

Editor's welcome

In this issue we look at

- How do the new rules work?
- Making a status decision for tax
- Action points for the end client/fee-payer/agency
- Action points for the Personal Service Company
- Who's who

Welcome to our Employer's Update Special about the new IR35 rules coming in from 6 April 2020.

The new rules affect payments made to workers who provide their services through a Personal Service Company, [PSC]. From next year, medium and large businesses receiving the services must decide if the worker will be treated like a directly employed employee, even though the services are being supplied via the worker's business. so, tax and NICs must be deducted and paid on payments made after 5 April 2020 by the business that pays the PSC. The status decision-maker must also set up an appeals system which can be used by the worker or the fee payer.

In the last few days, the Liberal Democrats and the Labour Party

have pledged to review the plans to extend IR35, which Labour's shadow small business minister, Mr Esterson confirmed would mean halting the roll out of the new rules next April. I believe a review is important as the new rules bring in a high degree of complexity that few are ready for and which HMRC should not be off-loading to businesses in this way. However, all of the parties have made spending promises and it seems likely that new IR35 may be used to pay for them.

Please have a read of this guide so you are ready whatever happens on the 12 December!



Christine Robinson
christine.robinson@bhp.co.uk

How do the new rules work?

1. The end client, [the business that receives the services], makes the status decision before the first payment is made and, if that is that IR35 applies, whoever pays the PSC must deduct tax and employee's NICs through their payroll from the invoiced payment and, in addition, pay over employer's NICs.
2. The end client gives the worker and the Personal Service Company, [PSC], a Status Determination Statement, [SDS], with the reasons for that decision.
3. If the end client is not the fee payer, it also gives the SDS to the next business in the supply chain, who passes it on to the next business and so on, until it reaches the fee payer. If this is not done, the tax and NICs liability will sit with the business that has not passed on the SDS.
4. The end client must take reasonable care when making the status decision. Blanket status decisions are unlikely to satisfy this requirement and could lead to the end client having to pay the tax and NICs liability if IR35 applies.
5. The worker and the fee payer have the right to appeal to the end client against the status decision. There is no deadline for them to appeal but the end client must provide a new SDS within 45 days of receiving a valid appeal. To be valid, reasons and evidence must be given to the end client, to support the appeal.
6. If the tax and NICs due is not paid over to HMRC by the fee payer or the business in the supply chain that holds the SDS, the liability will move back up the supply chain to the business just below the end client. If that business does not pay the liability, the debt can be transferred to the end client.

Public Sector businesses became the status decision makers for IR35 in 2017. However, the new 2020 rules, which go further than the 2017 rules, will also apply to the Public Sector, apart from the exception for small businesses.

Who is exempt?

If the end client is small, [according to the Companies Act definition <http://www.legislation.gov.uk/ukpga/2006/46/section/382>], new IR35 will not apply and the worker's business should continue to use the current IR35 rules which have been in place since 2000. If the end client is not a limited company, it will be small, and therefore exempt, if its turnover is below £10.2m in the financial year.

For charities, HMRC has confirmed in an email to the Charity Tax Group, that the definition of turnover should exclude donation and grant income.

For a who's who - see page 4.

Making a status decision for tax

Status decisions are made by looking at the written contracts and then checking how the services are actually provided. Where the services are being provided as an outsourced service, and you have little or no control over how they are provided, then it is unlikely that the worker providing the services is in an employment -type arrangement. One way to check this is to consider if the person providing the services can make a profit or a loss on the business arrangement. However, if you can control how the services are provided it is more likely that there may be an employment-type arrangement.

Unfortunately, there are no rules for the end client to follow, instead principles derived from employment law and tax cases have to be considered and then all of the circumstances particular to the arrangement have to be taken into account to make the decision.

The main principles considered to be the absolute minimum for a contract of employment are:

- Personal service – the worker does not have the right to provide a substitute
- Mutuality of obligations, [MOO] - there is an obligation on the end client to provide work and a corresponding obligation on the worker to do the work
- There is the right to have sufficient control over how, what, when and where the worker provides the services, such that it makes the arrangement a contract of service
- There are other provisions in the contract consistent with it being a contract of service such as the worker getting employee – type benefits such as paid holiday or sickness pay, or if the worker is integrated into the end client's business, perhaps as part of the management structure with responsibilities for employees

There will be many more questions that the end client should ask, to build a clear picture of the actual



working arrangements, as well as the written contract. It is important that this is done by whoever knows the most about the intended working arrangements, so that the SDS can be relied on.

The Status Decision Statement

The SDS must also give the reasons for that decision. Without these, the SDS is incomplete, which means that the end client has not taken reasonable care and could be liable for any tax and NICs due instead of the fee-payer.

HMRC's Check employment status for tax tool, (CEST)

Making a status decision involves a great deal of fact-finding. Once all the detail has been accumulated, the whole picture needs to be considered to decide if the arrangement is employment or self-employment. Even then, the decision will be the fact-finder's opinion and therefore subjective, so it is important that good notes are kept and dated.

HMRC's online tool, CEST, was designed to help engagers manage this uncertainty. It can be used by sole traders, PSC's and end clients and in most cases, it will give a decision on status. The tool has been heavily criticised, mainly because it doesn't consider MOO. HMRC

launched an amended version of CEST, on 25 November 2019, along with new guidance. We will test this and report back as soon as we can.

<https://www.gov.uk/guidance/check-employment-status-for-tax>

End clients do not have to use CEST, they can carry out their own status check instead. However, it is worth considering using CEST, firstly because it is an anonymous way to learn how HMRC look at employment status for tax, and secondly, because HMRC have undertaken to accept CEST decisions, as long as the answers given are accurate.

However a status check is carried out, there are three things to remember:

1. The person who knows most about the planned working arrangement should assess the status
2. Keep good notes and, if using CEST, print out a copy of the result and date it
3. If circumstances change, re-do the status decision

BHP can help you get ready for 2020. We can advise on planning the work and on status reviews and appeals. Please do get in touch to discuss how we can help.

Action points

For the end client

- Does the size of your business mean you will have to apply the new rules, or are you in the public sector, i.e. are you bound by the Freedom of Information Act?
- If so, organise a project team to identify where your business spends money on outsourced project work, consultancy or short-term engagements and on agencies.
- Work out how many status determinations need to be done. You will not need to issue SDS's for contracts that finish before 6 April 2020, or for outsourced services.
- Get an appropriate person to carry out the status determination. This should be someone who understands what the contractual arrangements are; who will be providing the services; the actual circumstances of the contract and how the services will be provided
- Give the worker, and PSC or agency, whichever is applicable, the SDS before the start of the contract or by 5 April 2020 for existing contracts. Include a statement on the SDS to say that the decision is only for tax and NICs, and does not confer employment rights on the worker
- Establish an appeals process and include details of this on the SDS
- Consider the costings of the work. If a contract is within IR35, employer's NICs are due at 13.8% on the net value
- If you are the fee-payer as well, let your payroll know there will be IR35 payments to process
- Review contracts with agencies and consider inserting an indemnification clause to protect the business if the fee payer, wherever it is in the chain, fails to pay over the tax and NICs due to HMRC

NB All employers have always had to consider the employment status of workers who say they are self-employed and the new IR35 rules do not change this.



For the Fee-payer's payroll

- Set up the worker as a starter using the normal starter form but mark it 'IR35', using the worker's name and NI number
- Identify the worker using the OPW flag on your payroll (off payroll worker)
- This flag will require an amendment to the Full Payment Submission, [FPS]
- Set the payroll components to show that the apprenticeship levy is due
- Set the payroll components to show that payments are not liable for auto enrolment, statutory payments and student loan repayments
- Use tax code BR
- Set up the taxable and NICable field for labour and expenses that are not eligible for tax relief, [use the same rules that apply to directly employed workers]
- Do not include the cost of materials, expenses that qualify for tax relief or VAT in the calculation for tax and NICs
- Provide the worker with a payslip for each payment, a P60 at the end of the tax year and a P45 when the contract ends

For the agency

- Establish who the end client is and if they are caught by the new IR35 rules
- Review the number of contracts with that client that will go over into the new tax year or will start after 6 April 2020
- Check what other agencies are involved in the supply chain for the services provided to the end client
- Set up a system to make sure that the SDS is received from the end client or agency higher up the chain, in good time to pass on to the next agency/ies
- Pass on the SDS where there is another agency in the supply chain
- Get an appropriate person to check the SDS and the reasons given, and to submit appeals to the end client, as necessary
- If your agency is the last agency before the end client, consider inserting a clause in the service contract with other agencies to indemnify your agency from being held liable to pay the tax and NICs if the tax and NICs due is not paid over by the fee payer
- Consider the costings of that contract. If you are the fee payer, you will be liable for the employer's NICs at 13.8%
- Let your payroll know there will be IR35 payments to process

Action points for the Personal Service Company

- Find out if the new IR35 rules will apply to the business you are providing your services to. If not, the original IR35 rules will apply and your business will have to make the status determination for the contract
- If new IR35 applies to the contract, you will have tax and employee's NICs deducted from the payment your business receives. Deductions will not be taken from materials, expenses that qualify for tax relief or VAT
- You can appeal against the status determination to the end client but must provide your reasons and evidence with your appeal
- The original IR35 rules allowed a deduction of 5% of the IR35 contract when calculating the deemed payment. The new IR35 rules do not allow this deduction.
- You will not be entitled to any employment rights from the end client or agency if new IR35 applies, which means, amongst other things, you are not entitled to pension contributions or statutory payments from the fee-payer
- If there is non-IR35 money in your business you can make pension contributions from that and if you pay enough NICs on a

salary from the non-IR35 income, you may qualify for statutory payments, such as SSP and the basic state pension

- You must receive payslips, P60's and a P45 from the fee payer, as appropriate
- You should show the P60 or P45 amounts on your personal tax return on an employment page
- The fee payer should not deduct employer's NICs from the payment to your business – it is an additional cost of the contract
- You can take a salary or dividend from your business equivalent to the net amount your business is paid (not including materials or VAT)
- You should not include the IR35 salary or dividend from your business on your tax return as the income has already been taxed
- Your accountant will decide whether to show the net or the gross payment in your business's accounts. If the gross payment is shown, the tax and NICs deducted will be shown in the accounts as an expense.

Now is the time to think about the future

Some large businesses have already decided that they will stop using contractors because of the increased administration and the risk of getting it wrong. If this applies to one of your clients, what will it mean for your business? Your client may offer you work through an Umbrella company. If you accept, this will mean you will have an employment contract with the umbrella company, who will pay you after deducting tax and NICs and their fee. Or you may be offered a direct employment with your client which could give you some valuable employment rights. Or, you might choose to keep your PSC but only work for small businesses. Whatever choice you make, we recommend giving some thought to whether running a small business after April 2020 will still be viable. Remember, if there is no non-IR35 money going into the business post April 2020, you may not be able to make pension contributions or National Insurance contributions to qualify for statutory benefits such as the basic state pension.

Please call your usual contact at BHP to discuss how the new IR35 rules will impact your business.

For more information contact our Employer Solutions team



Christine Robinson
christine.robinson@bhp.co.uk



Adrian Hulme
adrian.hulme@bhp.co.uk

Who's who

Personal service company, (PSC) – this is usually a company, but it can also be a partnership, limited liability partnership or a sole trader. HMRC use PSC to refer to an intermediary business that provides the services of a worker to an end client.

Worker – this is the person who performs the services. In an IR35 situation, the worker will provide services through a PSC.

End client – this is the business that receives the worker's services

Agency – This is the employment agency or provider who supplies workers, via their intermediary, to a hirer. They may also be responsible for paying the intermediary. If the agency hires a worker directly, that is, not through an agency, then the Agencies legislation will apply. <https://www.gov.uk/hmrc-internal-manuals/employment-status-manual/esm2000>