

Off-payroll working rules from April 2020

Submission to HM Revenue & Customs

Chartered Institute of Personnel and Development (CIPD)

May 2019

Background

The CIPD is the professional body for HR and people development. The not-for-profit organisation champions better work and working lives and has been setting the benchmark for excellence in people and organisation development for more than 100 years. It has 150,000 members across the world, provides thought leadership through independent research on the world of work, and offers professional training and accreditation for those working in HR and learning and development.

Our membership base is wide, with 60% of our members working in private sector services and manufacturing, 33% working in the public sector and 7% in the not-for-profit sector. In addition, 76% of the FTSE 100 companies have CIPD members at director level.

Public policy at the CIPD draws on our extensive research and thought leadership, practical advice and guidance, along with the experience and expertise of our diverse membership, to inform and shape debate, government policy and legislation for the benefit of employees and employers, to improve best practice in the workplace, to promote high standards of work and to represent the interests of our members at the highest level.

Introduction

The CIPD is interested in the potential impact of the off-payroll working rules on our members. Either as contractors supplying people management and development expertise to firms, or as HR practitioners working in the private sector.

HR practitioners will be impacted if they become responsible for determining a contractor's employment status, communicating the outcome of that determination, and establishing and then managing an appeal process to deal with contractor determination challenges. For example, practitioners will need to become aware of what their new duties are, what knowledge, skills and experience they need, and whether they need to bring in help from the outside, such as from a law firm or HM Revenue & Customs (HMRC).

The changes may also indirectly increase the workload of some HR practitioner's in the short-term if they spend time trying to find new individuals to take over from those contractors who decide to stop working because of the determination. There could also be implications for the workforce if employees must cover for contractors who have decided to leave.



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work and working lives*

In addition, some HR and payroll information systems will need to adapt to ensure that the organisation can differentiate data for those individuals who are employees and those who are deemed employees for IR35 purposes. The employer will need to distinguish between the two groups of individuals for reporting purposes, such as for CEO pay ratio reporting. To be able to meet the April 2020 implementation date, HMRC needs to issue final guidance as soon as possible for HR and pay practitioners telling them what they are expected to do and how, as well as providing them with practitioner-friendly information, advice and guidance.

We also flag our disappointment in the lack of joined up thinking between being taxed as an employee and being able to enjoy employee employment rights. We hope that this issue is addressed quickly.

We judge that most HR contractors will be able to ensure that their own contracts are written in such a way that they are not deemed to be within scope, and so the proposals should have a limited impact on them.

The CIPD response is focusing on section 4, *Helping organisations to make the correct status determination and ensuring reasonable care*, questions 13 to 16.

Our response

13. Would a requirement for clients to provide the reasons for their status determination directly to the off-payroll worker and/or the fee-payer on request where those reasons do not form part of their determination impose a significant burden on the client? If so, how might this burden be mitigated? Please explain your answer.

It is fair and reasonable for an off-payroll worker to have access to the reasons for their status determination, and that this information should come directly from the organisation responsible for making that decision, i.e. the client.

However, we are not clear why the question states that this right would only apply where those reasons do not form part of their determination. We presume that the off-payroll worker would like the reasons that did form part of the determination.

In principle, we agree with this proposal. However, we have concerns about the administrative burden that the extension of IR35 to the private sector will place on some companies, and this idea represents an additional administrative burden.

Our research (to inform the previous consultation August 2018) found that almost half of the 47 HR and payroll practitioners we questioned will need to enlist the support of a third party to make a status determination, and almost all will need support from HMRC.

Almost seven in ten of the 82 HR and payroll contractors we surveyed, meanwhile, were not confident that their clients would have the capacity, knowledge or resources to be able to make a correct status determination. Therefore, the scope for incorrect status determinations and challenges to them could initially be significant.

The best means of mitigating this risk is for HMRC to do everything in their power to ensure that clients have the information, support and guidance to make the correct status determinations in the first place, thereby minimising the number of potential status disagreements.

As we stated in our response to the previous consultation, the private sector is larger and more dynamic than the public sector and so the support and guidance provided needs to address this. There also needs to be clear and high-profile communications during the roll-out period and the concerns about the CEST tool need to be thoroughly addressed.

14. Is it desirable for a client-led process for resolving status disagreements to be put in place to allow off-payroll workers and fee-payers to challenge status determinations? Please explain your answer

We agree that there should be a process for resolving status disagreements to allow off-payroll workers and fee-payers to challenge status determinations. This would be fair and reasonable given the significant implications for the off-payroll worker of a decision that changed their established way of working. As the client is responsible for determining status, it makes sense that this should be a client-led process.

Given the potentially significant administrative burden this could place on the client, on top of their new IR35 responsibilities in determining status, careful thought should be given to any statutory requirements about the process that organisations need to follow.

Many organisations should have in place an individual dispute resolution procedure (hopefully, in line with the ACAS Code of Practice on discipline and grievance). However, it would not necessarily be appropriate for an appeals process allowing off-payroll workers to challenge incorrect determinations to mirror the organisation's formal procedure for dealing with employee complaints (for example the statutory right to be accompanied), although the general principle of dealing with an appeal about status promptly, fairly and consistently should apply. Careful thought needs to be given to developing a process that is proportionate to challenging a status determination.

15. Would setting up and administering such a process impose significant burdens on clients? Please explain and evidence your answer.

Initially it could, especially as many organisations will be grappling with their new responsibilities for making status determinations – a responsibility that many HR and reward practitioners feel ill-equipped to deal with, according to our research to inform the previous consultation on this issue.

No doubt, setting up the process would involve assigning resource and responsibility to a third party or designated senior-level officer within the organisation with the knowledge and confidence to review status decisions. We know from previous research carried out by the CIPD that dealing with traditional employee disputes thoroughly and fairly demands a significant amount of management time.

Further, decisions around employment status are multi-faceted and highly complex, and we note the concerns highlighted in the Government's response to its previous consultation – i.e. that *'a number of respondents expressed concern about the compatibility of CEST determinations with recent tribunal decisions, suggesting that the tool would require refinement and improvement if it was to be used for the private sector.'*

Careful thought needs to be given to what this process should involve, so that it doesn't place a too-significant burden on clients. The process needs to be fair but speedy, and not place cumbersome procedural requirements on client organisations.

16. Does the requirement on the client to provide the off-payroll worker with the determination, giving the off-payroll worker and fee-payer the right to request the reasons for that determination and to review that determination in light of any representations made by the off-payroll worker or the fee-payer, go far enough to incentivise clients to take reasonable care when making a status determination?

In theory, the requirement to not only be transparent about the outcome but also about how that outcome was reached should encourage HR and pay practitioners to take reasonable care when making a status determination. However, in practice this is debatable as we know that many private sector HR and pay practitioners don't have responsibility for administering IR35 and determining status/paying contractors.

If they are expected to make status determinations, then many people and pay professionals will need additional support and better guidance from HMRC, including an improved and refined CEST tool. Therefore, with the best will in the world, it is possible for inaccurate determinations to be made even if reasonable care is taken.

As Matthew Taylor's review of modern working practices pointed out, non-compliance is not only deliberate but can often be accidental and takes place out of ignorance. Therefore, it is essential that HMRC provides detailed, robust guidance about determining status as quickly as possible, as well as ongoing support and awareness-raising about the new responsibility for IR35 among private sector organisations.