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# HM Revenue & Customs Consultation:

# Draft secondary legislation: off-payroll working rules from April 2020

## Response from the Employment Lawyers Association

**19 February 2020**

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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. The working party members are listed at the end of this paper.

### General

We would refer HMRC to our previous responses to consultation for further detail of the issues with the proposed legislation. However, the publication of the technical note and draft secondary legislation brings to the fore an issue which, although mentioned in our previous response, bears repetition, since its effects may be significant. That issue is the impact of the draft legislation's approach to the transfer of liability up the supply chain, including in principle to the client. We would make the following observations on this point:

- As we have noted previously, it seems unjust that the PSC or worker might be able to engineer a situation where the worker is paid gross and the worker's deemed employment tax is paid by another party. By way of example, 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 not 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

Where a client may engage a worker's PSC directly at present, 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. We are already seeing clients taking steps to interpose an additional master agency into their supply chains as a means of "insuring" against the risk that a fee payer further down the chain may not adhere to its obligations. It is possible that there will be a flight to agencies that are seen as more "reputable and compliant", or simply bigger, so as to ensure that the client is not inadvertently exposed to tax liability due to a default by a fee payer further down the chain.

**ELA Working Party Members**

**Co-chairs:**
Emma Burrows, Trowers & Hamlins LLP
Stephen Ratcliffe, Baker McKenzie LLP

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