



**ICAS Response to Draft HMRC
Employment Status Manual
Off-payroll working rules from 6 April 2020
and
the CEST tool guidance

January 2020**

Introduction

1. The ICAS Tax Board, with its five technical Committees, is responsible for putting forward the views of the ICAS tax community, which consists of Chartered Accountants working across the UK and beyond, and it does this with the active input and support of over 60 board and committee members.
2. The Institute of Chartered Accountants of Scotland ('ICAS') is the world's oldest professional body of accountants and we represent over 22,000 members working across the UK and internationally. Our members work in all fields, predominantly across the private and not for profit sectors.

General comments

3. ICAS welcomes the opportunity to review and respond to the draft Employment Status Manual guidance on the incoming off-payroll working rules from 6 April 2020 and which was issued for comment in November 2019.
4. Overall, it is helpful to have guidance on the off-payroll rules, which can be complicated and is something which many non-tax or -employment legislation experts will need to understand and utilise. We also welcome the use of examples in the guidance.
5. It would also be helpful to include flow charts to help with the decision-making process. Our members report a high level of misunderstanding of the rules within the contracting community across all sectors, so anything which helps increase awareness and understanding is to be welcomed.
6. Generally, the draft legislation appears to be rather scant with many terms left open to interpretation. More definitions of terms could helpfully be included in the draft legislation, with examples of scenarios/illustrations provided in the guidance.
7. Although there has undoubtedly been much advance preparation, training, software design and education going on in the background in preparation of this regime within the private sector, the lack of final details not being made available until after the next UK Budget on 11 March is unhelpful.
8. The recent announcement to undertake a review of the implementation processes for IR35 rather than the actual legislation and CEST tool adds another layer of uncertainty just prior to the anticipated commencement date of 6 April 2020. In addition, the Budget delays arising from the General Election, as well as the new CEST Tool launch only happening at the beginning of December 2019 have only made the timescales for accurate preparation shorter. A delay to the start of the private sector regime would be welcomed to give employers, agents and contractors time to settle in. If not a full tax year, a delay to October 2020 would be most helpful.
9. Generally speaking, the CEST tool is rather difficult to use because it has to be completed in conjunction with the CEST guidance and whilst the relevant links are found within the tool, the user has to click into each individual link to understand what HMRC expects, which can be time consuming and in some cases confusing. We understand that HMRC has tried to be comprehensive here. However, some of the guidance within the links is still open to wide interpretation. This can pose a significant risk to business and may result in the giving of widespread blanket determinations of employed status – which in some cases will be incorrect and thus inequitable.

The Off-payroll Rules from 6 April 2020 Guidance

We have commented on specific areas of the guidance as follows:

ESM 10003

10. In deciding whether a limited company intermediary should be in scope of the new rules, Condition A deems a material interest to exist where the conditions at section 51(4) and (5) ITEPA 2003 are satisfied. This appears to broaden the time and effort required of the engager in obtaining this detail to determine whether the engagement is caught by IR35.

ESM10010

11. This section states that fully contracted out services, where the end client does not directly control the worker, are excluded from scope, but interpretation is not straightforward and examples could assist here. In particular, some more complex cases should be added in order to cover scenarios such as those commonly encountered in (for example) the Oil & Gas, Engineering and Construction sectors where there are multiple parties working on projects and a number of parties may exert an element of “control” over the input provided by an individual.
12. The heading in example 2, “Outsourced but involves a labour supply so within scope”, is rather misleading and appears to suggest that services where there is an element of labour cannot be outsourced, which is not what is illustrated within the given example.
13. It would be helpful for there to be more explanation of why the conclusions have been reached in each of the examples, so that organisations can apply them to similar (if not identical) circumstances. It would be even better if these examples were expanded; such as in example 4, the guidance says: “the large business must consider the off payroll working rules”. When it could instead explain: “the large business is receiving the personal services of the worker and should consider the off payroll working rules and issue a SDS. IT Solutions appears likely to be the fee payer and in any case as part of the supply chain will have obligations under the rules”.

ESM 10012

14. More guidance on what information is to be provided by the engager with the Status Determination Statement (SDS) would be helpful as this information will have a major bearing on whether there is a valid SDS, and hence whether the primary PAYE/NIC liability falls on the fee-payer or the end client. The guidance on “reasonable care” is much more helpful, and if a similar level of detail was provided on the SDS related information, this too would be helpful.
15. Example 1 in ESM10012 appears to be incomplete in that it does not go on to say that Retail Ltd has to operate PAYE/NIC as the lowest (in this case only) entity in the supply chain above the intermediary (if necessary, a cross-reference to ESM 10017 could be inserted here).
16. It would be helpful within this section to confirm that an SDS needs to be issued even when the engagement is outside the scope of IR35. Our understanding based on s61NA (which appears to be consistent with ESM 10012) is that it does need to be, and we also understand that this would be required to protect the end client where there is a chain, and the end client had taken reasonable care, but made an incorrect status assessment.

ESM 10014

17. Example of a client not taking reasonable care – whilst we agree that in the example shown the end user has not taken reasonable care, it is rather extreme and as such appears to be of limited value. Would it be more beneficial to insert an example which is more nuanced (for example, a client assesses categories of worker undertaking similar roles, rather than looking in detail at each worker’s particular circumstances) and setting out HMRC’s view as to why

(even if all of the workers' circumstances are very similar) this does not constitute "reasonable care".

ESM 10018

18. This is titled "responsibilities of agencies". This should explain that this not only refers to recruitment agencies - any entity in the chain could be described as an "agency".

19. The guidance in this section should confirm where any liability lies where:

- The end user/client takes reasonable care, but
- Incorrectly issues an SDS to the worker and to (or which is issued to) the fee payer and worker which says engagement is outside the scope of IR35, and
- HMRC subsequently successfully challenge the SDS (i.e. the engagement is inside the scope of IR35).

It appears that any PAYE/NIC liability cannot rest with the end user (as they have taken reasonable care and issued an SDS to the fee payer/ worker). However, it is not clear whether the liability then passes to the fee payer (assuming they are a "qualifying person") - under 61N all the conditions appear to have been met and they are in receipt of an SDS. Can the guidance be updated to confirm whether this is the position?

ESM 10019

20. It would be helpful to include an example of how the provisions in s61R7 are intended to work in practice (final bullet points before "Regulation 18 SSC (Int) Regs 2000") as this provision appears to make an entity with no actual UK place of business resident in the UK for the purposes of accounting for PAYE on a deemed employment payment.

ESM 10024

21. It would be clearer to reword the opening paragraph to say "Where a worker falls within the intermediaries legislation and is internationally mobile providing their services to a client abroad then the specific tax and NIC rules for individuals working outside the UK should be taken into account."

ESM10024A

22. **Scenario 1** - could more detail be added to the background in Scenario 1? Is it envisaged that the client has a UK place of business? What is the impact on liabilities down the chain if not?

23. **Answer 2** – will the UK agency only be responsible for deducting PAYE and NIC if it received a valid SDS from the overseas client? If this is the case, should Answer 2 state this?

24. **Scenario 3** – there is a lot going on in this example. It could be expanded to better explain the issues. For the purposes of the example, it should state it assumes the person operating the platform is the end user (this might not always be the case following the guidance at ESM 10010). If this is the case, the end user/engager should issue the SDS. In this type of scenario there is likely to be at least one "agency" in the chain. It would be helpful to insert a UK agency and explicitly state it is the fee payer (and will have to operate PAYE/NIC once in receipt of a valid SDS).

25. Assuming it is the client that issues the SDS – should the example also state it is the fee payer's responsibility to decide whether there is, in fact, a UK PAYE/NIC liability (taking into account the personal situation of the worker and Continental Shelf/ Mariner rules etc.)?

ESM10028

26. This section covers how the worker accounts for monies drawn from the intermediary. The example is good in terms of what the worker should include on their self-assessment, but

ideally it would also show the effect on corporation tax. The only guidance is 'as dividends are not deductible, when computing income for corporation tax purposes, the PSC is entitled to relief during the calculation of taxable profits to ensure corporation tax is not taken from already taxed income'. An expansion of the current example to include this calculation would be helpful.

ESM 10029

27. The 'recovery from other persons' provisions state: "where HMRC is satisfied that there is no realistic prospect of recovering the tax and NICs liabilities due from the fee payer/deemed employer, HMRC may decide to recover the debt from the first agency in the chain (the agency the client contracts with) or the client."
28. HMRC has stated its intention to utilise these provisions in circumstances in which, for example, a promoter of tax avoidance has entered into the labour supply chain. HMRC states it will not seek to recover from the first agency or client where it has been unable to recover the tax and NICs liability due to a genuine business failure. Can any further clarity be given as to how Agency 1 and the engager can protect themselves in such a scenario?
29. The draft legislation relating to the transfer of liabilities provisions within ITEPA 2003 and, once redrafted/inserted, within the PAYE Regulations, would benefit from further clarity and detail rather than further expansion of the guidance, which in itself does not serve to clarify the legislation as fully as it should. As we have stated above in our general comments section, the draft legislation is too widely drawn and needs some tightening up, especially in view of the fact that it has ostensibly been drafted to counter avoidance. The guidance could then confirm the HMRC interpretation of that legislation in the context of specific scenarios. For example, the term "genuine business failure" needs to be clarified and examples set out in the guidance to illustrate the HMRC interpretation.
30. Should the last sentence read "HMRC would not seek to recover the income tax and NIC from agency 1/end client where it cannot be collected as a result of a genuine business failure"?

ESM 10031

31. In the section entitled "Accountancy Fees" it says: "The cost of tax advice in relation to off-payroll working is not a deductible expense". We question this statement as most tax advice around off payroll working is compliance-related and should therefore count as a deductible expense.

The CEST Tool

We have commented on specific areas of the CEST guidance as follows:

ESM 11006

32. This section within the CEST Guidance explains that anyone is free to check employment status but the guidance here does not explain that under the new private sector rules, it is only the engager's perspective which ultimately counts for a status determination. This may make other stakeholders to the arrangements who are not already aware of this provision in the legislation believe that they have the authority to check the employment status using CEST and obtain a binding result. It would be helpful if a note could be inserted here to remind people that it is the engager's responsibility to make the status determination. A reference to ESM 11025 (the final bullet point re agencies) could also be cross referenced here.

ESM 11010

33. The disclaimer within the CEST guidance fails to mention that under the legislation it is the engager who is responsible for making the status determination. It would be helpful here if the guidance could encourage the engager to obtain as full a picture as possible by liaising

with other stakeholders such as agents to ensure the full facts of the engagement are obtained prior to making the status determination.

ESM 11020

34. The glossary of terms within the CEST guidance does not mention the term Mutuality of Obligation (MoO) and yet the concept is set out at ESM0543. The reader is also told here that the term IR35 relates to the intermediaries' legislation and to the public sector 2017 changes – but makes no mention of the forthcoming private sector provisions from April 2020. This is not helpful. We have added commentary on ESM0543 below to help clarify this point.

ESM 0543

35. We note that HMRC does not consider it necessary to establish mutuality of obligation within the CEST tool because it believes that MoO must exist for any kind of contract to be established. However, there is a high degree of commentary in the guidance about the concept and the reader is primarily referred to ESM7110 and *Nethermere (St Neot's) v Gardiner & Taverna* [1984] IRLR 240. It would be helpful if HMRC could consider and formulate its policy stance on MoO and make this public within the guidance. Currently, businesses and tax practitioners consider that MoO should be considered in line with established case law and this is leading to a divergence in approach, which does not help clients to make decisions.
36. The guidance refers throughout to the fact that employment status relies on case law and so it would be helpful if it contained a table (at the beginning of the guidance, updated regularly) of all cases which are relevant to generic employment status determination and also to IR35 case law – and show the key issues of each case and crucially whether HMRC won or lost each case. This would give the reader an overview of which issues have been important in each case and whether that case was binding or not.
37. Ideally the legislation and guidance would contain more specific examples to lessen the burden on non-tax specialists to have to try to understand the finer nuances within the case law to help them get it right first time.