

OFF-PAYROLL WORKING IN THE PRIVATE SECTOR

21 October 2020

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HISTORY & STATUS DETERMINATIONS

HISTORY



- April 2000 - 'IR35' (intermediaries legislation) introduced
- Not much happens for 17 years. Non-compliance with IR35 runs wild.
- April 2017 – Off-payroll working rules in the public sector introduced
- May 2018 – First “should we, shouldn’t we” private sector consultation
- March 2019 – Definitely going ahead with private sector rules so consultation on the detail launched
- 27 Feb 2020 – HMT Review of new rules published and confirmed going ahead but a light touch penalty regime in first year
- 6 April 2020 – New rules apply to private sector

History re-written due to COVID

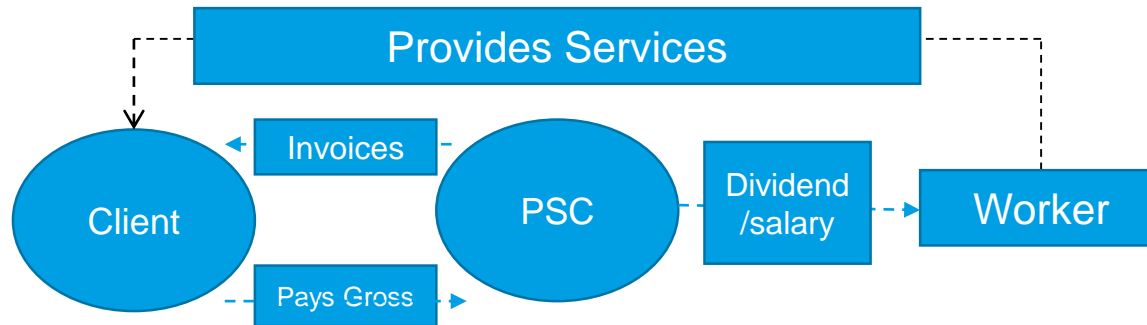
- ~~• 6 April 2020 – New rules apply to private sector~~
- 18 March 2020 – COVID causes HMRC to delay rules by one year
- May 2020 – David Davis' attempt to delay rules by 3 years with a Finance Bill amendment fails
- 6 April 2021 – New rules apply to the private sector

WHAT'S THIS ALL ABOUT?

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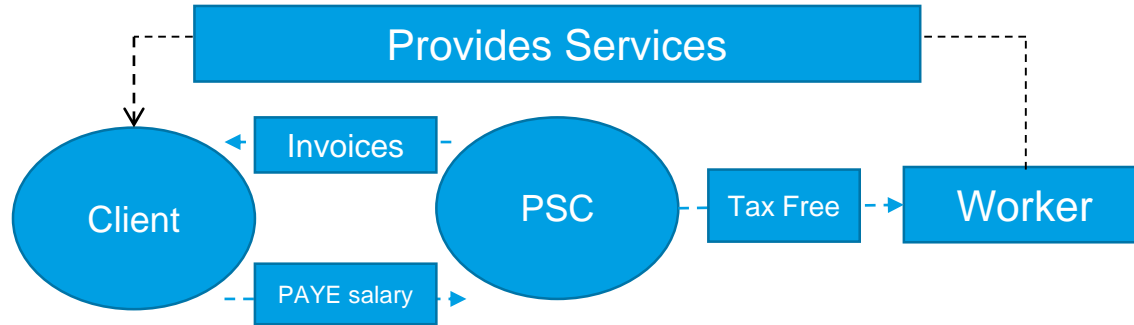


- From 6 April 2021, payments that businesses make to individuals who provide their services through Personal Service Company (“PSC”) will be subject to a new tax regime (but not if the services were provided before 5 April 2021):
- Unless the engaging business (“Client”) is **small**, it must determine whether the Worker providing their services is operating as an employee or not.
- If they are NOT operating as an employee – phew! Nothing changes.



WHAT'S THIS ALL ABOUT?

- If the Worker is operating as an employee – EVERYTHING changes:



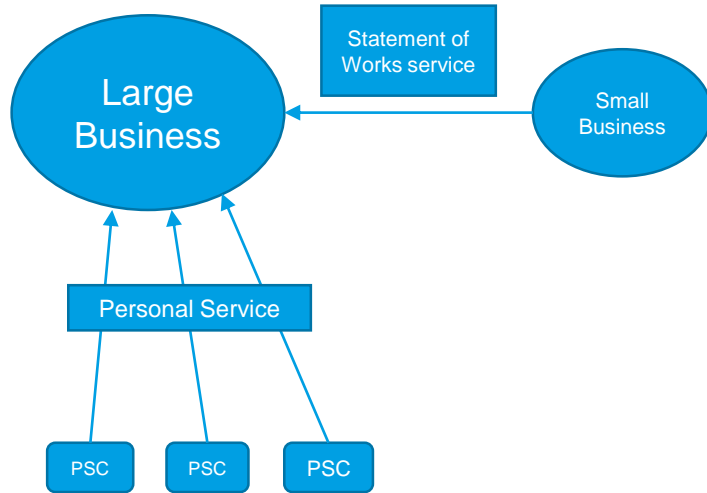
- The Client pays with a PAYE deduction at source which means that they also incur Employer's NI (13.8%) and Apprenticeship Levy (0.5%) – **cost of Worker has increased by 14.3%**
- No pension contributions, student loan deductions, holiday pay, SSP, etc.. are due under PAYE and no employment rights are created

Do you have a “Contract for Personal Service” or a “Contract for Service”?

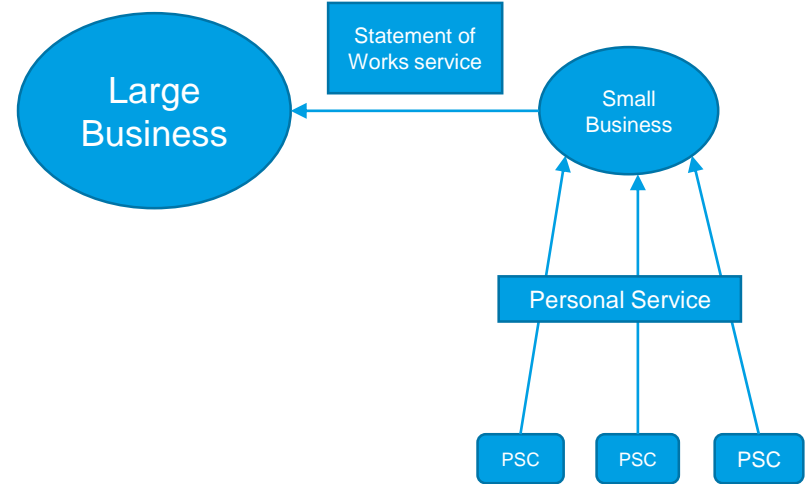
- These rules only apply to “contracts for personal service”
- They do not apply to “contracted out services” – also referred to as a “Statement of Works” arrangement
- What would happen if a number of contractors joined together to form a genuine consultancy?
- Beware of artificial SoW arrangements

An opportunity for smaller businesses

Standard Approach:



Alternative Approach:



Taxable amount – what amount goes through PAYE?

Invoiced amounts:

• Services rendered	£1,000
• Materials	£250
• Travel expenses	£75
• Clothing allowance	<u>£100</u>
	£1,425
• VAT	<u>£285</u>
• Amount payable	<u>£1,710</u>

Amount subject to PAYE = £1,100, being...

- Value of the invoice
- Less: VAT, Materials and expenses deductible under employment tax rules

What Tax Code and NI Table should be used?

- When a PSC is engaged for the first time, the worker will need to complete a Starter Checklist and sign “Starter declaration C” to confirm that this is not their primary job (which is with the PSC)
 - *Suggest that this is included with the SDS*
- This means that a BR code is operated until HMRC issue a code. The worker will not provide a P45 from a prior role.
- For National Insurance purposes, it looks like normal NI will apply with a monthly earnings period

SMALL COMPANY EXEMPTION

SMALL COMPANY EXEMPTION



- Tests are applied based on the filing date for the financial statements of the “client” company falling before each tax year.
- To benefit from the “small company exemption”, must satisfy two out of the three conditions below for two consecutive years.

Annual Turnover	Not more than £10.2m
Balance Sheet total	Not more than £5.1m
Number of Employees	Not more than 50

- Do not expect this exemption to be around for more than 3 or 4 years

SMALL COMPANY EXEMPTION



Accounting Reference Date	Filing Deadline for Accounts	Relevant Accounting Years in which the requirements are met (for 2021/22)
31 March	31 December	31 March 2019 & 31 March 2020
30 April	31 January	30 April 2019 & 30 April 2020
30 June	31 March	30 June 2019 & 30 June 2020
30 September	30 June	30 September 2018 & 30 September 2019
31 December	30 September	31 December 2018 & 31 December 2019



The COVID years

- For businesses close to the size threshold, they may be small in the year ended 31 December 2020 or 31 March 2021 due to COVID reducing turnover, assets and/or employee numbers
- However, these years are not considered until 2022/23
- So, these businesses may find that they need to comply with the off-payroll rules for 2021/22 but drop out of the regime in 2022/23 (and possibly later years)

EMPLOYMENT STATUS

Status Determination Statements

- Until the Client issues the Status Determination Statement (SDS) and reasons for the decision, they are liable of the tax and NI of the worker
- Status Determination (and reasons) are issued to the first party in the contractual chain and the worker (i.e. PSC and worker or Agency and worker)
- If there is more than one agency in the contractual chain, each agency must pass the Status Determination to the next in line until this reaches the entity making the payment to the PSC (called in these rules, the “fee payer”)

- The three main principles to determine employment status are:

- **Control**

What degree of control does the client have over *what, how, when and where* the worker completes the work?

- **Substitution**

Is *personal service* by the worker required or can the worker send a substitute in their place?

- **Mutuality of obligation**

Is the Client obliged to offer work, and is the worker obliged to accept it?

EMPLOYMENT STATUS TESTS

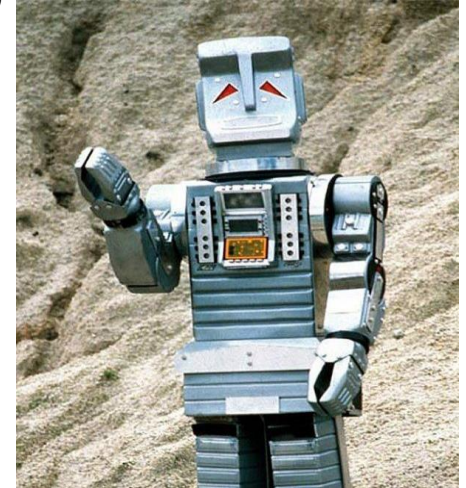
- Other factors include:
 - whether the worker is taking any financial risk
 - being 'part and parcel' of the engager's organisation
 - being in business on the worker's own account and
 - provision of own equipment

EMPLOYMENT STATUS TESTS

- HMRC want you to use their Employment Status robot to determine the Status of Workers
- The CEST tool was launched in 2017 – much criticised!
- A revised tool was launched in December 2019
- Only other update was adding a Welsh translation!

- It can be accessed at:

<https://www.gov.uk/guidance/check-employment-status-for-tax>



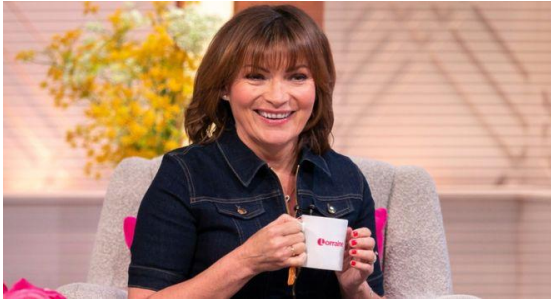
EMPLOYMENT STATUS TESTS

- Be warned – the definition of what it means to be an employee may change
- In February 2018, the Employment Status consultation was launched which sought views on whether the factors determining Employment Status needed a complete overhaul, particularly to tackle the “Gig economy”



EMPLOYMENT STATUS TESTS

- HMRC have also lost a couple of high profile Employment Status cases so may revisit changing the rules...



- But they have also won a few...



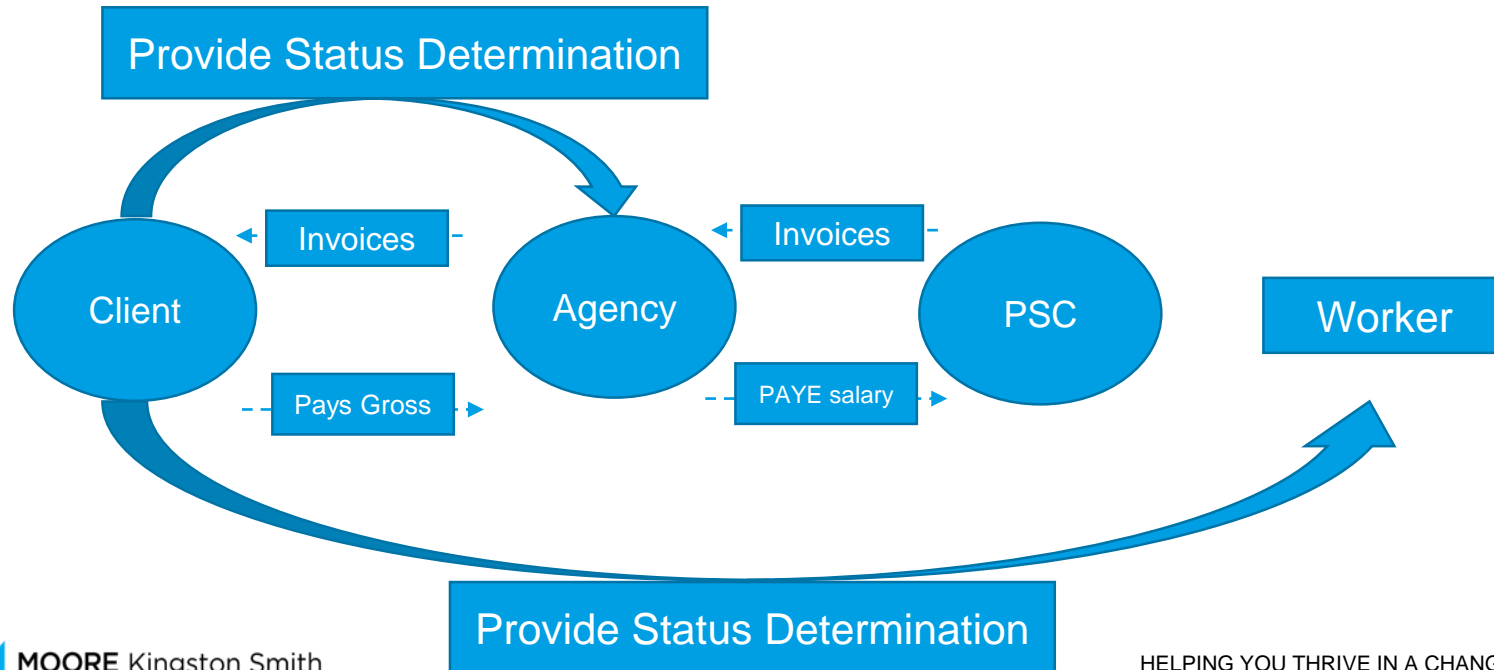
AGENCIES

USING AN AGENCY

- If your business uses an Agency to engage with your contractors, you must provide the Status Determination and the reasons for the determination to the Agency
- Payments are made to the Agency gross
- Depending on your Status Determination, the Agency will either make the payment to the PSC gross or after making deductions for tax and National Insurance under PAYE
- If the Agency incurs the additional cost of Employer's NI and Apprenticeship Levy, you can expect them to pass it on to you (plus a margin?)

USING AN AGENCY

- So, if the Status Determination is that the Off-Payroll Working rules do apply...



DISPUTES

WHAT HAPPENS IF YOUR CONTRACTOR DISAGREES WITH YOU?

- The Worker has a legal right to request from the Client the Status Determination and the reasons behind the conclusion reached. The consultation goes on to say:

In addition to this right to receive a determination and the reasons for the determination, it may be necessary for a process to be put in place to allow for determinations to be challenged.

The government believes that the most effective approach would be for clients to develop and implement a process to resolve disagreements based on a set of requirements set out in legislation.

The introduction of a client-led status disagreement process would allow organisations to tailor the process to fit in with their wider business processes, while maintaining a level of consistency across all organisations. As a minimum the government would expect any process to include the consideration of evidence put forward by the off payroll worker, advising the party of the outcome of that consideration and the reasons for that outcome.

The introduction of this stage would be the second step in seeking to resolve status disagreements, providing additional assurance to off-payroll workers and fee-payers that the client has not taken an arbitrary approach to determining status and has considered any evidence they may have to the contrary.

Public sector and medium/large-sized private sector organisations are likely to already have relatively sophisticated HR processes in place either in-house or sub-contracted to relevant service providers for managing workplace disputes.

DISPUTE RESOLUTION PROCESS

From August 2019 HMRC guidance

If you disagree with a status determination

From 6 April 2020, the fee payer and the worker will be able to challenge a status determination if you think it's wrong. The client who made the determination will need to have processes in place for dealing with disagreements about determinations they make.

If you disagree, you must explain the reasons why you think the client's determination was wrong. You can provide any evidence you feel supports the reasons for your disagreement.

You or your worker will need to write to the client to give reasons why they disagree.

This should include details of:

- the employment status determination they disagree with
- their reasons for disagreeing
- Keep copies of any records about disagreements.

The client will need to:

- Consider any further information that you provide to them and reconsider the employment status determination.
- Decide whether to maintain the determination because they feel it is correct and give reasons why, or withdraw the determination because they feel it was wrong.
- Respond to you within 45 days of receiving your disagreement.

REVIEW IN FEBRUARY 2020

Outcome of HM Treasury Review



Released 27 February 2020

- “While there remains some opposition to this change, the Government believes it is right to address the fundamental unfairness of the non-compliance with the existing rules. The reform will therefore go ahead on 6 April 2020”
- Customers will not have to pay penalties for errors relating to off-payroll in the first year, except in cases of deliberate non-compliance

Outcome of HM Treasury Review

- Information resulting from changes to the rules will not be used to open new investigations into Personal Service Companies for tax years prior to 6 April 2020, unless there is reason to suspect fraud or criminal behavior
- the rules will only apply to services carried out from 6 April 2020 onwards
- The Government will place a legal obligation on clients to respond to a request for information about their size from the agency or worker

BE PREPARED



YIKES – I AM A “CLIENT”, WHAT SHOULD I BE DOING NOW?

- Establish whether you can rely on the Small Company exemption

If not:

- Be prepared for the contractors you use to prefer working for smaller businesses who will not deduct tax at source from their invoices
- Look at your current workforce – identify which PSCs you use and whether you engage with them directly or through agencies
- Run the facts of each case you have identified through the “robot”. If the “robot” concludes that the off-payroll rules apply to your contractors, can you change the way you deal with them (i.e. allow for substitutes to be provided) to take an engagement outside of these rules?

YIKES – I AM A “CLIENT”, WHAT SHOULD I BE DOING NOW?

- Where you use agencies, start a conversation with them about what their processes will be to make sure that yours align with theirs.
- Assuming you accept the “robot’s” conclusion on PSCs you engage directly, start an early conversation with your contractors about the changes coming in April 2021 – they are about to get 14.3% more expensive so do you bear that cost or do you reduce the day rate you are paying? Is your business still viable with this additional overhead?
- Check the contracts you have with PSCs to ensure that you have the ability to make deductions for tax and NI where due under these rules
- Start to think about your Status Determination dispute process. Will this be handled by your in-house HR team or will you outsource it?

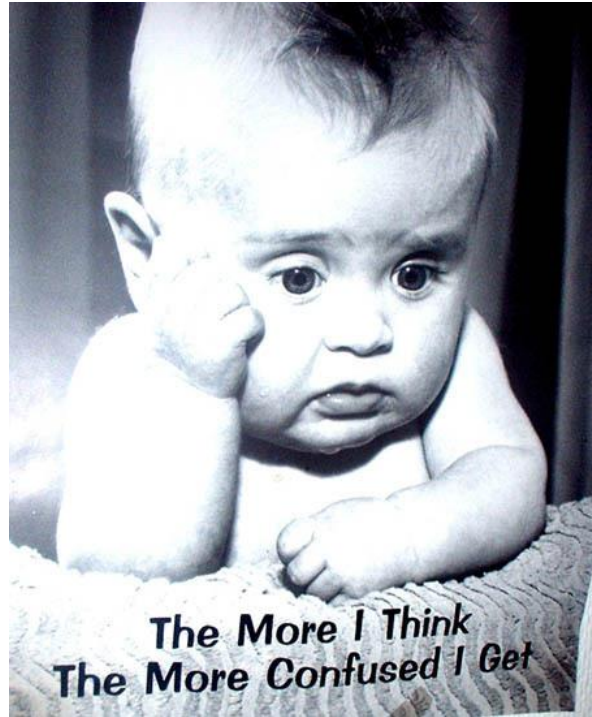
CRUMBS – I AM A “PSC” – WHAT SHOULD I BE DOING NOW

- Run your facts through the “robot” – how bad is it? HINT: It’s probably very bad.
- Do some number crunching – if you are paying yourself with dividends and have been splitting those with your spouse/partner, it is likely that you don’t pay very much tax. What would it mean to your household income if you start to suffer an income tax and NI deduction at source and your day rate comes under pressure?
- Are you due to re-mortgage any time soon or move house? If you expect your disposable income to fall, think about doing that before April 2021

CRUMBS – I AM A “PSC” – WHAT SHOULD I BE DOING NOW

- If the Off-Payroll Working rules are a major problem for you, is it feasible to only work for “small” companies? This may only be a short term fix.
- Are you due to re-negotiate your contract any time soon? If so, how long can you fix your day rate for? Can you resist any tax deduction or tax indemnity clauses?
- If you decide to just avoid all of this complexity and take a full time employment instead, what happens to your PSC? Can any remaining cash in the company be taken tax efficiently if it is wound up? Be careful of Phoenixing rules.

Any questions?





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