



**House of Lords
Economic Affairs Committee
Finance Bill Sub-Committee**

**Finance Bill 2020:
Off-payroll working in the Private Sector
Call for written evidence**

27 February 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.
3. ICAS has a public interest remit, a duty to act not solely for its members but for the wider good. From a public interest perspective, our role is to share insights from ICAS members into the many complex issues and decisions involved in tax and financial system design, and to point out operational practicalities.

General comments

4. ICAS welcomes the opportunity to provide written evidence to the Finance Bill Sub-Committee (FBSC) regarding the Finance Bill as requested in the Call for Written Evidence issued on 4 February 2020. ICAS was pleased to be able to offer oral evidence to the FBSC on 10 February 2020.
5. We have responded to questions 1 to 10 and question 12 in the call for evidence.
6. ICAS has reserved its comments to general issues arising from the policy objectives and draft legislation, rather than commenting on specific wording or section numbers within the draft legislation.

Specific questions

Question 1: What has been the experience of the new rules in the public sector? What lessons have been learned from this experience, and how have they affected the Finance Bill proposals?

7. According to feedback from members of the ICAS Employment Taxes Working Group, the rules as implemented in 2017 are broadly working - for those prepared to accept them – but at a cost. That cost, their clients tell them, is that blanket decision-making has resulted in widespread losses of contractors, who moved their services to the private sector or abroad. The average time spent recruiting someone is 8 weeks, and there has been losses of talent, knowledge and skills which have been hard to replace in many cases, and in turn led to service level interruptions. Examples of this are in the health sector and in IT public sector service provision.
8. Undoubtedly, lessons have been learned – including by the individuals concerned who find themselves taking home less pay than they were when they were a contractor instead of now, as a deemed employee. Lessons have also been learned by HR departments, procurement, finance and project managers who have had to plug skills gaps, reconfigure production teams, and find different ways of working.
9. However, these lessons have not yet fully emerged - the Public Sector regime is still in its infancy. HMRC carried out research four months into the introduction of the new regime (i.e. in July 2017) which was too early to reflect on the relative successes or failures of the regime across the entire Public Sector.
10. Additionally, it should be noted that any lessons emerging from the Public Sector experience may not be relevant in a private sector context where the working methods are different, faster-paced and more flexibility is required. Comparing the two is akin to comparing apples with oranges.

Question 2: Has the impact of the extension of the rules to the private sector been adequately assessed? In particular, is the assessment that has been made of the compliance burden (including costs) of these new rules realistic? Has the right balance been struck in the compliance burden on the taxpayer and on HMRC?

11. The impact assessment of £14.4 million addresses the administrative costs. There are many other cost implications to engager businesses, including:
12. **Software** - additional requirements for payroll and RTI because the contractor payrolls will need to be run separately with separate parameters. These calculations will attract employer NICs and, if the business is large enough, Apprenticeship Levy, whilst excluding Auto-Enrolment for pension, SSP, holiday pay, not claiming Employment Allowance, etc and not tying in with the HR and reward systems for the ordinary employee base. Employers will need to pay for this additional intellectual property.
13. **Training requirements** – organisations will need to train their staff to work with the new rules.
14. **Employer's NICs** for those who are the deemed fee-payer and who bear the cost of it without passing it down to the contractor. Notwithstanding this, anecdotal evidence from members reports widespread decisions by fee payers to pass on the secondary NICs burden to the worker by way of a deduction from fees for work undertaken post 6 April. Whilst the fee-payer is “paying” the NICs to HMRC in reality, the worker is bearing this cost burden.
15. **Apprenticeship Levy** costs for those employers who are big enough to be paying it are also payable despite the fact that the contractors will not themselves benefit from any apprenticeship related training.
16. **Time** required to assess contractor status and produce a Status Determination Statement (SDS) with reasoning. This must encompass the requisite amount of time to obtain all the correct information with which to make a decision and to take “reasonable care” in formulating that decision. It is estimated that to formulate an SDS requires between 30 and 90 minutes on average. If a business has 50 rotating contractors, this could entail between 25 and 75 hours of work each time the contracts are renewed or those contractors are replaced. We understand from ICAS members that some large engagers are taking a blanket “inside IR35” assessment approach and thus not carrying out any assessments. This is resulting in loss of contractors leading to project work constraints, the need for further recruitment and training resources, and delayed work delivery. There is also a need to establish a suitable dispute resolution process.
17. **Additional cost of professional services fees**, to comply with the new requirements - tax advisory, accountancy (especially regarding when the transfer of liability provisions may be relevant, in the context of potential contingent liabilities and provisions); and legal services regarding contractual arrangements.
18. In due course there may be **further court cases** relating to aspects of the new rules, including status determinations, and where business failures take place deciding if and to whom the liability passes back up the chain.

Question 3: Is the exclusion of small organisations sufficiently robust, and how might small organisations gain sufficient assurances that they fall within the exclusion?

19. There is a problem with excluding small employers in that by excluding them, they will not be aware of the rules; then they grow and may not realise they need to be included once they have crossed the relevant Companies Act thresholds.
20. The exclusion may serve to stifle growth in a similar way to the VAT threshold in that businesses will purposefully not grow to a size which brings them within the rules.

21. There is a possibility that small businesses will be deliberately set up to forestall/avoid this legislation and HMRC does not have the resources to combat this effectively.

Question 4: What will be the effect of these new measures on a chain of contractors and sub-contractors?

22. It seems inequitable that an agency who was neither involved in the process of preparing the SDS or the deemed fee-payer becomes liable for the non-compliance of another entity with whom they are not connected other than at arm's length through a supply chain. The transfer of liability provisions impose unduly onerous burdens on those not initially caught by the new rules and potentially cause accounting difficulties in terms of contingent liability and provision recording.
23. We understand from representations made by some ICAS members that some organisations are carrying out blanket assessments, advising contractors that they are inside IR35 and being paid at the same rate – and if they do not agree with this they should find another contract elsewhere or go on to a permanent contract of employment.
24. We have also been informed that contractors in the energy sector are deserting their engagements, especially in remote locations. The timing of this with Brexit and other related factors is unfortunate and may result in service reductions.

Question 5. What scope might there be for simplifying or otherwise reducing the administrative burden of these measures? What should HMRC do to help businesses understand the new administrative rules?

25. Larger employers are undoubtedly in a better state of readiness than small employers simply by virtue of the resources available to them. However, without final legislation, no-one can be completely ready.
26. In the small and medium sector there is less readiness and more uncertainty. There are many unrepresented businesses and taxpayers who are not knowledgeable about taxes generally. HMRC's Education and Support plans were interrupted by the general election but it is fair to say that the process should have started long before October 2019.
27. It would be helpful if a definition and examples of "reasonable care" existed which could be set out in guidance so that employers could understand what is required of them.
28. Further explanation is required to clarify the term "Secure the supply chain", which may not be easy, particularly if the supply chain is long and opaque. How can an employer secure the supply chain? It will require time and further cost; and there is no business purpose to this requirement other than a tax compliance need. In addition, there may be issues with GDPR whereby businesses up and down the chain are not prepared to release data to parties they are not directly contracting with.
29. The definition of "genuine business failure" should appear in the legislation and not simply be in the guidance, although it is helpful to have examples of a genuine business failure scenarios in the guidance.
30. Definitions of the terms "end user" and "Agency 1" should be placed in the legislation to avoid ambiguity.

Question 6: Are the tests for determining employment for the purposes of these rules sufficiently clear to both engager and worker? Do they reflect the reality of the contracting environment?

31. The CEST Tool is not difficult to operate, *per se* - but this does not mean the case law tests which determine employment status for tax are clear to engager and worker. Employment status is a complicated area of taxation and is governed by tax case law. No engager or worker is likely to be an expert in this area unless they work in the field of employment status permanently. Therefore, someone could complete the test without actually knowing or understanding what the important status determinant factors are.
32. The contracting environment is widely drawn and across all sectors. It is difficult to conceive of how the tests could cover the spectrum adequately.

Question 7: What is your assessment of the Check Employment Status for Tax (CEST) tool? Does the CEST require improvement? If so, how might it be improved?

33. The CEST tool is still throwing up inconclusive results, which is not helpful. HMRC's own figure of 15%, which could be understated, translates into many thousands of inconclusive results. Where does the engager go to resolve this – HMRC has a helpline available, but the figure of an 85% “successful” determination rate has proved that the tool cannot work for everyone.
34. The status tool is flawed as it ignores Mutuality of Obligation – a key concept for determining whether a contract of service exists.
35. There is no guarantee that the entries in the CEST tool will accurately reflect the reality of the working relationship, which would mean it cannot be relied upon. ICAS understands some employers are turning to professional assessors to assist them. We also understand that some engagers are charging £150 to provide a Status Determination Statement and up to £200 to handle an appeal against that statement.
36. HMRC does not have the resources to police the system effectively – and engagers and workers know this. This has been the nub of the problem since the conception of IR35 in 2000.
37. ICAS understands that some employers are resorting to insure their decisions in case HMRC determines that they are incorrect.
38. There is a lot of information available to engagers, agencies, Umbrella Companies and contractors – almost too much information. It can only ever be the case that, unless the person who has to make a status decision and produce an SDS with sound reasoning and due care and attention is an employment status expert, they do not have the required expertise. The engager may not be in a position to engage a professional adviser, and so, this could be said to render the information and tools available unhelpful. This is not a matter upon which people can easily “self-educate”.
39. It is difficult to conceive of how CEST could be improved but this does not mean to say it is working. It is simply not an appropriate way for tax status to be determined by amateurs (i.e. engagers) when the concept of Mutuality of Obligation is excluded within the parameters of the tool and there is no legislation in place which defines, using a simple set of basic principles, whether someone is employed or self-employed.

Question 8: How effective will the status determination process be in resolving issues of employment status? Are there adequate safeguards, allowing decisions to be challenged? If not, what more is needed?

40. The dispute resolution process is all but non-existent, with only a 45-day period for an appeal to be considered by the preparer of the SDS. This does not provide a pathway to natural justice for the appellant and it could be said that there is already an imbalance of power. Additionally, the legislation does not specify how long the appellant has to submit a complaint – i.e. no time limits are prescribed – only that the final payment must not yet have been made – but this timescale can vary greatly. The dispute resolution process is thus very one sided and after the 45-day process has been exhausted, there is nowhere else to go.

Question 9: In your opinion, are there better or simpler ways in which the objective of the new rules might be achieved?

41. ICAS considers that the transfer of liabilities provisions are generally flawed and present a bias against agencies and engagers in this quasi-employment context when compared to other mainstream employment scenarios. In these mainstream scenarios, the employer, umbrella company or agent is rightly pursued because they are rightly responsible for the PAYE and NICs deductions, but where that business fails, HMRC may seek only to list itself as a preferential creditor, and failing that there is no one else apart from the directors of that business to recover the PAYE debt from.
42. Instead of transferring the liability to Agency 1 under the new transfer of liability provisions, when in Agency 1's case it has not been responsible for determining the status of the individual, there is a case for reverting to the Chapter 8 legislation which is already in place, and issue a recovery notice to the PSC in the event of non-compliance of the fee-payer rather than transferring debt up the chain to an innocent third party.

Question 10: Will the Bill, as drafted, achieve the Government's objectives?

43. If the Government's objectives are to raise taxes and improve NICs receipts then, yes, the Bill will be likely to achieve this.
44. The Government should be prepared to accept there may be further avoidance behaviour such as with mini Umbrella Companies, disputes around responsibilities, and appeals to the tribunal against transfer of liability recovery notices.
45. Ultimately, a further cost, of employer NIC, is being introduced to business structures and somewhere within the structure this will need to be picked up; however, margins may not have the capacity to readily accommodate this.
46. Anecdotal evidence from members has shown that many large-scale recruitment businesses/Umbrella Companies are preparing as many SDSs as possible prior to 6 April 2020 to forestall the ability of the worker to appeal under the new rules. Is a form of anti-forestalling provision to be introduced to prevent this from happening and thereby protect workers from being placed at an unfair disadvantage?
47. The fact that employment status is still wholly determined by reliance on case law is clearly part of the underlying problem. Peeling back the layers, such as the CEST tool, IR35 as a concept, and the ability of individuals to invoice through limited companies, the nub of the problem is employment status as a concept. This needs to be addressed urgently - whether the Private Sector arrangements are implemented or not.

Question 12: How do the new measures relate to the wider context of changes in working arrangements, including the "gig economy"? Is it fair that some individuals are taxed as if they are employees, but do not have the rights of employees?

48. Taxpayers need certainty, equity, transparency. This legislation does not align itself with the Good Work Plan and forces workers into a quasi-employment status without the corresponding employment rights – which cannot be an acceptable solution.