Off-payroll working in the public sector (IR35)

Employment Tax

01 April 2017

New IR35 rules take effect from 6 April 2017. Where the engagement is with a public sector body the responsibility for deciding whether or not IR35 applies moves to the public sector body. If an engagement falls with the new IR35 rules then the person paying the PSC (that is the public sector body or third party agency) is responsible for deducting tax and NICs under PAYE. A new online tool from HMRC (the 'employment status service') will be made available to assist in deciding whether or not IR35 applies to an engagement.

The CIOT has responded to Finance Bill 2017 consultative clause 1 and Schedule 1, which would introduce a new Chapter 10 to ITEPA 2003, and draft NIC regulations, which would introduce a new category into the Social Security (Categorisation of Earners) Regulations, which will move responsibility for operating the current intermediaries rules from an individual worker's intermediary (typically a Personal Service Company (PSC)) to any public sector body, agency or third party paying that intermediary. In such cases, the 5% allowance currently available to those who apply the IR35 rules to reflect the costs of administering the rules will be removed. These changes will apply to payments made on or after 6 April 2017 even if the contract was entered into for work carried out prior to 6 April.

In responding, rather than repeating our concerns that imposing a requirement on the payer of the PSC to account for income tax and NICs through the PAYE system (in circumstances where the IR35 rules appear to apply) will introduce significant administrative burdens and have an adverse commercial effect for the public sector and those working in the public sector, the CIOT's objective was to ensure that the government's policy intentions are translated into statute as accurately and effectively as possible, without unintended consequences. We think that it is essential that engagers, agencies, PSCs and workers have certainty and clarity, as

regards these new rules, so that there is confidence that the rules are understood and being applied correctly by all parties. Consequently, we highlighted some areas where we think the draft legislation is lacking.

One of our main concerns with the new rules is what happens if the PSC/worker disagrees with the view of the public sector body or agency that Chapter 10 applies. While the public sector body or agency can be requested to provide further information, the new rules provide for no appeal mechanism where the decision has been incorrectly made. We therefore suggest that the legislation be amended to include a mechanism through which a PSC/worker can appeal a public body's (or agency's) decision that an engagement falls within the new rules. Also, we think it needs to be clear whether or not a PSC can rely on a decision by a public sector body (or agency) that the new regulations do not apply to an engagement and, if so, what then happens if the public sector body (or agency) has got it wrong.

Another concern is what happens when information on whether Chapter 10 applies is not provided. The draft legislation only requires 'the client' (that is the public authority) to provide information to the person with whom they contract, which may not be the entity that pays the PSC. We believe that the legislation should clearly require public bodies and intermediaries to pass on relevant information to the entity making the payment to the PSC, so that that entity can deduct tax where required.

It also appears that there is no penalty on the public sector body if it provides inaccurate, incomplete or otherwise misleading information. The draft legislation merely requires that the public sector body provide the information on whether IR35 applies (and to answer further questions) within 31 days of a written request being made. We believe that there should be appropriate sanctions on public bodies (and agencies) where information that is provided to the entity making payments to the PSC is incomplete, inaccurate or otherwise misleading.
Furthermore, the legislation concerning the provision of fraudulent information appears to only apply to 'the services-provider' (that is the PSC), or a person connected to them. We suggest that sanctions for the provision of fraudulent documents should also apply to the public body and any agencies, and not merely the PSC.

A particular area for concern is how PSC's will treat payments subject to the new Chapter 10 rules in its accounts. For example, a PSC may (at various times) receive

payments, which may be subject to the Chapter 10 rules, or subject to the non-public sector IR35 rules or not caught by IR35 at all, and the PSC may pay out that income to the director/worker as a combination of salary and dividends. We think, in this situation, it is unclear how one determines what payments of salary and dividends relate to the Chapter 10 income, what payments relate to the non-public sector IR35 rules and what payments are not caught by IR35 at all. Clearly, knowing which payments are which is going to be a key part of applying the correct tax/NIC treatment in terms of the PSC and the worker. We think that this means that identification rules will be needed, albeit that will bring with it further complication. We suggest that HMRC include some worked examples in guidance as to how the various rules will interact in practice.

A minor amendment to the new rules was announced in the Spring Budget. The public sector body or agency paying the PSC has the option to take account of the worker's tax deductible expenses when calculating the tax to be deducted under PAYE. There is however no obligation on this 'fee-payer' to do so and if they choose to do so it will be reliant on the PSC/worker providing details of expenses incurred promptly.

Another area requiring clarity is where the liability for secondary Class 1 NICs rests. For example, will the public sector body (or agency) be permitted to deduct secondary NIC from the payment that it makes to the PSC where the new regulations apply?

Finally, HMRC's new online tool, the 'employment status service' was being tested during late February and, hopefully, will have had its public launch by the time you read this! The new tool aims to give a result about whether an engagement is inside or outside of IR35. It is crucial that the tool is easy to use. Feedback from members as to the usability of the tool and the accuracy of its output would be very welcome.

The CIOT's responses to the draft legislation in respect of both income tax and NICs can be found on the CIOT website:

Draft FB17 Clause 1 Schedule 1: Off-payroll working - CIOT comments

The Social Security (Miscellaneous Amendments) Regulations 2017 - CIOT comments