Off-payroll working in the private sector: draft legislation and House of Lords inquiry

Employment Tax

31 March 2020

The ATT and CIOT have submitted comments on draft secondary legislation regarding the extension of the off-payroll working rules to the private sector and contributed evidence to the House of Lords Finance Bill Sub-Committee inquiry.

Draft secondary legislation

In January, HMRC released for consultation two pieces of draft secondary legislation relating to the off-payroll rules: the Income Tax (Pay As You Earn) (Amendment) Regulations 2020 ('the PAYE Regulations'); and the Social Security Contributions (Intermediaries)(Miscellaneous Amendments) Regulations 2020 ('the NIC Regulations') (see https://tinyurl.com/r7voate).
The PAYE Regulations set out when and how HMRC can seek to recover unpaid PAYE income tax and NIC liabilities from other parties where the deemed employer fails to make deductions. The NIC Regulations make similar provisions for NIC purposes to those provided for in the draft primary legislation previously released for PAYE purposes.

The ATT response focuses on the PAYE Regulations. The ATT's primary concern is the scope of these draft regulations, which leave HMRC with a high level of discretion as to when unpaid PAYE and NIC liabilities can be transferred within a labour supply chain. In particular, the ATT notes that the draft legislation does not reflect previous reassurances from HMRC that the rules will not apply in cases of genuine business failure where deliberate tax avoidance has not occurred. The ATT also has concerns over the repeated use of undefined, subjective and vague terms at important points in the draft legislation (for example, 'realistic prospect' and

‘reasonable period of time’) and the proposed grounds of appeal.

A clear understanding of how the transfer of liability rules could be applied by HMRC in practice will be key to the due diligence and other preparations of businesses that may be affected by the off-payroll rules. The ATT therefore urges HMRC to issue updated legislation and comprehensive guidance as soon as possible.

The full ATT response can be found at www.att.org.uk/ref348. The CIOT response also raises concerns that the draft
PAYE Regulations do not adequately reflect the government’s intention that: ‘The proposals are not intended to transfer liabilities in cases of genuine business failure, where deliberate tax avoidance has not occurred’ (Off-Payroll Working consultation response, page 5 para 1.21, published on 11 July 2019).

We suggest that the draft legislation be amended to make it clear that a recovery notice cannot be issued in cases of genuine business failure of the deemed employer (or the first agency where debt would otherwise be transferred to the client). Also, for completeness, we recommend that the grounds for appeal against a recovery notice be expanded to include genuine business failure of the deemed employer.

In addition, the CIOT is concerned that HMRC could transfer liability up a supply chain in circumstances where the client and first agency have taken reasonable care to ensure compliance with the off-payroll working rules by the deemed employer, but nevertheless the deemed employer has failed to account for PAYE and NICs on the deemed employment earnings. We therefore suggest that the draft legislation is amended to prohibit the transfer of a tax debt to a third party that has taken reasonable care to ensure the integrity of their supply chain and compliance with the off-payroll working rules by other parties in that supply chain but where, notwithstanding this, the deemed employer has for some failed to pay the relevant tax debts.

The CIOT is also concerned over some of the terms used in the draft legislation, such as what ‘no realistic prospect of recovery’ and ‘within a reasonable period of time’ will mean in practice. For example, there is a risk that HMRC could seek to pursue a third party simply because it becomes too difficult to pursue the deemed employer (or other relevant party) and it is easier to pursue agency one (or the client). We therefore recommend that the legislation defines these terms and that HMRC’s guidance clarifies when and how the transfer of debt provisions will be used.

The full CIOT response can be found at www.tax.org.uk/ref630.

House of Lords inquiry

In February, the House of Lords' Economic Affairs Finance Bill Sub-Committee issued a request for evidence on the extension of the off-payroll rules as part of its inquiry into draft Finance Bill 2019/ 20 (see https://tinyurl.com/sulaqsv).

The CIOT gave oral evidence to the Sub-Committee on 10 February 2020. The House of Lords asked whether the proposed rules for determining status as a deemed employee or self-employed is sufficiently clear and whether the Check Employment Status for Tax (CEST) tool is fit for purpose. The CIOT considers that while we have an updated version of the CEST tool (released in November 2019) and this can provide a safe harbour for businesses using the tool, it is a blunt instrument which cannot always provide an answer or may provide an answer you disagree with. In particular, the tool does not directly address mutuality of obligation (MOO). Although HMRC say that it is inherent in the questions being asked, the CIOT considers that there should be a separate section dealing with MOO.

The ATT submitted a short piece of written evidence by email. This repeated our previous calls for a 12 month delay
to the introduction of the new rules (see www.att.org.uk/PR200107), noting that the current lack of final legislation results in a real lack of clarity as to how the off-payroll rules will operate in practice in the private sector, making it extremely difficult for businesses to make adequate preparations.

The ATT is concerned that pressing ahead with extending the off-payroll rules to the private sector from April 2020 risks repeating the mistakes made when the rules were introduced to the public sector in 2017, rather than learning from them. The ATT submission also included a copy of our previous comments on the draft Finance Bill legislation released for consultation in July 2019 (see www.att.org.uk/ref340).

Review of changes to the off-payroll working rules

Lastly, HM Treasury published its report and conclusions from the government's review of off-payroll working on 27 February 2020 (https://tinyurl.com/yx3y933q). This confirms that the new rules will be introduced on 6 April 2020. The main changes to

‘smooth’ implementation are:

- There will be no penalties for errors relating to off-payroll working in the first year, except in cases of deliberate non-compliance.
- HMRC confirmed their previous commitment that information resulting from changes to the rules will not be used to open new investigations into personal service companies (PSCs) for tax years prior to 6 April 2020, unless there is reason to suspect fraud or criminal behaviour.
- As previously announced, the rules will only apply to services carried out from 6 April 2020 onwards.
- There will be a legal obligation on end clients to respond to a request for information about their size from the agency or worker.
- The legislation will be amended to exclude wholly overseas companies with no UK presence from the off-payroll working rules.