Off-payroll working rules from April 2020: draft Finance Bill

Employment Tax

01 October 2019

The ATT and CIOT have responded to draft Finance Bill legislation intended to introduce off-payroll working rules to the private sector and amend the off-payroll working rules currently applying to the public sector from April 2020.

In their responses, the CIOT and ATT commented on:

1. the small entity exception;
2. the status determination statement;
3. the status disagreement process; and
4. the recovery of PAYE.

Small private sector entities exception

The CIOT welcomed the carve-out for small private sector entities but thought it would have been better to have also excepted small public sector bodies from having to operate the off-payroll working rules.

The CIOT noted that the basic conditions for when a company qualifies as small for a tax year are based on the definition of ‘small’ in the Companies Act (CA) 2006. However, the specific reference in CA 2006 is not identified in the draft legislation and the CIOT therefore recommended specifically signposting the relevant CA 2006 definitions in the legislation.

The ATT shares the CIOT’s concerns over the use of CA 2006 terms in the draft legislation. The ATT’s preference would be for all terms used in the draft legislation to be clearly defined within it, especially where they may differ from familiar tax definitions. If the approach taken in the draft legislation is maintained, then the ATT believes it will need to be made very clear in guidance where a CA 2006 definition is

being used, together with a signpost to where that definition can be found. It would also be helpful to include in the guidance a glossary of CA 2006 terms used in the new legislation.

The ATT also has concerns over how the rules will apply to sole trader clients who cease to be small. They have recommended that the draft legislation be revisited to ensure the rules work in a pragmatic way and allow sole traders at least the same amount of time between ceasing to be small and having to apply the off-payroll rules as other business types.

The CIOT and ATT both noted that there is no requirement for small entities in the private sector to notify an agency or worker that it is small. As we would expect to see requests from workers for clients to confirm that they are small, and given that there may be some confusion as to whether an entity is small or whether the entity is in the public or private sector, we queried whether an obligation on the client to notify workers/agencies that it qualifies as small should be included in the legislation.

Status determination statement

The legislation does not prescribe the form of the status determination statement to be issued by the client. The CIOT therefore recommended that there be a requirement added for the statement to be in writing.

The CIOT also noted that the legislation does not appear to explicitly require the client to issue a determination statement to the worker, or the next entity in the chain with whom the client contracts, if the client has determined that the off-payroll working rules do not apply. We suggested that the legislation be amended to require this.

Status disagreement process

A client-led status disagreement process is being introduced which permits a worker or the deemed employer (fee-payer) to dispute the client’s determination. The legislation does not, however, prescribe a period in which to dispute the status (although once received, the client has 45 days to consider the ‘appeal’). The CIOT suggested including a time frame for disputes to be raised to provide certainty for the client. We also asked HMRC to clarify what happens where the two parties

ultimately cannot agree the status of the worker, and how PAYE and NICs may be recovered where the client issues a revised status determination declaring that the engagement does not fall within the scope of the off-payroll working rules.

Recovery of PAYE

The draft legislation contains very widely drawn powers for HMRC to amend the Income Tax (PAYE) Regulations 2003 to allow for the transfer of liability when there is non-compliance in the labour supply chain. The legislation would seem to provide HMRC with an unlimited discretion as to whom to pursue for the PAYE and NIC that should have been accounted for by one or other entities in the labour supply chain.

The CIOT has recommended that where the client/agency has taken reasonable care to ensure the integrity of the supply chain but, for some reason, there is a default and HMRC is unable to recover the PAYE and NICs from the party concerned, the power to transfer liability should be tempered by a defence of having taken reasonable care.

The ATT is particularly concerned that the draft legislation does not include any detailed provisions regarding how and when PAYE liabilities may be transferred. Instead, it appears that important practical issues will be addressed at a later point through secondary legislation or even guidance, and as a result are likely to receive less scrutiny. This approach also results in a lack of clarity as to how the off-payroll rules will operate in practice, making it difficult for businesses to make adequate preparations.

The details as to when PAYE liabilities could be transferred will be very important to the risk analysis and preparations of businesses affected by the off-payroll rules. In particular, they are likely to be important in framing the level and nature of due diligence which needs to be carried out in a labour supply chain before the rules come into force next April.

The ATT therefore urges that details are released sooner rather than later, and that key areas of the scope of the transfer of liability provisions (including that they will not apply in cases of genuine business failure where tax avoidance is not in point) are set out clearly in legislation, with guidance merely acting to clarify potential points of uncertainty and give practical advice.

Guidance

The CIOT added that a key aspect to the implementation of the new off-payroll working rules from April 2020 will be the publication of guidance. On 22 August 2019, HMRC published introductory guidance on the April 2020 changes to off-payroll working rules; however, we have urged HMRC to published detailed technical guidance as soon as possible. The ATT response also noted that the availability of practical and business focused guidance will be key to the successful extension of the off-payroll rules to the private sector, and highlights a number of issues which will need to be specifically addressed in this guidance.

The ATT response can be found on the ATT website.

The CIOT response can be found on the CIOT website.