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**Off-payroll working
and IR35: are you
up to date?**

A look at some areas of current relevance to those working through an intermediary, such as a personal service company (PSC).

The off-payroll working (OPW) and IR35 rules are tax avoidance measures, designed to prevent those working through what are called intermediaries from paying significantly less tax and National Insurance than employees. They hinge on the question of employment status for tax purposes.

The rules apply if a worker providing services to a client through an intermediary would fall to be treated as an employee if they were providing their services directly to that client. A PSC is the most common type of intermediary, though individuals, partnerships and unincorporated associations can also act as intermediaries.

What are the working arrangements?

Working arrangements vary considerably. As a worker supplying your services via an intermediary, the simplest labour supply chain might just involve you, your PSC and your client. In more complex supply chains, there may be a number of intermediary organisations in the chain between you and the client, including employment agencies.

Both the OPW and IR35 rules look through the actual arrangements in place to get a view of the underlying working relationship between you and the organisation you work for. Where the relationship is in substance that of employee and employer, the IR35 and OPW rules apply so that you are taxed as if you were an employee. The key differences between the two sets of rules are:

- who has responsibility for deciding the worker's employment status for tax purposes
- the mechanism by which tax and National Insurance contributions (NICs) are paid.

Under the OPW rules, the client decides on employment status and, unless the supply chain is such that another party is the deemed employer, the client has the resulting PAYE liability (below).

Under IR35, the worker (via the PSC or other intermediary) makes the decision and accounts for

the income tax on the deemed employment under self assessment.

Employment status: who makes the decision?

OPW rules apply where your client is in the public sector (a school or local authority, for example), or is what is defined as a medium or large-sized client in the private and voluntary sectors (such as some charities). In these cases, it is the client's responsibility to make the employment status decision.

IR35 rules apply where you provide services to what is defined as a small client, in either the private or voluntary sector. Here your intermediary makes the employment status decision. This is also the case if the client is considered as being based wholly overseas.

The definition of size comes from the Companies Act 2006. Broadly, a company is small if it meets two of these tests:

- its turnover is £10.2 million or less
- its balance sheet total is £5.1 million or less
- it has an average of 50 or fewer employees.

Where the client is not a company, only the turnover test applies. It should be noted that any corporate entity qualifies as small in the first financial year after incorporation. Special rules on determining size apply for groups of companies.

What are the tests used?

This is a complex area. There is no statutory employment test, and very real difficulties can attach to making a decision. High profile cases where there is significant disagreement between the taxpayer and HMRC continue to come before the courts.

You will find HMRC's main guidance in its Employment Status Manual. It also has an online status checker tool (CEST) which can be used, anonymously, to make a determination. The tool asks a series of questions, such as whether the worker is entitled to use a substitute; how much control the client has over how and where work is done; the degree of financial risk a worker has; and whether they have other work on a self-employed basis. It then generates a status determination on the basis of information given, though in some cases it may produce an 'unable to determine' result. HMRC undertakes to 'stand behind' determinations made using CEST, as long as the information used in doing so 'remains accurate and is in line with HMRC's guidance'.

The status determination statement

The OPW decision on employment status must be set out in what is called a status determination statement (SDS) and communicated to you, the worker.

If you disagree with the status determination, you can raise your objection at any time until the final payment for your services under the engagement is made. Your client should have processes in place to deal with this and must respond within 45 days of your disagreement being notified. The way that you are taxed will remain unchanged while the disagreement is looked into. When the disagreement process is completed, the client must tell you whether or not they have changed the status determination.

Points to look out for

In most cases, your client will assess your status on an individual basis. But in some cases, it may make a determination for a group of OPW workers. This is sometimes called a role-based determination, and can be appropriate where workers are engaged under the same contractual terms and conditions, and operate under the same working practices.

Role-based determinations are quite different from so-called blanket determinations, which are non-compliant determinations made without regard to individual circumstances. They may, for example, treat all workers as deemed employees, or as

self-employed. HMRC takes these very seriously, as a possible indication of tax fraud or avoidance. It encourages reporting instances where blanket determinations are made. Currently this can only be done using HMRC's generic online form for reporting fraud.

What about tax?

1. Where IR35 rules apply, the PSC operates PAYE, accounting for tax and Class 1 NICs on the payments of salary made to the worker during the year in the normal way.

There is a special procedure at the end of the tax year, involving the calculation of what is called a deemed employment payment, which is needed in some circumstances. Broadly, it arises when your salary, plus any benefits in kind, are less than the PSC's income from all contracts under the rules. In this case, the difference, less certain allowable expenses, is deemed to have been paid as salary on 5 April, and PAYE/NICs are due.

It's important to note that the timeframe for action is very short. Any additional tax and NICs arising from the deemed employment payment are payable by 19 April under the normal PAYE rules. Strictly, penalties and interest are charged on underpayments from this date, though there is an HMRC concession, entailing provisional payment on account, which can be of benefit. We should be pleased to outline the procedure involved.

Allowable expenses include: certain employment expenses (but not travel); certain capital allowances; employer pension contributions; employer NICs (both those already paid and those due on any deemed salary); and 5% of the gross income to cover all other expenses.

2. Under the OPW rules, the 'deemed employer' is responsible for deducting income tax and employee NICs from amounts paid to your PSC – as well as paying employer NICs and Apprenticeship Levy (where applicable). In the simplest labour chain, where your intermediary contracts directly with a client, the client will be the deemed employer. Where the labour chain is more complex, the deemed employer may be different.

Latest developments

What happens about tax if HMRC later decides that your client has made a mistake, and your engagement should have been treated as falling inside the OPW rules? Until now, the deemed employer has been responsible for the full amount of tax and NICs due, regardless of any tax and NICs you or your PSC have already paid.

New proposals will allow HMRC to set off taxes paid by a worker or their PSC/intermediary against a subsequent PAYE liability of the deemed employer.

Further details are still to be confirmed, but in outline, the use of offset will apply to liability to income tax and NICs assessed under PAYE on or after 6 April 2024, arising as a result of an error in respect of deemed direct payments made on or after 6 April 2017. Taxes available to be offset include: income tax paid on salaries and dividends; the worker's Class 2 and 4 NICs; and corporation tax. It will not apply retrospectively to adjust any PAYE liabilities settled before 6 April 2024. It may however impact compliance cases currently open. Where a set-off is to be given, you will find out about this in a direction notice from HMRC.

Of some concern is the fact that the proposals allow HMRC to use estimates to arrive at a figure for tax paid by the worker and their intermediary. This is because HMRC does not have ready access to all the information required to form a complete picture of the tax someone has paid in respect of a particular engagement. If you are unhappy with the estimate, although you can't appeal HMRC's decision that the engagement should be treated as falling within the OPW rules, it is expected that you will be able to appeal the amount it considers available for offset. The direction notice will give you the opportunity to provide more accurate calculations on the tax and NICs you have paid on that income so that HMRC can calculate the set-off amount more accurately.

It is important to note that any appeal must be made within 30 days. This is a tight timescale to

work to, and we should be pleased to help you put together the information you may need to do so.

Current HMRC compliance activity: umbrella companies

As the OPW rules have become tighter, the use of umbrella companies has increased. This makes it a particularly high-profile area for HMRC.

An umbrella company is a vehicle that some recruitment agencies use to pay the temporary workers they supply to their clients. As the worker, you provide services to the client that the recruitment agency has found for you, whilst the umbrella company acts as your employer and is responsible for paying your wages through PAYE.

Most umbrella companies act within the rules. The activity of some, however, causes concern, and HMRC regularly highlights the risks involved where umbrella companies offer arrangements to 'increase take-home pay' which in fact avoid tax, and it is important to be alert to the possibility of inadvertently using a non-compliant company.

Tell-tale signs can include being given payments said not to be taxable, which may, for example, be described as loans, grants or salary advances. HMRC's basic advice is 'if it sounds too good to be true it almost certainly is.' Checking payslips to make sure the right amount in tax and NICs is paid will help safeguard your position. HMRC has recently published updated guidance for those working through umbrella companies, setting out what employment rights are involved and what to look out for to be sure that an umbrella company is not operating fraudulently.

Here to help

This briefing has only been able to highlight some areas of current importance. It is not a comprehensive guide to the rules, and we should be more than happy to discuss these with you in detail. Please don't hesitate to get in touch.