



Off payroll

Reform of intermediaries (IR35) legislation



From 6 April 2017, the intermediaries legislation (also known as IR 35) was amended for public sector bodies as well as agencies and third parties who supply workers to the public sector.

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This briefing was first published in March 2017 and has been updated to reflect guidance and experience as at 25 September 2017.

Background

Under the changes, public sector bodies¹ and agencies and third party supplying workers to the public sector are responsible for deciding whether the off-payroll rules (also known as the IR 35 rules) apply to engagements where payment is via intermediaries, for example, personal service companies (PSCs), partnerships or individuals. Previously, this was the responsibility of the intermediaries themselves with them making an assessment for each engagement. The off-payroll or IR 35 rules have not changed; responsibility for assessment has been moved.

Where it is determined that the off-payroll rules apply (and the individual would be classified as an employee if they were not being paid via an intermediary), the public sector body (or the agency or third party supplying the worker) is also responsible for deducting and paying employment taxes and national insurance (NI) contributions relating to the engagement.

¹ Public sector bodies are defined in the new legislation using the definitions set out in the freedom of information legislation. Wholly owned subsidiaries of public sector bodies are also required to follow these new rules.

The new rules apply to payments made on or after 6 April 2017.

Available guidance

It is vital that all NHS bodies read the available guidance. HMRC has a landing page² for the latest updates on the change to this legislation. This page is updated as guidance is developed and the changes are implemented – it was last updated on 7 July to explain what a public authority is and what they need to do to follow the off-payroll rules but other pages linked to the landing page have been updated more recently³. It and the linked pages should therefore be closely monitored.

The HMRC's technical note⁴ provides detailed guidance on the new rules and also includes case studies to illustrate how the new rules will apply.

For those who want to review the source material, these new arrangements are set out in section 6 and schedule 1 of the *Finance Act 2017*⁵.

HMRC has also developed a digital tool to enable public sector bodies to assess the employment status of intermediaries and individuals⁶. It was launched on 2 March 2017 and HMRC have indicated that they would welcome feedback. HMRC will stand by the results of this assessment as long as it has been answered honestly and the arrangement has not been contrived to get a particular result. To evidence the results of the assessment each one must be saved either as a pdf document or as a hard copy print out. These need to be filed and held with personnel, payroll or creditor payment records in accordance with each entity's document retention policies.

NHS Improvement updated their guidance for NHS providers on 31 May 2017⁷ - in summary, they require NHS providers to follow the new rules on a case by case basis.

What does this mean for NHS bodies?

This change affects all NHS bodies throughout the UK as well as any of their wholly owned subsidiaries.

The legislation states that the new arrangements will apply where:

- a) 'an individual ('the worker') personally performs, or is under an obligation personally to perform, services for another person ('the client')
- b) the client is a public authority
- c) the services are provided not under a contract directly between the client and the worker but under arrangements involving a third party ('the intermediary'), and
- d) the circumstances are such that:
 - a) if the services were provided under a contract directly between the client and the worker, the worker would be regarded for income tax purposes as an employee of the client or the holder of an office under the client, or
 - b) the worker is an office-holder who holds that office under the client and the services relate to the office.'

² www.gov.uk/guidance/off-payroll-working-in-the-public-sector-reform-of-intermediaries-legislation

³ For example, the guidance on whether IR35 applies (www.gov.uk/guidance/ir35-find-out-if-it-applies) has been updated to include an explanation that off-payroll rules may apply if an agency, umbrella company or similar third party supplies a worker by engaging the worker's intermediary

⁴ www.gov.uk/government/publications/off-payroll-working-in-the-public-sector-reform-of-the-intermediaries-legislation-technical-note

⁵ www.legislation.gov.uk/ukpga/2017/10/contents/enacted

⁶ www.gov.uk/guidance/check-employment-status-for-tax

⁷ <https://improvement.nhs.uk/news-alerts/working-through-agencies-nhs-employees-substantive-contracts/>

All payments subject to tax and NI are also included in the calculation of the apprenticeship levy so the amount of apprenticeship levy paid by NHS bodies is increased where they are paying tax and NI on payments to intermediaries.

The new arrangements do not mean that workers paid through intermediaries are entitled to pensions, sick pay or maternity pay. For the workers affected, the new rules ensure that they are not subject to double taxation.

Systems to identify affected contracts

All NHS bodies need to put in place processes to identify all arrangements affected. This includes contracts in place before 6 April 2017 where payments will be made after that date.

A concern for NHS bodies remains that contracts are signed by individuals who do not understand the legislation and therefore new arrangements will not be compliant with the new requirements. HFMA members have long since been concerned that putting in place arrangements to identify these contracts is very difficult. NHS bodies may need to consider their standing financial instructions (SFIs)/ prime financial policies and levels of delegated authority to ensure that appropriate assessment is made before contracts are signed. They should also ensure that appropriate training and support has been provided to all individuals who may be entering into affected contracts on behalf of the organisation.

Determination of employment status

The critical decision is whether the individual would have been considered an employee if they were not paid through an intermediary. This assessment must be made by the person paying the intermediary.

The use of the new digital tool will help with this decision process. NHS bodies should consider whether the use of this tool is a mandatory part of letting affected contracts as well as the procedures that should be followed as a result of using the tool. These procedures should include the evidence that should be retained by the NHS body.

Where it is an agency or other third party that is making the payment, they can ask the NHS body to inform them whether or not the contract falls within these new rules. Where the agency or third party asks the NHS body for this information, the requests must be responded to within 31 days. It is widely expected that agencies will ask public sector bodies to make this determination. Therefore, arrangements need to be put in place to respond to these requests within 31 days otherwise the liability for tax and national insurance will transfer to the NHS body.

Arrangements for making payments

Where arrangements fall under this new legislation, tax and NI have to be deducted before the invoice for services is paid.

Where the rules apply, the information necessary to make tax and NI deductions must be collected – NI numbers, tax codes and identity details, contracts must reflect these requirements.