



Update on IR35 and employment review of the Budget Webinar Q&A

We have listed the questions received prior to and during our webinar hosted on 11 March 2021. Please see our responses below.

March 2021 Budget

- **If buying a company and TUPE applies - if we offer 100% on furlough, would we have to extend this to transferred employees? Can transferred employees be left on furlough as they are now?**

The employer makes the decision who to offer furlough to and therefore there is no requirement to offer furlough to transferred employees. Any transferred employees already on furlough pre transfer can continue on furlough post transfer. Changing furlough status by taking an employee off furlough post transfer should be dealt with carefully to ensure the changes to employment terms in the furlough leave letter are not related to the TUPE transfer.

- **Is apprenticeship levy here to stay?**

The levy was introduced in 2017 and large employers with a pay bill of over £3m are required to pay 0.5% of their total annual pay to the levy. There has been some push back from large employers as to why they have to pay monies that they do not want to spend on apprentice programmes and why their unspent levy is used for smaller employers. However with youth unemployment increasing and government initiatives for apprentices a key focus of their youth skills development programmes it is unlikely there will be major changes in the next few years to the levy requirement.

- **Have you any examples of how companies have been audited for furlough scheme usage?**

HMRC will investigate furlough fraud and will focus on areas where employers have required employees to continue to work whilst furloughed. This might include directors who have claimed under the CJRS but continued to work as an employee as opposed to only carrying out their director duties. It could also include situations where employees have not been paid the full furlough grant received by the employer.

HMRC are unlikely to investigate genuine payment calculation errors but employees can take action in this in the form of breach of contract and unlawful deduction of wages claims.

IR35: Off-Payroll Working

- **How much of an issue is the ability to send a substitute? If we typically engage freelancers to work two days at a time, sending a substitute would never happen.**

While HMRC does place a large emphasis on substitutes in the CEST tool, it does not follow that if substitutes are not used then it will be fatal. In reverse, if a substitute is used, then that will almost certainly result in a determination that the contractor is self-employed. However if there is no substitute, then it will be a question of assessing all of the remaining factors. There will be occasions where use of a substitute is entirely impractical or even impossible, yet the contractor can still be self-employed if enough of the remaining factors point in that direction.

- **How far do the new rules extend? Would we need to assess the workers of a building company carrying out building refurbishment, or of the business which empties the bins?**

The off-payroll working rules only apply where a worker is providing personal services to you. Therefore if a building company is doing work to your premises, the individuals are not providing any personal services to you, they are working for the building company. You are not the client of the workers.

- **If an individual is assessed as being within IR35 but you don't want to make them an employee, can you change their terms instead to try to put them outside IR35?**

In short, yes you can. You can use the CEST tool to help you work out which factors gave you the original result and then you can consider whether you can change the contract terms and working arrangements to ensure that they will be self-employed. You will have an existing contract in place, so you can't simply make changes to those terms without the contractor's consent, however if both parties to the contract want to make the changes then they can agree to vary the terms.

- **Do PSC's always only have one employee?**

No. To be on the safe side, audit all your consultants who provide services to you through limited companies, LLPs and Partnerships.

- **Small company - I thought it was every entity in the contractual chain needed to be small for this to apply?**

The key entity is the ultimate "end user" of the services.

- **Does IR35 apply to charities / not-for-profit?**

Yes it does.

- **Is employer's NI payable too ?**

Yes it is. This is what makes IR35 contractors more expensive after 5 April 2021.

- **Does IR35 apply from the first payment from 1st April - or days worked from 1st April?**

All work after 5 April 2021.

- **Is it right to assume that the new IR35 rules only affect the private sector and not the public sector as the rules already applied to public sector from April 2017?**

As you say, they have applied to the public sector since April 2017.

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