

Leaked HMRC webinar suggests taxman has misled the NHS on IR35



IR35

Has HMRC misled the NHS on IR35?

Leaked webinar raises serious questions

Tax experts and lawyers have called into question HMRC's grasp of the laws surrounding IR35 and expressed fear that the taxman has misled the public sector on implementing the Off-Payroll legislation, following the exposure of a controversial webinar delivered to the NHS.

'Working through intermediaries: implementing IR35 guidance in the NHS' was delivered by HMRC's policy advisor on IR35, Mark Frampton, to NHS Improvement in September 2017.

Leaked to ContractorCalculator by the [Independent Health Professionals Association](#) (IHPA), the hour-long webinar may help explain the reportedly huge number of blanket inside IR35 assessments since the Off-Payroll tax took effect, with experts slamming HMRC's guidance as 'misleading' and 'inaccurate'.

"Frampton's comments on employment status case law is a matter of concern," warns Martyn Valentine, director of employment status specialists [The Law Place](#). "The guidance issued to Trustees appears geared toward finding almost all NHS locums within scope of IR35."

"The consequence of this guidance to NHS Trusts has already resulted in a reduction in locums prepared to work in hospitals, leading to rota gaps not being filled, and a worsening of the winter crisis and endangering patient care," adds IHPA secretary-general, Dr Iain Campbell.

Stephen Mhiribidi, head of legal at the IHPA, shares those concerns: "Many locums are much slower to take shifts that entail significant travel, subsistence and accommodation costs, and rota gaps are increasing on a daily basis. Indeed, some trusts have found themselves in the red on the risk register as a direct consequence of this."

Is HMRC inciting blanket IR35 assessments?

Speaking during the webinar, Frampton commented: "If you look at the terms and conditions, and the way that an individual works, and they work in broadly the same way as an employee, then they should be taxed broadly in the same way as employees."

"Frampton is wrong here, and this is a dangerous statement, both for locums and the NHS itself," says Valentine, who warns that HMRC's guidance could be misconstrued by NHS Trusts as a licence to apply the rules on a uniform basis, forcing many genuine contractors to shun working for the NHS, or else risk suffering a considerable reduction in income.

"The legislation actually requires that IR35 be assessed on a case-by-case basis, with multiple factors outside of the contractual terms taken into account."

Assessing employment status under the Off-Payroll legislation requires that hirers take 'reasonable care' in assessing their contractors, a concept which is still unclear to many. However, Frampton provided HMRC's interpretation during the webinar:

“Reasonable care can be exercised by saying: ‘Well I know what the standard contractual terms are for all of my people and they would meet the criteria’. You don’t have to look at every single case individually if you know that that case is like other cases.”

This view is in stark contrast to the legal necessities for reasonable care, according to Valentine: “Reasonable care requires that an assessor considers all distinguishing factors for each engagement, which HMRC appears to be actively discouraging. In the process, it’s not unreasonable to suggest that the taxman’s comments could be construed as inciting blanket assessments and non-compliance with its own rules.”

Confusion over control proves taxman’s Achilles’ heel

Frampton instructed Trustees that their locums would routinely find themselves subject to the right of supervision, direction or control, encouraging them to ignore arguments raised by contractors that sufficient control does not apply to their engagement.

Attempting to demonstrate this, Frampton cited locums’ requirement to abide by the same regulations and standards of authority as employees, and obliged to “perform duties in a competent, orderly and efficient manner”. In doing so, Valentine argues that Frampton has once again exposed HMRC’s Achilles’ heel:

“By adhering to these regulations, locums are carrying out their obligations in law. These standards are not within the remit of the NHS Trust. They are something external in statute and therefore cannot be deemed to imply a master-servant relationship akin to employment.”

Dr Campbell agrees: “HMRC does not understand control in the context of health care. I am a doctor, and the regulatory environment is such that I am compelled to exercise my clinical judgment in the best interests of my patients and am not bound by any protocols set by the hospital. Our professional codes of conduct mean we must act as autonomous practitioners and we are simply not heavily controlled.”

“Mistaking a clinician’s obligation to comply with statutory standards for the existence of a right of control in employment law is a basic error that HMRC has shown itself to be prone to in recent years,” continues Valentine, speaking with reference to a recent high-profile tribunal cases involving [HMRC and the Professional Game Match Officials Ltd \(PGMOL\)](#).

Just last month, it emerged that PGMOL had defeated HMRC in court after the taxman had incorrectly challenged the self-employed status of PGMOL’s referees. The tribunal agreed that the regulatory control to which referees were subject didn’t constitute there being a contract of service in place, as HMRC had erroneously claimed.

“It’s little wonder that HMRC has lost 90% of employment tribunal cases over the past decade when you consider that it is still unable to grasp some of the fundamental aspects of case law,” adds ContractorCalculator CEO, Dave Chaplin.

Trustees told locums need assistant for substitution

During the webinar, NHS Trustees were advised that, in order to pass the IR35 substitution test, a contractor would need to have an assistant, should they be unable to complete the work themselves.

Frampton attempted to vindicate this claim by alluding to the ‘[Ready Mixed Concrete](#)’ employment status case, wherein a number of workers who had used substitutes were found to be self-employed.

“HMRC has clearly only glossed over the Ready Mixed Concrete case, which is largely concerned with the right of control, not whether a substitution has been exercised,” explains Valentine. “As such, this statement fails to reflect case law accurately and is potentially misleading.

“In reality, you only need a contractually enforceable right to source an equivalently skilled person to carry out the work. This position was reinforced by the Court of Appeal judgement in the Pimlico Plumbers case. But by portraying substitution as being almost outside the realms of possibility, Frampton has again risked inciting blanket assessments.”

Advice on MOO shows taxman needs professional help

The same flawed HMRC interpretation of mutuality of obligation (MOO) that has been chastised by experts and [rejected by IR35 Forum members](#) was relayed to Trustees, reiterating the taxman’s insistence that exchanging labour for payment constitutes its presence.

“If an employment status lawyer were to provide similar advice to this on MOO and cause him/her client to suffer loss, they could be considered negligent,” notes Valentine, who highlights HMRC’s failure to distinguish between contractual MOO and employment MOO.

“Frampton’s comments would mean that any professional providing services to a client in consideration for payment would be subject to MOO and potentially employed. This is a ludicrous misinterpretation of the law, and I find it perplexing that the head of HMRC’s IR35 unit would provide such delusive guidance on the legislation. If it wasn’t evident enough from its recent tribunal history, it’s clear from this webinar that HMRC requires professional intervention with its approach to providing guidance on matters of employment status law.”

Frampton used this same reasoning to justify the omission of MOO from HMRC's Check Employment Status for Tax (CEST) tool, stating: "That's why it's not in our tool. If you are using our tool, you're already looking at a contract in which people are getting paid."

According to Chris Leslie, former HMRC compliance manager and current director of [Tax Networks Ltd](#), these comments are indicative of a product that is not fit for purpose:

"I worked at HMRC when they built the original employment status indicator (ESI), which CEST replaced. I told them then that ESI was a poor tool, and CEST is certainly no improvement."

What is to blame for HMRC's questionable IR35 guidance?

Chaplin believes that the taxman's failures warrant serious attention from within Government's ranks: "The complexity of some of the issues HMRC has to tackle means that, where mistakes are made, it can unwittingly result in victimising innocent taxpayers."

"It's unacceptable that further practices haven't already been put in place to keep these mistakes from occurring, but given HMRC's track record with IR35, I wouldn't trust the taxman to implement a successful regime. What we need is an independent body responsible for prosecutions, managing appeals and complaints by taxpayers, and ensuring that HMRC operates truthfully and ethically."

Lesley comments: "In my experience assisting with IR35 Reviews I'm increasingly concerned about HMRC Officer's possibly being given powers beyond their ability, and there should be consistent checks and balances in place to ensure guidance given out is not misleading and/or inaccurate."

"In this instance it's quite possible that NHS Trusts following this guidance may have incorrectly classified locums as within the off-payroll rules when in fact they should not apply to them."

While Leslie puts the taxman's misguided messages down to ineptitude, former HMRC inspector and current tax partner at [Dow Schofield Watts](#), Philip Manley, believes the webinar is indicative of a more sinister tax-collecting approach by HMRC:

"Rather than collecting the right amount of tax, HMRC's approach appears to be geared toward collecting as much tax as possible. During my 14-year career at HMRC, I witnessed this first hand through regimes such as Accelerated Payment Notices. And since leaving the Revenue my experiences helping those affected by the retrospective 2019 loan charge leads me to believe HMRC have little regard to tax payers."

"This reformatting of IR35, where hirers are encouraged to force contractors with no means of appeal into employment engagements, is simply the latest in a list of unethical tax practices by HMRC."

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