Employment Status: a consultation and our responses

Employment Tax

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The ATT, CIOT and LITRG each separately responded to the government's employment status consultation and urged the government to undertake a broader debate on the taxation of employment.

In responding to the government's consultation on simplifying employment status, the CIOT and ATT focused on the income tax and national insurance (NIC) aspects of the consultation. We urged the government to undertake a broader debate on the taxation of employment and, pending this, recommended that legislation not be rushed through. LITRG noted that there has been an increasing trend towards the 'false' self-employment of low-paid workers (treating a worker as self-employed when the true nature of his/her engagement is that of employment) and focused on this issue in much of their response.

Employment status is at the core of the tax system. It determines the taxes a worker, and the business the individual works for, must pay. However, establishing the correct employment status of a worker can often be far from straightforward. It is therefore right that the government reviews how employment status is determined, the interaction with employment rights and whether the present approach can be improved.

This said, all three bodies were disappointed to see that the consultation did not look at the potential to make changes to tax or National Insurance rates or reliefs. The imbalance between the tax burdens on employment and self-employment remains very large, mainly because of the 13.8 per cent cost of employers' national insurance (NIC). This is the 'elephant in the room' in this debate: the cost of employers' NIC has a major influence on engagement decisions. Indeed, false self-employment is sometimes foisted upon the low paid, to drive down the engager's

costs and responsibilities, especially employers' NIC.

The ATT and LITRG thought that the government should also carefully consider the extent to which more costs and obligations are imposed on employers, as costs and obligations such as automatic enrolment into pensions, more regular PAYE reporting requirements under Real-Time Information (RTI), and the removal of the Percentage Threshold Scheme for statutory sick pay, add further pressures.

In its response, the CIOT recommended that government initiate a broader strategic review of how labour should be taxed in the 21st century. We thought that the government should work with stakeholders, including businesses, unions and individuals as well as tax advisers, to facilitate a broader debate to identify what is meant by employment (and self-employment) with a view to agreeing a sustainable solution to how earnings (whether from employment or self-employment) should be taxed, including how the government might 'level the playing field', and what rights and benefits should be associated with what status. A call for a wider public debate was also made by the ATT and LITRG.

While the consultation document suggested that codifying existing status law might improve the current system, LITRG found it hard to see how codification will make things any better for workers grappling with false self-employment unless there is also a refocus on compliance and enforcement. We pointed out that effective policing of the boundary between employment and self-employment is currently missing. There is no obvious route for workers to report 'false self-employment'. There seems to be no protocol in place for dealing with those who telephone HMRC presenting false self-employment. There are minimal risks of HMRC investigating engagers on a self-starting basis. A more proactive and visible approach to enforcement is needed to act as a serious disincentive to those engagers considering gaming the system.

We thought that, in the short term, it might be more worthwhile for the government to work with tax professionals and representatives on developing better guidance around the existing case law tests of employment status, to help workers understand the rules and distinctions for themselves. In particular, HMRC should try to identify which factors are misleading workers the most when it comes to their employment status and put out specific messages to try and counter them.

Additionally, the suggestion of a new online tool to help employers and individuals to establish a worker's employment status was thought to be a good idea by the CIOT and LITRG. While HMRC has the existing 'check employment status for tax' (CEST) tool, this has its limitations and could be improved. For example, it is too technical in its language to be easily useable by a lay person. CIOT added that an online tool should remain binding on HMRC (assuming the full facts have been disclosed) but could also be extended to reference the employment law position, albeit the parties (engager and worker) should not be bound by the result in the same way as HMRC.

The consultation also explored the potential for developing a formal test that could be applied to establish the employment status of an individual. The Statutory Residency Test (SRT) sets a precedent for such a piece of work. However clunky and unwieldy some of the SRT definitions are, and however time-consuming it is to systematically work through the various elements of the test, the SRT is generally regarded as an improvement to the old system. Hence, all three bodies thought an easy to use and apply statutory status test should be explored further.

However, LITRG pointed out that while the SRT can provide certainty on residence status and has reduced the flow of disputed cases, it is quite complex, and it is usually important to take appropriate professional advice to ensure a full understanding of the rules and definitions – this is not ideal as far as establishing employment status is concerned.

The ATT added that its members would also be supportive of the creation of a simpler regime in which an individual and their engager can easily determine their status, and from that status can determine their tax, rights, benefits and obligations. However, the test must work from both the perspective of HMRC and the engager and should not be so resource intensive that it is uncommercial for the engager to apply it, or for HMRC to monitor it.

Lastly, the CIOT suggested that the government publish a labour taxes 'road map' setting out its thinking on how earnings should be taxed in the future (and what rights and benefits should attach to what status), together with a realistic timetable to implement such changes that are found to be necessary. The ATT added that such a review should also be able to consider tax rates, employment rights and, importantly, IR35/intermediaries legislation.

The CIOT's response can be read on the CIOT website.

ATT’s response can be found on the ATT website.

LITRG’s response can be found on the LITRG website.