

EXPLANATORY MEMORANDUM TO
THE SOCIAL SECURITY CONTRIBUTIONS (INTERMEDIARIES)
(MISCELLANEOUS AMENDMENTS) REGULATIONS 2020

2020 No. 1220

1. Introduction

- 1.1 This explanatory memorandum has been prepared by Her Majesty's Revenue and Customs (HMRC) and also on behalf of Her Majesty's Treasury and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 This instrument implements in social security legislation the amendments to Chapters 8 and 10 of Part 2 of the Income Tax (Earnings and Pensions) Act 2003 (ITEPA 2003) made by Schedule 1 to the Finance Act 2020 for the purpose of National Insurance contributions (NICs). That legislation extends the changes for workers' services provided through intermediaries or personal service companies (PSCs), which were introduced for public authority clients in 2017, to medium or large clients outside of the public sector from 6 April 2021. The legislation also moves the responsibility for making relevant deductions from any payments due to the intermediary and the requirement to account to HMRC for those deductions, to the medium or large-sized organisation, agency or third party paying them.
- 2.2 Additionally, the instrument gives effect to provisions which mirror the equivalent Income Tax (Pay As You Earn) (Amendment No.3) Regulations 2020 (S.I. 2020/1150) (the PAYE Amendment Regulations). Where a deemed employer has failed to make NICs deductions under PAYE from payments made to a worker's intermediary or PSC for the worker's services, and there is no realistic prospect of recovering the outstanding NICs liabilities from the deemed employer within a reasonable period, this instrument allows HMRC to recover unpaid PAYE NICs liabilities from other parties within the labour supply chain. These parties are the client for whom the work has been undertaken or the agency the client contracts with in the labour supply chain (the first agency) where that agency is based in the United Kingdom (UK).

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is the United Kingdom.

4.2 The territorial application of this instrument is the United Kingdom.

5. European Convention on Human Rights

5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

- 6.1 Current law is included in Part 2 of ITEPA 2003 for tax and in the Social Security Contributions (Intermediaries) Regulations 2000 (S.I. 2000/727) and the Social Security Contributions (Intermediaries) (Northern Ireland) Regulations 2000 (S.I. 2000/728) (the Intermediaries Regulations) for NICs. The primary legislation was amended by the public sector reform introduced in April 2017 by way of the Finance Act 2017. The relevant secondary legislation was amended by the Social Security (Miscellaneous Amendments No. 2) Regulations 2017 (S.I. 2017/373) and the Social Security (Miscellaneous Amendments No. 3) Regulations 2017 (S.I. 2017/613).
- 6.2 The ITEPA 2003 provisions are amended by the Finance Act 2020 to ensure that individuals working like employees, but through a limited company (the worker's intermediary or PSC), pay broadly the same income tax as individuals who are employed directly. This instrument makes equivalent amendments for NICs.
- 6.3 This instrument amends the definition of a client so that where the worker provides personal service to a public authority, or medium or large-sized organisation outside the public sector that organisation is responsible for assessing whether the worker would be an employee if engaged directly. A public authority is defined by reference to the definition of public authority in the Freedom of Information Act 2000 and the Freedom of Information (Scotland) Act 2002 and by reference to provisions contained within amended Part 2 of ITEPA 2003, which draw on and adapt definitions contained within the Companies Act 2006 when referring to medium or large-sized organisations outside the public sector. The deemed employer is obliged to make payments to HMRC and to send HMRC information about any payments made using Real Time Information (RTI) reporting. This approach aligns with the rules for public authorities as implemented by the public sector reform of the off-payroll working rules introduced in April 2017. The provisions in these regulations add to the existing provisions by enabling HMRC to recover unpaid Class 1 NICs liabilities (both employee and employer NICs) from either the first agency, or the client (where they are not already the deemed employer).
- 6.4 This instrument amends the Intermediaries Regulations to reflect new provisions to be inserted into ITEPA 2003 by virtue of the Finance Act 2020 and amendments made to the Income Tax (Pay As You Earn) Regulations 2003 (S.I. 2003/2682) (the PAYE Regulations) by the PAYE Amendment Regulations.

7. Policy background

What is being done and why?

- 7.1 The off-payroll working reform is being introduced to improve fairness in the tax system by ensuring that individuals working like employees, but through a limited company or PSC, pay broadly the same income tax and NICs as individuals who are employed directly.

- 7.2 To address non-compliance, in April 2017 the government reformed the way in which the rules operate in the public sector. The reform moved responsibility for determining whether the off-payroll working rules apply from the worker's limited company or PSC to the public bodies engaging them.
- 7.3 At Budget 2018 the government announced the reform would be extended to medium and large organisations in all other sectors but would not apply to engagements with the 1.5 million smallest businesses.
- 7.4 This instrument makes similar provisions to those provided for in the primary legislation and in the PAYE Amendment Regulations for NICs purposes.
- 7.5 This instrument amends the Intermediaries Regulations so that a worker's limited company or PSC remains responsible for determining whether the off-payroll working rules apply where the worker is providing their services through an intermediary to clients that are outside the public sector and are small, or to clients that are outside the public sector and without a UK connection (based on the current residence and presence requirements for Class 1 NICs secondary contributors). The changes to the Intermediaries Regulations also include provisions to define the circumstances in which a client qualifies as small and also define when a person has a UK connection.
- 7.6 A duty is also placed on the client to confirm on request, whether or not they qualify as small for a tax year.
- 7.7 This instrument also make changes to the Intermediaries Regulations to provide that where the client is a public sector organisation, or medium or large-sized organisation outside the public sector with a UK connection, then the client is responsible for determining whether the off-payroll working rules apply, to payments made where the worker provides their services through an intermediary or PSC. The instrument includes consequential amendments in relation to the Social Security Contributions (Managed Service Company) Regulations 2007 (S.I. 2007/2070) to ensure that they do not apply where the client is a public sector organisation, or medium or large-sized organisation outside the public sector with a UK connection and the Intermediaries Regulations apply. The instrument also amends the Intermediaries Regulations to make clear that it does not apply where the client is outside the public sector and is small, or where the client is outside the public sector and without a UK connection and the Social Security Contributions (Managed Service Company) Regulations 2007 apply.
- 7.8 The Intermediaries Regulations are amended to provide for any NICs liability to rest with the client where it is a public sector organisation or medium or large-sized organisation outside the public sector with a UK connection, until such a time that the client provides the worker and the first agency with an assessment of whether the worker would be an employee if engaged directly by the client (the Status Determination Statement).
- 7.9 Such clients are required to maintain a client-led status disagreement process and the provisions include the time limits and consequences of failing to meet those requirements.
- 7.10 Where the client is medium or large for the current tax year but will qualify as small from the start of the next tax year, the client must provide a statement before the start of the next tax year to confirm that from that time, the Status Determination Statement previously provided is withdrawn because the client now qualifies as small.

- 7.11 This instrument also makes equivalent provisions to those provided for in the PAYE Amendment Regulations to allow for the recovery of unpaid NICs debts. The provisions for the recovery of unpaid NICs debts allow for HMRC to seek to recover these debts from other persons within the labour supply chain where the client is a public sector or medium or large-sized organisation outside the public sector, the Intermediaries Regulations apply and there is no realistic prospect of recovering the outstanding NICs debt from the deemed employer within a reasonable period. When seeking to apply these provisions, HMRC will first seek to recover any unpaid NICs liabilities from the first agency where this agency is based in the UK. Where HMRC are of the view that there is no realistic prospect of recovering the outstanding NICs debt from the first agency, HMRC will seek to recover unpaid liabilities from the client. The provisions require HMRC to issue a recovery notice when seeking to recover a debt from a client or the first agency.
- 7.12 There are two sets of circumstances in which HMRC may seek to issue a recovery notice to the client or first agency. The first is where HMRC have issued to the deemed employer a section 8 decision (determining the amount of the NICs debt) and the outstanding NICs remains unpaid. The second is where HMRC would have issued a section 8 decision, but is unable to do so because of the liquidation, dissolution or other incapacity of the deemed employer.
- 7.13 The instrument also provides for appeal rights for clients and the first agency in the labour supply chain, who have been issued a recovery notice. However, the recovery notice cannot be appealed in relation to whether there is a NICs debt if that matter has previously been the subject of an appeal that has been determined.
- 7.14 The instrument also includes requirements for the contents of a recovery notice to help the client or first agency in the labour supply chain identify who the NICs debt relates to and why it has been issued to them.
- 7.15 The amendments made by this instrument apply to services provided on or after 6 April 2021 and this instrument contains transitional provisions about payments made on or after 6 April 2021 in respect of services provided before that date.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument does not relate to withdrawal from the European Union.

9. Consolidation

- 9.1 There are no plans to consolidate these Regulations, which reflect new provisions inserted into the existing Intermediaries Regulations.

10. Consultation outcome

- 10.1 At Autumn Budget 2017, the government announced plans to consult on how to tackle non-compliance with the off-payroll working rules in the private and voluntary sectors. Since then, the government has consulted extensively on the reform of the off-payroll working rules. The most recent policy consultation on the detailed design of the off-payroll working reform can be found at: <https://www.gov.uk/government/consultations/off-payroll-working-rules-from-april-2020>. The previous consultation on how to tackle non-compliance with the off-payroll working rules can also be found at: <https://www.gov.uk/government/consultations/off->

payroll-working-in-the-private-sector. Prior to this the government also consulted extensively on the public sector reform introduced in April 2017.

- 10.2 In response to feedback, the government announced that the reform would not apply to the smallest 1.5 million organisations, minimising their administrative costs. As a result of the consultation on the detailed design of the reform carried out in Spring 2019, a statutory requirement for clients to introduce a status disagreement process and to issue a Status Determination Statement providing reasons for the determination was provided for. Changes were also made to how liability transfers through the labour supply chain including in cases of non-compliance. HMRC published draft legislation in July 2019 for consultation.
- 10.3 On 7 January 2020, the government announced a review of the implementation of the off-payroll working reform. The purpose of the review was to identify any further steps the government could take to ensure the smooth and successful implementation of the reform. The outcome of the review was published in February 2020, announcing some changes to the policy and further support for businesses and individuals.
- 10.4 A draft version of this instrument was published for consultation on 22 January 2020 with the consultation closing on 19 February 2020 and can be found at: <https://www.gov.uk/government/consultations/draft-secondary-legislation-off-payroll-working-rules-from-april-2020>. 31 consultation responses were received.
- 10.5 As a result, a number of changes have been made including: reflecting changes made to PAYE Amendment Regulations and primary legislation (including those agreed in response to the review); excluding wholly overseas clients from having to consider whether the off-payroll working rules applied to an engagement and instead requiring the worker's intermediary to continue to determine status for engagements with a wholly overseas client; requiring clients to confirm their size at the request of the worker or agency the client contracts with; limiting the time by which representations can be made to before the last payment for an engagement; a minor change to the content of a new Status Determination Statement following representations being made to include the date it applies from; ensuring the rules only apply to work carried out on or after 6 April 2021; and minor technical changes, including simplifying language where possible.
- 10.6 The final primary legislation is included in Schedule 1 to the Finance Act 2020. Throughout consultations and publication of draft primary and secondary legislation, the key founding principle of the client determining a contractor's employment status for tax has not changed.

11. Guidance

- 11.1 HMRC has published detailed guidance in order to assist those preparing for the implementation. Relevant guidance on understanding the off-payroll working rules can be found at: <https://www.gov.uk/guidance/understanding-off-payroll-working-ir35>. Further guidance on how the off-payroll working rules should be applied can be found at: <https://www.gov.uk/topic/business-tax/ir35>.
- 11.2 HMRC continues to provide extensive support, education and guidance to help organisations implement the reform and apply it correctly. This includes factsheets and communications resources for businesses and workers, together with one to one engagement, workshops and webinars being provided to those affected by the

changes. HMRC also developed an enhanced version of the Check Employment Status for Tax tool, which was launched together with guidance in November 2019.

- 11.3 Alongside this, detailed guidance has been published in the form of changes to the Employment Status Manual, which can be found at: <https://www.gov.uk/hmrc-internal-manuals/employment-status-manual/esm10000> and includes specific sections on the recovery provisions.

12. Impact

- 12.1 The impact on business, charities or voluntary bodies is expected to be significant but varied, due to the scope of the off-payroll working rules and the degree of change required by this reform.
- 12.2 For the impacts of the off-payroll working reform more generally, affected client organisations will incur one-off and ongoing costs as a result of the reform. Up to 60,000 client organisations outside the public sector are in scope of the reformed rules, with the majority of large organisations, and a high proportion of medium-sized organisations, engaging off-payroll workers through agencies. One-off costs could include familiarisation with the changes, upskilling staff in making status determinations and determining whether the rules apply to their existing off-payroll engagements. Ongoing costs could include making status determinations for any new off-payroll engagements and maintaining a status disagreement process for off-payroll workers who seek to challenge their status determination.
- 12.3 Organisations that engage workers' intermediaries or PSCs directly will also be responsible for deducting tax and NICs and remitting it directly to HMRC for these engagements through RTI.
- 12.4 Approximately 20,000 agencies who provide workers to medium or large-sized organisations will also be affected. They will need to operate payroll for any workers they supply who work through a limited company or PSC and fall within the scope of the rules. One-off costs could include familiarisation with the changes, upskilling staff and implementing processes that allow them to operate payroll on the payments made to PSCs. Ongoing costs for these agencies could include accounting for and reporting the PAYE liabilities through RTI returns. Some of these agencies will be first agencies. Where those first agencies do not already have deemed employer responsibilities to operate payroll for any workers they provide to client organisations, they may find they are subject to a recovery notice for the unpaid PAYE NICs debts of other parties below them in the labour supply chain.
- 12.5 Some will realise savings through reduced administrative requirements. There will be ongoing savings for around 230,000 workers' intermediaries or PSCs, who will no longer have the requirement for determining the worker's status for tax purposes, or the associated accounting burdens.
- 12.6 The impact on the public sector is expected to include necessary action to address changes to improve the operation of the reform. Ongoing costs could include addressing new requirements to provide the reasons for a Status Determination Statement up front and maintaining a status disagreement process for off-payroll workers who seek to challenge their status determination.
- 12.7 The impacts described above relate to the off-payroll working reform from April 2021 more generally, but these regulations may also have impacts on clients and the first

agency. Where there is a failure by other parties below the client and first agency to account for PAYE NICs liabilities, these regulations allow HMRC to recover the unpaid NICs debt from first agencies and clients.

- 12.8 A Tax Information and Impact Note covering this instrument was published on 11 July 2019 alongside draft legislation on the reform of the off-payroll working rules and is available on the website at: <https://www.gov.uk/government/publications/rules-for-off-payroll-working-from-april-2020>. Due to the delay to the implementation of the reform, an updated Tax Information and Impact Note will be published at the next fiscal event.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses.
- 13.2 To minimise the impact of the requirements on small businesses (employing up to 50 people), the approach taken is to exclude small businesses from having to determine whether or not a worker providing their services through an intermediary (such as a limited company or PSC) is subject to the off-payroll working rules. Following consultation small businesses receiving a worker's services will be required to confirm their size on request. However, the impact of this additional requirement is considered to be negligible.
- 13.3 Small agencies providing workers to clients within scope of the off-payroll working rules may be disproportionately affected by this change (as the measure will require them to place an off-payroll worker onto payroll). No specific action is proposed to minimise this regulatory burden. Small agencies that are also first agencies may also be affected where there is a failure by other parties below them in the labour supply chain to account for NICs liabilities. No specific action is proposed to minimise this regulatory burden.
- 13.4 The basis for the final decision on what action to take to assist small businesses was that although small agencies may be disproportionately affected by this change, there are likely to be overall savings of £6.1 million per annum for PSCs who will no longer have the requirement for determining the worker's status for tax purposes, or the associated accounting burdens.

14. Monitoring & review

- 14.1 The measure will be monitored through information collected from tax returns, ongoing communications with affected taxpayer groups and through commissioning external research into the impacts of the reform six months after implementation.
- 14.2 The instrument does not include a statutory review clause. None is required under Section 28(3)(a) of the Small Business, Enterprise and Employment Act 2015 because the power by which this instrument is made is being exercised so as to make or amend provisions imposing, abolishing or varying any tax duty, levy or other charge or provisions in connection with such provisions.

15. Contact

- 15.1 Şirin Geçmen at HM Revenue and Customs (email: sirin.gecmen@hmrc.gov.uk) and Jon Couzens (email: jon.couzens@hmrc.gov.uk) can be contacted with any queries regarding the instrument.

- 15.2 Christopher Simons, Deputy Director for the Off-Payroll Working Programme, at HM Revenue and Customs can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 The Rt Hon Jesse Norman MP, Financial Secretary to the Treasury, can confirm that this Explanatory Memorandum meets the required standard.