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HM Revenue & Customs Consultation:
Off-payroll working rules from April 2020

Response from the Employment Lawyers Association

28 May 2019

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Introduction

The Employment Lawyers Association ("ELA") is a non-political group of specialists in the field of employment law and includes those who represent claimants and respondents in courts and employment tribunals. It is not ELA's role to comment on the political or policy merits or otherwise of proposed legislation or regulation, rather it is to make observations from a legal standpoint. Accordingly, in this consultation we do not address such issues. ELA's Legislative and Policy Committee consists of experienced solicitors and barristers who meet regularly for a number of purposes including to consider and respond to proposed legislation and regulations.

The Legislative and Policy Committee of ELA set up a working party which was co-chaired by Emma Burrows of Trowers & Hamlins LLP and Stephen Ratcliffe of Baker McKenzie LLP to respond to this consultation paper. A list of the members of the ELA working party is at the end of this paper.

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.

In ELA's view having two different tests for corporates and non-corporates unnecessarily complicates matters. It is preferable to have one test applying to all private sector organisations. This will make the application of the off-payroll rules more straightforward.

In ELA's view both of the two simplified options raise difficulties. In either case, employers must be able to accurately assess the number of employees they have on their books. Smaller organisations are not always in a position to make an accurate prediction of their staffing needs and the extra administrative costs required to ensure

that they comply with the rules could be onerous without any obvious advantage to the implementation of IR35, particularly in the case of an organisation whose employee number is close to 50 and may fluctuate above and below 50 from time to time. Where the employee number fluctuates in this way, it would be difficult to comply with the proposed rules. Staffing arrangements can alter from month to month and organisations may unwittingly and innocently fall foul of the regulations under the current proposed options. Smaller organisations (especially growing businesses) may therefore be incentivised to use contractors to ensure that they have adequate staffing resources without having to change their approach to IR35 compliance on a regular basis.

A third possible alternative test could be for the private sector organisation to look at the number of off-payroll workers they use in the previous financial year. If they use a certain number of such workers, say over 10, the rules could automatically apply.

The two simplified approaches are unlikely to bring into scope entities that should otherwise be excluded from the reform, but, as noted above, they are not, in ELA's view, a particularly helpful way of bringing non-corporate entities into scope.

One alternative option would be to remove the small business exemption entirely. The off-payroll working rules apply to all public authorities so, for consistency, and to avoid confusion, they could be applied to all private sector organisations. This would avoid the risk of end clients having to amend their approach to IR35 compliance as their employee number fluctuates, and would minimise the risk of parties inadvertently concluding that the relevant PAYE liability sits with the PSC when it in fact sits with the payer.

Question 2: Would a requirement for clients to provide a status determination directly to 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.

Such mandatory requirement for transparency would certainly assist; clients could provide a copy of their assessment and the detailed reasons for the status determination directly to the worker, within a set timeframe. We would suggest that there should be a prescribed format in which that assessment should be provided, perhaps in the form of the answers to the questions on the CEST checker.

It is possible that the client may not have direct contact with the worker until after the commencement of the relevant engagement, so the timeframe referred to above should allow for the determination to be provided to the worker shortly after commencement of the engagement, if necessary.

We would also suggest that the Government considers the position of the worker who, having been told that IR35 applies, is nonetheless paid gross by the fee payer, suggesting that the fee payer is not complying with its PAYE and NICs obligation. The Government may wish to consider providing guidance to workers on what they should do in such situations to ensure that they are not penalised as a result of that failure.

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.

This approach does appear to work in most cases in the public sector setting. However, members of our working party have raised concerns that passing on information in this way could lead to misinformation being passed on (accidentally or intentionally). In addition, there may be unacceptable delays (reasonable or otherwise).

As above, we would recommend that there be a prescribed manner in which the information is supplied. This could, for example, be supplemented by a government portal, to which all parties within the chain can access to input and/or see details of the relevant determination, perhaps by a specific access code for each worker being provided to the client and then disseminated down the contractor chain.

Question 4: What circumstances might result in a breakdown in the information being cascaded to the fee-payer? What circumstances may 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?

As the government acknowledges, "each party in the chain is a potential point of failure, which may result in the status determination not reaching the fee-payer". There could be countless circumstances which may result in a breakdown of information, such as the absence of an individual whose role it is to provide the information from a party in the chain, the closure of an organisation or its insolvency, human error or technological fault.

In the event that the Client's status determination is based on inaccurate or outdated information (for example because the nature of the working relationship changes over time), no party in the chain can in fact rely on the status determination. The Government may wish to consider where liability might lie in such circumstances, particularly where: (i) the status determination is incorrect because of information supplied to the client by another party in the chain; or (ii) the status determination was correct when it was completed, but due to the evolution of the relationship it ceases to be accurate some months or years later.

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.

All circumstances would benefit from a simplified information flow. As noted above, one option would be for a portal to be created to which all parties in the chain might be given access.

There may be commercial reasons why a labour supply chain would have more than two entities between the worker's PSC and the Client, such as the need for local knowledge, other specialism, or panel membership.

We see issues in terms of confidentiality and, potentially, competition if there is direct contact, since in a typical chain there will be no transparency as to the fees imposed by each contractor in the chain (and hence the level of profit each "link" makes from the ultimate client). It seems likely that, in some cases, such direct contact might risk the commercial interests of those entities further up the chain.

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

In ELA's experience in the private sector, many engagements of contractors via PSCs have very short contracting chains, often comprising only the PSC and the client themselves, so in practice, in those cases, identifying the fee-payer will be very straightforward.

Where there is a longer supply chain, however, whilst a simplified information flow might appear to reduce the potential points of failure, it is unclear how the client might leapfrog other parties in the supply chain to easily identify the fee-payer. By definition, such a leapfrog would involve relying on contractual commitments to disclose the next entity in the chain, and require determination of whether that entity is onshore or offshore, which may in fact lead to more points of failure.

In addition, in circumstances where there are a number of agencies in the contractual chain between a PSC and a client, the agency with the direct relationship with the client may wish to prevent any other agencies in the chain from contacting the client, for fear that those other agencies may poach the client's business, as noted above. As a result, in many cases it may be very difficult in practice for the client to liaise directly with the fee-payer.

Where the client does not know the identity of the fee payer and needs to rely on being supplied with the information, there are options to mitigate the burden on the client. One of these would be to impose a statutory obligation on the party which contracts with the client to find out the identity of the fee payer and inform the client (an obligation they could pass down the contractual chain).

Another possibility to mitigate the burden on the client would be to impose a statutory obligation on the fee-payer or the party preceding it to supply the PSC with the fee payer's details and a statutory obligation on the PSC or worker to supply this information to the client. However, this increases the obligations on the PSC and there may be timing challenges, particularly if the obligation is on the fee-payer itself, as it may not be identified to the PSC before payment is due.

ELA consider that imposing the obligation to cascade information on all parties in the chain is the approach most likely to succeed rather than a simplified information flow provided that real consequences flow from failing to cascade the information, for

example a transfer of liability. We suggest obligations along the lines of the information exchange and flow of liability provided for in the Agency Workers Regulations 2010 (which many clients and agencies will already be familiar with), namely that liability would pass to intermediaries in the chain to the extent that information is not passed promptly up the chain. In such circumstances, it is in the interests of all parties to exchange information in a timely manner.

As above, ELA suggests the easiest way of achieving this would be through an information portal to which all parties have access with an access code.

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

The PSC will not necessarily know the size of the organisation to whom they provide their services and so this leaves the PSC in a position of uncertainty, not knowing if the small companies exception applies or if a larger client has simply failed to comply with its obligations. This is one reason why the Government may wish to consider whether a small companies exemption is helpful.

Both this uncertainty and the small companies exception does, as the government acknowledges, shift the responsibility for assessment back to the PSC, which is arguably inconsistent with the intention of the reforms. As such, one might anticipate an amount of resistance from PSCs particularly given that:

- This is a responsibility that falls on the PSC as a very small entity but which the consultation paper accepts that businesses with a turnover of up to £10.2 million do not have the capacity to absorb;
- It could mean that a PSC accepts an engagement at a rate assuming it is outside the off-payroll rules but finds itself with substantial additional tax liabilities, at a time when there may be a general downward pressure on rates as clients seek to offset their additional NICs liability for contractors who fall within the rules; and
- Uncertainty demands additional time and costs from the PSC, without any increase in protections (see answer to Question 18)

The concerns of the PSCs could be mitigated by a process for HMRC to aid status determination when requested by the PSC. Improvements to CEST, supported by straightforward guidance with examples and ideally backed up by trained advisers who could provide advice or (better still) a binding determination via a helpline (similar to the "clearance" which can be obtained from HMRC in respect of other tax laws), would assist.

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?

ELA is an association of employment lawyers in the UK. Typically, use of off-payroll workers is not particularly common in the legal industry in the experience of the members of our working party. That said, we are aware that limited use of off-payroll workers may be used by some law firms/in-house legal teams to fill roles on a short term basis and/or in relation to specific advisory/consultancy roles (e.g. retired partners from legal firms occasionally carry out specific advisory roles and may be engaged on a self-employed basis to do so). In our experience, whilst these roles may occasionally be resourced with assistance from an employment business or employment agency, to the more limited extent that off-payroll workers are engaged in the legal industry, the engagement will often be directly between the client and the personal service company ("PSC").

In our wider experience of working with different types of clients who require off-payroll workers, the length of the supply chain will typically depend on whether the end user client wishes to engage the services of an employment business or temporary work agency. Where there is no such agency involved, or where an agency acts only as an introducer but not the engager, the engagement is generally directly between the end user client and the off-payroll worker, rather than via a long labour supply chain.

That said, in our experience of working with employment businesses and agencies, it is common for agencies to form part of the labour supply chain (particularly where an end-user client has a significant or regular need for off-payroll workers). In those cases, in our experience it is common for the primary agency (i.e. the agency that contracts directly with the end user client) to have sub-contracted arrangements in place with smaller agencies which source the personnel and supply the personnel to the primary agency. This means that there are often (although certainly not in all cases) at least two intermediaries in the labour supply chain between the end user client and the PSC. In some cases, particularly with larger agencies, there may be additional intermediaries in the chain.

In our experience, multiple agency entities within a labour supply chain are more common where the type of off-payroll workers that are required are for specialist roles or areas. In that case the larger primary agency in the chain may have contracts in place

with various smaller agencies who specialise in seeking and recruiting candidates in particular specialist areas or with specialist skill sets.

Since the introduction of the off-payroll working rules in the public sector, we have also seen an increase in primary agencies within the labour supply chain sub-contracting with other agencies (possibly influenced by the fact that most of the risk for compliance with the rules rest with the agency which is the ultimate fee payer).

In terms of the roles carried out by the entities within the labour supply chain, in our experience of multi-party labour supply chains (i.e. where there is one or more agent or intermediary entity between the end user client and the PSC), the primary agency (i.e. the agency which has the direct contractual link with the end user client) generally has the role of negotiating and agreeing: the terms of supply with the end user client; the types of off-payroll workers the end user client requires; and terms for payment and fees.
Subsequent agencies in the labour supply chain will not typically have any contact with the end user client or any input into the terms agreed with the end user client. The secondary agency's contract will be with the primary agency only. The secondary agencies will have the main responsibility for seeking and selecting candidates in accordance with the requirements set by the primary agency. The secondary agencies will also be the agency with the direct contractual link to the PSC and will usually be responsible for payment of fees to the PSC.

In our experience many different types of industries and sectors use off-payroll workers, but their use is particularly prevalent in industries such as IT, education, healthcare, construction/engineering, certain functions within financial services and media/entertainment.

In recent years, the growth of the gig economy and platform/application business models has also seen an increasing use of off-payroll workers in sectors and industries in which use of off-payroll workers was previously less common.

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?

On its face, yes, it is likely that such an approach would encourage agencies higher up the chain (which are likely, on the whole, to be larger and better resourced than those further down the chain) to take measures to encourage compliance further down the chain. However, please see the responses to Question 10 regarding unintended consequences and comments regarding underlying assumptions immediately below.

It appears that several assumptions underpin this approach:

- The first bullet point on page 16 of the consultation indicates that HMRC/the government consider that the client or first agency at the top of the chain have more control than parties further down the chain. However, bargaining positions very much depend on the circumstances of any case. It may be unfair in certain cases to place liability higher up the chain to encourage compliance throughout the chain, especially if the PSC receives gross payments, but the first agency or client is found liable for the tax and NICs that should have been collected (please see further the responses to Question 10 below regarding ultimate liability for tax and employee NICs and reducing competition in the market).

- The approach assumes that only one party in the chain will have failed in its obligations (final paragraph, page 14) and that there is much to be recommended in terms of liability resting with one party at any one time (second bullet on page 16). From HMRC's perspective, enforcement against one party is valuable, but in the case of multiple failures through a chain, whether intentional or inadvertent, we would question whether ultimate liability should fall on just one party. HMRC may wish to consider a scheme where primary liability falls on one party, but that that party can recover sums from other responsible parties. Please see further the responses to Question 10 below, particularly with regard to ultimate liability for tax and employee NICs.

- It is unclear whether this approach truly is one where liability follows obligations and corrections can be made each time a payment is made (third bullet on page 16). This would only be guaranteed if a payment from one party to another was conditional on the upstream party being satisfied that all obligations under the rules had been met. Such preconditions to payments moving down the chain

could lead to perverse results, such as unscrupulous intermediaries using this as a basis to withhold fees.

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, there appear to be several consequences or impacts which may arise from collecting tax and NICs from the first agency and also from clients.

Ultimate liability for tax and employee NICs

We would propose that HMRC considers whether parties further up the chain should be "ultimately liable for the tax loss to HMRC" (version of Question 9 on page 15, though not the version of Question 9 on page 26).

- Whilst making those parties primarily liable for any failure to account for tax or NICs is no doubt helpful in pursuit of the collection of tax and NICs more broadly, it seems unjust that the PSC or worker should be paid gross and have the worker's deemed employment tax paid by another party. It is not unheard of for an in-demand worker to insist upon being engaged via a particular agency (the fee-payer), often one with which the worker has some connection, and there is a risk in such circumstances that the fee-payer and the worker might collude to evade their IR35 obligations, knowing that the ultimate liability will then sit further up the chain with the first agency or the client.

- Instead, the Government may wish to consider making parties further up the chain liable for employer NICs only. Whilst there remains a risk that fee-payers and workers might nonetheless collude to evade employer NICs liability, the risk would be lowered, and the Government could provide for a statutory right for the first agency or client (as applicable) to recover employer NICs from the fee-payer which should have paid them.

- Alternatively, the new rules could allow the first agency or client (as applicable) to recover employee NICs and employee tax from the fee-payer and/or the PSC and/or the worker (on the basis that the PSC has received gross payments and that the failure sits with the fee-payer).

- This approach reflects the standard position in employment settlement agreements. In those agreements, the (former) employee gives the (former) employer a tax indemnity in respect of any further tax and employee NICs that may be due on payments under the settlement agreement. This means that

whilst primarily liable for tax and employee NICs, the (former) employer can recover such sums from the (former) employee.

Visibility and commercial consequences

The rules put the primary obligation to account for tax and NICs on the fee-payer. This makes sense as the fee-payer is best-placed to know what sums are being paid to the PSC in respect of any one engagement and therefore to calculate the tax and NICs dues. In addition, the commercial arrangements between each the party in the chain can remain confidential.

Placing liability further up the chain cuts across that rationale:

- Parties higher up the chain may struggle to know what tax and NICs are due, since they will not know what proportion of the fees they have paid have actually been passed on to the PSC.

- Further, by knowing what part of the fee is going to the PSC, parties higher up the chain will have visibility of profit margins of other parties in the chain, which may undermine competition.

More complex chains

Rules that seek to impose liability upstream may drive behaviours focussed on diverting liability downstream.

Whilst the private sector does have long chains for the supply of labour, short chains also exist, particularly for highly-skilled expertise. Where a client may engage a worker's PSC without an additional intermediary, the fact that primary liability for tax and NICs will fall on the fee-payer may in itself be enough to encourage clients to engage workers through further intermediaries to make another party the fee-payer. This decision may be reinforced if liability transfers up the chain to the first agency if a party in the chain fails to fulfil its obligations.

Cynical clients or first agencies may be encouraged alongside constructing more complex chains to re-characterise engagements for labour as engagements for services, so as to attempt to avoid the application of the IR35 rules entirely. That may appear more cosmetically justifiable with longer, more complex chains. Whilst a party further down the chain may be characterised as the client for a supply of labour, ultimate end-users and first agencies will be more relaxed as they seek to divert the liability to account for tax and NICs away from themselves.

Reducing competition in the market

Whilst there is scope for chains to become more complex (see above), it is also possible that there will be a flight to counterparties that are seen as more "reputable and compliant" (paragraph 3, page 15 of the consultation) or simply bigger. This could inadvertently lead to the domination of the market, or certain segments, by big players who dictate terms to clients as well as agencies in the chain and, ultimately, workers.

Along with the underlying assumption in the rules that those higher up the chain have more control, it is possible that dominant players will have the bargaining power to game the system and unfairly divert liability away from themselves whilst in fact controlling the overall arrangements in place.

Insolvency/no fault

The consultation explicitly refers to encouraging "all parties to contract with reputable and compliant firms" (paragraph 3, page 15). HMRC intends then that parties further up the chain should be responsible even for agencies further down the chain that become insolvent. If that is the intention, the Government may wish to reflect in the new rules the auditing practices HMRC already expects of clients in respect of labour supply chains: https://www.gov.uk/government/publications/use-of-labour-providers/use-of-labour-providers-advice-on-due-diligence

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?

It is likely that such an approach would encourage clients to take measures to encourage compliance further down the chain, insofar as they are able. However, please see the responses to Question 10 regarding unintended consequences.

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

Please see the responses to question 10 above which apply equally in respect of clients and agencies.

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 will impose a significant burden (and cost) irrespective of the size of the organisation. It may also be inoperable, in practice.

In smaller client organisations may lack the resources to conduct the detailed status assessment which would be required for reasons to be provided. A mechanism for dealing with the receipt of requests and the provision of reasons would have to be established which would be burdensome. A new (appeals-type) process for challenging (on the part of the worker) the reasons for the determination would have to be created (see below). Therefore, this proposal envisages two additional administrative burdens on clients.

In all organisations and particularly in instances of longer supply chains the identity of the fee payer and/or the worker may not be known to the client which would then be unable to verify whether a request for reasons was valid. In the same way, the worker or fee payer in a longer supply chain may lack visibility as to the identity of the client (including the contact details of the relevant employees or officers at the client responsible for the relevant status determination). The risk is that a legal requirement may be imposed on clients/end users which they are then unable to discharge.

One unintended consequence may be that organisations sub-contract this process or only work with limited larger recruitment agencies which are prepared to indemnify them, in which case, there could be an anti-competitive effect. See also the answer to question 10 above on this point.

To mitigate the burden we recommend

- A reconsideration of whether this is the best process to deal with off payroll workers.
- An improvement to the CEST tool so that it provides certainty in more cases together with a facility to add reasons for the answers given could assist all parties in communicating the determination and the reasons for it.
- The publication of a pro-forma document setting out “reasons” which smaller organisations might rely on and could provide guidance on making the determination.
- HMRC could also consider the creation of an on-line portal or other digital tool which would enable all parties within the supply chain with a legitimate interest to have access to the status determination and any reasons given.

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.

ELA does not believe a client-led process is desirable.

- HMRC and not the client is the ultimate decision maker as to status for tax purposes so a client-led process will not provide finality for the parties. As a matter of natural justice, there needs to be a process in order that disagreements can be resolved in order that the off payroll worker has some mechanism to challenge a determination.

- If a client led process was required the client would be required to create and administer a new dispute resolution process. Smaller organisations are likely to lack the resource and expertise in dispute resolution. In larger organisations with a dedicated HR function, contractual relationships are "owned" by procurement rather than HR and procurement also lack expertise in dispute resolution.

- Imposing an additional (burdensome) process around "status disagreements" may also compromise workforce planning and resourcing arrangements and potentially impact productivity. One of the benefits of the agency worker model is that it is "response led."

- Imposing a dispute resolution procedure (which would have to be completed before a worker commenced work), will militate against the immediacy of supply.

- Workers may refuse to supply their services in such instances creating very real practical issues.

- From the worker's perspective - as the client is not the ultimate decision-maker any such dispute resolution process may be perceived as meaningless and may not deter subsequent challenges at self-assessment stage (increasing the burden on HMRC).

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

Yes, see 14 above.

Question 16: Does the requirement on the client 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 the determination in the 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 ELA suggests it does not go far enough. Where there is doubt as to status there is a potential conflict of interest between the relevant parties. Clients may take the view that where there is doubt, decisions should be conservatively made (particularly if the ultimate PAYE responsibility as regards correct employment status rests with them). This may result in larger numbers of workers being dissatisfied with the status determinations made. A dispute resolution process in which the body (HMRC) ultimately responsible for the outcome is not the decision maker, in fact, as to status would be unlikely to resolve this potential conflict of interest.

ELA is concerned that in practice, some clients may choose to outsource the determination of status and the dispute resolution mechanism to external providers, potentially the first agency in the supply chain. Assuming clients will require a guarantee or indemnity in relation to both these processes to be given by the agency provider, this may lead to a consolidation in the agency market because only larger agencies will have the expertise to determine status, to run dispute resolution mechanisms and to indemnify clients in relation to tax liabilities arising from those determinations.

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 workers pension?

In our view, it is unlikely that there would be significant take up of fee payers making pension contributions for off-payroll workers as described.

In practice, it seems likely that the fee payer would have to make contributions to whichever pension scheme the off-payroll worker has in place. This would involve the fee payer contacting and having appropriate arrangements in place with a variety of personal pension schemes and providers. This seems to us to be a disproportionate administrative burden for a fee payer, particularly given that most off-payroll workers are engaged on a relatively short term basis.

It is possible that this administrative burden could be mitigated to some extent if there was a designated or default pensions scheme for PSCs that could be used for this purpose (similar to a NEST arrangement). However, we consider that most PSCs would be reluctant to opt to have to use a default or basic pension scheme, rather than continuing to use whichever personal scheme they have already put in place (and they may see use of a default scheme as less attractive).

It is also difficult to see how the fee payer could use any scheme they may already have in place for auto enrolment purposes for workers/employees without blurring the lines in terms of the status of the off-payroll workers. Pension contributions are traditionally a benefit in the employment relationship, rather than between a client and a self-employed individual, and the fee payer making pension contributions for a PSC as part of their general auto-enrolment arrangement seems to us to potentially impact on the assessment of the PSC's status (particularly where the fee payer and PSC consider the arrangement should be regarded as outside IR35).

Off-payroll workers may also not wish to have pension contributions made throughout the financial year on their behalf. As PSCs account for tax on an annual basis (rather than each month through PAYE) the amount they wish to contribute to their pension may be dependent on other factors such as their tax situation for that financial year, the amount and tax treatment of any dividend they may take from their company, and what proportion of their annual and life time pension allowances remain available. Payment

of pension arrangements by a fee payer during an engagement may therefore restrict off-payroll workers' flexibility in managing these issues.

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

Good Work Plan

Whilst we note that the current consultation is separate from the Government's Good Work Plan, and that employment rights issues are outside the scope of the current consultation, ELA considers that there is a significant overlap in the focus and priorities of the current consultation and the Good Work Plan and that it would be beneficial to consider these issues together.

The changes to the off-payroll working in the private sector rules are intended to ensure that off-payroll workers who should be inside IR35 are taxed accordingly (and the rules may also lead to more businesses who use off-payroll worker deciding that it would be preferable to move to engaging individuals on payroll as an employee or worker from the outset).

However, whilst deeming an off-payroll worker within IR35 will mean that he/she is taxed as an employee, they will still not necessarily receive the rights and protections of an employee and/or worker (a matter which we would suggest be made clear in accompanying guidance to avoid misunderstanding). Given that, we consider that the Government's proposals on off-payroll working are relevant to the wider issue of Good Work and employment protection, particularly in areas where status is increasingly subject to challenge.

For example, the growth of the gig economy has led to the use of off-payroll workers within business models and industries that have not traditionally engaged the self-employed. In general, this "new wave" of off-payroll workers tend to be less well remunerated than traditionally was the case for self-employed contractors engaged in skilled and specialist roles. For example, self-employed contractors in specialist IT roles may be able to negotiate a daily rate that is higher than the equivalent salary of a permanent IT employee, which perhaps compensates to some extent for not having protection in relation to holiday pay, sick pay, etc, whereas this may be less true for the self-employed engaged in the gig economy (e.g. engaged in courier, driver, etc roles). It therefore seems that reform of taxation rules for off-payroll workers is relevant to the wider debate on Good Work, and how the Government should approach rights, protections and responsibilities (including taxation) in the modern workforce.

Application of IR35

We note that the consultation refers (at page 21) to the off-payroll working rules not applying in relation to “contracted out” services. This reflects the current position in the public sector. However, in practice it may be difficult to distinguish what will be regarded as a fully contracted out service and what is a contract for labour supply. There are likely to be grey areas and blurring of lines between the two (e.g. when a service is contracted out but involves the service provider's personnel in the resourcing of that service, it can be difficult to establish whether this would tip it into a supply of personnel arrangement). In that regard, it may be helpful to produce more detailed and practical guidance as to what a "contracted out services" scenario is, who is truly the "client" in that scenario where there is a PSC further down the chain, and the approach that HMRC would take in distinguishing between the two models in practice.

Definitions

On a related note, we would suggest that some consideration is paid to the definition of "client", "fee-payer", "engage" "contracted out" services etc., to ensure that confusion over when these rules apply, and who is responsible for which aspect of compliance, is minimised.

CEST Checker

The consultation paper is notable for the absence of any reference to the widely-reported concerns over the effectiveness of the CEST checker, whilst relying on it as core to compliance with both existing and new roles.

Before resolution of those issues before the implementation of the new rules, the Government will be introducing an unreasonable degree of uncertainty into tax compliance, resulting in tax exposure for even the most compliant clients, agencies and fee-payers.

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