



## OFF-PAYROLL WORKING (FINANCE BILL 2019-2020)

Issued 5 June 2020

Text of ICAEW briefing for MPs and HMRC on new clause 1 and new Schedule 1: Workers services provided through intermediaries (commonly known as off-payroll working or IR35) introduced in a [government amendment](#) dated 18 May 2020 to [Finance Bill 2019-21](#) originally published by the government on 19 March 2020.

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## BRIEFING FOR MPS ON **FINANCE BILL** BY ICAEW TAX FACULTY

### EXECUTIVE SUMMARY

1. We recommend that consideration of the workers services provided through intermediaries/ off-payroll working (OPW) measure should be delayed pending an autumn Finance Bill.
2. In response to the current COVID-19 pandemic, the UK government has postponed all unnecessary tax changes as part of its support package for business. One consequence is that the start date for the modifications to the off-payroll working (or IR35) changes have been put back to 6 April 2021.
3. This welcome deferral should also allow time for reflection on the details of the measure itself.
4. ICAEW has previously submitted comments on earlier drafts of this legislation, which, if adopted, would achieve greater clarity to the rules and a simpler tax system. The later start date now permits a more comprehensive review of the proposals, which should result in a better system.
5. In anticipation of an April 2020 commencement date, many businesses have already incurred significant costs and implemented the systems changes needed once the new regime applies. Their experience of this process provides a unique opportunity to consider whether the rules currently being legislated will work as intended.
6. Our comments should also be read in the context of possible changes to the taxation of the self-employed referred to by the Chancellor in recent announcements. Rather than introduce further changes piecemeal, tax and NIC changes need to be made alongside **The Good Work Plan** and other employment law outcomes from the Taylor Review.
7. Our major concerns and recommendations are set out in paragraph 15 et seq. Our specific concerns and recommendations on the clause are contained in Appendix 2.

### THE MEASURE

8. The measure amends and extends to the private sector the OPW rules that have applied since April 2017 in the public sector, where contractors provide services to end clients through their personal service companies (PSC).
9. In broad terms the measure will now apply to payments made after 5 April 2021 for services provided by contractors after 5 April 2021, where the private sector end client is large or medium-sized and based in the UK.

### THE JOURNEY SO FAR

10. A draft clause was issued for technical consultation in July 2019 (to which we responded in **ICAEW REP 86/19**).
11. The draft **Budget Resolutions** published in March 2020 contained the draft clause updated to include a small number of new provisions, some arising from the **OPW review** published in February 2020. These included:

- exclusion of clients with no UK connection
  - imposition of a duty on a client to state whether it qualifies as small for a tax year
  - deadline by which the client-led disagreement process must be started
  - recovery of PAYE
  - transitional provisions.
12. The March 2020 clause was deleted from the Budget Resolutions that were subsequently approved. In March 2020, the government announced a year's delay, so the revised start date is 6 April 2021.
13. The **Finance Bill** published in March 2020 did not contain a clause on OPW but the government stated that it intended to table an amendment at Committee stage. The **amendment** dated 18 May 2020 containing new clause 1 and new Schedule 1, and **explanatory notes**, were published on 19 May.
14. In our view, this amendment does not need to be enacted now. The government should use the next six months to reflect on the experiences of those public and private sector entities which have already implemented the changes or fully prepared for that implementation in anticipation of the April 2020 start date together with further evidence and feedback on how the measure can be improved, before introducing the clause in an autumn 2020 Finance Bill.

## OUR MAJOR CONCERNS AND RECOMMENDATIONS

15. There are a number of important policy issues that in our view need resolving before this measure is passed. This change has already caused considerable disruption to the working practices of businesses and individuals, and it is far from clear that the country will be ready to absorb them by this time next year. We do not yet know what form the economic recovery from Covid-19 will take, but it is likely that the world of zero-hours contractors will be considerably weakened by the pandemic and the changes to patterns of work will be nowhere near complete.
16. We would draw attention to the report **Off-payroll working: treating people fairly** published on 27 April 2020 by the House of Lords Finance Bill Sub-committee, chaired by Lord Forsyth of Drumlean, following its major inquiry into the changes. Their Lordships focussed in depth on unintended side-effects of the OPW measure, which was originally going to be introduced from April 2020. As the system changes have already been fully prepared for implementation by many businesses, some of these side-effects are already known. We gave oral evidence to the committee, and submitted written evidence on implementation costs (**ICAEW REP 19/20**). The committee's summary conclusion, with which we agree, was that "Government must address IR35's inherent flaws and unfairnesses".
17. As noted above, our comments should be read in the context of possible changes to the taxation of the self-employed referred to by the Chancellor in recent announcements. We believe that it would be better for government to think holistically than to introduce changes piecemeal. Any further changes to tax and NIC should be made alongside **The Good Work Plan** and other employment law outcomes from the Taylor Review.
18. We therefore **recommend** that Members should not legislate now, but should defer consideration of the measure until the Autumn Finance Bill, or, failing that, at least until there has been time to absorb and act upon the evidence of those private sector organisations which have already prepared to implement the changes, and the economic aftermath of the COVID-19 crisis is more certain.

19. We believe that the following policy matters in particular require attention before the measure is adopted, so the whole policy change should be deferred until a later Finance Bill:
  - a) There is much circumstantial evidence that contractors, by being engaged via umbrella companies, are being made to pay the cost of employer national insurance contributions in addition to their own employee NIC. We **recommend** that research be undertaken to establish the extent of this and that the measure be deferred until a satisfactory solution can be presented to Parliament.
  - b) Lord Forsyth's committee has "heard that certain non-compliant entities may still be using disguised remuneration schemes", a view supported by Sir Amyas Morse's [Independent Loan Charge Review](#) (see in particular the top of page 6 on the link). This abusive practice may increase if the measure is adopted, so we **recommend** that the measure is deferred until it is clear that HMRC has a clear strategy for dealing with it, whether by further legislation, better enforcement, or otherwise.
  - c) In policy terms, the alignment of taxation for contractors affected by the measure with employees should bring with it the corresponding employment and social security rights that are enjoyed by most actual employees. We **recommend** that the measure be deferred until this can be carefully considered as part of the Good Work Plan (see paragraph 6 above).
  - d) Similarly, we note that contractors who are deemed employees under the current public sector rules do not have the right to statutory payments, including statutory sick pay or statutory maternity pay, despite being liable to Class 1 NIC on the deemed employment income, which in an actual employment (such as the contractor has with their personal service company (PSC)) would normally give rise to these rights. When the contractor draws the net OPW earnings from their PSC as salary, these earnings are treated as non-NICable in that employment and therefore no SSP or SMP rights accrue. With a change to the Social Security & Benefits Act 1992, section 6A, and a statutory instrument, the earnings relating to OPW paid to the contractor by their PSC could potentially be treated as earnings subject to Class 1 NIC at 0% (instead of as non-NICable) and give rise to rights to statutory payments. Alternatively, the law could be amended to treat the contractor's deemed employment within the fee-payer as if it were an actual employment for statutory payment purposes. Whichever approach is chosen, the change will require legislative action by the Secretary of State for Work and Pensions. We **recommend** that Parliament should not pass this Finance Bill new clause and Schedule without resolving this issue.
20. We also **recommend** that the transfer of PAYE liability provisions, which could easily result in making innocent parties in the contractual chain insolvent, should be in primary not secondary legislation. We are concerned about the low level of safeguards for these provisions (please see Appendix 2, paragraphs 2 to 5, for more on this).
21. Our other important recommendations of a more technical nature can be found in Appendix 2.
22. For more details of our concerns and uncertainties about the measure please see our responses to the technical consultations on draft Finance Bill legislation [ICAEW REP 86/19](#) and draft PAYE and social security contributions secondary legislation [ICAEW REP 03/20](#). We have also published a number of outstanding practical questions on how to implement the new rules. These were given to HMRC in March 2020 and are available as [TAXguide 07/20](#) and [TAXguide 08/20](#).

## FURTHER INFORMATION

As part of our Royal Charter, we have a duty to inform policy in the public interest.

## APPENDIX 2

(Note: Appendix 1: Who we Are has been omitted as the text is on the front page.)

### OUR SPECIFIC CONCERNS AND RECOMMENDATIONS

#### Information flows and compliance

1. The following measures if included in the primary legislation would, we believe, improve information flows and therefore compliance:
  - a) **Para 5: New s60H:** Clients that are small should, when notifying PSC contractors that they are small, be obliged to remind those contractors that they (the contractors) must comply with the April 2000 IR35 rules and determine their own deemed employment status and, if appropriate, account for PAYE on a deemed 5 April payment. This will encourage contractors and their PSCs to comply (we note 90% non-compliance is currently estimated by HMRC). We suggest that HMRC provides a standard form of wording to be used for this notification.
  - b) **Para 12: Amended s61N:** PSC contractors should be obliged to forward to their fee-payer any status determination statement (SDS) saying that the contractor is a deemed employee. This will act as an alert to a fee-payer which is not aware of its obligation to account for PAYE owing to having not received the SDS sent down the labour chain by the client. This may happen innocently and inadvertently, eg because someone in the chain is on holiday and no-one checks their email inbox.
  - c) **Para 12: Amended s61N(5):** It would be clearer if the prospective legislation explicitly obliged clients to issue an SDS to both the party they contract with and the contractor, instead of deleting the requirement in the existing legislation in s61T. In particular, non-small clients need to be obliged to issue an SDS even when they have determined that a contractor is not a deemed employee; as this will make it clear to the contractor and the fee-payer that PAYE should not be accounted for and that the contractor need not apply IR35 to the income from that contract.

#### Transfer of liability to recover PAYE: para 19: New s688AA

2. We have concerns about the low level of safeguards in the proposed transfer of liability and recovery of PAYE provisions. These were exposed for comment only in January 2020 within the draft PAYE and social security contributions secondary legislation consultation referred to above, to which we responded in detail in [ICAEW REP 03/20](#).
3. We consider that these measures should be dealt with in primary, not secondary, legislation. In particular:
  - a) a party that has acted with due diligence should be not penalised, possibly by way of a dual liability, and this should be grounds for appeal;
  - b) recipients of recovery notices need to be able to appeal against both whether there has been a default and also the amount of the debt. If HMRC has had to rely on estimates, the figures in the recovery notice may be seriously inaccurate;
  - c) where the client and top agency have fulfilled all their obligations and the contractor's PSC has been paid gross because PAYE has incorrectly not been deducted by the fee-payer, the contractor should be liable for the income tax and employee NIC based on the amount received by the PSC;
  - d) "realistic prospect" and "a reasonable period of time" need to be explained in the primary legislation;
  - e) recovery notices need to include a date of issue, reasons for the decision, state when the debt is payable, how to pay it, that it is appealable and explain how to make the appeal;

- f) when HMRC withdraws a recovery notice, we suggest that HMRC should be obliged to inform the taxpayer (currently there is no such information provision), and that there should be a deadline by which this must be done, of, say, 30 days.
- 4. We should welcome clarification of how the recovery process will work in practice.
- 5. We should also welcome an assurance that HMRC will operate strict safeguards similar to those that apply when the NIC liability of a company is to be made the personal liability of its director(s), including that a high level of negligence has to be present and decisions by HMRC as to action to take are made by a specialist unit.

#### **Ascertaining employment status, CEST and MOO**

- 6. Ascertaining employment status is very complex and even experienced judges find it hard.
- 7. HMRC honours employment status determinations arrived at by its check employment status for tax (CEST) tool provided that the user has input the data truthfully. This undertaking provides welcome reassurance for end clients, agencies, contractors and advisers who use the tool.
- 8. However, CEST does not consider “mutuality of obligation” (MOO) in an employment sense as interpreted by the courts. This means that CEST’s determinations may not be the same as those which would be arrived at by a tribunal or court.
- 9. In order to increase the likelihood that CEST determinations accord with what a tribunal or court would find, we should welcome a reassurance that HMRC will incorporate into CEST MOO as understood by the courts. We note that the Upper Tribunal recently found in the employment status case of [HMRC v Professional Game Match Officials Ltd](#) [2020] UKUT 0147 that HMRC’s view of MOO was fundamentally flawed. It follows that the absence of adequate questions on MOO from the CEST tool means that the output from the tool is also fundamentally unreliable. HMRC and business cannot therefore use the tool unconditionally, which undermines the basis on which the OPW status process is supposed to work.

#### **The on-or-before payment deadline for reporting under PAYE real time information**

- 10. The on-or-before payment deadline for reporting under PAYE real time information (RTI) needs to be relaxed to allow for mismatches between payroll and invoice payment dates.
- 11. A period of grace of a tax month is required after the end of the tax month in which payment is made. This will require changes to the programming of HMRC’s RTI reporting system.