

Just six days after the Chancellor of the Exchequer reconfirmed in his Spring Budget that the implementation of the new off-payroll working (IR35) rules in the private sector would go ahead, as planned, on 6 April 2020, the government has announced a one-year delay until 6 April 2021.

The announcement was made late on Tuesday, 17 March 2020, by Chief Treasury Secretary, Steve Barclay, who said, "This is a deferral in response to the ongoing spread of COVID-19 to help businesses and individuals"; but also, that, "This is a deferral, not a cancellation, and the government remains committed to re-introducing this policy."

In light of the severe economic pressures being occasioned by the coronavirus disease 2019 (COVID-19) on businesses across the UK, the government's announcement of a delay will be widely welcomed by contractors (estimated to be some 230,000 in number). It will also ultimately be welcomed by most recruitment agencies and end-user clients across the private sector who would otherwise have been affected and were already facing greater compliance and administrative obligations and, in some cases, higher costs, although for many it will require some consideration of how much of their preparation for the new rules should be unwound.



Background

The government announced plans to tackle reform IR35 in the private sector at Autumn Budget 2017. It published a 12-week consultation in May 2018 and then announced that it would implement the reforms at Autumn Budget 2018 but chose to delay the implementation date to April 2020. A further technical consultation was held in the spring of 2019 and draft legislation published in July 2019.

HMRC consulted on the detail of the reform between 5 March and 28 May 2019 and, in April 2019, published guidance on the actions engagers can take to prepare for the reform.

In summary, the IR35 rules concern the use of an intermediary personal service company (PSCs) by contractors. The rules apply where the contractor would be treated as an employee if the PSC were not used. In such cases, the contractor is treated as an employee for tax purposes.

The changes due to be introduced on 6 April 2020 were broadly intended to ensure that the rules applied in the same way in the private sector as they have done for the public sector since 6 April 2017. In short, under the revised rules, the end-user client (rather than the PSC) would be required to determine the contractor's employment (for tax) status and whether the IR35 regime applies. Where it does, and subject to certain dispute resolution mechanisms, the responsibility for dealing with, and accounting to HMRC for, PAYE (income tax) and National Insurance contributions, would rest on the ultimate fee-payer (i.e. the end-user or, if applicable, an agency) rather than the PSC.

What Now?

For now, the current rules will continue to apply in the private sector. This means that the PSC (not the end-user client) decides whether IR35 applies and, if so, is responsible for accounting for PAYE and National Insurance contributions.

In terms of tax policy, nothing much has changed. The government and HMRC remain convinced that there is widespread non-compliance (whether careless or abusive) of the IR35 rules in the private sector. The government's estimate is that the cost of that non-compliance to the Treasury will rise to more than £1.2 billion a year by 2022/23. As a result, the new rules are considered justified by HMRC to enhance fairness between individuals that work in a similar way and to increase IR35 compliance.

It is worth reiterating that the Chief Treasury Secretary's announcement emphasised that this is a deferral of the government's plans. Subject to further developments concerning the economic fight against the impact of COVID-19, the implementation of the new IR35 rules in the private sector is intended to take place this time next year. In many respects, assuming COVID-19 has been controlled, the economic rescue package for businesses adversely affected by the pandemic that is being rolled out by the government will bolster the justification to clamp down on areas of perceived non-compliance or abuse.

It is possible that further changes to the new rules could also be forthcoming. Having completed a short review of the reforms, the Chancellor announced that a number of changes would be made to "support its smooth and successful implementation" including, for example, a soft-touch approach on imposing penalties for innocent mistakes and errors for the initial period. Subject to parliamentary time, further changes may be possible and many will see the delay as a further opportunity to lobby against the reform.

Affected end-user clients, recruitment agencies and contractors will now need to consider the extent to which preparations for the changes should now be unwound. This could include the following:

- Considering whether contractual changes that have been made are still appropriate.
- For those who have implemented a policy of not contracting directly with PSCs (or inside IR35 PSCs) or even not using PSCs at all, considering whether to reverse that policy.
- Where an inside IR35 determination has been made by the end-user client, will the contractor decide to ignore that determination and continue to treat themselves as outside IR35? This is not necessarily a straightforward decision in terms of risk, particularly where the determination was not a borderline situation.
- Will end-user clients and recruitment agencies be willing to engage contractors knowing that they are ignoring an inside IR35 determination that had been made in preparation for the IR35 changes?
- Contractors who have switched from PSC to umbrella/ agency arrangements may decide to switch back.
- Rate increases that were agreed to mitigate the cost of the changes to the contractor may be reversed where contractors decide they can continue working outside IR35.
- Where models have been implemented to fall outside the scope of IR35 (e.g. to provide a contracted-out service under a Statement of Work), will these be left in place?
- As part of preparing for the IR35 changes, some end-user clients have also been reviewing their arrangements with contractors that they contract with directly as individuals. They may consider that any changes arising from that review should remain in place.



Obviously, affected contractors, recruitment agencies and end-user clients should prioritise their own business response to COVID-19 and ensure they take advantage of any available government support that is made available. However, when time allows over the next 12 months, they should (again) ensure they are fully prepared for the new IR35 regime by running an audit of the existing arrangements, establishing clear processes and procedures to comply with the new rules and communicating with their contractual partners about the policies and approaches they will be adopting.

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