

# Changes to IR35 affecting the hiring of workers from April 2021

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# 1 What the changes mean for hirers

## Medium and large-sized entities

All public sector hirers and medium and large-sized private sector hirers (including some charities) must apply the rules where two or more of the following are met:

- turnover more than £10.2m pa
- balance sheet total more than £5.1m (i.e. assets before deducting liabilities)
- more than 50 employees.

If the test is met, compliance is required from 6 April following the filing deadline.

Where a company does not satisfy the test, the rules apply from 6 April following the end of the filing period for the second financial year when the conditions have been met for two consecutive years. Similarly, a company ceases to be small if it fails to meet the test for two consecutive years.

## Exception for non-corporate entities

Hirers that are not a company (registered, unregistered, or overseas) nor an LLP, only need to meet the annual turnover condition for the rules to apply. Watch out, as connected persons' turnover can be taken into account.

Where this simplified test is used, the rules apply from 6 April following the end of the calendar year when the condition is met. (There is no two consecutive years requirement as there is with corporate entities.)

## UK connection

For the rules to apply, the entity must have a UK connection for the tax year; either resident or with a permanent establishment before the beginning of the tax year.

## Groups and joint ventures: enquiries we are receiving

If the parent of a group is medium or large, subsidiaries also have to apply the rules. Similarly, for a joint venture company, the company will only be small (and exempt) if the controlling entities are small.



## Requests for information

Workers, and any entity with which a hirer contracts, can request confirmation from the hirer of its size for a specific tax year. The hirer has to provide the statement of its size by 45 days from either the day the request is received or before the start of the specified tax year, whichever is the later.

## What the new IR35 rules mean in practice – the nuts and bolts of what to do

If the conditions are met, the rules impose an obligation on the hirer to make an assessment determination of the employment status of every worker who they engage through their intermediary and an agency.

The determination is communicated using a Status Determination Statement (SDS). An SDS must be passed to the worker and the person or organisation the hirer contracts with and provide a conclusion and reasons for coming to it.

The hirer is responsible for deducting tax and National Insurance Contributions (NIC) until the SDS procedure is complied with, and a hirer can issue an SDS before 6 April 2021.

Reasonable care must be taken when making a determination. Failure will result in the tax and NIC becoming the hirer's responsibility. Reasonable care means the hirer acting in a way that would be expected of a reasonable person in their position (varies from case to case).

HMRC have published examples of what it considers reasonable and unreasonable.

Hirers must have dispute procedures in place to deal with any disagreements that arise from their determinations.

Where a worker disagrees with the assessment, they can make representations before final payment is made for their services. The hirer can then consider the reasons and decide to maintain the determination and give reasons, or give the worker a new SDS and state the date from which it applies.

The hirer must respond within 45 days of receiving the notification of disagreement. If this is not complied with, the worker's tax and NIC become the hirer's responsibility.

We are receiving enquiries and can confirm that if a hirer receives representations prior to 6 April 2021, the hirer is treated as receiving those representations on 6 April 2021.

If there is still disagreement after this process, the worker can follow the self-assessment and national insurance processes.



# 2

## What the changes mean for agencies

An agency will be affected if it supplies workers to:

- any public sector client
- medium and large-sized private sector clients
- another agency who supplies a worker for public sector clients or medium and large-sized private sector clients.

An agency will become liable for paying tax and NIC if the agency is:

- the fee-payer (note the conditions about size only apply to hirers)
- not the fee-payer but receives the status determination from the hirer above and does not pass it to the person below
- the first agency in the chain and HMRC cannot collect outstanding tax or NIC from parties below (e.g. the fee payer).

# 3

## Key potential pitfalls and risks



**Appropriate test** - It is vital to know which test to use; as described, there is a full test and a simplified test depending on whether the entity is corporate or non-corporate.

**Changes in size** - it takes two years of not satisfying the test for a corporate entity to qualify as small, and two years of satisfying it for it to qualify as medium or large. This could impact commercial strategies. The two-year rule does not apply to non-corporate entities.

**Circumstances** - keep aware of the circumstances of the groups, subsidiaries, and UK connections: the particular rules should be noted.

**Communication** - communication throughout a chain is key, liability can shift to the hirer or agency depending on the circumstances.

**Agencies** - failure to pass on a status determination is a key risk, and do remember that liability shifts to the first agency in a chain if HMRC cannot collect tax or NIC.

**Errors** - HMRC's Check Employment Status for Tax (CEST) online tool has limitations. For example, cases we are seeing suggest:

- misinterpretation of CEST questions is common - assessments are often undertaken by hiring managers who may not have the required experience or knowledge of working practices of an engagement change or there is a new contract.
- CEST provides an "undetermined" outcome for difficult cases. In this situation, it may be necessary to turn to case law and apply legal tests - mistakes can be made without specialist advice.
- CEST is inappropriate where there are more specific employment status rules and HMRC has issued specific guidance (e.g. some healthcare roles).

**Penalties** - there are cost implications for getting an assessment wrong; penalties are as high as 100% of the income tax and NIC that has been avoided.

**Challenges from HMRC** - in practice, HMRC may honour a 'self-employed' output from CEST without further enquiry, but may challenge the outcome where status has been determined by other means, and given the shortcomings of CEST, alternative methods of determination are often necessary. This brings heightened risk of a challenge by HMRC - having to defend your position may have time and cost implications.

**Employment claims** - sudden decisions to tax individuals as employees could prompt employment law claims concerning holiday pay, sick pay, and pension contributions.

**Time considerations** - It is essential to keep implementation dates in mind. It may take a long time to complete assessments, get advice, fully communicate with parties and implement the changes.



# 4 Key implementation options

## Training

If non-tax specialists are involved in the assessment, training and review may be required. It may be helpful to get tax advice at the outset to set out policy and support structures.

## Ongoing consultation

Developments in HMRC guidelines and case law are likely to move quickly and must be accounted for in the assessment process - setting a schedule of ongoing consultation with a tax specialist could help.

## Quality assurance

Designing workflows and having quality assurance processes in place will be beneficial. A consistent approach to questionnaires, communications, and status determination statements may prevent avoidable errors.

Reasonable care must be taken in reaching a conclusion. Compliance reviews by HMRC should be anticipated, so keep a record of assessment questions, answers and outcomes. Particular strengths or weaknesses of any employment status indicators and any reliance on specialist advice should also be recorded.

## Insurance

Given the clear risks involved in the assessment of complex cases, some clients are choosing to take out insurance. It may be better to get things right first time.

## Employed solutions

We are seeing from clients taking the following steps already:

- take contractors on as staff
- offer fixed-term contracts, in some cases at zero rate
- engage individuals as agency employees
- engage via umbrella companies.

However, it should be noted that if a worker is engaged, but not employed, by an agency, an umbrella company or a similar third party through the worker's intermediary entity, the off-payroll IR35 regime may still apply.



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