Employment Newsletter

March 2020

BACKHOUSE JONES

IR35 BACK in focus

What is IR35?

IR35 is a piece of complex tax legislation that was introduced in 2000 to target a tax loophole that HMRC considered may result in an underpayment of tax contributions.

The legislation was designed to make sure that an individual who works like an employee, but through their own limited company, pays broadly the same Income Tax and National Insurance contributions as those who are employed directly.

When will any proposed changes come into effect?

When IR35 was introduced in 2000 the onus was placed on the individual to assess their own tax status but HMRC have been introducing changes to the legislation over the last few years. In April 2017 businesses operating within the public sector saw the burden shift to them to assess the 'employment status' of an individual for tax purposes. Thus, if a public sector business assessed an individual who claimed to be self-employed as falling within IR35 they were required to notify the individual and confirm that deductions would be made for Income Tax and National Insurance contributions.

As of 6 April 2020, the burden for assessing employment status in the private sector will shift to the 'end user' i.e. the business engaging the self-employed individual whether directly or through an intermediary business.

It is anticipated that the changes will bring in £3.1 billion in additional tax revenues in the next 4 years. This is clearly across the broad spectrum of business sectors and not solely within the transport sector however, it considered that the use of self-employed individuals is prevalent with the transport sector and this will need to be addressed in order to remain compliant with tax legislation.

Will this affect me as an operator?

The changes due to take effect on 6 April 2020 apply to medium and large business only and there is currently a small company exemption that will apply. A medium and large business is defined as a business that meets two of the following three criteria:

- A turnover of more than £10.2 million;
- A balance sheet total of £5.1 million or more; or
- More than 50 employees

Businesses falling within the above criteria will therefore need to take control of determining an individual's employment status for tax purposes and so if you engage individuals either directly through a Personal Service Company (PSC) and/or another form of intermediary company you will need to act now.

What will the changes relate to?

On 7 February 2020 HMRC announced that the changes to IR35 will relate to services provided on or after 6 April 2020. Previously it had been suggested that the changes would relate to payments on or after 6 April 2020. Whilst this only seems like a subtle difference it means that business have until 6 April 2020 to assess the status and implement change rather than face a potential liability for non-compliance for

work undertaken prior to implementation of the legislation.

What does this mean for small businesses?

Whilst small businesses are exempt from the legislative changes this does not mean that they are exempt from the effects of IR35 or the use of self-employed individuals.

There have been many cases over the last few years where transport operators have been targeted for use of self-employed drivers, including the employment tribunal decisions in the Uber and Hermes cases. Whilst these decisions are not always concerned with tax liabilities they are telling as to how the role of the self-employed driver should be viewed by operators and the pitfalls they may face. It is not only HMRC who can investigate employment status but the individuals themselves who could seek to claim against the operator.

HMRC have identified a concern within the transport industry, and in particular with haulage operators, utilising the self-employed individuals or intermediary businesses and have suggested for a number of years that it would be rare for a driver to be genuinely self-employed unless they are an owner driver. In essence to be self-employed they should be in business on their own account and bear the responsibility for the success or failure of that business.

Having identified a perceived reliance on the use of self-employed drivers HMRC have written to the traffic commissioners to assist in identifying businesses who fail to comply. The traffic commissioner considers the use of self-employed drivers, who cannot be shown to be genuinely self-employed, as unfair competition and a potential issue of repute which could impact on an operators O-Licence.

What can I do about it?

Operators both large and small should be reviewing the status of those individuals they engage whether that is directly engaging the individual or through any form of limited company or agency and seeking to implement change. If an operator consider they are affected by IR35 and are not clear about how this may affect your business, give a member of our employment team a call on 01254 828300 for more advice.

Contracts of Employment: No longer on the BACK burner

Day one of a new staff members employment isn't always a smooth and plain sailing; inductions, health and safety briefings, introductions, where the kettle is – all important parts of day one! Paperwork is another task to complete and if most Operators were honest, issuing everything on day one can be tricky to complete within the time constraints of running a busy operation.

Contracts of employment in particular can usually fall on the back burner as employers currently have up to two months to issue a statement of written particulars of employment to employees who have been working for more than a month.

All this is about to change as from 6 April 2020 the right to contract of employment for employees and workers will become mandatory for employers to issue from day one.

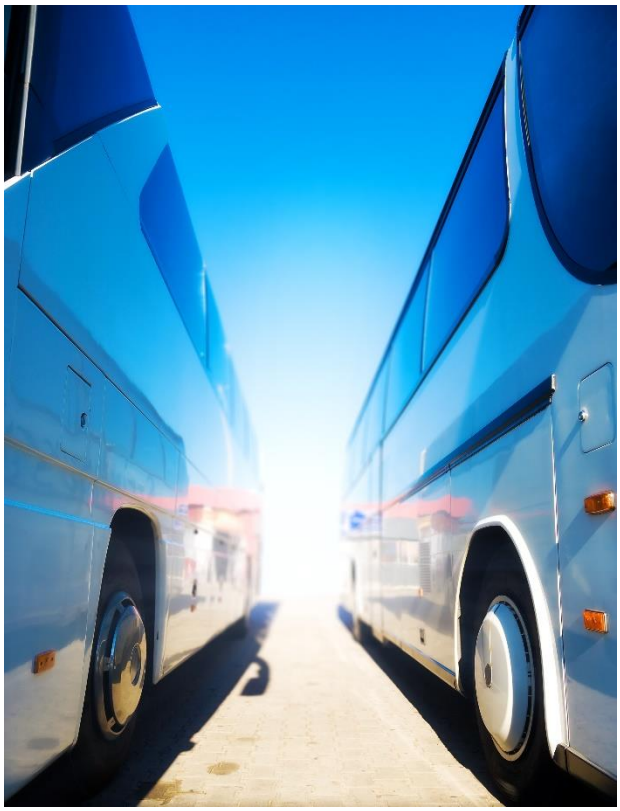
What needs to be included within these terms, has also been broadened.

In addition to the current information that must be provided for all new starters on or after 6 April 2020, the employment terms and conditions should also include:

- how long a job is likely to last, or the end date of a fixed-term contract;
- the duration and conditions of any probationary period;
- how much notice the employer and worker are required to give to terminate the agreement;
- details of eligibility for sick leave and pay;
- details of other types of paid leave;
- all remuneration (not just pay);
- training entitlement provided by the employer, any part of that training entitlement which the employer requires the worker to complete, and any other training which the employer requires the worker to complete and which the employer will not bear the cost;
- normal working hours, also the days of the week the worker is required to work, and whether or not such hours or days may be variable, and if they may be how they vary or how that variation is to be determined.
- We recommend that employers start to review their current contracts of employment as soon as possible to check they contain what is required

and check they have all been issued to staff to begin with. We regularly have queries relating to what the contracts permit, to find that they have not actually been issued as an oversight. Issuing contracts should now become an integral part of your recruitment process latter stages to ensure this is not omitted. As such we also recommend that processes are reviewed to delegate this task clearly and ensure that the correct documents are prepared in advance of anyone starting work on day one.

Although not officially part of the requirements under new legislation changes, employers working in the transport sector have more specific provisions to communicate to staff that are transport related. They should be addressed in the contracts of employment to ensure the standard and expectations are known from day one.



The change that is due to take effect from 6 April 2020 is an opportunity for operators to have their contracts reviewed by our team of specialist employment lawyers in the transport sector, to ensure they are up to date and protect the business as they should. A review or drafting of contracts can be provided for a fixed price.

Bereavement Leave

Bereavement affects all aspects of a persons life, not least their working life.

The implementation of the Parental Bereavement Leave Regulations 2020 from 6 April 2020 aims to alleviate this in one way. From 6 April 2020, parents who have lost a child aged 18 and under are entitled to up to two weeks paid parental leave, to be taken at any time within a period of 56 weeks from the date of the child's death. These weeks need to be taken consecutively.

Employee Rights and Obligations

It is important that employers are aware of the rights of their employees and also to ensure they educate their staff on what is required to exercise this right. An employee must first notify their employer of their intention to take bereavement leave and this notice must include:

- The date of the child's death;
- The date the employee wishes to begin their absence; AND
- Whether 1 or 2 weeks leave are intended to be taken

Further, this notice must be given to the employer before the employee is due to start work on the day they intend to be absent.

Where this is not reasonably practicable to do so, it must be done as soon as possible.

Where the two weeks leave wish to be taken in separate intervals, an employee must give one weeks' notice before the start of the second week of leave.

Employee Restrictions

Where a week of bereavement leave has already commenced, an employee is not permitted to cancel this week of leave. An employee may however, cancel a future week of leave, by giving notice of this decision to the employer, prior to the employee's ordinary start time if this is in the first 56 days following the death of the child. Where a decision to cancel bereavement leave takes place after 56 days, one weeks' notice is required.

Holiday Entitlement

Where an employee was due to take annual leave during a period of parental leave, they may still take this, and it will immediately end the period of bereavement leave. Any remaining bereavement leave rolls over, and may be used in the future, however, must be taken in a consecutive period.

How much are Employees entitled to?

Where bereavement leave is taken, an employee may benefit from all the terms and conditions of their contract had they not been absent, with the exception of any remuneration the employee is ordinarily contracted to receive were they not absent.
Under the new Regulations, the only remuneration an employee is entitled to receive during a period of leave is the smaller amount of either:

- £151.20 per week; OR
- 90% of their normal weekly earnings if this is less than £151.20

Comment

The new Regulations will not come into force until 6 April 2020 and up until this date, employees continue to have a statutory right to unpaid time off to deal with the death of a child.

Whilst the Regulations seek to provide parents who have lost a child with the necessary space and respect to grieve their loss without the same financial burden, the Regulations impose another burden on the employee to provide notice at a time that is already likely to be emotional and traumatic.

Whilst we understand that forward planning is a fundamental part of business and operation in the transport sector, it is important to approach such matters with flexibility and sensitivity.

This includes dealing with their return to work from bereavement leave where amended duties or flexible working should be considered and offered as part of a return to work meeting. It is also recommended that companies have a bereavement policy in place which deals explicitly with the new Regulations so to limit the need for queries to be raised at an already difficult time.

Ethical Veganism: A Protected Characteristic, what next?

In *Casamitjana Costa v The League Against Cruel Sports*, Employment Judge Robin Pistle has ruled that ethical veganism amounts to a philosophical belief and therefore, entitled to protection from discrimination under the Equality Act 2010.

Facts

The Claimant was a zoologist who dedicated his life to animals in need. In 2000 he chose to become a vegan, transitioning immediately without becoming a vegetarian first. The Claimant also discarded any clothes, items or products he used containing animal products.

After the Claimant's contract of employment was terminated by his employer, he brought a claim for unfair dismissal and discrimination.

The Claimant believed the real reason for his dismissal was because he had raised concerns with his employer about the pension fund being invested into companies involved in animal testing. Namely, the Claimant felt he had been dismissed because of his philosophical belief in veganism.

Judgment

The Judge in this case found that it was clear that veganism is concerned with living according to a belief or conviction that it is wrong to exploit and kill living beings unnecessarily.

The Judge assessed this decision in consideration of modern day thinking and felt that as veganism was increasingly becoming recognised nationally, it ought to be protected as a philosophical belief.

Summary

So, what does this mean for employers? Whilst this case is certainly a landmark decision, emphasis is placed on the Claimant being an 'ethical vegan' and not a dietary vegan. Ethical vegans go beyond eating a vegan or vegetarian diet; they oppose the use of animals for any purpose.

In this case specifically, when making his decision the Judge focussed on the way in which the Claimant conducted his everyday life, which included:

- When travelling for extended periods of time, he would take additional dietary supplements
- Will not consume any food which he believed to go through production in a way that harmed animals
- Take reasonable steps to ensure any financial products that invest in pharmaceutical companies are avoided if tested on animals
- Avoid sitting on leather seats or holding onto leather straps
- Would rather go hungry than eat animal produce when travelling to remote places

This case now means ethical vegans can enjoy all protections from discrimination, harassment and victimisation, in other words, they cannot be treated less favourably by an employer and other employees for holding this belief.

However, it is important to point out that this judgment is only a first instance decision and therefore is not binding on other tribunals. This is not to say however that other tribunals will not follow the example of Judge Pistle, and considering the media attention this case has received, it is most likely that other claims will be brought in the near future.

FOR ALL RELATED ENQUIRIES, PLEASE CONTACT OUR EMPLOYMENT TEAM ON 01254 828300

Please note: This publication does not constitute legal advice

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