ICAEW

REPRESENTATION 86/18

OFF PAYROLL WORKING FROM APRIL 2020 (DRAFT FINANCE BILL 2019-20)

Issued 5 September 2019

ICAEW welcomes the opportunity to respond to the draft Finance Bill 2019-20 legislation consultation on Off-payroll working from April 2020 published by HMRC on 11 July 2019.

The draft legislation is overcomplicated and will create compliance burdens. Its underlying policy is a sticking plaster solution to a wider problem that needs a long term solution which does not impose excessive compliance burdens or incentivise one type of employment status over another. The start date needs to be put back to 6 April 2021 to give all stakeholders – including HMRC – time to prepare on the basis of enacted legislation and resolved operational issues.

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ICAEW Tax Faculty Chartered Accountants' Hall Moorgate Place London EC2R 6EA UK
T +44 (0) 20 7920 8646 E taxfac@icaew,com icaew.com/taxfac

EXECUTIVE SUMMARY

1. The draft legislation is overcomplicated. Onerous responsibilities are allocated in an uncertain way to businesses in the labour supply chain. The start date needs to be delayed until April 2021 to enable all stakeholders properly to prepare on the basis of enacted legislation.

2. As mentioned in our previous representations, the underlying policy is a sticking plaster solution to a wider problem which needs a long term solution that does not impose excessive compliance burdens or incentivise one type of employment status over another.

3. As to the draft legislation we recommend as follows (the paragraph letters coincide with those on the subject headings in the body of this document):

   (a) information flows need to be improved and the legislation put into plain English to ensure that everyone in the labour chain is can understand what they are expected to do. There should be specific obligations on:

      i. all clients to notify those they contract with and workers as to whether or not they are small,

      ii. small private sector clients to remind workers that they (ie workers) are responsible for applying IR35 rules,

      iii. public sector and non-small private sector clients to send a status determination statement to those they contract with and workers in all cases, ie whether or not the worker is a deemed employee, and

      iv. workers to forward to the fee-payer the SDS that the client gives them;

   (b) reasons for conclusions in status determination statements and taking reasonable care: we should welcome confirmation that the output from HMRC's check employment status tool (CEST) will satisfy both these requirements, provided that reasonable care has been taken to ensure that inputs are accurate;

   (c) client-led disagreement process: in the interests of certainty we suggest that there should be a backstop deadline of 45 days from receipt of the status determination statement by when the worker or deemed employer must make representations to the client if they disagree with it, but this will not prevent the worker from completing their self assessment return on the basis of not being a deemed employee. Clarification is also needed for when the worker disagrees with a reconfirmed SDS;

   (d) recovery of PAYE to be dealt with in secondary legislation: what is proposed here should be consulted upon before the primary legislation is enacted. The proposals and draft secondary legislation should have been consulted upon alongside the draft FB legislation;

   (e) deadline for reporting under PAYE real time information: a period of grace of a tax month is needed after the end of the tax month in which payment is made to allow for mismatches between payroll and invoice payment dates;

   (f) as noted above, the commencement date needs to be put back to 6 April 2021 to give time for HMRC and businesses including software developers properly to prepare on the basis of enacted legislation, resolved operational issues and final IT

specifications, CEST and guidance, and an early announcement made to this effect; and

(g) we would welcome a clear statement in the law that where all services under a contract have been completed before the commencement date of the new rules, the new rules do not apply to that contract and, for contracts uncompleted at commencement date, clarification is needed on whether or not public sector clients need to issue SDS even when they have complied with current information requirements.

4. Detail is key, but too many operational points remain unresolved even though the public sector regime has been in force since April 2017. We are discussing the operational uncertainties with government separately so, despite their importance, they are not covered further in this response.

5. Providing technical comments on the proposed legislation has been hampered by the absence of a tracked changes version of the current legislation that is being amended. Best practice when inviting comments would be to publish such a document as part of the consultation package, and alongside Finance Bills.

GENERAL POINTS

6. The proposed legislation is Delphic and contains gaps that require extensive guidance to fill. It is unlikely to enhance compliance with the existing IR35 legislation that HMRC has been unable effectively to enforce since 2000. Its drafting is the antithesis of the spirit of the Tax Law Rewrite project which was a collaborative effort by government and professional bodies to make the wording of tax law simpler. The proposed legislation falls well short of our *Ten Tenets for a Better Tax System*, summarised in Appendix 1, by which we benchmark the tax system and changes to it, especially Tenets 2: Certain, 3: Simple and 4: Easy to collect and calculate. HMRC is having to publish even more guidance than for the public sector off-payrolling legislation to explain how it believes the rules are meant to work. The gaps in the legislation make it questionable as to whether some of HMRC's guidance has legislative backing. When things go wrong, HMRC will need to investigate the whole labour supply chain to find out why.

7. The policy underlying this draft legislation and the existing public sector legislation that it is amending is a sticking plaster solution to a wider problem which stems from disparate NIC rates and employment rights under tax and employment law between workers with different employment statuses. As stated previously, two sets of rules that depend on the size of a client adds unnecessary complexity and we suggest that consideration be given to the PAYE liability resting with the client.

8. We recognise the government's concerns in this area and that HMRC has difficulty in policing off-payroll working. Employment status is not always easy to determine – this is highlighted by the problems with HMRC's check employment status tool (CEST), reforms to which need to bed down before further policy changes are made, and the fact that HMRC's status determinations are too frequently overturned by the courts.

9. As we have said previously, in the longer term we believe that the current problems of off-payroll working need an holistic solution. The problems will only be overcome by way of long term integrated employment and tax solutions that build on the

Government's Good Work plan and do not incentivise one type of employment status over another.

10. As to the new rules, the start date of April 2020 is too soon, and should be put back to April 2021 to give time for HMRC and businesses to prepare on the basis of enacted legislation and resolved operational issues. We acknowledge that the start date has already been delayed once but the benefit of that extension was lost by publishing the previous consultation, for which the deadline was in May, only in March of this year. It would be helpful to have an early announcement that the measures will be postponed until April 2021 in order that businesses can plan and better prioritise their resources this Autumn.

11. Getting the detail right is essential if the off-payrolling regime is to achieve its objectives in accordance with our *Ten Tenets for a Better Tax System*. Too many operational points still need clarifying, some of which remain unresolved despite the public sector regime having been in force since April 2017, for example entitlement of deemed employees to statutory payments, pension conributions tax relief, earnings periods, etc. We have been raising these with government separately so we do not cover them further in this response.

12. Our suggested amendments do not necessarily cover all the concerns and recommendations that we cite.

DESCRIPTION OF THE OVERALL MEASURE

13. The draft legislation is intended to align the tax treatment for payments made for workers' services provided through intermediaries where the client is a medium or large organisation in the private sector with the tax treatment for payments made for workers' services provided through intermediaries where the client is a public sector organisation, which will itself be amended.

14. It amends Part 2 Income Tax (Earnings and Pensions) Act 2003 (ITEPA 2003), specifically s61K-s61X in Chapter 10 covering *Workers' Services Provided to Public Sector Through Intermediaries* which will be renamed *Workers' services provided through intermediary to public authority or medium or large client*). It also amends s48-s61 in Chapter 8 *Application of Provisions to Workers under Arrangements made by Intermediaries* which covers 'traditional' IR35 and adds, in Part 11 Chapter 3 *PAYE: Special types or payer or payee,* new s688AA to enable regulations to be made to amend the PAYE regulations covering recovery of PAYE where workers' services are provided through intermediaries and amends s60 Finance Act 2004: *Construction industry scheme: meaning of contract payments* to remove from CIS payments that come within Chapter 10.

COMMENTS ON THE DRAFT LEGISLATION

A. INFORMATION FLOWS

The measure

15. Section 61N obliges a business in the supply chain between a client and the worker's intermediary (through which they provide their services to their client) to withhold and

account to HMRC for PAYE where the worker would have been an employee if they had contracted directly with the client.

16. Depending on the circumstances, this obligation could lie with any business in the labour supply chain. This makes it imperative that the business who is responsible for withholding and accounting for PAYE is made aware that they are the one that is responsible.

17. The draft legislation provides for no explicit obligation on any private sector client to tell others in the labour chain whether or not they are small, and amendments made in the draft legislation result in there no longer being any explicit requirement for anyone in the labour supply chain to be told the employment status of the worker.

18. The only provision governing information flows is new s61N(5) inserted by para 12(3) which provides that "unless and until the client gives a status determination statement to the worker", the client rather than the fee-payer is responsible for withholding and accounting for PAYE.

Our concerns

19. It is unclear from the legislation what stakeholders are supposed to do or whether it achieves the policy intent.

20. The absence of explicit information provision requirements means that those responsible for withholding and accounting for PAYE may not be aware that they need to do so. Workers will be unable accurately to price their work if they do not know whether they will be paid gross (as they are either working for a small private sector engager or are considered outside IR35) or net (as a determination that they are a deemed employee has been reached).

21. The draft legislation provides no explicit obligation on the client to:

    (a) tell the worker or the person with whom the client contracts whether or not they, ie the client, is 'small', or

    (b) to send to the worker or the person with whom the client contracts their determination of whether or not the worker would be regarded as an employee if the services had been provided directly.

22. The current legislation in s61T obliges the client to tell the person with whom the client has contracted whether or not they consider that the worker would be regarded as an employee if the services had been provided directly.

23. However, para 13 deletes s61T.

24. If the draft legislation is enacted the only obligation to send a status determination statement (SDS) will be indirect – ie in new 61N(3) inserted by para 12(3) which makes the client liable to account for PAYE "unless and until" it has given an SDS to the worker. It should, we believe, refer to both the worker and the person with whom the client contracts.

25. Indeed, given that the existing legislation in s61M provides that s61N-s61R apply only where, inter alia, s61M(1)(d) applies, ie the worker is a deemed employee, we question whether there is any provision making it necessary for a public sector or non-small client to provide an SDS if the client considers that the worker is not a deemed employee.

26. In short, a public sector or non-small private sector client does not have to state that withholding does not apply. Only if the employee uses the client-led disagreement process does the client need to say that withholding does not apply (new s61T(2) inserted by para 13). This appears inconsistent with s61NA which states that an SDS can say that the conditions are not met.

27. In the absence of a requirement on the client to tell anyone else in the labour supply chain as to whether or not it is a small private sector entity, and if so outside the rules, or, if within the rules, to provide an SDS, other relevant parties in the labour supply chain will not be alerted to the fact that, as applicable, they must determine employment status and/or account for PAYE.

28. HMRC has estimated that there is 90% non-compliance by workers' intermediaries with IR35. If this is correct, then we believe that not requiring small private sector clients to tell the worker that they are small is a missed opportunity to get small private sector clients to remind workers that they still need to comply with their IR35 obligations.

29. We are also concerned that the although the worker may have received an SDS from the client saying that the worker is a deemed employee, the fee-payer may not have been told, for example because of a delay in passing on the SDS higher up the labour chain. This will mean that PAYE withholding will not take place when it should. It is unclear what action the worker and fee-payer should take in such circumstances and we do not think it is equitable that the worker, having received an SDS saying that withholding should be applied to fees, has no obligation to at least raise a query with the fee payer if it does not withhold PAYE.

30. Regarding guidance, new s61N(3) is inconsistent with para 29 in the draft Explanatory Notes which refers to the unless and until condition applying to having passed on an SDS to the party that the client contracts with as well as the worker.

31. The legislation is also inconsistent with the HMRC guidance that has recently been published which states:

    "Who to tell about your determination

    "From 6 April 2020, you must tell the worker, agency, or other organisation you contract with of your determination. Do this whether your determination shows that the off-payroll working rules will apply or not.".

Our recommendation

32. The legislation needs to be rewritten in plain English so all stakeholders can understand what everyone needs to do.

33. Specifically we recommend that to achieve what we understand is intended the legislation should require:

    a. all clients to notify workers and the organisations that the clients contract with whether or not they are small;

    b. small clients when notifying workers that they are small to remind the workers that they themselves are responsible for determining whether they would be regarded as an employee if the services had been provided directly and, if appropriate, for accounting for PAYE under the IR35 rules via their intermediary, eg personal service company;

c. public sector and non-small private sector clients to send a status determination statement to workers and the organisations that the clients contract with whether or not the client considers that the worker is a deemed employee; and

d. workers either to forward the SDS to the fee-payer so the fee-payer can chase up the chain if they have not received an SDS and/or to provide details of the fee payer to the client so the client can send the SDS direct to the fee payer.

Suggested amendment

34. Insert a new clause 61MA *Information to be provided by clients* at the end of para 11 on the lines of our recommendation in the previous paragraph.

B. REASONS FOR CONCLUSIONS IN STATUS DETERMINATION STATEMENTS

The measure

35. New s61NA(1)(a) and (b) and s61NA(2) inserted by para 12(6) provide respectively that clients must explain the reasons for reaching their conclusion in an employment status determination (SDS) and that a statement is not an SDS if the client fails to take reasonable care in coming to the conclusion mentioned therein.

Our concerns

36. Our concern relates to what will be acceptable "reasons for that conclusion" in new s61NA(1)(a) and (b) and what evidence will be required to support having taken "reasonable care" in new s61NA(2).

37. Determining employment status is very complicated and comprises a number of tests, many of which are judge-made.

38. HMRC provides an online check employment status tool (CEST). Whilst it is not perfect, many clients, agencies and workers use CEST to determine employment status.

Our recommendation

39. We should welcome confirmation that, where CEST has given a clear determination and reasonable care has been taken with the inputs, the output from CEST will be acceptable as "reasons for that conclusion" in new s61NA(1)(a) and (b), and as sufficient evidence to support having taken "reasonable care" in new s61NA(2).

40. In the absence of such a reassurance we should welcome clear guidance on what evidence will be required to meet these two conditions bearing in mind compliance costs.

Suggested amendment

41. In para 12, after 61NA(3) add:

(4) The output from HMRC's check employment status tool is sufficient "reasons for that conclusion" in new s61NA(1)(a) and (b) and sufficient evidence to support having taken "reasonable care" in new s61NA(2).

C. CLIENT-LED STATUS DISAGREEMENT PROCESS

The measure

42. Para 13 inserts a replacement s61T enabling workers to make representations to their client if they disagree with an employment status determination that the client has given them.

Our concerns

43. We are concerned as to whether this process will be sufficiently robust.

44. There is no deadline in new s61T by when a worker should start making representations to the client against an SDS.

45. We imagine that most workers who disagree with an employment status determination will make representations to the client as soon as possible, but the absence of a time limit means that, potentially, a client will be subject to an appeal at any time so will not have finality, and the longer it is left the more difficult it may become for overpayments to be recovered. It is not reasonable that an appeal could be made years after a contract has ended.

46. There appears to be no legislative provision to ensure that the fee payer is informed that the worker has made representations to the client.

47. We should welcome confirmation of the process where the client decides that the conclusion in the original SDS is correct but the worker still disagrees.

Our recommendation

48. We recommend that a time limit of 45 days from when the worker receives the SDS should be set by which time the worker or deemed employer must have made representations to the client.

49. This time limit is not intended to prevent the worker completing their self assessment tax return on the basis of not being a deemed employee.

50. Clarification is needed as to the steps the worker can take if he does not agree with the client's decision in new s61T(2)(a) that the original SDS was correct.

51. Clarification is needed where working practices have changed and a new employment determination is required: presumably the worker should use the client-led status disagreement process to get the SDS changed if the client does not issue a fresh SDS.

Suggested amendment

52. In para 13, in s61T(1) add at the end:

    "before the end of 45 days beginning with the day the worker receives the status determination statement."..

D. RECOVERY OF PAYE

The measure

53. Para 15 inserts a new s688AA ITEPA which authorises the making of secondary legislation authorising the recovery of PAYE of amounts which an officer of HMRC considers should have been paid in respect of a deemed payment.

Our concerns

54. A power of this kind should be the subject of primary legislation, so that it receives proper scrutiny by Parliament, rather than left to Regulations.

55. As a matter of good policymaking, the proposals with draft legislation should have been published alongside the draft Finance Bill legislation to enable consideration in the round.

Our recommendation

56. What is proposed here should be the subject of consultation before additional draft primary legislation is published for consultation or the current draft legislation is enacted.

Suggested amendment

57. Delete para 15.

E. DATE OF REPORTING UNDER PAYE REAL TIME INFORMATION

The measure

58. S61N(4) provides that "The deemed direct payment is treated as made at the same time as the chain payment made by the fee-payer.".

Our concerns

59. In most businesses, payment dates for invoices which are processed by people who run the bought ledger and settled by those in accounts payable differ from payroll paydays.

60. In the commercial world it may not be practicable to make payment dates for invoices align with payroll paydays.

61. This may mean that it is not possible for deemed employers to file RTI full payment submissions on or before the invoice is paid.

Our recommendation

62. We suggest that the PAYE on or before rule be relaxed to allow a tax month's grace following the end of a tax month in which a payment is made to a deemed employee to submit FPSs for deemed employees.

63. The new off-payroll worker (OPW) marker in payroll software, that we are delighted that HMRC has told software developers that it is specifying for 2020-21, should enable this to be written into the software with an appropriate reasonable excuse flag.

64. We would welcome the opportunity to comment on a draft regulation before it is laid.

Suggested amendment

65. Insert after para 15:

    Para 15A:

"After section 688A of ITEPA 2003 insert --

'688AA *Workers services provided through intermediaries: PAYE returns*

PAYE Regulations may make provision authorising deemed employers to report payments as soon as reasonably practical after the payment is made and in any event no later than the end of the tax month following the end of the tax month in which the payment is made.'.

F. COMMENCEMENT DATE

The measure

66. Paras 17 to 20 provide that the commencement date shall be 6 April 2020.

Our concerns

67. Introducing this change in April 2020 is too soon.

68. UK businesses are already implementing software and process changes for making tax digital for VAT, and the impact of Brexit remains uncertain.

69. We welcome the fact that government listened to our previous request that change in the private sector should not be introduced until April 2020 at the earliest. The basis of this request was to allow sufficient time for HMRC to provide guidance and software specifications based on enacted legislation and for businesses to review their internal processes, amend current systems or purchase and test appropriate software. In international businesses IT budgets are signed off more than a year in advance.

70. However, the consultation document with a deadline of 23 May 2019 was not published until four months after the Budget 2018 announcement was made and the draft legislation was issued only on 11 July 2019, with HMRC's interim guidance in August, thus eroding much of the benefit of the postponement to April 2020.

71. In addition, HMRC is still making improvements to its online check employment status tool (CEST), which still does not deal adequately with tests such as mutuality of obligation or in business on own account, eg number of other clients, etc.

72. Given that contracts entered into before April 2020 will be within the new rules if payments are made after April 2020, we question whether upgraded CEST will be ready in time to enable stakeholders properly to assess workers' employment status.

73. On the basis of past Finance Act timetables, we anticipate that the overall package, comprising enacted legislation and therefore finalised HMRC IT specifications, guidance and an improved CEST, and resolved operational issues, will not be available until too close to 6 April 2020 for businesses and HMRC adequately to prepare.

74. This would mean that all the factors, cited above, on which the government based its decision to delay the start date until April 2020 will once again apply.

Our recommendation

75. We strongly recommend that government further postpones the start date of the reform to April 2021 in order to help businesses plan and better prioritise their resources this Autumn, and that an early announcement is made to that effect.

Suggested amendments

76. In para 17,
replace “2020-21” with “2021-22”.

77. In para 18 19 and 20,
replace “2020” with “2021”.

G. PAYMENTS RELATING TO CONTRACTS COMPLETED BEFORE COMMENCEMENT DATE

The measure

78. This measure provides that the new rules apply where payments are made on or after 6 April 2020 even if relating to services provided before that date.

Our concerns

79. Having a clear statement such as in para 18 that the rules will apply to payments after the start date of the legislation is essential. However, we believe that this statement will create burdens where all services under a contract were completed prior to the commencement date for the new rules.

80. Arguably the new rules cannot apply when the contract has ended and the work performed was completed before 6 April 2020. This is because for example there is no requirement to issue SDS, and the changes in Part 1 do not apply. It is not however clear that this is the case.

Our recommendation

81. We would welcome a clear statement in the law that where all services under a contract have been completed before 6 April 2021 the new rules do not apply to that contract. (2021 if our recommendation on commencement in the previous section is accepted, failing which 2020.)

82. In the case of contracts which are not fully completed before the commencement date we should welcome a clear statement to clarify whether clients who, in accordance with existing s61T(1), informed persons who had entered into contacts with them that the condition in s61M(1)(d) was or was not met, need also to issue an SDS under the new rules in respect of payments after the commencement date.

Suggested amendment

83. Insert after para 18-

“18A The amendments made by Part 2 of this Schedule do not apply where all services under a contract have been completed before 6 April 2021.”.

APPENDIX 1

ICAEW TAX FACULTY'S TEN TENETS FOR A BETTER TAX SYSTEM

The tax system should be:

1. Statutory: tax legislation should be enacted by statute and subject to proper democratic scrutiny by Parliament.
2. Certain: in virtually all circumstances the application of the tax rules should be certain. It should not normally be necessary for anyone to resort to the courts in order to resolve how the rules operate in relation to his or her tax affairs.
3. Simple: the tax rules should aim to be simple, understandable and clear in their objectives.
4. Easy to collect and to calculate: a person's tax liability should be easy to calculate and straightforward and cheap to collect.
5. Properly targeted: when anti-avoidance legislation is passed, due regard should be had to maintaining the simplicity and certainty of the tax system by targeting it to close specific loopholes.
6. Constant: Changes to the underlying rules should be kept to a minimum. There should be a justifiable economic and/or social basis for any change to the tax rules and this justification should be made public and the underlying policy made clear.
7. Subject to proper consultation: other than in exceptional circumstances, the Government should allow adequate time for both the drafting of tax legislation and full consultation on it.
8. Regularly reviewed: the tax rules should be subject to a regular public review to determine their continuing relevance and whether their original justification has been realised. If a tax rule is no longer relevant, then it should be repealed.
9. Fair and reasonable: the revenue authorities have a duty to exercise their powers reasonably. There should be a right of appeal to an independent tribunal against all their decisions.
10. Competitive: tax rules and rates should be framed so as to encourage investment, capital and trade in and with the UK.

These are explained in more detail in our discussion document published in October 1999 as TAXGUIDE 4/99 (see https://goo.gl/x6UjJ5).