

## Off-Payroll renegotiations to reduce rates likely to breach law, warns barrister



Clients and recruitment agencies renegotiating diminished contract rates with contractors in response to the Off-Payroll rules are likely to have broken the law, a tax barrister and IR35 expert has warned.

Under the Off-Payroll rules, the 'fee-payer' is liable for employer's National Insurance (NI) (13.8%) and the Apprenticeship Levy (0.5%), on top of payments made to the contractor. Off-Payroll guidance published by HMRC states that fee-payers "are likely to wish to renegotiate the fee with the intermediary to reduce the rate for the job", thus offsetting their employment tax liability by renegotiating reduced rates with contractors, funding the employment costs with the savings.

However, as Alexander Wilson of [Invicta Chambers](#) highlights, clients following the taxman's guidance risk breaching the Social Security Contributions and Benefits Act (SSCBA) 1992:

"HMRC's guidance is dangerously misleading. The SSCBA makes it clear that employer's NI must not be passed onto the worker, whether directly or indirectly. The legislation is intended to be watertight, so it's difficult to envisage any instance where an attempt by an agency to renegotiate a contract to help navigate its employment tax liability would be permissible."

### Contractors to bear employment taxes under HMRC guidance

Rather than clarifying protocol under the Off-Payroll rules, [online guidance published by HMRC](#) has stoked confusion by suggesting that clients and agencies help fund their employer's NI liability by renegotiating contract rates with contractors.

In addition to suggesting fee-payers negotiate with contractors, it adds: *'They [fee payers] cannot lawfully deduct the secondary NICs from a fee that has been agreed, but could, depending on the contractual terms, negotiate a lower fee.'*

The Off-Payroll rules have rightfully relieved 'inside IR35' contractors of the employer's NI liability that they contentiously held under the original IR35 rules. But, HMRC's guidance appears a dubious attempt to encourage fee-payers to negate their liability by making a similar calculation. The assumption being that new rates negotiated will typically be the original rate minus the margin required to account for employment taxes.

### Is HMRC inciting illegal behaviour amongst agencies?

The taxman correctly acknowledges that fee-payers cannot lawfully deduct employer's NI from agreed rates. This is highlighted in the SSCBA, [Schedule 1, Section 3\(2\)\(a\)](#) of which states:

*'No secondary contributor shall be entitled to make, from earnings paid by him, any deduction in respect of his own or any other person's*

*secondary Class 1 contributions.'*

Whether or not an attempted workaround by HMRC, any renegotiation of rates in the taxman's proposed manner places an agency in serious risk of breaching the SSCBA, as Wilson highlights:

"If you read the relevant legislation, you can almost see the draftsman's mind working. The SSCBA is designed to prevent hirers from passing on their employer's NI onto workers by any means, whether directly or indirectly. It's hard to see how the very tight restrictions imposed by the SSCBA won't be breached, where an agency attempts to renegotiate contract rates as a direct response to its employment tax liability."

### **'Remedy unclear' for contractors faced with renegotiated rates**

HMRC's guidance is also difficult to apply in practice. Most contractors will rightly refuse a rate renegotiation that effectively sees them fund employment taxes. However, as Wilson acknowledges, not all contractors will have the luxury of being able to walk away from a contract:

"Once parties have agreed a contract, it is generally the case that the law will protect that contract. Unfortunately, prior to this, there's often an imbalance of negotiating power in these situations and workers are frequently subject to terms that are unfair. Fortunately, the courts in employment cases have demonstrated a willingness to disregard the fundamental principle which would otherwise protect a contract if that imbalance of negotiating power imposes unfair terms on workers.

"Many contractors will have invested a lot of time into making arrangements and, unless they have another job lined up, will be under immense pressure to agree to detrimental terms. HMRC's guidance encourages agencies to abuse their positions to negotiate with the financially vulnerable."

Affected contractors may need to consider other means of recourse, for which Wilson advises seeking expert advice:

"The remedy isn't clear. You might be able to make an employment tribunal claim, for which you would have to be able to prove that you were employed. Or you might be able to make a claim in the county court. It would depend on circumstances. You need to get into the right forum in the first place, so expert advice is essential."

### **Transparency key for clients and agencies**

For clients and agencies, the risks are numerous, but the extent of the problems posed is difficult to predict. In addition to the threat of litigation, attempts to renegotiate rates will inevitably cause conflict with contractors, many of whom will be seeking higher rates to compensate for their own tax increase.

Consequently, clients and agencies can expect to see contractors turn down engagements that have taken time and money to prepare. Where this becomes a common theme, client could risk delays to, and even cancellations of, projects, akin to [what was witnessed in the public sector](#).

"It could create a lot of problems in the supply chain if parties aren't rigorous in their approach and adherence to the law," says Wilson. "Clients and agencies need to be communicative and absolutely transparent with each other.

"From the outset, clients must confirm the rate being offered to the contractor. The agency margin and employment taxes need to be accounted for separately. You want to first establish in writing the rate that the contractor will receive, then you work out who pays what tax - not the other way around."

Unfortunately for clients and agencies, Wilson warns that attempted renegotiations of current contracts that span beyond April 2020 will very likely fall foul of the SSCBA:

"The contractor's fees will already have been established, so any renegotiation of the rate would be a rather risky move. The reality is that the clients and agencies will have to bear the costs of employer's NI for the remainder of the contract, should they decide that the contractor is caught by IR35. If they attempt to pass this cost on by re-evaluating the contract fee, they will have to think very hard about how they are going to justify that with relation to the SSCBA."

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