

IR35 AND THE RECRUITMENT SECTOR

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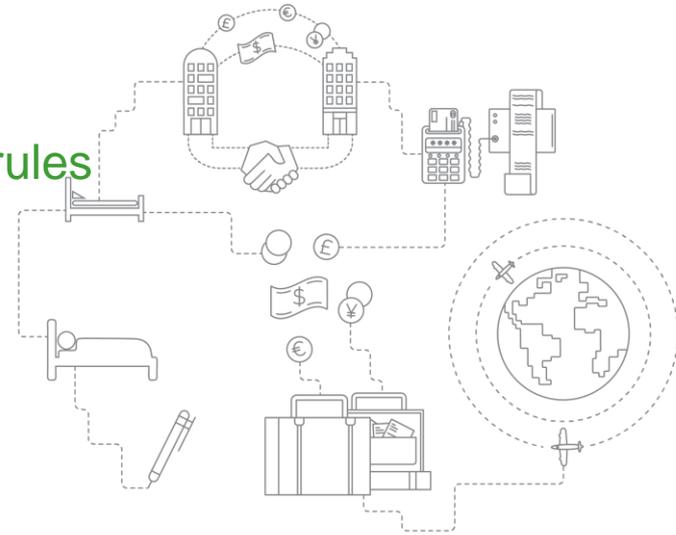
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Agenda for today's session

Introduction and overview of the new rules

Determining if IR35 applies

Next steps





Introduction and overview of the new rules



What is IR35 and off payroll working?

- IR35 is legislation aimed at identifying individuals who work 'off payroll' through intermediaries such as Personal Service Companies (PSC) who are in fact disguised employees.
- The intention of IR35 is that if these individuals work like employees they should pay broadly the same tax and NIC as employees.
- Under the current IR35 rules, the onus is on the PSC to self assess as to whether the legislation applies. This has led to wide spread non compliance.
- Separate obligations require recruitment agencies to determine employment status where self employed (not PSC) workers are engaged but these obligations are not part of these IR35 rules



Off-payroll working – a brief history

HMRC have been concerned for sometime about the increased number of off-payroll workers operating via PSC's.

Under the original IR35 rules there is an onus on the PSC to self assess. Because of the number of PSCs HMRC cannot enforce compliance effectively.

From 6 April 2017 responsibility for assessing engagements with PSCs working in the public sector only, has shifted to the public sector end-user.

Consequently where engagements between a public sector end-user and a PSC have the features of employment, the fee payer must account for tax and NIC (including employer NIC & apprenticeship levy) = Extra cost for the fee payer.

A consultation in relation to IR35 in the private sector was issued in May 2018. Budget 2018 confirmed that the public sector rules will be extended to the private sector from April 2020, but with an exemption for small businesses.

March 2019 HMRC issued a policy paper and consultation document. Draft legislation followed in July setting out how these rules will operate from 6 April 2020.

Private sector – changes from 6 April 2020 - impact

- End user to determine if IR35 rules apply to an engagement and to notify the party they contract with.
- Where an agency (eg recruitment business) is involved they must pass the determination of status and reason for it onto next party in supply chain.
- Where IR35 rules apply, fee payer who pays the intermediary to apply PAYE and incur costs of employer's NIC and Apprenticeship Levy.
- An agency becomes liable for PAYE and NIC if they do not pass the determination along the chain.
- Processes and additional resource required to assess current and future arrangements.

Changing risk profile

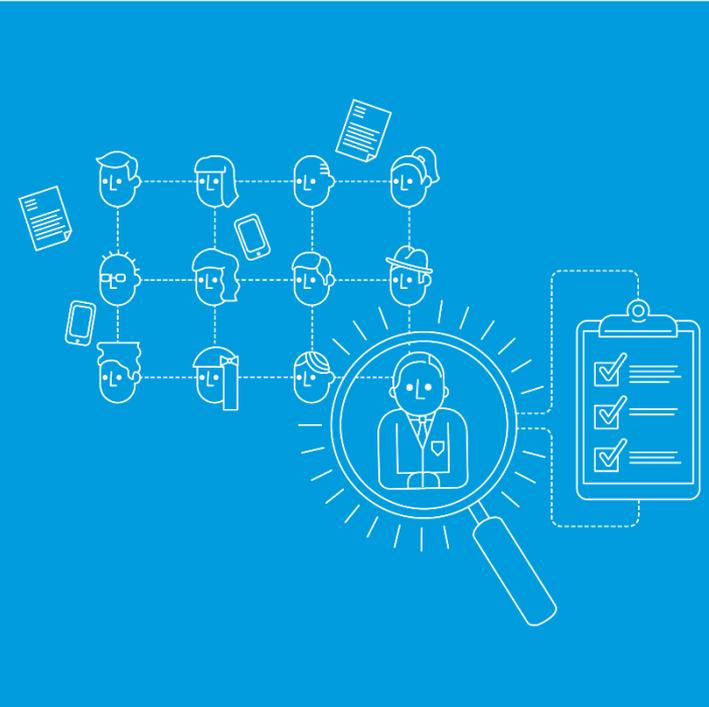
To 5 April 2020	Client engages with:			
	A self employed individual	A UK PSC	An individual through a UK agency	A PSC through a UK agency
Who must determine tax status?	Client	PSC	UK agency	PSC
Liability for PAYE/NIC?	Client	PSC	UK agency	PSC

Position from 6 April 2020	Client engages with:			
	A self employed individual	A UK PSC	An individual through a UK agency	A PSC through a UK agency
Who must determine tax status?	Client	Client	UK agency	Client as the End user
Liability for PAYE/NIC?	Client	Client as fee payer	UK agency	The Agency as fee payer*

Determining if IR35 applies



Determining if IR35 applies



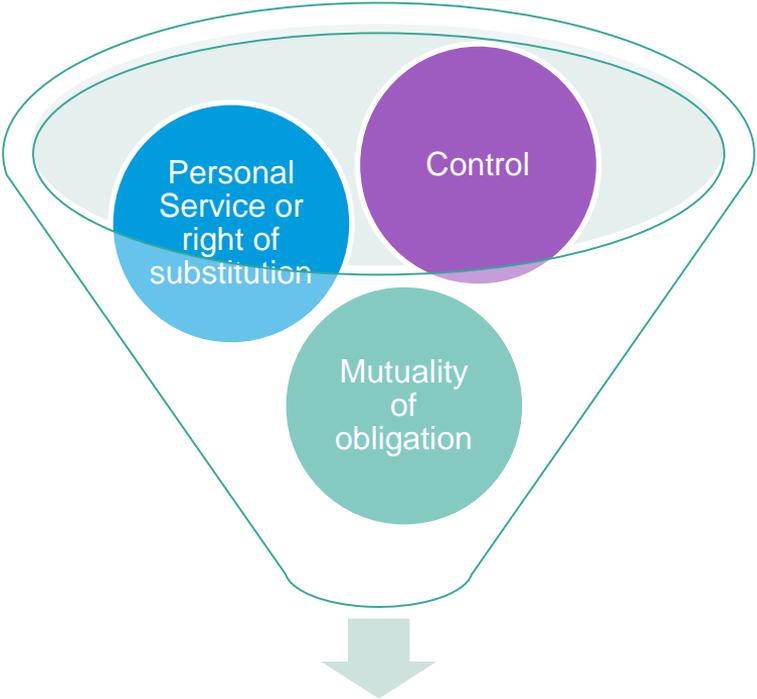
Determining whether an arrangement is caught by IR35

- IR35 applies where the individual personally performs, or is under an obligation to personally perform services.
- The legislation is based on a hypothetical contract between a client as the end-user and the worker.
- Consequently whilst the actual contract in place with the PSC/an Agency is part of the consideration, it is also necessary to consider the actual working arrangements on a case by case basis.
- If the worker is supplied via an agency/other third party then the client will need to notify both the agency/third party and the worker on or before the time the contract is entered into or if later before the services begin as to whether IR35 applies or not. Ongoing periodic review will also be required.

The employment status tests

- Status tests have evolved over time but are not currently in the legislation
- More than 10 tests in total but importance varies – 3 key tests considered further below
- Client need to consider the full picture on a case by case basis
- Is it the provision of ‘personal service’?
- Onus will be on the client as the end user to consider status and to pass on the status determination
- Need for ongoing review of existing arrangements as well as proposed new engagements
- HMRC check employment status tool (CEST) is a good starting point – www.hmrc.gov.uk/calcs/esi.htm
- These tests are applicable to engagements with self employed workers

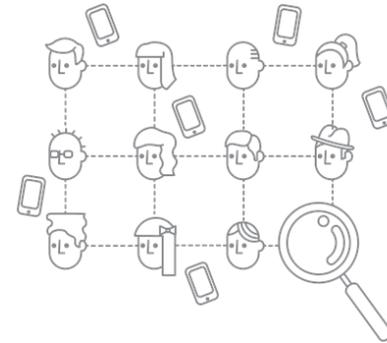
Employment status – the main tests



Key factors in determining employment status

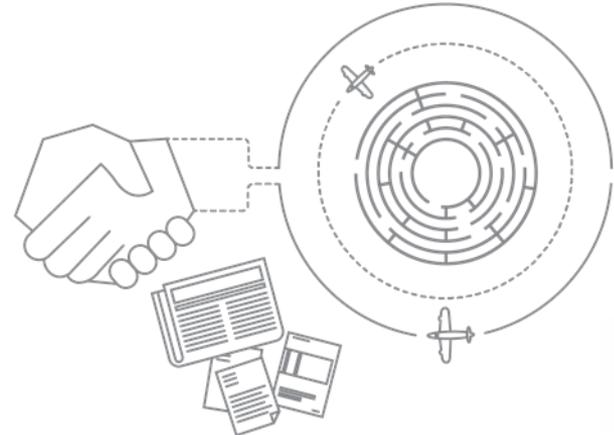
The tests - personal service or right of substitution

- Crucial test
- If personal service is not a requirement of the client and a genuine right of substitution exists [and ideally has been applied] then it is a strong indicator towards self employment and IR35 not applying
- If however a client insists that the work is done by a named individual and there is no right of substitution this would equate to personal service and is likely to be within IR35 rules
- Need to consider the contract and the actual working arrangements
- If a right of substitution exists, but permission has to be obtained then this dilutes the position



The tests - control

- The degree of control exercised over how, when, where or what is done is likely to become increasingly important test
- Master / Servant concept
- The less control = less likely to be caught by IR35
- A significant degree of 'interference' by the engager is more akin to employed status eg If the client is providing specific instructions on how the individual must carry out the work then this indicates control



Employment status – other tests



These factors should be considered when looking at the overall picture, especially if the main tests are not conclusive

HMRC status tools and guidance

HMRC's Check Employment Status for Tax ('CEST') tool

Many end-users in the public sector make their IR35 determination using CEST.

It is a guide and whilst it can be used as part of the process it should not be regarded as the be all and end all.

Many people have claimed that CEST is not fit for purpose.

HMRC on the other hand claim that it gives a clear answer in 85% of cases.

Government commitment to enhancing CEST and associated HMRC guidance by 6 April 2020.

Next steps



Summary of client status determination obligations from 6 April 2020

Client must make status determinations and provide reasons to the worker and the agency (if applicable)

The status determination needs to be made with due consideration of the contract and working practices

Possible client led status disagreement process will need to be put in place

ONGOING PERIODIC REVIEW OF ALL DETERMINATIONS

Actions prior to 6 April 2020

