

## HMRC deliberately omitted key IR35 case law from CEST tool, reveals NHS webinar



HMRC admits that it assumes mutuality of obligation (MOO) is present in every public sector contractor engagement, and deliberately omitted this key test of employment from its Check Employment Status for Tax (CEST) tool on this basis.

This glaring omission was one of several alarming revelations to NHS Trustees during the delivery of an [HMRC webinar on implementing IR35 in the NHS](#). This means thousands of contractors who are assessed using CEST risk being forced into false employment.

- HMRC states MOO should be assumed present in all public sector engagements
- As a result, CEST fails to align with the case law underpinning IR35
- HMRC inaccurately claims all doctors and nurses are likely to be caught by IR35
- Taxman instructions are encouraging unlawful blanket assessments in the sector
- Contrived IR35 assessments are driving locum staff away from the NHS

"We've known all along that CEST doesn't align with case law, and HMRC has publicly denied this," highlights ContractorCalculator CEO Dave Chaplin. "We now have evidence of its own head of policy admitting that the tool makes assumptions that are factually incorrect. This was an actual design decision. The taxman knew this, and yet HMRC has claimed that the tool aligns with existing case law, when in fact it clearly doesn't."

### Omission of MOO means CEST not fit for purpose

During the webinar ([access full copy of transcript here](#) - or [view this download copy](#)), when asked of an instance where MOO wouldn't be present during a question and answer session, HMRC's policy advisor on IR35 Mark Frampton responded: "It would rarely, if ever be the case in public sector hiring. That is why we did not put questions into the tool about it."

The claim directly contradicts IR35 legislation and the employment case law that underpins it, which requires that each of the three key tests of employment are considered when evaluating an individual's status.

As Michael Paulin, a barrister for [One Crown Office Row](#), explains, the omission of the mutuality of obligation test could lead to results that are legally inaccurate and incorrect:

“According to the classic description of what constitutes an employment contract, such as that set out in [Ready Mix Concrete](#), the concept of there being a mutuality of obligation between the parties is central to the question of the individual’s employment status.

“It stands to reason that if such important elements of case law are omitted from any purported assessment, then there is a real risk that the results of such an assessment may not correspond with the true legal reality.”

Martyn Valentine of [The Law Place](#), an IR35 legal expert adds “This is further proof that the CEST tool lacks credibility and undermines the entire legal basis for the test. This confirms what is widely suspected - HMRC are not competent to properly assess IR35 status. There should be a disclaimer given to any user of the tool saying that it has no basis in law.”

## **Why does HMRC assume MOO is present in the public sector?**

MOO is about a sustained obligation for an employee to provide regular work for a worker, and for the worker to work those hours and accept the work offered. For example, once a doctor finishes a three-month contract, they are under no obligation to carry on working, neither is the Trust required to continue paying them or offer them more work. Further, ongoing mutuality of obligation doesn’t exist where the Trust can terminate the engagement immediately.

However, as head of legal at the Locum Doctor’s Union (LDU) and [Independent Health Professionals Association](#) (IHPA) Stephen Mhiribidi notes, the instructions HMRC is providing NHS Trusts are in stark contrast with this:

“HMRC is telling Trusts that a doctor is subject to MOO because they work an hourly rate and are expected to turn up for work in the morning. If we assume that this is how MOO works, then yes, many locum NHS staff are subject to MOO. But it isn’t.

“There will be many NHS engagements where MOO does exist and many where it doesn’t. In many cases the absence of MOO will be a defining factor causing a contract to be outside of IR35, which I’m sure is the reason why HMRC omitted this from its tool.”

Chaplin adds that whilst many expected HMRC to set the pass bar too high when conducting IR35 assessments via CEST, to build in an assumption that all contractors would automatically fail one of the key tests of employment is staggering:

“To then encourage public sector bodies to use this is acting ultra vires and encouraging false employment, forcing tax payers to pay taxes they shouldn’t. So much for ‘making the tax system fair’. HMRC is trying to override the law and rig the system in its own favour.”

## **HMRC tells NHS ‘all locum staff are caught by IR35’**

Though HMRC initially instructed that its tool was purely advisory, there appears to be evidence suggesting that it is attempting to enforce application of CEST in the public sector. HMRC’s Jim Harra recently stated that [the taxman will only recognise assessments conducted via CEST](#). Mhiribidi says the pressure upon NHS Trusts to use CEST and assess locum staff as inside IR35 is even greater.

“NHS Trusts have told us that HMRC has instructed them that all locum staff are caught by IR35, and that not using CEST to assess contractors won’t amount to ‘reasonable care’ being taken. Trusts see no option but to use the tool so that they have a body of evidence to protect themselves from HMRC.

“Locum staff are asking why they should complete CEST if they know they are going to be taxed as an employee. We’ve heard of several instances where locum doctors and nurses have completed CEST and received an ‘outside IR35’ assessment, only to have the NHS Trust re-take the test on their behalf, filling in incorrect information contributing to an ‘inside IR35’ ruling.”

## **CEST standoff stretches NHS services**

Not only is CEST geared towards providing an inaccurate IR35 judgment, but the taxman’s instructions are encouraging a passive approach to IR35 compliance in the public sector that contradicts case law. Since the webinar was delivered in late September, Mhiribidi has received a letter from an NHS Trust claiming that HMRC advised that blanket assessments are acceptable.

Meanwhile, in addition to liability for back taxes, Mhiribidi says HMRC has made it explicitly clear that any Trust that finds a locum outside IR35 will be subject to further “Treasury fines, reputational damage and administrative problems”, in the event that HMRC conducts an audit returning an alternative result.

“As a result of this, we’ve had numerous Trusts refuse outside IR35 contracts for the simple fact that they would rather take their chances in court with anybody other than HMRC,” he adds.

All of these factors combined are making it near impossible for locum staff to secure outside IR35 contracts, which is in-turn draining the NHS of workers with critical skills.

“Two members of our committee haven’t worked since the reforms began in April because they can’t get a fair assessment, and those who have been able to have left for the private sector.”

He concludes: “I know of just one locum doctor who has agreed an outside IR35 contract with the NHS, but he won’t share details of his assessment with us because the Trust is worried about ramifications from HMRC.”

Published: Tuesday, October 31, 2017

© 2017 All rights reserved. *Reproduction in whole or in part without permission is prohibited. Please see our [copyright notice](#).*

*100,000+ monthly unique visitors*

© Copyright 2017 Byte-Vision Limited UK. All rights reserved [Copyright notice](#)