

CEST only asks a fraction of questions usually posed during an HMRC inquiry



HMRC's Check Employment Status for Tax (CEST) tool asks a maximum of 16 questions about a contractor's working arrangement before reaching a conclusion about their Off-Payroll tax status.

This number of questions is a fraction of what HMRC officers ask when conducting an IR35 inquiry, which, according to experts, provides an insufficient level of insight for an accurate status assessment.

An examination of inquiry documents by ContractorCalculator, plus input from leading tax experts, demonstrates that HMRC IR35 inquiries typically involve at least 50 questions, and often over 100.

In some instances, CEST makes an Off-Payroll tax determination based on just four answers to multiple choice questions, leading many to query why the tool applies not nearly the same level of rigour as the taxman's IR35 inspectors.

'CEST not robust enough'

"Put simply, CEST is not robust enough. This isn't just when compared to an independent IR35 assessment, but an HMRC investigation too," comments [Qdos Contractor](#) head of tax, Andy Vessey, a leading expert on UK employment status who defeated HMRC in the recent [Jensal Software IR35 tribunal case](#).

He adds: "An HMRC inspector will ask around 50 questions of the contractor alone before drilling down into the fine details of a contract, obtaining evidence, interviewing end-client representatives and so on. Frankly, CEST is nowhere near the thoroughness of HMRC's own investigations. It's clear that the tool, in its current form, is not wholly reliable."

"CEST appears to attempt to shoehorn a lot into each question, which would be better spread out into multiple questions," adds David Kirk, tax and employment status expert at [David Kirk & Co](#). "What you wind up with is far too little insight."

Kate Cottrell, former HMRC manager and IR35 expert at [Bauer & Cottrell](#), agrees, and notes that HMRC doesn't appear to have learned any lessons from its failed Employment Status Indicator (ESI) tool:

"It's impossible to be consistently certain of a contractor's status off the back of up to 16 questions. The ESI, which was not to be used for IR35 cases, had numerous questions and was often unable to determine status. This would result in a request for the user to discuss their case with an inspector.

"With CEST, HMRC is effectively saying: "Do as I say – not as I do. Answer a few questions and you will have certainty, but if you want us to give an opinion on your status properly, this will involve hundreds of questions, usually multiple HMRC officers and an interview with the client

just to make sure you have given accurate answers.”

Limited questions indicative of CEST’s shortcomings

“It’s not just the number of questions asked that is a concern, it’s what questions,” notes Kirk. “One of the biggest problems, in my opinion, is CEST’s failure to address the matter of whether you can be considered in [business on your own account \(IBOYOA\)](#). It considers some of the questions that go to this make up, but in different guises, and by no means all of them.

“A key aspect of IR35 is whether you are running a business, and you need to look outside of the contract to determine this. CEST fails to touch on matters such as whether the contractor is advertising themselves, whether they are actively looking for business and negotiating contracts, or indeed how many contracts they have.”

CEST also fails to consider multiple other factors relevant to IR35. The [tool’s omission of mutuality of obligation \(MOO\)](#) - one of the three key tests of employment - is well documented, yet this is only the tip of the iceberg, as Cottrell points out:

“Anyone with sense will not rely on the tool output. It takes little or no account of very important issues and the results change depending on who answered the questions, and at what point in the engagement the tool was used. Most importantly, CEST appears to ignore case law and precedent cases at that.”

With fewer questions posed, a disproportionate amount of weight is placed on certain answers. As Cottrell highlights, the tool’s basic design makes its outcome easy to manipulate, which can encourage non-compliant behaviour:

“The way CEST is designed makes it very easy for an individual to achieve an outside IR35 result, simply by saying they can send a substitute. This is a result which is not worth the paper it’s written on. But that’s what you get when you introduce a tool that encourages both collusion and avoidance.”

Hirers oblivious to tax risk posed by CEST

Coupled with its inaccuracy, the broad adoption of CEST by public sector organisations poses a serious threat. Contractors are growing increasingly wise to CEST’s inadequacies as a status tool, and many are prepared to litigate against clients who dubiously tax them in accordance with CEST’s guidance:

“It concerns me that many organisations continue to perceive CEST as mandatory, and their only method of making status decisions,” comments Vessey. “A lot of contractor clients are allowing themselves to be misled, which creates the risk of wrongful taxation and heightens their risk of exposure as contractors understandably challenge these decisions. It’s dangerous.”

Cottrell concurs: “There is a serious tax risk for organisations, and this is why it would be quite ridiculous for HMRC to roll this out to the private sector before it realises the full impact on the public sector.

“HMRC has a real problem here. If it admits that CEST is flawed, where does that leave all who have used it and how on earth will HMRC cope with undoing it all? HMRC has to stick with the tool, otherwise it needs to tear up the Off-Payroll tax rules and start again. The whole thing was and remains a real mess.”

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