



# Off-payroll working rules from 6 April 2021

The new off-payroll working (“OPW”) rules (also known as IR35) for the private sector are coming into effect from 6 April 2021, which is a 12 month deferral from the original planned date of 6 April 2020. The rules are aimed at individuals providing services through a personal service company (“PSC”) or other intermediary to a “client” (i.e. the organisation that needs the work done).

Businesses may need to implement various new policies and processes before 6 April 2021 in order to comply with the rules.

## Background

The original IR35 rules were initially introduced in 2000, to counteract tax advantages where individual contractors, who would be employees if they worked directly for their clients, instead provide their services through a PSC. HMRC referred to this as “disguised remuneration”. The original rules require the contractor to determine for each engagement if they would have been an employee if they had contracted directly with the client.

In 2017 the rules were changed for public sector contracts to make it the client’s responsibility to determine the individual’s employment status and for the client (or potentially an agency) to apply PAYE.

From 6 April 2021, the public sector rules will be extended to the private sector but will only apply to medium and large sized businesses.

Small private sector businesses (defined below) will not be affected by this change. The original IR35 rules will continue to apply to PSCs who engage with these small businesses.



# What is the new regime?

The new rules will apply for all services provided after 6 April 2021, under existing or new PSC contracts.

The new regime moves the onus of compliance and administration from the PSC to the client and, if different, the agency which pays the PSC (“the fee payer”).

Medium or large sized private sector, as well as public sector, businesses who engage with contractors either through PSCs or other intermediaries will be responsible for determining the tax status of an individual contractor’s engagement, i.e. whether they would have been employees had they contracted directly with the client and not via the PSC.

- **Status Determination Statement**

The client must issue a Status Determination Statement (“SDS”), which is a statement that declares a contractor’s deemed employment status (employed or self-employed) for each engagement that is expected to fall within the OPW rules. This statement must also set out the reasons for the conclusion reached. However, the best practice approach will be to issue an SDS to all contractors.

The client must give the SDS to both the individual contractor and the person the client contracts with, e.g. the PSC or an agency.

Each entity in the supply chain must pass the SDS to the next in the chain until it reaches the fee payer.

The client must take reasonable care in making the determination, otherwise the obligation to issue an SDS is not met.

Another important aspect of the rules is that an individual contractor or the fee payer has a right to challenge a status determination with the client if they disagree with it.

- **Paying through a payroll**

Where the client determines that the OPW rules should apply, the PSC must be paid under deduction of PAYE and NIC through a payroll. If the client pays the PSC directly it is responsible for making that payment through a payroll.

If the fee payer is an agency lower in the supply chain then, on receiving an SDS confirming that IR35 or OPW rules apply to that contract, that agency must make the payment through a payroll.

Either the client or the fee payer will therefore deduct tax and NI from the gross payment to the PSC and account for the employer’s NIC liability and if applicable, apprenticeship levy.

- **Using CEST**

HMRC has a support tool known as the Check Employment Status for Tax (“CEST”), which clients may use to help determine tax status, although they do not have to. HMRC’s CEST tool will give HMRC’s view of whether a particular engagement looks more like one of employment rather than self-employment. Some aspects of the original tool have been criticised with regards to flaws in identifying certain complex issues. HMRC have acknowledged this and have issued an updated version of the CEST tool. Furthermore, HMRC has confirmed that it will stand by the result given by the CEST tool, unless a compliance check finds the information provided was not accurate. The new version of CEST produces a note which includes reasons for its decision which can be included in an SDS.

- **Establishing the size of the private sector client**

The private sector client is responsible for determining their size.

This will be determined for a company by the Companies Act 2006 definition. So a simple guide is that a client that is a commercial company which needs an audit will be medium or large sized and a company which does not will be small.

Generally, a company or LLP will be small if it meets two or more of the following conditions in 2 consecutive periods:

- turnover of not more than £10.2m,
- balance sheet total (i.e. gross assets) of not more than £5.1m, or
- not more than 50 employees.

A company that is part of a group will need to apply Companies Act limits to the group’s consolidated or aggregate figures. If the parent of a group is medium or large, their subsidiaries will have to apply the off-payroll working rules.

The size of the client in a particular accounting period affects payments made under off-payroll contracts in the tax year starting after the filing date for that financial period.

An unincorporated entity will be medium or large if it has annual turnover in excess of £10.2m.

## What does this mean to you?

If your business is medium or large sized, you will be required to assess and review the employment tax status (i.e. employment or self-employment) of existing and new contracts with any contractors who operate through PSCs or other intermediaries.

You will then be required to issue SDSs, as explained above. The law only requires that an SDS is issued to those contractors where the deemed employment status will be that of an employee. However, it is highly recommended that this statement is issued to ALL contractors so that it is clear that the new rules have been considered as required.

The implementation of the OPW rules may require you to consider their impact on tax governance matters, such as Senior Accounting Officer ("SAO") and Corporate Criminal Offence of Tax Evasion ("CCO") rules.

You will need to set up new systems and processes to ensure compliance with these rules including identifying and analysing a contractor's employment status and operating a payroll if appropriate.

Failure to comply with the OPW rules may result in penalties, which are often based on a percentage of tax due. The penalties can be higher if there is not sufficient evidence to demonstrate that reasonable care has been taken to comply

with obligations under these rules. Although penalties will not be charged in the first year, except in cases of deliberate non-compliance.



## What are the next steps?

In order to prepare for the new OPW rules, we would recommend medium and large sized organisations consider the following:

- Review your workforce, identify those individuals who are providing their services through PSCs.
- Review the contracts already in place that will continue beyond April 2021, to determine whether the OPW rules will apply.
- Assess the financial and commercial effects of these rules for the business (including the impact on recruitment, staff retention, renewal of contracts).
- Prepare a cost analysis.
- Identify who will be responsible for making status determinations. Determine how decisions will be taken for current and future contracts and how these will be communicated to agencies and contractors.
- Identify who will be responsible for operating payroll in respect of payments to PSCs. Consider if a separate payroll should be operated.
- Identify what systems and policy changes are required to ensure compliance. This will include processes for the timely making, delivering and keeping copies of SDS's and the reasons for these decisions, as well as having a process to deal with disputes.
- Set up a system to document and test these changes.
- Identify a core team to work together to transition to the new rules, involving relevant employees from various departments across the business including Finance, HR, and Payroll.

## We are here to help

Preparing for compliance with these new rules could be complex and requires careful consideration and planning to manage the relevant tax risks and commercial implications.

We can support you with the transition by providing assistance in the following:

- Identifying the employment status can be complex and we can provide our expertise in employment tax law.
- Contracts and engagements can be complex and we can provide insight through our knowledge on recent case law that may assist in new contracts.
- Providing guidance on the steps to take to implement required systems.
- Payroll services.

Should you wish to discuss these changes in further detail, please contact your BGM adviser or Tax Partner, Louise Delamere at [louisedelamere@bgm.co.uk](mailto:louisedelamere@bgm.co.uk)



### Disclaimer:

This information provides an overview of the issues considered and is for general information only. It is not intended to provide advice and should not be relied upon in any specific transaction.

