

The proposed Off-Payroll Tax extension to the private sector (IR35)

From April 2020, private sector businesses are to become responsible for assessing the employment status of individuals hired on a contingent basis. This change means that the business, agency, or other third party paying the contractor, will be required legally to pay employer's National Insurance (NI) contributions (13.8%) and the Apprenticeship Levy (0.5%) on top of rates paid out to individuals deemed to be within scope of the off-payroll rules. The contractor's earnings are then to be treated as employment income, and subject to income tax and employee's NI deductions.

What are the off-payroll rules and what is their purpose according to HMRC?

1. HMRC claims that the off-payroll working rules (Chapter 10 of ITEPA) ensure that limited company contractors pay the same amount of tax as an employee when they are deemed to be working as an employee.
2. HMRC maintains that contractors operating outside of the rules pay significantly less tax than an equivalent employee. However, following the April 2016 increases to dividend tax, **the difference between tax obtained from limited company contracting and employment income is negligible** [1].
3. Despite HMRC vilifying contractors, the perceived shortfall is caused mainly by corporations who hire workers falsely as self-employed to **circumvent their employer's NI and workers' rights liabilities**. Figures taken from an illustrative example in HMRC's own consultation [2] show that **roughly 84% of HMRC's perceived tax shortfall is due to missing employer's NI contributions** [3].
4. The off-payroll rules seek to reclaim the avoided employer's NI by classing these workers as 'employed for tax purposes only', while **denying them employment rights**. This type of practice is exploitative and is the subject of a separate Government consultation [4]. However, **HMRC refuses to consider this issue** within the remit of the off-payroll consultation, despite being urged to do so by industry stakeholders and experts.
5. HMRC purports that non-compliance costs will reach £1.3bn a year by 2023/24. No evidence has been provided to support this claim, whilst the Office for Budget Responsibility's (OBR) policy measures database estimates that the Off-Payroll rules will yield £661m for the Exchequer [5]. This figure itself has a very high uncertainty rating due to the absence of data regarding the behavioural impact of the rules.
6. HMRC also **bases its calculations on the false assumption that contractors and employees get paid the same amount**. Contractors typically charge 30% more than their permanent counterparts, partly to compensate for the absence of employment rights and job security. When this is factored in, **contractors, in fact, generate more tax than employees**.

What does an extension of the off-payroll rules mean for the private sector?

7. The off-payroll rules will affect all UK self-employed workers and likely millions of organisations which source contingent labour to meet otherwise often unattainable work demands. By requiring that fee-payers make employer's NI and Apprenticeship Levy contributions on top of the fees paid to contractors, **the rules add an additional 14.3% to the cost of hiring contractors deemed within scope**.
8. This cost, and efforts to negate it by hiring firms, will inevitably give rise to **contract disputes, recruitment challenges and disruption to projects**. The response in the public sector has also demonstrated that the rules are also likely to **stoke the use of tax avoidance schemes**.

9. Ernst & Young (EY) found that **95% of businesses expect to be impacted significantly by the off-payroll rules**, with more than half expecting changes to be disruptive [6].
10. Government says small businesses will be exempt from this burden, yet exactly **how many remains unclear**. HMRC has claimed within its summary of consultation responses [7] that “over 95% of businesses will not need to apply the reform”. However, in a separate document published on the very same day, HM Treasury stated that ‘the smallest 1.5m businesses’ [8] won’t be affected, meaning that **the rules could impact potentially 4.2m of the UK’s 5.7m businesses**.
11. Non-compliance in the public sector has shown that organisations are willing to circumvent the rules by blanket assessing contractors as ‘employed for tax purposes’ before **unlawfully attempting to deduct their 13.8% employer’s NI liability from the contractor’s income** [9].
12. As a result, **thousands of legitimate contractors have been exploited by off-payroll**, despite HMRC’s insistence that the rules don’t impact the self-employed. Freedom of Information (FOI) requests by ContractorCalculator have revealed that blanket approaches to IR35 resulted in Network Rail deeming 99% of its contingent workers within scope of the rules [10], while 98% of contractors at both High Speed 2 (HS2) [11] and the Met Office [12] were considered caught as a result of similar approaches.
13. Materials distributed to candidates by Network Rail and subsequently shared with ContractorCalculator **informed contractors that employment costs would be deducted from their agreed rates** [13].
14. In the private sector, **many hirers are expected to adopt the same unlawful approach in an effort to avoid this extra cost, denying affected contractors employment rights in the process**.

Employed or self-employed? Employment status needs to be assessed on a case-by-case basis

Ian would be considered as self-employed for this contract



Ian is an IT contractor who offers his services through a limited company. He is hired by a Government department to design and develop a specific piece of software. The timescales for completion of the project are at Ian’s discretion and he has the right to use someone else to complete the services. Ian can work off-site and is permitted to work for other organisations while working on this contract, providing his work with the client department isn’t compromised. Ian has complete autonomy over how work is delivered but is required to provide monthly progress reports to his client.

This is a real-life example. Despite being clearly outside the scope of IR35, Ian was challenged by HMRC at a tax tribunal. The Jensal Software Ltd v HMRC ruling [14] resulted in a comprehensive victory for Ian, raising concerns over HMRC’s ability to police the legislation it is seeking to reform.

Jemima would be considered as an employee for this contract



The NHS needs locum nurses to help alleviate staff shortages across several hospitals and hires Jemima on an ad-hoc basis over six-months. She is required to use hospital equipment while working at the hospital and, although she often needs to use her best judgement at work, she needs to adhere to strict health and safety procedures. Because of this, **Jemima’s client deems her to be ‘employed for tax purposes’ and unlawfully deducts its employer’s NI liability from her earnings.** Jemima loses roughly a third of her earnings as a result of her new tax status, once the withdrawal of expenses has been accounted for. Jemima considers this decrease in earnings as too significant and looks for work opportunities abroad, thereby stretching the resources at this hospital even thinner.

This example is a scenario faced currently by thousands of locum nurses [9]. **The NHS is one of many public authorities failing to comply with the off-payroll rules, subjecting its workers to exploitation as a result.**

How has HMRC misrepresented the off-payroll rules?

15. **HMRC's recent track record in IR35 tribunal cases shows that it struggles to interpret the IR35 rules.** Its defence for *Jensal Software Ltd v Revenue & Customs* [14] was error-strewn and suggests that the taxman's stance on IR35 isn't to be trusted. Recent tribunal defeats to broadcasters *Lorraine Kelly* [15] and *Kaye Adams* [16] mean HMRC has only outright won one of its last 12 tribunal cases, at the time of writing. Despite this, the taxman maintains that 90% of contractors do not comply.
16. HMRC falsely claims that mutuality of obligation (MOO) exists where one party agrees to work for another in exchange for payment. This interpretation was roundly rejected by IR35 Forum members [17], as well as an IR35 tribunal Judge, who stated: "That would be true of every contract, both employment and for services, otherwise the contract would not exist at all" [18].
17. HMRC's stance on MOO was further undermined by the outcome of *Dr R Narayan v Community Based Care Health Ltd*, where an individual's claims for unfair dismissal and wrongful dismissal were denied, largely on the basis that there was an absence of MOO [19].
18. The Treasury maintains that the reform is not retrospective and claims that historical cases won't be targeted [8]. However, a leading tax barrister has warned that these assurances offer little certainty as the taxman is not bound to stand by them [20]. In addition to this, HMRC is embroiled currently in multiple high-profile IR35 cases where **it is seeking to secure retrospective income tax and NI payments from broadcasters** [21].
19. The taxman continually denies the issue of non-compliance, whereby public authorities hire contractors through umbrella companies that deduct employer's NI from contractor payslips, **despite evidence to show that this non-compliant practice is rife** [9].
20. Although the legislation requires organisations to assess each engagement on a case-by-case basis, **HMRC actively encouraged NHS Trusts to conduct blanket assessments** in a September 2017 webinar, stating: "You don't have to do an in-depth exercise in each case" [22]. Network Rail also agreed a non-compliant "strawman" approach to IR35 assessments with HMRC which resulted in 99% of its contractors being deemed caught by the legislation [10].
21. An initial £550m spike in income tax and NI payments via Pay As You Earn (PAYE) has been treated as evidence of heightened public sector compliance by HMRC [8], ignoring unanimous warnings from consultation respondents that **it was too early for a full compliance cycle to be analysed** [23]. HMRC has also conceded in a response to an FOI request that **it does not check for accurate status determinations** [24].
22. HMRC's interpretation of the **Government-commissioned IFF research report was condemned widely as unrepresentative and biased** by consultation respondents because it failed to consult with contractors or agencies. Others accused HMRC of cherry-picking preferable statistics from the report to feature within its consultation, to portray the reform in a more positive light [23].
23. HMRC also conceded that earlier drafts of the report contained information that was subsequently removed, yet blocked its disclosure, acknowledging that its exposure could impede Governments ability to introduce the rules to the private sector [25].
24. The CEST tool, developed by HMRC to help contractor clients assess employment status accurately, **is inconsistent with the employment case law underpinning IR35**. HMRC maintains that CEST's results are accurate, though it conceded in an FOI response to ContractorCalculator that it has **no evidence to substantiate this claim** [26].

25. Of 3,909 contractors across five key public sector bodies, **CEST determined 94% to be 'employed for tax purposes'**. When challenged on this disproportionately high number, Financial Secretary to the Treasury Mel Stride denied that it suggested that CEST was inappropriate [27].
26. When tested against the Lorraine Kelly case, CEST incorrectly determined IR35 to apply. This is made all the more concerning by the fact that, within the judgment, the tribunal Judge noted: "We do not consider this to be a borderline case" [28].
27. Following severe criticism of CEST from experts in response to its consultation [23], HMRC has pledged to work with stakeholders to fix the tool; in doing so **acknowledging that it is not fit for purpose**.
28. Stakeholders have generally warned that CEST needs to be amended at least six months in advance of any private sector rollout of the Off-Payroll rules, to grant firms enough time to prepare. But, the Institute of Chartered Accountants in England and Wales (ICAEW) has warned that an updated version of the tool isn't expected to be released until March 2020 [29], less than a month before the anticipated rollout.

What can the private sector learn from the public sector reform?

Question	Facts	HMRC claim
Have the off-payroll rules increased HMRC's tax yield from public sector contingent workers?	At this stage, it is unclear . To accurately evaluate the fiscal impact of the off-payroll rules, any increase in income tax via PAYE and NI needs to be considered alongside the inevitable reduction in Corporation Tax and Dividend Tax payments. A full compliance cycle, including resolved enquiries into employment status, needs to be available, as highlighted by the ICAEW amongst others [29]. Until then, how far the off-payroll rules have increased HMRC's tax yield remains unknown . The increased cost of hiring contingent labour to public authorities, which one public authority in the HMRC-commissioned IFF report [30] said was between 10% and 15%, also needs to be considered.	The off-payroll rules resulted in an additional £550m raised in income tax and NICs from the public sector in their first year.
Have public authorities been compliant with the reform and assessed contractors on a case-by-case basis?	There is overwhelming evidence to suggest that public authorities have not been compliant with the rules, with many imposing unlawful blanket rules that make all contractors deemed caught by IR35 without receiving an assessment. <ul style="list-style-type: none"> • A survey by the Freelancer and Contractor Services Association (FCSA) found that 50% of public authorities hadn't conducted IR35 assessments for their contractors, while an additional 26% applied blanket rulings [31]. • A study of 450 healthcare locums by ContractorCalculator and the Independent Health Professionals Association (IHPA) found that 60% of NHS locums were subject to blanket rules, while 50% were informed that they wouldn't be hired unless they were on an umbrella company's payroll [32]. • A survey of public sector contractors by Qdos Contractor found 38% reported having been subject to blanket assessments since April 2017 [33]. • FCSA claims to have collected evidence that a significant number of public bodies took a blanket approach to status assessment, including NHS Trusts, local authorities and central Government bodies [34]. • HMRC claims blanket assessments happen in just 10% of cases. Even with this lowballed estimate, the Association of Recruitment Consultancies (ARC) observes that roughly 100,000 contractors are set to be affected unfairly if the rules are extended to the private sector [35], based on 	Almost all public authorities are compliant with the reform, having made assessments on a case-by-case basis. The £550m increase in PAYE and NI since the Off-Payroll rules began is evidence of heightened compliance.

	<p>HMRC's estimation that contractor headcount is circa 1m.</p> <ul style="list-style-type: none"> • Non-compliance within the NHS has resulted in its practices being the subject of a judicial review [36]. • Jolyon Maugham QC told a Commons Select Committee on BBC pay that non-compliance among public authorities is forcing contractors into false employment: "They are saying everybody is an employee in circumstances where the law does not support that conclusion" [37]. • Worryingly, the private sector looks set to follow suit. A study by Brookson found that 59% of private sector clients intend to take a blanket approach to compliance, due to time and cost restraints, and 45% of businesses haven't taken any steps whatsoever to prepare [38]. 	
Do the off-payroll rules made it harder for public authorities to hire contingent labour?	<p>Public authorities have suffered notable difficulties sourcing contractors since the off-payroll rules were implemented.</p> <ul style="list-style-type: none"> • According to research from the Association of Professional Staffing Companies (APSCo), 70% of recruiters claim contract placements in the public sector have dropped [39]. • An August 2017 study conducted by ContractorCalculator found that 27% of contractors left the public sector after the reform went live and 38% of them couldn't be replaced [40]. • Harvey Nash also found that 49% of contractors surveyed seek contract opportunities exclusively in the private sector [41]. • The IFF study noted that 32% of central bodies had reported struggles in filling contractor vacancies [30]. • A survey of 115 public sector hiring managers by the Chartered Institute of Personnel and Development (CIPD) found that 51% of respondents lost contractors immediately following the reform, while 71% reported struggling to retain contractors [42]. • A National Audit Office (NAO) report found that several contractors, notably those in IT and project management, left the BBC in response to the Off-Payroll rules [43]. • As a result, 39% of private sector clients expect there to be fewer contractors available from April 2020 onwards, while 48% claim IR35 has encouraged them to engage fewer contractors, according to Brookson [38]. • 36% of contractors told an FCSA survey that they would only work on 'outside IR35' contracts, while 13% claimed they would quit contracting if they believed they were being incorrectly assessed as 'inside IR35' by a client [44]. 	The reform has not made it harder for public authorities to fill vacancies.
Has the reform increased contractor rates?	<p>There is substantial evidence pointing towards a significant increase in contractor rates following the implementation of the reform.</p> <ul style="list-style-type: none"> • APSCo found that 45% of recruiters reported increasing charge rates for contractors in the public sector [39]. • Harvey Nash found that 42% of contractors claimed to have increased their rates to counter the tax increase caused by their deemed employment status [41]. • The IFF also acknowledged that 28% of central bodies reported increases in gross hourly rates [30]. • A survey by the Association of Chartered Certified Accountants (ACCA) found that 96% of private sector contractors would attempt to renegotiate their contract fee to account for the additional tax liabilities, if deemed caught by IR35 [45]. 	For the majority of public authorities, the reform has not resulted in an increase in rates charged by contractors.
Have public sector authorities and projects suffered as a	<p>Many high-profile organisations and projects, including National Rail and HS2, experienced difficulties following the reform, while staff shortages within the NHS have resulted in a patient care crisis.</p> <ul style="list-style-type: none"> • ContractorCalculator found that 71% of projects were 	The reform has had no negative effects on the labour market, and changes in public

<p>result of the reform?</p>	<p>delayed or cancelled in the immediate aftermath [40].</p> <ul style="list-style-type: none"> • An October report by Transport for London (TfL) attributed a project delay of more than three months to a significant number of contractors leaving after the reform [46]. • ContractorCalculator and the IHPA found that roughly a quarter of locums left the NHS following the reform, with 87% of respondents claiming the reform has impeded patient care drastically [32]. • According to a survey of more than 800 contractors by the Association of Independent Professionals and the Self Employed (IPSE), 40% of public sector contractors witnessed project delays and 35% said they had seen costs rise following the public sector reform [42]. • CIPD found that 52% of public sector hiring managers reported rising costs, delays and even project cancellations following the changes [42]. • Though HMRC's IFF research report estimated that it cost public bodies on average £7,550 to implement the Off-Payroll rules [30], an NAO investigation found that costs incurred by the BBC in ensuring compliance totalled £1.5m – almost 200x more than HMRC's figure [43]. 	<p>sector recruitment were due to natural fluctuations in the workforce.</p>
<p>Can CEST be trusted to help hirers accurately determine IR35 status?</p>	<p>No. There is a growing body of evidence indicating that CEST is not fit for purpose.</p> <ul style="list-style-type: none"> • HMRC has acknowledged that CEST assumes MOO [47] – a key factor when assessing IR35 – to be present in all contractor engagements. This is incorrect. • Barristers and IR35 legal experts have advised that CEST cannot be trusted to give an accurate representation of employment status [47]. • In a letter to the Financial Secretary to the Treasury, the ICAEW advised that CEST was not suitable for use in the private sector [48]. • ContractorCalculator re-tested CEST against 24 employment status cases which HMRC claims CEST was tested to ascertain its accuracy. It found that in only 58% of cases did CEST provide the right answer for the right reasons [49]. • Another FOI request by ContractorCalculator found that CEST was not assessed formally under Government's own Digital Services Standards [50], while an examination of the tool shows that it has been stuck in beta phase for the past two years [51]. • HMRC has also conceded that it has no detailed evidence to support its claims regarding the accuracy of CEST [26]. • Speaking at a Public Accounts Committee (PAC) hearing, HMRC second permanent secretary Jim Harra conceded that the experts involved with the tool's development were members of HMRC's employment status team [52], meaning independent expert input was not sought. • Upon its introduction, CEST was used to assess the status of 663 BBC broadcasters. Though the majority of broadcasters had been assessed previously as self-employed via the BBC's internal review process, which was developed by Deloitte in liaison with HMRC, CEST claimed 92% to be caught by IR35 [43]. • Speaking before the PAC, BBC director general Lord Hall noted: "We were surprised by the way the outcomes of the tests that we had been applying perfectly legitimately and properly before were suddenly changed by CEST." [53] • Use of CEST has resulted in disproportionately high numbers of 	<p>CEST is aligned with employment case law underpinning IR35.</p>

	<p>'inside IR35' decisions elsewhere in the public sector, including for 99% of contractors engaged by Network Rail [10].</p> <ul style="list-style-type: none"> Many experts have called for CEST to be either amended or withdrawn, citing among the reasons failure to consider MOO and the fact that it is too limited in scope to assess private sector engagements accurately [23]. This sentiment is echoed in feedback on CEST gathered by HMRC and obtained by ContractorCalculator via an FOI request, where 50% of respondents described the tool as 'bad' or 'very bad' [54]. 	
Has the reform improved compliance with IR35 in the public sector?	<p>Not necessarily. There is evidence to suggest that this scenario is incentivising more contingent workers to engage in tax avoidance schemes. Meanwhile, evidence of blanket assessments from hirers suggests that many of those now working via PAYE shouldn't be.</p> <ul style="list-style-type: none"> The Times found that recruitment agencies are encouraging contingent workers into non-compliant umbrella loan-based schemes to counter the tax loss caused by the off-payroll rules, with new schemes continuing to emerge [55]. As many as one in ten companies managing the payrolls of locum workers – roughly 60 of the 550 schemes in operation – are being investigated by HMRC for operating outside tax rules [56]. This has prompted a leading UK medical recruitment agency to write to 30,000 locums, warning of the perils of these schemes [57]. During the first 10 months of the public sector reform, HMRC reported that roughly 58,000 engagements each month were found to be within scope of the rules, attributing this to previous high levels of non-compliance. However, FCSA uncovered guidance from numerous public bodies instructing that sole traders be considered within scope, suggesting that high volumes of sole traders are being caught inappropriately by the reform [20]. In email correspondence obtained by the IHPA via FOI, HMRC's IR35 lead Mark Frampton acknowledged that HMRC was "very concerned" by heightened engagement in tax avoidance schemes among healthcare locums following the public sector changes [58]. This is an issue which HMRC has publicly denied. 	The reform has improved compliance with IR35. The fact that there are now more contingent workers engaged on public authority or umbrella company payroll demonstrates this.

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