The Off-payrolling rules – Status Determinations and the Status Disagreement Process

Employment Tax | Tax voice

05 March 2020

Steve Wade considers the requirements for a status determination statement and the employer-led client disagreement process

**This article was written prior to the announcement that the implementation of the Off-Payroll Working rules are being delayed to April 2021.*

The Government's review of the implementation of the off-payrolling rules will no doubt have disappointed those who wished the implementation to be delayed. It is, however, now clear that the Government intends to push ahead and implement the new rules in respect of payments made and worked performed after 5 April 2020.

This article specifically focuses on the requirement of the "end client" to issue a Status Determination Statement (SDS) and have a "Status Disagreement Process" in place. It based on the draft finance bill (https://tinyurl.com/yyqy486) and the draft HMRC guidance published on February 27 which clarified many points but even at this late stage a number of areas still remain unclear.

At the time of writing the next version of the legislation is expected to be published in the Finance Bill on 19 March 2020. The broad thrust of the legislation is not expected to change but changes to the details are expected because HMRC guidance and the draft Finance Bill are not currently aligned.

A worker for the purposes of this article is as defined by HMRC in their draft guidance namely: "Worker – The individual personally providing their services". It does not necessarily mean a worker for the purposes of employment rights legislation.

Importance of the SDS

When the new rules apply the responsibility to assess whether the worker providing services through a PSC falls within or outside IR35 falls on the end client. If the new rules do not apply because, for example, the end client qualifies for exemption from these rules because they are small, the responsibility to determine whether the worker falls within or outside IR 35 remains with the worker's PSC.

When the new rules apply the end client must issue an SDS to the worker (https://tinyurl.com/vf5dl2n). They must also issue an SDS to an agency if they

contract indirectly with the worker's PSC through an agency.

The legislation only requires an SDS to be issued to the worker if the result of the status determination is that the worker should be subject to withholding. HMRC guidance suggests that an SDS should also be issued when withholding is not required. In discussion with HMRC they described this as "best practice". If it is "best practice" why isn't this in the legislation?

Where the end client contracts directly with the worker's PSC the responsibility to withhold PAYE, NIC and the Apprenticeship Levy, if due, will rest with the end client. The difficulties of integrating the receipts payable software which pays the PSCs fees with the payroll cycle and software is one reason why some larger organisations are ending direct contracts with PSCs.

Where the end client contracts via an agency the SDS is issued to the worker and also to the entity/agency that contracts directly with the end user. One reason why the issue of the SDS is important is that until the SDS is issued the responsibility to withhold PAYE, NIC and the Apprenticeship Levy, remains with the end client. Where there are a number of agencies in the supply chain between the end user and the worker's PSC, the responsibility to withhold moves down the supply chain as the SDS is passed down the supply chain. HMRC describe this transfer of liability as the legislation "incentivising" the agencies to meet their responsibilities.

The fact that the responsibility to withhold remains with the end user until such time as the SDS is issued has prompted a debate about what constitutes a valid SDS and representations made to HMRC during the consultation process, requested clarification on this point.

What constitutes a valid SDS?

At the time of writing, the draft guidance (which could be subject to change) states that:

"*For the Status Determination Statement (SDS) to be valid the client must:*

- *state in the SDS whether or not the worker would be an employee or office holder, or is an office holder, for tax and NICs purposes if they were directly engaged by the client.*
- *provide their reasons for coming to that conclusion.*

- *have taken reasonable care in coming to their conclusion.*"

Reasonable care means end users should "act in a way that would be expected of a prudent and reasonable person in the client's position". HMRC also make the comment that "A client with a small, straightforward workforce may only need a simple regime, provided they follow it accurately. Whereas a client with a larger and more diverse workforce may need to put in place more sophisticated systems" and that HMRC "would expect a higher degree of care to be taken by a large multi-national company with its own internal finance function than of a much smaller entity."

According to the guidance "HMRC expects each client to make a correct and complete determination, and preserve sufficient records to show how the decision was reached. Standard document retention rules apply to the SDS".

Some examples of reasonable care include, accurately using the HMRC Check Employment Status Tool (CEST), seeking the advice of qualified professional advisors, reviewing the processes being applied and amending those processes for future determinations, where necessary. If workers are given blanket assessments without taking into consideration the specific facts for each case, then this would not be regarded as taking reasonable care.

HMRC's guidance is also clear that if an SDS does not satisfy the three criteria outlined above then the SDS is invalid and the responsibility to withhold PAYE/NIC and Apprenticeship Levy where due, would rest with the end client. HMRC's guidance also states that "advertising a role as being either inside or outside the IR35 rules may provide clarity to workers but is not sufficient to constitute a valid SDS".

Client led status disagreement process

HMRC guidance at ESM10015 (https://tinyurl.com/uwmso4z) explains that "The legislation requires clients to have a status disagreement process in place to deal with disputes of Status Determination Statements (SDS) by workers and deemed employers. An agency who is not the deemed employer (see ESM10017) within a contractual chain does not have the right to use the client-led disagreement process.". In most cases the deemed employer will be the fee-payer. HMRC define a deemed employer in ESM10002 as: "This is the person treated as making the deemed direct payment to the worker. It is the person responsible for the deduction

of tax, NICs and apprenticeship levy, and paying these to HMRC. This may be the same person as the fee-payer, but it may be another person in the contractual chain if the fee-payer is not a qualifying person".

A qualifying person has to be resident in or have a place of business in the UK. In broad terms the qualifying person must also not be controlled by the worker. See ESM10017 (https://tinyurl.com/qqcnx34) for more details.

Although there must be a dispute resolution process the draft legislation is not very prescriptive about what the process should be. This is to allow end-clients to set up a process that suits their situation. The HMRC guidance stating "It is up to the client to decide the appropriate people within the organisation to deal with disagreements. The client could put in place a process to ensure the right person within the organisation receives any representations from workers. For example, by asking that representations are made to the person who issued the original SDS to the worker".

Allowing such flexibility would seem a sensible approach but there are some concerns with the legislation as currently drafted. Firstly, the current draft legislation imposes no specific time limit on the worker to challenge the determination, although the draft guidance states that the end client "is only required to respond to representations made during the course of the engagement and before the final chain payment is made in relation to that engagement. The end client is not obliged to respond to representations made outside of this timeframe". We will have to wait until 19th March to see if this appeal time limit will be incorporated in the legislation or whether it will merely be in HMRC guidance.

Secondly the draft legislation doesn't specify how an appeal has to be made. It could be made verbally or in writing, however, I would recommend that end-client's appeals process requires the appeal be made in writing. End-clients will not want disputes about whether an appeal was made and whether the 45-day deadline was met. End-clients will need an audit trail, and not only for future HMRC compliance visits. It is, therefore, unfortunate that the draft legislation doesn't specifically require the appeal to be in writing particularly as status determinations, and consequently the reasons for disputing a determination, can be quite complicated.

Once the appeal has been received, the end user has 45 days from the date of receipt of the appeal to review the position. Once reviewed, the end client must:

- “Inform the worker or deemed employer that they have considered their representations and that they have decided that their original SDS was correct and provide reasons, or
- Inform the worker and deemed employer they have considered representations and decided the original conclusion was wrong, provide a new SDS and state that the previous SDS is withdrawn.
- Take reasonable care in making any new SDS and ensuring it contains the reasons for reaching that conclusion.”

If, after completing the status disagreement process, the worker still disagrees with the outcome, then existing Self-Assessment and National Insurance processes can be followed to obtain a repayment. This isn’t, however, a quick or simple process.

HMRC guidance is clear that where the end client “does not comply with the minimum requirements of the status disagreement process, the responsibility for the deduction of tax, NICs and apprenticeship levy, and paying these to HMRC will transfer to the client for further payments”. This does not apply when the end client has received fraudulent documents during the appeals process.

Finally

It appears that the government are determined to introduce the new legislation from the 6 April 2020 despite the legislation in the Finance Bill not being available until the 19th March 2020. This leaves less than a month to resolve any differences between guidance and the legislation meaning some taxpayers will have to rely on the Chancellor’s assurances that HMRC will not be “heavy-handed” during the first year of this new legislation.

That said end clients will need to ensure that they have processes in place to ensure that “reasonable care” is taken when making status determinations and that they have a dispute resolution process in place. All end clients should familiarise themselves with HMRC’s draft guidance and any future revisions.

It is unlikely that the Finance Bill will be enacted by 6 April 2020 so It will be interesting to see how the Government introduces the law for both tax and NIC by 6 April.