

INFOGRAM

CHANGES TO LABOUR BROKER LEGISLATION (IRP30)

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As a result of the amendments to the Income Tax Act, APSO has investigated the changes relevant to labour brokers and the operational implications for our members.

The end of the IRP30 era presents new challenges

With effect from 1 March 2009 the definition of a Labour Broker has been amended to exclude companies and close corporations. As a result, the IRP30 exemption certificate is no longer applicable to these organisations. What this means is that, if you operate as a company or cc, you will no longer have to endure the historically oft flawed and frustrating annual IRP30 application process. Some of you may have received a letter from SARS informing you of the amendments and their consequences

We have also been informed by SARS that some 2009/10 IRP30 certificates were issued prematurely. Please note that these are invalid if they were issued to a company or cc. You should receive a letter from SARS informing you that they have been cancelled, but even if you don't it would obviously be illegal to present these to your clients.

So, where to from here?

Tax legislation has, for many years, placed the responsibility on the employer to deduct income tax from the employee. In response to this, many independent contractors adopted the strategy of forming a company, CC, or trust as a front, in order to avoid having PAYE withheld by their client. SARS countered this tax avoidance measure by creating the definition of a Personal Service Company or Trust in Schedule 4 to the Income Tax Act. In the most recent amendments, this definition has been amended to the all-inclusive Personal Service Provider, but the effect basically remains the same.

Since your organization, although a Temporary Employment Service (TES), no longer falls under the definition of Labour Broker, which now only includes natural persons, the question to be asked is whether it falls under the definition of a Personal Service Provider. If it does, the client is required to withhold 33% of the payment due as PAYE and issue an IRP5 at the end of the tax year showing the total amount deducted under code 3617.

Definition of a Personal Service Provider (PSP)

To be classified as a PSP, a company (or close corporation) must comply with three general jurisdictional requirements. These are the following:

- a. The services must be rendered personally by a connected person in relation to the company. A connected person is defined as a member, shareholder or beneficiary (if the shareholder is a trust) of the service provider, as well as any relative to the third degree of consanguinity i.e. extending to great-grandparents, great-grandchildren, uncles, aunts, nieces, nephews, and first-cousins; and
- b. The PSP must employ less than three full time employees, who are not connected persons, during the year of assessment; and
- c. Any one of the following three requirements must be answered in the positive:
 - i. The connected person in relation to the company would be regarded as an employee, had the company not been interposed between that person and the client; or
 - ii. The duties are performed at the client's premises; and that connected person is subject to control or supervision as to the manner in which his duties are performed; or
 - iii. More than 80% of the company's service income is or is likely to be derived directly or indirectly from one client or that client's associated institutions.

As you can see, the definition is quite clear. **All three requirements a. b. and c. must be satisfied before the company (or cc) will be a PSP, and the client is required to withhold tax.**

What should I provide to my client?

In the first instance, if you **do** fall under the definition of a PSP you are required to inform your client of the fact.

If you do not fall under the definition of a PSP, it is recommended that you simply advise your clients of the changes to the legislation with the consequence that you are no longer required to obtain an IRP30 certificate. APSO will provide you with a standard letter for that purpose. Please note that it is a criminal act to issue this letter under false pretences.

Please note, that like the old IRP30, this process has to be reviewed on 1 March every year.

If your client requires further confirmation that you do not fall under the definition of a PSP, we suggest that you follow the course of action detailed in the next section.

How do I explain to my client that my business isn't a PSP?

What you need to do is to make it easy for the client to determine whether, or not, your business is a PSP. Here's how:

1. Provide the client with a letter explaining, in non-legal terms, its responsibilities and the definition of a PSP. APSO will make available a standard letter for that purpose, on request.
2. If you do not derive more than 80% of your service income from a client and its associated companies, provide an affidavit to that effect. APSO will make available a standard affidavit for that purpose, on request, which you can complete and take to a police station or commissioner of oaths. Please note that, according to Schedule 4, an affidavit is only applicable to this requirement of the definition.
3. If you employ at least three full-time employees in that business, provide the client with an organisation chart of your organisation to illustrate this. It is recommended that you support this chart with a copy of your EMP201 as proof of number of employees.

Proving that a temporary employee is not a connected person should not present any difficulty and, besides this is irrelevant if your TES company has three or more unconnected fulltime employees.

Please note, that like the old IRP30, this process has to be reviewed on 1 March every year.

Conclusion

In my opinion, these amendments are consistent with the trend by SARS, over the past few years, to streamline the system and make the taxpayers more aware of their responsibility for honesty and accountability, which may be subject to audit at any time.

Let's embrace it in the appropriate spirit.

ADDENDUM:

The following extracts from the Income Tax Act Schedule 4 amended paragraphs are provided for your reference.

Paragraph 1

“‘**labour broker**’ means any natural person who conducts or carries on any business whereby such person for reward provides a client of such business with other persons to render a service or perform work for such client, or procures such other persons for the client, for which services or work such other persons are remunerated by such person;”

“‘**personal service provider**’ means any company or trust, where any service rendered on behalf of such company or trust to a client of such company or trust is rendered personally by any person who is a connected person in relation to such company or trust, and—

(a) such person would be regarded as an employee of such client if such service was rendered by such person directly to such client, other than on behalf of such company or trust; or

(b) where those duties must be performed mainly at the premises of the client, such person or such company or trust is subject to the control or supervision of such client as to the manner in which the duties are performed or are to be performed in rendering such service; or

(c) where more than 80 per cent of the income of such company or trust during the year of assessment, from services rendered, consists of or is likely to consist of amounts received directly or indirectly from any one client of such company or trust, or any associated institution as defined in the Seventh Schedule to this Act, in relation to such client, except where such company or trust throughout the year of assessment employs three or more full-time employees who are on a full-time basis engaged in the business of such company or trust of rendering any such service, other than any employee who is a shareholder or member of the company or trust or is a connected person in relation to such person;”

Paragraph 2

“(1A) Notwithstanding the provisions of subparagraph (1), a person shall not be required to deduct or withhold employee’s tax in respect of any year of assessment of a company or trust solely by virtue of paragraph (c) of the definition ‘personal service provider’ where the company or trust has in respect of such year of assessment provided that person with an affidavit or solemn declaration stating that the relevant paragraph does not apply and that person relied on that affidavit or declaration in good faith.”;