

The Long and Winding Road

Off-Payroll Working in the UK: Implementation Consultation Published

It has been a relatively long road and winding road, but HM Revenue & Customs (HMRC) has finally published (what most will hope will be) its final [consultation on the government's proposed reform of the off-payroll working \(IR35\) rules](#).

A Long Time Ago

The journey started back in the summer of 2015 with the publication of a discussion document considering reforming IR35 (which, broadly, concerns the use of personal service companies (PSCs)) as response to what HMRC perceived to be widespread non-compliance (estimated by the government to reach £1.3 billion per year by 2023/24). That discussion document eventually led to the introduction of new off-payroll working rules with effect from 6 April 2017, but for the public sector only. Following further consultation, and a series of high-profile tax cases examining the effectiveness of using PSCs, the Chancellor of the Exchequer announced, at Autumn Budget 2018, that the new regime would be extended to the much larger and more diverse private sector.

Although the focus of the implementation consultation considers, and asks for business to comment on, the technical design of the new private sector rules, it also has implications for (and proposes changes that will affect) the new regime already operating in the public sector. The consultation represents the last opportunity for businesses impacted by the new rules to engage with the government before the proposals become law. Alternative approaches are not considered. In addition, since the consultation confirms the core principles that underpin the new regime, it signals the point at which affected businesses should commence preparations in earnest.

The way ahead is now getting clearer. A summary of responses will follow the conclusion of the consultation period, with draft legislation (which will form part of Finance Bill 2019-20) expected to appear pretty swiftly during the summer. Barring any unforeseen sudden delays or a dramatic change in the legislative process, the new private sector rules will be enacted in what will be Finance Act 2020 and will take effect from 6 April 2020.

I've Seen That Road Before (?)

IR35 applies where a person provides their services as a self-employed person through an intermediary (the PSC), but would be treated as an employee of the end-user if there were no intermediary. Deciding whether IR35 applies in any given circumstance depends, therefore, on the employment status of the person providing services.

The reforms in the private sector will broadly follow the principles of the regime operating in the public sector.

That said, the consultation is proposing a number of critical modifications. In the majority of cases, any changes made for the new private regime will also be carried through into the public sector rules (with effect from April 2020).

However, the core idea of the IR35 reforms is unchanged. As we have reported [before](#), that aim is to make the end-user, client or business (rather than, as at present, the PSC) responsible for determining whether IR35 applies. The follow-on effect is that the responsibility for any PAYE and National Insurance (NI) compliance, accounting and reporting will transfer away from the PSC (to the end-user client, agency or other fee-paying entity that pays the PSC).

Much, therefore, obviously depends on both the ability, as well as capacity, of end-user clients to accurately make that assessment and, perhaps less obviously, on the availability of accurate tools to help end-users to decide.

The recent rise in the number of individuals that have used PSCs that have seen their "self-employed" status challenged by HMRC, and continued widespread dissatisfaction with HMRC's online Check Employment Status for Tax (CEST) service suggests there is still some scope for improvement. Considering that the cost of getting the assessment wrong are likely to be substantial (including, for example, claims for unpaid National Minimum Wage, pension contributions and holiday pay, as well as tax liabilities, penalties and interest) and prudent end-users are more likely to "play it safe" by treating contractors as employees, the need for improvement is increasingly pressing.

Happily, HMRC has committed itself to working "with stakeholders ... to explore enhancements to the [CEST] service and associated guidance ... before the reform comes into effect." HMRC is also developing an "education and support package" to help those who will need to apply the new regime to prepare for its introduction.

But Still They Lead Me Back

The consultation asks for views and information on a number technical, but critical, subjects and changes, including:

- **Scope** – The proposed changes will apply to **all** public sector end-users but "small" clients (as defined) in the private sector will be excluded (i.e. in the private sector, the new regime will only apply to medium and large-sized clients). The consultation seeks views on how the "small" test should be applied to unincorporated end-users.

• **Information Reporting** – One of the main concerns with rolling the public rules into the private sector concerned the complexity of labour supply chains and how, practically, an employment status determination might follow that chain to the ultimate fee-payer having the obligation to correctly operate PAYE. As a result, the government is seeking:

- Rather worryingly at this late stage, to understand “in more detail” how supply chains are structured, and
- Views on how to ensure a status determination can be cascaded through the supply chain, to all those who need to know in order to meet their compliance obligations, without imposing a disproportionate administrative burden on those involved.

• **Transfer of Tax Liability** – The government is proposing that the liability to operate PAYE and account for income tax and NI contributions moves up and down the chain in step with the information reporting obligations (i.e. any tax liabilities primarily stick with any entity that fails to meet its obligation to complete or pass-on a status determination). By locking the tax liability to the information reporting, the government hopes to encourage compliance and all parties in the chain to contract with reputable firms.

Let Me Know the Way

The consultation also attempts to address some of the concerns raised with the government during the previous stage of consultation. The aim is to help signpost the way for businesses to prepare for the new regime.

Most welcome among the proposals outlined in the consultation are those that concern resolving status disagreements. The consultation proposes providing off-payroll workers, and fee-payers, with the right to receive both the status assessment and the reasons for it directly from a client. This, the government hopes, will dissuade clients from making blanket determinations of employment status and encourage the rules to be applied in accordance with the facts and circumstances of any given case. In addition, the government is considering imposing a legal requirement on clients to implement and provide dispute resolution processes.

The consultation also helpfully covers how the new, reformed regime, for both the private and public sector, will interact with other areas (including, in particular, the Apprenticeship Levy, the Employment Allowance, existing double taxation and anti-avoidance rules, construction industry scheme (CIS) and pensions).

The government is encouraging client businesses to start their preparations immediately. The suggested actions include:

- Identify and review current engagements with intermediaries, PSCs and agencies that supply labour
- Review current arrangements, across all business functions, for the use of contingent labour
- Implement comprehensive, integrated, processes and controls (again, across the business) to ensure consistent employment

status decisions

- Review internal systems (e.g. payroll, HR and recruitment policies) in light of the impending changes

In addition to this list, we highly recommend testing current arrangements through CEST to assess its use and shortcomings.

A Long and Winding Road

The journey's end is looming slowly into sight, but we are not there yet. Although the policy for IR35 is firmly set, the proposals outlined in the consultation document highlight that the government's thinking on the possible impact of the new regime is still subject to change. While the effort in the consultation to address some of the valid concerns expressed by business at earlier stages of the engagements is welcome, the relative lack of specificity in proposing solutions, and the overt lack of understanding of how labour supply chains are structured in particular, are causes for concern. Since employment status continues to be the cause of substantive controversy, in both tax and employment law, the importance of this final opportunity to engage with, and inform, government thinking and understanding of off-payroll working ought not to be underestimated.

Comments on the consultation are welcomed until 11:45 p.m. on 28 May 2019.

Our combined team of employment and tax specialists has recently worked with a number of clients to audit their working arrangements to minimise or highlight key areas of risk and ways to reduce it. To find out more about how we can support your business, please contact one of the following partners from our dedicated Tax Strategy & Benefits and Labour & Employment teams.

Contacts

Patrick Ford

Partner, Manchester
T +44 161 830 5014
E patrick.ford@squirepb.com

David Whincup

Partner, London
T +44 20 7655 1132
E david.whincup@squirepb.com

Alison E. Treliving

Partner, Manchester
T +44 161 830 5327
E alison.treliving@squirepb.com

Miriam Lampert

Partner, London
T +44 20 7655 1371
E miriam.lampert@squirepb.com