Off payroll working in the private sector: consultation responses

Employment Tax

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The ATT, CIOT and LITRG have each responded to a consultation on extending the off-payroll working rules to the private sector from April 2020.

As reported in May's edition of *Tax Adviser*, HMRC launched a consultation earlier this year which confirms the government's intention to extend the off-payroll rules (which currently apply to public sector bodies) to the private sector from April 2020.

The intention is to use the current public sector rules as a starting point, but with some proposed changes. In particular, it is proposed that the rules would not apply to small businesses in the private sector that engage with off-payroll workers.

The ATT response

The ATT response welcomes the proposed exclusion for small private sector organisations but sets out a number of concerns regarding its proposed design and operation. In particular, ATT suggests that, instead of using the Companies Act 2006 definition of small, it might be more logical to base the exclusion test on the extent of an entity's engagement of off-payroll workers. The ATT is also concerned that organisations which cease to be small will not have enough time to prepare for and implement the off-payroll rules and recommends that they be given at least one year to do so.

The ATT response does not favour the proposed changes to information flows in the consultation and suggests that it should instead be made a requirement for the client (the end-user) to supply their determination directly to the fee-payer and worker. Such an approach would address problems with the flow of information being interrupted, and could also address concerns around privacy of information and the transfer of liability.

The ATT is uncomfortable with the consultation proposal to transfer liability for unpaid tax and NICs to the first agency in the chain or the client even where they may have complied fully with their own obligations under the rules. Instead, the ATT suggests that liability should only be transferred where the client or another agency have knowledge of the non-compliance further down the chain and were complicit in it.

The consultation suggests that a client led process would be helpful in allowing for determinations to be challenged. However, the ATT believes that it would be better for all parties involved if there was some way for clients and workers to agree status before commencing an engagement rather than arguing once a determination has been made.

The ATT also suggested how casual or risk-averse determinations might be discouraged.

The full ATT response can be found on the ATT website.

The LITRG response

LITRG's response largely focussed on what the impact of the changes to the private sector might have on low-income workers, who often find themselves offered work in the private sector on the basis that they will structure their work through a limited company. For example, with the tax advantage for their engager gone, it is likely that many workers will be pulled out of limited companies and put into PAYE umbrella arrangements. However, there are many non-compliant models out there, for example the elective deductions model and the mini umbrella company model.

Furthermore, depending on whether the limited company is closed down correctly, this could leave the worker with messy compliance issues that they do not understand. In our response, we urged HMRC to work with Companies House to come up with a way of making it as easy as possible for taxpayers to close down a personal service company (PSC), perhaps in conjunction with an amnesty for any accrued penalties.

We also took the opportunity to welcome HMRC's confirmation that they will not run any targeted campaigns looking at past IR35 compliance. However, it has come to our attention that following HMRC's success in the Christianuyi case, they might be considering investigating previous arrangements under the Managed Service

Company (MSC) legislation instead. This would seem to be on the basis that those providing hitherto exempt ‘accountancy services’ may actually now be caught as MSC providers (meaning that those using them are effectively managed service companies, whose income will be reclassified as employment income). We said we would welcome the opportunity to discuss this with HMRC further.

The full LITRG response can be found on the LITRG website.

The CIOT response

The CIOT response considers the key aspect of how businesses, agencies, PSCs/workers (and HMRC) can confidently be assured that decisions on status can be relied upon. We think that for most businesses this means that they will need to be able to rely on the output from HMRC’s Check Employment Status for Tax (CEST) tool. However, recent cases such as Albatel, MDCM, Jensal Software and Atholl House Productions, illustrate that HMRC’s views as to employment status are not being upheld by tribunals. Unless the output from CEST reflects the decisions made by the courts, users will have no confidence that they can rely on CEST to help with status decisions. We are therefore calling on HMRC to modify and develop CEST so that it is better able to address a wider breadth of scenarios, and to do this sufficiently ahead of April 2020 so that the changes can bed down before decisions have to be made as to the status of PSC/end client contracts.

The CIOT also welcomed the decision to exclude small private sector entities from the off-payroll working rules but suggested extending the exclusion to small public sector entities too, to ensure a level-playing field. Of the suggested approaches for bringing non-corporate entities into the scope of the new off-payroll working rules we preferred the option whereby the new off-payroll working rules will only apply where an entity has both 50 or more employees and turnover in excess of £10.2 million. This said, we thought how employee numbers are to be calculated in the small entity test (for corporate and non-corporate entities) may discriminate against businesses with predominately part-time employees and could affect the behaviour of some small businesses by discouraging them from taking on part-time employees in order to retain their ‘small’ status.

While agreeing that where PAYE and NICs has not been correctly accounted for the liability should initially rest with the party that has failed to fulfil its obligations, the CIOT was very concerned by the proposal to then transfer liability back to the first

agency in the supply chain – and ultimately, where HMRC is unable to recover the liability from the first agency, the end client – where HMRC is unable to collect an outstanding liability from a defaulting party. We recommended, at the very least, that a power to transfer liability should be tempered with a defence of reasonable care.

Lastly, the CIOT took a different approach to the ATT on the suggestion that end clients directly provide the PSC/worker with the status determination. We thought, on balance, it would be preferable if the end client is simply required to notify the decision to the party with whom the client contracts (and for there to be a requirement for that party to pass on the information until it reaches the fee-payer and PSC/worker).

The full CIOT response can be found on the CIOT website.