

Sage Response to HMRC consultation: “Draft secondary legislation: off-payroll working rules from April 2020”

Introduction

Sage, the UK’s largest technology company, is the market and technology leader for integrated accounting, payroll and payment systems, supporting the ambition of entrepreneurs and business builders. Sage helps drive today’s business builders with the most intelligent and flexible cloud-enabled software, support and advice to manage everything from money to people.

We welcome the opportunity to respond to HMRC’s technical consultation on the draft secondary legislation for the April 2020 changes to off-payroll working rules. There are still several areas where more clarity is needed for businesses and software providers to understand the planned changes, and we have outlined these in our response below.

We also wanted to use this opportunity to raise our concerns around the implementation of the planned off-payroll changes. Small and mid-sized businesses who will be impacted by these changes (for example as agents of larger organisations or because they run a Personal Services Company) now have only a matter of weeks to get ready to comply with new regulations, and it does not seem realistic that many will be ready within this timeframe. Additionally, as mentioned, there are several open questions regarding the current legislation. These areas of uncertainty contain some critical issues, such as how does the worker’s intermediary know who is responsible for the determination and deduction and how would the client necessarily know if the worker works via an intermediary.

Given this ongoing uncertainty and lack of awareness, Sage believes it is necessary to defer implementation by 12 months once all technical questions have been answered. This 12-month implementation period would allow experts to cascade appropriate individual advice once clarity has been provided in time for business to be ready to comply with the legislation. This time period also reflects annual tax years and the fact that most businesses and taxpayers engage an agent or accountant once per year.

We are aware that HM Treasury is currently conducting a review into the implementation of the programme to ensure a smooth rollout. We hope this consultation response can offer constructive feedback into that process.

1) Implementation of changes to off-payroll working rules

Sage has extensive experience supporting customers through regulatory changes for over 35 years. We have helped our customers through recent changes such as GDPR, auto-enrolment, the real time information changes to PAYE and Making Tax Digital for HMRC.

When Government makes significant compliance changes, it is essential that sufficient efforts are taken to raise awareness in the business communities impacted to ensure successful implementation and minimal business disruption.

Through our decades of experience, the recent changes to Making Tax Digital for VAT offers a positive model of how to prepare the SME community for regulatory change. Regular engagement between HMRC and software providers provided clarity for the project well in advance, allowing HMRC and partners to undertake widespread initiatives to educate business and accountants in the months leading up to the launch of the programme.

To demonstrate the extent of efforts to get the business community ready, Sage held free MTD training webinars for 12,500 businesses, we held 25 MTD roadshows across the UK and our MTD hub received over 1 million views. This shows the extent of advice on offer for the successful implementation of regulatory change.

By comparison, the off-payroll changes are more complex and, unlike MTD, effect multiple entities to determine where responsibility to comply with the changes lies. For those businesses impacted, there is a much greater learning curve to understand the changes and take necessary steps to achieve compliance.

Unlike MTD, there has not been a similar approach coordinated by Government to provide or enable the required education campaign to reach the businesses that will be affected by these changes. We therefore have concerns regarding the readiness of businesses, which has been reflected in recent polling data. For example, a survey of 1,500 business owners published in January 2020 showed that 35% had no awareness of the legislation¹.

In this instance, we do not believe that awareness among impacted businesses has been raised to sufficient levels. We therefore suggest the planned changes to the off-payroll working rules are deferred by 12 months to April 2021. This 12-month time period should be used by HMRC to provide clarity in the many existing areas of uncertainty and will allow time for experts to engage businesses and accountants with appropriate advice for them to be ready.

This suggested implementation period also reflects the fact that most businesses and taxpayers engage an agent or accountant once per year, therefore aligning with the tax year.

2) Technical comment on changes to off-payroll working rules

We have the following questions regarding how the proposed changes will technically function, which we believe need answering to provide clarity before changes can be rolled out:

1. How does the worker's intermediary know who is responsible for the determination and deduction? i.e. how do they know the size of the end client? The only indication will be the receipt or lack of receipt of an SDS but if they don't receive an SDS this could just because a party hasn't passed it on, in which case, the intermediary is not responsible for determination or deduction.
2. How would the client necessarily know if the worker works via an intermediary? What if you pay an agency for supply staff? How would they know whether there's an intermediary involved?
3. If a party in the chain doesn't pass on the SDS and they become liable for deductions – how will they be informed that they are liable for deducting tax and NI? I.e. if they haven't passed on the SDS, chances are they're not aware the liability sits with them.
4. As I understand it, if HMRC are unable to collect tax and NI from the fee-payer, the liability for deducting tax and NI will flow back up the contractual chain starting with the first agency:

¹ <https://www.accountancyage.com/2020/01/15/ir35-four-out-of-ten-companies-considering-dropping-contractors/>

- a. What constitutes being unable to collect tax? Is this where the party do not run a payroll? Or could they simply not add the worker to the payroll knowing the liability will be passed on?
 - b. If HMRC cannot collect tax from the initial fee-payer and the liability therefore passes back to the first agency – How will the initial fee-payer know that the liability no-longer sits with them and how will the first agency know that the liability now sits with them?
5. Is there a time limit for preparing an SDS and this being shared/reaching the fee-payer?
6. Presumably there is scope for several payments to be made to an intermediary before the SDS reaches the fee-payer – what should happen in this scenario?
7. Is there a requirement for the fee-payer to provide the worker with a payslip?
8. Will there be any requirement for the fee-payer to provide the intermediary with a remittance/reconciliation of what's been paid? I.e. to inform the intermediary of what's been deducted from the invoice value.
9. How will the rules interact with CIS? If a sub-contractor works through an intermediary and the contractor is registered for CIS how will the contractor handle the invoice (assuming they are also the fee-payer?) For example, a sub-contractor who works via an intermediary invoices the contractor (who is a large company) £100 for services. The contractor determines that the sub-contractor is a deemed employee and creates and sends them and the intermediary an SDS. Under the CIS rules the contractor would withhold £20 of tax and NI and include this on their CIS payments report but under the IR35 rules the contractor would include the payment on the payroll and deduct tax and NI. What would HMRC expect the contractor to do in this scenario?
10. Can you confirm what tax code the fee-payer should apply to the payroll for the deemed worker? ICAEW have suggested that tax codes BR or OT should be used depending on whether the worker has filled out a starter checklist. Please can you confirm whether this is acceptable.
11. Per the existing guidance, 'If the amount paid to a worker as employment income for off-payroll engagements is less than the amount received for their off-payroll working engagements in the tax year then the intermediary will need to calculate a 'deemed employment payment' for the difference and report and pay the resulting tax and NI via RTI'. Does this calculation consider income that's already had tax and NI deducted? For example, as an intermediary, I receive £750 which has already had tax and NI deducted but the worker doesn't extract the full amount through the payroll – is the intermediary liable to paying tax and NI again on whatever hasn't been paid out or is the deemed employment payment only in relation to deemed employment income that is received gross?
12. Can fee payers use two separate PAYE schemes for normal employees and deemed employees? ICAEW suggest separate schemes are acceptable but we've also heard that HMRC have discouraged this.
13. Might the fee payer ever be expected to comply with 'Attachment of earnings' orders?

14. If the worker is deemed to be an employee - Is the fee payer required to carry out 'right to work' checks?

15. If a PSC has a mixture of contracts that fall within/outside IR35, how should the PSC calculate employment allowance? (Our understanding is that a PSC cannot claim employment allowance for work that falls within IR35).

16. Per the existing guidance, income from deemed employment where tax and NI has already been deducted by the fee-payer should be included on the intermediary's payroll without any tax or NI to avoid double taxation. However, how should payroll be taxed when it includes both income that has already had tax and NI deducted and income that hasn't (either because the intermediary is responsible for deducting tax and NI or because the income is not deemed employment income). As an example:
 - a. Worker W sells his services via his personal services company Pers Ltd. Worker W is a well-known expert but knows others who have similar skills. Pers Ltd is limited by shares, being held equally by Pers Ltd and his non-working partner, both of whom are directors of the company. W's personal tax code is 1250L
 - b. BigCo contract with Pers Ltd for W to appear on the first Monday of each month at 9:00-9:30 to talk with visiting clients. The contract stipulates that no-one can be substituted for W and stipulates the time and location. This is within scope of IR35 and W is a deemed employee for this contract. BigCo complete and share a Status Determination Statement with both Pers Ltd and W. W does not want BigCo to know he has other customers so refuses to share his tax code with BigCo, who therefore assign him BR tax code. BigCo pay Pers Ltd £1,200 plus VAT per annum for W's appearance fee.
 - c. MidCo contract with Pers Ltd for an expert to provide analysis. The contract states that the questions will be e-mailed, a response is required within 15 working days and that they pay an hourly rate. W can substitute any other suitable expert, can decide where to work and when, so is outside of the scope of IR35 and he is not a deemed employee. MidCo complete and share a Status Determination Statement with both Pers Ltd and W. MidCo pay Pers Ltd £100,000 per annum
 - d. W plans to pay himself a salary before deductions of £15,000 which is a minimum wage requirement linked a loan he has taken out; he then plans to draw funds as needed from Pers Ltd as dividend payments to himself and his partner
 - e. On the 25th of each month BigCo receives a £100 invoice from Pers Ltd and having already completed and shared an SDS, then runs an off-payroll worker payroll, calculating PAYE at £20, and no NI'ee. They report these deductions via RTI, deducts the £20 from the invoice and then pay Pers Ltd £80 plus £20 of VAT. They also send a payslip to W that he uses to reconcile the invoice and funds received.
 - f. On 27th of each month, W wants to draw a gross salary of £1,250. PAYE on this would calculate at £41.52 (and NI'ee would be £63.68)
 - Question 1 – can Pers Ltd deduct the PAYE paid by BigCo and thus only deduct £21.52 for PAYE from this salary payment, or must they deduct the full £41.52?
 - Question 2 – if the £20 cannot be used to reduce the PAYE deductions that Pers Ltd must take from W's salary, is there any way W can request and receive a PAYE refund before the year end, or must he wait until he completes and submits his SA100?