HMRC new Paper on Mutuality of Obligation incorrectly defines MOO, invalidating CEST

HMRC has explicitly demonstrated its ignorance of the very employment law it is supposed to enforce as it finally publishes the long-awaited position Paper on Mutuality of Obligation (MOO) for the IR35 Forum.

HMRC’s official position is clearly one of denial in not admitting leaving MOO out of CEST is wrong, and further invalidates CEST as a status tool. As a result, CEST, which is widely used in the public sector, is delivering false status assessments and overriding the law for contractors.

The taxman claims that “a person using CEST will have already established MOO, which is necessary for a contract to exist” and “where contractual obligations are conditional upon an event mutuality of obligation will exist”.

“This is garbled nonsense from HMRC and entirely misconstrues the law,” highlights ContractorCalculator CEO, Dave Chaplin. “Judges have consistently told the taxman that simply having a contract is not sufficient MOO to be considered a pointer towards an employment relationship. HMRC has resorted to blatant lying to cover up its failings.

“Does this now mean all contractors need to examine MOO, see if it exists and, if not, then CEST and the off-payroll rules do not apply?”

MOO is not automatic just because a contract exists

Chaplin, whose persistent Freedom of Information Requests prompted the taxman to accelerate publication of the document, adds: “HMRC has opted to stand by a legally incorrect position inconsistent with the law, with tribunal judges’ decisions and even one of its own barristers disagreeing with the position, and telling HMRC it is wrong.

“The only people HMRC is kidding is itself. The entire tax and employment law community knows it is wrong and are holding HMRC to account on this.”

Chaplin is far from alone in his criticism of this latest muddled thinking from HMRC. Freelancer & Contractor Services Association chief executive, Julia Kermode told ContractorCalculator:

“The FCSA does not agree with HMRC’s view that anyone using its online tool will have already established mutuality of obligation by virtue of a contract being in existence. We believe that this is a significant omission that ignores accepted case law, and until this position is revised the tool is simply not fit for purpose.”

HMRC does not understand the law it enforces
Frighteningly, HMRC’s paper demonstrates a terrifying lack of basic legal knowledge, both of contract and employment law, and where the two are different. Terrifying because this is the government agency supposed to be enforcing tax legislation – IR35 – which is underpinned by established employment law.

“HMRC claims that ‘the fact that a contract may be terminated does not affect mutuality of obligation during the contract, even if it may be terminated without notice’,” continues Chaplin. “This claim demonstrates breathtaking ignorance on HMRC’s part – this is simply not true.”

HMRC adds: “the fact that the duration of such a contract is uncertain is irrelevant to mutuality of obligation, whilst the contract continues,” to which Chaplin responds: “The very fact that there is no obligation to provide work and no obligation to accept it – that is to say, no MOO – means precisely that the duration is uncertain. HMRC clearly fails to understand the basics here.”

**HMRC acting outside of the law**

HMRC does attempt to validate its position on MOO by citing past cases: “Where a worker is engaged on an assignment by assignment basis this may be a relevant factor but will not be determinative. This was confirmed in Arada v Windle & Another (2016).”

But, as Chaplin notes, HMRC is cherry picking its legal arguments and totally ignoring Usetech Ltd v Young, which is considered the authority on MOO and been cited in recent cases.

Chaplin concludes: “HMRC had admitted they have no evidence to prove CEST is accurate and independent testing shows it does not work properly. As a result, HMRC is abusing its position and is overriding the courts and the law. The taxman is, in fact, acting outside of the law. The paper changes none of this.”

Published: Thursday, July 5, 2018

© 2018 All rights reserved. Reproduction in whole or in part without permission is prohibited. Please see our copyright notice.

200,000+ monthly unique visitors

© Copyright 2018 Byte-Vision Limited UK. All rights reserved Copyright notice