

Member Statement

Updated Statement on Off Payroll Working Rules (IR35)

Following on from our recent statement on the Off Payroll Working Rules, FCSA is in the process of taking professional advice. We have contacted a leading barrister who has been instructed to provide expert Opinion on the legislation as currently drafted. We will publish this as soon as it is available. It is the FCSA's intention to also share this with HMRC to assist them in resolving the current issues in legislative drafting. We will also provide a further update after our meeting with HMRC on 14 October 2020.

In the meantime, our position is that both the intention of the legislation, HMRC's currently stated views and its internal guidance should not prevent the continued use of compliant PAYE umbrella models.

The intention of IR35 has always been to bring a change to employment taxes income which would otherwise be taxed as trading or investment income.

The current rules were only intended to change who is responsible for accounting for PAYE and NIC to HMRC. IR35 deems a hypothetical employment relationship when there is personal service but no employment relationship with the person receiving the services. From April 2021, IR35 needs to be considered in conjunction with the normal rules for PAYE and the PAYE Agency Worker rules. Note, currently the Managed Service Company rules must be considered before IR35, but this is reversed after April 2021.

However, as with a lot of recent legislation, IR35 is widely drafted to give HMRC power to prevent abuse. The crucial questions in this drafting surround the definitions of intermediary including whether the:

- lowest "person" in a supply chain is the worker, the worker's intermediary or an umbrella company employing and paying the worker. Based upon all currently available information, including HMRC seminars and internal guidance, the intention was that the worker's intermediary should be the lowest "person" in the chain.
- worker has either received or is entitled to receive a chain payment. On the basis that the worker is not a party to the contract i.e. the chain (which is not defined), it is debatable whether he or she does receive or is entitled to such a payment.

HMRC guidance specifically states that *"Note – Chapter 10 should not apply where an individual performs services for a client and that individual is already engaged under a contract of employment and their earnings are subject to PAYE by another party, other*

than that individual's intermediary, in that supply chain. For example, if a worker is legitimately employed by an agency and that agency operates PAYE, Chapter 10 should not be applied where that worker performs services to a client."

While HMRC's example does not specifically refer to an umbrella company, the reference to being employed with earnings subject to PAYE would apply to a compliant umbrella.

The drafting of the provisions relating to the recovery of any underpayments from other persons under these rules is similarly draconian. But HMRC guidance also sets out how these rules will be applied in practice. So, HMRC has confirmed it will not seek any underpaid PAYE and NIC from other parties in the supply chain when there has been a genuine business failure.

We are working hard on your behalf to try to ensure that there should be no need to change your business models. Please bear with us and, in the interim, ensure that you only take advice from suitably qualified and independent sources if you feel the need to.

FCSA are working closely with JMW, employment tax expert Sue Ollerenshaw and leading Counsel to ensure we provide a robust solution to the issue presented by current legislation.

Please feel free to share this communication with your supply chain, agency partners in order to demonstrate that FCSA Accredited companies are both confident in finding a workable resolution to the current issue and remain confident that the matter can be resolved for the entire supply chain.

Phil Pluck
FCSA CEO

Chris James
FCSA Chair