

Self-employed and employed status (Lecture B1387 – 22.44 minutes)

It is the employer's responsibility to correctly determine an individual's status as to whether they are employed or self-employed.

Their status will depend on the terms and conditions of the working relationship which in most cases will be set out in the contract. It is possible for the worker to be both employed and self-employed at the same time.

The employment status will affect the way tax and national insurance is calculated. HMRC considers employment status is based on facts – there is no choice. The following questions act as a guide to decide whether an individual is an employee or self-employed.

They are probably self-employed if they:

- are in business for themselves, are responsible for the success or failure of their business and can make a loss or a profit;
- can decide what work they do and when, where or how to do it;
- can hire someone else to do the work;
- are responsible for fixing any unsatisfactory work in their own time;
- the “employer” agrees a fixed price for their work which does not depend on how long the job takes to finish;
- use their own money to buy business assets, cover running costs, and provide tools and equipment for their work;
- can work for more than one client.

They are probably an employee if they answer YES to most of the following:

- do they have to do the work themselves?
- can someone tell them what to do, when and where to do it and how to do it?
- are they contracted to work a set number of hours?
- do they receive benefits such as paid leave or a pension as part of their contract?
- can they be paid overtime or bonus payment?
- do they receive a regular wage even if there is no work?
- do they manage other people who work for you?
- can they be moved from task to task?

The Check Employment Status Tool (CEST) is an online tool that can be used to help determine employment status see www.hmrc.gov.uk/employment-status/. It can be used by the worker, the employer or the agent to check the worker's or contractor's status. The system is based on HMRC interpretation of established cases and works by asking a series of questions. The outcome is

determined by the answers given by the user. The result given by the tool will provide an indication of the worker's employment status.

The employer can rely on the CEST outcome, say HMRC, provided the answers to the questions accurately reflect the terms and conditions under which the worker provides their services. The employer/engager must also print out or save the enquiry details screen and the CEST result screen as evidence of the decision made.

IR35 and Off Payroll Working - Chapter 8 - ITEPA 2003

The IR35 legislation was introduced by HMRC in 2000 to ensure individuals who worked through their own sole person limited company paid employment taxes like other standard employees.

The individual director/shareholder had to decide whether they fell within IR35 rules. If yes, then taking remuneration as dividends drawn from the company profits and hence saving tax was not permitted. The individual was required to take 95% of the fees derived from the IR35 work as "deemed salary" including employer's NIC leaving 5% to cover company expenses. Most contractors ignored these rules or were prepared to argue they did not apply. As a result, HMRC introduced rules to make the end client responsible for deciding the contractor's employment status – Off - Payroll Working. These rules currently apply to end users in the public sector and to large and medium-sized private companies.

NB: These IR35 rules still apply to a contractor working through their own limited company where they work for a "small private company" as that "end client" is not assessing their employment status.

Off Payroll Working Rules - Public and Private Sectors

From 6 April 2017 for engagements in the public sector and from 6 April 2021 for engagements in the private sector the responsibility for deciding whether the off-payroll rules for engagements applies was moved up to the "end client". Within the private sector the off payroll working decision is only applicable where the client is either a medium or large sized businesses. Small companies are excluded from these rules. The definition of a small business is based on the Companies Act 2006 definition of a small company.

The end client must look at any engagements they have with personal service companies and decide whether the relationship falls under off-payroll working rules. If that is the case, then that end client is responsible for operating PAYE and so deducting tax and national insurance from any payments made in respect of the engagement.

HMRC has indicated that they will not use information obtained from these changes to open an enquiry into earlier years unless they suspect fraud or criminal behavior.

A company is small if 2 or more of the following criteria are met:

- Annual turnover is less than £10.2million;
- Balance sheet total assets, before deducting liabilities, is less than £5.1million;
- Average number of employees is less than 50.

A simplified test applies to some clients and considers annual turnover. The new rules must be applied if annual turnover is more than £10.2 million and the client/business is not:

A company

An LLP

An unregistered company

An overseas company

The new rules will apply from the start of the tax year following the end of the calendar year when the conditions are met. There are also rules which cover connected and associated companies. If the parent of a group is medium or large, their subsidiaries will have to apply the off payroll working rules.

Checking Employment Status

The end user, public or private sector, must look at any contracts issued for the work and the ways of working or can use the HMRC "Check employment status for tax" service, CEST, to find out if the intermediaries legislation applies to the engagement. If this is unclear the IR35 Helpline should be contacted. The off payroll working rules will apply if the person providing their service would be an employee if there were no intermediary or they were an office holder for the client. Each engagement should be assessed separately as the results could differ. It is the end client who must make the decision as to whether or not off payroll working rules apply and issue the Status Determination Statement (SDS).

If the worker disagrees with the SDS issued by the end client they can appeal, For the private sector the fee payer must provide a response within 45 days of receiving the appeal. And for the public sector 31 days Failing to respond within the timescale will result in the fee payer being responsible for the worker's PAYE and NIC.

When off payroll working rules do apply the worker is treated as an employee for payroll purposes BUT does not benefit from any employment related benefits.

Calculating the Deemed Direct Payment

The deemed direct payment is the amount paid to the worker's intermediary that should be treated as earnings for off payroll rules.

- Work out the value of the payment deducting any VAT charged;
- Deduct the cost of any materials charged as used in providing the service;
- Deduct expenses that would have been deductible if worker was an employee;
- Remaining figure = deemed direct payment;
- If NIL or negative no deemed direct payment.

The employer/fee payer must deduct PAYE and employee NIC from the deemed direct payment pay employers NIC if applicable. The figures are reported on the FPS, alongside all other employees, indicating that this worker is an "off payroll" worker. The starter declaration is used to report "employee" to HMRC and tax is usually deducted at 20% until HMRC issue a different tax code. When the contract ends the leaving date is reported to HMRC and the worker is given a P45. Form P60 is issued at the end of the tax year when individual remains "employed" on payroll at 5 April.

As Class 1 NIC is being paid the payments to the worker should be included in the annual pay for the Apprenticeship Levy. But student loan repayments, statutory payments and workplace pensions are not relevant. Additionally the employer/fee payer is not responsible for:

- Deducting student loan repayments;
- Auto enrolment of the worker – this done through intermediary;
- Statutory payments – SMP, SAP etc. – these come from the intermediary;
- No entitlement to holiday pay or other employment rights.

Where the off payroll working rules apply the cost of travel and subsistence cannot be claimed. The reason is that the worker is being treated as an employee and so travel costs are considered the cost of “ordinary commuting”. Each engagement is taken as a new employment and each workplace as a permanent place of work. This brings their working into line with those working as temporary staff through an employment agency.

Contributed by Alexandra Durrant