

Getting back up to speed with IR35

With the pandemic and Brexit dominating you might have taken your eye off the IR35 ball. Here Becky Hardy outlines the state of play and what will be happening in 2021

Only a fraction of personal service companies are estimated to be IR35 compliant, so it's no wonder that HMRC wanted to shake things up on the matter of disguised employment.

The new rules for off-payroll workers shift the administrative burden away from the intermediary and require that the potential 'deemed employer' assess the employment status of the worker as if they were engaged directly. If the individual is deemed to be an employee, then the payment to the intermediary must be subject to PAYE and NIC withholding through payroll.

These new rules came into force in the public sector on 6 April 2017, and they are being extended to medium and large companies in the private sector on 6 April 2021. If you are affected by these changes, you are going to need to start doing the following:

- Identify your contractor population.
- Assess the employment status of off-payroll workers operating through intermediaries.
- Monitor engagements with new and existing off-payroll workers going forward.
- Communicate the results down the contractual chain, and operate withholding if you are the fee-payer.

While this might sound simple, the feedback we have had from our clients has consistently shown that the work required is far more complex and time-consuming than they have initially anticipated. For example, when it comes to identifying the contractor population, you will need to consider whether the individual is operating through a personal service company (which is the most common arrangement, but there are other intermediaries caught by the new rules) and that is not always clear. Suddenly checking a list of suppliers becomes a big job.

Another thing that we've been hearing from our clients is that the identification process has brought to light historical issues that they were not aware of, such as individuals who have been engaged directly and could be classed as employees for tax purposes. The rules for engagements with self-employed workers have always been in place and if HMRC successfully challenge the employment status you could be liable to historical PAYE and NICs... plus interest and penalties.

"But we only use agency workers, so we thought the agency had it covered!" is another objection we have been hearing. If the agency is engaging workers through intermediaries, and you are receiving the worker's personal service, then you are still responsible for conducting the employment status assessment and passing the result to the agency. In this situation the agency would be the fee-payer and would be responsible for operating payroll withholding on the payment if you determine deemed employment. This highlights how vitally important it is to know your contractual chain.

The new rules for the private sector apply to services performed on or after 6 April 2021. The key roles are:

- Worker – the individual providing personal service through an intermediary.
- End user / client – the entity receiving the personal service of the worker.
- Fee-payer – the entity which pays the worker's intermediary.

The end user must assess the employment status and issue a status determination statement (SDS) to the next entity in the chain, and to the worker. According to the draft legislation, an SDS is not valid if reasonable care has not been taken. This is a crucial concept, and if reasonable care is not taken the withholding obligation lies with the end client, even if they're not the fee-payer. HMRC have stated that blanket determinations do not constitute reasonable care; consideration must be given to the specific facts of each case. That is not to say that workers cannot be grouped together if the nature of the engagement is practically the same, but the approach must be robust enough to stand up to potential HMRC scrutiny.

The vital importance of taking reasonable care cannot be stressed enough.

Employment status is not often clear-cut, and it is reasonable to assume that people will disagree on the outcomes of assessments. The worker and the fee-payer are entitled to dispute the result of an SDS at any point during the engagement, and they must give reasons for the disagreement. Once a dispute has been raised, you have 45 days to respond to their objections, and you can either stand by the original assessment or perform a new one if needed. The original SDS applies until the dispute is resolved, and if you don't respond within the 45-day period you become liable to the PAYE/NIC withholding. Potential problems can therefore be mitigated by implementing an effective dispute resolution process before you start issuing status determinations.

“So what about outsourced supplies – they're ok aren't they?” Well, yes. But only if the supply is a genuine outsourced supply. There have been widespread attempts to re-badge supplies as outsourced, but it comes down to the commercial reality of the arrangements. If you are receiving genuine outsourced services, you will not be the client under the new rules and you will not be required to conduct status assessments or operate withholding – these requirements may instead lie with the provider, if they are subject to the new rules.

The new rules were originally scheduled to come into force on 6 April 2020 but were delayed by a year due to the global pandemic. Many people were partway through preparation when the delay was announced, and unsurprisingly it came as a welcome relief to those who were struggling under the weight of the administrative burden. The delay has given everyone some breathing space, but now is the time to refocus your attention and get back up to speed.

In response to the widespread criticism that HMRC's assessment tool – CEST – has received, Grant Thornton have developed their own software which performs assessments, manages the contractor population, and ensures reasonable care is achieved. Unlike CEST, it gives an outcome in every assessment. If you would like to arrange a free live demo, feel free to get in touch via <https://www2.grantthornton.co.uk/ESIP.html>

Becky Hardy is CTA-qualified, originally starting her tax career with Grant Thornton in 2006. She specialises in employment taxes and has been heavily involved in helping her clients prepare for the upcoming changes to the Off-Payroll Workers legislation