



IR35 IN THE PRIVATE SECTOR

**BROOKSON
LEGAL**

INTRODUCTION

So, the speculation is over and the Chancellor has announced that the Private Sector will be subject to changes to IR35 similar to those implemented in the Public Sector in 2017. Those changes will take effect from April 2020 and a further Consultation will be launched in the coming months to fine-tune how it will work.

Here's what we think:

IS THIS A GOOD THING?

There are positives and negatives to the Budget announcement. There was no doubt that the Government would make some reform to IR35 in the Private Sector and that the most likely outcome was that it would make the same or similar changes to those made in the Public Sector in April 2017. The Government has listened to representations against an April 2019 introduction, which is good provided that the Private Sector uses the 18 months until "go live" fully, and begins preparations now for this significant change. The announcement of a further Consultation regarding the precise way in which the changes will be rolled out into the Private Sector is a bit of a surprise. On the face of it, this sounds like a sensible approach and might help address some of the questions that have arisen since the Public Sector changes; on the other hand, another Consultation creates a further period of uncertainty, which risks eroding some of the time that the Government has allowed between announcement and the go live date.

WHAT DO WE KNOW FOR CERTAIN?

The Budget announcement confirmed a number of things:

- + The Private Sector will be following the Public Sector, at least in large part, in seeing end hirers being made responsible for assessing the employment status, for tax, of the off-payroll workers that they engage.
- + Those changes will not take effect for 17 months (although Private Sector businesses would be well-advised to start preparations now to implement what, for many businesses, will be a significant change programme).
- + "Small" businesses are excluded from the change. The Government says it intends to use similar criteria to the definition in the Companies Act 2006, which sets low balance sheet and turnover thresholds and says that a small company is one with not more than 50 employees.
- + There will be greater emphasis placed upon the "reasonable care" that hirers must take in making their determinations.
- + Employment status tests are not being changed by these new rules (although we wait to see what changes, if any, come out of the Consultations launched following the Matthew Taylor Review).
- + And despite misinformed coverage to the contrary, self-employment is not being outlawed, and neither is working through a Personal Service Company ("PSC").

WHAT DON'T WE KNOW?

The Budget announcement, and the Government's response to its Consultation into Off-Payroll Working in the Private Sector (released at the same time), leave a number of questions unanswered.

What is "reasonable care"?

The Public Sector rules provide that hirers must take "reasonable care" in making their determinations about employment status. Unfortunately, HMRC has given little guidance on what that means in the context of IR35 and therefore Public Sector hirers have been left to debate what it is they have to do to jump this regulatory hurdle. The Government's response to the Private Sector Consultation says that it *"intends to further explore options for the consequences of businesses failing to use reasonable care in making their decisions."* We can take from this that "reasonable care" is not going away and that there are likely to be clearer and more robust consequences for failing to take reasonable care. Whether we get more guidance on what constitutes reasonable care remains to be seen, but it is clear that affected Private Sector businesses must give serious consideration now to whether they have the in-house resource and expertise to implement these changes, or whether they must look outside for support.

Will CEST be made fit for purpose?

The Consultation response acknowledges that "CEST", the tool that HMRC built to help Public Sector hirers make their determinations, can be improved. This is no surprise, as CEST has been the subject of much criticism, not least because of the bizarre exclusion of "mutuality of obligation" from the employment tests that it applies. The Government says that *"HMRC is looking at where the CEST tool, along with wider guidance, might be improved, both as part of normal good practice and to ensure it reflects the needs of the larger and more diverse private sector"*. This is welcome, but we are sceptical that HMRC can develop CEST into a tool that is both user-friendly and assists the user in making decisions on those workers whose working practices and contracts are not clearly inside or outside of IR35.

Will the fee-payer have to follow the end hirer?

The Public Sector rules do not make it expressly clear that the fee-payer (usually the agency) must follow the determination of the end hirer. In other words, the Public Sector hirer, having taken "reasonable care" might determine that a worker is inside IR35 and should therefore be paid net of deductions; however, the fee-payer might still choose to pay that worker (via their intermediary, usually a PSC) gross, and in doing so assume the tax risk. The Government raised this specific point in the Private Sector Consultation, and we expect to see it raised and considered again in the forthcoming Consultation, with a possible outcome that the Private Sector rules will place an obligation on the fee-payer to follow the determination of the Private Sector hirer. This might also result in changes to the Public Sector rules.

How will affected workers be able to challenge decisions?

It is pleasing to see that HMRC says it will “*set out what people should do when they do not agree with the business’ decision on their employment status.*”. This was not adequately addressed in the Public Sector changes, which merely provide for the worker making an information request to the end hirer or, presumably, going down the daunting route of trying to recover tax paid through their Self-Assessment Tax Return. Will the Government create some form of arbitration that is both simple and cheap to access and will a simpler route to challenge a decision put further pressure on end hirers to use reasonable care when making a determination (as required by the legislation)?

Will HMRC look forwards only, and not backwards?

It seems the answer to this is yes (or a qualified yes). The Policy Note that the Government has issued says that:

- + 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 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.

A concern for Public Sector hirers, and now Private Sectors hirers, has been that, in disagreeing with the employment status of an off-payroll worker who has historically classified themselves as self-employed, they expose that worker to a HMRC enquiry into their historic tax returns. HMRC’s Policy Note rules out “focusing on historic cases” and “targeted campaigns into previous years”. Not a categorical assurance that HMRC will not look backwards, but a crumb of comfort, at least.

What additional reporting obligations will HMRC impose?

The Government considered, and rejected, additional record-keeping as a solution. However, the Consultation response now says that “*The government is considering what enhancements should be made to the information customers provide to HMRC regarding payments to personal service companies.*” It looks like hirers and agencies can expect additional reporting obligations.

Will the legislation adequately address anti-avoidance?

The Public Sector changes have seen an increase in the use of non-compliant umbrellas and off-payroll models, creating a Criminal Finances Act risk for the less vigilant businesses in the supply chain. The exclusion of “small” businesses from the new Private Sector rules will already have the more creative and unscrupulous thinkers in the industry scratching their heads for ways to circumvent the rules. No doubt the 2019 Consultation will also be looking to flush out any loopholes.

Will we see the growth in alternative supply models?

Almost certainly this is a yes. We are already seeing more agencies offering, and more end clients asking for, “statement of works”-type supplies, whereby the agency performs a clearly-defined piece of work, rather than supply the workers. Done properly, this “works”, in that it transfers the obligation to make the employment assessment to the agency (or, as it becomes, the outsourced statement of works provider) from the end client; however, if it is engaging self-employed contractors to perform the service, there is still an employment status decision to be made (by the “statement of works provider”) and the “statement of works provider” has the challenge of providing a defined service to the end client (with all the associated risks that entails), without being able to exercise the level of control that it might want to exercise (if the workers are to remain outside of IR35). There are also strong “substance over form” considerations here, in that HMRC will expect the arrangement to be “genuine” rather than contrived, and might look closely at the contract between the end client and the statement of works provider. Getting this wrong might see the tax risk landing back with the end client, who might then struggle to demonstrate that it has taken “reasonable care”.

Will we see a growth in employment-related claims?

Again, this is almost certainly a yes. There is a conflict between employment status for tax (which is what IR35 is concerned with) and employment status for employment rights and protections. Just because HMRC considers that a worker is an employee for tax purposes does not mean that the affected worker automatically enjoys any change in their employment status for the purposes of employment rights and protections. This is an issue being considered by the Consultations arising from the Matthew Taylor Review. However, once end hirers determine that their off-payroll workers are, in fact, disguised employees, there is a risk that those affected workers will bring employment claims, including under The Agency Workers Regulations. We have already seen Public Sector workers, determined as being inside IR35 by their Public Sector hirer, bringing holiday pay claims.

Will the Private Sector learn from the mistakes of the Public Sector?

We must hope so. The Private Sector has now been given 17 months to ready itself for these changes and, although that feels like a long time (and it is 12 months longer than it might have been!), there is a significant change programme to be undertaken by most Private Sector hirers, and this should not be postponed until after the 2019 Consultation or until HMRC’s Guidance is published. The Private Sector knows enough now to begin preparation for change.

WHAT SHOULD THE PRIVATE SECTOR BE DOING NOW?

Preparation for change should start now. We know that Private Sector hirers (other than the small ones) will be made responsible for assessing the employment status, for tax, of their off-payroll workers; we know that there is a low level of understanding of IR35, generally, within the Private Sector; and we know that most Private Sector hirers have little understanding of the employment statuses, and therefore risk, within their existing flexible workforces.

The starting point is to understand IR35. Those hirers and agencies who invest in the education of their stakeholders and staff will be in the strongest position to comply with the new legislation and to mitigate its impact, both from a legislative point of view and, perhaps equally importantly, from a commercial point of view, also. There will be a flight of talent to hirers and agencies who can demonstrate an understanding of and considered approach to the new rules.

At the same time, hirers and agencies should begin an exercise to understand the current profile of their off-payroll workforces and therefore the scale of the change to be managed. Knee-jerk reactions and poor commercial decisions in the Public Sector were driven by fear and a lack of understanding of how exposed Public Sector hirers were to the new rules.

Finally, Private Sector hirers and agencies should begin conversations now, with each other and with their off-payroll workers, about how best to manage the new rules. Have a plan; have a timetable; consider the options.

HOW CAN BROOKSON LEGAL SERVICES HELP?

Brookson Legal Services offers all of the following to both Private and Public Sector hirers and agencies:

- + Bespoke education and training on IR35 and the changes to the rules.
- + Audits of existing flexible workforces, reporting back on whether workers and roles are caught by IR35 and, where possible, what changes can be made to working practices and contracts to maximise the number of workers outside of IR35.
- + Advice on policies and processes to manage the new rules compliantly, and with minimum impact on everyday business.
- + Periodic audits, to ensure ongoing compliance with the new rules (and therefore support “reasonable care”).
- + A helpline to manage queries from all stakeholders.

WHO ARE BROOKSON LEGAL SERVICES?

Brookson Legal Services is part of the Brookson group of companies. We are a law firm, regulated by the Solicitors Regulation Authority, and our main area of work is employment status, and particularly IR35. We have team members who have sat on HMRC IR35 forums and we have been advising on IR35 since its introduction in 2000.

GET IN TOUCH

For more information, contact Brookson Legal Services at:

- + contact@brooksonlegalservices.co.uk
- + 0345 058 1227
- + www.brooksonlegal.co.uk

MEET THE TEAM



JOE TULLY
MANAGING DIRECTOR
joe.tully@brookson.co.uk



MATT FRYER
COMPLIANCE DIRECTOR



CARL HENNING
SENIOR SOLICITOR



JOE JOHNSON
TEAM LEADER

