

## Delay to IR35 reforms: FAQs

Planned changes to IR35 (or the ‘off-payroll working rules’) in the private sector will be delayed until 6 April 2021, the Government has announced, to relieve pressure in the wake of the Covid-19 pandemic. This will be welcome news for clients (engaging contractors via personal service companies or ‘PSCs’), agencies and contractors who are not yet ready. It does, however, raise questions for those who have changed their contractual arrangements and processes in anticipation of the changes taking effect next week. Here are answers to some initial questions that you might have about the impact of the delay.

### 1. What if there is already a status determination statement (SDS) confirming that a contractor is inside IR35?

Under the new regime, clients are responsible for determining a PSC worker’s employment status for tax purposes (see my previous blog post: [IR35 – strategies for dealing with it](#)). If a client has already determined that an arrangement will be inside IR35, the PSC should operate PAYE and account to HMRC for the appropriate tax and NI deductions. Why? An audit trail relating to the SDS will have been created, and a decision to switch it to being an arrangement outside IR35 risks an HMRC challenge in any future inquiry, assuming the reasons behind the SDS have not changed.

### 2. To what extent should clients/agencies revoke/revisit decisions made in anticipation of IR35?

For clients who have restructured their arrangements or who are advanced in their preparations, it may be too late and inefficient to do so – many contractors have had contracts terminated and have moved to an employed model or umbrella company arrangement, or changed business. Given current priorities in responding to Covid-19, clients might be better served by standing by their decisions and implementing them as and when appropriate, and by no later than April 2021. If the scope of an arrangement changes before then such that it (genuinely) does fall outside IR35, then it is for the contractor, rather than the client, to assert and provide evidence of this.

### 3. In what circumstances could a client be accused of aiding tax evasion?

Clients could be criminally liable for failing to prevent employees, agents or others who provide services on their behalf from facilitating tax evasion. This could arise if staff are knowingly concerned in, or assisting with, tax evasion – for example, by overtly working with a PSC to make a working arrangement look like it is outside IR35 when it clearly is not. However, there is a defence for clients who can show they have adopted ‘reasonable prevention procedures’. In this context, that could entail steps such as training staff, communicating to contractors their responsibilities to operate PAYE correctly, to remain compliant with applicable laws and take account of information provided (including any SDS) when settling their tax affairs for this year – as well as requiring agencies to take their own preventative steps. Whether deliberately aiding a PSC or not, many will inevitably have created audit trails in preparation for the IR35 changes that will be disclosable in the event of an HMRC audit or a dispute at a tax tribunal. Detecting and monitoring the risks of potential tax evasion, and having robust prevention procedures to avert these, will therefore be key.

### 4. What happens to renegotiated contractor rates to take account of tax and NI given the delay?

In theory, the rate could be renegotiated again. Caution should, however, be exercised if an SDS has been issued confirming that an arrangement is inside IR35 – agreeing to reduce the fee down to its pre-IR35 level could put the parties at risk of tax evasion scrutiny and potential criminal liability. In practice, it may be preferable to press ahead under the new arrangements given that unpicking an agreement may be difficult and time-consuming and that any

change could only apply until April 2021 – plus the PSC should be operating PAYE and accounting to HMRC on the basis of IR35 (in its current form) applying anyway.

#### 5. What should clients do about offers made to contractors for permanent contracts?

Given the current economic uncertainties arising from Covid-19, clients may need to reconsider offers and in some cases retract those offers where they have not yet been accepted. Contractors who have accepted offers should be given notice of termination of contract, or, if applicable, be paid in lieu of that. Where offers have not yet been accepted by contractors or agencies, clients may take this opportunity to revisit them. They will, however, want to consider the worker relations consequences of this, in terms of how it might impact on the relationship with the contractor, or whether it would give rise to problematic adjacencies where contractors doing similar work are on significantly different terms.

#### 6. What are the benefits of the delay for contractors and clients?

Covid-19 is focusing employers' minds as regards resourcing needs, hiring freezes and in some cases even redundancies. IR35 preparations have also revealed that, for some clients, processes and practices in relation to utilisation of contingent resources have not been sufficiently robust. The next 12 months allows clients an opportunity to strengthen governance and processes around the deployment of contractors, and to reprioritise their reliance on contractors, who could offer valuable flexibility and continuity at this uncertain time, versus permanent resources. Contractors could also potentially benefit under the Coronavirus Job Retention Scheme by recovering 80% of wages received under PAYE as employees of their PSC, subject to the cap and other conditions (see further our eAlert: [Coronavirus Job Retention Scheme \(CJRS\) – FAQs](#)).

#### 7. What additional steps can clients and agencies take between now and April next year?

A review of the terms of consultancy agreements and agency agreements as well as other key documentation is already well under way for most clients. The next 12 months allows clients an opportunity to revisit these, and to ensure the terms are fit for purpose and robust. It also allows the time to establish clear governance processes, decision-making bodies and an appeal process for challenges against SDSs.

#### 8. Given CEST might change again in the next 12 months, to what extent should clients and contractors rely on SDSs which have already been issued?

No one knows what further changes, if any, will be implemented. HMRC maintains that it will stand by the outcome of CEST, regardless of which version is used, provided that the answers provided to CEST are accurate and in line with its guidance on determining status. However, under the new regime clients will still need to show that they have taken reasonable care when preparing SDSs (beyond relying on CEST), for example by keeping records, delegating determinations to qualified staff, keeping SDSs under review and reissuing them where appropriate.

#### 9. How likely is HMRC to change its current position now about looking retrospectively at contractor tax arrangements?

HMRC confirmed (prior to the change of timing announcement) that it would not use the new rules to launch fresh investigations into PSCs for historic tax years, assuming there is no reason to suspect fraud or criminal behaviour. It might continue to take this stance, but it is highly likely to take a dim view of PSCs who ignore determinations that have been made in relation to current working arrangements in anticipation of the changes taking effect as originally planned. While enforcement concessions were promised in year one post-implementation (no penalties except in cases of 'deliberate non-compliance'), it remains to be seen if these will still be made given the extra 12 months' preparation time, and the likely economic needs for tax revenue post the pandemic.

## 10. Will the changes be abandoned before April 2021?

The Government has emphasised that its decision is a ‘postponement’ rather than a ‘cancellation’ of the new rules. That said, there will no doubt be continued lobbying efforts in the next year to push for the reforms to be abandoned, further delayed, or at least revisited, given the current crisis and its likely repercussions for businesses and individuals.

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