

## **IWORK – Written evidence (OPR0019)**

### **1. Has the recent extension of the off-payroll working rules to the private sector made it more difficult for engagers to hire people with the right skills and expertise? To what extent has it contributed to job vacancies?**

- 1.1 Yes, the off-payroll rules have undoubtedly made it more difficult for businesses to hire people with the right skills and expertise for their needs. Notably the UK's lorry driver shortage is the most high profile sector affected, but off-payroll is also a contributing factor in many other industries. In July 2021, the Road Haulage Association reported<sup>1</sup> that 53% of hauliers believe IR35 is a factor in the UK's driver shortage. Little wonder considering that self-employed drivers can take home approximately £1300 per week, which reduces to £650 to £700 per week when deemed "inside IR35" and paid via payroll without any corresponding increase in assignment rate. It is therefore unsurprising that many drivers have left the industry.
- 1.2 The burden of compliance and complexity of the new rules has meant that numerous firms made unilateral decisions to not engage individuals via personal service companies, and that such individuals must be paid via agency or umbrella payroll instead. It's important to note that engagers are making wholesale "inside IR35" decisions are being made without considering whether or not an assignment falls within the scope of off-payroll legislation, instead they are procurement policy decisions that are apparently entirely unrelated to off-payroll.
- 1.3 Given that these decisions are "procurement decisions" then there is no need to exercise "reasonable care" in relation to off-payroll legislation. Furthermore, there is no requirement to produce Status Determination Statements (SDS), and therefore affected contractors do not have any right to appeal the decision, despite the fact that these procurement policies mean such contractors are de facto "inside IR35" by virtue of payroll being the only payment option.

### **2. For those engagers who use the CEST tool to assess employment status, how effective do you consider it to be? Do you have confidence in its results? If not, what improvements need to be made?**

- 2.1 It is astonishing that HMRC's CEST tool omits mutuality of obligation (MoO) as a factor worthy of considering in relation to employment status for tax, despite the fact that MoO is one of three key factors in IR35 case law (the other two factors being personal service and control). Indeed, MoO has been a significant factor in many IR35 cases where HMRC's position has been challenged, including RALC Consulting Ltd v HMRC, and Canal Street Productions v HMRC. And yet HMRC's default view is that by virtue of a contract being in place there is sufficient MoO in place and therefore it does not need to be included in

---

<sup>1</sup> <https://www.rha.uk.net/LinkClick.aspx?fileticket=ICl0C-FWmVo%3d&portalid=0&timestamp=1627564639720>

their CEST tool. Our founder, Julia Kermode, participated in many heated discussions at the IR35 Forum during which stakeholders sought to rectify HMRC's position, unfortunately to no avail as they chose to resolutely ignore the advice of numerous experts and professionals.

2.2 Therefore we recommend that CEST be urgently updated to include MoO as a factor in determining employment status for tax, the absence of this is not only an arrogant disregard for the judiciary but also a very significant weakness which undermines the usefulness of the tool.

2.3 A further weakness of the tool is the ability for those using it to properly understand how to use it, and how to interpret the questions in order to correctly answer them. This is a very obvious problem given the number of public sector bodies that used the tool and have since been fined due to inaccurate status determinations – DWP fined £87.9m, Home Office £29.5m and HM Courts and Tribunal Service £12.5m. Whilst we acknowledge that progress has been made to improve the tool and make it clearer for users since its inception in 2017, more work needs to be done if we are to avoid private sector businesses also being subject to such costly mistakes.

**3. What changes have engagers had to make to apply the off-payroll rules to contractors, in terms of systems, personnel and training? By reference to your own experience, to what extent (if any) do you consider that compliance costs have increased because of the changes?**

3.1 It is very clear to us that engagers have needed to invest significant sums of money in developing their systems and upskilling their teams to be able to competently apply the off-payroll rules. Prior to setting up IWORK, Julia Kermode worked with several different end-clients to support their off-payroll preparations, and in all of these cases the clients needed to make very significant changes to their systems both in terms of IT and also team structures, roles and responsibilities.

3.2 The off-payroll legislation has created significant confusion within end-clients in terms of who within the business should be ultimately responsible for its implementation – finance director due to the risk of fines and potential future cost? Legal director? HR director due to the impact on people resources? Procurement director due to it being buying services? Payroll team? In reality, businesses needed to convene an off-payroll planning team spanning many different functions, which was in itself costly and time-consuming, plus decide who within the business has final sign-off, and where ongoing implementation responsibility sits within the organisation.

3.3 All of this preparation and planning had to be undertaken alongside grappling with the impact of COVID, the longer term viability of their business, and geographically dispersed staff. It is little wonder then that over half of SME end-clients<sup>2</sup> have made the conscious decision to defer the implementation until they are more settled post-pandemic. Of

---

<sup>2</sup> <https://iwork.co.uk/news/most-mid-sized-businesses-complacent-about-ir35/>

course, arguably the planning and preparation should have already been completed pre-pandemic given the original implementation date of April 2020, however it is unsurprising that in reality most businesses had left it until the very last minute when responding to the pandemic had to be prioritised.

#### **4. How well has HMRC supported engagers, contractors and their advisers with the implementation of the new rules and is any further or different type of assistance needed?**

- 4.1 Compared to previous legislation changes, HMRC did a much better job of communicating about the off-payroll changes in the private sector and this was particularly noticeable during the last 6 months prior to implementation. However, there were obviously still many shortcomings given the large number of clients (of various business sizes) who remained unaware of the legislation change right up until immediately before it came in, and some didn't know about it until afterwards.
- 4.2 The online webinars, (both live and recorded) were a useful communication tool which covered the main aspects well, but we are aware that it inevitably took some time to obtain answers to specific queries submitted to HMRC. The off-payroll changes are complicated for novices to get to grips with so creating clear communications were always going to be a challenge. Therefore, whilst the materials produced served a purpose most businesses required additional support, either from HMRC or via professional advisors.
- 4.3 HMRC's communications strategy was better for the larger businesses who already had access to a dedicated HMRC advisor by virtue of their size, however businesses without direct access to HMRC personnel were less likely to hear about the change in the first place, and also less able to obtain the answers they needed for their specific circumstances. In addition, an alarming number of contractors were entirely unaware of the change.

#### **5. To what extent has the introduction of the new rules generated disputes between engagers and contractors *vis a vis* the rules and how successfully or otherwise have these been resolved?**

- 5.1 The new rules require engagers to take "reasonable care" in establishing their status determinations, however as already outlined rather than considering the off-payroll legislation properly many clients chose to make wholesale procurement decisions to ban the use of personal service companies. In these instances clearly disputes arise from those contractors who must now choose a payroll option should they wish to continue working for their client, however as such decisions are apparently unrelated to off-payroll then there is no process for raising disputes. Contractors were left with a simple decision – accept or reject the new terms.
- 5.2 For those engagers which do consider off-payroll, many are still not issuing status determination statements (SDS): 38% of Randstad's

contractors state that they have not received an SDS from their client. Without an SDS which includes a rationale for the client's determination, it is nigh on impossible for contractors to effectively dispute the status they have been given, so the legislation requiring clients to have a dispute resolution process is defunct in these scenarios. Without an SDS there is nothing to dispute, and concerning for affected contractors there are no alternative channels to pursue for redress.

5.3 In scenarios where clients do provide status determinations, there are numerous incidents of contractors disagreeing with them, however the affected contractors usually decide against formally appealing their status determinations. The overwhelming view is that the appeals process is pointless given that it is still within the gift of the client to choose to maintain their original position.

5.4 Objectively, it does seem odd to have a dispute mediation process governed by one of the parties which has a significant interest and financial risk affected by the outcome. This point was made to HMRC during the consultation stage of the legislation process, and the concerns raised have been borne out. It would be far preferable to have an independent appeals process undertaken by an appropriately qualified and experienced authority (i.e. HMRC) so that both parties can be assured that their perspective will be properly considered, and it is wrong that HMRC continues to effectively delegate even more of their role to businesses.

5.5 Despite the obvious shortcomings of the appeals process, there have been a few situations where contractors have successfully changed their clients' view but these scenarios are in the minority. In these instances, success has been dependent on contractors gathering evidence to support their perspective, e.g. a determination from an alternative provider, and robustly arguing their case.

## **6. What behavioural effects have resulted from the introduction of the new rules in the private sector in terms of the arrangements adopted in hiring contractors?**

6.1 Very concerningly the cost of employers NICs for "inside IR35" assignments is effectively being paid by contractors because their contract rates are not being increased to take account of payroll overheads. This contradicts the intention of the legislation which is for engagers of contractors to pay the employers NICs on top of the rate. Whilst it is illegal for any worker in the UK to have employers' NICs deducted from their income this is effectively worked around through ambiguity (deliberate or otherwise) surrounding the advertised pay rate for roles.

6.2 Often contracts are advertised as paying a certain rate "inside IR35" or "via an umbrella" and contractors subsequently find that this terminology apparently means that the advertised rate includes all payroll overheads, e.g. rather than earning £X per day they are actually earning £X per day less employers NICs, less apprenticeship levy, less employers pension, less umbrella costs (if applicable), less employees

tax and NICs. Depending on the specific circumstances of the individual, the reduction in income can be 30-40%, which for most people is unaffordable.

- 6.3 It defies convention to advertise a pay rate which includes all additional on-costs – no permanent salaries are advertised in this manner. Action needs to be taken to ensure that advertised pay rates are always the gross rate that an individual can expect to receive, indeed it is surprising that this isn't already a legal requirement.
- 6.4 In April 2020, a new legal obligation came into effect requiring Key Information Documents (KIDs) to be given to all agency workers prior to them starting work. They are intended to provide important information such as pay rates and any deductions, however most contractors report not receiving them. Action is urgently needed to enforce this legislation.
- 6.5 A further behavioural change is the impact on sole traders, with many engagers wrongly believing them to be within scope of off-payroll and therefore making illogical decisions. One contractor that we spoke to has been forced to be paid via payroll because she is a sole trader, and yet the client engaging her does allow sole traders in other guises (such as gardeners and cleaners) however as she would be performing office-based services they refused to consider her sole tradership.
- 6.6 In addition to wrongly judging sole traders within the scope of off-payroll legislation, we have already outlined that numerous clients making "procurement decisions" to stop engaging personal service companies and/or contractors entirely. Such decisions are entirely attributable to the impact of off-payroll legislation on their business, and many firms have consequently lost the skills and talent that they need in order to recover from the pandemic.

**7. The government is proposing a new employment body with powers to enforce employment rights, including for those engaged by agencies and umbrella companies. How effective do you think such a body will be in ensuring workers, particularly the lower paid, are treated fairly?**

- 7.1 Key to the success of the proposed new employment body will be awareness of it's existence, particularly amongst the workers who stand to benefit it. Currently an alarming number of recruitment agencies are unaware of the existence of current regulatory bodies such as BEIS Employment Agencies Standards inspectorate, which is to be expected given the woefully low level of funding that this enforcement body is required to discharge it's powers within. When Sir David Metcalf was Director of Labour Market Enforcement, he proposed that the remit of the Employment Agencies Standards inspectorate should be broadened to encapsulate umbrella companies, which is a sensible suggestion given the synergies, however the proposal cannot hope to be effective or deliver results without a very significant increase in funding to enable success.

- 7.2 The same financial predicament will be true whether or not it becomes the remit of a new employment body; the simple fact is that current enforcement is significantly under-resourced<sup>3</sup> and we simply cannot expect additional outcomes without a significant investment.
- 7.3 Furthermore, there continues to be a question of what shape umbrella sector regulation should take in practical terms, despite the government having committed to doing so back in 2018 (published within their Good Work Plan<sup>4</sup>). Our recent discussions with the BEIS team tasked with implementing regulation of the umbrella sector have been very positive, particularly their commitment to ensuring that any such regulation is effective, fit for purpose and achieves the desired result. This is significant given the widespread perception that the government's commitment to regulate was simply paying lip service to lobbyists and would not have any beneficial impact on workers. The total lack of funding allocated to regulating the umbrella sector so far, despite their commitment in 2018, is also suggestive of apathy from the government.
- 7.4 The government is well aware of many instances of poor practice within the umbrella sector (not just limited to loan schemes) and that workers are being mistreated, including many who are vulnerable and/or lower paid. Given that the off-payroll legislation has created an increase in numbers of people engaged via umbrellas then it is imperative that umbrella sector regulation is progressed imminently.
- 7.5 The complexity of the task to regulate the umbrella sector must not be underestimated, however equally it must not continue to be deprioritised. As minimum, umbrella sector regulation must have a broad enough remit to encompass the following:
- a. all "umbrellas", i.e. those that employ workers, and those that do not employ workers;
  - b. employment law obligations such as paid holiday, NMW, pension autoenrollment;
  - c. tax compliance, i.e. loan scheme providers must be within scope.
- 7.6 In short, regulation should encompass businesses that undertake payroll functions (using their own PAYE reference number) on behalf of recruitment agencies. The tax compliance point is critical for inclusion in the regulatory remit, and whilst HMRC clearly have a role to play here they have thus far been spectacularly unsuccessful as demonstrated by the many thousands of innocent loan charge victims now facing financial ruin.
- 7.7 There are numerous additional factors that we could list, but the most important point is that effective umbrella regulation will not be straight forward to achieve and therefore will need adequate financial funding. In addition, success will be dependent on a robust communications strategy to ensure that workers are aware of the regulation and route to

---

<sup>3</sup> <https://www.tuc.org.uk/research-analysis/reports/tuc-action-plan-reform-labour-market-enforcement>

<sup>4</sup> <https://www.gov.uk/government/publications/good-work-plan>

redress. Providing adequate resources are allocated to regulating the umbrella sector, along with the commitment of the BEIS personnel involved then there is no reason why it should not succeed.

**8. How successful will the draft Finance Bill proposals for earlier publication of information about promoters and avoidance schemes be in protecting individuals from being drawn into such schemes?**

8.1 It will be very positive to publicise information earlier, but lessons must be learned from HMRC's previous appalling track record of communicating similar information to affected contractors. They published a "spotlight" to warn contractors about the loan charge in advance of the new legislation becoming effective, however IT records have shown there were less than 500 views of this particular spotlight. This is a deplorably low readership by any standard and, if these readers were all individuals potentially in loan schemes then it would have only reached 1% of the 50k people that HMRC predicted to be affected by the loan charge.

8.2 So the message is simple, yes publicise the information sooner but do not solely rely on HMRC's Spotlights as the communication method.

*15 November 2021*