

MUTUALITY OF OBLIGATION (MOO)

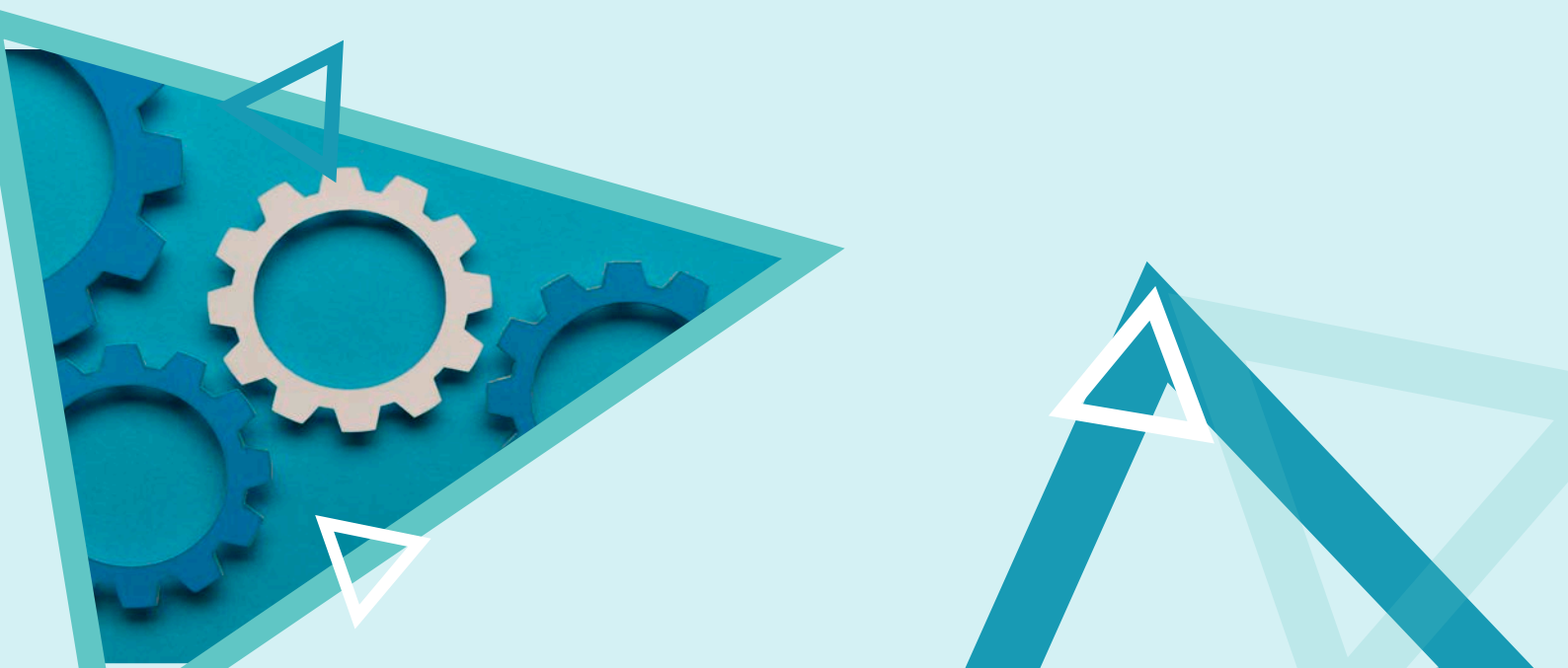
WE ANSWER THE FOLLOWING QUESTIONS:

1. WHAT IS THE DEFINITION OF MOO?

2. IF THE 'OLD RULES' APPLY AND YOU ARE RESPONSIBLE FOR YOUR OWN ASSESSMENT, SHOULD YOU USE CEST (HMRC ALGORITHM BASED ASSESSMENT TOOL) OR HAVE A MANUAL REVIEW CONDUCTED?

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3. WHAT ARE THE TAX RISKS OF WORKING FOR THE SAME CLIENT FOR MANY YEARS?



What is the definition of MOO?

The lack mutuality of obligation is another significant factor and essentially requires that there be no obligation on the end client to provide work once the contract has completed its term. Similarly, there should be no obligation on the contractor to accept work.

The contract should include a clause to demonstrate that no MOO exists. The longer the contractor has had a relationship with the end client, the more difficult it is to prove that the contractor is outside IR35. Although it is not a defining indicator, when work is regularly given and accepted over a period of time, HMRC may take the view that employee status has been created by custom and habit.

Other points to consider would be a clear end and start date and that the end client and contractor should be able to terminate the contract without cause.

If the 'old rules' apply and you are responsible for your own assessment, should you use CEST (HMRC algorithm based assessment tool) or have a manual review conducted?

The Check of Employment Status Tool (CEST) which has been developed by HMRC only contains a limited number of questions which are not sufficient to consider all the factors that determine the IR35 status of a contractor. Additionally, it is important to note that Mutuality of Obligation (MOO) is not included as a factor in CEST and therefore the tool cannot make a fully evaluated decision.

In contrast, WTT Legal's questionnaire contains over 90 questions to make a status assessment, which is necessary as the IR35 legislation is complex.

Whether a client/contractor or agency have used reasonable care when assessing the contractor's IR35 status is key and therefore solely using CEST to assess whether a contractor is inside or outside the scope of off-payroll may put the client/contractor/agency at risk. This is because the failure to use reasonable care may result in HMRC imposing significant penalties in addition to the tax liabilities which could have a huge impact, both financially and reputationally on a business.

What exactly is reasonable care? HMRC have asserted that when assessing the IR35 position the client "...should act in a way that would be expected of a prudent and reasonable person in the client's position". This may include engaging a suitably qualified person who thoroughly understands not only off-payroll, but also both the contractual elements, employment law and the working practices of the contractor to make an informed SDS. Furthermore, HMRC have indicated that engaging a professional to perform a status assessment, such as a law firm, would be deemed to comply with the reasonable care standard.

Companies should recognise that trying to self-manage IR35 is extremely complex and requires a significant degree of internal expertise.

What are the tax risks of working for the same client for many years?

Being engaged with the same end client for a significant time period, such as 10 years does have a bearing on whether the relationship is one of employment as it may indicate that mutuality of obligation (MOO) exists between the parties.

An employment relationship will have different expectations than that of a business relationship as there would be an assumption that the employer would supply continuous work and the employee will carry out the work when required.

The longer the contractor has a relationship with the client, the more difficult it is to prove that MOO does not exist between the parties. Although it is not a defining indicator, when work is regularly given and accepted over a period of time, HMRC may take the view that employee status has been created by custom and habit. In addition, it may be that the contractor has become 'integrated' within the company and is seen to provide a personal service. This would be reinforced if the contractor used company facilities intended for employees, was on the structure chart, attended company social events etc.