

Contracting bodies urged to support fight against public sector IR35 reforms

Contracting bodies have been issued a call-to-arms to get involved in the upcoming summer consultation on [public sector IR35 reforms](#). Experts warn that the 'non-starter' regime from the Government must be shut down before it results in real damage to all those involved.

This comes after an appearance by representatives from HMRC and the Treasury at the [Freelancer and Contractor Service Association's \(FCSA\) Compliance Seminar](#) served to compound mounting fears that public sector changes will simply act as a test run before a mass roll out into the private sector.

"With regards to the public sector [IR35](#) changes, I'm worried," admits Capita head of employment taxes Stuart Farrow-Smith. "I think when it comes to consultation we should go into it anticipating that it will be extended to the private sector. I believe it's a matter of when, not if."

"It is going to take a huge amount of lobbying by the industry once the consultation begins to prevent damage being done first to the public sector and then the private sector," adds ContractorCalculator CEO [Dave Chaplin](#).

What changes could we see in the public sector?

The Chancellor announced in the Budget 2016 that the engaging public sector bodies or agencies will assume responsibility for determining a contractor's IR35 status from the 2017/18 tax year.

Further HMRC guidance [posed more questions than answers](#) for contractors. Numerous oversights were made, whilst HMRC optimistically vowed to develop a 'simple' online tool, accompanied by objective online tests, to ease the compliance burden on the public sector.

When asked as to how this would work in practice, representatives from HMRC and the Treasury indicated that the public sector body which engages with the contractor will be responsible for deducting Pay As You Earn (PAYE) from a contractor's pay via Real Time Information (RTI).

RTI process 'convoluted'

However, after representatives failed to convincingly address concerns from contracting stakeholders regarding the new measures, experts identified a raft of potential complications.

"It's all a bit convoluted to be operating PAYE through RTI on an individual when you have a contract with their company, not them personally," notes Farrow-Smith. "It's going to send a whole load of mixed messages to credit a contractor's personal tax against their company's tax liability."

Issuing PAYE tax deductions via RTI could also lead to further costs for contractor clients as well as the contractors. With the responsibility to make deductions resting with public sector bodies, businesses who agree to pay a contractor a certain rate before their IR35 status is determined would have to part with more money to account for employer's National Insurance Contributions (NICs), should they be deemed within IR35.

Further questions, but few answers from HMRC

Further questions arise concerning agency fees and where they are likely to be sourced from if a contractor is forced onto PAYE after agreeing to a contract. HMRC was also asked whether a contractor would be liable for back payments if their IR35 status changed after beginning a contract.

As was the response to many questions, representatives indicated that HMRC would be looking to find the answer during the consultation which will take place this summer. Whilst it was suggested that HMRC's IR35 tool would be readily available for contractors to use during contract negotiations, no conclusion was drawn as to how frequently a contractor would have to check their status.

"To have a process whereby IR35 status is decided after an engagement, and then to somehow unwind the position and put RTI in place raises all sorts of issues," comments Chaplin.

"There is a legally binding contract in place. Even if it includes a short termination clause, a client cannot force a contractor to carry on working under different contract conditions to when they started. A renegotiation would certainly be required."

Impact on public sector contractors

There are several perceived knock-on effects that these measures look likely to have on the contracting sector. As ContractorCalculator has previously pointed out, contractor rates for roles where IR35 is presumed to apply [are likely to rise](#), eating into public sector spending and potentially resulting in no ultimate gain for the Exchequer.

Alternatively, as Ernst & Young executive director John Chaplin suggests, a migration away from limited company arrangements could occur, as the risk

associated with engaging with a limited company contractor could act as a deterrent for clients:

"Contractors may instead choose to engage directly as individuals through self-employed models. The argument that you are self-employed could feasibly be easier than proving to an as yet to be seen online tool that you aren't caught by IR35."

Uncertainty likely to cause contention

An increase in the numbers of workers being hired on fixed term contracts also remains a distinct possibility. Meanwhile, HMRC hopes that its online tool will provide enough certainty for public sector engagers to ensure they don't need to be too risk-averse – a suggestion that seems extremely ambitious given the complexities of IR35 legislation.

HMRC's acknowledgement within its technical briefing that the outcome determined by its IR35 tool and online tests wouldn't be able to act as more than guidance looks to prove another source of contention.

So far, there has been no mention of an appeals process. Perceptions of a contractor's status are often likely to differ between contractor and client. In which case, the courts would appear to be the likely destination. Even then, it raises further questions as to whether and how the contractor is expected to continue engaging with the client whilst a decision regarding their employment status is being reached.

Contract sector needs to fight the same fight – 17 years on

For Dave Chaplin, the solution is to achieve clarity from the offset: "The best we can hope for is for HMRC to put in place a set of processes for [determining IR35 status](#) prior to the engagement starting, and for the contract role to be advertised as either inside or outside accordingly.

"Government bodies should implement their own procedures for deciding how best to hire someone – whether it be self-employed, limited or a fixed term employment contract – and then engage that person."

This appears to be a sound solution but more can be done in the immediate future to ensure that it doesn't reach this stage. Given the mounting list of complications thrown up by the Government proposals, contracting bodies are implored to have their say in order to help shut down this regime.

As Chaplin highlights, the sector faces the same potential fate as it did 17 years ago, when the Government first attempted to issue the engager with the responsibility for determining contractor status:

"Those who get a chance to respond to the consultation, please do. IR35 rules were changed to how they currently stand in 1999 because of fierce lobbying from the business sector. The same fight needs to be fought again, 17 years later."

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