



Response to HM Revenue & Customs Consultation on Off-payroll working rules from April 2020

May 2019

Response to Government Consultation – Off Payroll Working Rules

The Birmingham Law Society is the largest provincial law society in the country having over 5,000 members including both solicitors and barristers. This response has been prepared by the Society's Employment Law Committee which has 21 members with a depth of experience whilst acting for employers and employees/workers. This response represents the collective opinions of its members several of whom have direct experience of working with and advising public authorities in connection with the operation of IR35 and are familiar with the practical problems that can be encountered in the implementation of the system.

Question 1 – Do you agree with taking a simplified approach for bringing non-corporate entities in to scope of the reform? If so, which of the two simplified options would be preferable? If not, are there alternative tests for non-corporates that the government should consider? Could either of the two simplified approaches bring in to scope entities which should otherwise be excluded from the reform? Is it likely to apply consistently to the full range of entities and structures operating in the private sector? Please explain your answer.

The Committee agrees with the simplified approach and would prefer the first option, to apply the approach to entities which meet either the criterion for number of employees or the criterion for turnover, rather than both. This is because there will be entities which meet the criterion for turnover but which have an artificially small number of employees, often as a result of having a large number of off-payroll workers.

Question 2 – Would a requirement for clients to provide a status determination directly to off-payroll workers they engage, as well as the party they contract with, give off-payroll workers sufficient certainty over their tax position and their obligations under the off-payroll reform? Please explain your answer.

Yes, the Committee agrees that a requirement for clients to provide a status determination directly to off-payroll workers would give the off-payroll workers sufficient certainty as to their obligations.

Question 3 – Would a requirement on parties in the labour supply chain to pass on the client's determination (and reasons where provided) until it reaches the fee-payer give the fee-payer sufficient certainty over its tax position and its obligations under the off-payroll reform? Please explain your answer.

No, the Committee believes that a requirement to pass the client's determination on to the fee-payer would not give sufficient certainty to the fee payer in all circumstances, especially if the determination of the client is that the off payroll working rules do not apply. In this situation, many fee-payers would reasonably believe that they will bear no liability for income tax and National Insurance whereas, in fact, they might bear such liability if the client's determination turns out to be incorrect.

Question 4 - What circumstances may result in a breakdown in the information being cascaded to the fee-payer? What circumstances might result in a party in the contractual chain making a payment for the off-payroll worker's services but prevent them from passing on a status determination?

The Committee is concerned that there could be a breakdown in the information being cascaded to the fee-payer in circumstances in which there is a party in the chain which is in a weak bargaining position relative to other parties in the chain, and which does not have access to legal advice. In this situation, the party will not always fully understand its obligations unless the other parties in the chain draw them to its attention.

Question 5 – What circumstances would benefit from a simplified information flow? Are there commercial reasons why a labour supply chain would have more than two entities between the worker's PSC and the client? Does the contact between the fee-payer and the client present any issues for those or other parties in the labour supply chain? Please explain your answer.

The Committee believes that a simplified information flow would be beneficial in most circumstances. In our experience, it is only in a minority of cases that the labour supply chain has more than two entities between the worker's PSC and the client, and we do not anticipate that contact between the fee-payer and the client would present any issues for any of the parties.

Question 6 – How might the client be able to easily identify the fee-payer? Would that approach impose a significant burden on the client? If so, how might this burden be mitigated? Please explain your answer.

The client can easily identify the fee-payer by carrying out appropriate due diligence of its supply chain. This would not impose a significant burden on the client except where the supply chain is particularly complicated. The burden could be mitigated by requiring other parties in the chain to provide accurate information to the client to help it to identify the fee-payer, and by imposing sanctions if they cause the client to fall into error.

Question 7 - Are there any potential unintended consequences or impacts of placing a requirement for the worker's PSC to consider whether Chapter 8, Part 2 ITEPA 2003 should be applied to an engagement where they have not received a determination from a public sector or medium/large-sized client organisation taking such an approach? Please explain your answer.

Yes, the Committee believes that there will be unintended consequences if it is unclear whether the small company exemption applies to the client. In such a situation, the worker's PSC might wrongly believe that it is required to consider applying the Chapter, whereas in fact it is the client which has failed to comply with its obligations. In some cases, there will even be an incentive for the client to deceive the PSC in this respect in the hope that the PSC chooses to bear liability which should properly sit with the client or the fee-payer.

Question 8 – On average, how many parties are in a typical labour supply chain that you use or are a part of? What role do each of the parties in the chain fulfil? In which sectors do you typically operate? Are there specific types of roles or industries that you would typically require off-payroll workers for? If so, what are they?

In the experience of the Committee, by far the most common arrangement is a shallow structure in which the client contracts directly with the worker's PSC. The second most common arrangement is one in which there is a single other intermediary between them, such as an agency or an umbrella company. Off payroll workers are most commonly used for skilled roles, such as IT consultants and healthcare specialists, and in the aerospace industry.

Question 9 – The intention of this approach is to encourage agencies at the top of the supply chain to assure the compliance of other parties, further down the chain, through which they provide labour to clients. Does this approach achieve that result?

No, the Committee is sceptical about whether this approach does achieve that result. Although liability will fall upon the agency at the top of the supply chain in certain circumstances, this incentive is undermined by the rule that liability initially moves down the labour supply chain, until it comes to rest with whichever party in the supply chain fails to fulfil its obligations.

Where there is a party which is in a weak bargaining position relative to other parties in the chain, and which does not fully understand its obligations, there will be little incentive for other parties in the chain to ensure that the weak party does obtain such an understanding and even, potentially, an incentive to actually deceive it about the extent of its obligations, as a means of avoiding what would otherwise be their own liability.

Question 10 – Are there any potential unintended consequences or impacts of collecting the tax and NICs liability from the first agency in the chain in this way taking such an approach? Please explain your answer.

Yes, the Committee considers that the first agency is itself one of those parties which could have relatively weak bargaining power compared to that of the client. Moreover, it is more difficult for a first agency to carry out due diligence of the client than vice versa. Therefore, a possible unintended consequence of collecting the tax and National Insurance liability from the first agency in the chain is that the client could be incentivised to avoid its own liability by trying to push it onto the agency.

Question 11 - Would liability for any unpaid income tax and NICs due falling to the client (if it could not be recovered from the first agency in the chain), encourage clients to take steps to assure the compliance of other parties in the labour supply chain?

No, the Committee believes that similar considerations would apply as for our answer to question 9, above.

Question 12 – Are there any potential unintended consequences or impacts of taking such an approach? Please explain your answer.

No, the Committee believes that there are fewer risks in liability falling upon the client than in liability falling upon the first agency. The client is often the party in the supply chain with the strongest bargaining power, and is the one which is most likely to take legal advice about any arrangements. Clients are used to carrying out supply chain due diligence, and most legal advisers maintain lists of recommended compliant agencies and umbrella companies, putting the client in the best position to ensure compliance of the parties below it.

Question 13 – Would a requirement for clients to provide the reasons for their status determination directly to the off-payroll worker and/or the fee-payer on request where those reasons do not form part of their determination impose a significant burden on the client? If so, how might this burden be mitigated? Please explain your answer.

No, the Committee does not consider that a requirement to provide such reasons would impose a significant burden on the client. The client will already have decided upon its reasons in making the determination and it already has an obligation to provide reasons, if requested, to the party with which it contracts.

Question 14 – Is it desirable for a client-led process for resolving status disagreements to be put in place to allow off-payroll workers and fee-payers to challenge status determinations? Please explain your answer.

No, the Committee does not consider that such a process would be desirable. Most clients will already wish, and will be advised, to consult with their off-payroll workers and fee-payers in the process of making a status determination. This is most usefully done at the earliest possible stage in the process, whereas the process proposed would postpone the involvement of these other parties until a much later stage, when consultation is less likely to have a significant effect upon the determination reached.

Question 15 – Would setting up and administering such a process impose significant burdens on clients? Please explain and evidence your answer.

Yes, the Committee believes that setting up and administering such a process would be burdensome and unnecessary, as it could result in the duplication of other processes which the client might well already have. This approach seems to us to resemble the now-repealed Statutory Disciplinary Procedure rules in that it places more emphasis on form rather than substance, punishing companies which jump through the wrong hoops, while doing nothing to prevent an insincerely conducted process amounting to technical compliance.

Question 16 – Does the requirement on the client to provide the off-payroll worker with the determination, giving the off-payroll worker and fee-payer the right to request the reasons for that determination and to review that determination in light of any representations made by the off-payroll worker or the fee-payer, go far enough to incentivise clients to take reasonable care when making a status determination?

The Committee believes that the proposed process goes too far and actually undermines existing incentives to take reasonable care. Clients might decide not to involve other parties earlier in the process to the same extent as they do now if they know that they will be required to take the representations of those parties into account at a later stage. The danger that disgruntled off-payroll workers will seek engagements elsewhere if they are not happy with a determination is already a sufficient incentive for clients to take reasonable care.

Question 17 – How likely is an off-payroll worker to make pension contributions through their fee-payer in this way? How likely is a fee-payer to offer an option to make pension contributions in this way? What administrative burdens might fee-payers face which would reduce the likelihood of them making contributions to the off-payroll worker's pension?

The Committee considers that off-payroll workers might want to make such contributions but that it will be administratively burdensome for fee-payers to offer such an option where the numbers involved are small.

Question 18 - Are there any other issues that you believe the government needs to consider when implementing the reform? Please provide details.

The Committee has concerns about the speed with which the government is introducing these reforms into the private sector. There were considerable problems when they were introduced into the public sector and, as this consultation demonstrates, there are many additional complications which will arise in private sector cases. We would urge the government to reconsider the April 2020 implementation date in order to examine more carefully some of the risks outlined in this response.

The Committee urges the government and HMRC to prioritise changing the behaviour of companies, as well as revenue generation, in enforcing the off-payroll working rules. We believe that some large and powerful companies may try to avoid their own liability by contracting with smaller and weaker, less sophisticated companies, which may not fully appreciate the risks which they are taking. Although HMRC can generate revenue by enforcing against smaller companies, this approach will do nothing to prevent the avoidance behaviours of larger more powerful companies, which can only be tackled if HMRC prioritises enforcement against the worst offenders.

24 May 2019

A handwritten signature in black ink that reads "L. Thomas". The signature is written in a cursive style with a large initial "L".

Linden Thomas
President
Birmingham Law Society