

Health and Social Care Policy Update – NHS Agency Caps and Controls

10th November 2016

It would be an understatement to say that the last 12 months have been challenging for recruiters working in health and social care. The introduction of NHS caps and controls have hit many agencies hard, and the news in the summer that the UK is to leave the EU has added an additional level of uncertainty. We also have a new Prime Minister and Jeremy Hunt continues as Secretary of State for Health. In our latest sector group meeting in October it was suggested by some members that IR35 could even be a bigger threat to the industry than the Caps.

In this latest policy update, we examine some of the issues and seek to answer some of the questions put forward by members.

NHS Caps

Price caps on the supply of agency staff to the NHS were introduced last year in an effort to reduce the amount of money that the NHS spends on its workforce. The first round of caps came into force at midday on 23rd November 2015, the second round on 1st February 2016, and the third on 1st April 2016. The maximum wage rates took effect on 1st July 2016.

Please see this link to the Agency Rules for more information:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/510391/agency_rules_23_March_2016.pdf

Maximum wage rate

The Agency Rules state that the maximum wage rate is the maximum amount of money that a trust can pay per hour to secure an agency worker. NHS Improvement have confirmed that this is irrespective of whether the worker is paid via PAYE or PSC. You should only charge for the costs you incur - and within the parameters set out in the Agency Rules.

Trusts are required to seek confirmation from agencies that their workers are not paid more than the maximum wage rates. In special circumstances, such as in order to ensure patient safety, trusts can 'break the glass', in which case higher rates can be paid.

National Insurance

The Agency Rules state that as of April 2016 charge rates are calculated at 55% above basic pay rates. This takes into account holiday pay, Employer National Insurance Contributions (ENIC), a nominal

employer pension contribution and a modest agency fee. There is no exclusion for employers' National Insurance in a larger supply chain and the costs are included in the total price cap, along with any agency fee and framework fee. Typically, the responsibility for paying employers NICs falls with the "employer" for tax purposes (i.e. the party that pays the worker) who then makes the necessary payment to HMRC. So where employers NICs are due they can be charged for, and should be paid to HMRC. But generally, the agency should charge within the parameters of the Agency rules.

Please also note that Employers' NICs are due on all workers, except where someone is genuinely self-employed. So where someone is engaged via a PSC, that PSC will be responsible for paying Employers' NICs where they are due (i.e. where the assignment falls within IR35). If the assignment is outside IR35 then Employers' NICs will not be due.

Although PSCs are still being supplied by agencies please see the notification below in the Agency Rules:

Personal service companies

8.1. NHS Improvement recognises that in some circumstances trusts engage directly with a worker directly via a limited/personal services company (PSC). Trusts must only engage directly with a worker working via a PSC where the trust is assured that the worker is complying with IR35 legislation. The trust must seek proof from the worker that they have complied with the obligations set out in HMRC guidance. If a worker cannot provide adequate assurance that they are operating within the law the trust must not engage with the worker via that arrangement.

8.2. As referred to in paragraph 5.2, the price caps apply when trusts engage with a worker via a limited/personal services company or third party limited liability partnership.

8.3. Trusts are however encouraged not to engage with individual workers via PSCs. Where possible, trusts should engage that worker via the trust's bank and/or encourage the individual onto the trust's payroll.

8.4. As part of the framework approvals process, NHS Improvement will grant approval where framework operators ensure that agencies on the framework agreements are seeking regular assurance from agency workers that workers are complying with IR35 legislation when engaging with a trust via a limited/personal services company.

Competition

The intention behind the caps is to bring agency workers' pay in line with substantive staff as set out in the Agenda for Change (AFC) pay scales and medical pay scales. With regards to potential breaches of the EU/UK competition rules in enforcing the Agency caps, the REC sought Counsel's Opinion from a Competition law specialist as we were concerned about the implications for the sector. Counsel confirmed that the EU/UK competition rules would not apply to NHS trusts or foundation trusts as they are unlikely to fall within the definition of "undertakings" under the competition rules. Undertakings are entities engaged in economic activities and activities carried out for purely social

purposes or on the principle of solidarity, have been found not to be economic. NHS trusts' procuring agency staff for their own internal use would not be engaged in economic activity and therefore the competition rules would not apply. The summary of Counsel's opinion is on the REC's Health and Social Care page which you can access at this link: <https://www.rec.uk.com/news-and-policy/policy-update/nhs-agency-caps-update-legal-opinion-and-more>

Special circumstances

Each tender process is comprehensively advertised via multiple channels, and agencies should be alert to any upcoming tender so that they don't miss out. Suppliers cannot normally be added on during the lifetime of the framework. In some circumstances, for example in the East of England, the only way to supply would be to subcontract to one of the CPP approved providers.

NHS Trust Development Authority and Monitor (now combined to form NHS Improvement) have previously confirmed that NHS trusts could apply for a dispensation to use off-framework agencies if they can offer lower rates or better value, against the approvals criteria than the existing approved frameworks. This dispensation is an option, provided the NHS trust is prepared to make the application on behalf of their preferred agency who meets the criteria.

Pan-London rates

The REC have been informed that NHS London Procurement Partnership (LPP) will be contacting all suppliers to advise them of the pan-London pay rates, which London trusts wish to use under the Framework.

The REC has raised the recently introduced 'spine point' London rates with LPP. We believe that if suppliers have bid on the basis that the rates set out in the pay reference tables in the Agency Rules will apply, then reducing the rates, especially when they have workers in ongoing assignments, will disrupt the continuity of supply. Suppliers have to deal with limited allocation of funds to cover all the employment costs and take a modest agency fee. Having to reduce rates and obtain consent from workers in a way that does not infringe the Conduct Regulations 2003 will be difficult given that Regulation 14 of the Conduct Regulations provides that the agency or employment business may not vary the terms it has agreed with the work-seeker, unless the work-seeker agrees to the variation. In addition, they must not make the continued provision of any services to a work-seeker conditional on the work-seeker agreeing to any variation in the terms e.g. a change in the pay rate.

We are seeking clarity about whether the ceiling pay rates for agency workers in nursing, midwifery, AHP/HSS was stipulated in the tender documentation, and whether suppliers were aware that this was a possibility post award. At this stage, LLP have simply stated that the documentation clearly stated that a Participating Authority can choose to set the pay rate, should they wish to do so. This is an area that the REC will continue to push on and we will keep members updated.

IR35

HMRC are currently seeking new arrangements which will shift the responsibility for compliance from PSCs to the entity *paying the* PSC. These new rules will come into force in April 2017 and are likely to have a very significant impact for the recruitment industry. The REC has worked with HMRC and other stakeholders to provide advice to members on the changes to IR35. There is a dedicated IR35 page on the REC's website, which you can access at this link: <https://www.rec.uk.com/legal-resources/legal-guide>

Going forward, the REC would like to gain feedback from members about their concerns surrounding IR35 as this is important in shaping our discussions with key stakeholders. In addition, we hope to gain additional information from government following the Autumn Statement and will keep members informed of how the new rules will specifically relate to Health and Social Care recruitment agencies.

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