

OFF PAYROLL DIRECTORS

Are your directors invoicing for their services?

The default position is that all directors' fees, whether executive directors, non-executive directors (NEDs) or de-facto directors must be paid under PAYE. HMRC do not accept directors or NEDs carrying out director duties as a self-employed individual. This has been the law for years, but HMRC are increasingly looking at this point.

Increasingly, individuals are given the title of 'managing director' or similar, without becoming a statutory director. The legislation states that it applies to office holders, not necessarily *directors*, so if the individual is carrying out the duties of an office holder PAYE will still be due.

Although a director or NED must be taxed through PAYE, unless they have a contract of employment they will not be an employee under employment law. So, although the director pays tax as an employee, they are not an employee for employment rights purposes – an important distinction between the tax and legal treatment.

Personal service companies (PSCs)

If a PSC is engaged to provide director services then the PSC currently is responsible for deducting the PAYE and NIC. However, this will not apply if the individual is the director but just invoices via a PSC. In this case the end client is liable to operate PAYE.

Case law

In a recent case, the directors of the retail company had each set up a consultancy company to provide their services to the company. The court found that the consultancy services they were providing were the duties of a director. The court found that the PSC could be disregarded because in reality it was the individual directors who were providing the services and the company should have operated PAYE.

Additional consultancy services

In some circumstances a director can provide specialist services under a separate contract which is genuinely on a self-employed basis. However, such an arrangement has to be very carefully documented and HMRC will often challenge.

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The next steps

If you have identified directors who currently invoice the business, you will need to take action to correct the position:

- Individuals must be paid via PAYE
- Contracts with PSCs should be reviewed to ensure they cannot be disregarded by HMRC
- If the end client is in the public sector, they will have to make the decision whether the arrangements are inside IR35 and, if so, the public sector body will need to apply PAYE
- If the end client is within the private sector, the PSC remains liable for operating any PAYE under IR35. From April 2020, the public sector rules above will also apply to medium and large businesses in the private sector.
- If you identify any issues you should consider making a voluntary disclosure to HMRC to correct the historic position.

The conclusion is that it is very difficult for any director to be paid other than through payroll.

SPECIALIST EMPLOYMENT STATUS TEAM

Please contact Steve Ashworth or Scott Campbell if you have any clients who may require a review in light of the above legislation.

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