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

Response from the Employment Lawyers Association

5 September 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.

Draft response to the consultation on the Finance Bill 2019/20 – Off Payroll Working Rules

Status Determination Statements and the Client-Led Status Disagreement Process

A. Status determination statements

(i) When and how must a status determination statement be made/given?

The draft legislation does not appear to specify when the status determination must be given, either in section 61N or section 61NA. This should be made clearer in the legislation, given that the consultation papers and government response refer to the Client having to give the status determination "on or before the start" of the engagement but there is no such reference in the draft legislation.

As ELA has commented in response to the previous consultation papers, in our view strict time limits would be needed regarding the provision of information both on commencement of an assignment, and if the assignment changes e.g. the Client must provide information to the Fee-Earner and Worker it engages at least 5 working days

prior to the commencement of an assignment (unless not reasonably practical (for example if the Client does not have contact with the Worker before commencement of the assignment) in which case it must be provided no later than 48 hours after the commencement) and within 10 working days of any change to the assignment which would change the nature of the engagement which would change the status determination.

In addition, section 61T does not require that the status determination statement needs to be provided in writing. ELA considers that it is essential for the Client to provide a written status determination (rather than, say, a verbal one) in order to enable the Client to evidence that this obligation has been complied with and to provide certainty for the Fee-Earner and Worker.

(ii) Reasonable care and the CEST test

Guidance should be provided as soon as possible regarding when a Client will be determined to have taken "reasonable care" in making a status determination. Clients are already preparing for the introduction of the legislation and need a workable CEST test now upon which they can rely. In particular, clarity should be provided as to whether Clients who have used the CEST test will automatically be deemed to have used reasonable care and as to whether Clients who have not used the CEST test (because of its current fallibility) will automatically be deemed to have not used reasonable care.

Given the issues regarding the reliability of the CEST test and the subjectivity of the questions and how clients may answer, many clients are preferring to undertake a thorough review of the case law when making status determinations and reaching their own view, rather than relying on the CEST test.

The CEST test needs to be radically improved and clear guidance should be made available now that HMRC will not place weight on a failure to use the CEST test where the client has either taken legal advice or undertaken an adequate review of the caselaw. We note that there have already been some useful changes to wording of some of the questions in the CEST test (such as the questions and potential responses to the question regarding substitution, which are appreciated) but further amendments are required to ensure that the tool is fully functional.

(iii) Specific example of concerns with the CEST test

By way of an example of the unhelpful / unclear wording of the CEST test:

The CEST test asks in relation to substitution: "If the worker's business sent someone else to do the work (a substitute) and they met all the necessary criteria, would you ever reject them? The criteria would include:

- Being equally skilled, qualified, security cleared and able to perform the worker's duties;
- Not being interviewed by you before they start (except for verification checks);
- Not being from a pool or bank of workers regularly engaged by your organisation;
- Doing all of the worker's tasks for that period of time;
- Being substituted because the worker is unwilling or unable to do the work."

The options are:
"Yes – we have the right to reject a substitute for any reason, including if it would negatively impact the work"; or
"No – we would always accept a substitute who met these criteria".
(our emphasis)
In ELA's view, the wording "Yes – we have the right to reject a substitute for any reason" (our emphasis) is unhelpful and misleading and does not sit well with the wording of the question, leading to uncertainty in how to answer this question. We would suggest a better set of options would be:
"We would agree to the substitution in these circumstances" (i.e. those listed above in the question) or
"We would reject the substitute in these circumstances".

By way of a further example:
Substitution: If the worker has already started the particular engagement, the CEST test asks: "Has the worker's business arranged for someone else (a substitute to do the work instead of them during this engagement?" (The question then goes on to list the "acceptable criteria" for substitution). The potential answers are:
"Yes – and we agreed"
"Yes – but we did not agree"
"No – it has not happened"
(our emphasis)
This takes no account of how long the engagement has been operating. It may only have commenced one month ago so the Client may not yet have had a request to send a substitute. The responses do not cater for this option.

B. Section 61T: Client-led status disagreement process

(i) Limit on the number of times the client-led status disagreement process can be used

Clients have raised concerns that there is no limit on the number of times that the fee-earner and/or worker can use the client-led status disagreement process during the course of an engagement. We acknowledge that there may be circumstances when it is appropriate to use the disagreement process more than once (for example where circumstances change during the course of an engagement). However, fee-earners and/or workers should not be able to use the status disagreement process vexatiously by raising the same challenge numerous times when circumstances have not changed.

We would recommend that the status disagreement process can only be used once in a 12-month period unless there has been a material change of circumstances. In most cases, we would anticipate that any material change of circumstances which might affect a status determination would require the parties to amend the contract under which the services are provided or to enter into a new contract in any event (for example where the nature of the services changes). As stated above, we would recommend that Client must provide information to the Fee-Earner and Worker within 10 working days of any change to the assignment which would change the status determination

(ii) Time limit for raising a status disagreement

In addition, Clients have raised concerns that there is no time limit on how far into the engagement a status disagreement can be raised. On longer contracts of, say, 12 months or more, Clients feel that it is not appropriate for the Fee-Earner or Worker to challenge the status well into an engagement, where there is no material change in circumstances since the outset.

We would recommend that the status disagreement process can only be instigated within the first 3 months of any assignment (in line with the time limit for bringing an employment tribunal claim, for example), except in cases of a material change in circumstances (as suggested above, such a change should be notified to the Fee-Earner and Worker within 10 days). In our view, the parties should have a clear view within the first two to three months of an assignment whether the Client's status determination is correct and therefore the fee-payer or worker should be able to raise a challenge within this time period without facing any particular difficulty.

In any event, the worker remains able to challenge the tax treatment directly with HMRC through the self-assessment year-end processes.

3. More general comments

(i) Greater clarity regarding the exemption for "contracted-out" services

We note that the previous consultation refers (at page 21) to the off-payroll working rules not applying in relation to "contracted out" services. However, this aspect is not made clear in the draft legislation. The draft legislation does not refer to "contracted-out" services at all.

We assume that affected parties are intended to infer that the Off Payroll Working Rules do not apply to "contracted-out" services from the fact that personal service is required (in section 61M). However, we consider that (a) there should be an express statement in the draft legislation that outsourced or "contracted-out" services are not caught and (b) further guidance should be given regarding the definition of "contracted-out" services.

As we have highlighted in previous responses to the consultation papers, 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.

(ii) Greater clarity regarding the interplay between the agency tax rules in section 44 – 47 of ITEPA and the Off Payroll Working Rules

In ELA's view, parties would benefit for greater clarity regarding when the agency tax rules in sections 44 – 47 of ITEPA apply and when the Off Payroll Working Rules apply and whether they are mutually exclusive. Simply saying (in sections 48(2)(a) and section 61K(2)(a)) that "Nothing in this Chapter affects the operation of Chapter 7 of this Part" does not provide the clarity required.

It is proposed that ITEPA be amended to allow for secondary legislation (Regulations) authorising the recovery of PAYE from another party in the labour chain. However, no information is provided about the sort of circumstances in which that would be considered appropriate or how this would work. In a commercial labour chain, this is the sort of risk that parties need to understand in order that they can contract for it. The absence of any information about how this will work will create a challenge for business looking to prepare for the changes in April 2020.

We appreciate that HMRC is looking for views on the draft new legislation. Nonetheless, we feel that the existing legislation relating to the quantification of chain payments and the deemed direct payment in sections 61N(2) (definition of “chain payment”), 61N(12), 61Q, 61R and 61S may not quite work in the context of the potentially long and more complex supply chains found in the private sector. Rather than taking a reasonable guess at what part of a payment is for the worker’s services to the client, would it be simpler and more certain if the entity in the chain that ends up being liable to account for the tax and NICs is entitled to require relevant information from the fee payer, i.e. to know what was actually paid by the fee payer to the PSC in respect of the services to the client?

As specialist Employment, rather than Tax lawyers, the way Chapter 10 is drafted seems complex. Whilst Chapter 10 only applies where the end client is a public body or qualifies as medium or large, there is a significant risk that small entities in the chain do not understand the effect of such complex legislation. There is a risk that complex legislation of this kind may allow more sophisticated or larger players to structure arrangements such that liability and risk is placed on smaller entities. Simplification of the way in which the legislation is drafted may reduce the risk of an unequal playing field.

In addition – has HMRC considered what should happen if more than one entity in a chain thinks it is liable to account for tax and NICs, or one or more entities account for tax and NICs mistakenly? If tax and NICs have been accounted for by one entity in a chain, even mistakenly, does that discharge the underlying liabilities in respect of the relevant engagement for all parties in the chain, or can/will HMRC still look seek recovery against the correct entity (and is that the intention behind new section 688AA)?

(iii) Better definitions

A definition of "client" would be useful.

ELA Working Party Members

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