



Impact of IR35 changes on practices : New Guidance

The IR35 has been introduced as an anti-tax avoidance mechanism and applies to those organisations defined as a ‘public authority’ under the Freedom of Information Act 2000. For NHS purposes this includes NHS England, CCGs, NHS Trusts and also GP practices providing GMS and PMS services.

It is only when one of these organisations is engaging the worker through an intermediary that the new IR35 rules need to be applied. If a locum works for a practice as a sole trader, then this probably doesn’t apply, but remember that from 6 April 2017 it is the responsibility of the intermediary (eg: the worker’s Limited Company) to assess whether the worker falls inside or outside of IR35 and if deemed to be inside, then to apply the appropriate tax and National Insurance. Please read this important guidance which will help explain the situation and there are links to the self-assessment tool to assist in calculating the IR35 status.

A Locum’s Guide to the Changes to IR35 Legislation

From 6 April 2017 the legislation known as IR35 – which affects how people work through Limited Companies – is changing. The rules and implications are complex. I have attempted to answer some of the frequently asked questions below.

What is IR35?

IR35, or intermediaries legislation, is anti-avoidance tax legislation brought in by the then Chancellor Gordon Brown in 2000. Its purpose is to prevent ‘disguised employment’ in which a worker receives payment from a client through an intermediary such as their own Limited Company, but whose relationship with the client is such that had they been paid directly then they would be employees of the client.

Prior to IR35 being introduced 17 years ago, a worker could work in the exact same job as a salaried employee, but could make significant tax savings by having the payment paid to their company, which they then draw dividends from.

What is changing on 6 April 2017?

Up until 6 April 2017 it is the responsibility of the intermediary (eg: the worker’s Limited Company) to assess whether the worker falls inside or outside of IR35 and if deemed to be inside, then to apply the appropriate tax and National Insurance. As of 6 April, with regard to Public Sector Body engagements, it will be the responsibility of the organisation engaging the worker (the engager) or the agency (if it uses one) to assess this, and if the worker is found to be inside IR35 then the engager/agency must apply tax and National Insurance deductions at source.

Importantly, the criteria for assessing whether an individual operating through an intermediary falls foul of IR35 will not change on 6 April. Hence, if a worker has been working safely outside of IR35 through their Limited Company and not falsely declaring themselves as such, then nothing should change, apart from responsibility for due diligence shifting away from the worker.

Who is affected by this change in legislation?

It is important to note that not everyone is affected by this change. Firstly, only the public sector is affected. The private sector process remains the same. Secondly, not all of the NHS is affected. The legislation specifies that this applies to ‘public authorities’ which are defined by the Freedom of Information Act 2000. In the NHS those authorities are:

NHS England

CCGs

Strategic Health Authorities

Local Health Boards

NHS Trusts & Foundation Trusts

Community Health Councils

GMS Practices

PMS Practices

It is only when one of the above organisations is engaging the worker through an intermediary that the new IR35 rules need to be applied. This means that APMS providers are unaffected, as well as private commercial providers who are contracted to provide NHS services such as some out-of-hours services, walk-in-clinics and urgent care centres.

How is IR35 status assessed?

A full explanation of how IR35 status is assessed is contained within the new BMA guidance which also contains a link to the HMRC online tool to help you calculate IR35 status.

Once an engager/agency has assessed me, do they have to do it again?

HMRC guidance is that for each individual engagement, the engager/agency must assess the IR35 status of the worker and if necessary take the appropriate action.

I work directly for practices as a sole trader, does this apply to me?

No. As there is no intermediary between you and the client, you are excluded from IR35. In this case, the issue is solely with regard to employment status.

I get my work through an agency, does this change apply to me?

If you work as a sole trader via an agency, then IR35 needs to be considered as the agency could be considered an intermediary. If you work via an agency through your own Limited Company then IR35 still needs to be considered even though there is more than one intermediary between you and the engager. In both cases, the responsibility for assessing whether IR35 applies and applying appropriate tax and National Insurance lies with the agency, rather than the public sector body.

The engager is a Federation or other such local organisation, are they affected?

The legislation is clear that this change applies only to "public authorities" defined as such by the Freedom of Information Act 2000. Federations are not listed by that legislation as public authorities, so are not caught by this new legislation. Nor is any other organisation or entity which is not listed as such by the Freedom of Information Act 2000.

What must an engager/agency do if the above tool says the locum is inside IR35?

If the above tool says the worker falls inside IR35 for this engagement then they should be paid through the organisation's payroll and tax and National Insurance deducted at source. As an employer, the engager/agency will also then have to add 13.8% employer National Insurance for all earnings above £156 per week in line with HMRC NI bandings. They would also have to generate payslips and a P60 end of year certificate for the worker as appropriate.

The locum is also free to only accept the engagement subject to satisfactory employment terms, which would need to be negotiated.

What are my options if an engager/agency deems me inside IR35?

If a locum operates through a Limited Company then they have several options:

Refuse to accept the engagement and seek business elsewhere

Accept the engagement and continue to operate through the Limited Company. The payment will then arrive into the company account, but instead of drawing a dividend on it, the locum would draw it as a salary. It would not be subject to any Corporation Tax, nor would it be subject to any further income tax as this has already been done. In this scenario, for the purposes of that particular engagement, the Limited Company serves no real purpose.

Accept the engagement on the condition that the Limited Company is bypassed and the locum is treated as a true employee with no intermediary.

Although being an employee for tax purposes does not automatically bestow employment rights, the locum is of course free to negotiate employment terms or turn down the engagement altogether if you are unhappy. Furthermore, if the locum feels they are being treated unfairly with regard to other employed workers in the same organisation, then they are free to take the organisation to an Employment Tribunal.

What happens if an engager/agency wrongly deem someone outside IR35?

Should HMRC carry out an IR35 investigation of the organisation, at any point in the future, then any engagements deemed outside IR35 when they are in fact inside would mean the engager/agency would be liable to pay any taxes and National Insurance due to HMRC as well as penalties. These taxes could be clawed back as far as 6 April 2017.

What happens to me as a locum if I am wrongly deemed to be outside IR35?

As far as HMRC is concerned, nothing. Liability would lie solely with the engager, or the agency if there is one, unless a specific indemnity arrangement is in place to compensate any liability which may befall the engager/agency

Can an engager/agency deem all workers inside IR35, just to be safe?

There is nothing to prevent an engager/agency from attempting this. However, HMRC guidance makes it clear that each engagement should be assessed individually and the above HMRC tool applied. Blanket policies by engagers or agencies do not comply with this. A worker is free to raise this with HMRC. However, given that wrongly deeming someone as an employee could result in more tax generated rather than less, it seems unlikely HMRC would take a harsh view. HMRC have said they will stand by any result their tool produces, providing the tool hasn't been manipulated to produce the result desired.

Although adopting such a blanket policy may mitigate future tax risk, the engager would then see a rise in their costs as they apply employer National Insurance, as well as the administrative and payroll costs involved.

An engager/agency has deemed me inside IR35, but I think I'm outside, what can I do?

HMRC have said they will stand by any result their assessment tool produces. However, as said above, where HMRC believes the tool has been deliberately used incorrectly they will treat this as deliberate non-compliance. However, as far as the locum is concerned, there is little that can be done to overturn the decision.

Do engagers/agencies have to offer employment protection to workers they deem inside IR35?

Being employed for tax purposes and being employed for statutory purposes are separate legal entities. Being deemed employed from the point of view of HMRC does not automatically confer any employment rights. Such a decision would fall within the remit of an Employment Tribunal.

Should a Tribunal rule in the favour of the worker and agree they have statutory employment rights then the engager/agency would have to provide such protection as:

Protection from unfair dismissal

Maternity leave and pay

Annual leave and pay

Redundancy payments

Furthermore, depending on the status of the engager, they may also be obligated under such circumstances to offer employment terms no less favourable than the BMA model salaried contract.

Whether a locum wishes to press for employment rights depends entirely on the engagement. A locum who does regular work each week for an engager may be more inclined to seek employment rights than someone who is seeking casual ad hoc shifts.

BMA guidance for locums on IR 35

BMA Law’s guidance on IR 35