

Response to Consultation on Off-Payroll working (IR35) - Calculation of PAYE Liability in Cases of Non-Compliance

28th February 2024

About APSCo UK and APSCo OutSource

The Association of Professional Staffing Companies (Global) Ltd (APSCo) is the trade association for the professional recruitment and outsourcing markets. APSCo Global comprises APSCo Asia, APSCo Australia, APSCo Deutschland and APSCo United Kingdom as well as APSCo OutSource, the trade body for the RPO and MSP sectors. Our members support businesses filling skilled permanent and contract roles at the higher end of the labour market across IT and technology, financial services, engineering, pharmaceutical and life sciences, manufacturing, retail, media and public sector, including education and clinical healthcare.

Across our members' sectors the use of highly skilled contractors is prevalent, due to client demand for resource flexibility to work on projects or to fill critical skills gaps. The sectors have had to adjust to the Off-Payroll working rules and we still have concerns about implementation relevant to this consultation:

- Members and stakeholders report widespread ignorance across the SME end-user community of the rules and their obligations, particularly if a recruitment firm is not involved in the supply chain. Should HMRC move to a more aggressive enforcement environment, then many small businesses may be left in technical insolvency by HMRC reassessments and demands. The April 2024 regulations may reduce their liability but given the timing of the PAYE liability calculation, they may be forced into administration before HMRC produces a final claim.
- Medium and larger businesses have adopted a cautious approach to the reforms, resulting in exceptionally large numbers of contractors being channelled into employment, via umbrella companies or leaving the marketplace all together. To address the skills shortage and in any event as part of the evolution of the workplace more clients are requiring "packages of work" or "statement of work services", defined in the rules as "contracted out services". In reality clients may be unknowingly carrying liabilities due to incorrectly defining services as contracted out, thereby not completing a Status Determination and in breach of the rules, leaving them at risk of mass reassessment. HMRC and HMT have been promising improved guidance on contracting out and this is sorely needed and should be expedited.

As HMRC and HMT are aware APSCo was heavily involved in lobbying for the PAYE liability regulations under consultation during its period as lay co-chair of the Employment and Intermediaries Forum (previously the IR35 Forum). This change was needed due to the inherent problem with the rules, which results in double taxation and over recovery by HMRC plus overburdening the deemed employer (often a recruiter) with the liability.

APSCo are pleased that HMT and HMR are introducing the draft Regulations under technical consultation and recognise that HMRC and HMT consulted extensively and productively with Forum stakeholders during the process. However, our members and their clients continue to find Off-Payroll burdensome. The Status Determination decision is legally complex, evidenced by the growing weight of case law on IR35, and CEST (Check Employment Status for Tax), although improved, continues to

provide unclear determinations on professional, skilled assignments commonly placed by our members. APSCo continues to be dissatisfied with the fundamental fact that recruiters are liable in law for the tax underpayment, despite having no formal role in the original assessment as to whether an assignment is inside or outside IR35.

Turning to the consultation, our members have raised several issues which we detail below.

The amount of tax already “recovered” is a “best estimate” reasonably made” by an HMRC officer.

There is no information in the ESM guidance published as to how a tax officer should reasonably reach the best estimate. There should be more clarity and transparency as HMRC will provide guidance on steps to take to reach that best estimate, and that should be public. This is necessary given the worker’s right of appeal and the right for a deemed employer to appeal the Schedule 80 determination (or other form of trigger).

Any information on either the worker or their intermediary required by HMRC to make a calculation must be communicated very clearly to the supply chain, not simply in an online ESM guidance. In addition, the intermediary reporting should be modified if necessary to ensure key information is collected at that point e.g. NI number and date of birth. It is much easier for members to collate this information if they are required to do so for HMRC reporting.

“Directions can be combined into one notice”

A recovery direction will state the date the original trigger notice was issued (and presumably identify it), the amount treated as recovered and the services provided for the deemed direct payment (the assignment). This makes sense. However, our members are genuinely concerned about how this will work in practice, given a set off amount may include figures for more than one worker across multiple assignments, giving a total with no breakdown.

A recovery direction will be combined with multiple directions into one notice, relating to the same deemed employer or relevant person. This suggests assignments across our members’ brands or companies, and across many different clients could all be clumped together in one direction, with no identification. This is not workable.

HMRC will clearly be aware of the figure and has a duty to issue a separate notice under the regulations to the worker (payee) for each recovery. A recovery by assignment figure is needed at the very least for internal accounting and allocation purposes, and to understand whether a member should appeal the original trigger notice, given they have been deprived of the right to appeal under these regulations.

The worker has a right of appeal under the regulations, but a deemed employer does not.

We assume that HMRC has concluded that a deemed employer already has a right of appeal elsewhere, otherwise it is totally inequitable. We do not understand why a worker requires a right of appeal, as this is not an appeal about the amount of taxes they or their intermediary have paid or are considered due by HMRC via self-assessment or corporate taxation. Members are concerned that this right of appeal will delay the process and leave them with pending liabilities, an issue for their accounting and any corporate due diligence process. The recovery notice will be a technical document evidencing a calculation, which of necessity may be a best estimate, which a worker will

not be in the position to fully understand. Therefore, we anticipate many needless appeals by workers and would ask that HMRC review this position, and particularly the deemed employer's right of appeal.

ESM Guidance on the Regulations and HMRC Guidance on ITEPA and agency work

These are relatively easy for a lay person to understand but are prepared for tax inspectors and accordingly are not suitable for the supply chain. In our experience only people highly knowledgeable in off payroll refer to the ESM guidance regularly. We expect HMRC to therefore publish clear guidance to workers and the supply chain alongside these regulations, particularly to ensure our members and their clients are collecting the information that will be needed by HMRC to calculate a recovery.

This is part of a broader issue. Due to multiple changes and additions over the course of twenty years the intermediaries' and agency rules under ITEPA are incomprehensible taken as a whole by the worker and supply chain. HMRC has a duty to provide much better overarching guidance, identifying the overlap between the various regulations – the agency regulations, managed service company, off payroll, supervision, direction and control etc.

In respect to off-payroll and contracting out services in particular, advice to buyers and their suppliers is awaited, but seemingly delayed. Currently, apart from the basic ESM guidance, we believe the only guidance or tools available are produced for public sector hirers, leaving the private sector to seek their own advice.

We note the guidance below in addition to a Guide for Buyers on using CCS Frameworks to buy Contracted Out Services. A contracted-out determination tool is very clearly needed to assist the private sector in making the right decisions on contracted out services.

<https://www.gov.uk/government/publications/help-to-comply-with-the-reformed-off-payroll-working-rules-ir35-gfc4/contracted-out-services-part-7>

We thank you for your consideration of these points. We are available to discuss in more detail with you and would welcome this opportunity.

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