

GNT 64 Off-payroll workers: “IR35”

From 6 April 2021 any business (that is not “small”) needs to consider the off-payroll rules. In effect, this means that where a business has engaged an individual to provide services (the “worker”) through an intermediary, such as their own limited company (a “personal services company” or “PSC”), the business needs to look through any intermediaries between the business and the individual worker and determine whether, if the worker had been engaged directly by the business, they should be treated as employed or self-employed for tax purposes. Where workers should be treated as employed for tax purposes, the business paying the PSC needs to operate payroll (including deduction of income tax and employee National Insurance Contributions (“NIC”) as well as payment of employer NIC (and, where relevant, the apprenticeship levy)).

Introduction

Rules first introduced in 2000, which became commonly known as IR35, were designed to reduce tax avoidance by individuals who, but for the existence of their personal service company (“PSC”) would be considered employees, for tax purposes, of the end user of their services (“end users”). The PSC was responsible for deciding what the employment status, for tax purposes, would be and, effectively, operating PAYE within the PSC.

With the obligation resting on the PSC, the end user of the services was provided with some certainty that, providing they correctly engaged and paid a UK registered limited company, such payments could be made gross, absent of tax and NIC. The end user would not, in all but very extreme circumstances, be held liable for underpayments of tax and NIC that the PSC may generate as a result of this arrangement.

This position changed for end users in the public sector from 6 April 2017 and for end users in the private sector, with the exclusion of end users classed as “small”, from 6 April 2021.

Legislation

Legislation from 6 April 2021 completely changes these arrangements. The obligation to determine the employment status, for tax purposes, was moved from the PSC to the end user, extending, and amending the rules that previously only applied to the public sector.

“Small” end users are exempt from the rules. For companies that is, broadly, those who meet two of the following three criteria:

- turnover below £10.2 million;
- balance sheet total below £5.1 million; and
- no more than 50 employees.

For end users who are not small there are a number of key obligations, including:

- end users must make an official determination of the employment status for tax purposes of each worker who provided services through a PSC (including where there are agencies or other intermediaries in the chain), and issue a Status Determination Statement (“SDS”) to each;
- operating PAYE deductions for income tax and employee NIC, and paying employer NIC and the apprenticeship levy (where relevant), on payments to PSCs where the determination is that the worker would be considered an employee for tax purposes.

Where end users fail to take “reasonable care” in reaching the determination, or do not meet their obligations, they will remain liable for PAYE deductions and employer NIC.

What to do

Any business (the “end user”) which uses the personal services of workers engaged via an intermediary must take a number of key actions. These actions will include:

1. **Determine whether the end user is “small”**

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Small end users are exempt from the majority of the off-payroll rules, but need to confirm to workers, on request, that they are small.

Any end users which are not small will need to complete the actions below.

2. *Identify all potentially impacted workers*

Care will be needed to ensure that all workers engaged via a PSC (or similar structure) are captured. This includes any workers provided through agencies who have engaged with the agency via a PSC.

Potential sources of information include accounts payable records, other accounting documents, HR records, agency arrangements, and direct information from business managers.

3. *Determine the employment status, for tax purposes, of each identified worker*

HMRC guidance makes clear that in order to have taken “reasonable care” in making the determination a blanket approach should not be taken.

It may be possible to simplify the determination process by grouping workers doing similar work under near identical contracts, otherwise a case-by-case determination needs to be made on an individual worker basis.

4. *Consider preferred course of action*

Where an end user has identified impacted workers, they may have a number of options, including:

- they may decide that working arrangements will remain unchanged, in which case they will need to follow the additional steps below to communicate and implement the required changes under the off-payroll rules;
- they may decide to review working arrangements to determine whether contractual and working practice changes may help in mitigating the risk of a worker being determined as an employee for tax purposes;
- they may give workers the opportunity to become employees (including employed on fixed term or temporary contracts, or via an agency).

Each of the above will have differing implications which will need careful consideration.

5. *Communicate with identified workers*

Each potentially impacted worker needs to be given a Status Determination Statement (“SDS”) confirming the conclusion of the end user’s determination of their employment status, for tax purposes. These need to be done in advance of the earlier of (1) onboarding process ; and (2) the date on which the first payment is made.

Workers have the right to appeal the decision and the end user needs to respond to any appeals within 90 days. An appeal could result in either (1) a confirmation that the original SDS stands; or (2) a new SDS with a differing status.

We strongly recommend that full and frank communications with workers begins as soon as possible in the onboarding process.

6. *Implement necessary payroll withholding*

Where the SDS determines that a worker needs to be treated as an employee the end user will need to operate PAYE deductions for income tax and employee NICs, and make payments of employer NICs (and, if relevant, the apprenticeship levy) on all payments to the worker’s PSC in real time. In our view the most efficient way for this to happen will be to make the payments via payroll.

Where the end user is not the entity actually paying the worker’s PSC (e.g. because there is an agency involved) the paying entity will be responsible for operating PAYE. There is potential recourse to the end user by HMRC if the payer fails to operate PAYE correctly, therefore end users should ensure that they have contractual protection in place. This means that it is important for end users to ensure that their contracts with supplying agencies provide for (1) an obligation on agencies to provide information on whether a worker has been engaged directly by them or via a PSC; (2) additional comfort that the agency will take reasonable care in their own supply chain arrangements; (3) confirmation that the agency will respect the status determination of the end user; and (4) confirmation that the agency will implement any necessary withholding arrangements as a result of a status determination arrangement.

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7. Ongoing review

Where the worker’s circumstances change (for example a contract is amended or extended, or any of the factors that inform an SDS change) the end users will need to produce a new SDS. Therefore, it is vital to ensure that any such changes are correctly fed back through the business.

It may also be necessary to consider any required changes in contractual provisions with agencies and to change contractor on-boarding processes to ensure all relevant workers are correctly captured going forwards.

How to determine whether an employment relationship exists

Overview

Employment status for tax purposes is based on the same indicators as for employment law purposes. However, there is no statutory definition and it is a matter of case law, with tax tribunals often reaching differing conclusions to employment tribunals. HMRC’s view may also differ from conclusions reached in tax tribunals.

This means that determining employment status for tax purposes can be difficult, and there are many differing indicators. It is the “overall picture”, taking into account all facts and circumstances, that is important and no single indicator can be determinative.

HMRC’s Check of Employment Status (“CEST”) tool

HMRC operate an online tool that can be used to check the employment status of workers for the purposes of the off-payroll rules. This is known as the Check of Employment Status (or “CEST”) tool and is available online [here](#).

As noted above, HMRC’s interpretation may sometimes differ from the tribunals and, as one would expect, may be more conservative. However, HMRC confirm that, where wholly accurate information is entered into the CEST tool, they will stand by the result. We do note that there have been a number of checks by HMRC where they state that a CEST result is invalidated due to very minor differences in opinion over the accuracy of inputs.

Employment status indicators

When determining the employment status of a worker for tax purposes there are a range of indicators. The key indicators which should be considered are described below. This list is not exhaustive, but is intended to cover the main areas considered for most cases in the tax tribunal.

Mutuality of obligation

Self-employed contractors often work on a project-by-project basis without any obligation to continue working once the contract or project comes to an end. Equally, the end user is under no obligation to continue offering the contractor further work once the project is complete.

An employer is obliged to offer its employee ongoing work throughout the duration of the employment contract and the employee is obliged to take or perform it.

The presence of mutuality of obligation is therefore a key component of an employment contract.

Substitution

If a contract states that the end user wants a specific individual, and only that individual, then, when fulfilled, this is considered the provision of a personal service. If the contract requires a named individual to perform the services, then this is more indicative of an employment contract.

Conversely if the off-payroll worker can fulfil the contract personally or is free to provide a substitute that is unfettered by restrictions from the end user this is an indicator towards self-employment.

If the worker has in fact exercised this clause and provided a genuine substitute free of any control or influence by the end user in the selection of the substitute, then this very persuasive the contract may be considered akin to self-employment.

Supervision, direction, control

The more supervision, direction and control over the worker the end user has the more likely this will be an indicator towards employment. One key test would be to consider if the end user can move the worker from task to task without the need for

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further negotiation of fees or scheduling. If they can then this is more akin to employment, if not then it is more akin to self-employment.

Payment

Although an indicator that carries less sway in tribunal judgements, HMRC continue to place significant emphasis on how a worker is paid. If they are paid on a project-by-project basis, with no obvious reference to an hourly (or other time-based) rate HMRC are more likely to consider them self-employed. If they are paid a time based (such as an hourly or daily) rate HMRC will consider them more likely to be employees.

In business on own account

Where workers are in business on their own account, they are more likely to be treated akin to self-employed. Examples would include providing services to multiple end users, operating their own website, using dedicated office space, having their own employees or having significant capital assets.

Capital invested

The greater the level of capital investment needed from the worker, the more likely this will indicate self-employment.

If the end user provides the worker with all the equipment and tools needed to complete a contract, this is likely to be considered an indicator towards employment.

Separation from or integration with the end user

If a worker becomes an integral part of an end user's structure (for example, managing employees, managing a business area, being named as key personnel on the end user's website, or being integrated into teams within the end user) this will be a key indicator of a relationship akin to employment.

In addition, the presentation of the worker to third parties will be informative. Where third parties (such as clients) are likely to consider the worker as an employee of the end user, this will be an indicator towards employment. Examples including the worker using a standard company e-mail address, using an e-mail signature that looks similar to that of employees, using business cards with the end user's details on.

Other factors that shown a degree of integration would include using the same expense systems as employees, security passes which do not differentiate between employees and non-employees, wearing the same uniform as employees and being included in employee training. In addition, being integrated can be indicated by inclusion in staff parties or team drinks and being eligible for employee discounts, benefit or bonus schemes.

Exclusivity

If the contract requires the off-payroll worker to work for the contractor exclusively over a prolonged period, HMRC are likely to view this as an employee-employer relationship.

Financial risk and reward

Self-employed workers are more likely to experience an element of financial risk and reward than employees. The greater the level of (the possibility of) financial risk and reward, the more likely they will be considered self-employed. For example, if the worker must make good any work that the end user deems unfit, this would be an indicator towards self-employment. This is linked to the financial arrangements noted above.

Additional considerations - Employment rights act.

Whilst the above give some of the key considerations in determine employment status for tax purposes there are circumstances in which, even absent an employment relationship in law, a worker may have rights under the employment rights act (whether as a “worker” or “employee”). It is prudent to consider such obligations separately.

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For further guidance please contact [Lewin Higgins-Green](#) (Tel: 020 7269 9367).

FTI Consulting can provide support for end users with off-payroll workers, as well as across all employment tax related matters. We regularly provide clients with advice on off-payroll workers, including:

- assistance with identifying off-payroll workers;
- assistance with designing and implementing processes and procedures to make status determinations, including ensuring the requirement for taking “reasonable care” are met;
- reviewing contracts and working practices to determine employment status for tax purposes;
- preparing necessary communications;
- assisting with suggested contractual changes for agency arrangements;
- providing help for HMRC checks and reviews; and
- conducting PAYE health checks, especially focused on employment status risks

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