



# IR35 and the new requirements for NHS employers

With effect from 6 April, major changes have been introduced to the intermediaries legislation (commonly known as IR35) which apply where the services of an individual are provided through an intermediary to a “public authority”. For the purposes of the legislation, “public authorities” includes all NHS organisations.

## What is IR35?

IR35 was introduced in 2000 to ensure that individuals who work off-payroll through their own company (or other intermediary as defined in legislation), who would have been taxed as employees had they been paid directly, pay employment taxes on their income. IR35 applies where:

1. services are provided by an individual via an intermediary owned or controlled by the individual (a “personal service company” or PSC), and
2. the individual is for all intents and purposes working as an employee, i.e.
  - a. they are required to provide personal service (i.e. there is no right to provide a substitute to do the work),
  - b. the employer must provide a certain level of work and the employee must do the work provided (i.e. there is no right to decline work),
  - c. the employer controls the way in which the work is carried out, where and when,
  - d. the person is integrated into the organisation (e.g. has a desk and phone, supervises staff and/or is supervised, is covered by employee policies, can access employee benefits et cetera), and
  - e. the individual does not bear personal risk (e.g. they do not pay for their own equipment and staff or fund their own training, et cetera).

## Effect of the new public sector rules

Under the new rules, where the client receiving the individual’s services is a public authority, responsibility for determining whether IR35 applies will move from the intermediary to the public authority or, if there are agencies or third parties in the contractual chain between the public authority and the intermediary, to the party closest to the intermediary in that chain. In addition, where the legislation applies, responsibility for operating PAYE and accounting for income tax and national insurance will fall on the public authority (or relevant third party where the public authority contracts with a third party for the services of the individual).

Where contracts are entered into directly with a contractor rather than with a PSC, and the contractor works for all intents and purposes as an employee for the public authority, then IR35 will not apply, but tax will still need to be deducted at source from payments made to him/her.

## NHS Improvement approval process

NHS Improvement has published an approval process that it requires NHS Trusts to follow when engaging staff through PSCs or limited liability partnerships (LLPs). The NHS Improvement assurance documentation is available [here](#). The application for approval requires Trusts to respond to 5 questions, namely:

1. Detail the changes made to your payment processes to ensure the correct tax and national insurance is deducted from PSC invoices where the worker is directly engaged with the trust.
2. Detail the steps that have been taken to ensure agencies and outsourced bank providers supplying the trust are correctly deducting tax and national insurance from workers engaged via PSCs.
3. Provide a copy of the internal escalation process the trust follows to approve the engagement of a worker through a PSC, rather than via PAYE on the trust payroll/bank. Include position of ultimate decision maker.
4. Provide details of the internal process to evaluate and confirm the IR35 status of roles at the trust.
5. Provide details of the roles that have been found to be outside IR35.

## Steps to take to ensure compliance with IR35

**We set out below the various steps that NHS providers should be taking to respond to the new IR35 rules**

### Step 1 – work out who is in and who is out of scope of IR35

Employers will need to know which contractors are working for all intents and purposes as employees of your organisation via a PSC, in order to know whether tax should be deducted from payments made to the PSC (whether by the Employer or by another body who is paying the PSC – be it an agency or umbrella company). HMRC has published an online employment status tool to check this (<https://www.tax.service.gov.uk/check-employment-status-for-tax/setup>). HMRC has confirmed that it will stand by the results generated by the tool unless a compliance check finds that the information provided is not accurate. Employers can print out the outcome of the employment status check as a record of HMRC's decision.

If you are not sure whether the company via which an individual provides services to your organisation is a PSC (i.e. they own/control the company), you can ask the worker to provide further details or a Companies House search can be carried out to check this point.

### Step 2 – write to workers in and out of scope, and to agencies/umbrella companies

Once you have decided who is in and who is out of scope, you should write to each worker, or to the relevant agency or umbrella company, confirming their status.

**a) Letter to workers who are in scope (saying tax will be deducted at source from payments made to them via their PSCs)**

This should go to everyone working via a PSC who appears to be working as an employee. This is interpreted widely by HMRC, so it is better to err on the side of caution and treat someone as an employee for tax purposes if you are unsure. Even if a worker provides you with the outcome of the HMRC online assessment tool you should proceed with caution as the tool can only be relied on if it is filled in correctly, so you may want to do the online assessment yourself and only confirm the individual is in fact out of scope if this is also the outcome of your own assessment.

You should also consider whether you wish to offer any other working options in addition to the worker continuing to work as a contractor via a PSC but with tax deducted by the Trust, or working via an agency. For example, if you are willing to allow contractors to work via the staff bank you may want to state this as an option too.

**b) Letter to workers who are out of scope (confirming payments will be made without deduction of tax)**

This should be used with caution, and only sent to those contractors whose contractual and actual working arrangements are consistent with contractor status i.e. you allow them to provide a substitute to do the work, they can decline work offered and are not guaranteed any particular level of work, and they can decide how, where and when the work is done, and are not integrated into your organisation. You should ensure that you have completed the HMRC online assessment tool and that this confirms that the individual is not within the scope of IR35 before sending this letter.

Since working arrangements can change over time, it is also advisable to keep these arrangements under review to ensure that they do not evolve into employment rather than independent contractor relationships, bearing in mind the tests set out above. The letter that you send should confirm that you will be required by law to deduct tax at source from any payments made if and when it becomes necessary to do so.

**c) Letter to agency/umbrella company (saying they should deduct tax at source from payments made to the worker via the PSC)**

This letter should require all agencies/umbrella companies to deduct tax at source from workers whom they pay via PSCs and to whom IR35 applies, from 6 April 2017. If they believe that IR35 does not apply, they should provide evidence to your satisfaction that tax should not be deducted at source. Again, it is suggested that you should undertake your own HMRC assessment to confirm whether any workers are out of scope before agreeing to treat anyone as not being subject to IR35.

### **Step 3 – deal with any queries or complaints**

We would expect that many of the staff providing services via PSCs are working (for tax purposes) as employees, and that it will therefore be appropriate to confirm that you will deduct tax and national insurance at source from payments made from 6 April 2017. However, for all other purposes they will continue to work as independent contractors, and will not have full employment rights. Employers may find that workers agree to this arrangement, since they will retain the flexibility to work how, where and when they want to as contractors, and will continue to enjoy the freedoms afforded to them by being a contractor.

However, there could be objections raised as a result of you applying the new taxation rules and organisations may find that some workers threaten to leave if these objections are not resolved. It is worth having a process in place for escalating and resolving disputes about contractors' tax status.

There are some steps that Employers can take to address concerns from workers about the application of IR35:

- a) they can continue to work (and be taxed) as a contractor without this breaching the requirements of IR35. This may be a case of amending their contractual arrangements, perhaps by declining to offer regular shifts, allowing them to decline shifts offered, giving them more control over the way in which they work, reducing the extent of their integration into your organisation, as well as completing the HMRC employment status tests in case of challenge.
- b) they can be offered employment contracts, to give them full employment rights. Given that the tests for employment status for tax purposes are broadly the same as those which would be applied to determine whether a worker is an employee for all other legal purposes, organisations may ultimately find it more appropriate to offer fixed term employment contracts to staff who wish to be employees and satisfy the employment status tests, or at least put them onto internal staff banks if you and they wish to retain some flexibility.

Particular concerns have been raised that locum doctors may withdraw their services at short notice as a result of the new rules, and that this may impact on patient safety. The GMC has issued a statement setting out its expectation that doctors will only withdraw their services on reasonable notice. The full statement can be viewed here [www.gmc-uk.org/news/30728.asp](http://www.gmc-uk.org/news/30728.asp)

#### **Step 4 - regularise your contractual arrangements**

Ensure that the documentation relating to contractors is up to date and accurately reflects the reality of their working arrangements. For contractors in scope of IR35, the contract should make clear that tax will be deducted at source from payments to the PSC. For those who are out of scope of IR35 because

- (a) their company is not a PSC and/or
- (b) they are not working as an employee, or
- (c) for those contracting directly with the Trust rather than via a company,

the documentation should state that tax will not be deducted by the Trust and that the worker will be liable for making the required payments to HMRC.

Particular care should be taken to ensure that the arrangements documented in the contract reflect what happens in practice, and that this does not evolve into an employment relationship over time.

#### **Step 5 – ensure ongoing compliance with HMRC and NHSI requirements**

Organisations should ensure that all documents are kept on file (letters sent to contractors along with any replies, any correspondence and meeting notes regarding tax status, copies of contracts and tax records, and copies of the HMRC employment assessment tools) in case you need to rely on these in the event of a challenge.

You should also put in place a process for ensuring that contracts are reviewed regularly to check that there is no change to the contractor's tax status. You must also ensure that NHS Improvement requirements are met, such as the requirement to provide details of all arrangements entered into with contractors, and assurance that tax is being properly accounted for.

There may be situations where in fact the steps above cannot be followed in this exact order (for example where the contract cannot be finalised until the tax status has been agreed), but the guide above should at least serve as a useful starting point.

## Revised NHSI guidance

NHSI had initially advised providers to ensure that all locum, agency and bank staff were subject to PAYE and on payroll for the 2017-18 financial year. However, on 30 May it issued new guidance [https://improvement.nhs.uk/uploads/documents/IR35\\_Update\\_30May1.pdf](https://improvement.nhs.uk/uploads/documents/IR35_Update_30May1.pdf) and now advises that an assessment of whether or not IR35 applies should be carried out on a case-by-case basis rather than by a broader classification of roles. NHSI requires this assessment to be "conducted fairly, accurately and take into account all relevant factors, including representations which may be provided by the individual". It suggests that the HMRC online tool is used, but warns that this "does not negate the necessity for careful case-by-case scrutiny".

Although NHSI suggests that this change will have "substantial administrative implications for providers", in practice, NHS bodies who are carrying out the above steps will already be complying with the new requirements. Employers should ensure that individuals/agencies are given an opportunity to comment on/discuss their assessment of whether or not IR35 applies, and consider whether to revise the assessment in light of any comments provided.

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