Damaging impact of HMRC's misleading webinars to NHS revealed

The damaging impact of an HMRC Off-Payroll compliance seminar described by one expert as "dangerous for both locums and the NHS" is now apparent, with research conducted by the Independent Health Professionals' Association (IHPA) exposing intensifying staff shortages within hospitals.

NHS Trusts across the company have adopted a blanket approach to Off-Payroll compliance that has rendered almost all locums 'inside IR35'. The approach has subjected critical health workers to excessive taxation while simultaneously withdrawing the travel expenses tax relief necessary for many locums to work long-distance engagements.

As a result of the approach, the IHPA has found that:

> - Locum vacancy 'fill rates' are down by more than 50% in many hospitals
> - 12,000 medics have left the UK in response to Off-Payroll legislation
> - One hospital failing to fill additional 100 nursing shifts per week due to Off-Payroll

"These consequences are a direct result of the grossly misleading advice delivered by HMRC to many NHS Trusts when the Off-Payroll legislation was first introduced to the public sector," says Dave Chaplin.

Controversial HMRC webinar incites industry-wide non-compliance

As reported by ContractorCalculator in October 2018, HMRC delivered a controversial webinar on Off-Payroll compliance to NHS Trustees in September 2017. A video containing excerpts from the webinar can be viewed here.

During the webinar Mark Frampton, introduced as HMRC's policy advisor on IR35, appeared to encourage what are now commonly termed as blanket assessments of NHS locums as 'inside IR35'. This approach arguably contradicts the very recent HMRC guidance published regarding the Off-Payroll legislation's 'reasonable care' requirement.

Speaking during the webinar, Frampton commented: "If you look at the terms and conditions, and the way that an individual works, and they work in broadly the same way as an employee, then they should be taxed broadly in the same way as employees."

Despite reasonable care necessitating the assessment of individual engagements on a case-by-case basis, Frampton went on to state: "Reasonable care can be exercised by saying: 'Well I know what the standard contractual terms are for all of my people and they would meet the criteria'. You don't have to look at every single case individually if you know that that case is like other cases."

"The resulting blanket approach appears to be being adopted across the board in the NHS," comments Dr Iain Campbell, secretary general of the IHPA. "From what I understand this one-size-fits-all approach is also being widely applied across the rest of the public sector, forcing thousands of legitimately self-employed workers either into false-employment or out of work."

How has Off-Payroll non-compliance impacted the NHS?

Speaking before the House of Lords Finance Bill Sub-Committee recently, Dr Campbell described the fallout: "On the ground, we are seeing that a lot of genuinely self-employed individuals can't obtain that status. We're seeing that many individual status assessments don't occur, and we are seeing blanket determinations applied to thousands of workers at once."

The diminishing impact on engagements is evident. The IHPA cites agency fill rate data from the NHS Professionals system, which is used by hospitals to advertise vacancies and accessible by agencies. The data reveals huge declines in fill rate of temporary worker requirement, which for many hospitals was found to be down by more than 50% and in some cases up to 75%. This issue has been intensified by a contemporaneous large surge in demand.

"Blanket assessments not only subject locums to excessive taxation, they also withdraw the travel expenses that many rely upon to make long-distance assignments a viable option," explains Dr Campbell. "As a result, much of the pain is concentrated in rural hospitals for which it is typically more difficult to recruit."

Migration of talent out of the UK is also an increasingly pressing issue. The IHPA refers to data from the Office for National Statistics (ONS), which it says shows that 12,000 locum medics left the country in the wake of the public sector implementation of the Off-Payroll legislation.

Indications also suggest that the true extent of the impact may be being kept under wraps by many Trusts. After the chief executive of Colchester General Hospital made headlines in April 2018 for banning his employees from speaking up about staff shortages, the IHPA investigated the hospital's Corporate Risk Register to find that it was down 100 additional nursing shifts per week as a result of the Off-Payroll legislation.

Has HMRC misrepresented the law?

The disastrous impact on the NHS stems from an approach to compliance that appears contrary to the legislation itself, which requires that hirers take 'reasonable care' when determining the IR35 status of contractors. Experts have highlighted that, in the context of IR35, undertaking reasonable care is akin to securing expert legal assistance when assessing one's own status.

HMRC's Employment Status Manual (ESM) notes that the necessary requirements of reasonable care in the context of the Off-Payroll legislation will depend on an organisation's experience and capacity. However, it also adds: *'It is reasonable to expect a person with limited abilities , or who encounters a situation of which they have limited experience, to take care to find out about the correct tax treatment or to seek appropriate advice.'*

This makes HMRC's instruction that organisations use its Check Employment Status for Tax (CEST) tool to determine blanket assessment status decisions even more dubious. Along with various other tests of employment. CEST notoriously omits mutuality of obligation (MOO) from consideration.

MOO is defined by the continued obligation of the hirer to provide work, and the worker's continued obligation to accept it, yet HMRC argues this test is satisfied by the mere imposition of a contract. The taxman's stance has been repeatedly rebutted by tax tribunal judges in recent cases, many of which HMRC has lost partly due to its misinterpretation of MOO.

“The problem is HMRC’s approach to MOO is simplistic,” explains IR35 expert Roger Sinclair of contractor specialist law firm Egos.“HMRC seems to suggest that, if there is a contact there, if work is done under the contract, and if that work is paid for, then the MOO requirement to constitute an employment contract is present, and does not need to be considered further. Unfortunately for HMRC, that does not seem to be the law.”

Martyn Valentine of The Law Place agrees: “By falsely claiming that MOO exists in every contract and therefore disregarding it entirely from CEST, HMRC is ignoring a long history of binding judgments. HMRC is exhibiting a flawed understanding of the vital importance of MOO in determining employment status by exclusively relying upon*Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968], which asserts that MOO exists where the 'consideration' for the contract is 'work and skill' in return for 'a wage or other remuneration'.”

Both Valentine and Sinclair acknowledge that such an approach is an over-simplification, and point to precedents set by the Upper Tribunal case of *Usetech Ltd v Young (HM Inspector of Taxes)* [2004], in which the tribunal clarified:

“Mutuality of some kind exists in every situation where someone provides a personal service for payment, but that cannot by itself automatically mean that the relationship is a contract of employment: it could perfectly well be a contract for freelance services."

Against that background, we must accept that it may be difficult for HMRC to incorporate a proper MOO test into CEST,” adds Sinclair. “However, that does not excuse the adoption of a position of effectively saying: ‘It’s too difficult so we’ll simply ignore it and pretend it’s not there'.”

Impending UT rulings to spell trouble for HMRC and clients

Despite having its stance on MOO quashed repeatedly by tribunal judges, HMRC has been unrelenting in its pursuit of contractors, and is challenging each of its recent tribunal defeats via the Upper Tribunal (UT). Though unfortunately costly for the contractors involved, Chaplin highlights that there is likely positive news pending for the contract sector:

“Legal precedent is set at UT, where we would expect to see the law clarified in line with what judges have previously stated. When this happens, it will be proven beyond doubt that the choice by HMRC’s IR35 team to deliberately omit MOO from CEST is misaligned with the law, rendering the tool unfit for purpose while proving conclusively that it doesn’t adhere to the Off-Payroll legislation’s reasonable care requirement.”

Whereas the repercussions for HMRC wouldn’t be entirely clear from the offset, tax barrister Alexander Wilson of Invicta Chambers believes there would be cause for concern for NHS Trusts and other contractor clients that have adopted the taxman’s approach to Off-Payroll compliance:

“The law around reasonable care is well-developed and it’s clear that the courts will look at the decision-maker’s circumstances in deciding what would amount to ‘reasonable care’. The resources available to a medium or large-sized business are such that I do not think the courts will be very forgiving.”

Wilson adds: “For such clients, employment status should be assessed professionally, by someone with a good understanding of the law. Any person in that position ought to recognise that CEST ignores MOO and, accordingly cannot be relied upon to provide a determination to the required standard of care.”

Chaplin concludes: “The taxman is tasked with educating 60,000 businesses and 20,000 agencies by 6 April on the nuances of case law, which HMRC itself appears not to understand. We are now in a ludicrous situation where businesses are losing their valuable contingent talent because they are using CEST and incorrectly misclassifying contractors as ‘deemed employees’.

“This inevitably causes contractors to jump ship and seek work elsewhere. HMRC is responsible for killing the freelance sector and has helped bring the NHS to its knees. Meanwhile, Conservative MPs appear to be standing idly by, doing nothing.

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