from 100,000 in the tax year 2007/08 to at least 500,000 in the tax year 2020/21.⁴
- 2.8 Further estimates suggest that the number of those working through an umbrella company has increased from between 300,000 to 400,000 in 2015 to over 625,000 in 2021.⁵
- 2.9 Reports suggest that umbrella companies are increasingly involved in the supply chains of lower-paid workers, including those who promote and enable tax avoidance schemes.⁶
- 2.10 Despite guidance from the Employment Agencies Standards (EAS) Inspectorate, which suggests that agencies cannot force people into using an umbrella company, by not offering any other option, supply teachers are effectively forced into such arrangements if they want to engage and work with the supply agency.⁷
- 2.11 Indeed, research conducted by the NASUWT found that almost half of supply teachers (49%) reported that they had been asked to sign a contract or

⁴ Ibid.

⁵ <https://www.litr.org.uk/sites/default/files/files/LITRG-Labour-Market-Intermediaries-Report-2021.pdf>

⁶ Ibid.

⁷ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/936515/eas-brief-guide-for-agencies.pdf

agreement with an umbrella/offshore company when working through a supply agency.⁸

- 2.12 Umbrella companies who promote and enable disguised remuneration (DR) schemes often fail to make it clear to those using such schemes (i.e. supply teachers) exactly what they are involved in, as there is misinformation and a lack of transparency about the pay rates and the way in which the pay is comprised (as National Minimum Wage, discretionary bonuses, or loans).
- 2.13 The introduction of a Key Information Document (KID) from 6 April 2020 sought to address issues of transparency by making it a requirement of agencies to provide agency workers, such as supply teachers, with key information prior to signing up for an assignment, including in relation to how they were paid, and if an intermediary or umbrella company is involved.⁹
- 2.14 However, it appears that there is still a lack of transparency over the deduction, fees and contractor pay/payments, with some agencies ignoring the legal requirement to provide all workers with a KID.¹⁰ This is a particular problem when the only source of work is via recruitment agencies, which can often be the case for lower paid workers.
- 2.15 Despite it being a legal requirement since April 2020, only 19% of supply teachers who obtained work through a new supply agency reported that they had been provided with a KID detailing how they would be paid and associated deductions, as well as other key details.¹¹
- 2.16 Furthermore, of those supply teachers who were provided with a KID, just over one fifth (21%) stated that the KID detailed whether they would be paid/employed through an umbrella company.

⁸ <https://www.nasuwt.org.uk/uploads/assets/uploaded/cbf2bdf5-8e39-484b-926b1becb8fc586c.pdf>

⁹ <https://www.gov.uk/government/publications/providing-a-key-information-document-for-agency-workers-guidance-for-employment-businesses>

¹⁰ <http://www.loanchargeappg.co.uk/wp-content/uploads/2021/04/How-Contracting-Should-Work-Inquiry-Report-April-2021-min.pdf>

¹¹ <https://www.nasuwt.org.uk/advice/supply-teacher/annual-supply-teacher-survey/annual-supply-teacher-survey-england.html>

- 2.17 The state has a fundamental role in protecting individuals, particularly the most vulnerable, from umbrella companies who use exploitative and unscrupulous employment practices, including non-payment, payroll skimming and the non-payment of holiday pay.¹²
- 2.18 It is therefore welcomed that this consultation looks at further action, including making it a criminal offence for those who continue to promote tax avoidance, such as unscrupulous umbrella companies and employers, including those covered by a Stop Notice.
- 2.19 The NASUWT welcomes the flexibility for HMRC by adding this to the existing civil penalties which can be applied to those promoting tax avoidance.
- 2.20 Despite the steps taken by HMRC, including measures introduced to strengthen anti-avoidance regimes in respect of tax such as the disclosure of tax avoidance schemes (DOTAS) and promoters of tax avoidance schemes (POTAS), it is still the case that DR schemes and other such enterprises have continued and are still promoted.
- 2.21 Irrespective of the threat of hefty fines and other actions by HMRC to force promoters of tax avoidance schemes out of the market, there are still ‘a number of promoters – the so-called “hard-core” – that remain in business, despite HMRC knowing who these promoters are’.¹³
- 2.22 Whilst the Union believes that this would be the strongest possible deterrent to those who continue to enrol new users into tax avoidance schemes, there is a need for caution, particularly if HMRC targets workers too readily over issues of non-compliance in relation to tax,¹⁴ especially in a context where supply teachers are already subject to exploitation due to the precarious, intermittent and insecure nature of their work.

¹²https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1037093/Umbrella_Company_CfE_Final.pdf

¹³https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/972080/Call_for_evidence_tackling_disguised_remuneration_tax_avoidance_-_summary_of_responses.pdf

¹⁴<https://www.litrg.org.uk/sites/default/files/files/LITRG-Labour-Market-Intermediaries-Report-2021.pdf>

- 2.23 Agency workers often have very little choice over whether or not they are enrolled into a DR scheme, and this is unlikely to be affected by HMRC in its approach to supporting taxpayers in identifying and steering clear of tax avoidance.¹⁵
- 2.24 As such, the NASUWT believes that those who promote and enable tax avoidance and DR arrangements exploit the economics of supply chains and the rise of intermittent, precarious and insecure work in the temporary labour market.
- 2.25 The Union maintains that the introduction of a criminal offence should ensure that there is a more comprehensive system of deterrents in place for those who fail to comply.
- 2.26 In addition, the NASUWT maintains that the failure of threats and fines for those who are non-compliant makes criminal sanctions the intuitive next step.
- 2.27 This includes the ability to be more sophisticated in recognising that it would be a criminal offence for a person to exert control or have significant influence over the continued promotion of a tax avoidance scheme by using complex company structures to disguise the fact that they are ignoring a Stop Notice.
- 2.28 It is hoped that this will enable HMRC to target the remaining 'hard-core' of promoters, who seem to have little fear of HMRC and appear to find ways of getting around the various regimes currently at the disposal of HMRC.
- 2.29 Whilst the NASUWT acknowledges the need to have the necessary safeguards in place, there are questions about how effective any new powers will be if they are only reserved for the most 'serious cases'.
- 2.30 In addition, any such power is contingent on the fact that a Stop Notice has to be issued first, which has the potential to introduce an additional, and

¹⁵https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/973478/Clamping_do wn_on_promoters_of_tax_avoidance_-_consultation.pdf

perhaps unnecessary, administrative burden which could impact on the ability of HMRC to operate at pace or scale.

- 2.31 The NASUWT would argue that the use of any such additional powers should be published in order to send a strong message to the public that those who promote tax avoidance can expect to be punished accordingly.
- 2.32 Furthermore, the Union believes that the naming and shaming of agencies and umbrella companies could act as an additional lever for compliance. It seems appropriate that employers who commit serious breaches of employment law should be named in order to serve as an effective deterrent.
- 2.33 Consistent application of naming and shaming must have the desired effect of incentivising non-compliant employers to act promptly or face further escalation through additional sanctions, including greater compensation for workers affected.

Expediting the disqualification of directors of companies involved in tax avoidance

- 2.34 In recognising that tax avoidance schemes, such as DR, are often delivered through limited companies, such as umbrella companies, the Union believes that it is appropriate that consideration is given to the disqualification of directors of companies involved in tax avoidance.
- 2.35 Nevertheless, there is need for caution, given that the Union has been aware that some promoters operate where the weakest and the most vulnerable are exploited and unwittingly registered as 'company directors'.
- 2.36 For example, some employment intermediaries are promoting products that encourage supply teachers to set up as a limited company. The NASUWT has serious concerns about such products and the implications for supply teachers in regard to their tax liabilities, specifically in setting up a new limited company where the supply teacher is the 'sole owner', director and employee.

- 2.37 As such, there is a danger that ‘innocent’ people are being recruited as (‘stooge’ or ‘nominee’) directors to front umbrella companies responsible for paying people using DR.
- 2.38 Given this, the Union notes the proposal in the consultation to include those who *‘control or exercise influence over a company that is involved in the promotion of tax avoidance,’*¹⁶ as this would hopefully tease out the distinction between those named as directors and those who are *actually* running the company.
- 2.39 The NASUWT believes it is incumbent on HMRC to ensure due diligence is maintained in order to understand if a director is aware of their role, particularly given the potential ramifications as a consequence of being disqualified as a director, including both reputational and financial.
- 2.40 As such, the Union advocates that HMRC concentrates its efforts on pursuing those who are effectively ‘pulling the strings’, especially given that the status ascribed to being a director of a limited company can be considered to be attractive for some people.
- 2.41 Whilst wanting to expedite the disqualification of genuine directors of companies involved in promoting tax avoidance, the NASUWT is concerned that those who have been recruited as ‘nominee directors’, such as those who are vulnerable and susceptible to exploitation, may fall foul of this through no fault of their own.
- 2.42 It cannot go unnoticed that once an individual has been disqualified as a director, this can have real and serious consequences for those individuals, including an immediate ban from acting as a director of a company for between 2-15 years, coupled with fines or a custodial sentence for those breaching a ban.

¹⁶ <https://www.gov.uk/government/consultations/consultation-tougher-consequences-for-promoters-of-tax-avoidance/tougher-consequences-for-promoters-of-tax-avoidance--3>

- 2.43 Furthermore, there is the reputational damage associated with being disqualified by acting as a director, including the embarrassment and stress that this may bring, as well as being prevented from undertaking or serving in a number of roles, such as school governor.
- 2.44 In addition, disqualification as a director may require an individual to disclose this if they are a member of a professional body, which could subsequently lead to a membership ban.
- 2.45 It is therefore right that the consultation makes references to a number of 'safeguards' in paragraph 3.37.¹⁷
- 2.46 Nevertheless, the NASUWT is concerned that 'safeguards' that revolve around court proceedings will offer very little protection, specifically as evidence suggests that those involved are often low paid and/or vulnerable.
- 2.47 As such, it is essential that HMRC give serious consideration to having appropriate measures in place *before* disqualification action is initiated to effectively weed out 'stooge' or 'nominee directors' who have little or no understanding in day-to-day operations.

ADDITIONAL COMMENTS

- 3.1 The Union believes that the Government must do more to educate and raise awareness of being signed up to be a 'stooge'/'nominee director' and the dangers associated with this.
- 3.2 It is worth noting that the enforcement measures proposed by HMRC should not have a detrimental impact on the worker and result in a situation where they are living in fear of intimidation from the employer and the prospect of losing their job.
- 3.3 To this effect, the Union welcomes the recent launch of the consultation looking at tackling non-compliance in the umbrella company market,

¹⁷ Ibid.

including potentially legislating to regulate umbrella companies more effectively.¹⁸

- 3.4 For example, the Conduct of Employment Agencies and Businesses Regulations 2003 should be strengthened to ensure that specific provisions relating to umbrella companies are incorporated. This should include the right for an agency worker, such as a supply teacher, to decide whether or not they want to be employed through an umbrella company, and a requirement for mandatory transparency so that all fees and costs are fully disclosed, including any associated deductions.
- 3.5 In addition, this should include a requirement for agreed rates of pay to include an uplift to cover any fees charged by the umbrella company, including the employer's National Insurance Contributions (NICs) and other related costs.
- 3.6 This should be accompanied by a statutory standards framework which strengthens existing regulations, such as those that make it unlawful for an agency to offer a position that is conditional on using a specified umbrella company, and those that stop workers being pushed or encouraged to opt out of the Conduct of Employment Agencies and Employment Businesses Regulations 2003.¹⁹
- 3.7 Furthermore, any such framework should make it unlawful for agencies to receive financial incentives or 'kickbacks' from umbrella companies, such as those received via introductions.
- 3.8 It is important that this must be accompanied with improved levels of funding and additional resources to enable the EAS to deliver its extended remit. The NASUWT therefore welcomes the improved levels of funding and additional resources to regulatory and enforcement bodies which fall under the remit of

¹⁸ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1161120/230411_Umbrellas_condoc_HMT_template.pdf

¹⁹ <http://www.ioanchargeappg.co.uk/wp-content/uploads/2021/04/How-Contracting-Should-Work-Inquiry-Report-April-2021-min.pdf>

the Director of Labour Market Enforcement (DLME), such as the EAS, as the regulatory and enforcement body for supply teachers as agency workers.²⁰

- 3.9 The Union believes that it is right and proper that the appropriate distribution of resources is allocated so that effective labour market enforcement can take place, especially given concerns that the chances of being investigated for noncompliant employers is too low.²¹
- 3.10 It cannot go unnoticed that, compared to European countries, UK enforcement agencies are under-resourced and underfunded. For example, in France, there are nearly 19 inspectors for every 100,000 people, whereas in the UK, there is just one inspector per 100,000 workers.
- 3.11 Furthermore, the International Labour Organization (ILO), Article 10, Labour Inspection Convention No. 81, recommends adequate resourcing for labour market inspectorates.²²
- 3.12 In its response to the DLME's call for evidence to the UK Labour Market Enforcement Strategy 2019-20, the NASUWT reiterated the desire for the DLME to seriously consider a licensing scheme which monitors and reviews compliance of employment businesses and umbrella companies operating in education.
- 3.13 Agencies and umbrella companies operating in the state-funded education sector would be an ideal area to extend licensing schemes, particularly given the growing concern over the way they operate and the levels of fees they charge, which is, in essence, money being diverted away from the public purse and the education of children and young people.
- 3.14 Licensing would be the most effective way to tackle non-compliance in education when there is evidence of repeated breaches of employment rights, as it requires the licence holder to demonstrate compliance before

²⁰ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/705503/labour-market-enforcement-strategy-2018-2019-full-report.pdf

²¹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/705495/labour-market-enforcement-strategy-2018-2019-executive-summary.pdf

²² https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C081

they are legally permitted to operate in the sector. They are also subject to continuing checks.

- 3.15 In order to secure public confidence, any licensing scheme should be backed up by an independent regulator that has the ability to hold employers to account and apply appropriate sanctions for those who do not comply with the provisions of any such scheme.
- 3.16 The NASUWT believes that this should be comprised of relevant stakeholders, including trade unions, in order to ensure that there is a requisite level of veracity about the scheme.
- 3.17 The Union is clear that employers who break the law should expect there to be significant consequences for their actions, yet at the same time provide workers with the comfort and knowledge that the system works in a fair and just manner.
- 3.18 Currently, there is very little to dissuade an agency if they want to push workers into arrangements with unscrupulous umbrella companies. The NASUWT believes this is an oversight that the Government should look to remedy in order to address issues involving matters of tax avoidance and employment rights in the temporary labour market.
- 3.19 The NASUWT believes that the consultation should consider remedies to ensure that the employer is ordered to reimburse the worker as soon as possible in order to avoid situations where workers are frustrated by the difficulty of enforcing awards against employers.
- 3.20 The enforcement process could be simplified if greater onus was placed upon the Government to enforce awards. Currently, the system relies too much on individuals pursuing a claim against an employer.
- 3.21 The Union is concerned that this fails to appreciate the reality on the ground for those workers who are victims to non-tax-compliant schemes, and the fact that a significant period of time may elapse when they continue to be paid via such schemes.

- 3.22 As stated previously, a significant number of workers are unaware that they are paid through non-tax-compliant schemes, and a number of workers in intermittent, insecure and precarious employment may speak English as a second language, and/or have issues with literacy, which could impact on their ability to access and fully understand if they are paid through noncompliant tax schemes.
- 3.23 In addition, public procurement rules should be strengthened to ensure that public sector bodies are prohibited from using those employment agencies and umbrella companies which fail to adhere to minimum standards.
- 3.24 The House of Lords Economic Affairs Finance Bill Sub-Committee reinforced this notion by recommending that the Government: *'ensure that no government or public sector body contracts with an intermediary operating a disguised remuneration scheme, and to publicise this requirement along with the protocols that public bodies are expected to follow'*.²³
- 3.25 Furthermore, consideration should be given to extending the law around joint and several liability, specifically during the procurement process, so that end-user organisations have an onus placed upon them to ensure that the practices of suppliers can be appropriately evidenced, including in respect of the operation of umbrella companies.
- 3.26 In the case of schools and colleges, as public bodies, they have a great deal of purchasing power and, as a consequence, leverage over their suppliers. This provides them with the opportunity to bring about change in the behaviour of those employed in the supply chain. Suppliers wishing to enter a contract with such public bodies should be expected to evidence a robust approach to both employment and tax law obligations.
- 3.27 Extending joint and several liability would provide workers with other avenues to pursue when seeking to enforce their rights, whilst ensure that

²³ <https://committees.parliament.uk/publications/4097/documents/40546/default/>

due diligence is maintained, which in turn could incentivise more permanent and secure employment.²⁴

3.28 For example, in Norway, public authorities are obliged to advance contract clauses on wages and decent working conditions in relation to the procurement of construction, facility management and cleaning services.²⁵

3.29 Public authorities in Norway are also required to follow up with suppliers on the performance of such clauses, such as requiring the supplier to make a self-declaration.

3.30 Whilst organisations such as trade unions are available to assist and offer invaluable advice, guidance and support, the NASUWT believes that measures should be introduced to promote and support collective bargaining and the right of trade unions to access workplaces and represent individuals and groups of workers when enforcing their rights.

3.31 Trade unions have a vital role to play in ensuring that workers are better informed and empowered in respect of their employment rights. The right to representation is a key concern for the NASUWT.

3.32 The involvement of trade unions is crucial in negotiating improved terms and conditions and putting in place mechanisms to remedy breaches of these terms and conditions.

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²⁴ <https://www.tuc.org.uk/sites/default/files/2021-07/Umbrella.pdf>

²⁵ <https://www.hrprocurementlab.org/wp-content/uploads/2016/06/Public-Procurement-and-Human-Rights-A-Survey-of-Twenty-Jurisdictions-Final.pdf>

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