



Off-payroll working in the Private sector

The following is provided by David Harmer and David Geldard of Markel Tax (formerly Accountax) based on our significant experience in dealing with IR35.

We do not agree this legislation should be enacted as we fundamentally disagree that the IR35 legislation in its current form is not being complied with by contractors. In our opinion focus should have been placed squarely on the government to reform IR35 guidance and information provided by HMRC rather than the introduction of such legislation. That being said, it seems the introduction of this legislation is inevitable and with this in mind we have analysed the legislation and discussed it with a variety of our clients including Personal Service Companies ('PSCs'), Agencies and end-clients.

While this draft legislation has dealt with some of the issues which arose from the public sector legislation, there are still a number of matters which are not addressed within the legislation itself (and others outside of the legislation which should be focused on).

1. End Client decision maker

It would seem that the main focus of this legislation is a "traditional" contracting chain of Client – Agency – PSC. While the application may seem simple to apply in this contractual chain, it is a commercial reality that there are a great many more complex chains. The legislation is not so easily applicable, for example, in the construction industry (or other trades/industries) where the end clients often subcontract to smaller contractors which, in turn, engage agencies or other subcontractors etc. While initial advice from the government has been that outsourced services would not be within scope of the legislation, there is insufficient information (within the legislation or otherwise) as to what an "outsourced provider" is or when and if they are the "end-client" for the purposes of the legislation.

2. Status declaration statement

It would seem the Government's intention is to hold liable the party who has failed to fulfil its obligation to pass on the SDS. Indeed the party left holding the SDS is the party which assumes liability of the potential tax and NIC under the legislation. However, the legislation does not provide any prescriptive timescales for the passing down of the SDS from the client to each party in the chain. In complex commercial chains, which do not appear to have been contemplated, we can foresee a number of issues with delays and confusion.

The legislation also fails to contemplate any delays in the end-client passing down its SDS within the 45 day period. We can see a number of issues for the end-client in complying with this timescale, especially where they are a large organisation with many contractors (not least of which because they have not previously had a requirement to have knowledge of IR35).

3. Client led disagreement process

The client-led disagreement process is arguably the most problematic aspect of the legislation; all of the businesses we have spoken with agree that the burden should not be placed on the end-client given their inexperience in dealing with IR35.

The legislation imposes an obligation upon the end-client to have a disagreement process and it imposes a timescale within which a response must be given to any disagreement with a status decision notified to them by a Contractor, it does not provide any more detail than this.

Given the end-client organisations' lack of experience in dealing with this subject matter, we would have expected significantly more detail within the legislation itself as to what this disagreement process should entail and how the end-client should administer it. At the very least, there should be detailed guidance from HMRC, if not a template guide to follow.

If it remains the case that each end-client has its own, self-regulated process, contractors will be left in a very unsatisfactory position, as there will be no certainty from client to client as to what they may expect; what is reasonable to one end-client organisation may not be reasonable to another, and it could create a bar to contracting.

4. Transfer of debt

The legislation contemplates transfer of debt and it is briefly mentioned in the guidance but there is a lack of explanation as to how the transfer of debt would be applied.

5. Check for Employment Status for Tax ('CEST')

HMRC's CEST tool has been the subject of much criticism; the Government itself stated that HMRC has committed to updating its guidance on IR35 and Status and to enhancing the CEST. To date little progress has been made and recently HMRC itself tried to argue in Tribunal that a taxpayer cannot rely on the CEST.

This draft legislation has been released against a back drop of uncertainty around the IR35 decision making process – this legislation does not address that at all. The end-client will be charged with making decisions without sufficient Government resource to assist in that decision-making process. In our view, the decision making process should have been address before passing over the administrative burden of that process.

Significant resources must be provided by the Government to improve the current guidance and the CEST (if, indeed, that is to continue to be the officially recommended method of determining status) otherwise we fail to see how the objective of increased compliance can be achieved. In our view, all that would be achieved is moving the liability to another target, which could be viewed cynically as a deliberate attempt to place the liability on someone with deeper pockets and less incentive to liquidate their business.

6. The Employment Status Consultation

The employment status consultation closed over 12 months ago and, to date, the Government has not released any of the conclusions or provided any overview of its intentions. If the Government is not intending to progress this any further, then it should provide confirmation of this, as it leaves all of those who engage self-employed subcontractor and PSCs in a state of uncertainty.

If the Government is planning to change the way in which self-employed status is determined (and therefore the basis upon which IR35 is determined) it should do this before placing the decision-making burden and liabilities on end-client organisations. If the way in which employment status is decided is changed after this legislation is introduced, it will place a material additional burden on the contracting industry.