



IR35 CHANGES:

THE DEATH OF THE "GIG ECONOMY"?

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AGENDA

- Our speakers
- What is BACFI
- IR35 Changes: The Death of the “Gig Economy”?
- Q&A
- Networking Drinks



OUR SPEAKERS

- Ian Brookes-Howells – Chair for tonight
Chair, BACFI and Interim Senior In-House Barrister
- Andrew Webster, IR35 Director, Workr Group
- Joseph Brown, Chartered Tax Adviser, Cubicstone Tax Services
- Fudia Smartt, Employment Lawyer, Partner from Spencer West



WHAT IS BACFI



- Bar Association for Commerce, Finance and Industry
- Specialist Bar Association of the Bar Council but independent.
- Representing barristers working in corporations, business, law firms, and public authorities for 55 years with over 200 members
- Our members work as in-house legal counsel, general counsel, CEOs, advocates, business managers and consultants
- Employed and contractors but outside of traditional barristers chambers



IR35 CHANGES: THE DEATH OF THE “GIG ECONOMY”?

- What is IR35?
- What are the changes being introduced in 2020?
- The conflict between the legal and tax definition of an employee.
- What happens if you get it wrong?
- Case Studies.



IR35 CHANGES: THE DEATH OF THE “GIG ECONOMY”?

- Alternative ways of working.
- Practical steps that a:
 - Contractor can take;
 - Business can make.
- Where can you get advice and information.
- Q&A
- Networking Drinks





IR35 PRIVATE SECTOR REFORM; A
PRACTICAL AND COMMERCIAL
ASSESSMENT



Agenda

- WORKR Compliance 'a practical and commercial assessment of IR35 Private Sector REFORM'
 - Delivery stage of WORKR Compliance
 - Engager and Fee Payer; making a choice
 - The possible outcome of the choice made
- Summary





Delivery stage



- 3971 status assessments completed by 3rd February
 - Across 307 roles
 - 11 clients
 - 16 sites in UK
- Variety of sectors
 - Oil & Gas
 - Banking & Finance
 - Marine
 - Engineering
- Forecast completed status assessments 7000 w/e 28th February
- Planning for IR35 BAU and enforcement

People + Process + Technology + Expertise

Pragmatic and Plain Spoken approach



Engagers and Fee Payers have a choice

- **Choice 1**
 - Independent and expert advice to understand the proposed changes; and its impact to
- The business – the ‘what – how – with who’ vs. doing the day job!
- Retaining existing talent supplying services via a PSC
- Skills and services planning to deliver future projects
- Tender submissions and future Business Development processes
- Cost of skills and services supplied via a PSC
- Understanding ‘alternative’ compliant pay options for in scope PSC and roles
- Re- assess supply chain relationships
 - Use of Fee Payer to mitigate risk
- Create operable and compliant methodology with chosen 3rd party IR35 expert, to meet the proposed changes





Engagers and Fee Payers have a choice

- **Choice 2**
 - Blanket PAYE or Umbrella
- Why?
 - Advised that it is 'low risk' in context of how Engager had treat contractor freelancers from Intermediaries Legislation (2000) to date
 - A presented methodology is too costly, too cumbersome, or the work and resource needed is unsurmountable
- **Choice 3**
 - Inaction
- Some Engagers / Fee Payers are
 - still unaware of the proposed changes!
 - aware of the changes but waiting for final legislation
- Aware of the proposed changes, sceptical of HMRC enforcement and plan to do nothing pre 6th April 2020
- Plan to extend 'Professional Indemnity' provision to manage risk
- Take out 'IR35 Insurance' – no methodology or 3rd party expertise needed!





Likely outcome of the choice made

- **Choice 1**
 - Seek independent and expert advice to understand the proposed changes
- Achieve clarity on existing PSC & Roles status including the reasons 'why'
 - Challenge the outcome of the methodology and status determinations in context of 'how' Engager currently treats PSC's vs how they intend to do so 6th April
 - Implement operable and compliant process to meet responsibilities of proposed changes, retaining evidence to support 'reasonable care'
- Retain a higher proportion of services via existing PSC's at agreed commercials
- Gain competitive advantage; attract 'talent' to meet planned projects and BIDS at existing margins & rates
- Transparent supply chain, introduces compliant Umbrella companies to the Engager





Likely outcome of the choice made

- **Choice 2**

- Blanket PAYE or Umbrella decision
- Responsibilities of the proposed changes have been met; technically Yes!
- A despondent contractor workforce
- Talent leaving for 'IR35 Friendly' Engagers
- Contractor's challenging the decision
 - Evidencing their own IR35 status
- Up to 35% rate increase to achieve PSC nett take home pay

- Agency PAYE numbers increase; added fixed and variable cost
- Commercial pressure to retain talent; contractors use 'intermediaries' outside of PSL
 - high risk and in scope of 'Criminal Finances Act'

- **Choice 3**

- Inaction
- Lose talent
- Competitive disadvantage; inability to attract talent
- Technically not meeting responsibilities; high risk





Summary

- Engagers and Fee Payers still have a choice; time is against them!
- Contractors can 'push' this issue where there is 'Inaction' and 'Blanket Decisions'
- Consider longer term impact of the choice that was made
- Genuine commercial and competitive advantage by 'embracing' the changes
 - Implementing operable and compliant processes to determine status assessment and facilitate IR35 BAU
 - Introduce 'Continual Improvement' programmes to assess effectiveness of IR35 BAU to reflect HMRC Spotlight Notices, Enforcement and Case Law
- Prudent to engage & retain 3rd party IR35 Consultancy support - meet responsibilities now and post 6th April
- Strategic decisions; compliant umbrella vs Agency PAYE
- Be positive and take a pragmatic view



Thank you



IR35 changes...

An employment lawyer's perspective

Fudia Smartt, Partner

SPENCER WEST LLP



In a nutshell....

* IR35 and off-payroll working rules

- Purpose
- Concerns of widespread tax avoidance
- April 2017 - changes to the public sector
- April 2020 - changes for the private sector



Employment status

Key questions

- Would the worker have been an employee for tax purposes but for the arrangement?
- IR35 rules – focus on determining status for tax purposes but take into account the wider ramifications!
- Differing employment law and tax tests – *Autoclenz* case
- CEST tool



Employment status – HMRC guidance

- Personal service
- Mutuality of obligation
- Control
- Substitution
- Provision of equipment
- Risk
- Opportunity to Profit
- Length of engagement
- Part and parcel of the organisation
- Employee-type benefits
- Right to terminate contract
- Mutual intention
- Personal factors



Employment law implications

- IR35 changes - an auditing opportunity
- Hiring contractors directly – considerations:
 - Type of contract – fixed term v permanent, part time or zero-hours?
 - Holiday pay
 - Pension auto-enrolment
 - Other employment rights – unfair dismissal, discrimination etc.
 - Apprenticeship levy





Where next?

- Rise of self-employment
- Taylor Review and creation of “dependent contractor”

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History of IR35:

- First introduced on 9 March 1999 via a press release (IR35 Version 1);
- 23 September 1999 IR35 Version 2 introduced after much lobbying;
- IR35 (version 2) became law in 2000, effective from 6 April 2000;
- May 2011, HMRC introduced unpopular Business Entity Test (abolished 2015);
- 16 March 2016, proposal of clampdown on off-payrolling for public sector;

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History (continued)

- March 2017, introduction of new IR35 Employment Status Test (EST);
- EST evolving into unpopular and unreliable CEST tool;
- 6 April 2017 operation of off-payrolling for public sector
- October 2018 proposal of clampdown on off-payrolling for private sector
- 6 April 2020 enforcement of off-payrolling for private sector

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- Onus on end user/client to decide if IR35 applies (Status determinations)
- Extensive lobbying of Treasury for changes
- House of Lords Finance Bill sub-committee and government review
- What next? - Watch this space!

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Who are affected by off-payrolling for private sector

- Incorporated entities
 - Companies Act 2006 entity (company)
 - Limited Liability Partnerships
 - Unregistered companies
 - Overseas companies
- Unincorporated entities
 - Partnerships, trusts, Unincorporated associations

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- **Small entities exemption – onus on contractor (and not client) to determine IR35 status**

Companies Act 2006 definition of medium/large company meeting 2 or more of the following tests:

1. Annual turnover of no more than £10.2m
2. Balance Sheet total of no more than £5.1m
3. Number of employees of no more than 50

Include connected and associated companies. Groups of companies are combined for this test

- **Unincorporated entities**

- Annual turnover limit of no more £10.2m only (simplified test)

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- Companies that cannot be small:
- Public Company, Member of an ineligible group or an authorised insurance company, banking company, e-money issuer, MiFID investment firm or a UCITS management company or carried on insurance market activity.
- A group is ineligible if any of its members is a public company, body corporate whose shares are traded on an EEA regulated market, a person carrying on a regulated activity under the Financial Services and Markets Act and a small company that is an authorised insurance company, banking

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- **Responsibilities of the end-user (client)**

- Determine if small exemption applies for coming tax year
- Status determination of workers by the end-user (client)
- Provide a status determination statement to the “worker” down the “contractual chain” as necessary
- Client led status disagreement process
- Deemed employment status, client accounts direct to HMRC PAYE and NIC due on “earnings”
- Deemed employment status, client pays PSC net of PAYE and NIC

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- **Determinations and appeal process**

- Client must take “reasonable care” when making the determination
- Use of CEST not mandatory, but HMRC may consider this not taking reasonable care!
- Keep records of determination as may be needed at some point in the future
- Inform worker or contractual agency of the determination, irrespective of whether off-payroll working rules apply (e.g. not deemed employment), and the reasons for the determination

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- **Determinations and appeal process**

- An appeal process has to be established if worker or agency disagrees with the determination
- Consider the appeal, the reasons for the appeal and the original determination
- Respond to the appeal within 45 days with the conclusion (determination upheld or revised)
- During appeal process, apply the rules as per the original determination

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- **Issues: End-user/client**

- Identify all engagements that will fall under the off-payroll working rules and complete the required determinations. For some this will need to be done before 6 April 2020
- Decide how you are going to complete the determinations. CEST or some other method. Make sure you keep records!
- Determine who you have to communicate the determination to
- If the rules apply, obtain the information to need to process the PAYE and NIC due (NINO, PAYE Code Number!)
- Ensure the PSC accounts for amounts subject to the off-payroll working deductions in its CT and VAT returns?

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What if the **Status Determination Statement (SDS)** is adjudged to be incorrect?

- Draft legislation is placing emphasis on client/end user to take reasonable care;
- Reasonable care not explained in draft legislation. Nevertheless, consider HMRC practises to include:
 - Obtaining detailed review of contract, and to determine whether the daily actions of the worker compliment the terms of the contract. This should be done by lawyer or accountant.
 - Making use of the CEST tool, and keeping a copy of result in support of the SDS.
 - Consider the Hall v Lorimer tax case and then apply the principle contained in HMRC’s IR56.

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What if the Status Determination Statement (SDS) is adjudged to be incorrect?

If proven that reasonable care has not been taken, penalties & interest can be imposed where:

- The taxpayer makes a careless error (in providing information to HMRC);
- Where a third party supplies information that is false or deliberately withholds information.
- When a taxpayer fails to notify HMRC that an assessment is too low.

HMRC would impose the Failure to Correct rules, and penalty would be at least 100% of the tax lost plus interest.

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Things to do to try and avoid an IR35 situation

1. Always offer your services.. The offer and acceptance of services is paramount
2. Are you in control. Can you be told what to do and how to perform your services?
3. Helpful, if you can avoid replacing an employee carrying out exactly the same duties
4. Agree with end user/client that a substitute can be used in your absence
5. Agree for a specific project period and for the fee to be project based – avoid timesheets
6. Where possible, avoid using an employment agency
7. Try to work from your own office – do not portray that you are an employee

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Things to do to try and avoid an IR35 situation

8. Take out your own professional indemnity insurance
9. Invest in your own professional development – training
10. Where possible, try and have a few contracts at the same time
11. Clearly define with client that a *Master/Servant* relationship does not exist
12. Invest in your own equipment
13. Make good any work performed in an unsatisfactory manner in own time/own expense
14. Avoid being a fixture of the client that you are performing services for.

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Thank you for listening!

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WHO IS JOSEPH BROWN?

Joseph has over 30 years experience in looking after private clients. His clients include City Executives, sportsmen and international high net worth individuals, hedge fund traders and private equity partners. He specialises in private client work, including advising non-UK domiciliary employees of large international companies and wealthy individuals who wish to take up residence or acquire property in the UK. This work would involve providing advice on overseas tax, capital taxes and in some cases trust tax planning.

Joseph also covers a range of tax issues in relation to employment matters, to include IR35 issues, and also HMRC enquiry, investigations and disclosure work.

Joseph is a member of both the Chartered Institute of Taxation and the Association of Tax Technicians. After spending over 22 years with his most recent employer, Joseph left at the end of November 2019 to start up his own tax consultancy service (CubicStone Tax Services Limited).

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Thank you to:

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