

HMRC still wrongly claiming all contractors caught by MOO, reveals IR35 Forum minutes



HMRC still maintains that all contractors are subject to a mutuality of obligation (MOO), but has again postponed disclosing the reasoning behind this assumption, the [IR35 Forum minutes for February 2018](#) reveal.

HMRC had previously stated in response to a Freedom of Information (FOI) request from ContractorCalculator that it would release its arguments regarding MOO alongside publication of the Forum minutes.

Instead, the taxman has issued a technical paper to Forum members in response to concerns over the Check Employment Status for Tax (CEST) tool and its omission of MOO, and is now awaiting feedback by the end of March.

Though HMRC has prompted a discourse over MOO, comments from chief executive of the Freelancer and Contractor Services Association (FCSA) Julia Kermode suggest its attempt to find some common ground with Forum members will be in vain:

“The FCSA does not agree with HMRC’s view that anyone using CEST will have already established MOO 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.”

Forum minutes reinforce flawed stance on MOO

Providing an overview of the technical paper, HMRC reasserted that both itself and CEST assume MOO to be present in every contractor engagement, stating:

‘Where work is provided and remuneration is paid HMRC will assume that there is mutuality of obligation and that a contract exists.’

“Without proper inspection of MOO, CEST is not only redundant, but grossly misleading,” says ContractorCalculator CEO Dave Chaplin. “What is even more worrying is that HMRC is promoting the use of a tool which doesn’t align with the law, and consequently gives incorrect decisions.”

‘Taxman in a precarious position’

Forum members had inundated HMRC with comments for consideration within the paper, including the risk that CEST’s approach risks challengers against contractor engagers in the Employment Appeals Tribunal. But, for Chaplin, the risk to HMRC is far greater:

“HMRC is in a very precarious position. At some point or another, it will have to concede that, by the letter of the law, MOO isn’t present in every contractor engagement. More than 400,000 assessments have so far been carried out by CEST. Each and every one of these individuals will require re-testing if CEST is amended to accommodate MOO.

“This isn’t the equivalent of Microsoft releasing a software bug. People’s livelihoods depend on this.” He adds: “HMRC needs to issue a product recall, but is unable to do so because it has no records of who has taken the test. Things are likely to get very messy for HMRC, which risks innumerable legal challenges from taxpayers who have been deceived by CEST.”

HMRC continues to prolong MOO saga

The taxman’s postponement is the latest event in a saga which began in September 2017 when a [policy adviser informed NHS Trustees](#) that CEST assumes MOO to be present in every public sector engagement.

Chris Leslie, former tax inspector and director of [Tax Networks Ltd](#) says: “In *Nethermere (St Neots) Ltd v Gardiner and Taverna* the concept of mutuality of obligation was explored; identifying an irreducible minimum of mutual obligation is essential and the obligations between the parties (the arrangements) need to be established when considering a regular course of dealing between the parties that may result in a contract of employment arising. A fixed-term contract may appear to be in line with MOO, but if the worker has discretion over his hours then that conflicts with HMRC’s narrow interpretation regarding the MOO test.”

HMRC stuck to its guns despite having the notion spurned by barristers, and promised to publish legal arguments supporting its stance in January 2018. After failing to deliver, the taxman responded to an FOI request from ContractorCalculator in February, stating it would publish its arguments alongside the February Forum minutes.

In [October 2017](#), barrister for [One Crown Office Row](#) Michael Paulin explained: “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.”

“It’s little surprise that HMRC has been stonewalling our requests and delaying the inevitable,” concludes Chaplin. “Barristers and QC’s have rebuffed CEST. What more proof that CEST is not fit for purpose does the taxman need?”

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