

WTT Legal Ltd – Written evidence (OPR0032)

1. Has the recent extension of the off-payroll working rules to the private sector made it more difficult for engagers (the business the contractor ultimately works for) to hire people with the right skills and expertise? To what extent has its introduction contributed to job vacancies?

The fall-out from the extension of the off-payroll working rules has definitely caused a skills shortage in certain sectors where engagers have implemented a blanket ban on engaging contractors through their own limited company i.e. IT, built environment and infrastructure, lorry drivers etc.

It is our experience that most engagers caught by the changes to the off-payroll working rules have chosen a risk averse approach by insisting that all contractors are engaged and paid through an umbrella company.

Whilst the majority of contractors have reluctantly accepted to work through an umbrella, others have declined as they:

- are not willing to join either the Umbrella or agency payroll and be paid as an employee; or
- have reached an alternative agreement with the engager to deliver their services under a Statement of Work (SOW) contract; or
- have chosen to only work with engagers where the off-payroll working rules do not apply, or the engager is willing to conduct a proper status assessment resulting in an 'outside IR35' status determination.

2. For those engagers (and their advisers) who use the CEST (Check Employment for Tax Status) tool to assess employment status, how effective do you consider it to be? Do you have confidence in its results? If not, what further improvements need to be made to it?

It is our view that the CEST tool is fundamentally flawed, placing too much emphasis on substitution (and recent case law has held that the right to substitution by itself should not result in an Outside IR35 determination). Furthermore, the CEST tool has not been amended to include mutuality of obligation despite repeated calls to include that factor in the assessment process. For that reason, we do not have confidence that it is a robust tool and that HMRC will stand by its findings. It is also worth pointing out that based on HMRC's own usage data to August 2021, CEST has been unable to issue a status determination in over 20% of submissions.

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?

All of the engagers we have spoken with have made changes to their internal compliance processes to ensure that their staff are able to competently make IR35 assessments, or that this function is outsourced.

We would expect that compliance costs have increased somewhat as a result of these additional processes and procedures. We have provided off-payroll training to numerous engagers.

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.

HMRC online guidance has been somewhat helpful but could be much more robust. HMRC webinars have not been especially useful and some of the information provided was actually determined to be incorrect.

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

We have observed that some engagers are extremely risk averse, being worried about the financial and reputational risks of implementing the off-payroll working rules incorrectly. This has led to conflict where contractors who are genuinely operating outside the scope of off-payroll having to either dispute the engagers assessment or defend the delivery of their statement of work based contract. The outcome has rarely been to the contractors satisfaction, with engagers either refusing to engage off-payroll, or seeking contractual indemnities from their supply chain. The present legal mechanism makes it difficult (but not impossible) for an individual contractor to challenge their status via his/her tax return rather than engage in a debate with their paymaster. It would be sensible for a clearer path to such a position to be provided.

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

As indicated above, most engagers caught by the changes to the off-payroll working rules are risk averse and have either banned the engagement of limited company contractors entirely or have flowed down onerous indemnities to the supply chain to mitigate this risk.

Anecdotal evidence suggests that some engagers are struggling to fill temporary posts with "inside IR35 determinations". Posts are being re-advertised as outside IR35 with no obvious difference in the role or its planned performance. Further, confusion over which party is to bear the employer NIC is creating an unhealthy environment in which rogue elements are cloning umbrella companies – without any sign of HMRC sanction – and encouraging tax avoidance. HMRC's powers to tackle tax avoidance scheme promoters are entirely ineffective.

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?

We believe that the umbrella sector, in particular, must be subject to robust regulation. This is especially relevant now as there has been a proliferation of new umbrella companies emerging as a result of the changes to the off-

payroll working rules. This increase will undoubtedly lead to many more contractors falling prey to the unscrupulous promoters of tax avoidance schemes that our elected bodies allow to persist. We remain concerned that the implementation of a Single Enforcement Body will take too long and that a more immediate solution must and can be found to protect the contractor and the supply chain. Such a body must include an ability to enforce payment of tax and NIC from the appropriate fee payer or engager and not from the individual contractor.

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?

We are optimistic that these proposals could prevent some individuals from being drawn into tax avoidance schemes, but ultimately this would be too late for many. Promoters will always find ways to reach the vulnerable.

Ultimately regulation is required to prevent promoters from getting into the supply chain in the first place.

15 November 2021