



## OFF PAYROLL WORKING/IR35: PAYROLL AND OTHER PRACTICAL ISSUES: ICAEW'S QUESTIONS FOR HMRC

Issued 13 December 2019

Off payroll working/IR35: payroll and other practical issues: ICAEW's questions for HMRC – text of questions submitted to HMRC on 13 December 2019

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Please would HMRC clarify its view on the following (we have sought to avoid duplicating previously answered questions and questions that HMRC undertook at Shipley to respond to).

To simplify the drafting of this note, we have assumed that the new rules will come into effect on 6 April 2020.

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## **A THE TRANSITION**

### **Payments**

1. We had asked HMRC to consider issuing a statement that the new off-payrolling rules do not apply where contracts / work has ceased prior to the commencement date for the new rules. Will HMRC do this? If not, please explain how the new legislation allows withholding of PAYE when there is no SDS that can be issued for the period of the contract.

**HMRC's response:**

### **SDS**

2. Please confirm that a valid SDS can be issued before 6.4.20, ie, please confirm that a determination of employment status which applies to a period after 5.4.20 and fulfils the requirements for an SDS, eg, states the reasons for the conclusion and reasonable care is taken, will be accepted by HMRC as a valid SDS if it was given to the contractor and agency before 6.4.20.

**HMRC's response:**

3. If a contract started pre-6.4.20, do public sector clients need to issue SDSs effective from 6.4.20, to ensure inter alia that the obligation for withholding continues to be with fee payers?

**HMRC's response:**

4. If the answer to the previous question is yes, is this the case even if the client was compliant with the new rules before 6.4.20, eg, gave a notification of employment status to both the worker and any party with whom the client contracted which contained reasons and reasonable care was taken?

**HMRC's response:**

5. If an SDS is issued before the start date of the new rules, say 6.4.20, and the contractor makes representations to the client that they disagree under new s61T(1), does the 45 day period in new s61T(2) by which the employer must confirm the original or issue a new SDS always run from 6.4.20 if the contractor's representations were received before 6.4.20?

**HMRC's response:**

## **B ONGOING COMPLIANCE**

### **Employment status**

6. Please confirm that someone working through a PSC cannot also be a limb (b) worker and therefore does not have employment rights (eg, paid holidays and be within auto-enrolment).

#### **HMRC's response:**

7. Are there circumstances in which a contractor working through a PSC can also be a limb (b) worker for the same contract?

#### **HMRC's response:**

### **SDS**

8. Please clarify whether an SDS needs to be issued by non-small clients in all cases, ie, regardless of whether or not the contractor's employment status as determined by client is that of deemed employee. We believe that it will be best practice for clients to do so to minimise the possibility of becoming liable to account for PAYE because of new 61N(5) inserted by para 12(3).

#### **HMRC's response:**

### **Notification where client is small**

9. The draft Finance Bill legislation does not oblige "small" clients to tell contractors that they are small. We acknowledge that the government wishes to minimise the compliance burden on small clients but the absence of such notification will create uncertainty for contractors who will not know whether the obligation to determine employment status, and if appropriate account for PAYE, lies with them or with another party. Given that this impacts on the contractor's ability to know how to comply with their tax obligations, and is likely to have a knock-on effect on compliance, we recommend that the contractor should have the right to be told by the client whether it is small.

#### **HMRC's response:**

### **Client-led disagreement process**

10. In order to give a degree of certainty to clients, we recommend that there needs to be a deadline by which contractors can raise disagreements with their clients under new s61T. We suggest a deadline of 45 days from when the SDS is issued or whenever circumstances change to make a valid SDS no longer accurate. This should not preclude a contractor from completing their SA and their PSC's tax returns on a basis different from the SDS.

**HMRC's response:**

**Payroll**

***Starter checklist*** [PB note Q11 Shipley Q+As]

11. Should deemed employees be asked to complete and return a starter checklist, like actual employees?

**HMRC's response:**

12. Can HMRC amend the starter checklist to include a question regarding deemed employees and make it clear that the student and postgraduate loan questions do not apply to deemed employees?

**HMRC's response:**

***Code numbers for starters***

13. We should welcome confirmation that deemed employees within the off-payrolling rules who make no declaration on the starter checklist should be treated in the same way as actual employees and so deemed employers should initially apply code 0T(M1/W1) under option C undeclared. Or if not, why not?

**HMRC's response:**

***Coding notices for employers***

14. Please confirm that as currently in the public sector, HMRC will continue to send deemed employers coding notices forms P6 and P9 for deemed employees, and will not be differentiating between off-payroll workers and normal employees.

**HMRC's response:**

***NIC period***

15. The law provides that, in payroll, tax must be accounted for when the payment is made whereas NIC should be accounted for based on the period in respect of which the payment is made. For example, where an invoice covers two months, two sets of NIC thresholds should be applied but only one tax threshold.

16. Please confirm whether the above statement is correct, or if not how fee payers should deal with this in payroll.

**HMRC's response:**

17. For example, how will this work in respect of a payment made:
- a) after 5 April 2020 in respect of the month of March 2020?
  - b) on 31 July in respect of an invoice covering 1 May to 31 July 2020

**HMRC's response:**

a)

b)

***Off payroll worker marker (OPWM)***

18. Will the OPWM need to be ticked in every FPS? If set up in error can it be removed in next FPS? And if not set up in time, can it be included in next month's FPS?

**HMRC's response:**

19. We have been told by HMRC's Operational Excellence team that the OPWM once attached to an employment cannot be removed in HMRC's NPS, and that the only solution is for the deemed employer to resign the employee where the OPW marker has been set in error. Please confirm whether this is correct.

**HMRC's response:**

20. How can a deemed employer which has incorrectly treated a contractor as a deemed employee:
- a) first, reverse the entries and,
  - b) secondly, recover the overpaid tax and NIC?

**HMRC's response:**

a)

b)

21. And how will HMRC reconcile its records, which may wrongly include a deemed employment, with the contractor's SA tax return when submitted, which will include no employment page for the deemed employment set up in error?

**HMRC's response:**

### ***Payslips***

22. Does a deemed employee have the right to receive a payslip (absent a provision in the contract to this effect)? We understand that employment rights legislation does not apply to deemed employments so a deemed employee has no right to receive a payslip. However, we consider that best practice demands a payslip be issued to help contractors see what they have been paid and what deductions have been made, even though deemed employees being able to access online payroll systems to download electronic payslips could potentially create security issues.

**HMRC response:**

### **Statutory payments for contractors who are deemed employees**

23. Please clarify how a contractor all of whose earnings are from deemed employments can become entitled to statutory payments. As a matter of policy is it intended that deemed employees should be treated the same as actual employees for this purpose? We believe that they should be but that the law will need to be changed to achieve this.

**HMRC's response:**

### **Expenses**

#### ***Allowable expenses***

24. The public sector rules have provision for adjusting the deemed payment to allow for the cost of materials, and expenses that would have been deductible if there had been direct employment (s61Q ITEPA - see below).
25. If the contractor (via the PSC/agency) charges expenses to the end client, who pays them (or the contractor arranges for them to be paid direct by the end client), then logic would suggest that they should be excluded from PAYE. However the legislation says, at Step 3, to deduct "so much of that amount as represents expenses **met by the intermediary**" (emphasis added).
26. Please confirm that in this situation the expenses are deductible from taxable pay by the deemed employer because they have been met by the intermediary or the engager.

**HMRC's response:**

***Non-deductible expenses***

27. Please confirm what returns should be made to HMRC by the end client and fee payers when a contractor's PSC is, via the fee-payer, paid expenses which would not be deductible if paid to an actual employee, for example commuting to a normal place of work.

**HMRC's response:**

28. For an actual employee, the cost of a non-deductible train ticket paid for direct by the employee's employer would be entered on form P11D in Box M with Class 1A NIC due, and the cost of a non-deductible train ticket paid for by the employee and reimbursed by the employer would be entered on form P11D in Box N (expenses) and liable to Class 1 NIC. As a contractor who is a deemed employee is not an employee, will form P11D be in point for deemed employer/ees, and, if so, under what statutory vires? If not, will HMRC expect deemed employers to account for tax and NIC, and if so, how?

**HMRC's response:**

**Correcting mistakes in payroll**

***Change to SDS***

29. If following an appeal an SDS that said PAYE withholding was due is replaced with an SDS that says no withholding is due, what is the procedure for reversing the situation and reclaiming the tax and both the employer and employee NIC paid? Please explain the procedure when the SDS was issued and re-issued in:
- a) the same tax year, and
  - b) different tax years.

**HMRC's response:**

a)

b)

***PAYE not accounted for***



30. What happens if an SDS is received by the fee payer too late to implement in payroll as the payment has already been made gross to PSC? Should the fee payer make an adjustment in the following pay period? What if the final payment for the contract has already been made?

**HMRC's response:**

31. Please confirm whether regulation 80 of the PAYE Regulations (Income Tax (PAYE) Regulations 2003) applies to a deemed employer / fee payer in the same way as to an employer, and if so, that the deemed employee can claim credit for the income tax determined to be payable under PAYE?

**HMRC's response:**

***Getting it wrong – who bears the cost?***

32. Where a client has issued to the worker an SDS saying that the worker is not a deemed employee and which complies with the requirements of new s61NA(1)(b) and (2) in the draft Finance Bill legislation (reasons provided and reasonable care taken), who bears the cost of:
- a) employer NIC,
  - b) employee NIC,
  - c) employee income tax, and
  - d) apprenticeship levy,
- if the SDS is proved later on to be wrong?

**HMRC's response:**

a)

b)

c)

d)

33. Does the answer differ depending on whether the client contracted directly with the contractor's PSC or did so via an agency?

**HMRC's response:**

34. Our understanding is that the liability will pass to the client, even where the client has done all in its power to comply, including using CEST to determine the status. This is unjust when the client has done all that it reasonably could have to comply, and in such cases the liability should fall on the worker or their PSC. If as a matter of policy the liability falls to the client, it is inconsistent with what happens when a PSC has to make a deemed employment calculation in respect of services supplied to "small" private sector clients in which case the PSC accounts to HMRC for the employer NIC.

**HMRC's response:**

***Unaccounted for PAYE – who is responsible***

35. Who is responsible for tax and NIC – including employer NIC and apprenticeship levy – if the deemed employer / fee-payer ceases trading:
- a) having withheld PAYE from an invoice but not remitted it to HMRC?
  - b) having made payment gross to PSC having ignored an SDS saying that the contractor is a deemed employee?

We consider that this the liability for tax and employee NIC should not transfer to the client if they have undertaken due diligence.

**HMRC's response:**

a)

b)

**The personal service company (PSC)**

***Corporation tax (CT) computation***

36. The accounts of a PSC are normally drawn up under the accruals basis. This means that fee invoices are shown in the accounts in the period in which rendered and are taxed that financial year. If an amount subject to the off-payrolling rules has been invoiced but is not paid and therefore is not subjected to PAYE until the following year, please explain
- a) in which year should the invoice amount be shown in the accounts, and
  - b) we suggest by way of an example, how the timing difference should be handled in the corporation tax computation of the PSC.

**HMRC's response:**

a)

b)

37. Please confirm that the legislation in s141A Corporation Taxes Act 2009 inserted by para 14 FA17 gives a CT deduction for the gross amount of the chain payment received, ie the amount invoiced, by the PSC whether or not it is onward paid to the contractor, not just the fees net of PAYE.

**HMRC's response:**

**Contractor's SA return**

38. HMRC has previously told us that the contractor's SA return should show an entry for amounts relating to off-payroll working fee income onward paid to them as tax and NIC-free salary by their PSC. If this is indeed the correct approach, please explain:
- a) how such amounts will be distinguished on the SA return and in HMRC's records from actual salary paid to the individual (eg where the PSC has undertaken work which is outside the IR35/off payrolling rules), and
  - b) how HMRC will prevent double taxation of the off-payroll working employment income shown on the two employment pages.

**HMRC's response:**

a)

b)

**Universal credit**

39. For deemed employees, what income is means-tested for UC? Is it earnings reported under RTI by fee-payers, or amounts in respect of fees paid to the contractor. If the latter, how will the amounts be reported to DWP, and, if both, how will double counting of income relating to the same contract be avoided?

**HMRC's response:**

40. When will guidance on the interaction with UC be available?

**HMRC's response:**