



Stop the Off-Payroll Tax rebuttal of Jesse Norman's latest misleading letter to MPs



HM Treasury, 1 Horse Guards Road, London, SW1A 2HQ

Dear Colleague,

Increasing compliance with the off-payroll working rules ('IR35') from April 2020

I am writing to let you know that the Government has published its response to the latest consultation on the reform to the off-payroll working rules (commonly known as IR35), alongside draft legislation for Finance bill 2019. Many colleagues have received representations on this issue and so this is to update you on the Government's plans and to outline the broader rationale for the reform.

Facts on the responses:

- *HMRC response was published a mere 32 working days after the consultation.*
- *Considerable concerns were raised, and the vast majority ignored.*
- *29 responses from a range of professional bodies including the ICAEW, CBI, REC, IPSE, ATT, CIOT, all warned of the damage to the flexible workforce and the UK economy.*
- *The overwhelming view was to halt reforms and address the many issues and flaws.*
- *Wide consensus that deemed employees must receive employment rights.*

Yet **all** of these concerns were ignored - see <https://bit.ly/2NO17oM>

The off-payroll working rules have been in place for nearly 20 years. They are designed to ensure that individuals working like employees, but through their own limited company, pay broadly the same tax and National Insurance contributions (NICs) as those who are employed directly. It is fair that two people working in a similar way pay broadly the same tax and NICs, even if one of them works through a company. The rules do not apply to the self-employed.

Rebuttals:

- *The 20 year claim is untrue - the "Off-Payroll" working rules are Chapter 10 of the Finance Act, which was introduced in April 2017.*
- *It is misleading to scapegoat individuals here, since the self-employed who use limited*

companies already pay similar levels of tax to salaried employees. The reality is that the vast amount (84%) of the tax being sought is due to firms not paying employment taxes (Employers NICs or App Levy). The off-payroll tax is a new tax burden for firms that hire self-employed individuals.

- *Under the new rules Employers NI is now paid by hirers, ON TOP of the individuals fees. This is a 14.3% extra stealth tax on 60,000 business and 170,000 workers.*
- *Every single business that hires self-employed workers will be affected, and every single self-employed worker will be affected – because every single person needs to be assessed under the new rules. Only after the assessment, is the tax treatment determined. The administrative burden applies to everyone.*

Currently, individuals outside the public sector who work through their own company are responsible for determining whether the off-payroll working rules apply and for paying the tax and NICs due. However, many of these individuals cannot, or do not, correctly operate the rules, leading to widespread non-compliance. HMRC estimates that nine out of ten individuals in this position are not compliant, costing the Exchequer hundreds of millions of pounds each year.

Rebuttals:

- *Neither HMRC nor the Treasury have provided any empirical evidence that “many” individuals don’t correctly operate the rules.*
- *HMRC provides “estimates” but has never published **any** sound evidence for this claim; and they have only fully won 1 out of 14 of the last court cases on this matter!*

From April 2017, the Government reformed the way the rules operate in the public sector. Public sector bodies are now responsible for determining whether the rules apply, and for ensuring that they and the individuals work for them pay them right tax. HMRC analysis of income tax and NICs receipts shows this has been successful in improving compliance, with an estimated additional £550 million being raised over the first 12 months, money now available to be spent on public services.

Rebuttal:

- *HMRC has not checked for non-compliance, where workers are misclassified; and it’s impossible to get a direct measure, so they simply have no credible grounds to claim an increase in actual compliance.*
- *Again we see an HMRC “estimate” – but there is no empirical evidence for this – but it is presented as a fact.*

Independent research has also shown that this change has so far been achieved without disrupting public services or reducing market flexibility.

The Government-commissioned IFF research report was condemned widely as unrepresentative and biased by consultation respondents because it failed to consult with contractors or recruitment agencies. HMRC have been cherry-picking preferable statistics from the report to feature within its consultation, to portray the reform in a more positive light.

Worse still, it has actually been revealed by a series of Freedom of Information (FOI) requests that HMRC have been caught doctoring this supposedly independent research report. *They were forced to admit that information was omitted from published research into the implementation of Off-Payroll in the public sector, which it admits could otherwise impede its ability to introduce the rules to the private sector. In a response to a Freedom of Information (FOI) request from ContractorCalculator, the taxman conceded that earlier drafts of the IFF Research report, 'Off-Payroll Reform in the Public Sector', contained information which was subsequently removed.*

*The final report, from old data gathered two years ago, focused on a small portion of the public sector during the early days of implementation **before the effects had kicked in.***

Evidence shows the damage to the public sector and public sector workers. *A study by IPSE and CIPD, found more than half (51 per cent) of public sector hiring managers thought they had lost skilled contractors because of April 2017's changes to the IR35 rules, while nearly three-quarters (71 per cent) were facing challenges in retaining their contractors. Organisations representing locum doctors and nurses have confirmed that their members are leaving the NHS and some are emigrating, due to the Off-Payroll Tax.*

Though the rules are now operating effectively in the public sector, non-compliance is growing elsewhere.

Rebuttal:

It is simply false to claim the rules are operating effectively in the public sector. The reality is that public sector organisations are unlawfully blanket determining contract workers as disguised employees to avoid risk to themselves.

Evidence obtained under FOI showed that 94% of workers across 5 public sector organisations were classed as "deemed employees" against a claim by HMRC that only a third of workers should be affected. To give two examples, Network Rail and HS2 were 99% and 98% respectively!

The fiasco with BBC presenters also shows that the rules are confused and creating chaos (an leading to huge amounts of taxpayers' money being wasted as HMRC take absurd cases to court, the vast majority of which they are losing!).

This is why as Autumn Budget 2018 the Government announced it would extend the reform to medium and large businesses. Having listened to stakeholders, the Government decided not to apply the reforms to the smallest 1.5 million organisations. It will take effect from April 2020 to give organisations time to prepare. This means that from April 2020, where an individual is engaged through their own company and working for a medium or large-sized organisation in the non-public sector, the organisation rather than the individual will be responsible for determining whether the off-payroll working rules apply and, where appropriate, for deducting the right tax and NICs.

Rebuttal:

It is wrong to say “deducting” because employment taxes are not a deduction – as per Social Security Contributions and Benefits Act 1992, Schedule 1, Part 3A. They are paid by business (13.8% + 0.5% = 14.3%) on top of the workers fees. It is this part of the Off-Payroll Tax that will be most damaging for businesses.

There have been claims that these changes will result in many organisation determining that all contractors who work for them will fall within the rules, regardless of their circumstances (often referred to as a ‘blanket determination’).

Rebuttal:

To use the words “claims” to seek to ignore actual evidence is grossly misleading and dishonest. Evidence obtained under FOI showed that 94% of workers across five public sector organizations were classed as “deemed employees” against a claim by HMRC that only a third of workers should be affected. Network Rail and HS2 were 99% and 98% respectively.

However, the evidence so far suggests that decisions in the public sector are assessed individually, and no evidence was found that supported the claims made.

Rebuttal:

This is a false statement. There is published evidence where blanket assessments have occurred. This is word play to imply there is no evidence, when in fact they did not seek to find it or have deliberately ignored it. The Treasury must be aware that this evidence exists.

In many contexts, applying a decision to a group of off-payroll workers with the same role, working practices and contractual conditions may be entirely appropriate.

Rebuttal:

This is wrong and unlawful. It is never appropriate, as recent case law has shown, and as the judicial review against NHSI proved. This is simply wrong in law.

However, several stakeholders remained concerned about this possibility, and the Government believes it is important to listen to these concerns and look to address them in a proportionate way. For this reason, the Government will introduce a legal requirement for clients to maintain a status disagreement process to ensure workers can raise concerns directly and in real time, and can expect the same treatment regardless of which client they engage with.

Rebuttal:

This approach was heavily criticized in the recent consultation response, with the vast majority saying clients should not be judge, jury and executioner, and that an independent appealable process should be introduced to ensure fair tax treatment. The current proposals create an impediment to access a court and are contrary to the principles of natural justice.

Some contractors are concerned that being found to be within the scope of the off-payroll working rules could lead to HMRC looking into their affairs for earlier years. The Government's primary aim is to address non-compliance going forward. For this reason, HMRC's focus will be on supporting organisations to apply the rules correctly, not on enquiring into historical cases. HMRC will not carry out targeted campaigns into earlier years, and organisations' status determinations under the reformed rules alone will not trigger an enquiry into pre-April 2020 years.

Rebuttal:

This is a highly questionable claim, considering HMRC are pursuing hundreds of BBC presenters for historic tax after they were classified as deemed workers shortly before April 2017, and also that HMRC forced through the 20-year retrospective Loan Charge legislation.

There is not an automatic "trigger", but they can still investigate if they choose to.

What HMRC are doing next

HMRC will continue to work with organisations ahead of April 2020 to ensure they have the help and support they need to implement the reforms effectively. In April this year, HMRC published a list of actions that businesses can take to get ready and HMRC are also providing organisations with education, guidance and support to make sure they have the tools to make the right determinations. Online guidance will be available from summer 2019, and HMRC will be conducting a series of face to face events, webinars, workshops and targeted meetings.

Rebuttal:

HMRC's "list of actions" was half a page of A4 – there are 80,000 organisations that will need help. This was grossly inadequate. As for other guidance, we are yet to see anything published.

HMRC are also making enhancements to the Check Employment Status for Tax (CEST) digital service, which will be available before the end of 2019. These enhancements include adding further questions to cover a wider range of working practices. CEST is also being updated to improve clarity and accessibility, with improved guidance available to help customers use the service.

Rebuttal:

The CEST tool created by HMRC has been shown to be inaccurate and biased, giving contradicting results to judges decisions in tax tribunals. The tool, supposedly introduced to help contractor clients assess employment status accurately, is inconsistent with the employment case law underpinning IR35.

HMRC maintains that CEST's results are accurate, though it conceded in a Freedom of Information (FOI) response that it has no evidence to substantiate this claim.

*HMRC also admitted to the Public Accounts Committee that **it threw away its last set of test data and didn't even keep a list of names of the people who tested it.***

HMRC also recently contradicted their promise to stand by the result of its own Check Employment Status for Tax (CEST) tool - having tried and failed to have this evidence dismissed in an ongoing IR35 tribunal case, with HMRC's legal counsel saying that the tool

was "of no assistance to the tribunal in determining the issue". HMRC are acting in bad faith. They have consistently said they would stand by the outcomes of CEST, yet here they are arguing in court that these findings are irrelevant when it doesn't suit them.

This whole farce confirms fears that an 'outside IR35' CEST assessment doesn't provide the certainty that HMRC and the Treasury have insisted it will - showing it is deeply flawed, something that many experts have been raising warnings about, warnings that so far have been ignored by Treasury Ministers.

The Government has produced a factsheet, enclosed, which provides further information on the reform and covers some of the points your constituents may raise with you. While there are some misinformed claims made about the reform, I fully appreciate that your constituents may raise legitimate concerns with you. HMRC will be providing extensive support and guidance over the coming months, and I would be very happy to discuss the reform and any points of concern with you in more detail.

Rebuttal:

The fact sheet is riddled with misleading unsubstantiated claims, and we would encourage you to read this one, based on factual evidence <https://bit.ly/2SCqit5>



Jesse Norman MP

To conclude:

This letter is another brazen attempt to mislead MPs and Parliament. It is shameful that a Government Minister would put his name to this.

The reality is that the Treasury and HMRC simply cannot be trusted to give an accurate and honest picture of their controversial and flawed plans. As with the disgraceful campaign of misinformation exposed by MPs over the Loan Charge, HMRC and the Treasury are willfully misleading Parliament over the Off-Payroll Tax.

Commentary from the Stop The Off-Payroll Tax campaign
#StopTheOffPayrollTax

