

IR 35 Forum Minutes

100 Parliament Street, Room G57

21 February 2018

15.30 – 17.30

Attendees:

Rowena Fletcher (RF)	HMRC (Chair)
Mark Frampton (MF)	HMRC
Bozena Hillyer (BH)	HMRC
Alan Reay (AR)	HMRC
Gavin McCann (GM)	HMRC
Allison James (AJ)	HMRC
Julie De Brito (JDB)	HMRC (Note-taker)
Samantha Hurley (SH)	Association of Professional Staffing Companies (APSCo)
Samantha Mann (SMa)	Chartered Institute of Payroll Professionals (CIPP)
Karen O'Reilly (KO)	Recruitment and Employment Confederation (REC)
David Kirk (DK)	Institute of Chartered Accountants of England & Wales (ICAEW)
Simon McVicker (SMc)	The Association of Independent Professionals and the Self-Employed (IPSE)
Julia Kermodé (JK)	The Freelancer and Contractor Services Association (FCSA)
Jason Piper (JP)	Association of Chartered Certified Accountants (ACCA)
Lesley Fidler (LF)	Chartered Institute of Taxation (CIOT)
Justine Riccomini (JR)	Institute of Chartered Accountants of Scotland (ICAS)

Apologies:

Phil McNeill (PM)	Institute of Chartered Accountants of Scotland (ICAS)
Lewina Farrell (LF)	Recruitment and Employment Confederation (REC)
Damian Lazenby (DL)	HMRC
Georgina Lowe (GL)	HMRC

Welcome & introductions

1: HMRC welcomed members of the Forum, and provided an update on action points.

Action point number	Action	Lead	Due	update
AP1/Dec	HMRC to ensure that update guidance covers issues on exemptions	HMRC	Update by the end of January	Examples have been shared internally. Once these have been

	and exceptions, especially on outsourced services			agreed they will be shared with the Forum minutes for comment.
AP2/Dec	Forum members to submit queries on accounting adjustments for HMRC to consider when updating guidance	HMRC	Update by end of January	Following a meeting with external stakeholders, draft guidance is currently with HMRC accountants.
AP3/Dec	HMRC to work with members and CBI to consider how to resolve issues with supply chains	HMRC	Update by end of January	Carried forward to next meeting
AP4/Dec	HMRC to review guidance on reclaiming NICs where the status decision is challenged in the SA return	HMRC	Update by end of January	The NIC repayment process is the same as the usual process. The individual should ask the engager if in-year, if not then they need to make a claim in the prescribed format.
AP6/Dec	HMRC to respond to queries about the inclusion of MoO in the CEST tool by end of January	HMRC	Update by end of January	On agenda
AP7/Dec	HMRC to work with EPG to establish new structure and	HMRC	Update by end January	Completed

	set 2018 meeting dates			
AP8/Dec	HMRC to approach suggested representatives (CBI, IOD, CIPP and FSB) for names of new members	HMRC	Update by end January	CIPP and CBI rep agreed. Following up with other organisations
AP9/Dec	HMRC to work with members to develop products for business providing guidance on working with umbrella companies	HMRC	Update by end Jan	Work progressing, carried forward to next meeting.

AP1/Feb – Circulate link to guidance on making a National Insurance reclaim to members –HMRC – by end March
Guidance can be found here: <https://www.gov.uk/claim-national-insurance-refund>

Administration of the Forum

2: Members have agreed that SH will be co-chair of the Forum. Following discussion of the remit of the Employers Payroll Group (EPG), Forum members agreed that SH will also represent the Forum at that group.

The Forum agreed that co-chairs will agree the agenda, meet prior to the Forum meeting to agree how to run the meeting and take it in turns to chair the meeting. Co-chairs will work together to ensure the group meets its terms of reference and will carry out a joint annual review of the Forum. If issues raised at the Forum need more work from external members, SH will be the contact point.

Members agreed the revised terms of reference.

AP2/Feb – HMRC to publish the terms of reference and updated membership on the Forum website by end March

Update on the employment status consultation

3: HMRC provided an update on the employment status consultation, which was published on 7 February alongside the government's response to Matthew Taylor's Review of Modern Working Practices. This is a joint Treasury, HMRC and BEIS consultation, which will be open for sixteen weeks, closing on 1 June 2018.

Responses should be sent to EmpStatusBEIS-HMT-HMRC@beis.gov.uk, and will be seen by all three departments. HMRC confirmed there will be a series of roundtables as part of the consultation.

Compliance update

4: HMRC explained that the Employment Status and Intermediaries team brings together around 250 experts in employment status, intermediaries and agency risks. They tackle the areas of highest risk. A key priority this year has been to support public authorities to implement the off-payroll working rules. Activities undertaken include education, one to one interventions, promoting the use of CEST, one to many letters, workshops with representative bodies and helplines.

5: HMRC are strongly committed to tackling non-compliant schemes, including those that facilitate incorrect employment allowance claims. Forum members were reminded to share any information they may have with HMRC through the usual channels, using the Tax Evasion Hotline at:

www.gov.uk/government/organisations/hm-revenue-customs/contact/reporting-tax-evasion

Members commented:

6: HMRC may be incorrectly measuring improved compliance as people inappropriately put on the payroll

HMRC agreed that an increase in numbers of people on payroll is not in itself a measure of improved compliance and are continuing to monitor impacts, including through our compliance work. The appeals process for disputing tax and NIC paid as part of off-payroll working in the public sector, is the same as for any other NICs / tax dispute. HMRC would publish a link to the guidance with the minutes.

HMRC have spoken to public sector managers across the sector, are working to support the correct implementation of the rules and have not seen significant evidence of over-deductions.

7: HMRC may be talking to the public sector but not necessarily to the individual contractor.

HMRC recognises that many contractors believe, or have been advised, that they are self-employed, even where the way they work suggests otherwise, so may feel they have been incorrectly classified if they are brought within the rules. They also recognise the need to continue to educate and explain how the rules work, including to individual contractors.

8: Are there education products available to share with members' clients?

HMRC will make material available to Forum members to share.

9: Clients have identified some key themes, including that the roll-out happened too quickly, tax codes aren't issued quickly enough, and that people don't understand the reform.

HMRC said that they had spent a lot of time talking to an enormous number and range of public authorities, including their tax departments, procurement and HR people. One of the lessons of the reform seemed to be that where an organisation was able to nominate one person with responsibility for implementing the reform, the implementation was more successful.

CEST – including mutuality of obligation (MoO)

10: HMRC introduced a technical paper in response to concerns from Forum members to better understand the HMRC view on how this works. It was agreed that Forum members would consider the paper presented by HMRC and provide comments to HMRC by the end of March. (HMRC is now reviewing those comments and will publish the final paper when agreed)

11: The key points in the paper were:

- Where work is provided and remuneration is paid HMRC will assume that there is mutuality of obligation and that a contract exists. HMRC considers whether this is an employment contract or a contract for services. HMRC is sceptical of an assertion that no mutuality of obligation - and logically no contract – exists in these circumstances.
- HMRC considers a range of factors to establish whether a contract is an employment contract or a contract for services. This is distinct from consideration of mutuality of obligation, which will already have been established. For the avoidance of doubt the CEST online tool assumes that a contract exists or is being considered. HMRC does not anticipate the tool being used outside of these circumstances.
- Issues such as substitution and delegation should be taken into account when considering if a contract is consistent with an employment contract. This approach was established in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* (1968) in which McKenna J observed that a limited or occasional power of delegation may be consistent with an employment contract.
- Where a worker is engaged on an assignment by assignment basis this may be a relevant factor, but will not be determinative. This was confirmed in *Arada v Windle & Another* (2016)

There was then a helpful discussion of the issues presented by MoO.

12: Members made a range of comments about what they thought the paper should address:

- Some members were concerned that the approach taken by CEST of assuming MoO could lead to challenges to engagers in the Employment Appeals Tribunal.
- Members suggested there was no MoO where people can walk off a job at any point and the CEST does not ask about this.
- The employer must be willing to provide ongoing work to the worker
- Commentary from case law around MoO can be confusing
- MoO can exist in a contract for as little time as a single day
- Substitution is a branch of MoO
- Members commented that there is evidence that some people have had contracts re-worded in an attempt to show that there is no MoO.

13: HMRC agreed to ensure the paper covered these issues. HMRC was aware of claims that in some engagements people had a right to walk off at any time, but this was not something they often encountered in reality, even in services contracts. HMRC had seen clauses inserted into contracts (for example in the health sector) and found them not to be exercisable and they would be challenged.

14: HMRC said that, following comments from Forum members, it would publish the MoO paper on the IR35 Forum website. Members agreed this would be helpful.

AP4/Feb – circulate the HMRC mutuality of obligation paper with other papers originally sent with the agenda – Secretariat by 23 Feb

AP5/March – Forum members to provide comments on the mutuality of obligation paper by end of March.

Interest rates

15: Forum members explained that investigations can take eight or nine years. The tax liability can be large but there can also be an overpayment of corporation tax overpayment which can offset this. When the interest is calculated the income tax is due interest at 3% but the CT repayment interest is due at ½ %.

HMRC said that policy colleagues are examining the issues.

AOB

16: Members asked if there had been a rollout of a new version of CEST to the construction industry. HMRC confirmed that there had not but that it had always been the case that CEST was available for anyone to use to determine their employment status.

17: IPSE are planning to publish a report on false self-employment in the construction industry and will share with the forum.

Provisional date of next meeting:

10 May 2018

Summary of Action Points:

AP1/Feb – Circulate link to guidance on making a National Insurance reclaim to members –HMRC – by end March

<https://www.gov.uk/claim-national-insurance-refund>

AP2/Feb – HMRC to publish the terms of reference and updated membership on the Forum website– by end March

AP3/Feb – HMRC to share education materials with Forum members – by end March

AP4/Feb – circulate the HMRC mutuality of obligation paper and other papers originally sent with the agenda – Secretariat by 23 February

AP5/March – Forum members to provide comments on the mutuality of obligation paper by end of March.