

Association of Accounting Technicians (AAT) response to HM Revenue & Customs Policy paper and consultation document: Off-payroll working rules from April 2020

1. Introduction

- 1.1. The Association of Accounting Technicians (AAT) is pleased to have the opportunity to respond to this consultation document published on 5 March 2019.
- 1.2. AAT is submitting this response on behalf of our membership and for the wider public benefit of achieving sound and effective administration of taxes.

2. Executive summary

- 2.1. **AAT remains concerned at the frequency of high-profile IR35 cases being lost by HMRC at tribunal.**
Recognising that simply adopting the same approach in the private sector risks considerably more high-profile losses for HMRC, more inconvenience and uncertainty for employers and contractors, reputational damage for HMRC and increased losses for the taxpayer; AAT urges HMRC to make necessary changes.
- 2.2. **In light of the above, AAT welcomes the decision to defer changes originally intended for application in April 2019 until 2020.**
This will also enable more time for affected parties to prepare, which should in turn increase compliance and reduce likely problems. This is also in line with AAT's previous recommendations submitted to HMRC in May 2018.¹
- 2.3. **AAT also welcomes the proposal to introduce a requirement to pass either the client's determination, or reasons for the determination, down through the labour supply chain.**
This addresses a significant shortcoming in the 2017 public sector off-payroll legislation.
- 2.4. **AAT's believes that more could be done to explain why a client needs to be aware of who is the fee-payer in the supply-chain.**
The desired outcome could just as easily be achieved by placing a statutory requirement on the lead-agency to maintain full knowledge of all parties in the labour supply-chain.
- 2.5. **AAT has previously warned that the failure to include a statutory appeal process in the 2017 legislation was a serious oversight.**
This left many workers exposed to inappropriate decisions or even the subject of a blanket employment status decision without a right of appeal. As a result, addressing this oversight is a most welcome development.

¹ AAT response to HMRC & HM Treasury consultation, "Off-payroll working in the private sector", 2018: <https://www.aat.org.uk/prod/s3fs-public/assets/Off-payroll-working-in-the-private-sector.pdf>

3. AAT response to the consultation document

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.

- 3.1. AAT recommends that HMRC enters into detailed discussions with large-scale engagers to ensure that the rules under design have minimal impact on their client/worker relationship.
- 3.2. Use of the section 382 test should be the default position for determining the size of an entity, irrespective of its legal form. Most commercial operations produce a full set of accounts for internal management purposes, to comply with Companies Act requirements or to satisfy the interests of third-parties such as lending institutions or grant awarding government departments. So, it is reasonable to expect all entities of this size to produce balance sheets as a matter of course.
- 3.3. The first option might seem a little unfair with its implicit assumption that a balance sheet total exceeds £5.1 million. However, AAT considers that its adoption could be a good thing in that, it will encourage the limited number of businesses which either have turnover in excess of £10.2 million or 50 or more employees to adopt best practice and produce robust balance sheets if they wish to legitimately avoid being deemed to be medium or large businesses.
- 3.4. In contrast, the second option, with its requirement that the two remaining criteria must be met before an unincorporated entity falls within scope, creates an uneven playing field that benefits unincorporated entities, who should, as previously highlighted, have robust accounting structures, as they are capable of producing a balance sheet.

Question 2:

Would a requirement for clients to provide a status determination directly to off-payroll 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.

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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.

- 3.5. While the requirement for clients to provide a status determination direct to a worker would give the latter certainty over their tax position, there are many reasons why such an approach runs counter to the way most normal labour supply chains currently operate, not least employment law.
- 3.6. Through participation in one of HMRC's recent Off-payroll working workshops, AAT is aware that some large clients are concerned that such a proposal will negatively impact on their client/worker relationship and disproportionately increase their administrative burden.
- 3.7. The proposed legislation should not lose sight of the fact that one of the overriding drivers for a client to engage workers through intermediaries is to ensure that it cannot be construed that an employer/employee relationship exists between the two parties. It is therefore vital that the 2020 Off-payroll rules do not disregard this fact.
- 3.8. AAT considers the desired outcome could be achieved through a requirement to pass a client's determination down the supply chain until it reaches the worker. Indeed, such an approach would have the advantage of mirroring current practice in the labour supply chain, particularly if the requirement is underpinned by imposing an obligation on the lead agency to be responsible for, and to monitor the performance of, others further down the chain.

- 3.9. As a safeguard, where, despite their best endeavours, a worker has been unable to obtain a copy of the client's determination from the fee-payer or the lead-agency, they should then be empowered to make a direct request. Say, after the expiry of a 14-day period, from the time of their initial fee-payer approach.

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.

- 3.10. AAT remains unclear as to why the client needs to be aware of who, within the supply-chain, is the fee-payer.
- 3.11. As previously observed, one of the main drivers for a client to engage workers through intermediaries is to ensure there is no employer/employee relationship. As a result, clients often prefer to pass all engagement related communications down through the supply-chain, rather than going direct to the worker.
- 3.12. An alternative approach, particularly where there is a lengthy labour-supply chain, would be a statutory requirement for the lead agency to monitor all other parties in the chain and, if deemed necessary, to pass a client's determination directly to the fee-payer.

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.

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Question 12:

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

- 3.13. It is entirely appropriate for HMRC to pursue its recovery of PAYE and NICs due from any party within the supply-chain, usually the fee-payer, who has failed to fulfil their obligations to pay over the deductions due until recovery is no longer possible. At this point, liability could transfer back to the lead agency in the chain and ultimately the client.
- 3.14. There can be little doubt that such an approach will incentivise the client and the lead agency to contract with reputable and compliant firms.
- 3.15. However, to ensure that HMRC does not relax its recovery action against a failing debtor, safe in the knowledge that whatever happens those at the top of the labour-supply-chain will underwrite its losses, a client or the lead-agency should have the right to require HMRC to demonstrate that it has pursued appropriate and timely recovery action before HMRC is permitted to recover the tax monies lost further down the chain.

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.

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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.

- 3.16. In the absence of a cogent description of a client-led status disagreement process, it is not possible to comment on its eligibility. That said, given the inherent bias toward the client in the status decision making process, it is against natural justice that the dominant party (client) in the process should be empowered to lead the disagreement process.
- 3.17. An alternative approach would be to adopt an independent dispute resolution process.

- 3.18. The introduction of an independent dispute resolution process would certainly help but ultimately the balance of bargaining power in the client/worker relationship is tilted heavily in favour of the client and in practice, if a worker wants the work they will simply have to accept the determination handed down to them.

Question 16:

Does the requirement on the client to 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 that determination in 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?

- 3.19. AAT considers a requirement to supply details of a determination would be insufficient to incentivise clients to take reasonable care when determining workers' status. As observed in AAT's response to questions 13 & 14 above, ultimately, if a worker wants the work they will have to accept the determination handed down to them.

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 worker's pension?

- 3.20. For various reasons, from employment law to thin operating margins or even IT systems not being configured to support pension contribution collections, most fee-payers are unlikely to be able to want to offer a facility to deduct and pay over pension contributions.
- 3.21. AAT also considers it unlikely that workers would entrust their pension monies into the hands of their fee payers, many of whom operate on such slender margins that insolvency is a real possibility.
- 3.22. Research from ComRes indicates that 69%² of the self-employed are not contributing to a pension and if a form of auto-enrolment was introduced for the self-employed, most would opt-out.
- 3.23. Taking all of the above into account, the introduction of an obligation to administer pension contributions on behalf of a worker is likely to prove administratively burdensome, costly and time consuming whilst ultimately resulting in very little take-up.

Question 18:

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

- 3.24. AAT remains concerned at the frequency of high-profile IR35 cases being lost by HMRC at tribunal. Of course, high profile cases such as Lorraine Kelly³ Kay Adams⁴, and Mark Daniels⁵ only represent the tip of the iceberg.
- 3.25. Recognising that simply adopting the same approach in the private sector risks considerably more losses for HMRC (whether high profile or not), more inconvenience and uncertainty for employers and contractors, reputational damage for HMRC and increased losses for the taxpayer, means HMRC must make necessary changes.

² How to solve the self-employed pensions crisis, IPSE, June 2018:

<https://www.ipse.co.uk/ipse-news/news-listing/how-to-solve-the-self-employed-pensions-crisis.html>

³ Contractor calculator, 21 March 2019:

https://www.contractorcalculator.co.uk/ir35_defeat_lorraine_kelly_tribunal_analysis_548910_news.aspx

⁴ London Loves Business, 16 April 2019:

<https://londonlovesbusiness.com/hmrc-loses-another-high-profile-ir35-tribunal-case/>

⁵ People Management, 28 March 2019:

<https://www.peoplemanagement.co.uk/news/articles/construction-worker-wins-ir35-tax-appeal>

- 3.26. There is some evidence that this is happening, for example AAT welcomes the introduction of a process to deal with status disagreements between the client and the off-payroll worker and/or fee-payer. This was a serious oversight in previous legislation and this should result in a much-improved approach. It is imperative that these plans are not diluted.
- 3.27. AAT recommends that HMRC initiates stakeholder engagement at the very earliest possible opportunity if it is to deliver the promised enhancement to its Employment Status determination tool CEST and the revised off-payroll working guidance for customers to use before the 2020 reform comes into effect. This should help to ensure any flaws, unintended consequences or misleading outcomes are rectified before being utilised by the public – and should address some of the problems being highlighted at recent tribunal cases.

4. **About AAT**

- 4.1. AAT is a professional accountancy body with approximately 50,000 full and fellow members and over 90,000 student and affiliate members worldwide. Of the full and fellow members, there are more than 4,250 licensed accountants who provide accountancy and taxation services to over 400,000 British businesses.
- 4.2. AAT is a registered charity whose objectives are to advance public education and promote the study of the practice, theory and techniques of accountancy and the prevention of crime and promotion of the sound administration of the law.

5. **Further information**

- 5.1. If you have any queries, require any further information or would like to discuss any of the above points in more detail, please contact Phil Hall, AAT Head of Public Affairs & Public Policy:
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