



January 2019

Off-Payroll working – where are we now?

- The government has confirmed that it will extend the "off-payroll" working rules to the private sector from April 2020.
- Companies may need to rethink the basis on which they engage contractors and should start to prepare for the change in law.
- We can guide you through the new rules and the steps you should take.

The "off-payroll" working rules typically apply to individuals supplying their services through an intermediary (commonly a personal service company) and were introduced for public sector contractors in April 2017. Legislation to extend the rules to the private sector from April 2020 will be published this summer but, in the meantime, there is action that those engaging workers through personal service companies (PSCs) can take.

Separately, the government has consulted on the rules that determine employment status and is considering what changes might be needed to take account of modern working patterns and environments. One of the proposed measures is to align the status tests for employment rights and tax purposes more closely.

A REMINDER OF THE "OFF-PAYROLL" WORKING RULES

At the moment, a private sector client contracting with a PSC does not have to account for income tax or National Insurance contributions (NICs) on the fees that it pays to the PSC. Instead, if the engagement is found to be within a set of tax rules known as "IR35", the PSC (not the client) is liable to account for tax and NICs. Broadly, IR35 applies if the individual worker would be regarded as an employee of the client had they been engaged directly rather than through the PSC. Concern about a lack of compliance in this area led the government to change the way IR35 operated for contractors in the public sector. Known as the "off-payroll" working rules, they make the public sector client responsible for deciding whether or not an engagement is within IR35. If it is, the client (or the person paying the PSC if different) is liable to account for income tax and NICs (including employer NICs) on the fees paid to the PSC. The government believes that the changes have worked well and, following a consultation last summer, announced in the 2018 Budget that it will be extending the off-payroll working rules to the private sector.

TRAVERS SMITH

What we know

- The new rules will apply to the private sector from April 2020;
- They will not apply to clients that are "small" companies;
- They will operate on broadly the same basis as they do in the public sector (i.e. the client will be responsible for deciding whether or not IR35 applies and the person paying the PSC's fee will generally be required to operate PAYE);
- The government has said that it will publish detailed guidance and provide support and education to help clients understand and implement the changes;
- The new rules should not affect the VAT position of payments made under the relevant contract; and
- They are a mechanism for collecting tax and **do not** in themselves cause contractors to become employees for employment rights purposes.

What we don't know

- What a "small" company is. The government has indicated that it will be based on definitions within the Companies Act 2006 and there are rumours that it might be a company with fewer than 50 employees;
- How the private sector rules will differ from those applicable to the public sector to reflect the diversity of private sector clients; and
- Whether modifications will be made to the rules as they apply in both the public and private sector such as changes to the Check Employment Status Test (CEST) which is the government's online tool for checking whether an engagement is caught by the off-payroll rules.

What you should do now

Although 2020 seems a long way off, there are steps you can take now to prepare for the off-payroll working rules:

- Carry out an audit of your existing arrangements with PSCs (whether you engage them directly or through an agency):
 - Identify those arrangements that will or might continue to be in place in April 2020;
 - Consider whether those arrangements are likely to fall within the off-payroll working rules. Some of your contractors might have already decided that their engagement with you is within IR35; from 2020 you might become responsible for the tax and NICs they currently pay under those arrangements. When the off-payroll rules were introduced in the public sector they applied to all payments made on or after the date on which they took effect regardless of whether this was under a new or existing arrangement.

What you
should do
now (cont.)

- Review the contractual terms of existing arrangements:
 - If the new rules will apply, does the contract enable tax and NICs to be deducted from payments made to the contractor and are you as the client (or the payer if different) indemnified in respect of such liabilities?
 - Will you have an additional liability to employer NICs under the arrangement? At this point, we do not know whether it will be possible to deduct employer NICs from payments made to a contractor. If such a deduction is not allowed, the employer NICs will be a further cost to you and you may need to re-think the fees paid to the PSC under the arrangement
- Consider the basis on which you engage contractors going forward:
 - Is the contract likely to extend beyond April 2020? If so, make a determination now as to whether or not the arrangement will be within the off-payroll rules;
 - Ensure the contract is ready for the new rules i.e. that it contains powers to deduct income tax and NICs and appropriate indemnities for these charges; and
 - Bear the potential cost of the new rules in mind when deciding the fee payable under the arrangement.

In all cases, it is important to remember that under the new rules you, the client, will be responsible for deciding the status of an arrangement based on the facts as you see them. It is not sufficient to simply rely on the view taken by the contractor or any other person. By discussing the IR35 status of a contractor with them at an early stage clients can avoid future disputes on the issue and ensure that a good working relationship is maintained.

How we can help

We can help you:



Review your existing arrangements to decide whether or not the new rules will apply to them;



Draft contracts so that they take account of the new rules; and



Establish whether future engagements are within the off-payroll rules.

Taking steps now will help reduce the administrative burden that the off-payroll rules could impose on your business. Please don't hesitate to contact a member of the Travers Smith Incentives and Remuneration Group or Employment Department if you would like to talk further about any aspect of this briefing.



Mahesh Varia

E: mahesh.varia@traverssmith.com
T: +44 (0)20 7295 3382



Ed Mills

E: ed.mills@traverssmith.com
T: +44 (0)20 7295 3424



Elissavet Grout

E: elissavet.grout@traverssmith.com
T: +44 (0)20 7295 3439