

## **APPENDIX 4 - PROTOCOL FOR OFF PAYROLL WORKING (IR35)**

### **Version 1**

<b>Definitions</b>	
Off Payroll Working	Payment for services provided by an individual by any means other than through the corporate payroll system
Employment Status Service (ESS)	HMRC tool to determine the employment/IR35 status for the purposes of PAYE tax and National Insurance
Employees	Contract of service relationship as determined by the ESS Tool
HMRC	Her Majesty's Revenue and Customs
Self Employed	Contract for service relationship as determined by the ESS Tool
Office Holders	Appointment to a statutory position that will last beyond the tenure of one person
PAYE	Pay as you Earn
IR35	Legislation to ensure the appropriate payment of PAYE tax and National Insurance for engagements through third parties
Personal Service Company	HMRC do not provide a definition for this term but it can be taken to mean a company that sells the work of an individual or group of individuals, and which is owned and operated by that individual or group of individuals

### **1. Background**

- 1.1 This protocol describes the procedure to be followed when engaging an individual to ensure that the Council remains compliant with HMRC regulations and guidance in relation to employment/IR35 status.
- 1.2 Before a decision is taken to engage a third party, services should ensure that all options are considered and explored so that the most appropriate solution is identified. This would include determining whether either a solution could be provided in-house within existing resources or by establishment of new positions where this is

appropriate. Other alternatives may include the appointment of agency workers on a short term basis. Advice can be sought from Strategic HR as required.

- 1.3 It should be noted that the Council's recruitment policy must be followed for appointments to established posts. Advice can be sought from Strategic HR as required.
- 1.4 Where it is deemed that recruitment is not the appropriate way of engaging a person then it becomes a procurement matter. Where this is the case and the value of work is expected to be more than £25,000, advice must be sought from Corporate Commissioning and Procurement to ensure all procurement requirements are met prior to proceeding any further.
- 1.5 As it will not always be known at the beginning of a procurement exercise if the delivery of the service(s) will result in the engagement of an individual, the procedure at section 4 includes the procurement stages which must be followed.
- 1.6 Whenever an individual is engaged to undertake work it is necessary to ascertain the employment status of that individual or, if the engagement is through an intermediary such as a personal service company, to determine whether IR35 rules apply.
- 1.7 IR35 rules (often known as off payroll rules or intermediaries legislation) ensure that individuals who work through their own company pay broadly equivalent taxes as employees.
- 1.8 Prior to 6<sup>th</sup> April 2017, where an organisation engaged an individual through an intermediary, such as a Personal Service Company or a limited company, the intermediary would be responsible for determining whether IR35 rules applied and where this was the case deduct tax and National Insurance accordingly.
- 1.9 From 6<sup>th</sup> April 2017, where a public sector body enters into such an arrangement, it must determine whether IR35 rules apply and where the rules do apply, calculate, deduct and report PAYE to HMRC. Where the public sector body engages an individual through an agency and IR35 rules apply, the agency will be responsible for the PAYE calculation, deduction and reporting. However, it is the public sector body which must determine whether IR35 rules apply and notify the agency accordingly.
- 1.10 HMRC regularly inspect the records of organisations and has the power to impose substantial penalties and require the repayment of lost revenues with interest for failure to comply with regulations and guidance in relation to employment status and IR35. During an inspection HMRC will wish to interview officers responsible for engaging individuals and will expect them to be able to fully justify decisions on employment/IR35 status.

1.11 Some of the factors which HMRC use to determine employment/IR35 status are:

- Control – where, when and how the work is done
- Personal Service – can the worker send a substitute
- Equipment – does the worker supply equipment
- Economic Reality – is the worker responsible for the success or failure of their business
- Mutuality of Obligation – is there an obligation to use an individual on a committed regular basis and is there an obligation on the individual to provide committed and continuous service
- Length of Engagement – longer engagements tend to point toward employment

This is by no means an exhaustive list and no single factor will determine employment/IR35 status.

## **2. Scope & Responsibilities**

2.1 The Council requires that this protocol is followed for all engagements where the Council's recruitment policy does not apply to ensure that all corporate and legal requirements are considered and risks identified and managed appropriately. This includes the engagement of:

- Office Holders, (see section 3 for further details)
- Self Employed Workers, (see section 4 for further details)
- Individuals through an intermediary such as a Personal Service Company (PSC), limited company, partnership or other individual, (see section 4 for further details)
- Other Workers, (see section 4 for further details)

2.2 This protocol does not apply for engagements via an employment agency. In these circumstances see the document "Procedure for the Engagement of Agency Workers and Appointment of Interims" held by Strategic HR.

2.3 This protocol does not detail all of the checks which must be carried out when engaging an individual as these can vary depending on the circumstances. The engager must ensure that checks such as the right to work in the UK, DBS, identity etc. are carried out as appropriate to the engagement. Strategic HR can be contacted for more detail as required.

2.4 The legislation equally applies to small value, ad-hoc pieces of work or service provision undertaken on behalf of the Council, which would not normally follow a formal process due to its value.

### **3. Office Holders**

- 3.1 There is no statutory definition of the word 'office'. It has been judicially defined as a 'permanent, substantive position which had an existence independent from the person who filled it, which went on and was filled in succession by successive holders.' (Rowlatt J in *Great Western Railway Company v Bater* 8TC231).
- 3.2 An office may be created by a charter, statute, or other document which is, or forms part of, the constitution of an organisation or which governs its operation. It is a separate and independent position to which duties are attached; it does not owe its existence to the incumbent or the discretion of an organisation. An office holder is not an employee.
- 3.3 Within the Council, office holders include the following:
- Elected Members
  - Chair of the Local Safeguarding Board (LSCB) (Children's Act 2004)
  - Members of Fostering and Adoption Panels (Fostering Services (England) Regulations 2007) (Adoption and Children's Act 2002)
  - School Improvement Partners (The Education (Schools Improvement Partners) England Regulations 2007)
  - Coroners (Coroners Act 1988)
  - Best Interest Assessors (The Mental Capacity Regulations 2008)
- 3.4 There may be other examples of office holders which arise over time due to statutory, regulatory or other changes. In order to establish whether or not a position holds the status of 'office holder', this will be determined by reference to the relevant legislation, regulations or other documentation and HMRC guidance. Service Directors must seek advice from Payroll and Human Resources in relation to any new positions which they consider may fall within the definition of an 'office holder'.
- 3.5 Any fees payable to office holders shall be subject to PAYE and NIC and deductions in this respect will be made via the Council's payroll. Payment of expenses should be in accordance with Council policy on expense payments to employees. All expenses must be properly receipted and will be assessed for PAYE. This paragraph applies whether the office holder is paid direct or through an intermediary.

### **4. Procedure for Engaging Individuals other than via a Recruitment Process**

- 4.1 Seek approval for the engagement from Service Director in writing.
- 4.2 In line with the Contract Procedure Rules, competitive quotations or tenders are to be obtained using the approved electronic e-tendering

system(s). Corporate Commissioning and Procurement can be contacted for advice if required.

- 4.3 The following wording must be contained within the Quotation or tender documentation to ensure suppliers know what they are bidding for and on what basis they will be paid. *“The Council reserves the right to carry out the Employment Service Status test to determine your status in accordance with HMRC guidance and deduct and make payment of tax and NI contributions accordingly.”*
- 4.4 In order to assess PAYE status each bidder must complete a “PAYE Status Questionnaire” which can be found at the end of this protocol. The answers provided on the questionnaire are for information purposes only and will not form any part of the evaluation process.
- 4.5 Terms and Conditions must be included with the quotation documentation and must include the following wording. *“The Council reserves the right in relation to the Contractor to carry out H.M. Revenue and Customs’ (“HMRC”) PAYE status test and, in accordance with HMRC Guidance, to deduct from the Price and pay to HMRC such sums in respect of tax and National Insurance as it may be required to deduct and pay in accordance with that guidance.”* Standard Terms and Conditions are available and are held within the NEPO Portal, the Council’s electronic tendering system. Where the standard Terms and Conditions are not appropriate, you must consult with Corporate Commissioning and Procurement and/or Legal.
- 4.6 Following evaluation of quotations or tenders if the preferred bidder is an individual, whether supplied by an intermediary or not then approval to appoint must be granted by Strategic Director, Corporate Services and Governance and the Service’s Business Partner in Corporate Finance using form HR141. A copy of form HR 141 is attached to this protocol.
- 4.7 Once approval has been granted, as outlined in 4.6 above, issue an Intention to Award letter/notification which must include the following words *“The Council may carry out the Employment Status Service (ESS) check to determine PAYE status in accordance with HMRC guidance and it shall be a condition of your contract that the Council may deduct and make payment of tax and NI contributions if required to do so in accordance with the outcome of that test.”* A standard template Intention to Award letter is obtainable from Corporate Commissioning and Procurement upon request, together with advice on how to adapt the template for this purpose.
- 4.8 Prior to awarding the contract or engaging the individual you must arrange to meet with a member of Payroll and HR Support who will determine whether an ESS check is required. The Payroll and HR Support officer will record their decision on form HR141. Where an ESS check is required, it is the result of the check that determines the

employment /IR35 status. It is not for Officers to make judgement on the result.

- 4.9 Where Payroll and HR Support have determined that an ESS check is required, use of the ESS tool is compulsory when engaging an individual whether that individual is appointed directly or through a third party such as those described above. The ESS tool must be completed by the engaging officer in the presence of the officer from Payroll and HR Support. There must be no reliance on ESS results provided by the individual or other third party. Any wilful non-compliance may result in disciplinary action being taken.
- 4.10 If the ESS tool determines that the Council must apply PAYE it will state either "The engagement should be classed as employed for tax purposes" or "The intermediaries legislation applies to this engagement." Issue an Award letter stating the outcome of the ESS check and that tax and NI contributions will be deducted at source. Go to section 5 of this protocol.
- 4.11 If ESS determines that the Council does not need to operate PAYE it will state either "This engagement should be classed as self-employed for tax purposes" or "The intermediaries legislation does not apply to this engagement". Issue an Award letter stating the outcome of the ESS check and that tax and NI contributions will not be deducted. Go to section 6 of this protocol.
- 4.12 On occasion the ESS tool may state "Unable to determine the tax status of this engagement". In these circumstances Payroll and HR Support will work with you to determine the appropriate outcome.
- 4.13 The preferred bidder may not change their pricing as a result of the outcome from the ESS check. Contact Corporate Procurement and Commissioning for advice if this situation occurs.
- 4.14 If Payroll and HR Support determine that no ESS check is required issue an award letter and go to section 6 of this protocol.

## **5. Payroll Procedure**

- 5.1 Payroll will require a copy of the HR141 approval form, the Employment Status Service results including the questions and answers, the first invoice from the worker, and the covering HR142 form. A copy of form HR142 is attached to this protocol. In addition if the worker is claiming any travel or expenses payment, receipts will be required.

The invoice should be itemised to show:

- Payment for Services
- Expenses

- Travel – including home to work travel

Paperwork can be submitted via post or email – email @ CS Paymaster Global

- 5.2 Workers will receive a payslip to confirm payment and the breakdown of statutory deductions. Pay date is 19<sup>th</sup> of each month- except in cases where 19<sup>th</sup> falls on a weekend when pay day will be the Friday before. Payroll will require invoices no later than the 9<sup>th</sup> of the month in order for payment to be received in the next available pay date.

## **6. Exchequer Procedure**

- 6.1 If the process deems that an individual is self-employed and IR35 does not apply then all invoices for payment should be sent to Exchequer Services, Corporate Resources.
- 6.2 Invoices can be submitted via post or email (CS Creditor Invoices).
- 6.3 Before approving the payment in Agresso the budget holder must ensure that the proper procedure has been followed and confirm that IR35 does not apply to this engagement.
- 6.4 Payments will then be made via the Council's Financial System and a remittance advice will be sent to the contractor.

## **7 Ongoing Reviews**

- 7.1 Payroll and HR Support must be contacted if the engagement is extended beyond its original term to determine whether a further ESS check is required.
- 7.2 Each contract should be regularly reassessed by the engaging service to ensure that ongoing work is in accordance with the original contract. Any variation will require that a further ESS check is carried out with a representative from Payroll and HR Support.

## **8 Status Enquiries**

- 8.1 The Council must inform the intermediary with whom they have a contract to provide services that the contract falls within the IR35 rules or that it does not. This should be included in the contract.
- 8.2 If the intermediary asks how the IR35 determination has been reached, the Council Officer responsible for the engagement must answer such an enquiry within 31 days of receiving the request. Failure to comply may result in the Council becoming responsible for the PAYE tax and NIC.

## **9 Data Collection and Record Keeping**

- 9.1 It is essential that services keep full records including forms HR 141 / HR 142 and ESS evaluation forms which can be used as evidence during an HMRC inspection. Records must be kept for a minimum of the previous 6 years plus the current year.



## **PAYE STATUS QUESTIONNAIRE**

Whenever an individual is engaged to undertake work it is necessary to ascertain the employment status of that individual. The individual may be engaged as a sole trader or a self-employed person and may not have any employment rights. However, this does not necessarily mean that they fall outside the scope of PAYE tax and national insurance. There may still be a requirement to deduct tax and national insurance contributions from payments made.

Tax legislation also exists in relation to the engagement of individuals through their own company. This is known as IR35 legislation (sometimes called intermediaries' legislation or off payroll working) and it ensures that individuals engaged through an intermediary pay taxes similar to employees, where they would be employed were it not for the company or other intermediary that they work through.

The intermediary can be:

- Your own limited company
- A service or personal company
- A partnership

The Council reserves the right to carry out the Employment Service Status test to determine your status in accordance with HMRC guidance and deduct and make payment of tax and National Insurance contributions accordingly.

In order to ensure compliance with Intermediaries legislation, it is necessary for the Council to fully understand the circumstances in which the work specified in the tender document will be carried out. Please complete the following questions accordingly. These questions are asked for information purposes only and will not form any part of the evaluation process.

No	Question	Response
1	Will you be carrying out the work as a sole trader/self-employed person (if you indicate "Yes" no further questions need to be answered)	Yes <input type="checkbox"/> No <input type="checkbox"/>
2	This Section should be completed if any part of the work will be carried out by the organisation bidding for the work	
2 (a)	<p>If the organisation is a company (not a partnership): In respect of any individual providing work through the company:</p> <p>i. does the individual have beneficial ownership of, or the ability to control, directly or through the medium of other companies or by any other indirect means, more than 5% of the ordinary share capital of the company; or</p> <p>ii. does the individual have possession of, or entitlement to acquire, rights entitling the holder to receive more than 5% of any distributions that may be made by the company; or</p> <p>iii. where the company is a close company, does the individual have possession of, or entitlement to acquire, rights that would in the event of the winding up of the company, or in any other circumstances, entitle the holder to receive more than 5% of the assets that would then be available for distribution among the participators?</p>	<p>Yes <input type="checkbox"/> No <input type="checkbox"/></p> <p>Yes <input type="checkbox"/> No <input type="checkbox"/></p> <p>Yes <input type="checkbox"/> No <input type="checkbox"/></p>
2 (b)	<p>If the organisation is a partnership: If any individual is providing the work through a partnership then in relation to any payment or benefit received or receivable by the worker as a member of the partnership:</p> <p>i. is that worker alone or with one or more relatives, entitled to 60% or more of the profits of the partnership; or</p> <p>ii. do most of the profits of the partnership concerned derive from the provision of services under engagements a) to a single client or b) to a single client together with associates of that client to which Part 2, Chapter 8 of the Income Tax (Earnings and Pensions) Act 2003 applies; or</p> <p>iii. under the profit sharing arrangements, is the income of any of the partners based on the amount of income generated by that partner by the provision of services under engagements to which Part 2, Chapter 8 of the Income Tax (Earnings and Pensions) Act 2003 applies.</p>	<p>Yes <input type="checkbox"/> No <input type="checkbox"/></p> <p>Yes <input type="checkbox"/> No <input type="checkbox"/></p> <p>Yes <input type="checkbox"/> No <input type="checkbox"/></p>

3	<b>This section should be completed where some or all of the work is sub-contracted by the bidder.</b>
	Name each sub-contractor carrying out the work
Bidders must now complete section 3.1 A separate form must be completed for each sub-contractor.	

No	Question	Response
3.1 (a)	Is the sub-contractor a sole trader/self-employed person (if yes no further questions need to be answered)	Yes <input type="checkbox"/> No <input type="checkbox"/>
3.1 (b)	<p>If the sub-contractor is a company (not a partnership): In respect of any individual providing work through the company:</p> <p>i. does the individual have beneficial ownership of, or the ability to control, directly or through the medium of other companies or by any other indirect means, more than 5% of the ordinary share capital of the company; or</p> <p>ii. does the individual have possession of, or entitlement to acquire, rights entitling the holder to receive more than 5% of any distributions that may be made by the company; or</p> <p>iii. where the company is a close company, does the individual have possession of, or entitlement to acquire, rights that would in the event of the winding up of the company, or in any other circumstances, entitle the holder to receive more than 5% of the assets that would then be available for distribution among the participators?</p>	<p>Yes <input type="checkbox"/> No <input type="checkbox"/></p> <p>Yes <input type="checkbox"/> No <input type="checkbox"/></p> <p>Yes <input type="checkbox"/> No <input type="checkbox"/></p>
3.1 (c)	<p>If the sub-contractor is a partnership: If any individual is providing the work through a partnership then in relation to any payment or benefit received or receivable by the worker as a member of the partnership:</p> <p>i. is that worker alone or with one or more relatives, entitled to 60% or more of the profits of the partnership; or</p> <p>ii. do most of the profits of the partnership concerned derive from the provision of services under engagements a) to a single client or b) to a single client together with associates of that client to which Part 2, Chapter 8 of the Income Tax (Earnings and Pensions) Act 2003 applies; or</p> <p>iii. under the profit sharing arrangements, is the income of any of the partners based on the amount of income generated by that partner by the provision of services under engagements to which Part 2, Chapter 8 of the Income Tax (Earnings and Pensions) Act 2003 applies.</p>	<p>Yes <input type="checkbox"/> No <input type="checkbox"/></p> <p>Yes <input type="checkbox"/> No <input type="checkbox"/></p> <p>Yes <input type="checkbox"/> No <input type="checkbox"/></p>

4	If any arrangement exists other than those described in 1 – 3 above please provide full details below:
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**Declaration**

I/We confirm that the above information is correct and accurate

Signed By	
Name(s)	
Position	
For and on Behalf of	[Insert Organisation Name]

**HR 141: Request for approval to engage an Individual to carry out a service**

<b>Group</b>	
<b>Service</b>	
<b>Function</b>	
<b>Engaging Manager</b>	
<b>Nature of service to be provided</b>	
<b>Reason</b>	
<b>Budget/Estimated Cost</b>	
<b>Estimated Duration of work</b>	

I certify that in house service provision has been fully explored and the service required cannot be carried out by any in house provider.

Signature of Engaging Manager.....

<b>Service Director Approval</b>		<b>Date</b>	
<b>Strategic Director, Corporate Services &amp; Governance Approval</b>		<b>Date</b>	
<b>Corporate Finance Business Partner Approval</b>		<b>Date</b>	

If approved please refer to appendix 4 of the 'Protocol for Procurement of all Services' document which details the procedure to be followed for payment to the individual engaged to carry out the work

**To be completed by Payroll and HR Support**

Based on the information detailed on the PAYE Questionnaire, does an Employment Status Service Check (ESS) need to be completed for this engagement?

Yes ☐ No ☐

Name of Payroll and HR Support Officer.....

Date.....

### HR 142 - Payment authorisation for Individuals engaged to carry out a service

Engaging Manager: \_\_\_\_\_ Group & Service: \_\_\_\_\_  
 Extension Number: \_\_\_\_\_

Is this Initial payment?	Yes	Attached to this form must be a copy of the approval form HR 141, ESS tool results - including questions and answers, Invoice for the work along with any other evidence for payment i.e. receipts etc.
	No	Attached to this form must be a copy of the invoice for work along with any other evidence for payment i.e. receipts etc.

Please note invoices must be clearly itemised to show payment for services, expenses and travel  
 - including home to work travel. All receipts for travel and expenses will be required.  
 Failure to submit all relevant paperwork will result in a delay of payment

Contractor Details										
Name										
Nature of service										
Address (including post code)										
Contact Number										
Email Address										
BACS Payment details	Account Name									
	Account Number									
	Sort Code			-			-			
NI Number										
Date of Birth										
Is employment deemed or does IR35 apply in this case?	<input type="checkbox"/> Yes Please forward to Payroll for payment along with the relevant invoice and any other necessary paperwork- email to CS Paymaster Global									
	<input type="checkbox"/> No Please forward to Exchequer services for payment along with the relevant invoice and any other necessary paperwork - email to CS Creditor Invoices									
Cost of service										
Cost of expenses										
Other payments										
Total Cost										
Cost code										
Engaging officer details	Name					Signature				