

# Off payroll arrangements

## HMRC compliance and reporting requirements



### Introduction

In March 2015, the HFMA ran a survey to assess whether there are issues in the NHS with reporting off payroll arrangements and to gather best practice in relation to the arrangements organisations already have in place.

The survey report<sup>1</sup> was issued in May 2015 and identified two significant issues in relation to off payroll arrangements:

- HM Revenue and Customs (HMRC) compliance - HMRC will review arrangements for paying individuals on an off payroll basis as part of a PAYE review. If it is determined that an individual paid 'off payroll' is an employee, back pay and NI are both payable alongside interest and a penalty fee. There is a cash cost to getting it wrong
- Reporting - finance staff encounter practical difficulties when trying to identify off payroll arrangements when compiling the annual report.

This briefing aims to start to address those issues by providing a single source of reference to the available guidance and following up the survey to learn lessons from other's mistakes.

In this briefing off payroll arrangements are only considered from the perspective of reporting and tax arrangements. Other issues such as health and safety, safeguarding or employment rights and responsibilities are not considered.

While every care had been taken in the preparation of this guidance, the HFMA cannot in any circumstances accept responsibility for errors or omissions, and are not responsible for any loss occasioned to any person or organisation acting or refraining from action as a result of any material in it.

It is each NHS organisation's responsibility to determine the appropriate reporting treatment and tax arrangements for individuals based on their individual circumstances. Where there is any doubt, the NHS organisation should consult with HMRC.

This guide is intended to be of interest and help to NHS organisations in England. However, NHS organisations in Wales, Scotland and Northern Ireland may also find its contents useful.

*'In relation to the period that the doctors were paid incorrectly on an off payroll basis, the trust had to pay:*

- *The total amount of tax and NI (employees and employers) that would have been paid had they been paid as employees less*
- *The amount of tax and NI already paid by the doctors plus*
- *Interest.'*

<sup>1</sup> [www.hfma.org.uk/publications-and-guidance/publications.htm?sort=3&keyword=&categories=info\\_8](http://www.hfma.org.uk/publications-and-guidance/publications.htm?sort=3&keyword=&categories=info_8)

## HMRC Investigation

HMRC investigations are very thorough and are likely to identify any non-compliant arrangements that exist. There are no thresholds for reviewing arrangements and it is expected that everyone who meets the definition of an employee should be paid via the payroll. Where HMRC identify current compliance issues, a retrospective review is likely to follow.

*'HMRC visits are very thorough and will have a major impact on the finance department.'*

## HMRC Guidance

It is vital that reference is made to the HMRC's website for [guidance](#) on employment status<sup>2</sup> when an off payroll arrangement is proposed. The HMRC's [Employment Status Indicator](#)<sup>3</sup> tool should be used to determine whether an individual is an employee or not. Where it is determined that the individual *is* an employee then they must be paid through the payroll.

## Compliance

It is not enough for the individual to declare that they are self-employed or otherwise. The decision has to be based on the working arrangements which are proposed. This can be an issue as some individuals will refuse to be engaged as an employee and will insist on providing services under a contract for services. It is therefore important that all individuals in an NHS body who have the authority to let a contract or engage an individual to provide services understands the impact of getting it wrong. The risks of engaging someone on an off payroll basis must be understood at the outset so that an informed decision can be made.

It is very difficult for the finance department to identify all off payroll engagements as the arrangements are usually made without consultation. This increases the risk that they are being incorrectly treated as off payroll when, in fact, they are an employee and employer's tax and NI is due. This can result in fines from the HMRC. We are aware that a number of NHS bodies have been given financial penalties by HMRC where it has been determined that employees have been incorrectly paid on an 'off payroll' basis. Two case studies are included as an appendix to this paper.

*'The whole process took about three years from initial visit to the letter asking for confirmation that the tax returns had been made on time so the penalty was not payable. The unanticipated cost to the foundation trust was the employer's NI contributions that were due. This was from the period that the arrangement had been taken over by the foundation trust rather than the full six years.'*

<sup>2</sup> [www.gov.uk/government/collections/employed-or-self-employed](http://www.gov.uk/government/collections/employed-or-self-employed)

<sup>3</sup>

[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/422248/OTS\\_Employment\\_Status\\_report.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/422248/OTS_Employment_Status_report.pdf)

## **Why the Interest in Off Payroll Arrangements?**

In January 2012, following the discovery that the then chief executive of the Student Loans Company was engaged on an off payroll basis, the Chief Secretary to the Treasury announced a review of the tax arrangements of public sector employees. .

The aim of the review was to ascertain the extent of arrangements that could allow public sector appointees to minimise their tax payments.

The review reported in May 2012 ('the May 2012 report') and recommended that public sector senior managers should always be employees other than in exceptional circumstances and that off payroll arrangements should be reported in the organisation's annual report. It also proposed that sanctions be applied if public sector bodies did not comply with its recommendations. The proposed sanction was a fine of up to 5 times the payment in question. As far as we are aware no such sanctions have been applied to date.

As a result, from 2012/13 onwards all public sector bodies (including NHS bodies) have been required to include information about off payroll arrangements in their annual reports.

## **How does this apply in the NHS?**

In August 2012, David Nicolson wrote to all NHS bodies to provide guidance on how the May review's recommendations should be implemented in the NHS. The letter included guidance issued by HM Treasury and HMRC called *Procurement policy note – tax arrangements of public appointees (Action note 07/12)*<sup>4</sup>.

This letter was supplemented in September 2015 with a letter to all NHS bodies' chairs and chief executives from Tim Sands at the Department of Health. The 2015 letter provided clarification on the reporting requirements in relation to off payroll arrangements and the assurances that NHS bodies should seek in relation to them. It also updated the guidance in the 2012 letter to take account of the fact that the HMRC's business entity tests around personal service companies have been withdrawn.

## **Disclosures in the annual report**

### ***Requirements***

The reporting requirements in relation to off payroll arrangements are issued by HM Treasury each year as part of their year-end Public Expenditure System (PES) paper. Those requirements are then incorporated into the appropriate accounting manual by the Department of Health and Monitor.

For 2014/15, the reporting guidance in relation to off payroll arrangements was issued to government bodies in PES(2014)11 *Guidance on the preparation of 2014-15 annual reports and accounts* published on 18 December 2014. This paper is not publically available but its requirements are included in NHS specific manuals. The 2015/16 manuals will be updated once the relevant PES paper is issued.

In 2014/15, Monitor's ARM also included the following new reporting requirement:

"The remuneration report should also contain a statement on the NHS foundation trust's policy on the use of off-payroll arrangements, which as a minimum should cover

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<sup>4</sup> [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/62099/PPN-0712-Tax-Arrangements-of-Public-Appointees.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/62099/PPN-0712-Tax-Arrangements-of-Public-Appointees.pdf)

arrangements for highly paid staff and controls it has in place over the use of such arrangements.”

### **Actual disclosures**

The HFMA has reviewed a selection of NHS foundation trust annual reports and accounts and found that just under half did not make a reference to their policy on off-payroll arrangements. It is not clear whether the lack of reporting of policies is due to the fact that policies are not in place – only one of the annual report and accounts reviewed stated that the organisation was in the process of developing its policy.

Based on the example policy and procedures and the annual report and accounts that were reviewed, NHS bodies’ reasons for using off payroll arrangements include:

- The role is intended to be a short term role
- There is a need to cover a gap whilst recruitment of a permanent employee is completed
- The role is to complete a project which is not part of the day to day operations of the NHS body
- Specialist skills are required.

It is clear that the key to the smooth collection of the required information is to identify off payroll individuals *as they are engaged*. This means that the procedure notes for letting contracts and engaging individuals need to be clear and well known to everyone in the organisation who has a role in recruitment or letting contracts.

### **Conclusion**

Following our review of the guidance available and listening to feedback from the sector the key messages are:

- Getting it wrong could incur a cash cost and this applies to all engagements however small
- Any HMRC visit takes time to deal with but this time will be vastly increased if non-compliance is identified
- The thresholds for reporting and seeking assurance set out in the guidance to the NHS only apply to the reporting requirements and not to any HMRC review of arrangements themselves
- This is not an issue that can be managed within the finance department. Everyone with the authority to engage an individual or let a contract should understand the complexities of the issue and where to go for guidance. It is vital that those individuals have access to clear and comprehensive guidance and know where to go for help. There should be someone in the finance department who is the designated expert who keeps up to date with the issue.

## Further reading

Review of tax arrangements

[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/422248/OTS\\_Employment\\_Status\\_report.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/422248/OTS_Employment_Status_report.pdf)

HMRC's collection of guidance on employment status

[www.gov.uk/government/collections/employed-or-self-employed](http://www.gov.uk/government/collections/employed-or-self-employed)

HMRC's employment status manual for the lay person

[www.gov.uk/employment-status](http://www.gov.uk/employment-status)

HMRC YouTube Channel – self-employment and HMRC webinar

[www.youtube.com/watch?v=Als7oyi5slg](http://www.youtube.com/watch?v=Als7oyi5slg)

HMRC's Employment Status Manual for HMRC staff, and tax advisors

[www.hmrc.gov.uk/manuals/esmanual/Index.htm](http://www.hmrc.gov.uk/manuals/esmanual/Index.htm)

IR 35 forum

[www.gov.uk/government/groups/ir35-forum](http://www.gov.uk/government/groups/ir35-forum)

HMRC guidance on IR 35: how it applies

[www.gov.uk/ir35-find-out-if-it-applies](http://www.gov.uk/ir35-find-out-if-it-applies)

HMRC online forms

[www.gov.uk/government/organisations/hm-revenue-customs/contact/employer-enquiries](http://www.gov.uk/government/organisations/hm-revenue-customs/contact/employer-enquiries)

Helpline 0330 200 3200 (8am to 8pm Monday to Friday; 8am to 4pm Saturday)

## **Appendix 1: case studies**

### **The cost of not checking an existing arrangement**

A foundation trust was using out of hours GPs to cover shifts within their urgent care centres. This arrangement had been inherited from another NHS body who provided assurance that paying these individuals on an off payroll basis was correct and had been agreed.

It would appear that this wasn't strictly the case and when the HMRC visited, no documentation could be found to confirm the arrangements set up with the GPs or any correspondence with HMRC. HMRC interviewed the individuals involved and tried other means of confirming the basis of the arrangement, by looking at SLA agreements. However, no evidence could be found.

HMRC reviewed the current arrangements and confirmed that in their opinion the payments should be made through payroll. The foundation trust agreed with this assessment.

The foundation trust supplied the details of all payment made since the service was taken over from the other NHS body. HMRC checked for tax paid, then issued a settlement payment request for the NI contributions that would have been due, which ended up a fairly substantial figure.

HMRC also calculated a fine of £226k but said that it would be suspended if the foundation trust ensured that all tax returns were made on time for a period of one month. The foundation trust complied with this requirement so the fine therefore became non payable.

The whole process took about three years from initial visit to the letter asking for confirmation that the tax returns had been made on time so the penalty was not payable.

The unanticipated cost to the foundation trust was the employers NI contributions that were due. This was from the period that the arrangement had been taken over by the foundation trust rather than the full six years.

The biggest lesson learnt for the foundation trust was that all arrangements should have been reviewed in detail when they were taken over in the transfer of service provision arrangements.

### **The cost of a PAYE visit**

HMRC visited a trust for a standard PAYE review. The team undertaking the review went into a lot of detail about all aspects of staff remuneration and identified issues in lots of areas including:

- Expenses
- Taxable benefits such as paying for sandwiches at staff meetings or providing pizza for staff working bank holidays
- Off payroll arrangements.

At the time of the visit, the trust contracted with some doctors on an ad hoc basis and paid these doctors through claim forms. The claim forms clearly stated that the doctors were responsible for their own tax and NI arrangements.

HMRC deemed that these individuals were employees. After the HMRC visit the trust put the doctors on the bank and paid them as employees. However, in relation to the period that the doctors were paid on the basis of claim forms the trust had to pay:

- The total amount of tax and NI (employees and employers) that would have been paid had the doctors been paid as employees less
- The amount of tax and NI paid by the doctors<sup>5</sup> plus
- Interest.

A penalty payment was also due but that was suspended for two years. After the two year period, HMRC revisited the trust and asked them to complete a self-assessment to ensure that all of the issues that they had identified had been corrected. Following the self-assessment, the penalty was not payable.

The lessons learned by the trust were:

- HMRC visits are very thorough and will have a major impact on the finance department
- Evidence is required for everything, even down to inspecting the blue lights on cars to check they cannot be removed.

In terms of off payroll arrangements, individuals are employed through the bank when they do ad hoc work whenever possible. However, the trust still has to buy in specialised services from self-employed individuals who would not accept the work on any other basis.

The finance department are not 100% certain that all contracts are being appropriately let as it is difficult to monitor the arrangements that local managers are entering into.

### **GPs – off payroll but paid through the payroll**

Surprisingly, there is no clear definition of off payroll individuals and finding a definition it is not as straightforward as it might seem.

The May 2012 report indicates that it is payments in relation to individuals who are engaged to provide services but who do not have pay as you earn (PAYE) and national insurance (NI) contributions deducted at source (which usually happens through the payroll).

However, according to the FAQ 2<sup>6</sup> issued by the Department of Health in March 2015, arrangements for GPs which the HMRC has deemed to be office holders are off payroll. Despite being off payroll, those individuals are paid through a CCG's payroll for PAYE and NI purposes but their pension is paid through the SOLO route by the CCG. Counter intuitively, these individuals are classified as off payroll even though they are paid through the payroll.

However, in Scotland, some health boards have encountered a slightly different issue. HMRC have objected to individuals who do not have employee status (and are therefore off payroll) being paid through the payroll. The health boards have sought to pay them through payroll in order to deduct pensions at source. It is important, in this case, to ensure that the non-employees/off payroll individuals paid via payroll are excluded from any employee tax and NI returns to the HMRC.

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<sup>5</sup> This reduced the bill that the trust had to pay but they were told that HMRC did this voluntarily and was under no obligation to reduce the bill in this way.

<sup>6</sup> [www.info.doh.gov.uk/doh/finman.nsf/4db79df91d978b6c00256728004f9d6b/75334ce516e12ab280257d9d004144b3/\\$FILE/2014-15%20Manual%20FAQ2%20CCG%20GP%20Pensions%20disclosures.pdf](http://www.info.doh.gov.uk/doh/finman.nsf/4db79df91d978b6c00256728004f9d6b/75334ce516e12ab280257d9d004144b3/$FILE/2014-15%20Manual%20FAQ2%20CCG%20GP%20Pensions%20disclosures.pdf)