Workplace Newsletter

Keeping you up to date with all things Employment Law, HR & Work-Based

November 2019

Self-employed Contractors and IR35

Does your business engage self-employed individuals? If so, you need to be aware of changes in tax rules coming into force in April 2020.

This will require medium and large businesses to:

1. Assess the status of each self-employed contractor engaged via a personal service company (PSC) to determine whether they are caught by the new rules;
2. Issue a statement to each self-employed contractor confirming the outcome of your assessment and give the right to dispute the determination;
3. Ensure that any contractors who are subject to the new rules are added to your payroll (this means increased employer national insurance costs);
4. Ensure that your apprenticeship levy includes any contractors caught by the new rules.

What is IR35?

IR35 is a piece of HMRC legislation designed to prevent tax avoidance in the field of self-employment. It is designed to ensure that the self-employed who carry out their work in the same way as an employee pay income tax and National Insurance.

Since 2017 public sector bodies have been required to decide whether IR35 applies (rather than leaving it to the self-employed contractor to determine). If IR35 does apply, the public sector client must make the PAYE deductions.

How is this changing?

From April 2020, the public sector IR35 rules will also apply to medium and large businesses in the private sector (small businesses are excluded). The reforms mean that the client business engaging the self-employed contractor will need to determine whether that contractor has "deemed employment status" for tax purposes, and make the appropriate PAYE deductions if so.

Read more p2>

Welcome

Welcome to the inaugural edition of our workplace newsletter. With our key focus being employment and HR, we are aiming to provide our readers with highlights across all aspects of workplace news – reflecting the multi-disciplined advice and support we can provide. We hope you enjoy reading and pick up some helpful information along the way.

outset.

In simple terms, this means you as a business may need to add self-employed contractors to your payroll.

Determining deemed employment status

You will need to consider the reality of all aspects of the working arrangements, not just what the written contract states. Making an assessment of deemed employment status is complex and involves looking at a number of factors. There are however three key factors to keep in mind:

1. Personal service – can the contractor send a substitute? If they can, then they are likely to be genuinely self-employed.

2. Mutuality of obligation – ideally the obligations of the contractor should be limited to only a finite task or set of responsibilities.

3. Supervision, direction and control – a truly self-employed individual will not be treated in the same way as an employee, e.g. they would not be subject to disciplinary procedures or performance reviews.

HMRC are encouraging businesses to use their on-line CEST tool to assist in the decision making process and have declared that they will stand by any result given by CEST, provided all the information provided is shown to be accurate.

Having reached its conclusion, the business will then need to provide a Status Determination Statement (SDS) to the contractor. The SDS must state the outcome of the assessment and the reasons for that conclusion. You will also need to create an internal process to resolve any disputes about your determination.

Next Steps

Start planning now. Businesses should carry out audits of their existing arrangements with contractors well in advance of April 2020 to determine where PSCs are used. Where there are PSCs, you will need to carry out assessments for each.

Where your contractors are caught by IR35 this will have a potentially significant financial impact on your business. Get ahead of the changes by mapping out the potential impact to your business now. Putting in place the necessary budgeting and infrastructure will be key in minimising any detrimental impact to business continuity.

Our top IR35 tips

Do your due diligence
Is your contractor is providing services through a PSC? Dig deeper as this may not be immediately evident where the contractor is supplied through an agency.

Provide internal guidance and training
For key staff on when the new rules may apply, the relevant process for determining employment status and making and disseminating the SDS.

Budgeting
The application of IR35 will be more expensive with additional tax, employer's and apprenticeship levy costs (yes, unfortunately this means a contractor caught by IR35 increases your apprenticeship levy cost).

Consult
With relevant departments such as payroll and finance.

Make the determination
Develop a process for your deemed employment status assessments. This must be carried out on a case by case basis – don't apply the same determination to all for ease – HMRC will not like this!

Keep under review
Any material changes in the way services are provided during the engagement. These could result in a change in deemed employment status and impact the costs that flow from that. Ensure you have systems in place to regularly review the arrangements.

Time management
Ensure you build sufficient time into the project planning stage to address any challenges which you might encounter along the way.

Notify your contractor
Provide the SDS to the contractor and ensure you have a dispute process in place. Challenges to a SDS will need to be dealt with promptly, not only to comply with prescribed timescales, but also from a commercial perspective.

Carry out any necessary contractual negotiations
Review standard contracts used and identify amendments required in conjunction with your legal adviser. It may be necessary to negotiate new terms with the PSC or any agency sitting in between.

Communication
Develop a consistent communication plan for current and future contractors.

outset.insight

We understand that sometimes you need a digestible overview of a particular area of employment law.

We've developed a series of downloadable guides covering a range of key topics to give you exactly that. Follow our LinkedIn page to keep an eye on when new ones are released.

As we publish them they are made available on our website and Outset Insights currently available include constructive dismissal, sex discrimination and bullying and harassment.

Find out more on our website and keep up to date with all of our latest news and publications via our LinkedIn page.

Mega Growth 50

We're proud to announce Outset has been recognised as one of 50 fastest growing businesses in Kent and ranked in position 22.

Our growth is a testament to our fantastic team of people who are committed to what we're trying to achieve as a business, along with the investments we've made in technology and our building of an ecosystem of services.

We'd like to thank all of our clients, colleagues and partners who have contributed to this success.

MEGA GROWTH 50 2019

Beat the Bullies and Protect your Business

11-17 November is anti-bullying week - a campaign aimed at raising awareness and reinforcing messages about combating bullying. Although originally started as a campaign to address bullying at school, the principles apply to the workplace too.

Every successful business realises that its workforce are its greatest asset and with ACAS reporting that workplace bullying costs UK business £18 billion per year as a result of sickness related absence, this is an issue employers can't afford to ignore.

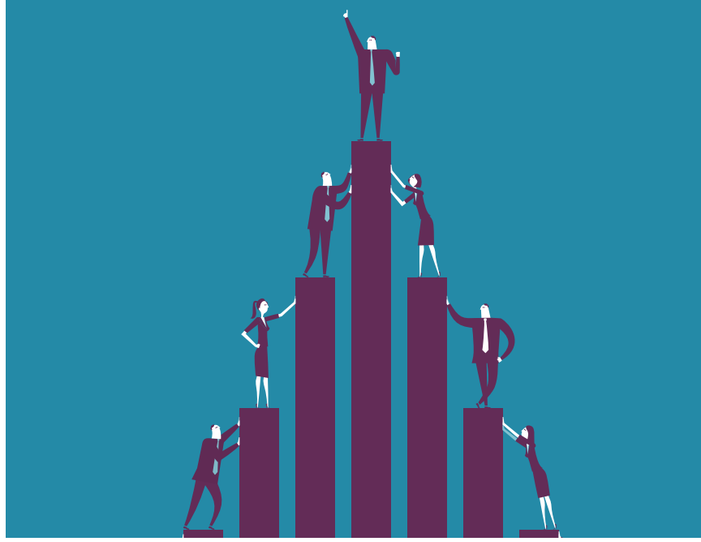
What the law says

There is no specific law against bullying at work – however a bullied employee who has failed to be protected by their employer might be entitled to resign and bring a claim for constructive dismissal.

If the bullying relates to a protected characteristic under the Equality Act (for example race or religion) the employee could bring a discrimination claim.

An employee can bring a claim under the Protection from Harassment Act 1997 if they are subjected to an "oppressive and unacceptable course of harassment" (which means it must have happened at least twice) by another employee who knows or ought to know that their conduct amounts to harassment and which causes the employee alarm or distress.

The employer will be liable for the employee's acts committed "in the course of employment". However, the Protection from Harassment Act was originally introduced to tackle stalking, and claims arising in an employment context are pretty rare.



Our top tips for preventing and combating bullying at work are:

1. **Policies & Procedures** - there are a whole suite of policies which will contribute to managing expectations and behaviours, including Bullying & Harassment and Code of Conduct
2. **Awareness** – demonstrate that company policies are important by bringing them to the attention of new starters, having a system in place so you can track whether employees have reviewed them, and letting staff know when you update them.
3. **Lead by example** – show your workforce that issuing policies isn't just about box ticking - look at other ways you can demonstrate your commitment to zero bullying. This could be by taking part in campaigns like anti-bullying week, or encouraging regular team events.
4. **Training** – make sure managers are trained, not only in recognising when bullying might be going on under their noses, but ensuring their own management styles aren't going to put them at risk of being called a bully.
5. **Take complaints seriously** – if you are faced with a bullying complaint, make sure that individual feels supported, is listened to and you conduct a thorough investigation. Look at other ways you can provide support to employees, such as an employee assistance programme.

Celebrate

Recently we've been celebrating some of our longer serving colleagues – Lorraine Williams in the legal employment team (15 years) and Paul Underhill in our health and safety team (10 years).

We think it says a lot about a workplace when you have such dedicated, long-serving team members.

Increase your productivity by 30% each day

In case you missed it, Darren Stevens, our Head of Employment Law, recently published an article highlighting how speech recognition and screen reader technology has not only increased his productivity by up to 30% each day but enabled him to drive greater efficiencies for our clients.

Read his article here.

30%

Changes on the horizon for family friendly rights

Employees on maternity leave have the right to be prioritised over other employees who are at risk of redundancy if a suitable alternative vacancy is available.

Parents on adoption leave have the same protection, as do parents on shared parental leave. If an employer does not comply with these requirements, the employee will have a claim for automatic unfair dismissal.

What is changing?

The Government is going to extend protection to cover:

- Pregnant employees from the point at which they tell their employer that they are pregnant (in writing or orally), until six months after the end of maternity leave.
- Employees returning from adoption leave, for a 6 month period after the adoption leave.
- Parents returning from shared parental leave.

What about paternity leave?

The Government has decided not to extend redundancy protection to employees returning from paternity leave due to the short length of the leave (2 weeks).

When?

The Government intends to extend the redundancy protections described above "when Parliamentary time allows". Given recent focus being on bigger fish, there are is no real time-frame for when this will actually happen.

Outset Comment

How the extended protection for parents returning from shared parental leave will work hasn't yet been determined. It is thought likely that any period of protection will be proportionate to the period of shared parental leave taken. Some employees may choose to take only a short period of leave and would not be exposed to the same risk of discrimination as a mother returning from a lengthy spell of maternity leave. We can only hope that the rules around extending redundancy protection aren't as complicated as the shared parental leave scheme itself.

The fact protection can kick in at the point an employee verbally informs their employer of their pregnancy could give rise to evidential issues if no record of the discussion is kept. Arguments may arise at a later date over when the protection began to run.

Potential niggles aside however, any measures aimed at eliminating pregnancy and maternity discrimination are to be welcomed. With pregnant women and mothers reporting more discrimination and poor treatment at work in this decade than in the last one, something has to change and this appears to be a step in the right direction.

Believe it or not...

If you think that UK employment laws can be a minefield to navigate, spare a thought for these employers around the world:

Moonlighting as a brothel manager in Austria is not unlawful. Although the teacher in this case disclosed to the school that he was a director of a company, he didn't tell them what that company did. When the school found out, they dismissed him. The case made it all the way to the Supreme Court and ultimately it was determined that the dismissal was fair, because the teacher was actively involved in managing the brothel which was incompatible with the morals and values expected of a teacher. Interestingly, comment from the Court suggested that the decision would have been different if the teacher had only been a customer of a brothel.

In Illinois, USA, the use of marijuana will be legal from 1 January 2020. Understandably this is causing major headaches for employers and Illinois employment lawyers. Companies can have zero tolerance policies, but use of marijuana outside of work is not unlawful so how do they manage this in practical terms? On the face of it this sounds like a ticking time-bomb, but perhaps applying similar principles as to alcohol might be a good place to start?

Recent Case Decisions

Tillman v Egon Zehnder Ltd

Restrictive Covenants – can a faulty clause be corrected?

In **Tillman v Egon Zehnder Ltd** the Supreme Court confirmed that the "blue pencil test" can be applied to faulty restrictive covenants. This case concerned the wording of a non-compete clause which was determined to be too wide as it prevented Tillman from being "interested in" any competing business.

By simply removing those words the Court determined that the rest of the clause made sense and was reasonable, therefore it could stand.

This case reminds us that careful drafting of business protection clauses are key. If there is wording which goes too far there will be limited circumstances in which the offending words can be struck out.

The Harpur Trust v Brazel

Holiday pay for part year workers

In **The Harpur Trust v Brazel** the Court of Appeal confirmed that holiday pay for workers who only work part of the year (such as term time workers) should not be pro-rated or calculated using the 12.07% advocated by ACAS. Instead, the correct calculation is to:

1. calculate average week's pay over 12 weeks (in which some pay was received) prior to the first day of the relevant holiday; then
2. multiply that figure by 5.6 to determine annual entitlement.

This decision presents a number of practical considerations and given the amount of case law about holiday entitlement and pay over recent years resulting in ongoing confusion, it is possible that the legal provisions relating to holiday pay may be reviewed and clarified post Brexit.

In the meantime, it would be sensible for businesses to adopt a pragmatic approach, i.e. get as close to the correct payment as you reasonably can based on the current state of the law.

Phoenix House Ltd v Stockman

Is it misconduct for an employee to make a covert recording?

In **Phoenix House Ltd v Stockman** Stockman accused senior management of discriminating against her and complained that a restructure was biased against her. An acrimonious set of events followed which involved Stockman raising a grievance, being told she would be subject to disciplinary action, going off sick and eventually being dismissed summarily. The dismissal was found by the courts to be unfair but a question arose as to whether her compensation should be reduced to nothing on the basis she had covertly recorded a meeting.

The employer argued that had they known that she had covertly recorded a meeting they would have been entitled to dismiss her for gross misconduct (it only came to light during the legal proceedings). Phoenix House argued that Stockman was seeking to entrap the HR administrator by recording her, but the appeals tribunal disagreed and noted that there were various other motives including the employee wishing to keep a record of the meeting.

Ultimately Stockman's award was reduced, but only by 10%. The courts made it clear that a number of factors would be considered in deciding whether an employee covertly recording could be regarded as misconduct justifying reduction of an award. These factors should be taken into account by any employer considering disciplining an employee who has made a covert recording:

- motives of the employee and their conduct in the recorded meeting (for example, whether they appeared to be asking leading questions)
- extent of the employer's blameworthiness
- subject matter being recorded
- previous responses of the employer to such conduct involving other employees

Employers would also be well advised to review their policies and procedures and consider including wording about whether recording of meetings is permitted and asking at the start of such meetings whether the individual is recording.

The Chief Constable of Norfolk v Coffey

Disability – beware of assumptions

In **The Chief Constable of Norfolk v Coffey** the Court of Appeal ruled that it is unlawful disability discrimination to refuse someone employment because of an assumption that they will be unable to perform the role because of a perceived disability.

Coffey suffered from slight hearing loss, however this causes her no problems and she is able to go about her daily activities without issue – she didn't therefore meet the definition of disability under the Equality Act. Regardless of this, her employer perceived that her hearing loss would prevent her from carrying out the role she applied for.

Although she didn't in fact meet the definition of disability under the Equality Act, Coffey still succeeded in a disability discrimination claim against the Norfolk Constabulary.

They made the mistake of perceiving Coffey to have a progressive condition, which they considered would affect her ability in the future to perform the role.

The Equality Act prevents discrimination where an employer perceives an employee to have a disability, even if it turns out they are wrong and the employee does not in fact have a disability. This case is a stark reminder to employers that it is important not to make assumptions and, where there is doubt, arrange for suitable medical assessments and take heed of the results.

Raj v Capita Business Services Ltd

Harassment – what does "related to sex" mean?

In **Raj v Capita Business Services Ltd** & another the Employment Appeals Tribunal reached perhaps a surprising decision relating to how certain physical contact is determined to be "related to sex", or not.

The courts held that a female manager massaging a male employee's shoulders in an open-plan office, while unwanted conduct, was not 'related to sex' for the purpose of a harassment claim.

The tribunal decided that there was limited evidence that the massaging was related to Mr Raj's sex.

The courts say the context was a manager standing over a sitting team member, and the contact was with a 'gender neutral' part of the body in an open-plan office.

This might seem an unusual decision, and it begs the question whether the tribunal and EAT would have found differently had the sexes of the manager and sub-ordinate been reversed.

Based on this decision, it isn't necessarily advisable to jump to drastic conclusions where physical contact between employees is involved.

That said, we would suggest exercising caution and particularly with the issues highlighted by the #metoo movement, complaints from employees about any form of unwanted physical contact should always be taken seriously.

Is your business Primed for key upcoming employment changes?

In December 2018 the UK Government announced the 'Good Work Plan' and many of the changes in employment legislation will come into force in 2020.

Statement of Terms and Conditions

- Currently employers have 2 months to provide a Statement of Terms and Conditions to employees. From 6 April 2020 this will be a 'day one' right;
- Employers will also have to provide this statement not just to employees, but also to workers – something which they have not had to do before;
- Additional details will have to be provided in the Statement of Terms and Conditions, such as details of any probationary period, benefit entitlement and details of any paid leave (e.g. maternity leave).

Holiday Pay

The reference period used to calculate holiday pay is currently 12 weeks. This will change to a 52 week reference period from 6 April 2020.

Agency Workers

- From 6 April 2020, businesses who engage Agency Workers will have to provide them with a 'Key Facts Page'. This document will need to include details such as the type of contract they are employed under, details of any fees that might be taken and the minimum rate of pay they will receive and from who.
- The grandiose termed "Swedish Derogation" which applies to agency workers will be abolished from 6 April 2020 – so if you don't already know what it is, don't worry too much about finding out!

The biggest takeaway for businesses is around the statement and holiday pay calculation changes. Ensure you're ready by planning ahead, and always take specialist legal advice when looking at your contractual documents (getting things right at the start can save a lot of headache later on!)