

Off-payroll working rules from April 2020

About ACCA:

The Association of Chartered Certified Accountants is the global body for professional accountants, offering business-relevant, first-choice qualifications to people of application, ability and ambition around the world who seek a rewarding career in accountancy, finance and management.

ACCA supports its 208,000 members and 503,000 students in 179 countries, helping them to develop successful careers in accounting and business, with the skills required by employers. ACCA works through a network of 104 offices and centres and more than 7,300 Approved Employers worldwide, who provide high standards of employee learning and development. Through its public interest remit, ACCA promotes appropriate regulation of accounting and conducts relevant research to ensure accountancy continues to grow in reputation and influence.

The contract employment market remains an effective way for growing businesses to access highly skilled workers on flexible basis. Many of these workers form the bedrock of sound financial, business management, technological and cyber security advice that enables the production of world leading goods and services that set the UK ahead, and in often underpin productivity.

For further enquiries please contact:

Lilly Aaron
Policy Manager- Europe
lilly.aaron@accaglobal.com
+44 (0)207 059 5021
+44 (0)7802381494

Jason Piper
Senior Manager - Tax and Business Law
Jason.piper@accaglobal.com
+44 (0)207 059 5926
+44 (0)7711745579

General Comments:

ACCA wholly supports anti-avoidance policy measures to combat the loss of tax revenue and employee rights brought about by the arbitrary creation of intermediary entities to disguise the true nature of the worker/client relationship. While the consultation does not aim to tackle the link between tax and employment rights, as the off-payroll rules are developed and extended it is imperative to note the directly related imbalance caused by the absence of legal protections to the worker.

In drafting our response to this consultation, ACCA conducted a survey of members in the private sector that either engage with or operate as off-payroll workers. Of a pool of around 50 respondents; 58% of respondents were off-payroll workers; 7% were an agency or fee-payer working with off-payroll workers; and 35% were from private sector businesses that engage off-payroll workers.

As mentioned above, feedback from members affected by this legislation reflected heightened concern that workers could find their tax liabilities increased to approximate the tax due for an employee of their client without benefitting from the same security and rights that these employees receive. Others stated their intention to look elsewhere for contracts or as with some of the adjacent engagers (29%), consider reducing their reliance and exposure to off-payroll workers.

ACCA believes that the result will be that in many instances the worker will pass the increased cost up the supply chain in response to increased tax liabilities and economic returns. In turn, clients may respond to the increased financial risk by reducing their reliance on off-payroll resourcing.

Separately, the figure of £1.3bn given in the consultation as the cost of private sector non-compliance by 2023/24 is inconsistent with an OBR estimate that the proposed rules would represent a £661m uplift for the exchequer by the same date. Assuming both figures are based on the same incorporation & business births and deaths, the proposed rules fail to collect £639m of the tax gap. It is reasonable to assume the Exchequer may choose to extend the rules for small entities as it has done with the private sector. In this case HMRC should aim to be transparent about intentions for a phased approach.

At a time of heightened business uncertainty, while many businesses are contemplating upcoming changes to business reporting requirements, it may be advisable to consider a delay to the introduction of the rules. Such a delay would allow a pilot of the changes to CEST and more vitally, allow for a comprehensive appraisal of the rules and any unintended consequences or interactions. This should include a review of implications from the private sector, to properly understand and mitigate some of the less desirable effects of the legislation before extending the rules to the private sector. On this basis ACCA suggests a delay to 2021 with the changes to CEST trialled from late 2019 and a review of the operation public sector rules.

Consultation Questions

DEFINING THE SCOPE OF THE REFORM

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.

ACCA does not regard either option as representing a simplified approach but as noted, accountancy professionals will be familiar with the criteria adopted by the Companies Act test and as such it is preferable to align eligibility as closely as possible.

Additionally, where the client entity qualifies as small and therefore is exempt, the worker continues to be required to assess whether Chapter 8, Part 2 ITEPA applies to the engagement. Should the client not meet the criteria within an accounting year there would need to be a reappraisal of the status of the worker as the liability transfers from worker to client at the end of the period. At present there is no obligation for the client to notify the worker of this change or an expected upcoming change in liability. In most cases the worker will not be expecting the status of their engagement to change and it may be unclear as to whether the original determination made by the PSC will carry across.

INFORMATION REQUIREMENTS

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.

No, a determination given by a client would not give off-payroll workers sufficient certainty over their tax position. In the absence of other evidence, initial determinations must be made on written documentary evidence. However, case law shows there is a tendency for tribunals to consider the day-to-day operational relationship between the engager and the worker. For example, in the case of JLJ Services vs HMRC a substitution clause was found to be 'irrelevant' because of the practical arrangements 'on the ground'. It has become unclear whether the inclusion of a substitution clause that is not exercised will negate the existence of the contractual right for the worker to provide a substitute.

This view is clearly reflected by the business base to which it will apply; 88% of respondents to our survey that identified themselves as off-payroll workers said that a determination from a client would not give them certainty over their status in the future when operating on a similar basis again.

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.

In order to manage its own liability the client has a financial incentive to pass on the determination. However, to prevent further disputes both within the supply chain and later with HMRC, more detail should be provided alongside status determinations.

In extended supply chains the client may face difficulties in identifying the fee-payer, presenting a hurdle when seeking further information about the terms of engagement (i.e. extent of right to substitution or control) with the worker that would determine their employment status. This may prevent the client from making an informed status determination and ultimately, their ability to comply with the proposed rules.

Over half of the respondents from across our survey pool (52%) overall said that contracts are usually required to start within 31 days. Requests for further information regarding determinations or disputes are likely to delay project commencement and fail to meet the resourcing needs of business. Providing this information earlier in the process would be helpful but will clearly result in an added up-front administrative burden on the client parties.

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?

It is most likely that a breakdown in information being cascaded down the supply chain would be as a result of lack of understanding from the relevant parties of their obligations. When surveying members, only half of those engaging off-payroll workers said they believed their resourcing teams had the capacity or relevant knowledge to be able to take on the added task of making status determinations.

As accounting software becomes more sophisticated and universally adapted it seems that some form of centralised accounts payable connected software that notifies all parties of the worker's expected pay date, and any liabilities would give clarity to the obligation and dissemination of information of all parties.

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.

No response.

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.

See response to Question 4.

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.

See response to Question 1.

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?

No response.

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?

The proposed rules must attribute the appropriate liability to the responsible parties. If an agency or fee-payer further down the supply chain fails to pass on a status determination (or reasons upon request) the liability must ultimately fall with the client. If there is a failure to comply with the rules within the supply chain, the liability must follow this failure. This principle directly opposes the proposal that HMRC collect the outstanding liabilities at all cost, by transferring the liability to the client if there is complete failure to comply by all other related parties. In this scenario the client risks taking on the burden of compliance as well as the financial risk, regardless of their own compliance.

As mentioned above, as there is no established process or standardised system proposed for cascading the determination, there is no assured way of notifying other parties of a transfer of liability. This information is absolutely crucial to reaching certainty among all parties over the status determination.

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.

The concern here is that collection from the first party in the contractual chain takes away a level of control from the contractor. As mentioned in response to Question 3, it is likely that requests for further information or disputes over determinations will delay the process, particularly within extended supply chains where information may be passed back through the informative flow.

52% of respondents across a variety of parties in the supply chain said that contracts were often started within 31 days and a further 43% said the nature of contract projects demanded start dates remain flexible. The complexity and process of a back-and-forth informative flow could simply delay contract start dates.

Additionally, there is a remaining question over the simplicity and effective return of tax collected on incorrect assessments. A worker may launch a Section 8 appeal to recover the deducted employee NI but must separately deal with the fee-payer for the collection of employer NI. As mentioned above, the proposed approach does not give the worker the benefit of real time information on where the liability rests and which party in the supply chain should be pursued should they need to recover the deducted payments. It would be more helpful if HMRC would build the informative flow in a way that keeps the worker/ worker's PSC informed of the liable party and simplifies the process for prompt recovery.

Question 11 and Question 12

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?

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

No response.

Helping organisations to make the correct status determination and ensuring reasonable care

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.

Yes this would greatly increase the burden on the client but would clearly offer greater clarity for the worker over the reason for the determination. Although, as well as supply the of the determination and reason, it may be difficult for the client to ensure the determination reaches the fee-payer without an obligation on other parties in the supply chain (such as an agency) to similarly cascade the information.

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.

ACCA is particularly concerned by the proposal that a process for resolving status disagreements should be client-led. First, the development of such internal processes presents a disruptive administration and compliance burden for the client. Secondly, a client-led dispute process will place in question the impartiality and integrity of the outcome.

The consultation suggests that a client-led dispute resolution process will provide a certain level of 'consistency across organisations'. It is ACCA's view that this would not be the case, with dispute resolution procedures varying between clients. This may lead to workers or fee-payers being required to put together supporting evidence to challenge the determination without an expectation of the basis upon which it might be overturned.

For example, 67% of respondents to our survey foresaw their organisation relying on CEST to assist in reaching status determinations. While CEST continues to exclude mutuality of obligation indicators, clients are unlikely to be encouraged to include it within their own determinations and related disputes.

There is also a risk that this legislation will unfairly impact smaller self-employed workers (regardless of the company structure of the intermediary) where a perceived imbalance of power means workers feel unable to challenge blanket or potentially incorrect status determinations. In our survey of members, only 60% said they felt they would feel able to challenge a status determination. A related comment left by a respondent to our survey read;

'...If you want work, you have to do what the client wants otherwise they let you go and hire someone else...'

Additionally, around 96% said that if found to be within the off-payroll rules they would likely renegotiate their contract fee to account for the additional tax liabilities, passing the cost on to the client. There is reason to believe that the proposals risk increasing costs to private sector contracts.

Question 15

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

50% of client/ agency respondents to our survey said they believed their resourcing team had the resource and relevant knowledge to make status determinations but there remained a significant proportion (28%) who believed their organisation did not have the ability. The implication for satisfactory compliance at scale is particularly concerning. The integration of a robust appeal process would create an extraordinary compliance, administration and resourcing burden for the client to remain compliant that in many cases, providing the resource for shorter-term contracts would be prohibitive.

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?

No response.

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?

No response.

Question 18

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

Against a crowded legislative timetable and other economic challenges facing business, it may be advisable to consider a delay to introduction to allow for changes to CEST to be digested and a full consideration of the implications from the public sector reform.

While ACCA recognises that this is not a desirable course of action for the department, it may be beneficial to consider and better understand the full range of interactions rather than a gradual or phased reform of the rules as the implications become known.

In particular it would be helpful for business to have the changes introduced over a properly developed timeframe. A delay would allow business to understand the significant implications for their internal and external business reporting systems and their own preparations, ultimately achieving HMRC's aim of giving business greater certainty.

HMRC has consistently placed an emphasis on the scale and cost of non-compliance and must show the same due diligence over the accuracy of the resulting determinations which will determine thousands of companies' working practices and in many cases, viability.