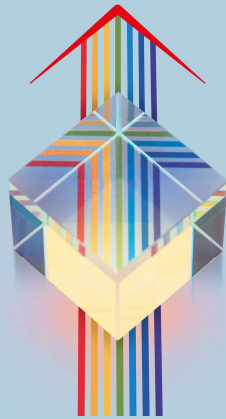


ICAEW KNOW-HOW
TAX FACULTY



Off payroll working

23 NOVEMBER 2020

PRESENTED BY:

KATE UPCRAFT

STEVE WADE

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Presenters



Today's moderator
Peter Bickley
Technical manager
ICAEW Tax Faculty



Today's speaker
Steve Wade
Associate Partner
EY

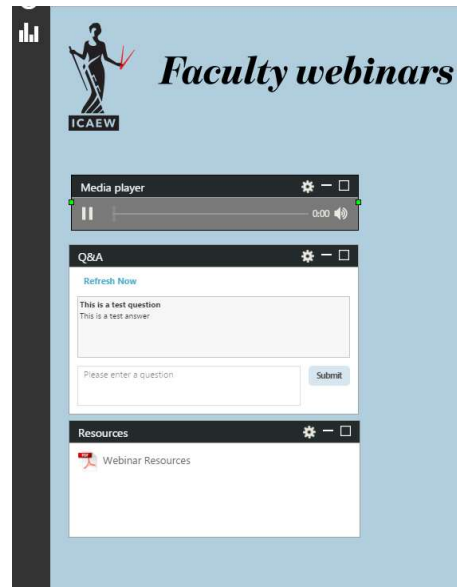


Today's speaker
Kate Upcraft
Kate Upcraft Consultancy

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Background...

- IR35 was a press release from Inland Revenue in 1999
- The plan then, as now, was for end hirers/engagers to decide status of limited company contractors, freelancers and consultants
- Reversed from 2000 so limited company decided if they are 'caught' and paid PAYE on deemed income via their own company
- U-turn in April 2017 for public sector, all but small businesses in private sector April 2021
 - Called 'off-payrolling' so we have existing 'IR35' and new 'off-payroll'
- This is not about sole traders just limited companies

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Definitions

Off-payroll	HMRC's description of contractors they think ought to be 'on payroll'
Engager	An end client using off-payroll workers
PSC (Personal Service Company)	<ul style="list-style-type: none"> • Usually single director limited company offering specialist labour who invoices the engager for their services • Can also be other intermediary such as a limited liability partnership where one partner/family receives 60% or more of the profits
Fee payer	<ul style="list-style-type: none"> • The entity who pays the PSC • Could be an agency or engager

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Definitions

CEST (Check Employment Status for Tax)	HMRC's online tool for working out whether the IR35 rules apply
Deemed employee	A PSC director who is added to the payroll of the fee payer so their fees can be subjected to tax and NI
SDS	Status Determination Statement
Small engager (employer)	<ul style="list-style-type: none"> • In the private sector the rules don't apply to a business that is small <ul style="list-style-type: none"> – A company that doesn't need an audit is small • They can continue to use PSCs and pay them gross • What is 'small' next...

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Implementation date and cut off

- New rules effective from 6 April 2021
- Two sets of rules for off-payroll contracts
 - Work for large and medium sized private sector engagers and all in public sector
 - Engager determines tax status
 - Engager issues Status Determination Statements (SDS) to
 1. The person with which it contracts, and
 2. The worker
 - Payments made to the worker must be under deduction of PAYE and NIC
 - Work for small engagers in the private sector
 - Existing private sector rules continue unchanged (IR35)
- Only apply to payments made for services delivered from 6 April 2021

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How to determine size: see TAXguide 3/20

- Size of client relevant in private sector only. Small or non-small?
- Step 1, look at the accounts for a year. Small if it meets 2 of 3 conditions

2 out of 3:	
Annual turnover	More than £10.2m
Balance sheet total	More than £5.1m
Average number of employees	More than 50

- Step 2, qualifies for small company treatment under OPW rules if it meets 2 of 3 conditions
 - It meets small size limits in current financial year
 - It met small size limits in preceding financial year
 - It qualified as a small company in the preceding financial year

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Illustration

Year	Accounts for the year indicate:	Using 2 out of three conditions test, CA defines company as:
1	small	small
2	medium	small
3	small	small
4	medium	small
5	medium	medium
6	small	medium
7	medium	medium
8	small	medium
9	small	small

Impacts payments made under OPW contracts in the tax year starting after the filing date for that financial period
eg year ended 31 December 2019, payments after 5 April 2021

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When is a Status Determination Statement required?

- An SDS is only required to be issued by the client where
 - It is a public sector entity, or
 - L/M sized private sector entity
 AND
 The contractor's employment status as determined by the client is that of deemed employee
- BUT best practice will be to issue an SDS regardless of status decision
 - Reduces risk of becoming liable to account for PAYE if an agency/fee payer fails to make deductions

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Form and content of the Status Determination Statement

The SDS

- Could be a document or in an email
- Must provide both the
 - status decision made by the hiring organisation
 - reasons behind the decision
- Recommend it should detail appeal process
- Have you or your clients already issued SDSs – perhaps in anticipation of the April 2020 delayed start date
- Should you re-issue SDSs?
- Need to withdraw if small

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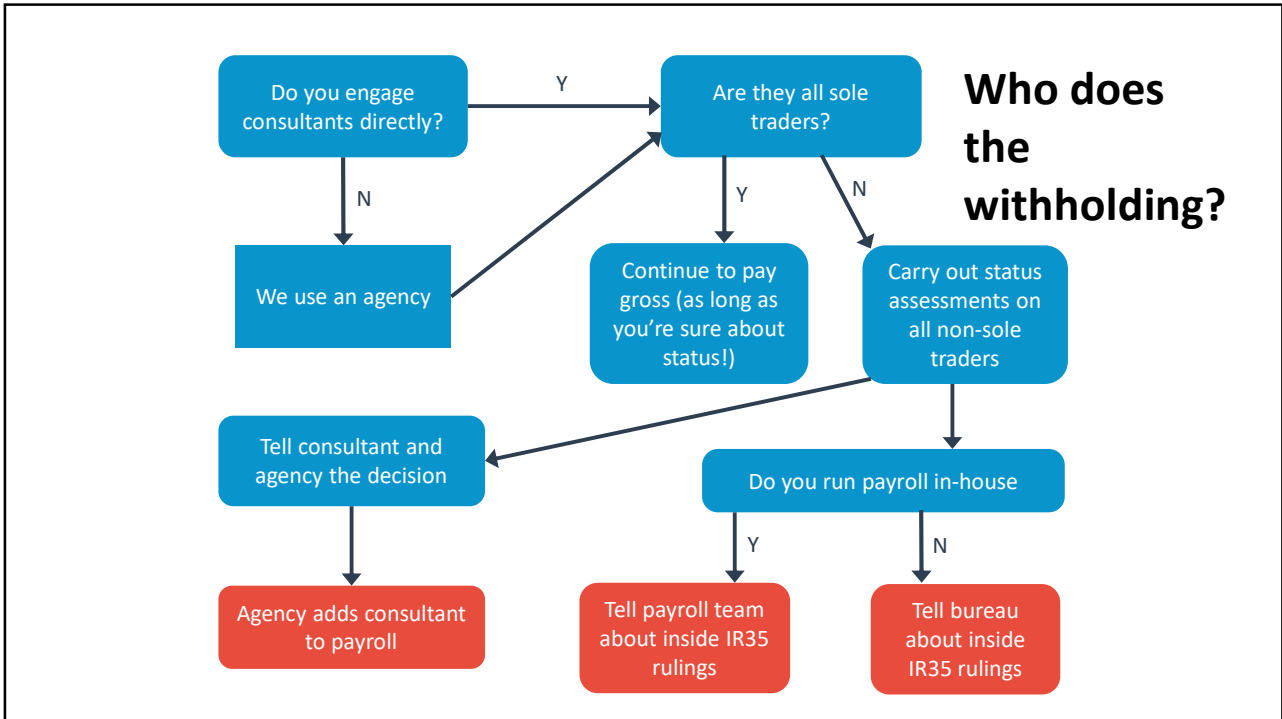
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Disagreement with SDS

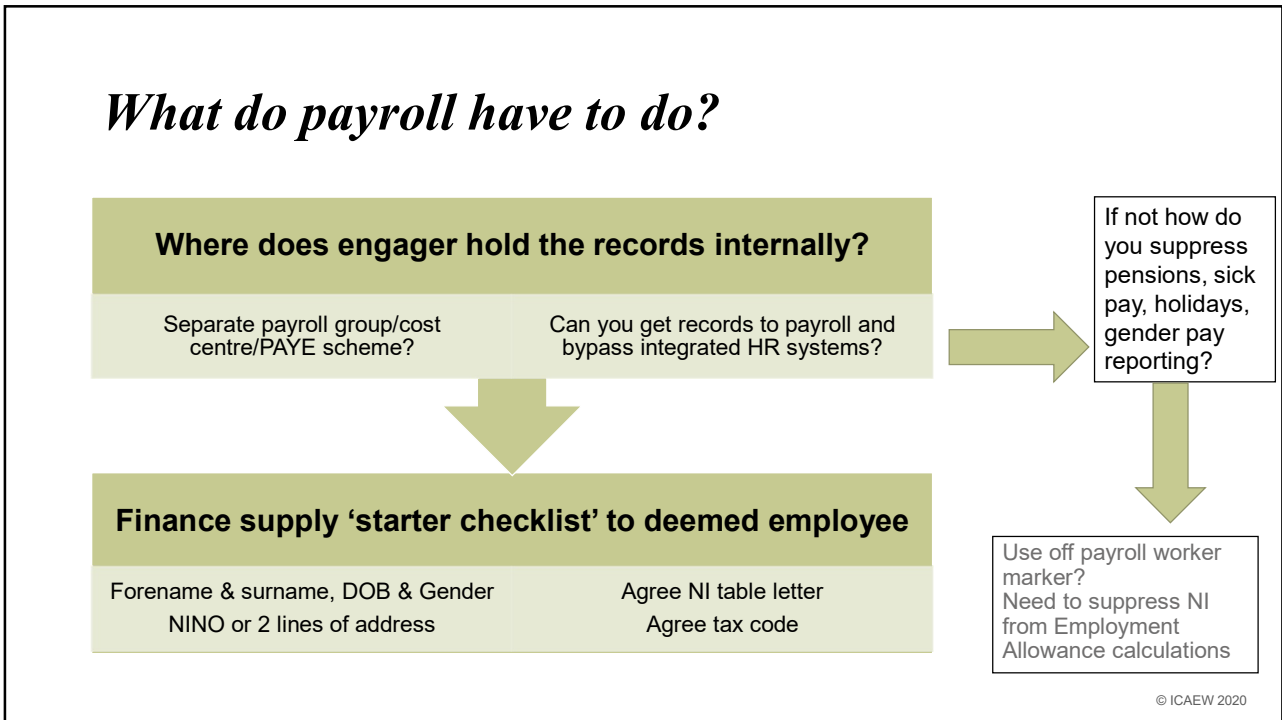
- **Status challenge** possible by
 - Worker
 - Fee-payer
- Must give reasons
- Currently, no time limit for starting the challenge
 - Within the period of the continuing contract and before last payment
- Will be client led
- No involvement of HMRC
- Client has 45 days to respond

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What does fee payer's finance team have to do?

Finance receive invoice

Ensure contractor knows how/when payment will be made: **Payroll date v finance run?**

1. Deduct VAT and qualifying expenses and pass only fees to payroll by payroll deadline, **or**
2. Pass gross invoice amount to payroll by payroll deadline identifying non-taxable items

1a. Receive net payment amount back from payroll plus statement (payslip) and pay that + VAT, expenses, **or**

1b. Finance pay just VAT/expenses and payroll pay fees, **or**

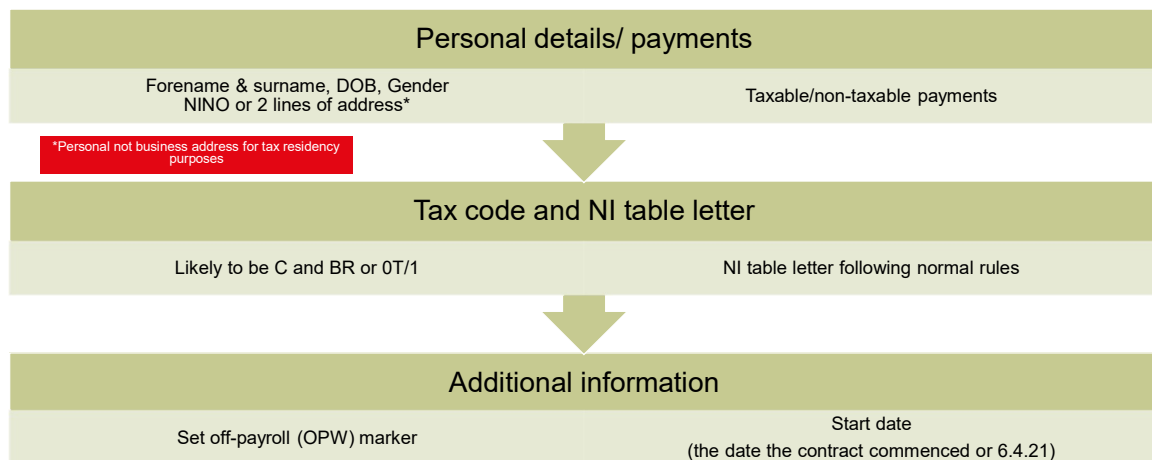
2. Payroll pay everything, finance send payslip or remittance advice*

*Doesn't have to be a payslip as not an employee as per Employment Rights Act

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Payroll: setting up record



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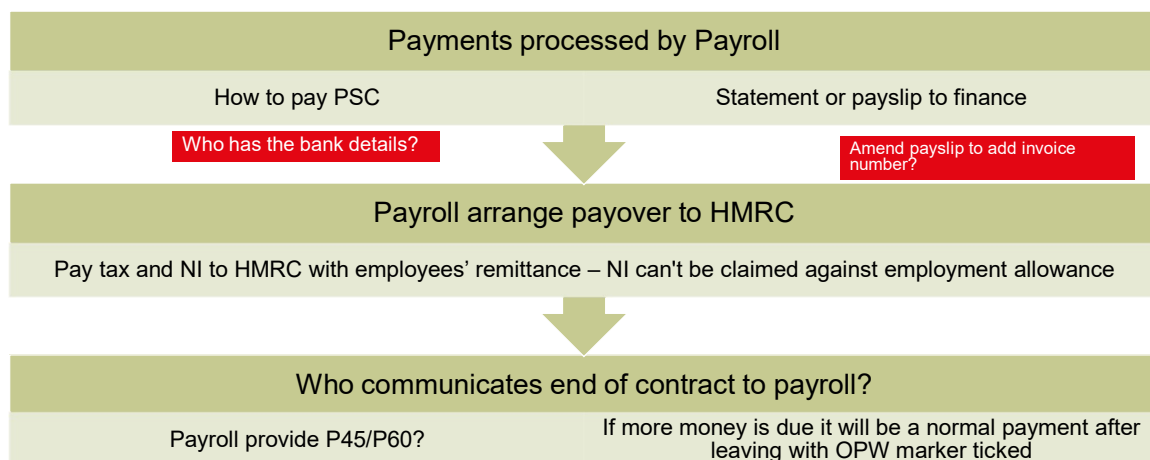
What is the 'salary' in the payroll?

- If engager has agreed "PAYE rate' ie after a notional deduction for employer NIC they must gross back up before calculating deemed payment in payroll
 - Eg if rate was £1,000 then negotiated to £900, £1000 is used in payroll and only excess over £100 can be taken off invoice as already reduced by £100
- <https://www.gov.uk/hmrc-internal-manuals/employment-status-manual/esm10021>

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Gross to net process



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What if an inside IR35 is overturned?

- PAYE may have been operated for some months even crossing tax years
- On the next available FPS (or YTD FPS too if for a prior year) the deemed employer should
 - Set the leaving date to the same as the start date for the deemed employee
 - Set all the year-to-date values to zero
- This will allow the deemed employer to recover the tax and NI from their next remittance and so repay themselves the employer NI and the tax/NI deductions to the deemed employee

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What about the PSC's Payroll

- PSC can take salary/dividend out of his/her company tax and NI free up to the net amount that has already been taxed by the client and received by the PSC
- Has that been done for any PSC's working in the public sector since April 2017?
- PSC's FPS should report the salary tax and NI free or dividend tax free
- PSC is responsible for pensions and statutory payments
 - Problem calculating Ni'able pay – it will have to be overwritten
- Any income from a small 'engager' still needs to be assessed for IR35 by the PSC

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Transfer of liability - ESM10031

“GENUINE BUSINESS FAILURE EXAMPLE ONE

Using the context set out in the general example above.

Agency 2 deducted tax and NICs from payments to the worker’s intermediary. Agency 2’s main source of income was from a large contract with another party. The other party terminated that contract through their own choice and so agency 2 lost its main source of income. As a result of this loss agency 2 couldn’t pay its debts, including debts to HMRC, and was subsequently liquidated.

This is a genuine business failure. Agency 2 did not benefit in any way from its own liquidation or the events surrounding it, nor did agency 2 intend not to pay its debt to HMRC, the loss of the contract was something outside of agency 2’s control. In this case HMRC would not seek to recover the debt from agency 1 or the client.”

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Transfer of liability - ESM10031

“GENUINE BUSINESS FAILURE EXAMPLE TWO

Using the context set out in the general example above.

Agency 2 contracted with agency 1 at a deliberately low rate in the knowledge that they were not going to pay any tax or NICs it deducted to HMRC. Agency 2 did this to ensure that contract with Agency 1 was secured and agency 1 knew they were paying well below the market rate. Agency 2 kept all income from the contract and intentionally avoided the debt to HMRC by liquidating before paying the amounts due.

This is not genuine businesses failure. Agency 2 intentionally liquidated to avoid debt and benefitted from withholding of payments due to HMRC. As Agency 2 has liquidated the business no longer exists and so there is no realistic prospect of recovery by HMRC within a reasonable period of time. HMRC will first seek to recover the debt from agency 1. If it cannot be recovered from agency 1, HMRC can seek to recover the debt from the client.”

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Transfer of liability - ESM10032

“The intention behind the provision is to incentivise and drive up the use of compliant labour supply chains to ensure the rules are applied as intended. To help prevent the liability being recovered from agency 1 or the client, those parties may wish to take steps to ensure the parties that are contracted in their labour supply chains are compliant.

It is in the interest of the client and/or agency 1 to check carefully who they are dealing with. It is good commercial practice for businesses to carry out checks to establish the credibility and legitimacy of their supply chain.”

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Transfer of liability - ESM10032

“A judgement on the integrity of the labour supply chain and the suppliers, customers and goods or services within it would be expected to be made. This could include checking carefully who they are dealing with in relation to the nature of the supply to establish the integrity and credibility of those within the labour supply chain, considering:

- What is the agency/labour supplier’s history in the trade?*
- Is the agreed contract price for the supply of labour lower than market value without a clear explanation for why?*
- Have normal commercial practices been adopted in negotiating prices?*
- Have they been asked to make payments to third parties other than the party the client is contracting with or asked to make payments to an offshore bank account? If so, is there a valid reason for that?*
- Is a newly established agency with minimal trading history offering to supply labour cheaper than a long-established agency?*
- Is this the same agency/labour supplier as previous, but operating under a different name? If so, why?*
- Is the party insisting that they can further subcontract the labour supply? If so, why?*

Suitable checks to secure the labour supply chain will vary depending on the circumstances and length of supply chains. Each organisation should consider what checks are suitable in their individual circumstances.”

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Off-shore 1 –ESM 10025

“Section 61R Chapter 10, Part 2 ITEPA 2003

Client wholly overseas

Where a medium or large-sized non-public sector client is based wholly overseas, so there is no UK connection immediately before the beginning of the tax year because it is not UK resident and does not have a UK permanent establishment, then the rules at Chapter 10, Part 2 ITEPA 2003 do not apply (see [ESM10006](#)). The worker’s intermediary should consider whether Chapter 8, Part 2 ITEPA 2003 applies for these engagements.”

“definition of permanent establishment at section 1141 Corporation Tax Act 2010”

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Off-shore 2

- Contractor must also have a UK liability
- HMRC draft guidance ESM 10025 states:

“The worker must be a person who is within the UK charge to tax and/or liable for Class 1 NICs”

Where a worker should be subject to UK tax and NICs (based on existing domicile and residency rules), then UK domestic legislation applies to the engagement. This means the engagement could be subject to Chapter 10 (tax) / Part 2 (NICs) rules. A client does not need to consider whether Chapter 10 / Part 2 rules apply where there is no liability to tax and NICs in the UK.”

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Practical tips

- Consider setting a deadline for any disagreement with SDS
 - You can issue and respond before 6.4.21 but 45 days start on 6.4.21
 - If contract has ended the so has the opportunity to disagree
 - <https://www.gov.uk/hmrc-internal-manuals/employment-status-manual/esm10015>
- Best practice for all non-small client to issue an SDS for inside and outside rulings – legislation requires them for inside only
- Use HMRC template letter to tell PSCs you are small/have become small
 - <https://www.gov.uk/hmrc-internal-manuals/employment-status-manual/esm10011b>
- HMRC can issue tax codes for deemed employees in the normal way
- Taxable expenses can be reported on form P11D or via payroll as for actual employees
- Beware of schemes to avoid these rules!

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Other resources

- ICAEW_off-payroll working / IR35 hub at www.icaew.com/IR35
(TAXguides currently being updated)
- HMRC's guidance ESM1000 at <https://www.gov.uk/hmrc-internal-manuals/employment-status-manual/esm10000>
(updated 12 November 2020)

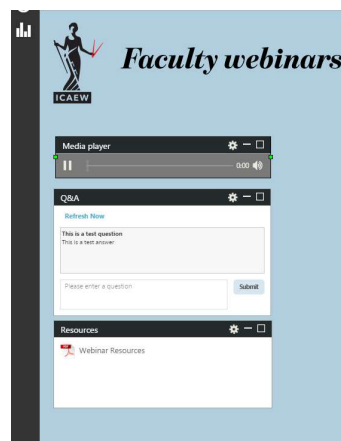
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