

HMRC revamps CEST IR35 off payroll working tool

With just months to go until the IR35 off payroll rules start to apply in the private sector, HMRC has published its first update to its controversial check employment status for tax (CEST) tool since it was launched in 2017.

From April 2020, the off-payroll rules which already apply to contractors engaged in the public sector will be rolled out to medium and large sized private companies.

This will see responsibility for determining whether an engagement falls within IR35 rules shift from the worker's personal service company (PSC) to the engager (the business which requires the worker's services).

Where the rules do apply, the responsibility for applying the appropriate tax and National Insurance contributions will fall on the engager or agency which pays the worker's PSC. CEST, the online tool which workers – and now hirers/engagers – can use to determine employment status, has attracted considerable controversy in the two years it has been available, with contractors claiming that in many instances it fails to reflect the nature of their work.

HMRC has now updated CEST, stating that if the engager does not know the worker, the tool will not ask questions about their circumstances, and adding some extra questions.

Colin Ben-Nathan, tax director at KPMG and chair of CIOT's employment taxes sub-committee, said the changes that have been made are 'helpful', but pointed out there remain fundamental issues with determining a worker's status.

"It is very difficult to assess status, especially in an IR35 context, as there are no real statutory rules, so the tool is trying to reproduce the effects of various decisions made at tribunals on the issue, which is no mean feat," he said.

Ben-Nathan also highlighted the number of 'cannot determine' results produced by inputting information into CEST, which he said were not helpful to workers or companies seeking to engage them.

While there is a disputes procedure to settle such queries, the length of time taken is likely to prove an issue.

"There are also niche sectors, such as media, film and TV, where the factors to consider make CEST determinations particularly difficult. HMRC has said the aim of any assessment is to "paint a picture" of what the overall arrangement is, but CEST may not be sufficiently nuanced in some particular circumstances," he stated.

HMRC said the update to CEST was to make it 'clearer, reduce user error and consider more detailed information.'

An HMRC spokesperson said: "CEST was rigorously tested against case law and settled cases by officials and external experts.

"It is accurate and HMRC will stand by the results, provided the information input is accurate and it is used in accordance with our guidance."

Susan Ball, employer solutions tax partner at RS, said around 30 questions have been updated or included for the first time, and that several industry bodies and reportedly more than 300 stakeholders were asked to use the new version and feed in comments. However, Ball pointed out that until now CEST produced an answer in only 85% of cases.

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challenging cases.

Ball said: "It must be remembered that CEST is the only tool that will produce a result that HMRC will stand by – provided the information input is accurate and the tool is used in accordance with guidance.

"While CEST has generally been accurate in cases where the employment status is reasonably clear, it has been criticised for not providing a definitive answer in more borderline or challenging cases, particularly in certain sectors. For example, it would be helpful if HMRC could now issue new Film, Television and Production Industry Guidance Notes last updated in 2012," she said.

Organisations representing contractors remain concerned about the operation of CEST.

Andy Chamberlain, deputy director of policy at IPSE (Association of Independent Professionals and the Self-Employed), said: "The changes to the CEST tool do not go far enough. Crucially, the tool still does not account for mutuality of obligation between contractors and their clients, which is a fatal flaw.

"Until CEST more accurately reflects case law, we can expect more incorrect assessments and more tax tribunal defeats for HMRC. It may not be possible to produce a tool that can be relied upon to give accurate status determinations. IR35 status can only be assessed by piecing together several contributing factors, taking a step back and considering the whole picture.

"CEST is a comparatively crude tick box exercise that seems to hinge on the answers to one or two questions. That's not how IR35 works in the real world. We are all for removing IR35 altogether and replacing it with something simpler, but as a means to applying the law as it stands, our view is CEST remains inadequate."

IPSE cautions that in its view, until CEST takes account of mutuality of obligation, multiple engagements, contractual benefits – such as holiday pay, maternity/paternity pay – and whether someone is in business on their own account, it is unlikely it will be able to reach the right decision on status.

- Thanks to Croner-I for this article