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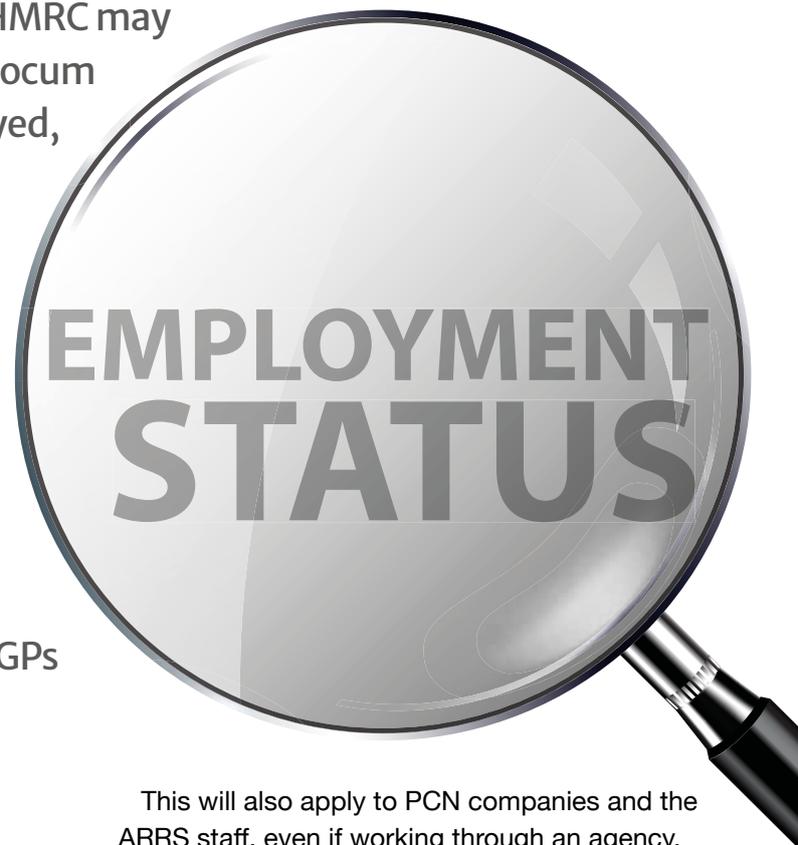
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EMPLOYMENT STATUS IN PRIMARY CARE

In a bid to clamp down on tax avoidance, HMRC may challenge the status of sessional GPs and locum doctors who are registered as self-employed, if their services provided to practices are used as if they were employees.

This means the practice will have to pay employer National Insurance contributions (NICs), as well as deducting the employee NICs and PAYE from the payment to the locum.

This guide gives advice to GPs and practice managers on how to ensure that the employment status of their sessional GPs and locums stands up to scrutiny.



What do practices have to do?

The responsibility for deciding whether a sessional GP or locum is genuinely self-employed or should be treated as an employee rests with the practice.

Other healthcare professionals who provide services to the practice, for example counsellors, nurses, pharmacists and paramedics, may also be affected, as could workers such as cleaners. The GP partners themselves are not affected.

This will also apply to PCN companies and the ARRS staff, even if working through an agency.

If the practice determines that the individual should be treated as employed for tax purposes, then a Status Determination Statement (SDS) should be issued. This should state the assessment determined and the reasons for this. The SDS should be given to not only the individual but also any agency the individual may be contracted through.



Sessional GPs working through limited companies

Often sessional GPs and locums provide services to GP practices through their own limited company, also known as a personal service company (PSC). It used to be the case that it was the doctor's responsibility to ensure their employment status was correct. Since the introduction of the off-payroll working legislation for public sector employees on 6 April 2017, the responsibility lies with the practice – whether the doctor operates through a PSC or not.

If a sessional GP or locum using a PSC is deemed by the practice to be employed by the practice, then the practice must deduct 28% minimum from the payment to the doctor (direct

serious financial consequences for the practice, although HMRC should provide a credit in their settlement figure for any self-assessment income tax already paid by the doctor.

In certain circumstances, however, HMRC may direct under regulation 72 of the PAYE regulations 2003 that the liability will fall to the 'employee.' For this to happen the practice must have taken reasonable care to comply with the regulations and acted in good faith and/or the doctor accepted payments knowing they should have been paid as an employee.

It is this possibility that makes due diligence so important in the engagement of sessional doctors. In other words, as long as the practice has taken advice, reasonable care and recorded



or to the PSC) and pay that to HMRC, under the current legislation. This comprises basic rate tax at 20%, plus employee NICs at 8%. The practice must also pay any employer NICs to HMRC.

Sessional GPs supplied by agencies

If the locum is paid by an agency, the practice will need to tell the agency paying the locum that, in their view the off-payroll working rules should apply.

What are the penalties for getting it wrong?

Where a practice engages directly with an individual, there are two possibilities if HMRC, following an enquiry, finds that a self-employed doctor should have been employed. The default position is that the practice will have to pay not only the employer NICs, but also the employee NICs and income tax. HMRC can go back a number of years to recover the tax and NI it considers due. Getting the employment status position wrong can therefore have

its reasons for acting as it did, HMRC may seek recourse from the engaged doctor.

What if a PSC is involved?

In non-public sector cases and where the end user is a small company, which would include PCN companies (as they do not hold the contract), the IR35 rules impose the duty of determination and deemed employment payment calculation on the worker.

But what about general medical practice? GP surgeries are considered as part of the public sector. Schedule 1 of the Finance Act 2017 brings us legislation entitled '*Workers' services provided to public sector through intermediaries*'. This contains its own clauses describing how the responsibility for payment of the PAYE deductions can shift through the supply chain depending upon which organisation or person has or has not met its obligations.

In a standard situation of practice – PSC – locum doctor, it is the practice responsibility to determine the status and, if deemed employed,



deduct tax and NICs. If, however, the locum doctor has provided fraudulent information, the liability can fall to the individual. There are significant responsibilities for practices in this area which should not be taken lightly.

Employed v self-employed explained

The law does not define 'self-employment' or 'employment' so it is the terms and conditions of a particular engagement that determine whether the contract with the sessional GP or locum is one of employment or self-employment.

If the doctor is engaged under 'a contract of service' then they will be an employee and should be paid through the payroll. Only genuine self-employed doctors should be paid

- The other provisions of the, perhaps implied, contract are consistent with it being a contract of service.

Personal service

The first bullet point opposite refers to the provision of personal service. The ability to provide a substitute is therefore frequently included in contracts to circumvent personal service and thus support a self-employed status. Sessional GPs in general practice, nevertheless, are almost certainly not permitted to do this. Part 15 of a standard GMS contract, for instance, provides that a practice agreement with a sub-contractor to provide clinical services MUST prohibit that sub-contractor from sub-



outside the payroll.

The fact that a sessional GP or locum may say they are self-employed or that they have worked previously as a self-employed doctor is not a decisive factor in determining their employment status. The decision must be made on the current terms and conditions of the engagement at the point of the doctor's engagement with the practice, together with consideration of the status indicators used by HMRC.

The engagement will be deemed to be one of employment if:

- There is a mutual obligation for the GP to provide their personal service to the practice and for the practice to provide work.
- The practice must have a sufficient amount of control over what the doctor has to do, where the work is carried out, when the work is done and how the work is carried out. The first three of these may well be obvious from the nature of the work and surgery-based locations, so by far the most important factor is the 'how'.

contracting those services. There is a similar clause in PMS agreements.

Mutuality of obligation

The first bullet point opposite also covers mutuality of obligation (MOO), a term used to test whether there is an obligation on the worker, in this case the locum or sessional GP, to work and an obligation on the other party, in this case the practice, to provide work.

But at what point does MOO have to be considered? Is the criteria based on the time between separate engagements or each time work is offered and accepted? Of course this will turn on the facts, but most doctors in general practice, both the engaging practice GPs and the sessional worker, would probably consider each engagement as a separate ad hoc arrangement to cover a different requirement at a different time, even if close together. Agreement terms should reflect that there is no obligation to offer or accept further engagements outside the agreed appointment.



Possibly the lead case that considered MOO was the House of Lords case of Carmichael, but others continue to test tribunals and courts alike. The case of Hafal v Lane-Angell recently heard by the Employment Appeal Tribunal (link below), illustrates how mutuality of obligation can affect employment status.

Is the absence of mutuality fatal to the establishment of a deemed employment? The majority of court decisions would appear to say 'yes', which makes it all the more surprising that HMRC's online employment status checker described below does not include any questions on the matter.

It is important that practices do not underestimate the importance of MOO in

responsible for the 'how' part of the control issue (exercises their professional clinical judgement without supervision or direction), but otherwise is outside of the practice's organisation. Importantly the contract should mirror the service provided by the worker

An interesting case in the First-tier Tribunal for tax looked closely at whether a TV presenter was caught under the rules in relation to work performed for the BBC and the programme *Loose Women*. They had to determine if there was a hypothetical contract between the individual and the BBC. In this case the individual was seen to be in business on her own and her identity was taken into account, being more connected to *Loose Women* than



determining employment status. Advice should be sought from specialist medical lawyers and accountants.

Contracts – written or implied

There are several issues that should be addressed within a contract to distinguish how the terms and conditions of a particular engagement for a locum or sessional GP differ from those of a salaried GP to maintain a self-employed status.

These issues include mutuality of obligation and the extent of the control the locum or sessional GP has over when, where and how the work is carried out. The tasks that the locum would undertake should also be set out in the contract by way of a schedule of works.

There should, however, be an overall impression given to anyone involved with the practice, including patients, that a salaried GP is part of the team (attends meetings, makes decisions, contributes to the running of the surgery etc) and that a sessional GP is

the BBC. Furthermore, the Upper Tribunal found that the legislation did not apply for the services provided by the PSC. The final decision following the court of appeal, was that all arguments were finely balanced but it did point towards self-employment overall. (*Atholl House Ltd v HMRC* TC02263 29.11.23)

Some practices work with locums and sessional GPs on the basis of implied contracts. Other practices prefer formal written contracts which should be drawn up in conjunction with a specialist medical solicitor.

See the box at the end of this document for links to BMA guidance for locums and sessional GPs, including contracts.

HMRC online employment status checker

HMRC has developed an online employment status checker which practices can use to find out if their locums and sessional GPs should be classed as employed or self-employed for tax purposes.



The terminology used in the status tool can be confusing since it is designed to cover both the situation where a practice pays a doctor directly and where a doctor is providing their services through a PSC.

The status tool assesses a number of aspects including the following:

- The tool asks whether a substitute can be sent if the sessional GP can't attend the session. As described above, this is generally specifically excluded from being permissible by virtue of the practice NHS contract. Check the contract under the specific heading of "sub-contracting of clinical matters."
- Does the practice have the right to exercise control over when, where and how the work is carried on? In practice, the schedule of agreed work and surgery site should determine when and where, but check what controls are in place on the 'how'. Note that the important thing here is not the exercise of control. It is often the case that there is actually no need for a practice to exercise such control, but the key to the test is whether they have the right to do so.
- Is the work paid purely on a time basis, or on the basis of work done?
- Who provides the equipment to carry out the work?
- What financial risk is borne by the locum and his/her company (if he or she is working through a limited company)?
- To what extent is the locum part of the practice's organisation?
- Does the locum have his or her own business structure (characterised by medical defence cover, need to promote and advertise)?

Using the online checker

The online checker takes practices through a series of questions and it is essential that these are answered accurately.

Anyone on the practice team can use the online checker. However, an administrator may answer the questions raised during the process very differently from the practice manager, a senior GP or the GP locum themselves.

Consistency is the answer and ideally the practice manager and the locum or sessional GP should work through the checker together. However, it is ultimately the practice that should be comfortable that the responses are accurate.

Throughout the process the person using the online checker should link their answers back to the contract – either written or implied through other supporting evidence of what actually happens in practice.

The online checker is anonymous and won't store any information you enter or the result given. Results can be printed out for your own records.

Make a note of any questions where there is uncertainty over the answer. If, having completed the online checker, the answer is that the doctor should be treated as an employee, it may be worth revisiting the questions where there was uncertainty.

A number of users have reported that the result is given as 'Unable to determine the tax status of this engagement'. In this instance practices should seek advice from a specialist accountant or contact the HMRC IR35 helpline to get a determination.

Disclaimer per HMRC

An updated disclaimer has now been added to the checklist:

HMRC will stand by the result you get from this tool.

This would not be the case if the information you have provided was checked and found to be inaccurate.

HMRC will also not stand by results achieved through contrived arrangements, designed to get a particular outcome from the service. This would be treated as evidence of deliberate non-compliance, which can attract higher associated penalties.

Continued >>

EXAMPLE

Dr A is well known and liked by the practice and generally works every Monday. She tells the practice when she doesn't wish to work due to holidays and training commitments, but by and large works most weeks. She does locum work for other practices during the rest of the week, but not on any regular basis.

The practice manager used the HMRC online checker to establish her employment status. Both the doctor and the practice wanted the end result to be 'self-employed'.

Here's how the practice manager worked through the online checker questions. The shaded answers are those selected:

Q1 What do you want to find out?

- If the off-payroll working rules (IR35) apply to a contract
- If some work is classed as employment or self-employment for tax purposes

Q2 Which of these describes you best?

- The worker
- Hirer

Q3 What job role are you using the CEST tool for?

This will help to improve the service we provide to you.

What job role are you using the CEST tool for?

- **Communications and IT (printed, radio, TV and online)**
For example, technical engineer, content writer, developer, IT architect.
- **Construction, selling and maintenance of infrastructures**
For example, builder, carpenter, surveyor, engineer, architect.
- **Distribution**
For example, delivery driver, warehouse operative, distribution co-ordinator.
- **Education (including online)**
For example, tutor, professor, teacher, teaching assistant.
- **Energy and utilities**
For example, smart meter installer, engineer, electrician, welder.
- **Engineering and manufacturing**
For example, product designer, machine operator, factory or warehouse worker.
- **Environmental services (forestry, agriculture and fishing)**
For example, tree surgeon, farm worker, game keeper, marine biologist, vet.
- **Health (including clinical research) and care (medical and social)**
For example, nurse, physician, physiotherapist, doctor, dentist, clinical research associate, technician and researcher.
- **Professional services**
For example, banking, finance, lawyer, insurance broker and public administration.
- **Service Provider (including retail and tourism)**
For example, shop assistant, bar tender and barista.
- **Something else**
- **Prefer not to say**

Continued >>

Q4 Does the worker provide their services through a limited company, partnership or unincorporated association?

These are also known as intermediaries.

An unincorporated association is an organisation set up by a group of people for a reason other than to make a profit. For example, a voluntary group or a sports club.

Does the worker provide their services through a limited company, partnership or unincorporated association?

- Yes
- No

Q5 Has the worker already started working for your organisation?

- Yes
- No

Note: The practice manager isn't sure. The locum has worked for the practice for many months so the answer could be Yes. But if each week is a distinct engagement the answer could be No. The practice manager says Yes for now.

Q6 Will the worker be an office holder?

This can include being a board member, treasurer, trustee, company secretary or company director.

To find out about employment status for office holders click the link:
Will the worker be an office holder?

[INFO LINK](#)

- Yes
- No

Note: The locum doesn't hold any offices or regulatory positions within the practice.

Q7 Has the worker ever sent a substitute to do this work?

A substitute is someone the worker sends in their place to do their role.

Has the worker ever sent a substitute to do this work?

- Yes, you accepted them
- Yes, but you did not accept them
- No, it has not happened

Note: On one occasion Dr A was unwell and rang the practice to let them know she could not attend, but advised that her friend, Dr B, was available as a replacement. The practice must engage directly with Dr B. Dr A cannot be paid for those sessions and then pay Dr B as a sub-contractor. See the reference above relating to standard practice clauses on this matter. This is therefore not a true substitute in the normal sense.

Q8 Do you have the right to reject a substitute?

A substitute is someone the worker sends in their place to do their role.

This can include rejecting a substitute even if they are equally qualified, and meet your interviewing, vetting and security clearance procedures.

To find out about hirer's right to reject a substitute on page ESM11045 of the Employment Status Manual click the link:

Do you have the right to reject a substitute?

[INFO LINK](#)

- Yes
- No

Note: Even if Dr A suggested an alternative locum it would be up to the practice to decide whether or not to accept the alternative.

[Continued >>](#)

Q9 Has the worker paid another person to do a significant amount of this work?

To find out about hiring and paying helpers on page ESM11055 of the Employment Status Tax manual click the link:

[INFO LINK](#)

Has the worker paid another person to do a significant amount of this work?

- Yes
- No

Note: While Dr A's husband organises her diary and books appointments, this is not significant.

Q10 Does your organisation have the right to move the worker from the task they originally agreed to do?

A worker taken on for general tasks, rather than one specific task, might be moved as and when priorities change. The client may not need the worker's permission to move them.

To find out about what the worker does on page ESM11065 of the Employment Status Manual click the link:

[INFO LINK](#)

Does your organisation have the right to move the worker from the task they originally agreed to do?

- Yes
- No, they would have to agree
- No, that would require a new contract or formal working arrangement

Note: Imagine the practice at short notice needs Dr A to work at a branch surgery further away from her home because they don't need a locum at the main surgery. They would have to ask the Dr if they would be happy to work at the branch.

Q11 Does your organisation have the right to decide how the work is done?

This can include your organisation instructing, guiding or advising the way the task should be completed.

This is not relevant if it is highly skilled work. For example, an airline pilot.

To find out about how the worker carries out the work on page ESM11070 of the Employment Status Manual click the link:

[INFO LINK](#)

Does your organisation have the right to decide how the work is done?

- Yes
- No, the worker solely decides
- No, your organisation and the worker agree together
- Not relevant, it is highly skilled work

Note: A locum doctor is a highly skilled role and patient consultations will take place without any control by the practice.

Q12 Does your organisation have the right to decide the worker's working hours?

To find out about when the work is done on page ESM11075 of the Employment Status manual click the link:

[INFO LINK](#)

Does your organisation have the right to decide the worker's working hours?

- Yes
- No, the worker solely decides
- No, your organisation and the worker agrees
- No, the work is based on agreed deadlines

Note: Yes - the practice will determine the length of the session, although it is likely that this will be agreed with the doctor at the outset of the contract, together with the number of sessions.

[Continued >>](#)

Q13 Does your organisation have the right to decide where the worker does the work?

To find out about where the worker carries out the work on page ESM11080 of the Employment Status Manual click the link:

[INFO LINK](#)

Does your organisation have the right to decide where the worker does the work?

- Yes
- No, the worker solely decides
- No, the task sets the location
- No, some work has to be done in an agreed location and some can be the worker's choice

Note: The practice will decide which surgery the locum needs to work in, so the task determines the location.

Q14 Will the worker have to buy equipment before your organisation pays them?

This can include heavy machinery or high-cost specialist equipment used for this work. This does not include laptops, tablets and phones.

Vehicle costs are covered in the next question.

To find out about equipment costs on page ESM11090 of the Employment Status Manual click the link:

[INFO LINK](#)

Will the worker have to buy equipment before your organisation pays them?

- Yes
- No

Q15 Will the worker have to fund any vehicle costs before your organisation pays them?

This can include purchasing, leasing, hiring, fuel and other running costs for this work. This does not include commuting or personal vehicle costs.

Will the worker have to fund any vehicle costs before your organisation pays them?

- Yes
- No

Q16 Will the worker have to buy materials before your organisation pays them?

This can include items that form a lasting part of the work, or are left behind when the worker leaves. This does not include items like stationery.

This question is most likely to be relevant to the construction industry.

To find out about material costs on page ESM11100 of the Employment Status Manual click the link:

[INFO LINK](#)

Will the worker have to buy materials before your organisation pays them?

- Yes
- No

Q17 Will the worker have to fund any other costs before your organisation pays them?

This can include non-commuting travel or accommodation, or external business premises for this work only.

To find out about other costs on page ESM11105 of the Employment Status Manual click the link:

[INFO LINK](#)

Will the worker have to fund any other costs before your organisation pays them?

- Yes
- No

Note: Not an easy question to answer. Dr A is unlikely to supply any materials. She will have basic medical equipment in her "doctor's bag" but does this meet the criteria for high-cost specialist equipment? Unless she is required to carry out home visits she won't need a vehicle for the session. She will have other expenses such as GMC fees and CPD.

[Continued >>](#)

Q18 How will the worker be paid for this work?

- An hourly, daily or weekly rate
- A fixed price for the project
- A fixed amount for each piece of work completed
- A percentage of the sales the worker generates
- A percentage of your organisation's profits or savings

Note: A rate is agreed for the session, so this would fall under the first category.

Q19 If your organisation was not happy with the work, would the worker have to put it right?

- Yes, unpaid and they would have extra costs that your organisation would not pay for
- Yes, unpaid but their only cost would be losing the opportunity to do other work
- Yes, they would fix it in their usual hours at their usual rate or fee
- No, the work is time-specific or for a single event
- No

Note: Dr A may be asked to explain more fully what went on in a specific consultation if another doctor didn't fully understand her notes or wanted more information which possibly might fall into the 2nd Yes category. On balance though the first No answer is probably more relevant.

Q20 Will you provide the worker with paid-for corporate benefits?

This can include external gym memberships, health insurance or retail discounts.

Will you provide the worker with paid-for corporate benefits?

- Yes
- No

Q21 Will the worker have any management responsibilities for your organisation?

This can include deciding how much to pay someone, hiring or dismissing workers, and delivering appraisals.

Will the worker have any management responsibilities for your organisation?

- Yes
- No

Q22 How would the worker introduce themselves to your consumers or suppliers?

- They work for you
- They are an independent worker acting on your behalf
- They work for their own business
- This would not happen

Note: It will be clear to the patient that Dr A is a locum working for the practice so the second answer should be selected.

Q23 Does this contract stop the worker from doing similar work for other organisations?

This includes working for your competitors.

Does this contract stop the worker from doing similar work for other organisations?

- Yes
- No

Q24 Is the worker required to ask permission to work for other organisations?

- Yes
- No

Continued >>

Q25 Are there any ownership rights relating to this contract?

These types of rights are usually found in media, arts and creative industry contracts. This includes all:

- **copyright**
- **trademarks**
- **patents**
- **image rights**

Are there any ownership rights relating to this contract?

- **Yes**
- **No**

Q26 Has the worker had a previous contract with your organisation?

To find out about series of contracts on page ESM11155 of the Employment Status Manual click the link:

[INFO LINK](#)

Has the worker had a previous contract with your organisation?

- **Yes**
- **No**

Q27 Will this contract start immediately after the previous one ended?

This does not include any holiday period between the two contracts.

Will this contract start immediately after the previous one ended?

- **Yes**
- **No**

Q28 Will this work take up the majority of the worker's available working time?

This includes preparation or any other time necessary to deliver the work, even if it is not referred to in the contract.

To find out about working time available on page ESM11160 of the Employment Status Manual click the link:

[INFO LINK](#)

Will this work take up the majority of the worker's available working time?

- **Yes**
- **No**

Q29 Has the worker done any self-employed work of a similar nature for other clients in the last 12 months?

This only refers to work requiring similar skills, responsibilities, knowledge, or ability.

Self-employed work is when it is the worker's responsibility to pay Income Tax and National Insurance contributions on their earnings.

Has the worker done any self-employed work of a similar nature for other clients in the last 12 months?

- **Yes**
- **No**

Finally, we get to the answer provided by HMRC's tool which in this instance is:

Self-employed for tax purposes for this work

It is important to note that there are many grey areas and HMRC are likely to challenge the equipment angle in the future. For the most up-to-date advice, talk to a specialist medical accountant before using the online checker.

[Continued >>](#)



Next steps

If the online checker confirms that the locum is classed as self-employed for tax purposes, then the practice must keep evidence to prove this. HMRC has confirmed that keeping a print-out of the online checker results would be sufficient evidence for this purpose.

However there have been some circumstances where HMRC has challenged answers, therefore it is recommended to keep a note as to why specific answers were given.

Self-employed locums will be responsible for paying their own tax and NI. They should tell

HMRC as soon as they begin to provide locum services so that HMRC can assess the type of tax and NI that should be paid.

If the locum using a PSC has to be treated as employed, the locum will need to be set up as a new category of employee on the practice payroll system called an 'off payroll worker', or 'deemed employee' which does not come with the same rights as an employee. The locum should keep track of the tax and NI deducted at source and adjust their tax return to get credit for the tax paid. In addition an SDS should be issued to the locum.

LINKS

- Employment Appeal Tribunal: Hafal Ltd v Miss K Lane-Angell <https://tinyurl.com/34zpt5x2>
- HMRC online employment status checker <https://www.gov.uk/guidance/check-employment-status-for-tax>
- BMA locum practice agreement
[BMA locum practice agreement](#)
- BMA guidance for locums and employers
[Guidance for locums and employers \(bma.org.uk\)](#)
- BMA IR35 guidance
[How IR35 affects doctors \(bma.org.uk\)](#)



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