

IR35 FAQs

STATUS DETERMINATION STATEMENTS (SDS)

Q: Will an SDS only be required for incumbent workers who operate via a limited company, or do all incumbent workers need a SDS?

A: HMRC Response - If a worker is not engaged through an intermediary (a limited company, partnership or individual) then the engagement is not within the scope of Chapter 10 and so the requirement to issue an SDS doesn't apply. A valid SDS is required for all workers which do work through an intermediary; engagers should consider whether status decisions previously given to incumbent workers who work through an intermediary could be considered a valid SDS. If all legislative SDS conditions are met, and the engagement still operates under the same contractual terms and working practices, another SDS is not required for these engagements.

A: Tax Centre of Excellence (TCoE) Response - The off-payroll legislation only applies to workers engaging via a qualifying intermediary (e.g. their own PSC / limited company). For example, if the worker is employed by and on the payroll of a supplier, agency or umbrella company within the supply chain, then the legislation will not apply and there is no requirement to issue an SDS or operate a Status Disagreement Process. In these scenarios, all earnings from the engagement will be treated as earnings from employment, and subject to tax through PAYE.

TCoE will work with HMRC in adding to guidance on how to identify these scenarios.

Q: Who should have responsibility for completing the Check Employment Status for Tax (CEST) tool and SDS statement - Recruiters or Hiring / Line Managers or both?

A: TCoE Response - This will very much depend on the trust's internal processes. The key thing is that it is the trust that is engaging the worker that undertakes the IR35 assessment (using CEST if that is their chosen method of doing the assessment) and issues the SDS statement directly to the worker and to the body they contract with.

Often it can be any of the following that complete the CEST and prepare the SDS but different trusts may operate differently:

- Hiring managers within the business area
- A central workforce related team
- A central tax function or finance function with responsibility for tax
- A commercial / HR or other function that has taken on IR35 responsibilities

Q. Will the outcome of the CEST suffice as the SDS as long as reasonable care has been taken when completing the tool?

A: HMRC Response - HMRC's CEST tool can be used to support the client's conclusion when they are deciding a worker's employment status for tax. CEST outputs do meet the conditions to be a valid SDS but reasonable care must be taken. HMRC will stand by CEST's results provided accurate and correct information is used but using the tool is not mandated. Further information on Status Determination Statements can be found here: [HMRC Employment Status Manual](#)

A: TCoE Response - Whilst the CEST output can suffice in terms of representing an SDS, there are some practical reasons why you should consider including a covering statement to the worker in line with TCoE best practice:

- to ensure that the worker understands that this is their Status Determination Statement and that it is your trust that has made the determination
- to include details of the engagement to which it relates
- to include details of where / how the worker should raise any disagreements to prevent workers submitting these to different areas of your organisation which could impact on your ability to track and manage responses within 45 days
- to provide any further details you wish to provide the worker in terms of your rationale for the IR35 status determination, linking it to the worker's specific engagement / working practices.

Q: When a worker assignment is extended, is a new SDS through the CEST tool required, as this is technically a new contract, or can a statement to confirm there are no changes to the role/worker from the original SDS suffice?

A: HMRC Response - Wherever there is a new contract a new SDS is required. There could be a new contract because there is a material change to the worker's terms including, amongst other things, the nature of the business, the nature of the service provider's contract, and the relationship between the worker, the service provider and the customer. Where a contract is extended with no other changes, then a new SDS may not be required if this does not result in a new contract. If the contract ends and a new one is started, a SDS will be required.

A: TCoE Response - Each extension should be carefully considered to understand whether it is really just an extension with no changes to terms and conditions (T&Cs), role, deliverables or working practices, or if there are changes which mean it should be considered to be a new engagement. A new assessment needs to be undertaken and a new SDS issued for new engagements and where there are changes to the engagement, role, T&Cs or working practices. Where there are no changes, there is no requirement to reassess or issue a new SDS but it is good practice to consider the original determination at extension to ensure it remains accurate. Trusts may also wish to re-issue the SDS at extension, even if this is only to confirm to the worker that nothing has changed so that parties are clear on the basis moving forwards.

Q: If there are identical job roles can a blanket SDS be applied?

A: A blanket SDS can be against a job role if the contractual engagement is identical for all workers. Each worker and agency would still require a copy of the SDS if they are engaged via an intermediary (PSC / Ltd / Partnership).

Q: Can the supplier input into the status determination?

A: This is the trust's decision, a supplier can provide information to support a client in making an SDS, but the determination can only be made by the trust.

Q: For new requirements after 6 April 2021, should the SDS be completed prior to the job advert being issued?

A: Trusts may choose to make a pre-determination using the CEST for advert purposes and to let the candidate market know the expected IR35 status of the role. Unless the details of the role change, there's no need to re-do the original assessment. An SDS would only be shared with the appointed worker and agency if they engaged via an intermediary (PSC / Ltd / Partnership). The worker then has the ability to challenge the original determination via the disputes process.

Q: Is there a requirement to carry out assessment of off payroll workers paid via PAYE model?

A: The legislation does not apply to PAYE workers and therefore would not require a status determination.

Q: If a role is determined to be 'inside IR35' at job advert, can the status change once the candidate has been appointed. If yes, what best practice is there for reissuing an SDS?

A: If the working practices and nature of the engagement differs from those originally envisaged when the advert was placed then a new status assessment will need to be undertaken. If the chosen candidate brings new information in terms of answering the final Business on Own Account questions within CEST then these can then be factored into the decision.

If the working practices and nature of the engagement is exactly as envisaged when the role was advertised then no new IR35 assessment is required once the candidate is chosen. However, the candidate is able to raise a disagreement, providing new information, in which case the trust will need to consider the status in light of any new information.

Q: Is the need for an SDS based on the fact the worker is working via Ltd Co; not whether or not they are inside or outside?

A: Yes, regardless of whether the role has been defined as inside or outside of IR35 the worker will require an SDS if they are engaged via an intermediary. This will allow the worker to dispute the determination.

Q: Can a supplier / agency issue the SDS to the worker on behalf of the trust?

A: A trust can agree with a supplier that they will cascade the SDS to the worker. **However, the legal responsibility would remain with the trust, so there is a risk, particularly with long supply chains that the worker does not receive the SDS the liability still remains with the trust.**

Q: Do we have to issue an SDS for every existing worker, should we issue a new SDS or a repeat of their old SDS to every existing worker, or is it just new engagements from 6 April 2021 onwards?

A: If a trust has already issued a determination status and it met the standard required

from 6 April onwards, then the existing determination already issued could be treated as the current SDS. However, if you have any doubt in a decision made, or if there have been changes to the role / engagement the recommendation would be to reissue the SDS. Legally you must reissue if the reasonable care taken to reach the decision doesn't meet the standard required. Previous SDS' may not have been communicated with the worker and the agency, you will have an obligation to share the SDS with them both regardless of whether this is an existing or new SDS.

Q. Do trusts need to send the SDS to an individual's personal email address or their work address (where the SDS is for an extension/current worker)?

A: TCoE Response - The SDS needs to be issued to the worker personally (as well as to the body that the trust contracts with). It should not be issued to the PSC. As long as the worker is able to access and knows how to access the SDS then this is sufficient.

Q: Where can we find a definition of an intermediary?

A: A definition of an intermediary can be found here:
<https://www.gov.uk/hmrc-internal-manuals/employment-status-manual/esm10003>

Q: Can you clarify whether the use of LLPs are considered in scope of the legislation?

A: An LLP is a qualifying intermediary under the off-payroll legislation.

Q: Can you confirm that shareholders (more than 5% shareholding) of companies of any size are also treated as an intermediary?

A: The company would be a qualifying intermediary under the off-payroll legislation if the worker provided their services through it (receiving a chain payment from it) and had a material interest (>5% shareholding) in the company. See link below to definition of an Intermediary:
<https://www.gov.uk/hmrc-internal-manuals/employment-status-manual/esm10003>

Q: For new roles where you do not know whether there will be a PSC engaged or not, do we need to issue an SDS prior to recruitment?

A: Trusts can pre-determine whether a role is inside or outside of IR35 before going to market. If a worker engaged via an intermediary (PSC/ Ltd / Partnership) is engaged then that original determination can be shared with the worker, as long as there have been no changes to the role / engagement etc.
Under the legislation, an SDS must be issued prior to the first payment being made in relation to that engagement.

Q: If a worker is engaging via an intermediary but has chosen/ are happy to be in-scope of the off-payroll working rules from the beginning, does an SDS still need to be issued?

A: Yes. The off-payroll legislation applies to all workers engaged via a qualifying intermediary. An IR35 assessment needs to be undertaken and an SDS needs to be issued to all such workers stating whether you have assessed their engagement as in-scope of IR35 (in which case the deemed employer will deduct employment taxes from their fee) or out-of-scope of IR35 (in which case they will be paid gross).

Q: If a trust advertises to the market clearly which roles are inside or outside of

IR35, does this mean they are exempt from issuing a SDS?

The determination must be made, regardless of whether it is before or after the role itself is placed. Workers still have a right to dispute either way. If the appointed worker falls within the scope of the legislation (engaged via Ltd. / PSC / partnership) the trust would be required to issue an SDS to the worker.

Q: If in an emergency, 50 workers were needed overnight, would all workers require an SDS or would an overarching determination suffice to cover all the workers? Would the workers need a copy of the SDS before they can start the work?

It would indeed be acceptable to make a determination based on a role rather than the individual worker on the proviso that all of the 50 workers roles and contracts were identical. All Ltd workers and their agency would need a copy of the SDS and individual workers still have the right to dispute the determination even if it was done as a grouped determination.
Under the legislation the SDS has to be issued before the first payment but not necessarily before commencement of work.

SUPPLIERS AND UMBRELLAS

Q. What assurances are HMRC expecting trusts to provide when a contractor has been engaged via an umbrella and therefore does not require an SDS?

A: Further clarification is being sought from HMRC. At a minimum contracting authorities need the ability to understand / have visibility of their own supply chains.

Q: If the agency states that a worker is engaged via a specific umbrella company, is that enough or should a trust be asking for specific documentation / evidence (and what would that be)?

A: A trust must satisfy themselves that they've done everything they can to determine an agency for example is legitimate and the arrangement is as it's been suggested. Further guidance may be provided in due course.

Q: If a trust engages with a supplier that requires all their In Scope workers to work through an FCSA accredited umbrella. Are SDS' therefore not required for any of the workers?

A: As long as the workers are employed by and on the payroll of the umbrella company there is no need to provide an SDS.

Q: What qualified and registered bodies would be deemed acceptable, for example in regards to use of an umbrella company to satisfy that?

A: A trust must satisfy themselves that they've done everything they can to determine an agency for example is legitimate and the arrangement is as it's been suggested. Further guidance may be provided in the future.

Q. If a contractor is engaged via an umbrella, does a trust require a confirmation that tax is being correctly paid for every worker?

A: It is key that trusts understand whether or not there is a qualifying intermediary in the supply chain between the fee payer (deemed employer) and the worker. Where there is such an intermediary (e.g the worker's ltd company) then the trust will be liable for employment taxes unless an SDS has been issued. This is the case regardless of how the

arrangement has been described, so if an arrangement is described as an umbrella company arrangement but this is not genuine and payment is still being made to the worker's ltd company, the trust would still be liable for employment taxes and potential penalties.

Q. How should trusts ensure that they have applied this assessment correctly to the right population of workers?

A: As above.

Q. What evidence should trusts record to evidence that status determinations are being flowed further down the supply chain?

A: The trust is accountable for issuing the Status Determination Statement to the worker. If they choose to outsource this to the supply chain, they are still liable if any SDS does not reach the worker. Trusts need to understand this risk and take steps to mitigate however they deem necessary if they do choose to outsource this task.

Q: Is an SDS required if a PSC is in the supply chain but off-payroll (i.e. associate or sub-contractor)?

A: If a worker is engaged via their PSC and is working as a resource within the trust, then the trust will need to undertake an IR35 assessment and issue an SDS.

Q: If a trust has workers supplied via a framework, and they are PAYE via the prime supplier or engaged with an agency in the supply chain, will the workers require an SDS?

A: There is no requirement for PAYE workers to receive an SDS regardless of the route they are supplied by. If a worker is engaged via intermediary (PSC / Ltd / Partnership) then an SDS would be required regardless of the route they are supplied by. Umbrella company arrangements, where the worker is employed by and on PAYE of the umbrella, are excluded from legislation.

COMPLIANCE

Q. Compliance - is there any sense that HMRC might reconsider the application of OT Taxation in terms of recovery when they are investigating a trust?

A: A recent update on compliance was published on 15/2/21 but more information will be forthcoming regarding compliance <https://www.gov.uk/government/publications/hmrc-issue-briefing-supporting-organisations-to-comply-with-changes-to-the-off-payroll-working-rules-ir35>

Q. Given the current situation with Covid, do you envisage any further push back from stakeholders to delay the roll out?

A: HMRC Response - Ministers took a decision in March 2020 to delay the implementation of the reforms to April 2021. Since then the primary and secondary legislation has been put in place to bring the new rules into force on 6 April. Businesses and organisations should plan and prepare for the reforms being in force on that date.

Q: Are there penalties if a trust incorrectly classifies resource as services?

A: The trust can be liable if they don't undertake their obligations, if they have procured

resource via an intermediary and they haven't issued an SDS they will be liable for tax and potential penalties.

Q: What evidence should a trust be capturing for audit purposes?

A: It is advisable to retain evidence to demonstrate that reasonable care has been taken. This could include:

- evidence that supports treating any procurements as contracted-out-services
- evidence that decision makers have had training or have expertise in applying off-payroll legislation / undertaking IR35 assessments
- documentation of the rationale behind how the CEST questions were answered when undertaking IR35 assessments
- process documentation showing roles and responsibilities, key controls in the process such as review or assurance of decisions made, etc.
- assurance that the trust has robust processes to identify off-payroll workers engaged via all commercial routes and accurate records of all off-payroll workers engaged
- evidence of SDSs being issued to all off-payroll workers engaged via an Intermediary;
- evidence of receipt date of disputes and responses within 45 days
- records of any professional advice sought
- records of any independent assessment / audit of IR35 processes that you have sought

Q: If a worker through a PSC can provide evidence that their salary/ profit share is already being fully taxed, do we still need to deduct tax? Is there evidence that HMRC would accept (payslip for the salary they are paid and a self assessment tax return for the profit from the business) to avoid us having to do a tax adjustment for someone who is already paying the correct amount of tax and avoid adding an additional burden on them?

A: No. If the worker is engaging via their Ltd company then the trust will always need to undertake an IR35 assessment and issue an SDS. If the conclusion from that assessment is that they are out-of-scope (not operating like an employee) then they will be paid gross and their company will pay the relevant amount of Corporation Tax with the worker paying the relevant amount of tax on income withdrawn from the company (salary or dividends). If the conclusion is that they are in-scope then the fee-payer will need to deduct employment taxes from their fee with tax relief available to the worker's company to reflect employment taxes already paid on the income.

The purpose of IR35 legislation is to prevent workers avoiding employment taxes when working like an employee by inserting an intermediary into the chain - they would pay less corporation tax / tax on dividends taken from the company than they would pay income tax / NICs as an employee.

Q: Do HMRC recognise 3rd party IR35 expert guidance as appropriate backing in deciding the status determination of workers? If the CEST tool and the 3rd party recommendation together conclude that the outcome is outside of the legislation would HMRC consider reasonable care to have been taken?

A: HMRC will stand behind the CEST outputs, however they don't mandate the use of CEST when making a status determination. HMRC recognise that 3rd parties may assist in the determinations, but they don't endorse them or provide commentary on particular tools. Using 3rd party assessment could contribute to showing reasonable care, but it would not necessarily indemnify the trust.

DISPUTES

Q: How many disputes are you expecting to see from incumbent workers?

A: Still unknown at this point. To reduce the likelihood of challenge TCoE advises to make it clear so that the worker can see their own working practices reflected in the SDS.

Q: In relation to the 45 day timeframe for resolving disputes. Within the disputes process, is there a time limit associated for a worker to raise a dispute?

A: It should be made clear firstly that the 45 days mentioned are calendar days and this clock would start from the day the challenge was received. The worker would no longer be in a position to challenge once the service has been paid for. In essence, once the final payment has been delivered the worker is no longer in a position to challenge. It should also be made clear that if a worker raises a challenge before 6 April the 45 day clock will not start until 6 April.

Q: Can workers that aren't engaged via a Ltd company dispute their status?

A: If they aren't engaged via an intermediary, that legal right doesn't exist to dispute because it's not in scope of the legislation.

Q: Should trusts communicate the process of raising a dispute out to the entire organisation and to workers?

A: There is nothing in law that would suggest this type of cross organisation communication be mandatory. It should be noted that mapping the decision to an actual role, core duties, and the finer details could help to prevent the risk of challenge. It could be considered good practice to share the process of how to raise a dispute organisation wide and to workers that receive an SDS.

Q: Would the clock only start ticking if the dispute was raised through the formal defined channel of raising a dispute?

A: The exact format of the dispute resolution process has not been defined by HMRC and is for each trust to define internally.

Q: Is there any criteria that a dispute must meet to be deemed acceptable by the trust?

A: The trust would have to accept and review all disputes received, there is no criteria for what level/type of rationale would be deemed appropriate to progress with. However, if the dispute doesn't give reason why the worker disagrees, the trust could stand by the original determination. Should the case arrive where little to no rationale is provided, then it would need to be sought.

Q. Disputes may be a concern where determinations change for an incumbent worker. However, for new roles, surely given that such roles are advertised as inside or outside, this risk of challenge should reduce significantly over time?

A: Logically you might expect a lower likelihood of dispute where a worker has accepted a role in the knowledge that it is in-scope of IR35. We believe that the key to minimising disputes will be: (a) consistency in status decisions so that contractors working in the same way have consistent IR35 status; and (b) the worker recognising their engagement and working practices in the reasons stated within the SDS. Some disputes may arise due to workers wishing to factor their own business history into the CEST decision i.e.

answering the business on their own account section of CEST.

SERVICES CONTRACTS

Q: Do current service contracts need to be reviewed or does this only apply for contracts awarded after 6 April?

A: If contracts are for true contracted out services then they fall outside of IR35 and therefore do not need to be reviewed. If there is concern that services contracts may actually be for resources, assurance needs to be carried out and SDS provided if Ltd workers are engaged under these contracts.
An SDS needs to be issued to all incumbent workers / resources in addition to new workers engaged post 6 April 2021.

Q: Is there a best practice approach when drawing up services contracts to ensure there are no hidden resources?

A: The trust should fundamentally decide what it is they are looking to buy, rather than drafting a contract one way or the other. For example if the requirement is to augment an inhouse resource, then contract accordingly.

Q: Can there be a situation in which a managed service is solely provided by a PSC so that the off payroll rules do not apply?

A: This will come down to the facts of the individual case, nothing precludes this from being a possibility.

Q: Are all time and material contracts a clear indicator of resource procurement, rather than a contracted-out service?

A: HMRC suggest the need to look at all factors and not just payment methods, trusts need to look at the workers, how they are embedded, determine whether an in house resource is being augmented or is it truly outsourced. It shouldn't be based on payment alone (or outcome based). Who is in control is the most significant factor.

Q: If a trust is not identifying workers on a services contract but requires oversight of security clearances of individuals, does this influence whether this would be considered a procurement of bodies or a service?

A: The oversight of the level of clearance/ validity would not alone be enough to determine that this was a procurement of resource.

Q: If a trust procures the services of an individual person through a call off under a framework does the trust need to raise an IR35 assessment and provide the result to the supplier/worker or would the assessment not be required as our contract would be with the supplier and the worker would be employed by the supplier?

A: If the worker is employed by and on the payroll of the supplier then there is no need for the trust to undertake an IR35 assessment or issue an SDS. However, if a supplier engages a worker via the worker's limited company and provides that worker as a resource to the trust then an SDS is required to be issued to the worker and to the supplier being contracted with.

Q. Should a trust apply the resource v service check to all engagements where off-

payroll workers have been identified. e.g. trust has a contract directly with Joe Bloggs Ltd. Joe Bloggs is the director and is therefore an off payroll worker providing some of the services. Does this engagement automatically need a determination - or does it depend if the services are deemed resource or a fully contracted out service?

A: IR35 assessments should be undertaken and SDSs issued for any procurement involving the supply of off-payroll workers (a supply of labour) where those workers are engaged via intermediaries such as their own limited company. If you believe the procurement is capable of being a contracted-out-service then you should consider the guidance available and take care that the reality of the working arrangements are considered alongside the commercial contract.

FURTHER SUPPORT AND GUIDANCE

Q: Where can I get more information about IR35?

A:

[GOV.UK](https://www.gov.uk)
[Tax Centre of Excellent Guidance](#)
taxation@justice.gov.uk

Please feel free to contact [NHS Workforce Alliance](#) framework managers directly to discuss contract specific points.

Q: Are there further case studies or scenarios available to support an organisation determining whether it is a contract or not?

A: There are further case studies and scenarios captured within TCoE's guidance including 3 or 4 covering contracted out services. Please note this guidance should only be shared internally and not with external stakeholders.

Q: How should smaller organisations approach the process, is there any support that is available?

A: TCoE have limited resource to provide this support. They may not be able to engage individually, they look to understand the need across the sector and deliver an across the board session. But do ask for help and they will support. TCoE mailbox taxation@justice.gov.uk.

Q. For those trusts who do not have dedicated resources or tax experts what would be the recommended training for colleagues to take part in to meet the standard technical knowledge required?

A: TCoE Response: TCoE will not have the resource to handle all in depth training needs in the run up to 6 April 2021, however, we would like to explore the needs of (perhaps smaller) organisations. It may be possible to organise a group training session, or to tailor our guidance, but we would certainly wish to understand if there is a common concern among similarly affected depts. Please do get in touch if you have requirements such as this.

We can also re-iterate that TCoE will have monthly Direct Tax Technical sessions focussing on IR35, and that we highly encourage them to attend these, and that HMRC guidance and Tax CoE off-payroll guidance should be reviewed on the websites. Also do look out for HMRC off-payroll workshops.

Q. Can the TCoE information be shared with suppliers and other internal stakeholders who want to understand how we are dealing with IR35?

A: Although access to the TCoE website will be available to all, we would not alert suppliers to this, and would request that TCoE guidance or comments are not referred to in communication with suppliers. Information can be shared with relevant internal stakeholders within public sector bodies. TCoE would recommend communication with suppliers is more appropriately handled by your teams, (perhaps commercial/contract divisions), who manage the relationship with a supplier.