

HMRC has digital health businesses in its sights

Companies working in the sector should check workers' employment status, warns Matthew Sharp

After a pause in compliance activity during the Covid-19 pandemic, HMRC is ramping up its compliance and enforcement activities. One of the key focus areas for HMRC is 'off-payroll compliance' (i.e. whether people are being properly categorised as self-employed workers as opposed to employees).

This is relevant as self-employed workers generally pay lower amounts in income tax and National Insurance Contributions – so disguised employment leads to a lower tax yield for the Government. And evidence suggests that HMRC is focusing its off-payroll compliance activities on the Pharma and Healthcare sector, including digital health businesses.

A quick glance at HMRC's annual compliance yield report for 2021/22, published on 18 July 2022, revealed that:

1. HMRC's Large Business Directorate is currently investigating £1.3 billion of, what it considers to be, under declared tax liabilities relating to 'employment status' issues.
2. The report also shows that HMRC's Large Business Directorate is currently investigating approximately £4 billion of, again what it considers to be, under declared tax liabilities relating to the Pharma and Healthcare sector. To be clear, this figure includes employment status issues and other tax compliance issues.

These figures show (compared with the figures for other tax issues and sectors – as published by HMRC at the same time) that the Pharma and Healthcare sector is towards the top of HMRC's hit list. Further still, it shows that one of the key issues under investigation is off-payroll compliance.

What is HMRC investigating?

One area of focus for HMRC has been 'locum' compliance. Locum use is particularly prevalent in the Pharma and Healthcare sector, including digital health businesses (which may explain the figures quoted above).

Locums are ordinarily treated by businesses engaging them as being 'self-employed' for tax purposes. In other words, digital health businesses do not routinely put locums on to their own payroll and do not operate PAYE. This is now under attack from HMRC.

This position (i.e. that locums are self-employed for tax purposes) has historically (overall) been accepted by HMRC. Indeed, in its own Employment Status Manual HMRC says:

1. ESM4030 states that dentists, for example, who are not employed in the NHS are generally taxed on a self-employed basis.
2. ESM4270 states that locum pharmacists who are "*engaged on a sessional or daily basis*" and "*perform only the statutory requirements of a pharmacist's job*", are likely to be treated as self-employed.

HMRC is now seeking to challenge businesses, including digital health businesses, who have relied on such guidance, stating that locums are more properly characterised as employed for tax purposes.

In the Pharma sector, HMRC is seeking to challenge the historically established position that locums are self-employed by alleging that locums typically do more than the "*statutory requirements*" – seemingly seeking to distance itself from its own guidance, which is not binding as a matter of law.

Our specialist Contentious Tax team are currently assisting a number of large businesses in relation to this sector wide challenge by HMRC. These investigations are not confined to locum pharmacists and dentists; locum doctors, agency doctors, private practice doctors and locum opticians are all subject of ongoing challenges, to some extent.

For digital health businesses, unfortunately, the problem does also not start and end at medical practitioners. HMRC are also targeting digital services providers and IT professionals. Such professionals are also high on HMRC's list of targets, such that digital health businesses are doubly exposed.

Is this related to IR35?

In short, yes and no. HMRC is targeting:

1. PAYE compliance (i.e. the use of sole traders / consultants). PAYE rules are separate and distinct to IR35.

Under PAYE, if HMRC think that a worker (Dr. Bloggs) should have been classed as employed (rather than self-employed) for tax purposes they can look to the digital health business engaging them for the tax that should have been collected, possibly stretching back up to 6 years or more in some cases.

2. Agency compliance. Doctors are often supplied by medical agencies. HMRC normally expects the agencies to be operating PAYE and deducting Class 1 National Insurance. HMRC is operating probes on such compliance.

3. And yes, HMRC is also looking at IR35 compliance. In other words, whether persons working through intermediaries (e.g. Dr. J Smith operating through J Smith Limited) are also operating in a compliant way. From April 2021, IR35 compliance became the problem of the end user engaging the worker (rather than the problem of the individual workers and their intermediary). This is also now a compliance area to watch out for digital health businesses.

You can read more on HMRC's particular challenge to the employment status of one particular locum doctor [here](#); the case concerns a locum doctor, George Mantides, and underlines the importance of getting your contract/written terms correct.

What should digital health businesses do?

Firstly, if you receive a letter from HMRC concerning off-payroll compliance (or indeed any issue) you should get professional support from a specialist tax disputes practitioner immediately.

We are increasingly seeing HMRC use their powers under Schedule 23 of the Finance Act 2011 to request 'bulk data', including from digital health businesses. These requests (framed innocuously) request details of all off-payroll workers engaged by a business in a particular tax year. Again, if you receive such a notice, you should get support from a specialist tax disputes practitioner without delay.

There are also proactive steps that you can and should be taking. Given HMRC's focus on the Pharma and Healthcare sector, a challenge to your business is likely.

Digital health businesses should, as a matter of best practice, self-audit their off-payroll compliance and, if issues are found, these should be corrected and the issue reported to HMRC. Again, you should get professional support from a specialist tax disputes practitioner. Self-audit will help to avoid HMRC penalties and demonstrate compliance, if and when HMRC do pay you a visit.

The long arm of the law

Finally, these issues are not confined to the UK. We are seeing similar investigations being commenced in the EU and further afield. Digital health businesses should look at off-payroll compliance with all of their workers, not just those in the UK.

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