Off-Payroll: Firms expecting clear guidance let down by HMRC

HMRC's latest guidance document, April 2020 changes to off-payroll working for clients, is misleading, poorly written and riddled with gaps and inaccuracies – in one case it even recommends illegal behaviour. As a result, clients who want to stay compliant and implement the rules correctly have been badly let down by the taxman and will require expert help.

Some of the document's basic flaws include:

> - Merging and confusing the new Off-Payroll legislation (Chapter 10 of ITEPA) with IR35 (Intermediaries Legislation, Chapter 8 of ITEPA)
> - Unlawfully implying that secondary class 1 NICs can be deducted from the deemed direct payment contrary to existing tax law, (SSCBA Schedule 1, Par 3(2))
> - Omitting basic definitions, such as what does 'reasonable care' or 'reasons for determination' mean.

"Once again HMRC has created rules so complex even its own people don't understand them," highlights ContractorCalculator CEO Dave Chaplin. "We all depend on the taxman to help us pay the correct amount of tax. And clients simply can't implement the Off-payroll rules correctly using this guidance."

Who should apply the Off-payroll rules and when?

Even fundamental questions, such as who should use the rules and when clients must start using them, are poorly answered. In the overview, HMRC correctly states that the rules will change from 6 April 2020, but fails to mention that contractors with contracts spanning the implementation date may require assessment long before then.

The guidance informs public sector clients that they have additional responsibilities under the rules from April 2020, but not specifically what they are. This includes creating a Status Determination Statement (SDS), but does not explain what this is or link to further guidance.

The section on who the rules apply to is overly complex. It leaves owner-managers of mid-sized and smaller firms unsure of whether they need to apply the rules to their contractors, or not. It also uses the calendar year, not the tax year or company year, to determine at which point an increase in size makes a business eligible, creating further ambiguity.

How do clients implement the Off-payroll rules?

The guidance highlights that clients are responsible for “deciding the employment status of workers”. This, according to Chaplin, is an interesting choice of language: “The purpose of the rules is to assess and determine tax status, not decide employment status.

“Surely if the object was employment status, and the contractor satisfies the tests of employment, they should get employment rights alongside paying tax like an employee?”

There are ambiguities in the section that explains what you need to do as a client, as HMRC instructs clients to “make sure you keep detailed records of your employment status determinations, including the reasons for the determination and fees paid”.

“This is indeed correct,” adds Chaplin, “as detailed records by all parties are essential for demonstrating to HMRC why the rules have been applied and the evidence supporting a status assessment by the client, but fees paid to whom? This is confusing.”

Then the guidance suddenly changes audience. Where previously the guidance has been speaking to clients, here it confusingly reads like it is partly talking to contractors then in the same sentence reverting back to speaking to the client:

Small-sized clients in the private sector will not have to decide the employment status of their workers. This means that you will not receive a determination from them. This will remain the responsibility of the worker’s intermediary.

What does ‘reasonable care’ mean?

Anyone new to the Off-payroll rules and IR35 who is reading the guidance to better understand their responsibilities could be completely confused by the section titled *Taking reasonable care when making a determination*.

“HMRC explains that clients must take reasonable care when determining the employment status of their contractors and threatens that clients become liable for tax and National Insurance Contributions (NICs) if they don’t,” explains Chaplin.

“But it does not actually define reasonable care anywhere in the guidance, nor is there a link to additional support available on HMRC’s website. This is unhelpful, to say the least.

“The taxman is saying ‘you must take this action or we hold you liable if you don’t do it properly’ but does not explain how to take the action properly. How are clients expected to fulfil their obligations if the enforcer of this legislation doesn’t tell them what they are?”

Then, in the next section about who to tell, the guidance says that the status determination and the reasons behind it needs to be communicated “From 6 April 2020”. That’s too late for contractors who either signed up to a new contract before that date, or who have contracts that predate the deadline and are completed after it.

Confusing advice for agencies and contractors

The guidance for intermediaries, or contractors, is equally confusing, not least because it’s title is “April 2020 changes to off-payroll working for intermediaries”, which does not at-a-glance suggest it has anything to do with contractors or workers. It then conflates the original IR35 legislation (chapter 8) with the new Off-payroll rules legislation (chapter 10), even though the tax treatment is different.

Further errors creep in with statements such as: “If the off-payroll working rules apply, your worker’s fees will be subject to tax and National Insurance contributions.” This is disingenuous and misleading, as the client must pay employment taxes with the contractor’s fees subject to class 1 NICs.

And throughout it talks about “paying your worker”, which sounds like it should refer to the client or agency, not the contractor paying themselves.

The final section of the guidance, Fee-payer responsibilities under the off-payroll working rules, could apply to either clients or agencies. It isn’t until section 3 of the guidance that it actually explains how to check if this entire section of guidance is even relevant.

This section leads with “In most cases the organisation paying a worker’s intermediary will be the fee-payer”, which in reality means in most cases the agency, but it does not actually say the words ‘agency’, ‘employment business’, ‘recruiter’ or anything that hints that this section is mainly for agencies and clients contracting direct.

Off-payroll rules compliance needs expert advice

The above are just some of the examples of how HMRC’s guidance for clients is not fit-for-purpose. It is clear agencies and contractors are left similarly confused, assuming of course they can work out what guidance is actually relevant to them

As a result, Chaplin urges clients, agencies and contractors to seek expert advice to ensure they don’t end up assuming liability for tax and

NICs: “The cost of making a mistake, in terms of tax liability and penalties, is steep. Investing in the services of an IR35 and Off-payroll rules expert, or using a solution such as IR35 Shield, is solid investment.”

Chaplin concludes: “Taxpayers look to HMRC for guidance on how to implement tax legislation correctly and so they are complaint and pay the correct amount of tax. This guidance does not help clients, agencies and contractors to do this.”

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