

## OFF-PAYROLL (IR35)

### Understanding off-payroll working rules:

- The off-payroll working rules (known as IR35) came into force within the private sector in April 2021.
- The new rules contained in Chapter 10, Part 2 of the Income Tax (Earnings and Pensions) Act 2003, move the responsibility for operating the off-payroll working rules away from the contractor to the client.

### Who the rules apply to:

- The new off-payroll rules apply to contractors working through a Personal Service Company (PSC), providing their services through a recruiter to medium/large sized private sector client.

### When the rules apply:

- As of 6 April 2021, the client must decide if the contractor is a deemed employee, meaning PAYE and NICs would be payable on the contractor's income and deducted by the fee-payer, which would be the party that has a contractual relationship with the worker (often the recruiter).
- The PSC and contractor no longer have the primary liability for unpaid tax, therefore clients and recruitment companies carry the risk of unpaid tax and NICs on the contract income.

## THE OFF-PAYROLL STATUS DETERMINATION PROCESS

### End of the Grace Period

April 2022 marked the end of the 12-month grace period in which HMRC stated that as a way of supporting organisations that are trying to comply with the new off-payroll rules, financial penalties would not be issued for any inaccuracies provided that there was no evidence of deliberate non-compliance.

As the grace period has now come to an end, APSCo recommends that members review our guidance on our IR35 page to ensure that they are operating in compliance with the off-payroll working rules.

### Does your client need to make a IR35 determination?

### SMALL COMPANY EXEMPTION

Under section 382 of the Companies Act 2006, a company qualifies as "small" if **two** of the following conditions apply for **two consecutive financial years**:

- Annual turnover not more than £10.2 million;
- Balance sheet total (assets) not more than £5.1 million; or
- Number of employees not more than 50 employees.

ESM1006 has further detail available to help your client determine the size of their organisation in line with the above requirements.

Note: The small company exemption applies to the client, not the fee-payer or the PSC.

### Next steps:

Client are required under section 60H Chapter 10, Part 2 ITEPA 2003 to state in their opinion, if asked, whether they qualify as "small" in a tax year.

The client must respond to size-related information requests for the relevant tax year within 45 days. ESM1001B has templates available to confirm size.

### WHOLLY OVERSEAS EXEMPTION

Where services are being provided into the private sector and the **client** is based 'wholly overseas', having no UK connection in the form of being a UK tax resident or having a UK permanent establishment, the worker's personal service company (PSC) will remain responsible for deciding whether IR35 applies.

Guidance on what is considered to be a permanent establishment can be found in INTM153060, and further information on the wholly overseas exemption can be found in ESM10006.

### OUT OF SCOPE

Small organisations and clients who are wholly overseas do not need to consider the off-payroll working rules in the private sector.

**The PSC will be responsible for determining the off-payroll status as per Chapter 8, Part 2 ITEPA 2003.**

## STATUS DETERMINATION STATEMENT (SDS)

### *What does the client need to do?*

- The client must produce a Status Determination Statement (SDS) after completing a determination, confirming whether the assignment is inside or outside IR35 and the reasons for reaching that conclusion.
- HMRC have a Check Employment Status for Tax (CEST) tool, which you can access [here](#), along with supporting guidance on using the tool in [ESM11000](#). HMRC have confirmed they will stand by determinations made using the CEST tool, however the information input into the determination must be accurate and what actually happens in practice.

### *Who does the SDS need to be passed down to?*

- The client must pass the SDS down the supply chain by to the next party which could be a Managed Service Provider (MSP), the recruitment business (who is often the fee-payer), the PSC itself and to the worker.

### *When does the SDS need to be passed down the supply chain?*

- This must be done by the date of the first chain payment to be made for the PSC's services, although practically the parties will need to know the status before the start date in order to correctly set up the contracts and method of engagement.

[ESM10012](#) goes into detail as to what constitutes a valid SDS with worked examples.

We have produced IR35 guidance intended for members to give to their clients which can be accessed through the APSCo website [here](#).

There is also a high-level infographic with an overview of the key IR35 steps to be shared with clients which can be accessed [here](#).

If none of the exemptions apply

The off-payroll working rules will apply where the client will be responsible for determining whether the assignment is inside or outside IR35.

Outside IR35

Inside IR35

### **Popular FAQ:**

#### **My client is making blanket determinations for all of our contractors, can I accept this?**

Blanket assessments do not meet the statutory obligation to take [reasonable care](#) when making an IR35 status determination. Clients can take a role-based approach if they have a number of contractors working on the same contract on similar terms and conditions, however they must complete a final determination once they know who the worker will be.

Further information on what constitutes reasonable care can be found in [ESM10014](#).

Please note that clients choosing not to engage with PSCs for example in their supply chains is not the same as making a blanket determination.

You can access more of our popular FAQ's on IR35 through our website [here](#).

## CONTRACTS

Our model contracts include the relevant provisions for "outside IR35" assignments (i.e. substitution, control, financial risk etc), however there are also clauses in place that where you have an "inside IR35" assignment, the contract is still suitable for use and the appropriate clauses will come into effect.

We have a factsheet available on the website on the key IR35 clauses in the [APSCo agreement for contractors](#) which you can access [here](#).

The worker is considered to be an employee of the client for tax purposes, and therefore subject to PAYE tax and National Insurance contributions.

## INSIDE IR35 DETERMINATION

### *Alternative engagement models:*

- **PAYE payroll (agency workers)** - where a recruitment company contracts directly with the worker and operates tax and NICs on payments made, providing the workers with agency worker rights (AWR). If you decide to engage with workers directly, AWR may apply given they meet the eligibility criteria. Further information on AWR can be found on the government website [here](#).
- **Umbrella Company** - where a umbrella company employs the worker directly, the off-payroll working rules do not apply. Some umbrella companies do not employ the worker directly and use intermediaries, so ensure that this is checked as you may unwittingly enter into a PSC contract where the off-payroll working rules will apply. There is guidance available on our website on umbrella compliance which you can access [here](#).
- **"Inside IR35" PSC** - should a contractor wish to continue operating through their PSC after having been deemed "inside IR35", you will need to calculate a "deemed employment payment" using the RTI (Real Time Information) payroll system. The deemed employment pay rate is the income of the worker after deductions, including both employee and employer NICs and the Apprenticeship Levy. Neither worker rights nor stakeholder pension rights apply. Further information on operating deemed payments can be found on the government website [here](#).

## CLIENT-LED STATUS DISAGREEMENT PROCESS

The legislation imposes an obligation on the client to provide a "client-led status disagreement process", where either the recruiter or the contractor may disagree with the outcome of the determination and wish to appeal it.

The client must respond to a request to review the status determination statement within 45 days. Once reviewed, the client must either confirm that the determination is correct with reasons or provide a new status determination statement with the new conclusion confirming when it will be effective from and withdraw the previous SDS.

If you are the fee payer and disagree with the client's determination, you will need to write to the client and give reasons why. You need to ensure you keep records of status determinations and any corresponding disagreements.

Note: during the dispute process, the client's original status determination stands. Further information can be found in [FSM10015](#).

I do not agree with the client's status determination, can I appeal it?

### **Popular FAQ:**

#### **Are “inside IR35” contractors entitled to employment rights?**

Should a contractor choose to continue operating via their Personal Service Company (PSC), although the assignment is “inside IR35” they will not benefit from any “employee rights” such as holiday pay, sick pay, pension contributions or dismissal rights etc. Contractors receive these benefits through their employment with their PSC.

If an assignment falls “inside IR35”, it is likely that the contractor is no longer in business on their own account and is within scope of the Agency Workers Regulations (AWR).

Under AWR, workers are entitled to comparable basic pay and conditions to a permanent employee on the client site. If a contractor wishes to engage via an umbrella company, they will be an employee of the umbrella company and therefore they will benefit from both employment rights and AWR rights.

You can access more of our popular FAQ’s on IR35 through our website [here](#).

**This IR35 infographic provides a high-level overview of the key steps to determining whether the off-payroll working rules apply for assignments in the private sector.**

**If you have any further queries, please contact [membership@apsco.org](mailto:membership@apsco.org).**

#### **Disclaimer**

**This infographic is intended for use by APSCo members only. The facts, information and opinions contained herein are correct to the best of APSCo’s knowledge at the time of publication. This document is intended to provide general information only and does not constitute advice. It is not an exhaustive and complete reference document on this subject. APSCo can take no responsibility or liability for the use of or reliance on the information contained within this document or for any decisions or the consequence of any such decisions made by APSCo members.**