

OFF PAYROLL WORKING: LEGISLATION CHANGES IN THE PRIVATE SECTOR (IR35)

1. WHAT IS THE LEGISLATION?

The Government announced its intention to reform the legislation changes around Off Payroll Workers (also known as IR35) in the Private Sector. This is an extension to the changes implemented in the Public Sector in April 2017.

IR35 is tax legislation that is designed to combat tax avoidance by workers supplying their services to clients via an intermediary, such as a PSC, but who would be an employee for tax purposes if the intermediary was not used. Such workers are called 'disguised employees' by Her Majesty's Revenue and Customs (HMRC).

'Off Payroll Workers' simply means contingent workers (contractors and temps). It applies to workers who operate through a Personal Services Company (PSC) - also referred to as a Limited Company.

Further information on:

- Off-Payroll Working / IR35 can be found [here](#)
- A "Budget Brief" from HMRC concerning the extension to private sector can be found [here](#)
- The Off Payroll Working in the public sector legislation can be found [here](#)

2. WHEN IS THIS DUE TO TAKE EFFECT?

Subject to Parliamentary approval and Royal Assent, the new rules will come into effect in 6th April 2020, and will apply to any payments made to the contractor on or after that date. Therefore, the changes will apply to existing contracts where work is completed before 6 April 2020, but the payment is made to the PSC on or after that date.

3. WHAT CHANGES WILL THE LEGISLATION BRING?

The changes will mirror those introduced into the public sector in 2017, with some additional proposals expected:

- From 6 April 2020, medium and large businesses will need to decide whether the rules apply to an engagement with individuals who work through their own company.
- The responsibility for assessing the employment status for a contractor's engagement will move from the PSC / Limited Company, to the private sector organisation, or 'End Hirer' (client) who engages them. This means that the End Hirer will have to assess the employment status of all existing workers engaged through a PSC.
- If the assignment is assessed as falling within IR35 (often referred to as being 'caught' by IR35), then the "Fee Payer" (the party contracting with the PSC, i.e. a recruitment agency) is responsible for making all relevant employers and employees National Insurance and income tax deductions from the PSC's gross pay and paying these directly to HMRC.
- The End Hirer will be liable for unpaid taxes / fines if they do not make a determination, and do not pass this to the fee payer.
- The End Hirer will be liable for unpaid taxes / fines if they have not used reasonable care in determining the status
- The Fee Payer will be liable for unpaid taxes / fines if they do not process the payment in line with the End Hirer determination
- There will be a requirement for the End Hirer to implement a "client led disagreement process" whereby a contractor can request a review of their status if they believe it to be incorrect

4. WHY HAS THE GOVERNMENT INTRODUCED THE LEGISLATION?

The Chancellor described the measure as a means of tackling perceived high levels of non-compliance with IR35 among the self-employed within the private sector and stated that *“following our consultation, we will now apply the same changes to private sector organisations as well. But after listening carefully to representations made during the consultation, we will delay these changes until April 2020 and we will only apply them to large and medium-sized businesses.”*

HMRC previously stated that the changes are being introduced to improve fairness in the tax system by ensuring that where individuals are working for a company via an intermediary (such as their PSC or, Ltd Company) they are not able to ‘sidestep employment taxes’ or National Insurance Contributions (NICs) by working through a PSC.

HMRC estimates the cost of non-compliance at £1.2billion per annum by 2023.

HMRC has a limited track record of success in disputing individual cases and the cost of disputing cases was too high for them to maintain. Shifting responsibility to the end user is seen by them as a way to more effectively drive compliance.

5. WHAT IS THE DEFINITION OF AN OFF PAYROLL WORKER?

An off payroll worker is defined by HMRC as a person who provides a service through his/her own intermediary. The intermediary can be:

- A worker’s own Limited Company, also known as a personal service company (PSC)
- A partnership
- Another individual

For clarity this does not affect workers engaged via Umbrella or PAYE models.

6. HOW WILL THE ASSESSMENT BE MADE?

HMRC developed an online employment status tool “[Check Employment Status for Tax](#)” (CEST) to support organisations in helping them to determine whether the rules apply “in the majority of cases”. They have stated that the questions used in the tool are based on case law.

However, the End Hirer may use other ways to make the assessment, i.e. using a third party IR35 assessor, or other online tool. Eames are working with our clients to understand what compliant process they will look to implement.

7. WHAT DETERMINES YOUR IR35 STATUS?

PERSONAL SERVICE/SUBSTITUTION	CONTROL
<ul style="list-style-type: none"> • Is the contractor obliged to provide their services personally? • Does the contractor have an unrestricted right to send a substitute (subject to necessary qualifications and experience to carry out the work)? • Is the contractors responsible for sourcing and paying the substitute (has this been exercised)? • Does the client have the right to refuse the substitute? • Is the right to substitute legitimate? 	<ul style="list-style-type: none"> • HOW <ul style="list-style-type: none"> – Control over the manner in which the work is completed? • WHEN <ul style="list-style-type: none"> – Choice over hours? Need consent for time off? Any restrictions? • WHAT <ul style="list-style-type: none"> – Working a project or role? Can client move work? • WHERE <ul style="list-style-type: none"> – Choice over where work is carried out?
MUTUALITY OF OBLIGATION	OTHER FACTORS
<ul style="list-style-type: none"> • Is the client obligated to provide work? • Is the contractor obligated to accept work? • Is there an obligation to work out termination periods? • Can the contractor finish up once the work is completed? • Is the payments based on time or body of work? 	<p>Is the contractor treated like, or do they act like an employee? (e.g. access to employee benefits, facilities, functions, performance bonuses, line management, appraisals, rolling contracts, business cards etc.)</p> <ul style="list-style-type: none"> • In business on your own accounts? • Carry financial risk? • Own equipment? • Intention of parties? • Confirmation of arrangements?

8. IF AN ASSIGNMENT IS ASSESSED AS "INSIDE IR35", WHAT IS THE RISK OF A RETROSPECTIVE HMRC INVESTIGATION?

Within the public sector, contractors were concerned they were at risk of a retrospective investigation by HMRC if they were assessed by the end hirer as being inside IR35 under the new legislation, where previously they had assessed themselves as outside or IR35 for that same assignment. However in the budget the Government confirmed that:

- HMRC will focus its efforts on ensuring businesses comply with the reform rather than focusing on historic cases
- HMRC will not carry out targeted campaigns into previous years when individuals start paying employment taxes under IR35 for the first time following the reform
- Businesses' decisions about whether their workers are within the rules will not automatically trigger an enquiry into earlier years

However, this is not a guarantee, and there is a possibility that it could present a risk to contractors.

9. IF A CONTRACTOR ALREADY ASSESSES THEIR LTD COMPANY STATUS AS INSIDE IR35 AND MAKE THE NECESSARY PAYMENTS, WILL THE LEGISLATION STILL APPLY?

Yes, the contractor will no longer be required to account for these taxes as it will fall to the Fee Payer to do this for them.

10. SHOULD CONTRACTORS CONTINUE THEIR ASSIGNMENT VIA THEIR LTD COMPANY/PSC IF ASSESSED AS CAUGHT INSIDE IR35?

Contractors will need to seek independent advice on whether to retain their PSC for their future engagement post April 2020. A trusted advisor such as an accountant, or guidance from an industry or legal professional should be able to provide assistance.

The public sector changes saw that many contractors changed their engagement model from Ltd to either Umbrella or PAYE when assessed as inside IR35 for tax purposes. There were a number of reasons for this but overall it became less attractive to continue under their PSC due to:

- Reduced take home pay due to the tax deductions
- Still a requirement to pay accountants' fees, insurances and Corporation Tax
- Concern over being exposed to HMRC investigation

11. WHAT ARE THE OTHER ENGAGEMENT MODELS AVAILABLE TO CONTRACTORS VIA EAMES?

The following options are available via Eames, should a contractor decide to change engagement model:

- Umbrella – this could provide additional employment benefits, as well as ensuring the correct taxes are paid.
- PAYE – Eames are currently exploring PAYE services. More information to follow.
- SOW – Depending on our engagement with specific clients, we are able to offer Statement of Works (SOW) services via our partner, ECMS.

12. CAN CHANGES BE MADE TO CONTRACTS TO PROTECT THE LTD CONTRACTOR FROM THE LEGISLATION?

The Client and recruitment agency must comply with the legislation as both are liable for incorrect assessments and tax. They therefore cannot make any changes to existing contracts to protect workers from this legislation unless the contractors' actual working practices change. The employment status assessment must be based on the actual working practices and the contract must reflect these practices as well. HMRC look for the actual working practices of an assignment, and not solely at the contract.

WHAT ARE YOUR OPTIONS?

INSIDE IR35	OUTSIDE IR35
Limited Company (PSC)	Limited Company (PSC)
Umbrella	
PAYE	

EXAMPLE CONTRACTOR TAKE HOME – NET PAY

The following calculations have been made on standard assumptions to costing. Actual figures may differ depending on contractor and circumstances. Eames cannot be held to these figures as they are example calculations.

Pay Rate	Days	Gross pay	WEEKLY			
			PSC Outside IR35	PSC Inside IR35	Umbrella	PAYE
			Net pay	Net pay*	Net pay	Net pay*
£1,500	5	£7,500	£4,127	£3,748	£3,710	£3,357
£1,200	5	£6,000	£3,375	£3,047	£3,015	£2,729
£1,000	5	£5,000	£2,874	£2,579	£2,551	£2,308
£900	5	£4,500	£2,623	£2,345	£2,319	£2,099
£750	5	£3,750	£2,269	£2,018	£1,972	£1,785
£700	5	£3,500	£2,130	£1,888	£1,848	£1,675
£650	5	£3,250	£1,992	£1,759	£1,721	£1,560
£600	5	£3,000	£1,883	£1,630	£1,595	£1,451
£550	5	£2,750	£1,791	£1,548	£1,508	£1,376
£500	5	£2,500	£1,683	£1,462	£1,425	£1,300
£450	5	£2,250	£1,544	£1,354	£1,318	£1,197
£400	5	£2,000	£1,406	£1,221	£1,191	£1,082

*PSC Inside IR35 - This does not take into account additional fees for PSC insurances, accountancy costs and additional costs relating to running a PSC / LTD company.

*PAYE - On equivalent PAYE rate which excludes holiday pay and employers national insurance.