

IR 35 Forum Minutes

100 Parliament Street, Room LG/04

Monday 11th December 2017

14:30-16:30

Attendees:

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| Rowena Fletcher (RF) | HMRC (Chair) |
| Mark Frampton (MF) | HMRC |
| Damian Lazenby (DL) | HMRC |
| Alan Reay (AR) | HMRC |
| Nicholas Irvin (NI) | HMRC |
| Allison James (AJ) | HMRC |
| Georgina Lowe (GL) | HMRC (Note-taker) |
| Chiara Crean (CC) | HM Treasury |
| Samantha Hurley (SH) | Association of Professional Staffing Companies (APSCo) |
| Tania Bowers (TB) | Association of Professional Staffing Companies (APSCo) |
| Sarah Ghaffari (SG) | The Institute of Chartered Accounting in England and Wales (ICAEW) |
| Karen O'Reilly (KO) | Recruitment and Employment Confederation (REC) |
| James Collings (JC) | The Association of Independent Professionals and the Self-Employed (IPSE) |
| Simon McVicker (SM) | The Association of Independent Professionals and the Self-Employed (IPSE) |
| Julia Kermode (JK) | The Freelancer and Contractor Services Association (FCSA) |
| Jason Piper (JP) | Association of Chartered Certified Accountants (ACCA) |
| Matthew Fryer (MwF) | Brookson Legal |
| Lesley Fidler (LF) | Chartered Institute of Taxation (CIOT) |

Apologies:

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|-----------------|---|
| Chris Tait | HMRC |
| Chris Simons | HMRC |
| Philip Lloyd | HMRC |
| Travis Woodward | HM Treasury |
| Phil McNeill | Institute of Chartered Accountants of Scotland (ICAS) |
| Kate Cottrell | Bauer & Cottrell |
| Danny Batey | Bauer & Cottrell |
| David Kirk | David Kirk & Co |
| Carl Henning | Brookson Legal |
| Lewina Farrell | Recruitment and Employment Confederation (REC) |

Welcome & introductions

1: HMRC welcomed members of the Forum, and thanked them for their agenda items.

Budget Announcements

2: HMRC referred to the recent Budget statement and highlighted two announcements:

Off-payroll working

The government reformed the off-payroll working rules (known as IR35) for engagements in the public sector in April 2017. Early indications are that public sector compliance is increasing as a result, and therefore a possible next step would be to extend the reforms to the private sector, to ensure individuals who effectively work as employees are taxed as employees even if they choose to structure their work through a company. It is right that the government take account of the needs of businesses and individuals who would implement any change. Therefore the government will carefully consult on how to tackle non-compliance in the private sector, drawing on the experience of the public sector reforms, including through external research already commissioned by the government and due to be published in 2018.

Employment Status Discussion Paper

The government will publish a discussion paper as part of the response to Matthew Taylor's review of employment practices in the modern economy, exploring the case and options for longer-term reform to make the employment status tests for both employment rights and tax clearer. The government recognises that this is an important and complex issue, and so will work with stakeholders to ensure that any potential changes are considered carefully.

3: The consultations will take place in 2018, but HMRC have no information about the exact timing. The two consultations are related. The employment status consultation will consider the long term case for reform, however there is a more immediate need to consider how best to tackle private sector non-compliance with the off-payroll working rules.

4: The Exchequer cost of non-compliance with the off-payroll rules is estimated to be £1.2bn by 2022/23. HMRC / HMT confirmed the figure is based on the costing estimates for the public sector reform, the methodology for which had previously been agreed with the Office for Budgetary Responsibility.

Implementation & Administration of the Public Sector off-payroll reforms

5: External forum members presented a paper with examples of issues arising post implementation, including blanket decision making and concerns about staff shortages in some parts of the public sector, provided by APSCo and IPSE. HMRC welcomed the paper, but advised it would not be appropriate to publish it alongside the minutes of the meeting, where it might be seen as an HMRC approved narrative on the reform. The forum discussed the points raised in the paper:

i) Members said that a named taxpayer had delayed off-payroll decisions by up to 6 months. As a result the taxpayer is now trying to recoup under-deducted tax/NICs from contractors.

HMRC cannot comment on specific taxpayers, but they have continued to support public bodies to implement the reforms consistently.

ii) Concerns about blanket decisions being made about whether the off-payroll working rules apply, particularly in respect of a named sector, and subsequent changes of position leading to uncertainty and exacerbating existing recruitment issues.

HMRC confirmed they have been working with the sector, including delivering webinars and guidance. HMRC said blanket decisions could mean different things to different people. Applying a decision to a group of workers with the same role, terms and contractual conditions can be appropriate. Ruling all engagements in or out, irrespective of the contractual terms and actual working arrangements, is not. HMRC was aware that advice ruling all workers in had been initially issued and then withdrawn in the sector in question, but hasn't seen evidence of blanket decisions (everyone is in) within the public sector. The paper suggested that blanket rulings would be common in the private sector in the event of reform. HMRC said that whilst they couldn't speculate on possible responses to a reform, the shape of which had yet to be determined, the consultation would be able to explore these risks in detail.

iii) Concern that tax rules may influence the new Crown Commercial Services (CCS) contractor terms and conditions.

HMRC could not comment on CCS contracts.

iv) Members have seen that contractors are moving to umbrella companies or to non-compliant schemes, rather than being put on the payroll of the fee-payer.

HMRC is aware of tax avoidance schemes, often involving umbrella companies, being promoted to contractors as a way to get around the intermediaries legislation. These schemes do not work and have potentially serious consequences for both promoters and users. Forum members thought naming and shaming scheme promoters would really help. HMRC cannot name and shame current working cases although of course cases that go to court have featured in the press. HMRC would like to work with members on how to tackle this behaviour more effectively.

v) Concern that contractor rates are rising as a result of the reform.

HMRC had not seen widespread evidence of rate rises, although there were cases where the worker could negotiate a higher rate. HMRC confirmed that the independent research, which will be published in the New Year, will include evidence on rates across the public sector.

vi) Concern that the ‘outsourced service exemption’ is unclear and would be exploited in a potential private sector roll out, and that clearer guidance on the off-payroll working accounting procedures would be beneficial.

HMRC accepted that there is scope to improve the example(s) around ‘outsourced service exemption’ and that they will continue to review the guidance as necessary.

AP1 - HMRC to ensure that updated guidance covers issues on exemptions and exceptions, especially on outsourced services.

AP2 – Forum Members to send queries on accounting for HMRC to consider when updating guidance.

vii) Forum are keen that consultation continues rather than government feeling that there has been enough consultation already on the operation of IR35. Concerns that the external research should have included organisations such as employment agencies, rather than just public bodies.

The Autumn Budget announcement is evidence of the government’s commitment to continued consultation on how to address non-compliance with the off payroll working rules. Consultation and dialogue with stakeholders has continued throughout the development and implementation of the public sector reforms. There have been numerous meetings and workshops, including with organisations represented on the forum and their membership throughout the year, as recently as the previous week. This ongoing dialogue, including the evidence submitted in the paper being discussed, and through the shared members surveys would inform the announced consultation. HMRC also explained that the external research had been deliberately targeted to get feedback from public bodies of their experience, where HMRC wanted them to be able to feedback openly and anonymously.

viii) Concern that contractors are moving to non-compliant structures, driven by a desire to retain the same level of take-home pay, or in some cases by public bodies themselves. Also that supply chains in the private sector are more complex than in the public sector, making reform more difficult.

HMRC is keen to work with the forum members on non-compliance with IR35 rules. In the context of the upcoming consultation views on visibility of the supply chain, particularly any differences between public and private sector supply chains would be welcomed. HMRC also welcomed the suggestion that CBI should also be invited to contribute to these discussions.

AP3 – HMRC to work with members and CBI to consider how to resolve the issues on supply chains

ix) Concern that there may be an increase in the number of false employments if blanket decisions are made by engagers, potentially leading to an increase in employment rights appeals. Concern that one case found in favour of the contractor could set a precedent for many other cases.

HMRC had not seen any cases of false employment that could be linked back to the reforms but said they are interested in any evidence, for example pre-action letters. Members confirmed that whilst they saw the potential for increased employment rights appeals they had no evidence of an emerging trend yet.

x) Concern that any assessment of the public sector reform would be incomplete at this time, and so it should be delayed to allow time to include details of claims made following the end of year through SA returns, for which more guidance was required around the NICs position.

HMRC confirmed that the consultation will carefully consider all sources of information, but the government needs to deal with an immediate and growing Exchequer risk. The lessons learnt and assessment of the impact of the reform will be an iterative process, and will reflect emerging evidence as it becomes available. SA returns would be processed and monitored in the usual way and HMRC would provide clarity around NIC re-claims.

AP4 - HMRC to review guidance on reclaiming NICs where status decision is challenged in SA return.

xi) It was felt that HMRC should consider employment status and the off-payroll working rules holistically and not add more legislative “bolt-ons”.

HMRC reiterated that there is an immediate Exchequer risk that needs to be addressed. Forum members also raised some concerns about the intent of the intermediaries legislation and whether definitions needed tightening. It was agreed that this issue should be picked up separately.

xii) Concern that there is no guidance as to what happens to individuals holding ‘Entrepreneur Immigration Visas’ (for the self-employed) and are determined as inside “IR35”.

HMRC had not seen this issue but if members were aware of examples and had more details, they would look into it and consider guidance to help this group.

AP5 - HMRC to examine the impact on immigration guidance.

External Research Undertaken for HMRC on the IR35 Public Sector Changes

6: It was agreed that this item had been covered in the discussion of the paper from members.

7: HMRC confirmed that the fieldwork is now complete, and the research report will be published in 2018. The report will set out the scope and intention of the research.

8: A member asked whether HMRC will also share the criteria for success in the public sector before considering extension to the private sector. HMRC explained that such an extension was only one option in a wide ranging consultation on non-compliance with the off-payroll working rules.

9: Members raised the issue of timing of any further reforms and the change burden upon business, particularly the read across to the implementation of the Making Tax Digital for business changes. HMRC confirmed that the timing of any changes would take into account other changes impacting customers.

CEST and Mutuality of Obligation (MOO)

10: HMRC noted that claims that MOO is omitted from the CEST tool have also been raised in contractor bulletins and at roundtable discussions. CEST does not explicitly look at MOO, it is designed to determine whether an existing or future contract will be one of employment or self-employment. It is assumed that a person using CEST will have already established MOO, which is necessary for a contract to exist, otherwise there would be no need to be using CEST to determine the status of the existing or hypothetical contract.

11. This view has been challenged in the press and by some members of the forum and HMRC will provide a considered response, suitable for publication, in the second half of January.

AP6 - HMRC to respond to queries about inclusion of MOO in the CEST tool by end of January

IR35 Forum Review

12: HMRC thanked members for their contributions to the IR35 Forum review.

13: HMRC confirmed that the public sector wouldn't be represented in the forum as it is very broad and not represented by a single group, so inviting representatives from all parts of the sector would make the group too large, and risk it becoming unbalanced. HMRC already engage with a variety of public sector bodies and their representatives, so their views are received outside of the forum. HMRC noted there was no barrier to the group inviting guests to meetings where agenda items would benefit from their perspective.

14: It was agreed the CBI should be asked to join the forum. HMRC has also been talking to a representative from the Chartered Institute of Payroll Providers (CIPP). It was also suggested that the forum should consider inviting the Institute of Directors (IOD) and Chartered Institute of Payroll Providers (CIPP) to join, and the Federation of Small Businesses (FSB) should be asked to re-join.

15: It was agreed the forum would now be a subgroup of the Employers Payroll Group (EPG). Future meetings should be jointly chaired by HMRC and an external member. An external member would then attend the EPG to represent the forum, which already has standing membership from the HMRC employment status policy team.

16: The draft terms of reference included in the IR35 Forum review would be updated and aligned with the EPG's terms of reference. The new terms of reference move the group into a more proactive role, which was welcomed by members. HMRC will work with the EPG to confirm the change and set up future meetings to align with the EPG dates. New members would be contacted in the New Year and invited to the next meeting.

17: The proposals set out in the IR35 Forum review were agreed by the members.

AP7 – HMRC to work with EPG to establish new structure and set 2018 meeting dates.

AP8 – HMRC to approach suggested representatives (CBI, IOD, CIPP, and FSB) for names of new members

AOB

18: What more could HMRC do to help people understand what compliant umbrella companies look like, and address the issue of non-compliant umbrella companies and promoters of avoidance schemes? HMRC is interested in doing further work in this area in partnership with members. It was agreed that HMRC would work with forum members to develop guidance products for businesses.

AP9 – HMRC to work with members to develop products for business providing guidance on working with umbrella companies.

Summary of Action Points:

AP1 - HMRC to ensure that updated guidance covers issues on exemptions and exceptions, especially on outsourced services.

AP2 – Forum members to submit queries on accounting for HMRC to consider when updating guidance.

AP3 - HMRC to work with members and CBI to consider how to resolve the issues on supply chains

AP4 - HMRC to review guidance on reclaiming NICs where status decision is challenged in SA return.

AP5 - HMRC to examine the impact on immigration guidance.

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Appendix:

Copy of meeting Agenda:



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