

# What rail companies need to know about the changes to the off-payroll legislation

September 24, 2020



In little over six months the rail industry will have to become fully compliant and up to date with changes to the off-payroll system known as IR35.

The changes, coming into effect from April 2021, will mean that businesses become responsible for assessing the employment status of their contractors.

To explain more, here is David James, an Engineering Programme Director at the STR Group, a global provider of staffing solutions. An industry leading expert on the subject, he was brought in by Worley as its IR35 Project Manager. He has put a large solution in place to look after the company's 1,500 contractors.

"IR35 is the common name given to the Intermediaries Legislation which came into force from April 2000 and is the HMRC's 'test' for self-employment for tax purposes only when a contractor is working through their PSC.

The legislation is to distinguish between a genuine self-employed contractor working via their PSC, and those who work via their PSC but whose working practices could suggest they operate more like an

employee (who the HMRC call a 'disguised employee') so would fall inside IR35.

If you are a genuine self-employed contractor working outside of IR35, then you usually receive gross payments for your services via your PSC allowing you to pay some of your income in dividends and other methods which in turn creates a tax benefit.

Working via a PSC will also reduce the amount of National Insurance payable. The inside IR35 'disguised employee' should pay broadly the same amount of tax and NI as an equivalent employee would.

What I have found interesting while interacting with many PSCs, clients and IR35 working parties is listening to what side of the fence people sit on with regards to IR35 taxation. It is usually one of - 'the PSC should pay less tax as they have no employment rights (no sick pay, maternity/paternity rights, redundancy pay, holiday pay, no notice, no claim for unfair dismissal)' or it is 'the PSC is seen as a tax dodger' and 'they should all pay the same tax and NI as an employee regardless of no employment rights'...a debate that will no doubt always surround the PSC working model.

I understand that the change in off-payroll legislation is because HMRC believe they are missing out on a huge amount of taxable income from many PSCs (especially NI contributions) but they do not have a great history of winning IR35 legal cases. To make this extra tax income more accessible (and supposedly 'improve the compliance' around contracting in the UK), HMRC decided to move the liability of the PSCs tax status away from the often, single person PSC and onto the medium and large business (known as the 'end-user') who engage the PSC.

The 'fee-payer' (usually the recruitment agent who payrolls the PSC) can also be liable depending on if the end-user has proved their 'reasonable care' when providing their Status Determination Statements. Small businesses are exempt. HMRC know that by getting medium and large businesses involved via a change in legislation, there will be a more stringent approach when assessing the PSCs IR35 status, therefore more 'disguised employees' will be identified and changed to a PAYE solution and taxation will rise.

Ironically, this was how HMRC originally wanted to manage the Intermediaries Legislation from April 2000, but it was dropped after consultation as many businesses raised concern over the administrative burden...the same concerns I have heard over the last 12 months and I believe the main reason we have seen blanket decisions from the large UK corporates.

The change in Off-Payroll rules provides a simpler, self-regulated formula for HMRC which they claim saw an estimated additional £550 million in Income Tax and National Insurance contributions raised in the first 12 months from rolling this legislation out in the public sector\*.

Before the deferral to April 2021, HMRC's draft off-payroll legislation was forecasting an increase in taxation of £3.1 billion from 2020-2024 within the private sector\*\*. One of biggest concerns for end-users prior to legislation change was around the subjective manner of how IR35 is interpreted and implied, then how to complete an assessment that would show all factors of IR35 had been reviewed and adhered to.

HMRC introduced their CEST tool in 2017 which HMRC said they would support the result of if the questions had been answered correctly. Some areas of the public sector are still suffering with this tool (have a look

at the NHS Digital problem with CEST) and even the updated version HMRC released in November 2019 has had plenty of criticism including the fact it does not cover Mutuality of Obligation...a key factor of IR35.

The recent House of Lords Economic Affairs Finance Bill Sub-Committee's report comments that CEST 'falls well short of what is required'. So, the end-users who engage PSCs have had to look at other IR35 assessment methods which will prove their 'reasonable care' if challenged in an HMRC tribunal on a PSCs IR35 status determination.

With the lack of education and support from HMRC on the whole matter (until the Government's review in January 2020 which then produced some online communication resources and Employment Status Manuals), plus the fines HMRC could impose on businesses due to incorrect status determinations (and the bad publicity attached to it), you can start to understand why the big corporates just rolled out blanket bans on PSCs and wanted to engage PAYE only from April 2020.

It was just easier to do and mitigated risk of an investigation. The businesses I am aware of which did not impose blanket bans and actually managed a process of assessing all their current PSCs have had a huge amount of work to do with minimal official guidance to help them -and as you can imagine, over recent times there have been plenty of so called 'experts' that have appeared across social media and the press claiming all sorts of 'help and advice' to businesses through this process (Worley had some excellent support from Andy Webster's team at Workr Compliance and Dave Chaplin's team at IR35 Shield).

Also, during the 9 months leading up to the change in legislation, the UK had a change in Prime Minister, the ongoing daily saga of Brexit, a general election (so a cancelled Autumn Statement) and then a new Government. All of which attributed to a delay of the final legislation on IR35 which we didn't see until the Budget on 11th March...just 27 days before original implementation date.

Finally, everyone knew what was happening, and all the hard work that put companies in a strong position ready for implementation was worth it. Then the delay to rolling out the legislation which has been attributed to COVID-19. Interesting this delay wasn't mentioned in the Budget on 11th March but a week later on the 17th March. The delay was viewed as a minor win for those opposing the changes in legislation, and at the time some claimed that the government could scrap the legislation into the private sector altogether.

The 12-month deferral created further confusion for businesses who engage the PSCs over liability and what they should be doing between now and April 2021. There is also concern from PSCs with regards to keeping their original outside IR35 status, especially where the engaging business assessed them as inside IR35 prior to April 2020.

In a nutshell it is BAU until April 2021. Businesses do not have to determine the IR35 status of their PSCs as this liability still sits with the PSC until April 2021. My advice to any PSC would be to go and get an assessment to prove your IR35 status...which you should have been doing each year anyway as good working practice.

The COVID-19 pandemic is affecting most industries and will do for some time. It is therefore important that all businesses use this deferral to the off-payroll legislation to help with stabilising their business in

the current climate, but still be planning ready for the implementation in April 2021.

On Monday 27th April the House of Lords Economic Affairs Finance Bill Sub-Committee's published their report, 'Off-payroll working: treating people fairly' published...and it is quite a damning report. The first summary paragraph of the report suggests that the IR35 rules 'have never worked satisfactorily' and concludes that 'this framework is flawed' ...not a great start.

The report carries on and reads poorly for the government's IR35 ruling in the public and private sector. Yet more evidence for those who oppose the IR35 reform and claim that it is not fit for purpose. On 19 May, MP David Davis' tabled amendment to the Finance Bill 2020-2021 proposing a delay in off-payroll to April 2023 failed to gain the votes required by MPs.

Now that we know the off-payroll legislation will be rolled out in the private sector from April 2021, it is important that you use this time wisely to plan and get your business ready. Businesses need to roll out procedures on PSC engagement (based on the new world from April 2021) and your contractors need to be assessed to produce a status determination.

Businesses need to develop the methodology around the new process of engaging PSCs compliantly –think about the changes your company may need to make to engage PSCs in the new world including audits to show any potential HMRC investigation you have a fully compliant engagement process.

Blanket determinations are argued to be in breach of the HMRC's rules and will do nothing but repel PSCs and their flexible working practice from your business. Use the proven resources available (and by proven, I mean resource who have actual experience of managing IR35 projects –not the so-called experts who have just read and produced a few LI articles / videos) and get your business ready to use PSCs compliantly from April 2021...do not panic or leave it all until 2021 and go for the blanket approach."

\*Gov.uk policy paper 'Rules for off-payroll working from April 2020'

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