

# ENTERPRISE SERIES

## Off-Payroll Working Rules

### A brief summary

Mike Hayes, Tax Partner, Moore Kingston Smith  
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# HISTORY OF IR35

## A brief history April 2021

- 1999 – IR35 introduced
- 2017 – responsibility for determining status of contractors in the public sector moved to the ‘client’
- IR35 changes rolled out to the private sector
- Exemption from rules where the client is a small business
- Now detailed guidance in HMRC Employment Status Manual – see ESM10000 onwards

The background of the slide is a vibrant, abstract image of the aurora borealis (Northern Lights) in shades of blue, teal, and green, set against a dark, starry night sky. The lights appear as flowing, ethereal curtains of color.

# SMALL COMPANY EXEMPTION

## Small company exemption

- A corporate entity will be medium or large-sized if it meets at least two of the following criteria for two consecutive financial years:

Annual Turnover > £10.2m

Balance Sheet total > £5.1m

Number of employees An average > 50

- A corporate entity will cease to be medium or large-sized if it no longer meets at least two of the above criteria for two consecutive financial years

## Small company exemption

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



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# EMPLOYEE STATUS

## Employment status tests

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

## CEST

- CEST introduced in March 2017 ahead of the introduction of the off-payroll working in the public sector rules
- For the CEST tool to produce an accurate result, the person conducting the assessment should know and understand the following:
  - The worker's responsibilities
  - Who decides the work to be done
  - Who decides when, where and how the work needs to be done
  - How the worker is paid

## CEST

- If there are any benefits or expense reimbursements involved in the contract engagement
- The tool focusses on the right of substitution rather than case law results
- Three possible results:
  - ‘the intermediaries legislation applies’
  - ‘the intermediaries legislation does not apply’
  - ‘unable to determine’

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

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# THE PROCESS

## I am a 'Client', what should I be doing?

- 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
  - Consider guidance for specific sectors e.g. Film & TV Crew
    - Note - you should be doing this for all cases whether or not a service company is involved

## I am a 'Client', what should I be doing?

- Where sector specific guidance doesn't apply
  - Run the facts of each case you have identified through CEST
  - If CEST 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?
- Where you use agencies, start a conversation with them about what their processes will be to make sure that yours align with theirs



## I am a 'Client', what should I be doing?

- If IR35 applies:
  - Do you bear that cost?
  - 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 & NI where due under these rules

## What happens if your contractor disagrees with you?

- Client must issue a Status Determination Statement (SDS)
- To be valid the client must:
  - State in the SDS whether the worker would be an employee or office holder, or is an office holder, for tax & NIC purposes if they were directly engaged by the client
  - Provide their reasons for coming to that conclusion; &
  - Have taken reasonable care in coming to their conclusion

## What happens if your contractor disagrees with you?

- Clients must have a status disagreement process in place to deal with disputes of Status Determination Statements (SDS) by workers and deemed employers
- As a minimum the client must:
  - Consider the worker's &/or the deemed employer's representations – either made verbally or in writing
  - Respond to the worker &/or the deemed employer's representations within 45 days from when the representations are received

## What happens if your contractor disagrees with you?

- Inform:
  - The worker and/or deemed employer that it has considered their representations and decided that its original SDS was correct & provide reasons; or
  - The worker and/or deemed employer it has considered representations & decided the original conclusion was wrong, provide a new SDS with the date this new SDS became applicable & state that the previous SDS is withdrawn
- Take reasonable care in making any new SDS

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# FINANCE BILL 2021 CHANGES

## Finance Bill changes

- The rules apply where the worker
  - has a non-material interest in the intermediary, and
  - has received/has rights which entitle the worker to receive, a **chain payment** from the intermediary
- Also new anti-avoidance rule to tackle structures aimed at getting around rules
- HMRC will generally tax highest 'relevant person' in the chain



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# SUPPLY CHAIN DUE DILIGENCE

## Supply chain due diligence

- Know your suppliers workforce – understand what the relationship is between the workers & the provider of the labour:
  - who provides the workers
  - who the workers are
  - what their employment status is
  - who is responsible for making sure how they are paid and how much
  - if there is any indication of exploitation including modern slavery
  - are they allowed to work in the UK

## Supply chain due diligence

- Add clauses to the contract:
  - requiring your authorisation before further sub-contracting to a third party, & check that this is adhered to
  - that travel and subsistence arrangements between the workers & the labour supplier comply with HMRC requirements
  - stopping the use of off-shore intermediaries
- If workers supplied by agencies are being treated as self-employed - decide if the Agency Rules apply

## Supply chain due diligence

- .....and much much more, see.....
- [Advice on applying supply chain due diligence principles to assure your labour supply chains - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/advice-on-applying-supply-chain-due-diligence-principles-to-assure-your-labour-supply-chains)

## Contact details



Mike Hayes, Tax Partner

T: 020 7566 3813

M: 07912 22 22 64

E: [MHayes@mks.co.uk](mailto:MHayes@mks.co.uk)

 [Find me on LinkedIn](#)

Visit our website: [www.mooreks.co.uk](http://www.mooreks.co.uk)

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Moore Kingston Smith

Devonshire House

60 Goswell Road

London

EC1M 7AD

t: +44 (0)20 7566 4000

f: +44 (0)20 7566 4010

[www.mooreks.co.uk](http://www.mooreks.co.uk)



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# Due Diligence on the Supply Chain

Tim Stovold  
20 May 2021



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# Due Diligence on your Supply Chain




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CORONAVIRUS

## Testing staff companies accused of Covid tax scam

David Byers

Wednesday May 12 2021, 12:01 am  
The Times



Test centre staff said they were moved between different mini-umbrella companies every few months  
CHRISTOPHER FURLONG/GETTY IMAGES

Tiny payroll companies including some employing NHS Test and Trace and testing centre workers are abusing one of George Osborne's key tax policies to defraud the Treasury out of millions of pounds, it has been claimed.

Thousands of "mini-umbrella" companies are being set up to take advantage of the employment allowance. The tax break, announced by the former chancellor in 2013, permits an annual discount of £4,000 per company on national insurance contributions. It was designed to encourage small companies to take on more workers.

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# Due Diligence on your Supply Chain

## Avalanche of HMRC Guidance released this month

The screenshot shows the HMRC website interface. At the top, there is a search bar with the text 'Search on GOV.UK' and a magnifying glass icon. Below the search bar, a navigation breadcrumb reads 'Home > PAYE > Supply chain due diligence principles'. The main header area features the HM Revenue & Customs logo and the text 'HM Revenue & Customs'. The central content area has a blue background with the text 'Guidance' and 'Advice on applying supply chain due diligence principles to assure your labour supply chains' in white. Below this, it says 'Updated 13 May 2021'. To the left of the main content is a 'Contents' section with links: 'Why you need to assure your labour supply chain', 'How to assure your labour supply chain', 'Supply chain due diligence principles', 'Guidelines to help you check, act and review', 'If you do not do checks or take appropriate action afterwards', and 'More information and checks'. Below the contents is a 'Print this page' button. The main content area is divided into two sections: 'Why you need to assure your labour supply chain' and 'How to assure your labour supply chain'. The 'Why' section explains that failing to take reasonable action can lead to significant legal, financial, and reputational risks, and that you may be liable for unpaid taxes and National Insurance contributions. The 'How' section states that proper checks are important for protecting workers and preventing modern slavery.

## Due Diligence on your Supply Chain



Some (but not all!) compliance regimes relevant to DD on supply chain

- **Off-Payroll Working rules obligations**
  - risk of being liable for unpaid tax and NI in supply chain
- **Failure to prevent the criminal facilitation of tax evasion**
  - risk of unlimited fine and prosecution
- **Modern slavery and illegal working in the supply chain**
  - - risk of fines and prosecution

## Due Diligence on Supply Chain



### What do HMRC expect you to do? Supply chain due diligence principles:

#### (1) Check

You can check your suppliers' tax and legal compliance, for example, whether they have submitted their tax returns and payments on time

#### (2) Act

Do not assume tax compliance, be vigilant for previous business failures or possible criminal intent. Check the credibility of directors and verify signatories of contract negotiations and documents are accountable office holders

#### (3) Review

Effective due diligence needs continuous monitoring and review which includes live risk management – this can stop or prevent harm before it occurs, for example it will provide added protection against denial of VAT recovery

## Due Diligence on Supply Chain



### What should you be doing?

- Make sure you have read the latest HMRC guidance and introduced into your procedures relevant practices they recommend
- Document (and publicise?) your policies
- Keep evidence of the checks that you have carried out
- HMRC will be checking! If there is fraud in your supply chain, you need a defence against any risks passing to your business

Moore Kingston Smith

Devonshire House

60 Goswell Road

London

EC1M 7AD

t: +44 (0)20 7566 4000

f: +44 (0)20 7566 4010

[www.mooreks.co.uk](http://www.mooreks.co.uk)



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# 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...

