



# OFF-PAYROLL WORKING IN THE PRIVATE SECTOR

## Response by Association of Taxation Technicians

### 1 Introduction

- 1.1. The Association of Taxation Technicians (ATT) is pleased to have the opportunity to respond to the HMRC and HM Treasury consultation document *Off-payroll working in the private sector* ('the Consultation') issued on 18 May 2018<sup>1</sup>.
- 1.2. The primary charitable objective of the ATT is to promote education and the study of tax administration and practice. We place a strong emphasis on the practicalities of the tax system. Our work in this area draws heavily on the experience of our members who assist thousands of businesses and individuals to comply with their taxation obligations. This response is written with that background.
- 1.3. Our response is broken down as follows:
  - o Section 2: General observations
  - o Section 3: The operation of the Check Employment Status Tool (CEST)
  - o Section 4: Chapter 5 - The compliance challenge
  - o Section 5: Chapter 6 - Options for how to tackle non-compliance: Extending the public sector rules to the private sector
  - o Section 6: Encouraging or requiring businesses to secure their labour supply chains
  - o Section 7: Additional record keeping
  - o Section 8: Other issues and options considered but out of scope of this consultation
  - o Section 9: Summary of key points
  - o Section 10: Contact details

In sections 4 to 7 we have only responded to those questions from the Consultation for which we have an appropriate evidence base.

- 1.4. As part of our process of responding to this consultation, we read the IFF research report *Off-Payroll Review in the Public Sector*<sup>2</sup> which was commissioned by HMRC ('the Research Report'). We observe that the Research Report does not reflect the experiences of all the stakeholders affected by the public-sector off-payroll working rules as it only surveyed public sector bodies and sites. The Research Report does not therefore reflect the problems faced by agencies, workers and Personal Service Companies (PSCs) in complying with the public sector rules. Anecdotally, there have been many reports by contractors of problems with mis-categorisation. The concerns of workers who have effectively had to bear the cost of employer NICs and cope with the ongoing uncertainty regarding accounting in PSCs under the public sector rules are also not reflected in the Research Report.

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<sup>1</sup> <https://www.gov.uk/government/consultations/off-payroll-working-in-the-private-sector>

<sup>2</sup> <https://www.gov.uk/government/publications/off-payroll-reform-in-the-public-sector>

- 1.5. In preparing this response, our focus has been on the implications of the proposed extension of the public sector rules to their private sector counterparts. That focus should not, however, be taken to mean that we consider the case to have been made for such extension. It has not. The fundamental problem with the intermediaries' legislation has always been with its policing rather than its design. Departmental under-resourcing has significantly undermined its chance of operating as intended.
- 1.6. Our strong preference would be for the relevant law in relation to private sector contracts to remain unchanged and for there to be a substantial reinforcement of HMRC resources in order to achieve very substantially greater compliance. We recognise, however, that public spending constraints and other pressures on departmental resources make such a substantial reinforcement improbable. For that reason only, we focus in this response on the implications of the proposed extension rather than on any preferred (but more resource-heavy) alternative.

## 2 General observations

- 2.1 As previously noted in our response to the HMT/HMRC/BEIS consultation on Employment Status<sup>3</sup>, we do not consider that employment status and the intermediaries legislation for off-payroll working<sup>4</sup> can be considered in isolation. Nor can the differential in NIC rates between employed and self-employed individuals - which has encouraged the use of intermediaries such as PSCs and in turn led to the introduction of the intermediaries legislation - be ignored. While we appreciate that, politically, consideration of changes to NIC rates may be unpalatable, it must be acknowledged that NIC rates are a significant factor in driving off-payroll working and status decisions in general. The Consultation notes that, in HMRC's view, 'non-compliance in the private sector remains extensive and continues to grow' so it is disappointing that closer alignment of the NIC rates of those inside or outside the off-payroll working rules is excluded from the scope of the Consultation.
- 2.2 The underlying rationale of the proposals is to move the decision regarding whether the off-payroll rules apply to the client<sup>5</sup> and away from the PSC, which may have an incentive to conclude that the rules don't apply. However, in the world of long and complex supply chains, with multiple agencies introducing a great distance between the PSC at one end and the client at the other, there is a risk that the client will simply adopt the approach with the least risk of challenge by HMRC, to the detriment of the PSC and ultimately the worker.
- 2.3 Our concern is that clients will decide that the off-payroll rules apply in a greater number of situations than they truly do and that, unless the PSC has a very strong bargaining position, they will not be in a position to challenge such decisions.
- 2.4 Under the off-payroll working rules introduced for the public sector in April 2017, where a worker disagrees with a client's decision as to their classification there is no right of appeal to HMRC. HMRC's view is that this is a dispute between the client and worker which must be resolved between them. The tax position essentially becomes part of the contract negotiations. Such

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<sup>3</sup> <https://www.att.org.uk/technical/submissions/employment-status-att-response>

<sup>4</sup> These rules are commonly known as IR35 and are set out in the intermediaries legislation in Part 2 Chapter 8 ITEPA 2003.

<sup>5</sup> Following the consultation terminology set out at 2.5 we are using the term 'client' to identify the organisation receiving the worker's services.

disputes appear to be relatively common - the Research Report notes at 1.37 that 46% of central bodies, and 31% of sites reported having disputes with contractors or agencies about classification, and that amongst these the most common dispute was over contractors being assessed to fall within the off-payroll working rules.

- 2.5 The response from the Low Income Tax Reform Group (LITRG) which we have had sight of goes into more detail on the issues for lower paid workers and we endorse their response.
- 2.6 Those workers who were not able to resolve a dispute with a public sector client to their satisfaction have, to date, been able to turn to clients in the private sector for work. However, this option will be removed if the public sector rules are extended to the private sector. It is therefore important that the risk of incorrect decisions is minimised. We anticipate for the reasons stated below that CEST is likely to play a significant role in this.
- 2.7 The challenge is to come up with a practical mechanism for resolving disputes outside the process through which the various parties agree the terms under which work is offered and accepted. We considered whether there should be a right of appeal to HMRC if the worker disagrees with the client decision. Our concern though is that in practice very few workers are likely to be in a sufficiently strong negotiating position to make use of such an appeal, as it would very probably affect their chances of future engagement. Also, it is unlikely that such a process would be quick enough to reach a decision before the client needed the worker to start work. This forces us, reluctantly, to the conclusion that the most practical solution in the short term is to ensure that CEST is developed into something that is reliable and accurate and in which both worker and client can have confidence. There also needs to be a safety net where CEST does not or cannot reach a conclusion to ensure that the client can comply with their classification obligations. We have made additional points on CEST in section 3.
- 2.8 Where the off-payroll working rules apply, one of the effects is to ensure that a worker operating via a PSC pays employee's NIC, despite the fact that they may not have the same legal rights. Furthermore, where the client considers that the off-payroll working rules apply but wishes to avoid any increase in their own overall costs, the worker can find themselves effectively suffering the employer's NIC cost in addition to the employee's element. Rather than 'levelling the playing field' with normal employees, this effectively results in those working through intermediaries suffering much higher NIC rates without receiving the benefit of the same legal rights and protections.
- 2.9 If the decision is taken to extend the off-payroll working rules introduced for the public sector in April 2017 to the private sector, we would like to see a single set of rules which apply equally to both sectors. Having two different sets of rules (one for the public sector and another for the private sector) would increase complexity and could create further distortions in the labour market.
- 2.10 Finally, in this section, we also have concerns over the timing of the implementation of any new rules. In particular, changes should not be introduced for the private sector:
- 1) Until the Employment Status consultation<sup>6</sup> is concluded; and
  - 2) Before April 2020 – businesses are already being challenged to deal with Britain's exit from the EU and MTD for VAT in 2019. Extending the public sector off-payroll reforms to the

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<sup>6</sup> See <https://www.gov.uk/government/consultations/employment-status>  
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private sector will simply add further administrative burdens at a time when business is already dealing with great uncertainty.

- 2.11 We also have concerns about extending the off-payroll rules introduced for the public sector into the private sector until there has been a full corporation tax and income tax compliance cycle. Income Tax Self-Assessment returns for the first year of operation in the public sector are not due until 31 January 2019, and it is yet to be seen therefore how many of these return will include adjustments made by PSCs/workers who do not agree with the public sector decision.

### 3 The operation of the Check Employment Status Tool (CEST)

- 3.1 We note that section 1.34 of the Research Report states that the majority of respondents (91% of public sector bodies and 79% of public sector sites) had used the Check Employment Status Tool (CEST) since the public sector reforms came into effect. We expect that the greater majority of private sector businesses would rely similarly on CEST if the off-payroll reforms were to be extended to them.
- 3.2 Given this expected level of reliance on CEST, it is important that the tool is reviewed and updated frequently by HMRC in order to reflect new developments in case law. However, this should not lead to a requirement for clients to continually re-check CEST in respect of ongoing contracts as that would be impractical and create additional unwelcome compliance burdens.
- 3.3 We understand that CEST was designed with public sector engagements in mind and therefore it is also important that the tool works effectively for private sector employments, which may differ in structure to public sector employments. We would like to see a period of user testing in newly affected industries prior to any extension of the off-payroll working rules.
- 3.4 We have a number of concerns regarding the operation of CEST in practice based on experiences to date. These include:
- The frequency with which it does not give a conclusive answer.
  - Apparent inconsistencies in answers received (an issue noted in the Research Report).
  - Our members also report that the binary nature of many of the questions posed is at times inappropriate given the subtle nuances that can apply in employment status cases.
- 3.5 One particular area of concern which has been addressed recently in HMRC's paper to the IR35 Forum<sup>7</sup> is that CEST does not consider mutuality of obligation. Whilst we do not wish to enter into a detailed discussion of this issue here, we note that HMRC's assumption that there will always be mutuality of obligation where a contract exists, or will exist, does not appear to be consistent with the tests developed by the Courts.
- 3.6 Where a case is complex or unusual or CEST does not provide an answer, in an ideal world we would consider that a form of ruling mechanism would be a helpful alternative for CEST. This would require the client to determine the applicable terms and conditions, apply CEST in the first

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<sup>7</sup> See [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/722316/HMRC\\_paper\\_on\\_Mutuality\\_of\\_Obligation.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/722316/HMRC_paper_on_Mutuality_of_Obligation.pdf)  
P/ATTTSG/Submissions/2018

instance, and confirm either that CEST does not supply an answer or explain why they consider that CEST does not give an appropriate result. To be effective in practice, there would need to be a reasonable window, say 30 days, in which HMRC would agree to respond. We are aware that this would have a significant resource implication for HMRC, and we have already noted above that we assume that lack of resources will mean it is unlikely that HMRC will be able to substantially reinforce compliance with the existing off-payroll working rules. However, in this situation the resources would be being applied to *prevent* problems arising in advance, rather than to deal with non-compliance at a later date. Certainly a ruling mechanism would be a sensible way to provide comfort to taxpayers and ensure the correct tax is collected in complex or unusual cases where CEST is not appropriate.

- 3.7 We would also like to see a suitable forum involving HMRC and external stakeholders (such as professional bodies and representative clients) meeting regularly to discuss CEST. Such a forum could bring any issues to HMRC's attention and work with HMRC to resolve them in a timely manner. It may be that this fits within the remit of the existing IR35 Forum<sup>8</sup>. We would suggest that this forum could, in the run-up to any introduction of the rules, test the various scenarios proposed by its members as suggested above at 3.3.

#### 4 Chapter 5 – The compliance challenge

##### 4.1 ***Q1. What could be done to improve the compliance enquiry process to reduce non-compliance, whilst safeguarding the rights of customers?***

- 4.2 We note in the Consultation that the following are seen as areas of concern in relation to current compliance with the off-payroll working rules in the private sector:

- The requirement for HMRC to deal with each PSC on a case by case basis
- The perception, borne out in reality, that HMRC enquiries are unlikely
- The long time lag between income being earned and payment of tax, although this is hardly unique in the self-assessment framework
- The fragmentation of responsibilities between the supply chain
- The challenges in collecting the tax due if the PSC has few or no assets

- 4.3 In terms of HMRC's difficulties in dealing with PSCs on a case-by-case basis, we have concern over the desire expressed at 6.1 in the Consultation that any solution should '*address or mitigate the compliance challenges set out in the previous chapter, for example the need to deal with each PSC individually*'. We appreciate that putting apparently similar cases together creates efficiencies for HMRC, but wonder if there needs to be a process through which it is determined that a number of PSCs can properly be considered together. There should be protections to stop workers being considered together with others if they have a genuine reason to believe they are not operating on the same contractual terms as others.

- 4.4 There is a balance to be struck between efficiency for HMRC where many PSCs are genuinely engaged on the same terms and the rights of the individual to have their position considered on a case by case basis. One of our members commented on the existence of regional variations in the

<sup>8</sup> <https://www.gov.uk/government/groups/ir35-forum>

construction industry, noting that in the north of England it is more common to employ brick-layers directly whereas, in the south, contractors were more likely to seek brick-layers through labour agents. Even within one business for similar roles there can be regional differences in how labour is engaged and the terms and conditions under which each worker operates. Simply considering the position of all 'bricklayers' would not be appropriate, but it may be appropriate if a single labour agent offers workers work on the same terms.

- 4.5 The fact that, after almost 20 years of the off-payroll working rules, HMRC's satisfaction with the level of compliance is so low suggests that it is appropriate to consider a radically different approach to the off-payroll working issue. Hence our call at the start of this response to consider both employment status, the intermediaries legislation and Employers NIC issues in the round before making any further changes.

## 5 **Chapter 6- Options for how to tackle non-compliance: Extending the Public sector Rules to the private sector**

- 5.1 ***Q4. If the private sector rules were changed, do you have any evidence that there are parts of the private sector where the administration of any regime may need to vary even though the basic principles including for determining status, remain the same?***

- 5.2 The position of the construction industry should be considered. In this industry, the Construction Industry Scheme (CIS) already creates large administrative burdens. It is unclear how CIS would interact with the proposed new rules. Would both have to be applied, as is the case in the public sector, or could there be an exemption from the new rules where CIS already applies to an engagement? In the interests of simplicity and practicality, it would be preferable not to have to consider two different sets of rules in respect of the same engagement.

- 5.3 ***Q5. Is there any evidence that parts of the private sector will not have, or be able to acquire the administrative capacity, knowledge and resources to enable them to implement any changes in relation to off-payroll workers?***

- 5.4 Our concern is that smaller businesses that engage contractors will struggle with the new rules for the following reasons:

- The one-off set-up costs noted by the public sector in the Research Report into the public sector experience will be felt more keenly in a smaller business, where profit margins and cash flow may be a particular concern.
- For those businesses that engage PSCs or intermediaries infrequently there will little or no potential for efficiencies on the grounds of familiarity by making repeated decisions.
- Smaller businesses may lack the internal resources and need to seek professional advice, which will increase their recruitment costs.
- Smaller businesses engaging PSCs may be unfamiliar with the issues involved as the responsibility for complying with the off-payroll working rules has, to date, sat with the PSC.
- Unlike large businesses which can approach their Customer Compliance Manager (CCM) for advice, smaller businesses have fewer routes to get assistance from HMRC.
- Smaller businesses are more likely to rely on CEST which does not always give an answer.

- 5.5 ***Q6. How could these difficulties be mitigated?***
- 5.6 The difficulties identified could be mitigated, at least in part, through additional support from HMRC such as the provision of *Talking Points* type webinars and examples in online guidance. We have commented in 3.6 above on the potential for an additional route for complex rulings in addition to CEST.
- 5.7 It would also be important to allow a sufficient lead time for businesses to familiarise themselves with the new rules. As noted in 2.10 above, it would be helpful to avoid a change of rules in 2019 when businesses will be coping with the implications of Brexit and the mandate of Making Tax Digital (MTD) for VAT.
- 5.8 ***Q8. What action should be taken in the case where the fee-payer hasn't acted upon the client's conclusion that the worker would have been regarded as an employee for income tax and NICs purposes if engaged directly? Should an obligation be placed upon the fee-payer to adopt the client's conclusion and there be sanctions for failing to do so?***
- 5.9 We have assumed that this question is intended to apply to both the current off-payroll working rules in the public sector and the proposed extension to the private sector. Under both scenarios the responsibility for making a decision on whether or not the off-payroll working rules apply rests with the client. The fee-payer must comply with that decision and withhold the necessary tax and NICs otherwise they are effectively able to overrule the client's decision. It is not therefore unreasonable to impose an obligation on the fee-payer to adopt the client's conclusion.
- 5.10 ***Q9. What action should be taken if the worker or PSC is knowingly receiving income that has not had the right amount of tax and NICs deducted?***
- 5.11 We struggled with the premise of this question. What is meant by having 'the right amount of tax and NIC deducted'? The right amount is presumably the amount as determined by the client. The worker does not have responsibility for making the decision, and should not have the responsibility for auditing the client's decision. Unless the worker (and by extension their PSC) was aware that the client had considered that the engagement was caught by the off-payroll working rules, and that one of the intermediaries had not followed the decision, we are struggling to see when this situation would arise. It is even less likely to arise if penalties are applied to the fee-payer for not complying with the client's decision.
- 5.12 The only other circumstance where it may be reasonable to state that the individual worker is *knowingly* in receipt of income that has not had the right amount of income tax and NICs deducted is if the PSC and the client colluded together in coming to an inappropriate determination that the PSC was entitled to a gross payment. In this case, we would expect there to be grounds for prosecution for the common law offence of cheating the Revenue.
- 5.13 We would be concerned if a penalty could be applied to the PSC where the client's decision that the off-payroll working rules did not apply was overturned by HMRC on review. Once the responsibility for establishing the position has been passed to the client, there should not be a requirement for the PSC to carry out their own detailed analysis of their status. If the PSC chooses to do so, and reaches a different conclusion, that is be part of their negotiations with the client.
- 5.14 ***Q12. Can you provide any evidence that these costs would vary depending on how much notice businesses were provided for the introduction of any reform?***

- 5.15 We do not have the evidence base to quantify costs. However, we agree with the observations in the Consultation that the introduction of new rules in the public sector was implemented very rapidly, causing concern and practical problems for those affected. Given that there is a larger number of businesses in the private sector, which span a greater range of sizes and types, we urge that there is as long a lead-time as possible before any changes to be introduced. As noted above, we ask that new rules are not brought in before April 2020 at the earliest because the introduction of both MTD for VAT and Brexit in 2019 would make any earlier date particularly difficult for businesses to accommodate any additional changes or administrative burdens.
- 5.16 *Q13. Is there anything else HMRC could do to ease the implementation for businesses, and can you provide evidence of how this would ease implementation or administration for businesses?*
- 5.17 We anticipate a need for increased HMRC resources to deal with more helpline queries initially as employers get to grips with new systems. We understand from page 15 of the Consultation that HMRC considers that CEST gives a clear answer on 85% of occasions. That leaves clients in 15% of cases needing to consult further guidance or HMRC helplines. There may also be cases where the client or worker disagrees with the CEST conclusion and wishes to seek further advice. We appreciate this will lead to greater upfront costs for HMRC but, without such support, businesses will struggle to be compliant. We have made further comments on CEST in section 3 above, including a suggestion at 3.6 for an alternative ruling mechanism where CEST is not able to produce an answer.

## 6 Encouraging or requiring businesses to secure their labour supply chains

- 6.1 Rather than respond to individual questions in this section, our overall comment would be that this proposed measure would be difficult for businesses to operate in practice, and for HMRC to police. We see no benefit in pursuing this idea further.

## 7 Additional record keeping

- 7.1 Rather than respond to individual questions in this section, our overall comment would be that, on the assumption that many businesses may already be keeping the records required, there may not be a significant additional burden for many businesses resulting from these proposals. However, it is not clear that the proposals would adequately address the concerns raised in Chapter 5 of the Consultation. Accordingly we see no benefit in pursuing this idea further.
- 7.2 We have had sight of the response from the Chartered Institute of Taxation (CIOT), which proposes additional reporting requirements on clients in order to put HMRC in a better position to identify PSCs and understand the value of their contracts. Such information could be used to better direct HMRC enquiries. This approach would fit with our position as set out previously that we would like to see HMRC carrying out increased compliance activity.



## 8 Other issues and options considered but out of scope of this consultation

- 8.1 As noted above, we would prefer to see employment status and the off-payroll working rules considered together. In our response to the Employment Status consultation<sup>9</sup> we called for a wider public debate to look at what employment should look like now and in the future. We would support a broader, more radical approach to reviewing the position rather than investing time in reassessing responsibilities for the existing off-payroll working rules.
- 8.2 Ultimately our members would be supportive of the creation of a simpler regime in which an individual and their client can easily determine their status, and from that status can determine their tax, rights, benefits and obligations.

## 9 Summary of key points

- 9.1 In summary, we would like to reiterate our opening points that our strong preference is that the relevant law in relation to private sector contracts remains unchanged and that HMRC compliance activity is substantially reinforced. Before any substantial changes are made to the status quo we would like to see a wide-ranging public debate on what employment should look like now and in the future including the structure of intermediaries, and the varying NICs borne by those operating as employees or workers.
- 9.2 In the absence of the above, the key issues we would like to highlight in respect of this consultation are:
- No new measures should be introduced until the completion of the existing Employment Status review and certainly not until 2020 since businesses already have the mandate of MTD for VAT and Brexit to cope with in 2019.
  - In the meantime, the operation of CEST is key and we ask that a forum of HMRC, professional and trade bodies is set up to review the operation of CEST and identify and resolve any operational issues.
  - Where CEST does not provide a conclusive answer, an alternative ruling mechanism needs to be provided.

In the longer term, consideration is given to some form of Tribunal process for workers of PSCs to challenge their classification and/or establish employment rights.

## 10 Contact details

We would be pleased to join in any discussion relating to this consultation. Should you wish to discuss any aspect of this response, please contact our relevant Technical Officers, Helen Thornley ([hthornley@att.org.uk](mailto:hthornley@att.org.uk), mobile 07773 087125) or Emma Rawson ([erawson@att.org.uk](mailto:erawson@att.org.uk), mobile 07773 087111).

**The Association of Taxation Technicians**

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<sup>9</sup> See <https://www.att.org.uk/technical/submissions/employment-status-att-response>  
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**11 Note**

The Association is a charity and the leading professional body for those providing UK tax compliance services. Our primary charitable objective is to promote education and the study of tax administration and practice. One of our key aims is to provide an appropriate qualification for individuals who undertake tax compliance work. Drawing on our members' practical experience and knowledge, we contribute to consultations on the development of the UK tax system and seek to ensure that, for the general public, it is workable and as fair as possible.

Our members are qualified by examination and practical experience. They commit to the highest standards of professional conduct and ensure that their tax knowledge is constantly kept up to date. Members may be found in private practice, commerce and industry, government and academia.

The Association has over 8,500 members and Fellows together with over 6,000 students. Members and Fellows use the practising title of 'Taxation Technician' or 'Taxation Technician (Fellow)' and the designatory letters 'ATT' and 'ATT (Fellow)' respectively.