

## Agencies can override incorrect Off-Payroll (IR35) status decisions by clients



Agencies engaging contractors in the public sector can lawfully override Off-Payroll status assessments conducted by end clients, meaning contractors may find it easier to secure an accurate status evaluation and subsequently fair tax treatment.

According to Matt Boddington, director at employment status specialists [Chartergates](#), an examination of [sections 61M to 61T of the Income Tax \(Earnings and Pensions\) Act](#) shows that the 'fee-payer' – the party responsible for the deduction of tax – is under no obligation to act on the client's status conclusion:

"As the express provisions of section 61M(1) demonstrate, the only statutory authority to make deductions from a payment made to a contractor's limited company is if the IR35 legislation applies.

"The legislation itself only applies where the 'worker would be regarded as an employee of the client'. Such authority is only provided by the IR35 legislation. A client's assessment, which is only to be treated as advisory, is not sufficient to determine that IR35 applies, meaning the fee-payer is not obliged to tax the worker in accordance."

### Agency need not know of client's Off-Payroll assessment

Not only is the fee-payer not compelled to abide by the client's conclusion, Boddington also highlights that there is nothing in the legislation requiring the fee-payer to know what the client's assessment is:

"Curiously, the legislation only requires that the client deliver the outcome of its status assessment to the party below it in the supply chain. Supply chains are often long and complicated, so unless the fee-payer happens to be engaged by the client directly, which quite often they aren't, they needn't know the outcome."

"At the same time, the client's decision doesn't have to be passed down to the contractor," he adds. "So a contractor can wind up in a bizarre situation whereby they enter into a contract and are expected to abide by a status decision that hasn't even been directly shared with them."

### 'No excuses': agencies urged to support contractors

Despite being evident in writing, the fact that the fee-payer has authority over how contractors are taxed under Off-Payroll has been unclear to many since the legislation's inception.

"You won't find anything in the legislation which explicitly says that the fee-payer doesn't have to follow the client's conclusion," notes Boddington. "It's a bit more subtle, which is probably why it has gone largely unnoticed."

The taxman has generally encouraged fee-payers to tax contractors in accordance with client assessments. HMRC's [Off-Payroll Working in the private sector](#) consultation even proposes sanctions be imposed on fee-payers where they fail to act on the client's assessment. Not only does this suggest that HMRC has been aware of this grey area all along, but also that it is not entirely happy with the rules in their current public sector format.

"Agencies now have no excuse for not standing by their contractors and helping them get fair tax treatment," comments ContractorCalculator CEO Dave Chaplin. "The legislation is geared towards encouraging parties to take the risk-averse option, which has, in turn, resulted in many contractors being overtaxed. In truth, agencies have little to worry about."

### **Don't be misled by 'liability' and 'reasonable care'**

Agencies are urged to adopt compliant practices to overcome what Boddington considers to be crafty drafting of legislation that ultimately plays into the taxman's hands:

"The biggest faux pas with the Off-Payroll legislation is the supposition that the client or agency becomes liable for incorrect status assessments because the liability only works one way.

"You cannot be liable for incorrectly determining that the Off-Payroll rules apply, because if you say they apply when they don't, there is nothing to be liable for. You've just forced a contractor to pay too much tax. It's a clever bit of drafting, which has created a situation whereby clients conduct blanket assessments that automatically deem contractors to be within the scope of the rules."

Boddington adds: "The legislation suggests that compliant clients will be acting reasonably, when, in fact, they're doing nothing of the sort. Far from encouraging fairness, Off-Payroll has incited unreasonable, non-compliant assessments."

### **Element of risk present regardless of agency approach**

Although contractual or commercial repercussions may arise from ignoring the client's assessment, agencies are advised that there are no statutory consequences under Off-Payroll. And, while many have simply decided to stand by the client's determination, Boddington explains that the best course of action is to take measures to guarantee compliance:

"Non-compliance works both ways. If tax should have been deducted, yet hasn't, there's the obvious risk that the agency will be deemed liable. So, measures need to be taken to ensure that this doesn't happen.

"But paying tax where it isn't due is also non-compliant, so agencies should be striving to make correct assessments, ensuring that the right amount of tax is deducted. Otherwise, if excessive deductions are made, the agency could be subject to a contract claim, and may risk losing a significant portion of their workforce."

In light of the blanket assessments that are so prominent across the public sector, Boddington also acknowledges that significant commercial advantages could arise for agencies that are willing to take compliance into their own hands:

"If an agency is fully engaged with the legislation and making accurate decisions, it is already at an advantage compared with the blanket decision-makers. Initially, compliance may seem like an arduous process which puts the agency at a short-term disadvantage, but, in the long-term, it will pay off, as contractors will be more inclined to engage with these recruiters."

### **How agencies can mitigate Off-Payroll risk**

Agencies face an inevitable degree of risk regardless of the decision that they make. However, Boddington highlights three ways in which they can mitigate this:

1. Make an accurate assessment – don't place trust in HMRC's Check Employment Status for Tax (CEST) tool
2. Explore insurance products which cover the liability in the event of an incorrect assessment
3. Introduce another party to the supply chain – there are plenty of third-party companies willing to take the responsibility of assessing status and deducting tax.

Boddington concludes: "There are plenty of affordable IR35 assessment solutions, the costs of which can be passed onto the contractor. I would avoid using any HMRC solution. The taxman quite frequently gets the decision wrong, even in cases where it is prepared to litigate, as its tribunal history has shown."

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