



Sellick Partnership
Recruitment Specialists

Sellick Partnership

Client guidance to the IR35 off-payroll reform in the private sector



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The aim of this guidance is to help you, as the end client using the contractor services, get ready for the April 2021 changes to the IR35 off-payroll rules for the private sector.

Background

As part of the Budget on Monday 29 October 2018, the Chancellor announced that the government would reform the off-payroll working rules (known as IR35) in the private sector in April 2020. This followed consultation and the introduction of reform in the public sector in April 2017. However, the implementation was delayed until April 2021 because of the spread of the coronavirus (COVID-19). The delay has been to help businesses and individuals deal with the economic impact of the COVID-19 pandemic.

The government have in the interim, incorporated the new rules in the Finance Act 2020, which received royal assent in July 2020. Due to the current pandemic, this could be subject to further change and in this instance, we would update this guidance should it occur.

The reform ensures that workers, who would have been an employee if they were providing their services directly to the client, pay broadly the same PAYE tax and National Insurance contributions as employees.

Public sector

In April 2017, HMRC introduced the off-payroll working rules in the public sector. The off-payroll legislation imposed an obligation on the public sector body to inform Sellick Partnership of the status of the contractor and whether or not the contractor would be regarded as an employee or office holder of the client were it not for the contractor's Personal Service Company "PSC" being in the contractual supply chain (i.e. "inside IR35").

Private sector

The private sector definition includes all organisations that are not subject to the Freedom of Information Act. Prior to April 2021 in the private sector, the person providing services through their own PSC are responsible for deciding if IR35 applies and thus if the assignment is "inside" or "outside" IR35. However, from April 2021 the responsibility for determining the IR35 status of the role will move from individual contractors to the end-client organisation receiving the contractor service, and the responsibility to deduct the PAYE tax and NIC will fall to the organisation making payment to the PSC. This is usually the recruitment business such as Sellick Partnership — referred to in the legislation as the "fee-payer".

N.B. Small organisations are exempt so this change will only affect medium and large private sector organisations defined under section 382 of Companies Act 2006. However, there is an obligation on end-user clients to confirm to the fee payer whether they are exempt due to their classification as a small organisation.

During a 12-month period, a business is deemed to be a 'small' company if it meets two or more of the following criteria:

- Turnover — not more than £10.2 million
- Balance sheet total — not more than £5.1 million
- Number of employees — no more than 50



Impact of an “inside IR35” assessment

Before April 2021, if Sellick Partnership are paying a contractor through their PSC, the contractor has almost certainly determined that the role falls “outside of IR35”. This allows the contractor the option to remunerate themselves through dividend payments. In general, dividends attract lower personal tax rates than a standard PAYE scheme payroll. If you as the client determine the role actually falls “inside IR35”, Sellick Partnership will no longer be able to make payments to the contractor’s PSC. We would need to ensure full PAYE and NIC deductions are taken. This will almost certainly lead to a reduction in take home pay for the candidate.

Determining whether an assignment is “inside” or “outside IR35”

From Tuesday 6 April 2021, it will become your responsibility as the end client to determine whether the off-payroll working rules apply, i.e. is this assignment “inside IR35”? You must do this for every contract you agree with an agency. In order to determine this, you should refer to the HMRC guidance and complete the employment status for tax (CEST) tool.

The CEST tool is a series of questions about the working practices of the role. Before you complete this, you would need to know things such as:

- the worker’s responsibilities
- who decides what work needs doing
- who decides when, where and how the work is done
- how the worker will be paid
- if the engagement includes any benefits or reimbursement for expenses

Here is a link to the HMRC CEST tool: <https://www.tax.service.gov.uk/check-employment-status-for-tax/reason-for-using-tool>

Key criteria data must be reviewed to establish employment status for tax. Essentially, if there is evidence that a contractor has similar working conditions and responsibilities as an employee of the client and there is evidence of supervision, direction or control, then they are likely be classed as “inside IR35” and the off-payroll working rules apply. Case law is evolving constantly in the tax tribunals, courts and employment tribunals but the key factors that determine a contractor’s IR35 status are as follows:

- **Substitution** — a genuine right of substitution has long been deemed to be a very important factor when demonstrating that a contractor’s assignment falls “outside IR35”. For a substitution to be considered valid, the right to supply a substitute must be a genuine one. This means that the client must agree to it in practice and be satisfied that the substitute has the skills and if necessary pass any security processes. The contractor must pay for the substitute, and it should be an unfettered right.
- **Control and direction** — a contractor must be able to demonstrate a certain amount of autonomy in the way they undertake a project where professional services are provided. Both the working practices and written contract must show that the client has no influence over how the contractor performs his/her services provided that they meet client-specific targets or project completion dates. Control factors that may point towards an “inside IR35” status include if they are being supervised, have break time or staff benefits such as sick pay or holiday pay.
- **Financial risk** — the contractor may take on a level of financial risk in undertaking the engagement. Contractors who don’t take any financial risk, for example don’t have to rectify poor quality services at their own cost, are more likely to be “deemed employees” for tax purposes. Contractors taking financial risk would also be expected to maintain appropriate insurances.
- **Mutuality obligation** — this refers to the obligation of an employer to provide work and pay for it, together with the obligation of the employee to personally do the work. According to HMRC, having a



contract agreeing to provide services, mutuality is established but most experts consider the legal picture to be more complex. It is likely there will be more clarity on this in the coming months factoring into it notice periods, termination agreements, provision of equipment, continuity of the engagement, absence procedures and even if the contractor has become “part and parcel” of the organisation.

You should communicate your determination using a Status Determination Statement (SDS).

An SDS must:

- be passed to the worker and the person or organisation you contract with (usually Sellick Partnership as the employment business)
- give your conclusion and the reasons for coming to it

You will also need to:

- make sure you keep detailed records of your employment status determinations, including the reasons for the determination and fees paid (there is no fee for using the HMRC CEST tool)
- have processes in place to deal with any disagreements that arise from your determination
- confirm the size of your organisation if asked by the employment business, or the worker

Assignments “Outside IR35”

When you make the status determination that an assignment is “outside IR35”, you will need to ensure that “reasonable care” was taken during the decision-making and that the decision itself is reasonable. In the event HMRC finds your “outside IR35” determination to be incorrect, the liability will sit with the fee-payer (typically Sellick Partnership as the recruitment business) unless you as a client did not exercise reasonable care. This would invalidate the SDS and mean you as the client would become liable for the workers tax and National Insurance contributions.

Effectively, the liability will pass down the supply chain once each party fulfils its obligations to pass the status determination statement to the next party in the chain. Sellick Partnership will do its own reasonable due diligence on your status determination to consider whether it is in line with the likely factual reality of the assignment and that it is not a contrived arrangement. In addition, we are not compelled to abide by your SDS.

Assignments “Inside IR35”

If you determine that an assignment is “inside IR35”, you need to understand what options are available in terms of an alternative to the person providing services through their own PSC.

At Sellick Partnership, we would recommend that the contractor chooses to be paid via an Umbrella Company to ensure they are paying the appropriate taxes. Sellick Partnership undertake stringent compliance checks for all umbrella companies before allowing a contractor to sign up to their services. Sellick Partnership would pay the umbrella company at a limited rate however, it would then be the umbrella’s legal obligation to ensure the contractor has paid the statutory deductions such as tax and NI at source.

For the financial impact in the event an assignment is determined as “inside IR35”, there are several potential outcomes:

- **Option one** — share the costs: You as a client bears the cost of employer’s NICs only: you will absorb the cost of the employer’s NICs due, however the contractor’s net payment will still decrease as there are deductions for the contractor’s PAYE tax and NICs from their gross pay.
- **Option two** — the contractor bears the costs: the net payment for the contractor will decrease as the fee-payer needs to account for the employer’s NICs and deduct the contractor’s PAYE tax and NICs from the gross pay.



- **Option three** — you as the client bear all the costs: In this instance, the contractors pay rate is increased to absorb the cost of the employer's NICs and the deduction for all or part of the contractor's PAYE tax and NICs, this effectively absorbs any loss due to the contractor so their net payment remains unaffected by the new off-payroll working rules.

Assignment status is undetermined

The route to determining employment status for tax is fact-specific and in some cases, there is no clear outcome. It is possible that some minor changes to working practices could give a clearer result. You should agree an approach with your MSP or Sellick Partnership to minimise the number of status determinations that are challenged. It is worthwhile working through HMRC's employment status for tax test and entering different responses to gain an understanding of the different outcomes. This tool is often used in the public sector when establishing IR35 status.

Should yourself as the client and the contractor disagree on the status, the legislation imposes an obligation to provide a "client-led disagreement process". The client must respond to a request to review the status determination statement within 45 days. During this time the fee payer should continue to apply the rules in line with your original determination. The client must then either confirm the determination is correct, with reasons, or provide a new SDS reaching a different conclusion and withdraw the previous one. Remember to keep detailed records of your employment status determinations.

Blanket rulings and reasonable care

There are three instances whereby the client becomes the "fee-payer" and therefore carries the tax liability:

- Where the client fails to inform the supply chain and provide the status determination statement
- Where the client-led disagreement process is triggered, and the client fails to respond within 45 days
- Where the client fails to take reasonable care when assessing the IR35 status of the contractor

Examples of roles inside and outside IR35

HMRC produced a technical note in 2017, which contained several illustrative scenarios. Below are two obvious examples:

1. Off-payroll working rules apply — "Inside IR35"
 - Nic works through his own PSC as an IT product designer at a large blue-chip PLC
 - Nic will be working in their IT development centre
 - He is not required to supply his own equipment
 - Nic will work under the direction of a senior manager
 - Flexible working hours are available, but Nic will need to agree time off with his Manager.
2. Off-payroll working rules do not apply – "Outside IR35"
 - Jasmine is a Website Designer, contracted to a medium private company through a PSC to design and build a website. She will:
 - Deliver the website to an agreed standard by the agreed date
 - Visit the company's offices for meetings, but mainly work from own office
 - Provide her own equipment needed to do the job in hand
 - Employ her own staff to help deliver the contract if she needs to
 - Cover her own costs and expenses
 - She is not filling a role, but rather providing a whole service, the fee for which covers her equipment, time and staff costs (should she want/need to engage others to assist on the project).



When you need to start applying the rules?

The IR35 reforms will only apply to services provided on or after Tuesday 6 April 2021. If the services are provided in full before Tuesday 6 April 2021 but payment is made on or after this date, the new rules will not apply to the payment. Where services have started before Tuesday 6 April 2021, but have not yet been completed, the new rules will only apply to the portion of the payment that relates to services falling after Tuesday 6 April 2021.

Additional Notes

Should there be any changes to the engagement or the way the work is done, the role must be re-assessed, gaining more information on the working practices and redo any assessment.

What next?

HMRC have said that they will provide support and guidance to help businesses implement the off-payroll working rules and ensure the guidance is appropriate to the larger and more diverse private sector. HMRC outlined the likely timescale, following the normal fiscal event timetable:

1. Organisations that forward plan and get compliance practices in place will minimise their risk and disruption to the workforce. This is particularly important in terms of contracts and extensions written now which will or may continue beyond 6 April 2021.
2. Contractors on long-term contracts with clients, which they are currently treating as “outside IR35” will be reviewing their position. HMRC has indicated that it does not intend to investigate such placements retrospectively, but nonetheless expect that some contractors will be considering whether it is preferable to convert to a permanent role or source another contract role.
3. In the new calendar year, Sellick Partnership will require an assessment of all current workers expected to be in contract beyond March 2021.

Further guidance

April 2021 changes to off-payroll working for clients:

<https://www.gov.uk/guidance/april-2020-changes-to-off-payroll-working-for-clients>

Fee-payer responsibilities under the off-payroll working rules:

<https://www.gov.uk/guidance/fee-payer-responsibilities-under-the-off-payroll-working-rules>

Prepare for changes to the off-payroll working rules (IR35):

<https://www.gov.uk/guidance/prepare-for-changes-to-the-off-payroll-working-rules-ir35>

Understanding off-payroll working (IR35):

<https://www.gov.uk/guidance/understanding-off-payroll-working-ir35>

Private sector off-payroll working for clients:

<https://www.gov.uk/guidance/private-sector-off-payroll-working-for-clients>

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