

Off-payroll working in the private sector.

Submission by Prospect to a consultation by HM Revenue and
Customs, and HM Treasury

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1. Prospect is a trade union representing over 140,000 skilled and professional workers across the UK economy, covering both the public and private sectors. Our BECTU Sector has a strong presence in the entertainment industry, with over 14,000 freelance members working in Film, TV, theatre, and events. Most operate as self-employed sole traders, but a growing proportion work through personal service companies, for public and private sector engagers.
2. Many of these PSC members were affected by the April 2017 changes to intermediary tax rules in the public sector which transferred the liability for unpaid employment tax on deemed employment payments (under IR35) to the engager. The largest public sector engager of freelance labour in the entertainment sector is the BBC, but across Prospect many members, from school inspectors, to consultants working for government agencies, were also affected by the intermediary changes.
3. Despite most public engagers having the scale to operate properly-staffed Human Resources and Legal departments, there were many initial problems when the new intermediary rules were introduced.
4. Prospect believes that members should pay the employment taxes appropriate to their status, either as employees, or as self-employed workers. The vast majority of our freelance members are operating businesses in their own right, and incur costs wholly and exclusively in the course of providing their services to clients. Whether working as sole traders or through PSCs, these are treated as legitimate business costs for purposes of tax, and are deducted from profits.
5. The intermediary changes led to a number of freelance members being re-categorised by engagers as employees, often having previously provided services as sole traders or via PSCs. However they were not given access to employee benefits on the grounds that while they were employees for purposes of tax laws, they were still self-employed for employment law purposes. This led to significant reductions in profits (i.e. income) because costs like travel and subsistence, or purchase of materials and consumables, were not tax-deductible, yet were not being reimbursed by engagers.
6. It must be emphasised that the vast majority of freelance members disadvantaged in this way were peripatetic and precarious workers who are not dependent on any single provider, and in Prospect's view should have been treated as legitimately self-employed. Although there is scope for recovery of some travel and subsistence costs via the self-assessment process, this involves significant delay, and there are difficulties in demonstrating that the location of an assignment where PAYE has been deducted is not a usual place of work.
7. Not only have members working through PSCs been affected (the group originally meant to be covered by the intermediary changes), but self-employed sole traders have also been wrongly categorised as employees. This has occurred due to public sector engagers overhauling their procurement processes for small businesses, and generally adopting an over-cautious approach which tends to identify more workers as employees than were previously. Engagers have always carried the tax liability for any self-employed sole trader who is subsequently identified as having been in an employment relationship with them, and the intermediary rules aimed at better compliance under IR35 have had a knock-on effect on relationships with the self-employed.
8. A prime culprit in the culture of over-caution that our members have witnessed is HMRC's online CEST employment status checker. Despite this facility being acknowledged by HMRC as legally non-determinative, all public sector engagers we are aware of have treated the result of the CEST check as being the final word, even in cases where the knowledge and experience of the client suggest that it is wrong.

9. Apart from the general assumption that CEST is legally-determinative, there are flaws in the algorithm underlying the online test. Most obviously, no weight is given to the case of *Hall v Lorimer*, in which the court determined that providing services to multiple engagers is an indicator of self-employment. (That case concerned a member of Prospect's BECTU sector working in the TV industry).
10. Less obviously, but equally problematic, is the test for the right to substitute labour. The CEST algorithm tends towards a conclusion of employed status where there is no absolute right of substitution, whereas the large body of case law takes account of a qualified right to substitute as an indicator of self-employment. It is common in our industries that the right for freelancers to substitute their labour is subject to the criterion that any substitute worker is professionally capable of doing the work, but this should not undermine their self-employed status.
11. Our experience of the April 2017 intermediary changes in the public sector leads us to predict that their extension into the private sector could be highly disruptive, particularly in the entertainment industries which depend on a high proportion of flexible freelance workers who can undertake short engagements.
12. Many companies in film, TV, theatre, and events do not have robust internal support from HR or legal professionals, due mostly to their lack of scale, and, at the very least, any changes will need to be carefully communicated to them to avoid confusion. They will also need to be reminded that there has been no change in law regarding employment status for tax purposes, only a switch in liability, and their established protocols for engagement of freelancers may well be adequate. The CEST online checker needs to be clearly labelled as legally non-determinative, and treated with the same caution as the many other online tools for testing employment status.
13. Business disruption is likely as freelancers increase their fees whenever wrongly categorised as employees, in order to defray costs like travel and subsistence in a situation where their business income is subject to PAYE. Extending the April 2017 changes to the private sector could impose a heavy load on HMRC itself as hundreds of companies in our sector seek individual advice on engagement of freelancers.
14. In response to selected questions from the consultation we offer the following comments:
15. **Q1. What could be done to improve the compliance enquiry process to reduce non-compliance, whilst safeguarding the rights of customers?**
16. In our view there is no significant problem of non-compliance in the industries where our members provide services. The entertainment sector has a long history of atypical working relationships, and in film and TV there is HMRC guidance tailored to the needs of engagers which encourages compliance.
17. **Q4. If the private sector rules were changed, do you have any evidence that there are parts of the private sector where the administration of any regime may need to vary even though the basic principles including for determining status remain the same?**
18. Anecdotally we are aware of a multitude of smaller companies in our industries which will struggle to cope with changes to long-established engagement practices in the sector. Our greatest concern is that, once these engagers have become aware of the changes (which could take some time) we will witness the same problems our members encountered in the public sector, but on a larger scale.

These will include a tendency to be over-cautious, both in respect of PSCs and sole traders, with the result that a number of legitimately self-employed freelancers will be put into the PAYE regime and have difficulty recovering their business costs.

19. **Q9. What action should be taken if the worker or PSC is knowingly receiving income that has not had the right amount of tax and NICs deducted?**
20. This question seems somewhat nugatory, since the consultation precedes a likely transfer of tax liability to engagers in the case of non-compliance with IR35, and the liability for non-payment of PAYE in any other circumstances already rests with the engager.
21. **Q13. Is there anything else HMRC could do to ease the implementation for businesses, and can you provide evidence of how this would ease implementation or administration for businesses?**
22. If the intermediary rules now in force in the public sector are extended to the private sector it will be essential that clear information and guidance is conveyed to businesses, with as much notice as possible. Companies should also be reminded that they can still use their knowledge and experience to assess employment status, and should not be overly-dependent on checking tools like CEST.
23. **Q14. Overall, what are your views on this option? Would it be a proportionate response to the issue? (Encouraging or requiring businesses to secure their labour supply chains)**
24. Generally our members are directly engaged by clients, with few intermediaries or other parties in the supply chain, so this option would have little effect in the industries where they work.
25. **Q25. Overall, what are your views on this option? Would it be a proportionate response to the issue? (Additional record keeping)**
26. Given the short labour supply chain in film, TV, theatres, and events, it would be possible for engagers to gather and store the kind of information listed in the consultation, and it is easy to see how this would aid HMRC investigations. However, the tradition in these industries is that engagers have a short-lived relationship with workers providing services, and the administrative process is often confined to dealing with invoices for work done, so this option could prove to be burdensome for businesses, particularly the significant number of SMEs and micro-enterprises in the sector.
27. In conclusion, we believe that there is no serious problem with IR35 compliance in industries where our freelance members work, and the extension of the public sector changes to the private sector could lead to many legitimate sole traders and PSCs being wrongly categorised as employees, causing significant disruption and cost to their individual business models. The film, TV, theatre, and events industries in the UK are now based on having easy access to a self-employed workforce, and the proposed changes could have an unwelcome economic impact on the sector.
28. For further information about Prospect's views in this consultation please contact Tony Lennon, Freelance and Research Officer, BECTU Sector at tlennon@bectu.org.uk