

Check Employment Status Tool (Lecture B1177 – 13.53 minutes)

The IR35 rules are changing from 6 April 2020 for private sector end clients. As part of this reform, HMRC have amended the Check Employment Status Tool (CEST) which is designed to give a verdict on whether a worker can be categorised as self-employed or employed. This change is designed to make the tool more robust.

CEST is still inconsistent with case law. Most tax cases use a much more woolly idea to determine status. They refer to 'painting a picture' then standing back and looking at this to determine if the individual feels as if they are employed or self-employed. The CEST will not always the same answer as might be achieved by taking this more holistic approach.

Disclaimer

The CEST is an online tool accessed via the www.tax.service.gov.uk website. It can be easily found by putting the term 'CEST' into any search engine.

The starting page of the tool states:

'HMRC will stand by the result you get from this tool.

This would not be the case if the information you have provided was checked and found to be inaccurate.

HMRC will also not stand by results achieved through contrived arrangements, designed to get a particular outcome from the service. This would be treated as evidence of deliberate non-compliance, which can attract higher associated penalties.'

Obviously, the need to ensure that the information is accurate will be understood but it does not give much leeway for some questions which are perhaps somewhat misleading.

The questions

The CEST can be used for IR35 purposes or just for determining if someone is employed or self-employed. We are going to look at it in the context of IR35.

The CEST can be answered by the worker, the hirer or an agency. You are asked to specify who you are.

The tool is split into different sections. Some of the questions will not get asked, dependent on other answers but most of the questions will get asked most of the time. The sections are:

- Background
- Office holder
- Substitutes and helpers
- Worker's financial risk
- Worker's involvement
- Worker's contracts

Note that there is no section on mutuality of obligation which is one of the key criteria when determining employment status. This is because it is HMRC's view that this must exist if there is a contract between the parties. This is disputed.

There are three possible outcomes of the tool in the context of IR35: inside the IR35 legislation, outside the IR35 legislation and unable to determine the tax status of the engagement.

The following is a list of the questions (although some of them will not get asked if a previous answer is seen as being determinative). The background is not covered and neither is the officer holder question. Broadly if the worker is an officer holder with the end client they are automatically treated as employed/within IR35 and no further questions will be asked. These are the questions from the perspective of the worker. If the hirer or the agency are completing this, then they are asked similar questions worded from their viewpoint.

Substitute and helpers

1. Have you ever sent a substitute?
 - a. Yes
 - b. Yes, but the client did not accept
 - c. No, it's never happened
 - d. 1a (Only asked if say yes to above). Did you pay the substitute? If yes, then go on to working arrangements and if no, move on to Q3.
2. Does your client have the right to reject a substitute? Y/N
3. Have you paid another person to do a significant amount of work? Y/N

Working arrangements

4. Does the client have the right to move you from the task you originally agreed to do?
 - a. No that would require a new contract
 - b. No you would have to agree
 - c. Yes
5. Does your client have the right to decide how the work is done?
 - a. Yes
 - b. No you solely decide
 - c. No you agree together
 - d. Not relevant was work is highly skilled

6. Does your client have the right to decide your working hours?
 - a. Yes
 - b. No you solely decide
 - c. No you and your client agree
 - d. No the work is based on agreed deadlines
7. Does your client have the right to decide where you do the work?
 - a. Yes
 - b. No you solely decide
 - c. No the task sets the location
 - d. No some work has to be done in an agreed location and some can be your choice

Worker's financial risk

8. Will you have to buy equipment before your client pays you (this can include heavy machinery or high-cost specialist equipment. This does not include laptops, tablets and phones)? Y/N
9. Will you have to fund any vehicle costs before your client pays you (this can include purchasing, leasing, buying fuel and other running costs for this work. This does not include commuting or personal vehicle costs)? Y/N
10. Will you have to buy materials before your client pays you (this can include items that form part of the work or are left behind when you leave. This does not include items like stationery)? Y/N
11. Will you have to fund any other costs before your client pays you (this can include non-commuting travel or accommodation or external business premises for this work only)? Y/N
12. How will you be paid for this work?
 - a. An hourly, daily or weekly rate
 - b. a fixed price for a specific piece of work
 - c. an amount based on how much work is completed
 - d. a % of the sales the worker makes
 - e. a % of the end client's profits or savings

13. If the client was not happy with your work would you have to put it right?
- a. Yes, unpaid you would have extra costs that your client would not pay for
 - b. Yes unpaid but your only cost would be losing the opportunity to do other work
 - c. Yes you would fix it in your usual hours at your usual rate or fee
 - d. No the work is time specific or for a single event
 - e. No

Worker's involvement

14. Will your client provide you with paid for corporate benefits? Y/N
15. Will you have management responsibilities for your client? Y/N
16. How would you introduce yourself to your client's customers or suppliers?
- a. You work for the client
 - b. You are an independent worker acting on your client's behalf
 - c. Your work for your own business
 - d. This would not happen

Worker's contracts

17. Does the contract stop you from doing similar work for other clients? Y/N
18. Are you required to ask for permission to work for other clients? Y/N
19. Are there any ownership rights relating to this contract (IP, copyright, trademarks, patents, image rights)? Y/N.
- If yes, does the contract state the rights for this work belong to you? Y/N
- If yes, does the contract give the client the option to buy the rights for a separate fee? Y/N
20. Have you had a previous contract? Y/N
21. If yes, will this contract start immediately after the previous one ended? Y/N
22. If no, is the current contract the first in a series of contracts agreed with the client? Y/N
23. Does the current contract allow for it to be extended? Y/N
24. Will the work take up the majority of your available working time? Y/N

25. Have you done any other self-employed work of a similar nature for other clients in the last 12 months? Y/N

Considering the questions

The number of permutations that can be inputted for 25 questions runs into the millions. Playing around with the data, looking at those which might be most relevant, some interesting points emerge.

Looking at the first section. If you indicate that the client has sent a substitute who was paid by the worker, you are not caught by IR35 regardless of what other answers are given with the narrative supplied saying 'Your answers told us you have sent a substitute'. If a substitute has been sent or could be sent but the worker did not or would not pay them, then it is treated as if you cannot send a substitute. Whether you have paid someone to do work for you seems to be completely irrelevant as it does not seem to make any difference to the outcome.

Where substitution rights are not relevant, then the question of control seems to become more important. If the client can move the worker from task to task, then it would appear that you are almost always caught by IR35 regardless of how other questions are answered. If you state that you can only be moved with your agreement or with a new contract, there are more cases where the tool cannot make a judgement although there is a greater likelihood that it decides you are not caught.

Other factors which seem to be important, but only where enough of them are present (i.e. one in isolation would not make someone within the rules) would be:

- Rectifying faulty work
- Payment of costs
- Getting benefits
- Having management responsibilities
- Identifying as working for the client
- The IP being held by the client

Practical points

It is important to make sure that the questions are answered accurately but it is not always straightforward. Think about the question about rectifying defective work:

If the client was not happy with your work would you have to put it right?

- a. Yes, unpaid you would have extra costs that your client would not pay for
- b. Yes unpaid but only cost would be losing the opportunity to do other work
- c. Yes you would fix it in your usual hours at your usual rate or fee
- d. No the work is time specific or for a single event
- e. No

If the answer is you would not put it right, but you would not get paid, what would the answer be? Presumably (d) or (e) but neither of those are helpful in terms of the overall analysis of the situation.

Other issues include what does the CEST mean by someone who is highly skilled? What machinery might be considered to be specialist (since a laptop for someone who is engaged in highly detailed CAD might be a very specialist piece of kit).

The conclusion has got to be that the CEST does give some comfort but might not give a completely accurate picture. Interestingly, the recent round of IR35 cases have given us some judgements with a very detailed picture of the contractual relationships between the parties. The details of the relationship between Lorraine Kelly and ITV were inputted into the CEST. This was unable to make a determination, despite this being comprehensively decided in favour of Lorraine Kelly by the First Tier Tribunal.

Contributed by Ros Martin