

HMRC IR35 tool creates farce as contractors now move from La La Land to Limbo Land



Contractors relying on HMRC's Employment Status Service (ESS) tool to determine their IR35 status risk are being handed wrong results, or are given an unhelpful 'unknown' response, leaving them in a state of limbo with no clue on status.

According to ContractorCalculator CEO Dave Chaplin, the live public version of the tool that HMRC released on 2 March 2017 is still failing to cover key areas of employment case law and is simply not fit-for-purpose:

"The tool states that 'HMRC will stand by the result given unless a compliance check finds the information provided isn't accurate', which is no guarantee at all, because they just have to say 'you are wrong' and it doesn't count for anything!

"Not only does it not mean anything, but the tool gives a significant number of contractors an "unknown" status. Claiming they will stand by this is hardly pioneering work and does not provide the certainty to the market which was their original goal."

How does the tool perform using real cases?

ContractorCalculator put each of the 21 historical IR35 court cases through HMRC's tool and the conclusions are:

- For 27% of the court cases, HMRC simply says "Unknown"
- 10% of cases are being given a pass despite a judge failing the case in court.

Further testing of common scenarios also revealed some surprising results:

- Contractors who are significantly controlled, or moved about from task to task without it being in their contract, can pass the test, contrary to what the case law says. There is no case law to support this. "Tail-end Charlies" should be classic fails
- A significant number of project based contractors who should easily pass the test, are given the status "unknown".

Whilst it appears that the tool is now hooked up to an analysis engine it is still failing to cover key areas of employment case law and is simply not fit-for-purpose.

Contractors inside IR35 are being passed by HMRC

“It gets worse,” continues Chaplin. “The tool now passes some contractors who should clearly fail. For HMRC to stand by the outcome, is not only misrepresentation, but is effectively trying to override the law of the land. Does HMRC have these powers?”

Having reviewed the publicly available tool, Chaplin notes that the substitution section is still inaccurate and appears to imply, contrary to case law, that interviewing someone means the substitution does not count. This is factually incorrect, as paragraph 84 of the latest Pimlico Plumbers judgement explains.

“Overall, the questions are still poorly constructed and there is very little included regarding mutuality of obligation (MOO), one of the ‘irreducible minimums’ needed to prove an employment relationship exists.”

Contractors and clients can't rely on HMRC's ESS tool

With only a few weeks to go before the IR35 reforms come into force, HMRC's tool is nowhere near fit-for-purpose. The taxman could be handing out employment status decisions to contractors, agencies and public sector hirers that are wrong.

Or worse, with an ‘unknown’ result, neither contractors nor clients have any kind of certainty. For an organisation to assess its tax risk on such an uncertain basis presents a huge risk to projects and could ultimately cost taxpayers a fortune.

“I would urge public sector bodies to consider alternative testing to establish a contractor's correct IR35 status such as ir35testing.co.uk and agencies should have their standard contracts reviewed by qualified lawyers,” highlights Chaplin.

“We have repeatedly warned HMRC that a robust online test could not be developed within such a short timeframe.”

Chaplin concludes: “We invested seven years into the development of our IR35 test which, for the record, accurately predicts the correct result of all 21 court cases. The public sector is in complete chaos and it's about to get worse as contractors are handed either the wrong result or no result at all.”

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