

Consultants and Contractors through Agencies

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Note this page deals with the situation where you are engaging a consultant or contractor through an agency.

If you are directly engaging a consultant who is an individual or sole trader, then you should refer to the guidance on Consultancies.

If you are engaging directly with a limited company (that is not an employment agency) that sells the work of an individual contractor, and which is owned and operated by that individual (also known as PSCs) you should refer to the guidance on Contractors, PSCs and IR35.

Background

From time to time units across the University will need to engage with an agency to supply an individual who is not a member of core staff to undertake a specific role or project.

The engaging unit must raise a purchase requisition for each piece of work.

Taxation

Where an individual is supplied through Reed Employment Services, we do not need to consider taxation.

For any other agency, the unit must use the HM Revenue and Customs 'Check Employment Status for Tax' tool (CEST - formerly the ESS) available from the HMRC website to assess the role. You should assume that the individual is providing their services through a limited company. This interactive tool poses questions which will determine whether the PSC falls inside or outside the "Intermediaries Legislation". This must be done before approaching the agency.

You should save a pdf copy of the outcome, and forward it for review to Finance-VAT@open.ac.uk, enclosing sufficient supporting information and/or the contract. Units must answer the CEST questions factually, and must resist the temptation to provide answers that might be considered favourable to attracting a particular candidate to fill the role.

Where a candidate is filling an interim or fixed term position, the CEST outcome will be that the contractor would fall within the Intermediaries Legislation.

What next?

If the confirmed CEST outcome is that a PSC is outside the Intermediaries Legislation, then the unit should send the reviewed CEST to the procurement team with the purchase requisition. The agency may wish to undertake further checks, perhaps using a third party firm to verify that the role is outside the scope of the Intermediaries Legislation.

If the confirmed CEST outcome is that a PSC is inside the Intermediaries Legislation, then the agency must find a candidate who is happy to be subject to PAYE, and the agency must confirm in writing that they will operate PAYE on all payments to the individual.

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Contractors, PSCs and IR35

Contractors, PSCs and IR35

Contractors and IR35

Note this page deals with the situation where you are engaging directly with a limited company that sells the work of an individual contractor, and which is owned and operated by that individual. These companies are known as PSCs. If you are engaging a consultant who is an individual or sole trader, then you should refer to the guidance on "Consultancies"

Background

From time to time units across the University will need to engage with a PSC to provide an individual contractor who is not a member of core staff to undertake a specific project. The engaging unit must raise a Service Agreement for each piece of work.

Taxation

The unit must use the HMRC 'Check Employment Status for Tax' tool (CEST - formerly the ESS) available from the HMRC website (<https://www.tax.service.gov.uk/check-employment-status-for-tax/setup>) to assess all engagements with PSCs. This interactive tool poses questions which will determine whether the PSC falls inside or outside the "Intermediaries Legislation".

You should save a pdf copy of the outcome, and forward it to Finance-VAT@open.ac.uk by email together with the contract, or other helpful supporting information. The VAT team will aim to review your completed CEST within 48 hours. If your requirement is more urgent, then please contact the team directly. Units must answer the CEST questions factually, and must resist the temptation to provide answers that might be considered favourable to the requirements of a particular PSC.

What next?

If the CEST outcome is that a PSC is **outside** the Intermediaries Legislation, then the unit should send the reviewed CEST, together with the quotes and/or SSJ for procurement compliance review, to the procurement team with the purchase requisition. The procurement and payment process will continue in the normal way through OpUs and Accounts Payable respectively.

If the CEST outcome is that a PSC is **inside** the Intermediaries Legislation, then the OU must operate PAYE on all payments to the PSC. We do this by using a "Dummy DEVCORN" contract.

Raising the Dummy DEVCORN Contract

The unit must raise a contract using the DEVCORN systems. Units DO NOT issue the contract to the PSC. Instead the unit must note the DEVCORN number on the Service Agreement, and complete the OU PAYMENT DETAILS sheet which is attached to the Service Agreement – this collects details of the supplier's Name, NI Number and DoB. The Unit must send the Service Agreement, to the Procurement team.

Right to work

Under current legislation, Units are not obliged to ensure that any contract issued to a PSC includes a warranty that the individual contractor has the right to live and work in the UK, to satisfy the requirements of UK Visas and Immigration. This

obligation currently falls to the PSC itself, but this may change in the future. For further information please email finance-staff-payments@open.ac.uk.

Getting it wrong

If HMRC subsequently rule that the University has acted incorrectly in relation to the taxation of payments to PSCs then the University will be liable for unpaid tax, and may also be subject to a financial penalty. The underpaid tax and penalty could be significant, up to 150% of the fees paid, and will be passed on to the unit. If you require further information, please email: finance-staff-payments@open.ac.uk

Consultants Payroll

The consultants' payroll is run monthly with payment being made directly into consultants' bank accounts. A full list of this year's pay dates and input close dates is available from the Schedules menu of this website. Payment can only be made when the procurement team have submitted the Services Agreement to Staff Payments office and payments have been released on the DEVCON system by the Unit.

VAT

Where a PSC within the Intermediaries Legislation charges VAT, you should enter the VAT element as an expense on the DEVCON contract. This will ensure that the Staff Payments Office do not operate PAYE on the VAT element.

Consultancy Payroll Schedule

Please see this schedule via the 'Schedules' section on this site.

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IR35, PSCs - FAQs

FAQs - Consultants and Contractors, IR35, PSCs and Off Payroll Working

- 1 What are Consultants and Contractors?
- 2 What is a PSC?
- 3 What is IR35?
- 4 What is the CEST (formerly ESS)?
- 5 When do I need to complete the CEST?
- 6 When do I NOT need to complete the CEST?
- 7 Can I "re-use" an CEST?
- 8 What about overseas suppliers?
- 9 Who reviews the CEST?
- 10 What happens to the completed CEST?
- 11 Will the OU operate PAYE on all Consultancy/Contractor contracts?
- 12 How do I know if a Contractor via an agency is a PSC?
- 13 How does the decision impact on the agency's recruitment process?
- 14 What happens if the Contractor or agency disagrees with the CEST decision?
- 15 What is a Dummy Devcorn contract?
- 16 What about VAT?
- 17 When will my Contractor get paid?
- 18 Do I need to complete an CEST for a Limited Engagement Worker Contract (LEW)?
- 19 Do I issue the Devcorn Contract to the individual engaged on an LEW?
- 20 What if the University gets it wrong?
- 21 What about Right to Work?

1 What are Consultants and Contractors?

Consultants and Contractors are external workers who are not members of core staff and are engaged by the University to undertake a specific project. At the OU, we use the term Consultant to mean: an individual or sole trader. We use the term Contractor, to mean: an individual providing their services through their own limited company, also known as a personal service company (PSC).

2 What is a PSC?

A PSC is a "personal service company". This means a limited company that sells the work of an individual or group of individuals, and the individual(s), or their relatives, own some or all of the company's shares. PSCs are often called something like "John Smith Consultancy Ltd" but some have more obscure names. You can check whether the Contractor providing the service owns the company you are engaging through the excellent Companies House website <https://www.gov.uk/get-information-about-a-company>.

Large companies or organisations which have a number of directors and employees will NOT be PSCs.

3 What is IR35?

IR35 is a piece of tax legislation, which applies to Contractors providing their services through PSCs. It is also known as the intermediaries or Off-Payroll Working legislation. Where a PSC is providing services to The University, IR35 requires that The University must use HMRC's 'Check Employment Status for Tax' tool (CEST - formerly the ESS) to decide whether to operate payroll taxes on the payments to the PSC.

4 What is the CEST?

The CEST (formerly the ESS) is the HMRC 'Check Employment Status for Tax' questionnaire. It is used to decide whether a business needs to operate payroll taxes (PAYE) on payments to consultants and contractors. You can find it here: <https://www.tax.service.gov.uk/check-employment-status-for-tax/setup>

5 When do I need to complete the CEST?

You need to complete the CEST if you are buying in the services of a Consultant or Contractor ie a sole trader or an individual providing their services through a PSC. You also need to complete the CEST if you wish to recruit an individual through an employment agency other than Reed. You should complete the CEST **before** you engage a contractor or approach an agency to provide a contractor.

6 When do I NOT need to complete the CEST?

You do NOT need to complete the CEST if:

- you are buying goods. you are engaging a Consultant and they agree that their payments are subject to PAYE.
- you are buying services directly from a large company with many employees, or the Finance Office have previously confirmed that the company you are dealing with is not a PSC

7 Can I "re-use" an CEST?

Yes, you can re-use the CEST completed for a Consultant or Contractor if the work being done is identical to a previous contract.

8 What about overseas suppliers?

You will need to complete the CEST for all consultancy work done in the UK by a PSC, even if the PSC is not a UK company. If you are engaging a Contractor or Consultant who will do the work outside the UK, then you should follow the HR Overseas Engagement Policy.

9 Who reviews the CEST?

Staff Payments review the CEST for all Consultants, you must send the ESS to Finance-staff-payments@open.ac.uk. For Contractors, you must send the CEST to Finance-VAT@open.ac.uk where Mairead O'Connor or Harriet Latham will review it. If your request is urgent please Skype us.

10 What happens to the completed CEST?

The CEST is shared with the Consultant, Contractor or agency prior to engagement. You must attach the completed and reviewed CEST to any Procurement requisitions that are raised to agencies providing contractors.

11 Will the OU operate PAYE on all consultancy/contractor contracts?

The default position is that all consultancy contracts are subject to PAYE. If the Consultant wishes to be treated as self-employed, you must complete the CEST. If the outcome confirms that the consultant is self-employed, then the payments can be made gross by Staff Payments Office. For Contractors (PSCs), The OU will only operate PAYE on those contracts where the CEST states that the contractor is inside the Intermediaries' legislation.

12 How do I know if a contractor via an agency is a PSC?

You should always assess the role using the CEST before approaching the agency, making the assumption that the Contractor is using a PSC. The agency will then advise accordingly.

13 How does the decision impact on the agency's recruitment process?

If the CEST shows the contract to be in scope, then the agency must find a Contractor happy to be subject to PAYE, and the agency will then operate PAYE on their payments.

If the CEST shows the contract to be outside the scope, the agency may also require the Contractor to obtain an independent review, in order to provide insurance against enquiries from HMRC. For example Harvey Nash use a company called Qdos. This process is for the benefit of the agency, and is arranged by the agency, but it may delay the recruitment process.

14 What happens if the contractor or agency disagrees with the CEST decision?

Where the OU has decided that a contract is in scope, this decision is final. The Finance Office team are happy to discuss the outcome with Contractors if that is helpful.

15 What is a Dummy Devcorn contract?

The Dummy Devcorn contract is a mechanism to enter Contractors' payments which are subject to PAYE onto the OU's payroll system. The Dummy Devcorn contract is NOT issued to the Contractor. Instead, the Contractor will be issued with a Services Agreement by Procurement, once completed by the Unit and sent to procurement@open.ac.uk, together with the quotes and/or an SSJ for procurement compliance review. The Services Agreement will set out the work to be done and explain that the OU will operate PAYE if required to do so.

The Dummy Devcorn contract is also use for LEW contracts (see 19 below).

16 What about VAT?

If a Contractor is registered for VAT, their company must charge VAT even if the payments are within IR35. To deal with this, you must enter the net fee (excluding VAT) as the fee payment, which will be subject to PAYE. The VAT element will be an expense.

If a Consultant is VAT registered, and their payments are subject to PAYE, the Consultant must NOT charge VAT – this is because the payments are Outside the Scope of VAT. If the Consultant issues an invoice with VAT, you should ask them to re-issue it without VAT.

Note that an individual Consultant is able to register for VAT – this doesn't alter their employment status.

17 When will my Contractor get paid?

If your Contractor is outside the scope of IR35, your Contractor will get paid in the normal way through accounts payable. If your Contractor is inside the scope of IR35 and you are using the Dummy Devcorn route, your Contractor will get paid in line with the consultancy payroll dates.

18 Do I need to complete a CEST for a Limited Engagement Worker Contract (LEW)?

A Limited Engagement Worker Contract or LEW is used by the University when engaging individuals supplied by an agency directly. In most cases the engager should have completed the CEST at the outset before approaching the agency, and the LEW route will only be appropriate where the role is inside IR35. There is no need to re-do the CEST once the LEW is drawn up.

19 Do I issue the Devcorn Contract to the individual engaged on an LEW?

No – you will issue the LEW contract only. The dummy Devcorn contract will only be used to enter the payments onto the payroll system as described at 15 above.

20 What if the University gets it wrong?

If HMRC subsequently rule that the University has acted incorrectly in relation to the taxation of payments to PSCs then the University will be liable for unpaid tax, and may also be subject to a financial penalty. The underpaid tax and penalty could be significant, up to 150% of the fees paid, and will be passed on to the unit.

Additionally, deliberate mis-description of a payment, directly or via an agency, to an individual or their personal service company (PSC) as being payable without deduction of PAYE, knowing that the individual will use the gross payment to evade income tax and NIC resulting in a loss of revenue to HMRC, is considered to be facilitation of tax evasion, and is a criminal offence in accordance with Part 3 of The Criminal Finances Act 2017.

21 What about Right to Work?

Where we engage a Contractor through a PSC, the responsibility for Right to Work checks falls to the PSC. However for Consultancy contracts, that responsibility falls to the University. Units should ensure that any contract issued to a new consultant includes a warranty that they have the right to live and work in the UK, to satisfy the requirements of UK Visas and Immigration. Staff Payments Office will then update the acceptance flag on DEVCON and update the Equal Opportunities data. For further information please email finance-staff-payments@open.ac.uk

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