

Role-based blanket IR35 assessments are unlawful and highly risky



Since the Off-Payroll rules passed the IR35 compliance burden over to contractor clients and agencies in the public sector, blanket assessments whereby contractors are assessed based on a role have become commonplace. This has resulted in many contractors being unjustifiably taxed as though inside of IR35.

The [Off-Payroll legislation](#) contains a 'reasonable care' requirement. However, its ambiguity has aided HMRC in encouraging many public sector hirers to conduct blanket, or 'role-based', assessments that don't comply with the rules, yet increase tax yield.

The three primary reasons why blanket role-based assessments are dangerous are:

1. They **do not constitute 'reasonable care'** – They breach a requirement of the legislation section 61T(6)(c), resulting in the tax risk passing back up to the hirer from the agency ('fee-payer').
2. **Insurance underwriters will not cover the tax risk** unless an individual assessment has been conducted, and agencies do not wish to take on uninsured risk.
3. If investigated by HMRC, an inadequate role-based blanket assessment could trigger an **extension of the enquiry window to six years due to 'carelessness'** under Section S36(1) TMA 1970. If the error was deliberate this could extend to 20 years (S36(1A)). Individual assessments should limit enquiries to only four years.

"It's very easy to recognise a blanket role-based assessment that doesn't adhere to reasonable care," comments ContractorCalculator CEO Dave Chaplin. "You ask yourself whether the *individual* has been assessed. If they haven't, a proper assessment hasn't been conducted and the reasonable care requirement therefore hasn't been met." The resulting consequences cause a whole host of problems in the supply chain.

What constitutes a blanket assessment?

The Off-Payroll legislation states that the client becomes liable for tax if it 'fails to take reasonable care in coming to its conclusion' concerning the status of the contractor. [Employment status lawyers have noted](#) that, in the context of a contractor facing an IR35 enquiry, taking reasonable care constitutes:

1. Acquiring independent legal advice

2. Making a full assessment on an individual basis.

However, the failure to elaborate on 'reasonable care' in the context of Off-Payroll has helped facilitate non-compliance by way of blanket assessments, which typically fall into one of two brackets:

1. Where a client makes an IR35 status decision without conducting an assessment
2. Where a client assesses a role to predetermine the IR35 status of contractors.

To the layman, it is obvious that the absence of an assessment entirely does not adhere to the reasonable care requirement. However, making status determinations based solely on the assessment of a job description or role also falls a long way short of compliant behaviour.

The problem with role-based assessments

"Role-based assessments fail to take into account the full factual matrix required to assess the individual's status accurately," explains Chaplin. "Without directly assessing the individual, it's impossible to evaluate the factors that are solely applicable to them – the most important being whether they are in business in their own right."

Chaplin illustrates this using the example of a hospital recruiting nurses: "A nursing agency provides nurses to various hospitals on an ad-hoc basis. A hospital asks for a grade four nurse, and the agency decides who it will send. Now, imagine an individual nurse who may be considered for the same assignment, yet sources their own work and is in business on their own account.

"In both instances, the nature of the work is exactly the same, yet one nurse is likely outside of IR35, while the other is indeterminate. If a hospital was to make a role-based assessment – particularly using HMRC's flawed Check Employment Status for Tax (CEST) tool – there is a high probability that both will be deemed 'employed for tax purposes'. This situation is why it is essential to assess the individual."

Chaplin explains: "Ultimately, role-based assessments fail to constitute reasonable care because the assessor firstly assesses a role, and then assumes that the set of circumstances identified can be applied directly to anyone who undertakes the job.

"Every employment status tribunal has sought to assess the status of an individual, partly by carefully considering their personal circumstances. A 'role' cannot go to court to defend itself."

Chaplin adds that companies are free to place individuals on a payroll, but notes that this would warrant the provision of employment rights; a requirement not asked of hirers of 'inside IR35' contractors under Off-Payroll. This adds to the already diminished appeal of 'inside IR35' contracting and creates significant difficulties for recruiters.

The consequences of failing to take 'reasonable care'

Role-based assessments are the most common form of blanket assessment. Unfortunately, their failure to meet the reasonable care requirement has severe consequences for hiring organisations, as Philip Manley, former HMRC inspector and current tax partner at [Dow Schofield Watts](#), explains:

"Under Section 61T(6), the entire tax risk is retained by the client, rather than being passed down to the agency, or 'fee-payer'. This then builds considerable uninsured risk on the balance sheet of the hiring firm, not only exposing it to huge future risk, but potentially reducing its market value.

"It gets worse," warns Manley. "If HMRC subsequently investigates because reasonable care has not been met, it may argue the hirer has been 'careless' in making its assessment.

"HMRC then has the right to extend its enquiry window to a full six years, increasing the tax risk even further. In the event that a deliberate error was made, that window can be extended to a total of 20 years, resulting in a crippling financial burden for the company."

Role-based assessments cut off insurance options

The Off-Payroll rules mean the hirer or agency has considerable tax risk to consider when hiring contractors on an 'outside IR35' basis. Failure to conduct balanced assessments which find some contractors to be outside of IR35 will considerably weaken a firm's competitiveness with regards to sourcing contractors, so this is a necessary risk. Fortunately, it can be insured against, but not if role-based assessments are used.

“In simple terms, the actions of one is treated independent of the actions of another, even if the type of action taken is the same,” explains Peter Blackmore, co-founder of [Blackmore Borley](#), insurance providers to freelancers for over 20 years.

“If you lived on the same street or drove the same car, it does not mean that the premium for insurance, or the coverage offered, will be the same. The reasons for offering the insurance are fundamentally different. In terms of IR35, someone who has been individually assessed as outside of IR35 could be covered, but someone who uses someone else’s assessment is not.

“Each contract needs to be assessed and passed in the name to whom it relates in order to obtain valid insurance. If someone else uses the same contract but does not have a full assessment, then they cannot be insured,” adds Blackmore.

“They cannot rely on someone else being assessed as outside of IR35 and just assume that they have the same certainty regarding their status, even if the contract is the same. In order for the agency or hirer to protect themselves, each individual contractor has to be assessed before insurance can be issued and valid.”

Blackmore’s arguments are echoed by Thomas Wynne, managing director of [Kingsbridge Insurance](#), a provider of tax protection products for fee-payers, who reiterates that blanket assessments are uninsurable: “Underwriters will provide cover where a proper individual IR35 assessment has been made, which must include some element of legal oversight. Any assessment made on a blanket basis simply isn’t insurable.”

Government denies issue of widespread blanket assessments

The issue of blanket assessments has been reported widely and acknowledged within the public sector. In May 2017, NHS Improvement (NHSI) instructed Trusts that locum staff should be assessed on a case-by-case basis after a judicial review found its use of blanket assessments to be unlawful.

[NHSI went on to revise its guidance](#), stating: “We expect all providers to comply in full with their legal obligations by ensuring that all locum, agency and bank staff are taxed appropriately following a proper analysis of their individual circumstances.”

Months later, the Independent Health Professionals Association (IHPA) (previously the LDU/HPU) [launched further legal action against NHSI](#) after it emerged that Trusts were still being encouraged [to assess locums as within IR35](#).

Non-compliance isn’t limited to the NHS, as demonstrated by studies conducted by the Freelancer and Contractor Services Association (FCSA) and Qdos Contractor:

- FCSA found that 50% of contractor clients hadn’t assessed their contractors
- 84% of whom simply deemed their contractors to be caught by IR35
- 26% of all FCSA survey respondents admitted conducting role-based assessments
- Qdos found 38% of public sector contractors reported being blanket assessed.

The taxman has reportedly even acknowledged that status decisions are being made [without a proper review of each assignment](#). HMRC has attempted to downplay the issue, estimating it to be the case roughly 10% of the time. Nonetheless, this is a startling admission given its imminent plans to extend the Off-Payroll rules to the private sector.

Despite the overwhelming evidence and HMRC’s own admission, Government continues to deny the problem, with correspondence from the Chancellor of the Exchequer regarding the Off-Payroll rules claims that assessments are being made on a case-by-case basis.

IR35 Forum minutes reveal HMRC attempting to defend the unlawful

HMRC further acknowledged the existence of blanket assessments in the [minutes from an IR35 Forum meeting](#) held in November 2018. Remarkably, points 5 and 6 document the taxman’s attempt to justify blanket assessments, stating:

“HMRC explained the phrase “blanket rulings” is often used to refer to two different scenarios... However, the term is also being applied to circumstances where, having reviewed one contract, an engager may consider that identical facts and terms and conditions apply to other contracts, and it is then not necessary to review every individual engagement separately.”

Commenting on these revelations, Stephen Mhiribidi, head of legal at the IHPA, who was involved in the judicial review against NHSI, said: “It’s frankly staggering that the IR35 team at HMRC are now making these false claims about blanket assessments, given that the NHS

already conceded that role-based assessments were unlawful during the pre-action phase of judicial review. Did HMRC not get the memo?”

Chaplin adds: “HMRC is actively encouraging organisations to conduct unlawful role-based blanket assessments. This is entirely inappropriate guidance, and not the first time the IR35 Team at HMRC have provided misleading advice. Only last year, their IR35 team, delivered a web seminar to the NHS and were [accused of making misleading statements likely to incite blanket IR35 assessments.](#)”

Former management inspector and director of [Tax Networks Ltd](#), Chris Leslie says: “HMRC is attempting to circumvent the requirement to assess properly, as an easy solution to off-payroll (IR35). Unfortunately, HMRC’s predicate-logic approach suppresses the subjectivity of classic case law. It is convenient, but perhaps incompetent.”

According to legal expert Martyn Valentine, founder of IR35 specialists [The Law Place](#), HMRC’s guidance stems from a flawed understanding of IR35, which, if adhered to, could give rise to greater issues further down the line:

“HMRC’s advice could facilitate and incite tax evasion, for which all parties could be prosecuted. If such advice caused an insurer, agency, or other party to suffer loss then there could be a claim for negligence.

“HMRC’s interpretation does not align with the law,” he adds. “The taxman appears to be trying to encourage unlawful blanket assessments within the market, which would lead to greater tax collection under false pretences. It’s grossly misleading advice and there is scope for it to be challenged under judicial review.”

How legislative amendments can prevent HMRC ‘abuse of powers’

In its current format, Off-Payroll is an exploitative regime. To protect contractors from excessive taxation by way of blanket assessments, the legislation must:

- Instruct contractor clients that assessments be based on named individuals
- Require that the client explain the basis on which a decision has been made
- Require that relevant information from all parties be shared and considered as part of the assessment
- Allow contractors to appeal an assessment at the point of decision.

Unfortunately for contractors, as long as HMRC continues to perceive a heightened tax yield as a result of the rules, Government will likely remain disinterested in making the necessary changes.

Chaplin concludes: “The problem is that HMRC is trying to override the law for its own convenience. HMRC is now attempting to cover over the fact that its implementation of the reforms was botched, resulting in widespread unlawful blanket assessments.

“The taxman has no powers to instruct organisations to circumvent the legislation by blanket assessing contractors. This is yet another example of it abusing its powers to try and obtain the maximum, rather than fair and correct, amount of tax.

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