How have changes in the law regarding employment status of employment business operatives affected employment practices in the construction industry?
Contents…………………………………………………………………………………………………………………………………………...2

1. Introduction..................................................................................................................................................................3

2. Objectives and Aim..................................................................................................................................................3

3. Employment Status..............................................................................................................................................4

4. Fiscal Conditions ....................................................................................................................................................9

5. Construction Industry Scheme ..........................................................................................................................10

6. Agency Workers Regulations 2010 .......................................................................................................................11

7. False Self-Employment........................................................................................................................................13

8. Statistical Analysis................................................................................................................................................18

9. Future Developments..........................................................................................................................................20

10. Tax Relief for Travel and Subsistence...............................................................................................................21

11. Conclusions.........................................................................................................................................................22

12. Practice Outcomes............................................................................................................................................23
1. **Introduction**

1.1 **Who should read this practice note?**

This practice note is aimed at solicitors and practitioners of employment law, who have clients engaged in the construction industry, and for wider employment practices. This report will also be of use to labour managers, employment businesses (commonly referred to within the construction industry as “agencies”) and those who provide advice in the construction industry (such as employers’ associations and union officers).

1.2 **What is the issue?**

This practice note contains guidance on the recent changes to the law (both common law and statute) that have affected employment practices of contractors within the construction industry, specifically employment business operatives (“agency workers”).

This practice note offers some guidance on how the employment status of agency workers has arisen, how employment status is decided in the Employment Tribunal and considers the potential benefits for those who provide advice in the construction industry.

Agencies are also known to have changed employment practice due to changes in the law and it is expected that further changes in practice will emerge with the introduction of new legislation.

2. **Objectives and Aim**

The objective of this practice note is to bring together changes in the law surrounding false self-employment and the employment status of agency workers to better inform solicitors and practitioners, companies, workers and their representatives how the changes in legislation will affect employment in the construction industry.
The developments surrounding employment intermediaries arising from the Finance Act 2014 have seen agencies respond to Government attempts to crack down on this practice. Agencies have done this by moving these workers "en bloc to umbrella company contracts"\(^1\).

This project will investigate the way in which agencies will further respond to the necessity for reporting to the HMRC that came into effect from April 2015 and further proposed legislation, whether this will lead to more direct employment, and the fiscal implications as to whether agencies will move towards a PAYE system and become labour-only subcontractors.

It is proposed that there is an element of reaction from business in the take up of agency workers influenced by the strength of legislation at the time regarding workers' rights, and particularly the fiscal options available. This report will look at what changes in practice these agencies have made following recent changes in relevant law.

3. **Employment Status**

3.1 **What is the definition of employee and why does it matter?**

One of the main reasons for degenerative competition in the construction industry and high levels of false self-employment has been described as the blurred and confused definition of what constitutes an employee\(^2\).

When looking at whether a worker is incorrectly classified, and should pay the required income tax and National Insurance Contributions (NICs), the definition of an employee must be considered. The contract of employment is at the heart of this employment relationship.

Those who are falsely self-employed have been defined as those who declare themselves or are declared by the hirer as self-employed “simply to reduce tax liabilities, or avoid employer's responsibilities”\(^3\). These workers would not be undertaking the normal activities of a contractor in tendering for work or negotiating on prices for example.

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\(^1\) UCATT 2014, Foreword.
\(^2\) Behling and Harvey 2015.
\(^3\) OECD 2000, 156.
The main statutory definition of employment is contained within s.230 Employment Rights Act (ERA) 1996 as:

1. In this Act “employee” means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

2. In this Act “contract of employment” means a contract of service or apprenticeship whether express or implied, and (if it is express) whether oral or in writing.

3. In this Act “worker” .... means an individual who has entered into or works under a contract (or, where the employment has ceased, worked under) a contract of employment—
   (a) A contract of employment, or
   (b) Any other contract, ... whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;
   And any reference to a worker’s contract shall be construed accordingly.

Under s.83(2) Equality Act 2010, the definition of employee is more similar to the “limb (b) worker” in the ERA 1996. This states that employment means:

(a) Employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;

(b) Crown employment;

In determining employment status, the critical ingredient is the existence of a contract. An agency worker is more likely to fall under the definition of worker in s.3(b) ERA 1996 as a “limb (b) worker” as there is unlikely to be a contract of employment between the operative and the end user hirer.

The definition of employee, as used by the HM Treasury in the Onshore Employment Intermediaries: False Self-Employment consultation document, is a person that provides services and is the subject of (or subject to the right of) supervision, direction and control by the company\(^4\) but the status for taxation has been altered from the employment definition.

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\(^4\) HMRC 2014.
Courts have often had the responsibility of deciding the status of the worker and who bears the responsibility for the employment of a worker\(^5\) and whether it is appropriate to imply a contract of employment between the parties where the worker was provided through an agency\(^6\), even where an agreement specifically states that no contract of employment exists.

Elias LJ confirmed in *Smith v Carillion Ltd*, citing *James v London Borough of Greenwich*\(^7\) and *Tilson v Alstom Transport*\(^8\) as main authorities, that

1) The onus is on the Claimant to establish a contract should be implied\(^9\);
2) A contract can be implied only if it is a necessity to give business reality to a transaction and create enforceable obligations\(^10\);
3) No implication is warranted simply because the conduct of the parties is more consistent with an intention to contract than with an intention not to contract\(^11\); and
4) A contract can be implied only if the arrangements which actually operate between the worker and end user no longer reflect how the agency arrangements were intended to operate\(^12\).

This gives a high bar to clear for employment status in tripartite arrangements. In *Smith* it was deemed there was no necessity to imply a contract as implication was not necessary in the circumstance to give business reality to the situation and to create enforceable obligations\(^13\). It is “also important to bear in mind that it is not against public policy for a contractor to obtain services in this way, even where the purpose is the legal obligations which would otherwise arise were the worker directly employed”\(^14\).

\(^5\) Ibid.
\(^7\) [2008] EWCA Civ 35.
\(^8\) [2010] EWCA Civ 169; [2010] IRLR 169
\(^12\) Autoclenz Ltd v Belcher [2011] UKSC 41.
\(^14\) Smith v Carillion Ltd [2015] IRLR 467.
3.2 Tests of Employment

The four main tests used to differentiate employment and self-employment are control, integration, economic reality and mutuality of obligations\textsuperscript{15}.

The level of control which the employer exerts over the individual will also be crucial, and judgment is based upon the facts of a case per Ready Mixed Concrete v Minister of Pensions and National Insurance (1968)\textsuperscript{16}. This is still a case of great importance when looking at a worker’s true employment status rather than their label.

This case sets out the basic requirements for an individual to be employed. These are that to be an employee:

1) The person must be paid;

2) The person must have agreed to carry out the work personally; and

3) The employer must exercise at least some control over the individual.

Where all of these criteria are satisfied, it may still be possible that the person is not an employee for the purposes of legislation.

The level of integration into the company will be a factor, such as the requirement to wear a uniform, the provision of sick pay, and whether the person is covered by the company’s disciplinary and grievance procedures.

No one feature should be taken in isolation and an array of other factors can influence a judgment on employment status, such as is the individual paid by PAYE or by invoice, who provides materials and equipment, and does the individual take a financial risk in providing this service (the economic reality)\textsuperscript{17}.

Cases have confirmed that even substantial integration into the company will not necessarily mean that an agency worker is an employee of the hirer\textsuperscript{18}. Some agencies will seek to limit integration to prevent a worker qualifying under the control test.

\begin{footnotesize}
\textsuperscript{15} Burchell et al 1999, 11.
\textsuperscript{16} Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2QB497.
\textsuperscript{17} Hall v Lorimer [1994] ICR 218.
\textsuperscript{18} Alstom Transport v Tilson [2010] EXCA Civ 1308.
\end{footnotesize}
3.3 The requirement to work personally

The requirement to perform the work personally is included in both the ERA 1996 and EA 2010 definitions of employee and this is often a compelling factor in determining employment status.

If an individual can send a substitute to perform his duties, then this would usually be enough evidence to show that the contract was not a contract of employment. Agencies often include substitution clauses in their contracts as a means of attempting to avoid employee status.

However, *Ready Mixed Concrete* set out the limited power to appoint a substitute did not necessarily mean that there was no contract of employment. The facts would need to be established to see whether this right to send a substitute is fettered, whether there was an intention for this clause to be used and whether it in fact was ever used.

Where an individual is unable to attend, rather than chooses not to, and where a choice of substitute is limited (such as from an approved register of the employer's) then this would not preclude a contract of employment. The reality of the situation has been deemed essential to employment status.

The Finance Act 2014 has had the effect of removing the requirement to work personally from the definition of employment from s.44 Income Tax (Earnings and Pensions Act) 2003 (ITEPA) relating to income tax and The Social Security (Categorisation of Earners) Regulations 1978 and The Social Security (Categorisation of Earners) (Northern Ireland) Regulations 1978 (TSS(COE)R) relating to NICs. This has not meant that the definition of employee has changed in regards to employment status.

This change will affect the taxation of the individual but will not increase costs associated with employment such as overtime, contractual sick pay and other benefits of direct employment. This also means that an individual may be employed for taxation purpose but self-employed for employment purposes.

Umbrella companies have become a method of choice for many agencies as this shifts liability for the employment of the worker under the ITEPA and TSS(COE)R to the umbrella

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company, which is in essence the worker themselves, and further distances the worker from the end user in the contractual chain.

4. **Fiscal Conditions**

The fluid, blurred definition of employment has meant employment status is not a clear definition and this has meant fiscal incentives can have a powerful effect on employment\(^\text{22}\).

The regime for this type of systematic tax avoidance could be said to link to the developments of the fiscal regime. The Selective Employment Tax was the first of these regimes introduced in 1966\(^\text{23}\) which levied a flat rate tax against employers. In 1968, as part of the Phelps Brown report it was suggested the construction industry, in which it had been relatively easy to set up as self-employed\(^\text{24}\), was a particularly favourable mechanism for many construction workers\(^\text{25}\).

The Finance Act 1971 in effect endorsed mass self-employment in the form of the 714 Certificate Scheme. The system meant that those qualifying as self-employed (and this was a considerably low threshold to meet) could receive a certificate which would mean no income tax would be deducted at source. Expenses could then be deducted from profits and an annual assessment tax paid on the remainder, at a much lower level than those directly employed.

For those self-employed who did not qualify for the 714 Certificate Scheme, the SC60 system applied. Income tax at base rate would be deducted from payment for labour and a final appraisal made at the end of the tax year\(^\text{26}\). Registration for self-employment was uncomplicated and would often bring beneficial tax deduction levels, meaning that individuals were encouraged financially to set up as self-employed and companies were happy to see reduced employment rights and associated costs. Many companies believed they had to follow this model of encouraging self-employment or they would not be able to compete\(^\text{27}\).

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\(^{22}\) Behling and Harvey 2015, 10.


\(^{24}\) Winch 1998.


\(^{26}\) Briscoe et al 1999, 212.

\(^{27}\) Harvey 2000 and Harvey 2001.
Although the system had been set up in an attempt to collect at least some level of income tax and NICs, the Inland Revenue actually encouraged self-employment regardless of what the reality of the employment relationship, and this can be seen as one of the biggest proponents for false self-employment today.

HMRC has started to crackdown on agencies and HMRC probes have yielded over £130 million in 2013/2014, which is a 68% increase in the amount received two years previous\(^{28}\).

5. **Construction Industry Scheme (CIS)**

The CIS is a scheme created by the HMRC for the purposes of taxation for contractors and subcontractors in the construction industry, designed to minimise tax evasion. Misuse of the CIS scheme has been reported by unions for years and the introduction of this new legislation was aimed at combating those falsely self-employed.

The major fiscal development of CIS made the receipt of gross payments more stringent than under the 714 Certificate Scheme\(^{29}\). It is believed the introduction of CIS reduced the number of self-employed workers due to the tougher restrictions in terms of eligibility\(^{30}\).

Briscoe et al even suggested that those unwilling to switch to the SC60 (where ineligible for the CIS) and not wishing to be directly employed, may enter the “black economy” and work for cash-in-hand\(^{31}\).

“The use of umbrella companies has risen dramatically since the government passed legislation in April 2014 to crack down on false self-employment”\(^{32}\). Many have stated that in their opinion umbrella companies have been established simply as a means of disguising illicit payment practices, and to “ultimately exploit workers at the disadvantage of bona fide employers”\(^{33}\).

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\(^{28}\) Construction Enquirer 2014.

\(^{29}\) Briscoe et al 1999, 217.


\(^{31}\) Ibid.

\(^{32}\) Elliot 2014, 9.

\(^{33}\) JIB March 2015.
UCATT estimates that currently over 50% of those working are falsely self-employed\textsuperscript{34}. It is estimated that there are currently 963,000 receiving payments through the CIS, which is an increase on the figures from 2013/2014 of 39,000.\textsuperscript{35} These figures show an increase despite the crackdown through the Finance Act 2014.

UCATT have said that the increase in those self-employed through CIS shows how fragmented employment status in the construction industry is and the only way to resolve false self-employment is to class workers as employees where not genuinely self-employed\textsuperscript{36}.

6. **Agency Workers Regulations 2010 (AWR)**

6.1 **Introduction**

The construction industry has been notorious for a 'hire and fire' culture. The unions have wished to see falsely self-employed workers reclassified as employees to benefit from greater levels of employment protection.

Agency workers have been called “one of the least protected groups... in the British labour market”\textsuperscript{37}. The AWR went some way to bestowing limited employment rights on those who are employed by the same hirer in the same role continuously for 12 weeks.

An agency worker in Reg. 3(1) of AWR is defined as an individual who:

\begin{itemize}
  \item [(a)] Is supplied by a temporary work agency to work temporarily for an under the supervision of a hirer; and
  \item [(b)] Has a contract with the temporary work agency which is –
    \begin{itemize}
      \item [(i)] A contract of employment with the agency, or
      \item [(ii)] Any other contract to perform work and services personally for the agency.
    \end{itemize}
\end{itemize}

\begin{flushleft}
\textsuperscript{34} UCATT website \url{http://www.ucatt.org.uk/false-self-employment}.
\textsuperscript{35} Construction Enquirer, 6\textsuperscript{th} August 2015.
\textsuperscript{36} Ibid.
\textsuperscript{37} Forde and Slater 2005, 250.
\end{flushleft}
Again supervision and control by the hirer of an individual is essential in this definition\(^{38}\). Problems stem from the triangular nature of the employment relationship and the contract as the status of the worker is not always clear\(^{39}\). Further there has been uncertainty whether the TWA or hirer bears responsibility for the worker regarding issues of employment\(^{40}\).

Again substitution clauses have been used attempting to circumnavigate the definition of agency worker and avoid higher levels of protection compared to self-employed operatives.

Under AWR from day one of an assignment, an agency worker has access to amenities, improved access to training, and is informed about permanent vacancies. After 12 weeks in the same role with the same hirer, agency workers become entitled to limited equal terms such as basic hourly rate, overtime and holiday pay\(^{41}\). The introduction of this 12 week qualifying period was referred to by the CBI at the time as the “least worst outcome”\(^{42}\).

The BIS 2010 Explanatory Memorandum to the AWR stated between 85-100 percent of increased wages demands from agency workers would be passed on to the hirer by the agency\(^{43}\), and this was a cause for concerns for UK businesses trying to remain competitive. It was believed this could represent as much as £241 million in additional costs to the hirer (and partly passed onto the worker by way of increased administrative charges)\(^{44}\).

Agencies and contractors have therefore both sought to reduce costs associated with the AWR by avoiding the implementation of the 12 week qualifying period by removing labour at this stage or attempting to ensure workers do not meet the definition of agency worker under Reg. 3(1) AWR.

6.2 Have greater levels of protection under the AWR lead to fewer self-employed workers?

The 2011 Workplace Employment Relations Survey (WERS) looked at the proportion of agency workers used in 2011 (following the introduction of the AWR) and the figures from 2004, the previous WERS survey. Official statistics suggest that construction was one of the

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\(^{40}\) Williams 2004, Forde and Slater 2005

\(^{41}\) BIS 2010.

\(^{42}\) CBI 2008e.

\(^{43}\) BIS 2010, 18.

\(^{44}\) BIS 2010, 18.
worst affected sectors during the recession\textsuperscript{45} and the 2011 WERS stated that roughly 70\% of respondents reported the recession had a dramatic effect on their workplace\textsuperscript{46}.

In 2011, 11\% of workplaces had agency workers whereas in 2004 this was 12\%\textsuperscript{47}, implying the introduction of the AWR did not have much of an impact on the composition of workforces.

The problem has remained that hirers remove labour prior to this 12 week qualifying period and workers do not qualify under AWR. Following the recession, unions believe that people have not been in a position to question their method of engagement.

It is possible that changes in the levels of self-employment have been caused by economic conditions, the need to increase flexibility and reduce costs. Increasing employment protection has seen agencies seek ways to avoid these increased costs in construction although this has not been as apparent in other sectors.

The CBI stated that although the AWR increased costs, it is less harmful to competitiveness that feared as flexibility was protected\textsuperscript{48} and this has led to fewer changes than would have been thought prior to the AWR introduction.

7. **False Self-Employment**

7.1 **Reasons for the high level of false self-employment**

High numbers of falsely self-employed operatives in the sector have been due to factors such as the seasonality of work, nature of projects (requiring peaks and troughs of labour requirements\textsuperscript{49}), the nature of the blurred legal position and the fiscal systems that have been in place over several decades meaning agencies have often required self-employment status before engaging individuals.

\textsuperscript{45} Office for National Statistics: Index of Production, Index of Services and All in Employment by Industry Sector.
\textsuperscript{46} Wanrooy et al 2011, 11.
\textsuperscript{47} Wanrooy et al 2011, 11.
\textsuperscript{48} CBI 2008b.
\textsuperscript{49} Nisbet and Thomas 2000, Nisbet 2007.
The Government has for many years wished to tackle this problem as the construction industry “traditionally consists of a large number of self-employed persons”\textsuperscript{50}, many of whom are self-employed purely for fiscal advantages.

Although steps to combat false self-employment have been welcomed by unions, it quickly became apparent to them that employers were attempting to circumnavigate the new tax regulations with some employers forcing workers into umbrella payroll companies\textsuperscript{51}.

HMRC has been keen to class these workers as employees for the purposes of taxation so that the higher levels of income tax and NICs that are paid. The Department for Business, Innovation and Skills (BIS) estimates overall gross wage benefit for agency workers to be between £1,196 and £1,327 million a year, which represents a net benefit of between £897 and £995 million per annum after tax\textsuperscript{52}.

7.2 What was the taxation position of agency workers prior to the Finance Act 2014?

Up until 6\textsuperscript{th} April 2014, agency workers (where properly engaged) were generally treated as employees for tax purposes under the above legislation. The exception to this is where workers are employed via personal service companies (PSCs).

Agencies have been able to avoid the necessity to deduct PAYE and pay NICs with complicated contracts of self-employment which have meant that individuals did not need to work via PSCs. Agencies benefitted from not having to pay NICs and the worker is paid gross, claiming tax relief on expenses. This was mutually beneficial and therefore common.

The ITEPA is the relevant legislation for the purposes of income tax. The Finance Act 2014 amended s.44 of ITEPA 2003 to remove the obligation for personal service for agencies and intermediaries.

The ITEPA places the responsibility for deducting income tax and NICs and the paying of this through PAYE real time information (RTI) on the agency. The agency worker was only treated as an employee for the purposes of income tax where there was a requirement for personal service.

\textsuperscript{50} Behling and Harvey 2015, 3.
\textsuperscript{51} Unite the Union 17 June 2014, \url{http://www.unitetheunion.org/how-we-help/list-of-sectors/construction/constructionnews/new-government-measures-on-false-self-employment/}
\textsuperscript{52} BIS 2010, 17.
For NICs, the relevant legislation is TSS(COE)R which dictated that for a person to be treated as employed for NICs, the worker must provide or be under an obligation to provide personal service. This obligation was removed by Reg. 3(b) of The Social Security (Categorisation of Earners) (Amendment) Regulations 2014 which restricted those not required by TSS(COE)R for NICs to circumstances (among other specific instances) “in which the worker provides the services is not subject to (or to the right of) supervision, direction or control by any person.”

7.3 What effect has the Finance Act 2014 had to the taxation of agency workers?

The requirement for personal service has been removed from Chapter 7 Part 2 ITEPA 2003 applying to both individuals and for agencies and other intermediaries.

Workers who are supplied through intermediaries, if subject to (or to a right of) supervision, direction and control of the hirer (end client) are treated as employees and the agency is required to utilise PAYE. NICs also need to be paid where the worker is subject to the control of someone in the supply chain. The Control Test, as part of the common law definition of employment, is taken as the reason as to why the worker can be classed as an “employee" for this purpose, as shown by the case of Oziegbe where a lack of control meant self-employed operatives were properly classed as such.\(^\text{53}\)

Further, the regulations for returns, record keeping and the penalties attached to the new legislation as contained within the Finance Act 2014 came into force on 6\(^{th}\) April 2015.

This has again meant that agencies need to react and either pass on increased costs with which they are now burdened or circumnavigate the legislation to keep costs down. This has led to the emergence of umbrella companies and other methods of avoiding these requirements.

\(^53\) Gabriel Oziegbe v HMRC [2014] UKFTT 608 (TCC).
7.4 The rise of umbrella companies

The developments arising from the Finance Act 2014 has meant that many agencies require individuals to be employed via umbrella payroll companies, which are contracted to the agency, and then contracted to the end user client. This is merely a new method of avoiding taxation which was previously seen through false self-employment methods such as personal service companies and the CIS scheme.

HMRC, in their recent consultation of tax relief for those using intermediaries stated there has been a "substantial increase in the number of workers recruited through employment intermediaries (including umbrella companies...)". The reason for this substantial increase is explained as the ability of workers to unfairly access tax relief on their home-to-work commute and subsistence expenses they would not be entitled to if they were employees. This has led to an unfair playing field where workers can access tax relief employees cannot, although they could be doing the same job with the same company and live in the same place.

What is important to remember is although umbrella companies are a protested and potentially unsavoury method of engaging individuals, if properly constructed they can be within the confines of the law as it currently stands.

Often individuals have stated they pay both the employer’s and employee’s NICs. Contained in the UCATT 2014 report, an unnamed HMRC worker is quoted as stating:

"An employer cannot by law deduct secondary Class 1 National Insurance contributions (Employer's contributions) from employees: such contributions are the responsibility of the employer.

However, in an umbrella company which is properly constructed and operated, a worker does not have deducted, from the pay to which they are entitled contractually, employer’s National Insurance."
The amount agreed between the worker and the agency becomes income of the umbrella company\textsuperscript{60}. Understandably often workers do not understand their employment status. The umbrella company then has employer’s National Insurance and an administration fee deducted from its income and the remainder is paid to the worker. Administration charges can be the same whether an individual works one day a week or a full week and hence those working one day a week, for example, can receive little take home pay after the relevant deductions.

Workers have been accused of claiming excessive expenses to increase wages, and some agencies have been accused of encouraging workers to claim as high a level of expenses as possible\textsuperscript{61}.

7.5 Union Perspective

UCATT called false self-employment “undoubtedly... the biggest employment rights challenge in construction”\textsuperscript{62}, leaving workers without rights to paid sick leave, holiday pay, overtime pay, comparable market rates and allowances.

UCATT have wanted HMRC to clampdown on the illicit method of using umbrella payroll companies to prevent the pass on of NICs to the worker, and to hope for greater employment rights as an employee\textsuperscript{63}. This method is of particular relevance to the construction industry due to the high number of self-employed individuals (54% of manual workers, which is twice the national average\textsuperscript{64}).

Umbrella companies have been the focus of unions as the main mechanism of tax avoidance that has seen workers take-home pay “cut substantially, leaving them impoverished, demoralised and confused”\textsuperscript{65} with many believing they pay both the employer and employee NICs.

\textsuperscript{59} Elliot 2014, 16.
\textsuperscript{60} Ibid.
\textsuperscript{61} Ibid, 3.
\textsuperscript{62} UCATT website \url{http://www.ucatt.org.uk/false-self-employment}
\textsuperscript{63} UCATT 2012.
\textsuperscript{64} Ibid.
\textsuperscript{65} Elliot 2014, 1.
Some contractors have utilised agency labour and avoided direct employment in the construction industry as “financial flexibility could be impeded by collectively negotiated wage agreements that stretch over several years”\(^{66}\).

8. Statistical Analysis

It could be argued the increase in false self-employment in the construction industry is due to rising costs from the introduction of legislation such as the AWR or Working Time Directive meaning agencies have sought to reduce costs to survive.

The WERS states only 3\% of companies reported increasing agency or temporary labour compared to 15\% of firms which reported reducing levels of agency or temporary labour\(^{67}\), and there was no dramatic change in level of agency labour nationally between 2004 and 2011\(^{68}\).

Critics argue legislation such as AWR limits flexibility and capacity, which will ultimately lead to the economy suffering through a lack of competitiveness. Advocates have stated that legislation is required in order to protect a particularly vulnerable groups of workers in the industry. However, this is not universally agreed\(^{69}\).

The CBI criticised some of the arguments forwarded by unions, stating that attempts by unions to class all temporary workers as ‘vulnerable’ are not accurate\(^{70}\). The CBI though are not an impartial body and are protecting their members by highlighting the belief that the implementation of legislation to increase the rights (and often remuneration) of agency workers leads to less employment opportunities due to rising costs, and less flexibility, which will decrease competitiveness.

The uniqueness of the system in the UK, from both a legal and fiscal standing has led to the situation the industry is in today.

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\(^{66}\) Westers 2014, 1.
\(^{67}\) Wanrooy et al 2011, 11.
\(^{68}\) Ibid.
\(^{69}\) CBI 2008c.
\(^{70}\) CBI 2008d.
The graph above shows how the numbers of workers engaged in the construction industry has changed over time. As would be expected, during the recession in the early 1990s and then again in the recent recession of 2008, labour figures have dropped sharply.

As suggested above by Briscoe et al, there was a drop in self-employment figures likely brought about by the introduction of the CIS and the drop-off of 714 Certification Scheme in the late 1990s.72

In contrast to the overall decline in those employed, the number and proportion of self-employed workers has risen sharply during these periods. As companies seek to cut costs during these difficult economic conditions, this has been achieved by reducing liability in terms of employment rights including the (usually higher) terms and conditions under collective agreements that will apply to employees.

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71 Behling and Harvey 2015, 6.
As shown above, the number of self-employed operatives has sharply grown since 2011. This would be the period during recession that was particularly difficult for the construction industry. This is also the period when the AWR became effective.

CBI reported that self-employment fell by 55,000 in the three months to May 2015 compared to the previous quarter although employment generally only reduced by 67,000 in the same quarter\textsuperscript{74}. It is possible this is due to the legislative changes and will be a continuing trend.

9. **Future Developments**

The UK’s more unregulated market in relation to the taxation of self-employed operatives (until recent developments) has led to the high levels of agency labour and the decline of directly employed operatives\textsuperscript{75}.

\textsuperscript{73} Behling and Harvey 2015, 6.
\textsuperscript{74} CBI 2015.
\textsuperscript{75} Booth et al 2002, 181.
Lavin has stated the incentive to hire agency labour would fall over time\textsuperscript{76}. There are factors, such as the developments of major projects which could have a domino effect.

Crossrail and Heathrow Airport require agencies to pay the rates as agreed by collective agreements (such as the Joint Industry Board Agreement) in order to utilise their labour resources on these sites. Industrial relations is becoming more of a focus for contractors on these projects. Agencies have in some circumstances needed to directly employ workers and, in essence, form labour only subcontractors.

In such circumstances, agency workers have been obtaining direct employment (for a limited of period at least) and are sent from employer to employer as required. However, there are understandably higher costs associated with paying rates as applicable under collective agreements, with the entitlement to full employee protection, which can make competing on sites on which these requirements are not present, difficult.

Agencies have seen greater costs from the administrative requirements (particularly for record keeping and notifications\textsuperscript{77}), combined with the quicker turnover of staff brought about by agencies seeking to avoid liability under the AWR, and the need for greater permanent staff on some major projects (or brought by union pressure).

Self-employment has been associated with low levels of training and the high level of self-employment over the past few decades has seen growing skills shortages\textsuperscript{78}. Hence if the legislation has the effect of promoting further direct employment, training should improve and higher skilling could lead to greater direct employment as companies seek to retain better skilled workers.

10. **Tax Relief for Travel and Subsistence**

On 8\textsuperscript{th} July 2015, the HMRC published a consultation document on restricting the tax relief for home-to-work commuting for those employed through intermediaries, such as umbrella companies.

\textsuperscript{76}Lavin 2005.

\textsuperscript{77}Intermediaries must return details of workers who are not PAYE at least once every 3 months under The Income Tax (Pay As You Earn) (Amendment No. 2) Regulations 2015 which amended The Income Tax (Pay As You Earn) (Amendment No. 2) Regulations 2015..

\textsuperscript{78}Rainbird and Clarke 1988, Clarke and Wall 1998.
Many workers engaged through umbrella companies are paid lower wages than they were through CIS, and top up wages with expenses claims for travel and subsistence relief (sometimes being proposed and encouraged by agencies).

The proposed restrictions on tax relief on home-to-work commuting for those employed through intermediaries under the supervision, direction or control of any person will have an impact on employment practices. These proposals are intended to counter the rising use of umbrella companies and other intermediaries since the introduction of the Finance Act 2014.

Tax and NICs relief on travel and subsistence payments are generally only available for travel in performance with the worker’s duties (such as for travel between places of work). Hence, removal of these tax exemptions will result in lower take home pay for those engaged through umbrella companies. Agencies will need to consider how they engage operatives, as skilled workers in the construction industry would be loathed to accept another cut in take-home pay.

11. Conclusions

Agencies are thought to have been reacting to the introductions of enhanced employment rights for agency workers by avoiding additional costs and liabilities through self-employment models. Agencies have not merely been reacting to new legislation but “have reinforced and regulated the employment of temporary workers in firms”.

Agencies have become more powerful and now have significant control over labour within the construction industry, as shown by the graphs above. Companies are forced into a system of degenerative competition and many feel self-employment is the only way to reduce costs of labour to maintain competitiveness.

The full measure of the effectiveness of the Finance Act 2014 is not yet known. The requirements for record keeping and the assumptions that the HMRC will now make (that

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individuals are employees unless shown otherwise), may still have a major effect on the levels of those classed as self-employed.

Agencies could move to labour only-subcontractor status, highlighted under collective agreements\textsuperscript{80}, which would require direct employment. Unions would likely support this due to the employment protection that comes along with employee status. Pressure will be placed on clients to require contractors to meet terms such as those under collective agreements and some clients will readily endorse such moves for compliance, such as the Liverpool City Council\textsuperscript{81} and the Welsh Assembly\textsuperscript{82}.

Fiscal policy has driven the desire of individuals to avoid higher taxation associated with direct employment (through the 714 Certification Scheme and the CIS) and the changes imposed by the new self-employment legislation.

Agencies and contractors will seek to remain competitive by reducing costs wherever possible and umbrella companies have provided another legal (albeit morally dubious) method of achieving this. Much like with the increase in demand for direct employment in the late 1990s prior to the introduction of the CIS, it may take a combination of union activism, government enforcement and client pressure before the industry shifts back to the levels and proportion of direct employment that was last seen in the late 1980s.

12. **Practice Outcomes**

- The crackdown on false self-employment has led to agencies establishing complicated systems involving personal service and umbrella companies to reduce NICs and taxation

- There will be increased administrative burden on agencies with the requirement for record keeping and returns which became effective from April 2015

- Further restrictions are proposed on the ability to claim tax relief on journeys between home and the place of work will reduce the take home pay of workers. This will deter individuals from seeking self-employed status

\textsuperscript{80} JIB 2015, 60.
\textsuperscript{81} JIB September 2015.
\textsuperscript{82} Welsh Government 2015.
• Direct employment is likely to rise as workers demand employment under national collective bargaining agreements, and unions demand direct employment

• However, there is no real correlation between increases in employment protection and reduction in agency numbers nationally as new methods of avoidance emerge

• Agencies may change their labour model to that of labour only subcontractors to comply with legislation and access high profile work sites (e.g. Crossrail, Liverpool City Council, Welsh Assembly)

• Construction is likely more susceptible to false self-employment due to the historical fiscal regime which encouraged this method and this is likely to continue in the short to medium term
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