

# Off payroll working in the private sector

*Budget 2018 confirmed that – as expected – the government would extend the 2017 reforms of the off-payroll working rules (which applied only to public sector contracts) to the private sector. It is now in the process of consulting on the detail of these changes. Although the main impact of the latest changes will be on affected private sector businesses, and contractors engaging with them, public sector bodies should note that some changes are proposed which will also affect them.*

## Scope of the reforms

The intermediaries legislation, more commonly known as IR35, is intended to prevent businesses and individuals avoiding the increased tax and National Insurance costs associated with employment by interposing an intermediary – generally a personal service company (PSC) between an individual and the business they work for. The legislation is not intended to catch genuine self-employment, but the government has long been concerned that contractors are incorrectly categorising engagements as falling outside the IR35 rules, leading to a potentially substantial loss of tax.

Since April 2017, public sector bodies (as the ‘engager’) have been responsible for determining whether IR35 applies to the engagement. Where a contract is deemed to fall into IR35, the public sector body is responsible for deducting tax and NICs from payments to the contractor, unless there are other entities in the supply chain (in which case, in broad terms, the responsibility to make the deductions falls on the body making the payment to the PSC – known as the ‘fee payer’). For private sector contracts, the obligation to determine whether any contract falls within IR35 – and if so to make the necessary deductions – has continued to rest with the PSC itself.



From April 2020, large and medium-sized private sector businesses will be required to make the IR35 determination in respect of relevant contracts as the engager. Small businesses will be exempt from the reforms, and where a contractor engages with a small business via their PSC, the PSC will retain responsibility for determining whether IR35 applies.

This is a welcome change from the initial proposals, published in 2018, which would have extended the reforms to all private sector business, regardless of size. But the decision to exclude small business does raise immediate questions – such as how is a small business defined? And how is a contractor expected to know whether or not they are engaged by a small or medium-sized business? What happens where an engaging business becomes, or ceases to be, small?

HMRC has launched a consultation, closing on 28 May 2019, which seeks the views on how to deal with the expansion of the reforms to the private sector. The output from this will follow some months later in 2019, which leaves many businesses feeling that time to prepare for an April 2020 implementation will not be enough.

## Defining small business

The consultation document proposes that the existing Companies’ Act definitions will be used to determine size. A small company is proposed to be one which satisfies two of the following three conditions:

- Annual turnover – not more than £10.2 million
- Balance sheet turnover – not more than £5.1 million

- Number of employees – not more than 50

Of course, it is not only incorporated businesses which engage contractors, and the consultation document proposes that the same tests apply to unincorporated business. A modified form of the test will apply to any entities which do not draw up a balance sheet.

The intention is that, in considering whether the off-payrolling rules apply for a particular tax year, a business will look at its size for its preceding accounting period. This will have the benefit of fixing the size of the business for a full tax year, although those with accounting periods ending close to the start of the tax year (particularly 31 March/ 5 April year ends) will have very little time to assess their position.

Contractors – and agencies, where there is one in the supply chain – will, therefore, need to understand the size of the contracting organisation, and remember to update this annually where there is an ongoing relationship.

---

## Changes to the current public sector rules

The consultation proposes a number of changes to the off-payrolling rules as they currently operate for the public sector, aimed at addressing some of the practical issues which have arisen.

The current public sector off payroll working rules require engaging businesses to provide an employment status determination to the party they contract with – which may be an agency or other intermediary, instead of with the entity that pays the fees to the PSC (the fee payer) or the PSC directly. There is no requirement for the party contracted with to pass them along further, although in practice they are usually passed down the contractual chain until they reach the fee payer, who then uses this information to

deduct PAYE and NICs accordingly. Additionally, neither the fee payer nor the contractor has a legislative right to request the determination. The consultation proposes changes to these rules that will create a formal requirement for recipients of these determinations to pass them on to the next person in the contractual chain. It also proposes giving fee payers and contractors the right to ask the engaging business directly for the reasons for their employment status determination. This will ensure that fee payers have the information they need to comply with the rules.

Concerns have been expressed about the lack of a mechanism in the existing rules for a contractor to dispute a determination. The government intends to address this by requiring engagers to have a review process which would allow a decision to be revisited if the contractor disagrees with it.

Further changes will allow HMRC to seek to recover PAYE and NICs from elsewhere in the supply chain where a party fails to meet its obligations.

---

## CEST and guidance

HMRC have promised that there will be improved guidance for businesses engaging contractors ahead of the changes. This will include making improvements to the Check Employment Status for Tax (CEST) tool. It is to be hoped that these changes will address some of the concerns around the current tool, including the fact that it does not take account of whether there is mutuality of obligation between engager and contractor. However, determining employment status for tax is complex, it requires a full assessment of a wide variety of factors, and it is likely to remain difficult to accurately reflect these in a tool designed to be straightforward for non-tax specialists to use. Whilst CEST may produce

a clear and reliable result for more straightforward cases, further analysis or advice will be needed to make sure that those with more borderline or complex fact patterns have their status correctly determined.

---

## Next steps

Some of the important detail – including how effective the revised CEST tool and accompanying guidance will be, and how the dispute mechanism will work in practice – remains unclear, pending the outcome of this latest consultation. However, both contractors and engagers should begin to prepare now for the changes.

For engaging businesses, this will mean ensuring that they are equipped to determine whether or not a contract falls within the IR35 rules – which can represent a significant challenge in itself – and to put in place processes to ensure that these decisions are made consistently where multiple contracts are used. They will also need to review their internal systems, such as payroll, finance and HR processes, to ensure that they can make the correct tax and NICs deduction from payments if required.

As stated above, determining employment status for tax can be complex, and contractors should take this opportunity to consider whether an engager could reach a different conclusion on their status to their own, and the likely impact on their business of any such determination.

The consultation closes on 28 May 2019, and the government has stated that it will publish detailed draft legislation over the summer.

***If you would like any further information on this matter or wish to make a representation please contact your usual Saffery Champness partner.***

T: +44 (0)20 7841 4000 E: [info@saffery.com](mailto:info@saffery.com) [www.saffery.com](http://www.saffery.com)

Saffery Champness' *Taxation Briefing* is published on a general basis for information only and no liability is accepted for errors of fact or opinion it may contain. Professional advice should always be obtained before applying the information to particular circumstances. J7482.  
© Saffery Champness LLP May 2019.



Saffery Champness LLP is a limited liability partnership registered in England and Wales under number OC415438 with its registered office at 71 Queen Victoria Street, London EC4V 4BE. The term "partner" is used to refer to a member of Saffery Champness LLP. Saffery Champness LLP is regulated for a range of investment business activities by the Institute of Chartered Accountants in England and Wales. Saffery Champness LLP is a member of Nexia International, a worldwide network of independent accounting and consulting firms.