



Improvement

Guidance for the use of off-payroll interims

December 2016

NHS Improvement publication code: CG 40/16

1. Introduction

1. This guidance clarifies the off-payroll arrangements for substantive and interim NHS office holders following recent discussions between NHS Improvement, the Department of Health (DH), Her Majesty's Treasury (HMT) and HM Revenue & Customs (HMRC). Specifically, it concerns payroll rules for 'office holders' at NHS trusts and foundation trusts.
2. It supplements previous guidance to NHS trusts and foundation trusts from Monitor and the NHS Trust Development Authority (now part of NHS Improvement), DH and HMT on this issue.
3. As a reminder, the DH letter dated 23 September 2015 to NHS trusts and foundation trusts (see Annex 1) states that in accordance with HMT guidance "the most senior staff must be on the payroll, unless there are exceptional temporary circumstances, which will require Accountable Officer sign-off and cannot last longer than six months. This should apply to all Board members (executive and non-executive) and to senior staff with 'significant financial responsibility'."

2. Clarification of the scope of the off-payroll rules

4. Recent advice from HMRC to NHS Improvement goes further than the HMT guidance in paragraph 3 above. HMRC has confirmed that all appointments to posts defined as 'office holders'¹ should be **on payroll** regardless of the expected duration of the appointment (and subject to the exceptions set out in paragraph 5 below). On payroll means that office holders should have PAYE deducted from their income at source and should **not** be engaged using a personal services company (PSC), an employment agency, a consultancy or other intermediary vehicle. This advice is grounded in the Income Tax (Earnings and Pensions) Act 2003 (particularly section 5) which provides that office holders' income should be treated as employment income for the purposes of income tax and national insurance. While someone engaged via a PSC may in some circumstances be capable of holding an office, HMRC does not consider that this can occur for NHS appointments.
5. The only provisional circumstance that HMRC may consider an off-payroll engagement is where an individual is appointed to cover an office holder who is temporarily unable to perform duties (for example, because of illness or other

¹ 'Office holder' is defined in further detail by HMRC at <https://www.gov.uk/employment-status/office-holder> and in the guidance note ESM2502 <http://iim.org.uk/wp-content/uploads/2015/03/hmrc-offices-definition.pdf> If you require further information, please consult HMRC through mike.barlow@hmrc.gsi.gov.uk.

incapacitation), but who retains 'office' while he or she is not working. But making this exception will rest on the particular facts. The Sector Relationship Manager Public Bodies Group at HMRC is happy to discuss these types of situations directly with NHS bodies and can be contacted by emailing mike.barlow@hmrc.gsi.gov.uk.

Note this is a much narrower exception than the one which applies to board members and senior staff with "significant financial responsibility", as stated in the DH guidance (see paragraph 3 above).

6. In the context of NHS trusts and foundation trusts, NHS Improvement considers 'office holders' to be the trust board members. Foundation trusts should refer to their constitution to determine who the board members and therefore the office holders are. NHS trusts should refer to their NHS trust establishment order.

3. Immediate actions

7. NHS trusts and foundation trusts (where appropriate) should bring this guidance to the attention of their board of directors, the remuneration committee and governors.
8. NHS trusts and foundation trusts should make no new off-payroll office holder appointments from the date of this publication.
9. HMRC expects NHS trusts and foundation trusts to review all existing office holder off-payroll appointments immediately for their compliance with this guidance. Existing office holders should move from off- to on-payroll engagements or be replaced by alternative on-payroll candidates at the end of their engagement or by 30 April 2017, whichever is the sooner. Trusts will need to adhere to their internal governance processes when implementing these changes.
10. Irrespective of the length of term, NHS trusts should seek approval from, and foundation trusts should seek the views of, DH and HMT ministers for any future on-payroll office holder appointments (interim or substantive) made through the usual very senior management (VSM) appointment process if the proposed salary is £142,500 pa or above.
11. NHS Improvement will support providers on an individual basis to minimise any disruption caused by these actions.

4. Other considerations

What are the expectations regarding on-payroll salary ranges for those individuals willing to move from off- to on-payroll arrangements?

NHS Improvement is working to provide a clearer steer on interim pay levels, including consideration of a broader rates cap. Please work directly with your regional director of improvement and delivery at NHS Improvement to build appropriate case proposals for appointments for submission to DH and ministers for salary approvals/views in accordance with current arrangements.

What happens if you cannot comply with the guidance?

HMRC has powers to investigate non-compliance with tax obligations. NHS trusts and foundation trusts are encouraged to seek legal advice on a case-by-case basis where the guidance is not adhered to.

HMRC has advised that trusts may **not** rely on the exception for exceptional and temporary (no longer than six months) appointments of office holders as set out in the DH letter dated 23 September 2015 (see Annex 1).

What about appointments you are directed to make?

If NHS Improvement mandates an office holder appointment as a result of regulatory action against your trust, for example the appointment of a new chair or chief executive, your trust will need to ensure that the individual is appointed in accordance with this guidance, that is, on an on-payroll basis. NHS Improvement can support your trust in these circumstances.

What about senior managers who aren't office holders?

The DH letter dated 23 September 2015 (see Annex 1) also captures senior staff with significant financial responsibility, a wider group than office holders. NHS trusts and foundation trusts should continue to adhere to the DH guidance for these members of staff.

5. Other pay rules you need to be aware of

VSM appointment approval process

As per usual, foundation trusts should seek the necessary views and NHS trusts the necessary approvals for VSM appointments where the proposed annual pay is £142,500 or above.

Instances where VSM proposals are required include:

- new substantive hires on £142,500 pa or above

- on-payroll interim arrangements where the pro-rated or full-time equivalent salary would be £142,500 pa or above
- acting up arrangements where the candidate is already (or expected to be) on a salary in excess of £142,500 pa
- pay rises taking VSM staff to £142,500 pa or above
- pay rises for VSM staff already earning salaries of £142,500 pa or above.

Interim agency very senior manager approval

On 31 October 2016 NHS Improvement introduced a new approval process – requiring its prior approval for all interim agency VSM contracts with a daily rate over £750.

These rules apply to:

- all NHS trusts
- NHS foundation trusts receiving interim support from DH
- NHS foundation trusts in breach of their licence for financial reasons.

All other foundation trusts are strongly encouraged to comply with this process.

Full details of the rules and how to apply are given in [Interim agency very senior manager approval process](#).²

² https://improvement.nhs.uk/uploads/documents/interim_agency_VSM_approval_process.pdf

Annex 1: Letter from the Department of Health regarding tax arrangements for off-payroll staff

To Chairs
Chief Executives

Of: NHS Trusts
NHS Foundation Trusts
Clinical Commissioning Groups

23 September 2015

Dear Colleague

Tax Arrangements of Off-Payroll Staff

1. Sir David Nicholson's letter of 20 August 2012 (gateway reference 17993) set out the guidance that NHS employers should follow when engaging staff "off-payroll". This guidance now needs updating and is superseded by this letter. The principal change results from the withdrawal of HMRC's "business entity" tests for assessing the level of risk for the "IR35" provisions applying.

Background

2. On 31 January 2012, the Chief Secretary to the Treasury announced a review of the tax arrangements of public sector appointees. The aim of the review was to ascertain the extent of arrangements which could allow public sector appointees to minimise their tax payments, and make appropriate recommendations.

3. The review was published on 23 May 2012. The key conclusions, referred to as the "off-payroll guidance" were:

- *The most senior staff must be on the payroll, unless there are exceptional temporary circumstances, which will require Accountable Officer sign-off and cannot last longer than six months.* This should apply to all Board members (executive and non-executive) and to senior staff with "significant financial responsibility". The Accountable Officer should decide if other staff should be included. Anyone taking major financial decisions on behalf of the organisation should be on the payroll of the organisation. Exceptionally, Accountable Officers may use their discretion to decide whether non-executive directors whose employers are reimbursed directly as compensation for releasing their employees to serve as non-executives in the NHS should be exempt from this requirement;
- *Engagements of more than six months in duration, for more than a daily rate of £220, should include contractual provisions that allow employers to seek assurance regarding the income tax and NICs obligations of the engagee and*

to terminate the contract if that assurance is not provided. Employers also have the option of extending this requirement to other contractors as they believe appropriate;

- *Implementation will be monitored carefully with financial sanctions of up to five times the pay of the individual involved for Departments that do not comply.*

4. In addition, employers were required to seek to apply the recommendations of the review to existing relevant contracts, subject to ensuring value for money.

5. Employers should now use the guide and illustrative clauses attached at Annex A and B to implement the recommendations of the review.

6. Employers must now report each year on their implementation of the off-payroll guidance in their Annual Report and Accounts.

Scope of guidance

7. All organisations subject to the HMT Guidance “*Managing Public Money*”

come within the scope of this guidance. This includes NHS Trusts, NHS

Foundation Trusts and clinical commissioning groups (CCGs). It is the responsibility of employers to ensure they implement this guidance fully. Employers should undertake a risk-based assessment in deciding the cases on which to seek assurance. They should always seek assurance on cases judged to be at high risk of tax avoidance. As a minimum, employers must seek assurance in 20% of all cases and retain copies of the evidence obtained. Compliance with the guidance will be monitored via the information recorded in annual reports.

Clarifications

8. Experience of implementing the guidance since August 2012 has shown that there are a few areas in need of clarification.

Duration of contract

Employers should be aware that the six months’ duration for contracts must be a continuous period of six months and not aggregated from shorter periods. For example, three separate periods of three months within a financial year would not be within scope. However, employers should not sanction a series of short-term contracts artificially designed to circumvent the assurance process.

Secondees

Where staff are seconded to an organisation but remain on the payroll of the substantive employer, employers should assure themselves by inspection of payslips that tax and national insurance deductions are being appropriately made. Where the

parent organisation is reimbursed for their salary , PAYE and NICs should be operated on the full amount of the reimbursed salary.

Agency staff

Where staff are engaged via employment agencies, it is the responsibility of the NHS employer, not the agency, to undertake the assurance process, including cases where the worker is contracted with the agency via an intermediate body (usually a personal service company).

Evidence of assurance

If contractors rely on financial advisers or agencies to provide the assurance, this must provide the same level of assurance as that required from the contractors themselves. A letter from the contractor's accountants affirming the worker's status in regard to IR35 status will not normally be sufficient without documentation to support the assertion. Annex A provides information about the kinds of evidence that is required. If an employer has concerns about the results of a contract review, whether conducted by HMRC or an independent body, the HMRC Contract Review Service may help – there are further details at Annex A.

Limit on daily rate

9. The HMT guidance does not specify any limit on the daily rate that may be paid to off-payroll workers. However, the Secretary of State's letter of 2 June to Chairs advised that such a limit would be introduced in the NHS. The Department of Health is currently undertaking a review to establish this limit. Pending the outcome of this review, employers should be mindful of the need to avoid payment of rates greatly in excess of those payable to on-payroll staff and to consider where possible alternatives to the appointment of off-payroll interim staff.

Queries

For queries on this guidance, please contact Pauline Fleck in the NHS Pay,

Pensions and Employment Services Team at pauline.fleck@dh.gsi.gov.uk. Tel 0113 254 5772.

Yours sincerely



Tim Sands
NHS Pay, Pensions and Employment Services
Department of Health

Annex A: Assurance guide

This guide is to help employers seek assurance regarding the income tax and NICS obligations of their appointees, as recommended by the Chief Secretary to the Treasury's (CST) Review of Tax Arrangements of Senior Public Sector Appointees, the "off-payroll guidance".

Employers must have the contractual right to seek assurance that the worker is meeting their income tax and National Insurance obligations if an individual (the "worker") is engaged by the employer for 6 months or longer and being paid £220 per day or more - but not being paid through the employer's payroll (with PAYE and NICs deducted at source).

In line with the recommendations of the CST review, employers should decide when to seek the assurance. For example, they may wish to seek the assurance for some contracts only. They may seek the assurance at the start of the contract, if they know it will last for 6 months or longer; alternatively they may seek the assurance at the 6-month or some other point.

Workers should be responsible for the information provided, even if it comes from their accountant or professional adviser, and given a reasonable time (e.g. 20 working days) to provide information requested.

Employers should determine the employment status of all their off-payroll workers, regardless of how the worker is engaged.

The employer should use HMRC's online Employment Status Indicator (ESI) tool (<https://esi2calculator.hmrc.gov.uk/esi/app/index.html>) to determine if the worker is classed as self-employed or an employee for tax purposes. Then:

- if the worker is classed as self-employed – the employer should confirm that the worker is registered to pay tax. For example if the worker has been working on a self-employed basis for a number of years they might provide their previous year's business accounts and filed tax return, or if they are newly self-employed they will be able to provide form SA250 as evidence that they have registered as self-employed with HMRC. Once the evidence has been provided, the employer need take no further action;
- if the worker is classed as an employee – they should be put onto the Departmental payroll. If they are working through a limited company, assurance must be sought that they are applying IR35 legislation when appropriate with tax and NICs liabilities met.

Worker engaged directly

Where the worker is engaged directly (not through a limited company or other body) it is the responsibility of the engaging employer to ensure that they correctly classify the status of the worker as employed or self-employed. They must do this prior to the engagement starting; this is a requirement for every UK employer. The status and tax treatment is determined by the terms and conditions under which a worker is engaged. Employers may seek assurance about the tax obligations of workers engaged directly when determining the employment status of the workers.

Worker engaged through a limited company or other intermediary

Where someone is working through their own limited company (a “personal service company” PSC) there is no requirement for the employer to operate PAYE and NICs. Instead, the worker must consider the Intermediaries’ legislation known as IR35.

The IR35 legislation prevents people who would be classed as an employee if the company was not in place from paying less tax and NICs by operating through a PSC than by being engaged directly by the engager (the employer). It says that if the relationship between the worker and the engager (the employer) would be employment if it weren’t for the interposition of the company, then the company must treat the money from that contract as the worker’s earnings and pay tax and Class 1 NICs via RTI.

The assurance to be sought depends on the arrangements in place as follows:

1 – Worker working through a limited company or other body operating PAYE on the whole income for their work

Where a worker is not on the employer’s payroll but is working through a limited company or other body and on the payroll of that body there is no requirement for the employer to operate PAYE and NICs.

The employer may seek assurance as follows:

- If the worker is engaged through a limited company or other organisation (e.g. a partnership or a university) and is on the payroll of that company/organisation with PAYE and NICs deducted at source on pay which is equivalent to the entire income of the limited company/organisation for their work, then the worker can provide evidence that all of the money the limited company/organisation is paid by the employer is put through that body and they are receiving/withdrawing it all with PAYE/NICs deducted at source.

- This can be evidenced by the production of their payslips which will show their salary, and PAYE and NICs deductions. (Where the worker is a director of a personal service company, the company may deduct a small percentage for administrative costs.) The person may be the director of the company, working for a personal service company or one of many employees. This test also applies to those on secondment whose parent organisation is reimbursed for their salary when PAYE and NICs should be operated on the full amount of the reimbursed salary. It will be possible for the worker to provide payslips at the 6 month point for the previous 6 months.

2 – Worker working through their own limited company and PAYE not operated on total income of limited company for their work.

Employers may seek assurance in these circumstances as follows:

Where the worker is engaged through their own limited company (a personal service company) and not withdrawing all the company's income from the employer under PAYE (as set out above) they will need to provide evidence of one of the following:

a) If the worker feels that they are outside the scope of IR35, they will need to provide assurance for example, following a contract review by HMRC's independent IR35 helpline. The worker should be able to provide evidence of a contract review to say that they are outside the scope of the IR35 legislation at the 6 month point. If the terms of the contract remain the same, the assessment of the service company will not change for the duration of that contract.

b) If the contract is within the scope of IR35, the worker can provide evidence that their company is operating the IR35 legislation on the payments received from the employer. This can be evidenced by the worker providing a "deemed employment payment calculation" and showing the tax and NICs liabilities have been met in full. The Deemed Employment Payment is a calculation that requires the worker's company to consider all the income of the PSC/intermediary for the year from a particular contract that is within IR35, calculate a "deemed employment payment" and pay Class 1 NICs and tax on that deemed payment.

The deemed payment calculation can be accessed online at <http://www.hmrc.gov.uk/ir35/ir35.xlt>. The legislation only requires the individual to make this payment at the end of the tax year, so it will not be possible to provide assurance until this point – the individual will need to indicate that they are intending to do this when assurance is sought and commit to meeting this requirement at an agreed later date.

Under the off-payroll guidance, it is the employer's responsibility to determine whether or not a worker has provided assurance that they are meeting their tax and NICS obligations. Employers may seek advice from HMRC when making such determination, but an employer cannot make a referral to HMRC's Tax Evasion

Hotline in lieu of deciding if a worker has provided assurance. This is because taxpayer confidentiality means that HMRC will not be able to share the results of any follow-up action with the employer.

Under the off-payroll guidance, referrals to the HMRC Tax Evasion Hotline are to be made when a worker has failed to provide assurance and the employer has terminated the worker's contract, unless the worker has already left the employer.

If an employer is concerned that the results of a contract review, whether conducted by HMRC or an independent body, do not adequately reflect the reality of the contract, the employer may wish to consider stipulating in advance the information a worker should disclose in a contract review. An employer needs to ensure that it has systems in place to enable it to have confidence in the results of any contract review which are supplied. Information required by the HMRC Contract Review Service may be of assistance here, <https://www.gov.uk/ir35-find-out-if-it-applies>.

Annex B: Illustrative contract clauses

Please note

These Clauses have been drafted on an illustrative basis and are not intended to be implemented in to any Contract without a thorough review involving a) the individual employer's governance and (where applicable) information sharing practices and b) a review of the contracting parties in the particular circumstances (including tripartite arrangements) and termination provisions.

Generic Clauses for Individual Worker [Employer contracts with Worker, or obligation in Header Contract to be flowed down to worker*]

1. Where [Worker*] is liable to be taxed in the UK in respect of consideration received under this contract, it shall at all times comply with the Income Tax (Earnings and Pensions) Act 2003 (ITEPA) and all other statutes and regulations relating to income tax in respect of that consideration.
2. Where [Worker] is liable to National Insurance Contributions (NICs) in respect of consideration received under this contract, it shall at all times comply with the Social Security Contributions and Benefits Act 1992 (SSCBA) and all other statutes and regulations relating to NICs in respect of that consideration.
3. [Name of Contracting Authority/Agency] may, at any time during the term of this contract, request [Worker] to provide information which demonstrates how [Worker] complies with Clauses 1 and 2 above or why those Clauses do not apply to it.
4. A request under Clause 3 above may specify the information which [Worker] must provide and the period within which that information must be provided.
5. [Name of Contracting Authority/Agency] may terminate this contract if-
 - (a) in the case of a request mentioned in Clause 3 above-
 - (i) [Worker] fails to provide information in response to the request within a reasonable time, or (ii) [Worker] provides information which is inadequate to demonstrate either how [Worker] complies with Clauses 1 and 2 above or why those Clauses do not apply to it; (b) in the case of a request mentioned in Clause 4 above, [Worker] fails to provide the specified information within the specified period, or (c) it receives information which demonstrates that, at any time when Clauses 1 and 2 apply to [Worker], [Worker] is not complying with those Clauses.
6. [Name of Contracting Authority/Agency] may supply any information which it receives under Clause 3 to the Commissioners of Her Majesty's Revenue & Customs for the purpose of the collection and management of revenue for which they are responsible.

** - Where there is no 'direct' contract between the Worker and the Contracting Authority, the Contracting Authority will need to ensure that these provisions are contained in the 'Header' Contract/Framework agreement and that the 'supplier' is legally obliged to flow these terms down to the Worker with whom it contracts. One way to do this would be to include the provision as an annexe to the 'Header' Contract/Framework Agreement and confirm that it must be included in any terms between the 'supplier' and the worker. There will also need to be information provisions in the Header contract to ensure that the information supplied by the worker can be provided directly to government departments to carry out any necessary assurance, and make the decision to terminate if necessary (through the correct contractual route).*