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28 August 2018

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Dear [REDACTED]

## **Off Payroll Reform in the Public Sector**

Further to your letter of 6<sup>th</sup> July 2018 we are writing to provide a response to your queries.

Whilst we have responded in full regarding TfL's policies and procedures, to be able to disclose personal data of third parties we must have a lawful basis to do so to avoid breaching Data Protection rules. The letter we received does not refer to a statutory power which would oblige us to provide such information and Paragraph 5 of Schedule 36 suggests that HMRC require the approval of a tribunal to request such information. To enable us to legally disclose this information please write to us detailing the statutory powers under which you are requesting this information.

### **1. Steps prior to April 2017**

TfL do not engage any non-permanent labour (NPL) directly, therefore all Personal Service Companies (PSCs) are engaged via an agency or other labour provider.

#### ***General approach***

Prior to April 2017 a steering group was established within TfL, including representatives from HR, Legal, Tax and Commercial. This group worked to ensure that TfL was compliant with the legislation by April 2017. We also worked very closely with the agencies we use as they were also keen to ensure compliance.

An exercise was undertaken to identify all roles where contractors were being paid via a PSC or other relevant intermediary. Information was gathered on the nature of the roles in question and discussions were held with hiring managers to understand the working arrangements. This allowed us to form a high level view as to which roles were likely to fall within the IR35 legislation and which might be outside the scope of the legislation.

All hiring managers were contacted and instructed to have discussions with the contractors in their areas.

They were broadly offered five options regarding their continued engagement at TfL:

- 1) Individual continues as NPL and converts to PAYE status (i.e. is paid via the payroll of the relevant agency)
- 2) Individual continues as NPL and converts to umbrella company status
- 3) Individual converts to a TfL employee on a permanent or fixed term contract (where considered appropriate)
- 4) Individual stops working at TfL
- 5) Individual undertakes an IR35 verification test and continues to operate via their PSC if the test proves they are outside IR35

These options were offered after consideration of the criticality and nature of the roles, as not all were considered to be appropriate in all circumstances. IR35 testing was only offered after consideration of the nature of the role by TfL, if a role was considered to be clearly within IR35 no testing was offered.

A decision was made not to engage contractors who are operating via a PSC where the contractor is found to be within the IR35 legislation. This was due to the complexity of operating the legislation in these instances and ensuring the relevant deductions are correctly made. In these cases we will request that the contractor be paid via the payroll of the agency or an umbrella company.

### ***IR35 verification testing***

The IR35 verification testing process we use was applied consistently in all cases and was developed in conjunction with the relevant agencies. Each agency appointed a nominated independent verification provider, all of whom had prior experience of undertaking IR35 assessments.

If IR35 verification testing was considered to be appropriate the contractor was offered the opportunity to undertake this testing. This was not compulsory and the contractor could decide to take one of the other options instead.

The IR35 verification process works as follows:

- 1) The contractor completes an IR35 test designed by the independent verifier. These tests are more detailed than the HMRC tool, however they all examine the same areas and have been compared to the HMRC tool in order to ensure that they give the same result. In some cases the HMRC tool is also used as a "second check".
- 2) Based on the answers to this test the independent verifier makes a recommendation as to whether the contractor is inside or outside IR35.
- 3) A summary of the questions and responses are sent to the hiring manager at TfL via the NPL team.
- 4) The hiring manager confirms that they agree that the answers to the questions are accurate and correctly reflect the contractor's ways of working.
- 5) The NPL team also consider the responses to the questions and based on their knowledge of the role decide whether the recommendation is reasonable. If necessary further questions are asked.
- 6) The final decision as to whether the contractor is inside or outside IR35 is notified to the agency by the NPL team.



- 7) Where a contractor is outside IR35, a 6 monthly re-verification process is undertaken to ensure that there have been no changes to the ways of working that would impact the outcome of the test.

### ***Training and support***

Throughout this period the NPL team were engaging closely with the business to provide advice and support. As well as meeting with individuals as required they produced written guidance and FAQs, as well as running a number of briefing sessions throughout the business. All hiring managers were encouraged to attend a "How to work with your PSC contractor" briefing session which explained the legislative changes, the TfL response to the changes and the IR35 rules. A copy of the slide pack from this briefing session is attached at Appendix 1. I am also attaching a copy of an internal guidance note for hiring managers at Appendix 2.

### ***Commercial contracts***

In some instances we engage "gangs" of workers via other intermediaries e.g. construction companies. We often know little about the individuals engaged, whether they are employees of the intermediary or whether they are engaged by them as contractors. In these instances we wrote to the intermediaries in question to ask them whether there were any PSCs in the labour chain.

We then used the HMRC tool to assess the roles in question. In all instances the roles were assessed to be outside the scope of IR35 largely due to the high level of substitution and the fact that TfL does not supervise, direct or control the workers. We wrote to all relevant intermediaries to notify them of the outcome of our assessment.

## **2. Processes currently in place**

When a new vacancy request is received by the NPL team they consider whether the role would definitely fall within IR35 or whether there is potential that it might be outside the IR35 legislation. This consideration is based on their knowledge of the nature of the role, the job description and a checklist completed by the hiring manager (attached at Appendix 3). They are then able to advise the agency as to whether we are looking to recruit only PAYE/umbrella workers or whether we are open to engaging contractors who are operating via their own PSC.

If it is decided that the role may fall outside the IR35 legislation then any contractor that was engaged who was operating via a PSC would follow the above independent verification process.

The above verification process is "owned" by the NPL team and they approve all decisions. They hold details of all NPL engaged via all agencies. We have full visibility of all contractors and how they are engaged by the agency i.e. PAYE, umbrella or PSC.

For each PSC worker the NPL team hold the following information:

- A copy of the third party test
- Correspondence with the hiring manager agreeing the test
- All correspondence with the agency

- The completed compliance checklist (appendix 3)
- Details of any re-verifications
- Any other related information

Each PSC worker is detailed on a spreadsheet with dates of the last test and when a new test is due.

Monthly spreadsheets are sent to the agencies to confirm the workers engaged as PSCs. The NPL team also meet with the agencies and indemnifiers every 6 months to go over the process.

Training and guidance is on-going as per section 1 above.

### **3. Details of directly engaged PSCs**

TfL does not engage any PSCs directly.

### **4. Details of PSCs engaged via agency**

The numbers of PSCs can change on a weekly/monthly basis, however currently there are 270 contractors working at TfL that provide their services via their own PSC.

These are split between the following:

Hays – 213

Morson – 26

Matchtech/Gattaca – 11

Fusion – 13

Rullion – 5

Ballard Chambers - 2

As above, TfL do not engage PSCs that are deemed to be caught by the IR35 legislation, therefore all 270 have been assessed as being outside the scope of the legislation.

We can confirm that the agencies were notified of the decision in all instances, in accordance with the process described in section 1 above.

### **5. Umbrella companies**

We can confirm that TfL does not have a policy to encourage the use of umbrella companies for contractors found to be within the IR35 rules. If we confirm that a role is within IR35 the agency will assist the contractor to decide whether they wish to be engaged via the agency payroll or an umbrella company, we do not provide any advice on this matter. Each agency has certain umbrella companies that they work with and again we do not get involved in this decision except to make certain stipulations e.g. that we will not accept offshore umbrella companies.

**6. TfL employment contracts**

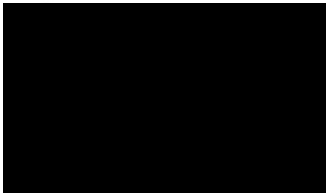
Where it was considered appropriate some workers did move to employment contracts with TfL, either permanent or fixed term. We understand that circa 167 contractors became permanent employees or entered a fixed term contract with TfL around April 2017.

**7. Contracted out services**

We do not believe that this is applicable.

I hope that the above information is useful.

Yours sincerely



Encs

