

## **HR COMMITTEE 18<sup>th</sup> MARCH 2021 - BRIEFING PAPER**

### **IR35 (OFF-PAYROLL WORKING) OBLIGATIONS**

#### **BACKGROUND - What is IR35?**

These rules are sometimes known as 'IR35', and others as 'off-payroll working'. It was brought in by Inland Revenue to reduce tax avoidance and ensure fairness between individuals who work in a similar way. They are designed to make sure that an individual who works like an employee, but through their own limited company, pays broadly the same Income Tax and National Insurance contributions as other employees

The rules have been around since 2000. As a public body, we have needed to abide by IR35 rules since 2017, so the principal is not new. The rules are being updated from 6<sup>th</sup> April 2021, and with the new changes, it's important all those who may utilise a personal service company are aware of our obligations.

A prime example of this for the Council, could be the use of Agency workers. The reformed rules will not apply for workers provided through an agency where the workers are employees of the agency. If the Agency pays the worker through their payroll and deducts PAYE/NIC, then the arrangements are outside of the off-payroll working, and no further action is needed.

Previously, we could rely on the agency to carry out the tests to check if a worker they were not paying through their payroll would fall in or fall out of IR35. If an agency proposes a worker for a contract with us, and they will not be paid directly by the agency, as part of our agency framework agreement, they must inform us.

A worker falling 'inside' of IR35 means that the off payroll working rules apply and the worker is subject to deduction of relevant NI and tax. A worker found to be 'outside' of IR35 means that these deductions do not need to be made.

#### **THE CHANGES - WHAT ARE OUR OBLIGATIONS?**

We will now have a statutory duty to do the following before a contract begins:

- Carry out a Status Determination Statement (SDS) ourselves (detailed below), if we are informed that the worker is not being paid directly through the agency
- The SDS needs to include: Name of agency, name of worker, contract start and end date, date SDS completed, who completed by.
- Be more accountable for our assessment
- Detail our rationale and conclusion, and the reasons for this
- Ensure we can detail that a reasonable test has been conducted, keep audit trail
- Detail what we do if a worker disagrees with the assessment
- Provide these details to the agency, and any third parties, as well as directly to the worker themselves (we cannot rely on the agency to do this for us)
- Provide appropriate information so managers are aware

If this isn't all done, we are responsible for the tax and NI.

## **THE ASSESSMENT - How do we make this assessment? (Manager's responsibilities)**

Reasonable care in making decision on status is very subjective; guidance from HMRC suggests we complete accurate CEST, always new one for each assignment, ask for further advice if needed, have robust procedure. We must ensure we are careful in our assessment, and not be swayed by the worker trying to skew the outcome. Managers must ensure a CEST is completed for each assessment, and this is issued to all parties, including directly to the worker, along with the letter in 2.10g.

### **What is a CEST?**

The Check Employment Status for Tax (CEST) tool on HMRC website complies as a valid SDS, as long as accurate and reasonable care is given. This gives you an email and print out which is valid as a completed SDS.

<https://www.gov.uk/guidance/check-employment-status-for-tax>

If an agency informs us that they are not paying the worker directly through their payroll, NFDC requires managers to complete a CEST tool, and then liaise with HR.

A new CEST is required for each worker and contract of work, if used before, things may have changed.

CEST tool results many come back indeterminable. HMRC stats show 52% outside, 29% within scope, 19% undetermined. So, although these do occur, they are the least common outcome. Should this be the result, the guidance is that the manager re-checks answers to ensure correct – if still undetermined, there is a link with email and contact details to discuss the application with HMRC. It is important that we keep evidence of advice given.

### **APPEALS AGAINST OUR DECISION - What happens if a worker disagrees with the outcome?**

Appeals against SDS – if we receive this from a worker, it will need to detail why they disagree. The manager and HR should discuss the matters disagreed upon, and we must consider and review our decision within 45 days and issue a new SDS if original conclusion is found to be wrong. Letters for both keeping and overturning the original decision are given in 2.10h and 2.10i

If we don't follow or respond, we will be liable for tax and NI.

If worker still disagrees, they can disagree again, and if you maintain your decision, the worker must provide further different information than they previously gave for us to consider, if they only provide the same information, we can just restate your decision.

### **WRONG DECISIONS - What happens if we make the wrong decision?**

If we do all of these steps, and can document we were honest and reasonable, then even if we accidentally get the decision wrong, we would not be liable.

If we have not followed the steps, or cannot document them, we will be liable for tax and NI costs.

**What happens if the agency doesn't pay the relevant taxes?**

If we pay the agency, and the agency doesn't pay correctly for limited legitimate reasons (e.g. goes bust), the recovery of department at HMRC moves to the client by HMRC. This could be us in that case.

**Can we pay the worker ourselves without them being an employee?**

Yes, from 6/4/21, payroll can add the worker to our separate payroll on the Hub just for 'worker' purposes to ensure appropriate tax and NI are paid. As we are not actual employer, (just for tax purposes), other statutory entitlements (holiday, sick pay, pension) are not paid by NFDC, these will be claimed through their intermediary e.g. agency.

**FURTHER INFORMATION - What do I do if I have queries on IR35?**

Please discuss any specific case queries with the HR Advisory Team.

**RECOMMENDATION:**

That the briefing paper is noted.