

PRACTICUS™

2020
1R35
CHANGES

A GUIDE FOR CLIENTS

ONE+MANY

PRACTICUS™

HELPING PEOPLE
TO NAVIGATE
CHANGE

ONE+MANY

2020 IR35 CHANGES

The Off-Payroll Rules (IR35) are not new tax legislation. In fact, rules have been in place since 2000, when they were referred to as the Intermediaries Legislation. Nonetheless, HMRC suspects that there is widespread non-compliance and it is changing the way determinations are made around IR35 to tighten up the system.

This affects you as an organisation that uses contractors, such as the interim professionals we provide, and the way we all work together.

The good news is that the vast majority of changes that are coming into force in April 2020 were already implemented in the public sector back in 2017. Interim professionals remain an expedient business solution for organisations in the public sector and, as evidence, it remains one of our biggest and highly valued markets.

In fact, we have a great deal of experience with the new rules to help you navigate the upcoming challenges. And unlike 2017, HMRC has granted a lot of time for organisations to prepare. We are confident that - together - we can minimise the potential disruption to your business.

DARREN TOLHORST
CEO, PRACTICUS LTD.



THE CHANGES

KEY POINTS

KEY POINTS	OLD RULES	CURRENT RULES APPLIED TO PUBLIC SECTOR ONLY	NEW RULES TO BE APPLIED TO PUBLIC SECTOR AND MOST OF THE PRIVATE SECTOR
Which of my contractors are affected?	n/a	PSCs only (those operating as sole traders or via umbrella companies are unaffected)	PSCs only (those operating as sole traders or via umbrella companies are unaffected)
Who determines the IR35 status of a contract?	PSC	End client	End client
What form does the IR35 determination take?	A PSC would use their experience and might also call on a specialist contract reviewer to help determine their status.	A simple In or Out decision which must be reached using reasonable care. There is no obligation to provide reasons for reaching that decision unless requested.	A new Status Determination Statement (SDS) must be provided stating if the contract is In or Out, plus supporting reasons for reaching that decision.
Who should receive the result?	n/a	The agency who contracts with the end client.	The agency who contracts with the end client AND the contractor. If multiple agencies are involved, the determination will need to pass down the chain.
Should 'reasonable care' be applied?	n/a	Yes - no guidance issued but the market has adopted the use of the CEST tool and provides a result as evidence.	Yes - further guidance is due in October/ November .
Can the contractor challenge the decision?	n/a	No but there is a 31 day rule whereby if requested, the client must provide reasons for reaching a status. However there is no right to appeal a decision.	Yes - there is a clearer Client-led Status Disagreement process where the contractor or fee-payer* can challenge the end client directly - the end client has 45 days to respond .
Are blanket decisions acceptable?	n/a	No - they do not demonstrate reasonable care.	No - they do not demonstrate reasonable care.

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Who deducts the Employee taxes and pays the Employer contributions?	PSC	Fee-payer* unless the end client fails in its obligations (they then become the fee-payer).	Fee-payer* but liability will pass up the chain to any other entity who fails in its obligations, including the end client.
Do I have to give employment rights if a contract is found to be inside IR35?	n/a	No – the PSC (or umbrella if they switch) is the employer and is responsible for employment rights.	No – the PSC (or umbrella if they switch) is the employer and is responsible for employment rights.
Define an end client?	n/a	All public sector bodies and associated organisations who are subject to FOI requests.	All public sector PLUS all private sector clients with the exception of 'small companies' as defined by two of the following: <ul style="list-style-type: none"> • Turnover is under £10.2m • Balance sheet is less than £5.1m • Fewer than 50 employees. <p>NB subsidiaries of bigger companies do not count as small and are in scope.</p>

*The fee-payer is the entity in the chain that pays the PSC

SHOULD YOU FEAR LIABILITY?

Not as you might think. In the actual experience of our public sector clients, the risks are quite manageable and will obviously reduce towards zero if you are fulfilling your obligations to:

1. PASS ON AN APPROPRIATE STATUS DETERMINATION STATEMENT (SDS) TO THE AGENCY AND THE CONTRACTOR BEFORE THE CONTRACT STARTS
2. USE REASONABLE CARE WHEN REACHING AN SDS
3. RESPOND TO A STATUS DISAGREEMENT NOTICE WITHIN THE ALLOTTED 45 DAYS
4. ARE TRADING WITH REPUTABLE, WELL ESTABLISHED AGENCIES IN YOUR SUPPLY CHAIN

This last point is important. If HMRC cannot recover monies from the offending party in the supply chain then they are able to chase that debt across it, all the way to the end client as a last resort. In order to minimise your potential risk, it's very important you know who you are trading with, their ability to fulfil their new responsibilities and the supply chains they are involved in.



USE
REASONABLE CARE
WHEN REACHING
AN SDS

THE SUPPLY CHAIN

TYPICAL SUPPLY CHAIN:



OTHER:



*Managed Service Provider

LESSONS LEARNED FROM 2017

The government's roll out of changes to the public sector in 2017 were widely described as shambolic. The draft legislation created more questions than answers when it came out in November 2016. HMRC's CEST tool to aid IR35 determinations and the final legislation both came out less than a month before go-live on 6th April. This left no time at all for the market to really understand the impending legislation and adjust.

The good news for the private sector is:

- Clarity and time – the private sector roll out has been communicated much better and well in advance, giving you time to understand and plan.
- Over two and a half years of learning – Practicus has made hundreds of public sector placements since the changes, working with our clients on IR35 aspects on every one of them.
- Case law – there have been a number of well documented tribunals so clients can now incorporate case law into their decision making when reaching an SDS.
- Less fake news – information from HMRC and the government is more forthcoming and there is not the same vacuum of misinformation and scare stories.

WHAT SHOULD I CONSIDER WHEN REACHING AN SDS?

If the role is an Office Holder (CEO, FD etc.) then they are automatically inside IR35.

If a role is in your permanent structure (i.e. you need someone to cover maternity leave or while you recruit a permanent employee) then it will be very hard to argue they are outside IR35.

Everything else requires careful determination and you should consider the following:

- Is this a distinct project / piece of work not able to be delivered within BAU?
- Do we need niche skills not commonly found in my organisation?
- Is it time limited?
- Am I obliged to provide work beyond the scope?
- How much autonomy will the contractors have?
- What financial risk does the contractor bear – are they expected to put poor / undelivered work right in their own time at their own expense?
- Will I accept a suitably qualified substitute should the contractor be unable to attend site?
- Do I consider them to be 'part and parcel' of my organisation?

The above is not exhaustive, however, some of the questions will help address key areas of case law when assessing employment status – mutuality of obligation (MOO), personal service/substitution, supervision, direction & control (SDC) and 'part and parcel'.

Of course there is HMRC's CEST tool to help clients reach their decision, but even now it is still in BETA. We are urging our clients caution in its sole use to provide an accurate SDS as it is widely regarded as being weighted in favour of finding contracts inside IR35, it isn't based on case law and, in a recent tax tribunal, HMRC itself dismissed the results of its own tool. Changes are promised by the end of the year but care needs to be taken and case law remains the best guide. It's also worth noting that there will be 'competitor' tools available in the coming months which promise to address the gaps in the CEST tool.

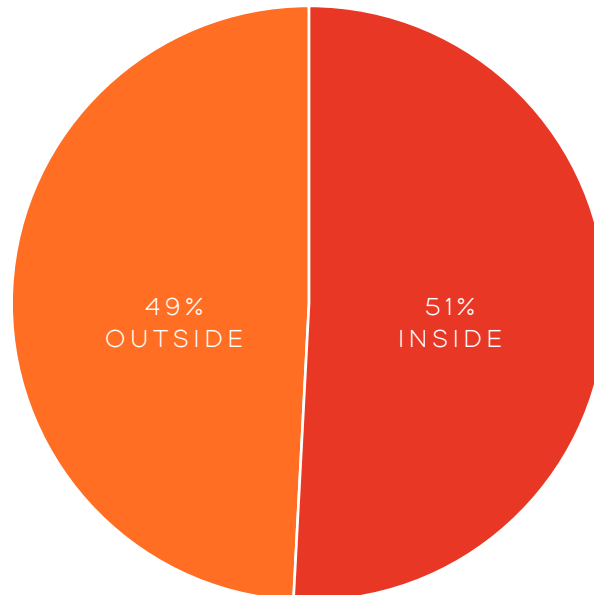
KEY CONSIDERATIONS

1. Take the opportunity to review contractor spend and visible value being generated by your off-payroll community – without doubt some organisations are overly reliant on contractors, however, it is also true that some level of external support will continue to be required and can be invaluable. Hence, this is a good opportunity to look at your whole contractor portfolio and understand where the value is coming from. Some clients have already suggested their strategy will be to rationalise overall contract spend to help offset rate increases for those key contractors who fall within IR35 moving forward (to help partially cover their potential loss of net income).
2. Loss of talent due to fear of retrospective investigation by HMRC – although HMRC have said they will not go after contractors in this way, contractors remain sceptical. Contrary to some commentary, PSCs are not tax-avoidance vehicles. It may be the case that a contractor will have legitimately assessed their assignment to be outside IR35 during the current, or previous, tax years and a new 'inside' assessment could discredit this. Thus rate increases to retain talent may not always be the answer. The same would apply in attempting to switch existing contractors to Fixed Term Contracts from April 2020.
3. Skill & knowledge transfer – due to the above, it is likely that you will lose some valued contractors so it's imperative that you build skills and knowledge transfer activities into your IR35 plan.

There's a lot to consider and we're passionate about helping our clients and interims navigate the upcoming legislative changes in the private sector, just as we did for the public sector back in 2017.

THE GOOD NEWS

The public sector market has adjusted and settled down and clients are still able to obtain the temporary skills and capacity they need to deliver key projects or BAU. Levels of contractors are very similar to before the changes. Of our own circa 500 public sector placements since the challenges, 51% are inside IR35 and 49% are outside, and rarely have we been unable to fill an inside IR35 role.



Based on 484 Practicus placements: April 2017-July 2019

CONTACT

We will continue to engage with the market via our social media, LinkedIn and email communication, informing you of legislative updates and any other key commentary. In the meantime, please do not hesitate to get touch with Practicus if you have any queries at all.

...WE'RE PASSIONATE
ABOUT HELPING
OUR CLIENTS AND INTERIMS
NAVIGATE THE UPCOMING
LEGISLATIVE CHANGES
IN THE PRIVATE SECTOR....

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