

Treasury's Off-Payroll assurances won't remove historical IR35 risk for contractors



Contractors who have their IR35 status overturned by clients following the impending private sector Off-Payroll rules are advised not to take Treasury and HMRC claims, that historical cases won't be targeted, at face value

Tax barrister and IR35 expert Alexander Wilson, of [Invicta Chambers](#), warns that recent assurances made by Government provide little certainty. This, he says, leaves the door wide open for HMRC to retrospectively examine the tax affairs of individuals deemed within the scope of the Off-Payroll rules.

"Though the Treasury has publicly suggested that the Off-Payroll rules will only result in IR35 status being considered prospectively, such claims are worth very little unless written into statute," explains Wilson. "Rather than relying on such comments, contractors are better off seeking professional advice to mitigate risk and ensure compliance."

Wilson's comments are of particular importance to contractors deemed within the scope of IR35 by a client, having previously operated outside of the rules, as they reinforce the risk that accepting such a determination could attract unwanted attention from the taxman.

However, the knock-on effects of the resulting uncertainty also threaten to create significant unwanted repercussions for contractor clients, and even HMRC.

What are Treasury's Off-Payroll assurances over retrospection?

In a [document released following the 2018 Budget](#), the Treasury provided the following assurances over proposals to extend the Off-Payroll rules to the private sector:

- *the reform is not retrospective – as it has in the public sector, HMRC will focus its efforts on ensuring businesses comply with the reform rather than focusing on historic cases*
- *HMRC will not carry out targeted campaigns into previous years when individuals start paying employment taxes under IR35 for the first time following the reform and businesses' decisions about whether their workers are within the rules will not automatically trigger an enquiry into earlier years*

At a [recent Public Accounts Committee \(PAC\) hearing](#), HMRC's Jim Harra offered similar assurances to users of the taxman's Check Employment Status for tax (CEST) tool, commenting:

“If we are satisfied that an engager has a good process in place for using the tool, and the tool has given them the answer that someone is or is not an employee, we will accept the outcome that the tool gives them, and they will not find themselves liable for past liabilities if they have used the tool correctly.”

Wilson considers the Treasury and HMRC’s claims in relation to [legitimate expectation](#), a public law principle which potentially places limitations on a public authority’s ability to act inconsistently with an individual’s expectations. This expectation needs to be reasonably based on a representation or consistent past practice of the authority. Rarely, a general declaration might give rise to such an expectation.

“Legitimate expectation essentially exists to protect individuals against harm in instances where they have relied on a promise made by a public body, and can sometimes be relied upon by taxpayers to protect their expectation to a particular form of tax treatment,” explains Wilson.

Can statement form basis of a ‘legitimate expectation’ claim?

In the landmark case of [Veolia ES Landfill Ltd and Viridor Waste Management Ltd v HMRC](#) [2016], Mr Justice Nugee defined three pre-requisites which are generally necessary for a successful taxpayer claim based on legitimate expectation. These are:

1. That a clear and unambiguous statement has created the expectation
2. That the taxpayer has ‘put all their cards face up on the table’
3. That the public authority’s decision is considered conspicuously unfair.

Unfortunately, as Wilson explains, relying on a statement either issued in a published note or made publicly by a spokesperson would struggle to meet the above criteria, leaving a contractor’s claim wanting:

“For a taxpayer to ‘put all their cards face up on the table’ generally means approaching the public authority directly and making them aware of the individual’s specific circumstances, which the authority uses to inform their statement, forming the basis of their expectation.

“Where Government is raising awareness about a macro-political area of policy, or a general proposition, it’s a steeper hill to climb for an individual to prove that there was reliance on a legitimate expectation than it would if the advice issued was very specific to the individual’s particular circumstances.”

‘Door wide open’ for retrospective HMRC enquiries

There are also question marks over whether the claims made by the Treasury and HMRC can be considered unambiguous. As Wilson observes, nuances over the terms used could enable HMRC to use its discretionary powers:

“In my view, the Treasury’s comments leave the door not just ajar, but wide open for HMRC to act retrospectively. The Treasury claims ‘HMRC will not carry out targeted campaigns into previous years’, and that an ‘inside IR35’ assessment won’t ‘automatically trigger an enquiry’.

“However, we know that HMRC adopts a risk-based approach when weighing up lines of enquiry. At no point does the Treasury confirm that HMRC won’t include a contractor’s IR35 status being overturned by a client as one of a number of risk factors when deciding who to pursue. Its comments are very much open to interpretation.”

Wilson adds: “Harra’s comments are even more uncertain. HMRC has set out no criteria for what a ‘good process’ for using CEST might constitute. Even if a user goes to great lengths to ensure that CEST is answered accurately, there is nothing to prevent HMRC from arguing that the tool hasn’t been used correctly. It’s completely up to the taxman’s discretion, and provides no guarantees whatsoever.”

Recent HMRC conduct reaffirms risk for contractors

Previous case law has also proven that it is possible for a public authority to establish legitimate expectation through its conduct in other areas. This should raise a major red flag for contractors, given HMRC’s aggressive pursuit of backdated tax through the contentious [Loan Charge](#) and the hundreds of [freelance broadcasters who suffered retrospective tax bills](#) shortly after the Off-Payroll rules hit the public sector.

“If HMRC is conducting itself in a certain manner, it could set a precedent, and you would be very well advised to pay attention to that as a taxpayer,” warns Wilson.

“Without an amnesty written into statute, these promises from Government cannot be relied upon, especially when you consider how HMRC has conducted itself with regards to the Loan Charge,” adds ContractorCalculator CEO Dave Chaplin. “We’ve also seen cases in the public

sector where contractors have had historic cases opened against them, following the April 2017 reforms.”

Legitimate expectation defence ‘doomed to failure’

Ultimately, where a contractor is subject to an enquiry and found to have been non-compliant in previous years, any argument based on legitimate expectation will likely be doomed to failure, as Wilson explains:

“Let’s say HMRC launched an enquiry into a contractor’s affairs and found that they had been avoiding tax for several years. The case would go to tribunal, where it would be extremely difficult for the contractor to make an appeal based on legitimate expectation.

“This is for the simple fact that the tribunal’s concern is that the contractor pays the correct amount of tax. Where the contractor’s concern is protecting themselves from a backdated tax bill which they are genuinely liable for, this wouldn’t be considered a legitimate interest that should be protected by legitimate expectation.”

Wilson concludes: “The key message for contractors is not to take any claims from the Treasury or HMRC for granted. Instead, they should be seeking professional advice, to help ensure that they aren’t in HMRC’s firing line, come April 2020.”

The danger for contractors, clients and HMRC

The threat to the UK’s contingent workforce is clear. However, as Chaplin highlights, contractors aren’t the only ones affected: “This presents considerable risk to contractors and clients, irrespective of the true status of the contract. The contractor may well hold all of the tax risk, but this doesn’t let the client off the hook.”

Chaplin observes that affected contractors may attempt to prove their self-employed status by taking their client to an employment tribunal, anticipating defeat, a route [recently taken by contractor Tony Elbourn](#).

“The client would need to spend considerable time assisting with HMRC’s enquiries, including preparing witness statements, and attending interviews and court. This is something they would have to contend with for each contractor. Then, of course, if the tribunal finds a contractor to have been employed, there are also employment costs to account for.”

The inherent risk is already impacting supply chains, with reports that many organisations are imposing blanket bans on hiring contractors in order to negate risk. In addition to restricting both workforce mobility and contracting opportunities, this also poses a significant threat to HMRC’s tax yield.

“The taxman will go from collecting a significant amount of tax from the affected contractors, to no tax at all, due to the fact that these individuals will be out of work. This is just one of the behavioural effects that will need to be considered by the Office for Budget Responsibility (OBR) when it firms up the calculations for the Exchequer impact.”

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