

IR35: New judicial review against NHSI due to incorrect IR35 assessments



FOR THE second time this year, the unions responsible for locum doctors and healthcare workers are going to court to protect their members from overtly unfair treatment and financial damage, and stop clinical staff losing 30-50% of their pay, due to the unlawful blanket application of the new IR35 tax rules.

The action by the Locum Doctors' Union (LDU) and the Healthcare Professionals Union (HPU), both members of Independent Health Professionals Association (IHPA) follows the National Health Service improvement (NHSI)'s U-turn earlier this year on its unlawful decision to place all healthcare contractors within the IR35, irrespective of their personal circumstances.

The overturning of the unfair implementation of the off-payroll (IR35) legislation in May 2017 meant NHS Trusts were required to carry out case-by-case assessments for each locum worker to decide whether or not each individual's circumstances mean they should fall within IR35.

However, members of the LDU and HPU allege that NHSI is continuing to encourage Trusts to automatically find contracted NHS workers to be within the tax rule.

The unions also believe that unqualified administrative staff at NHS Trusts are carrying out the assessments without supervision, relevant training and knowledge of the up to date guidance from NHSI - and as such many locums are facing losing 30-50% of their income as a result of being automatically found within IR35.

The news comes despite the fact that guidance published by the LDU and HPU was distributed to NHS Trusts and 2,500 healthcare professionals around the country on how to carry out the assessments correctly and fairly.

The LDU and HPU have instructed Mr Alex Peebles, a solicitor at Duncan Lewis, to proceed with an application for a judicial review.

Dr Benedict Itsuokor, president of the Locum Doctors Union, said: "The NHSI seem to have forgotten their obligations as per their representations in the pre-action protocol process. Following the u-turn in May, the feeling was that the fair and lawful implementation of IR35 within the NHS had been resolved amicably to all stakeholders' satisfaction - NHSI was to recommend all Trusts consider each individuals workers' status on a case-by-case basis, rather than blindly ruling all were within IR35. However, our members are reporting instances of IR35 being applied without the necessary assessments of individuals workers' status.

"In some cases, it seems to be more identifying the individual circumstances of those who are outside of IR35, rather than fairly considering everyone. Within certain Trusts, we are hearing that the only locum workers in the entire workforce who have so far been deemed to be found outside of IR35 are emergency staff such as out of hours GPs, whom the Trusts are required to employ and whom the NHS is extremely reliant on.

Itsuokor continues: "This is extremely disappointing, and leaves us with no choice but to proceed to judicial review."

Dave Chaplin, CEO and founder of ContractorCalculator says, "We have been speaking to consultants who are still experiencing problems whereby the NHS are ruling them as caught by IR35 when clearly they should be outside. One sticking point appears to be the HMRC CEST tool, which is incorrectly stating these consultants are caught by IR35, yet independent assessment by lawyers are saying otherwise – yet, the NHS says they have to use the HMRC tool."

"We have also been hearing about consultants who, when agreeing to a contract, and then asking for an IR35 assessment, are then told the contract is no longer available."

Chaplin continues: "The problem of misclassification is two-fold. If consultants who are genuinely not caught are pushed inside IR35 then the NHS opens themselves up to the risk of an employment tribunal. If they agree to someone being outside IR35 and get it wrong, then they could be hit with significant extra taxes and penalties down the line for getting it wrong."

Those interested in finding out more information on the legal action, new guidelines and joining the Locum Doctors' Union can visit www.locumdoctorsunion.uk.

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