



LABOUR MARKET ENFORCEMENT STRATEGY 2023/24

Issued 27 May 2022

ICAEW welcomes the opportunity to comment on the Labour Market Enforcement Strategy 2023 to 2024 published by Department for Business, Energy & Industrial Strategy and Home Office on 13 April 2022, a copy of which is available from this [link](#).

For questions on this response please contact our Tax Faculty at taxfac@icaew.com quoting ICAEW REP 46/22.

The potential for non-compliance in the world of work is substantial. We therefore recommend that Government:

- makes it simpler to determine employment status;
- changes the tax/NIC system to reduce the fiscal incentive to classify workers as not being employees;
- incorporates into national minimum wage (NMW) law the power to enable HMRC to exercise discretion over unintended technical breaches by employers; and
- ensures that employment law is consistent across the four nations of the UK.

This response of 27 May 2022 has been prepared by the ICAEW Tax Faculty. Internationally recognised as a source of expertise, the ICAEW Tax Faculty is a leading authority on taxation and is the voice of tax for ICAEW. It is responsible for making all submissions to the tax authorities on behalf of ICAEW, drawing upon the knowledge and experience of ICAEW's membership. The Tax Faculty's work is directly supported by over 130 active members, many of them well-known names in the tax world, who work across the complete spectrum of tax, both in practice and in business. ICAEW Tax Faculty's Ten Tenets for a Better Tax System, by which we benchmark the tax system and changes to it, are summarised in Appendix 1.

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KEY POINTS

1. The potential for non-compliance by employers is substantial and we do not envisage that it will reduce unless some structural issues are addressed.
2. In order to make it easier for organisations to comply, we recommend that the Government inter alia:
 - brings forward legislation to improve clarity on employment status which reflects modern working practices and aligns the tax and employment rights frameworks, to make it simpler for hirers to determine the employment status of their workers (as promised in the Government's **Good Work Plan** of 17 December 2018 on page 44 in response to Matthew Taylor's recommendations 1-5) – we suggest that this be considered by the **Future of work review** announced on 12 May);
 - changes the structure of the tax system to reduce the fiscal incentive on hirers to not classify individuals as employees (as suggested by Matthew Taylor in his **Good Work** report of July 2017, cited at Recommendation 26 on page 49 of the Government's **Good Work Plan** of 17 December 2018) – we suggest that this be considered by the **Future of work review** announced on 12 May;
 - incorporates into national minimum wage (NMW) legislation a power of collection and management similar to that in the Taxes Acts to provide discretion to HMRC to distinguish between unintended NMW technical breaches and deliberate exploitation of employees by employers; and
 - ensures that employment law is consistent across the four nations of the UK.

ANSWERS TO SPECIFIC QUESTIONS

Section 1

Please briefly tell us about you / your organisation and your interest in enforcement of labour market regulations.

3. Please see above. Many of our Chartered Accountant members are employers or work in firms that have employers as clients.

Section 2 - Key areas

1. Recent changes in how UK labour market is operating

For instance since the end of the Coronavirus Job Retention Scheme (CJRS), changes in employment status (eg, the shift away from self-employment following IR35 rules changes) increases in job vacancies.

1a. What changes have you observed or experienced?

1b. How might these changes impact non-compliance and is this likely to grow or subside over the coming year (2022 to 2023)?

4. The numerous ways in which organisations can engage people, eg as agency workers, umbrella company workers, self-employed sole traders or via personal service companies, creates uncertainty amongst businesses as to what each of these terms means and what their responsibilities are.
5. In addition, having multiple employment status classifications for employment law, including employee, worker and self-employed with separate definitions for Northern Ireland, but only two for tax and national insurance contributions (NIC), i.e., employed and self-employed, is not in our view a long-term sustainable position.

6. Determining employment status is difficult. For organisations that use contractors, the introduction of the off payroll working (OPW) rules has brought to the fore the risk of incorrectly determining employment status.
7. The move to greater home working has blurred the boundaries, and recent court cases, for example *Atholl House (Kaye Adams) [2022] EWCA Civ 501*, have highlighted the complexity of determining employment status albeit without providing the clarity needed.
8. With "The Great Resignation", recruitment and open positions have increased rapidly. Organisations are working hard to fill the gaps in certain industries and the uncertainty around the different methods as well as the strict policies that some organisations felt required to introduce to manage the OPW reforms has made this a much more difficult and time-consuming process.
9. The structure of the income tax and NIC system results in a fiscal disincentive to classifying workers as employees, both for the workers and the engagers. The main problem is the cost of employer NIC where workers are employees or deemed employees.
10. We therefore recommend that the Government in its *Future of work review* announced on 12 May 2022:
and
 - acts on its commitment in its *Good Work Plan* in response to Matthew Taylor's recommendations 1-5 on page 44 to "bring forward legislation to improve clarity on employment status, reflecting modern working practices" and "detailed proposals on how the tax and rights frameworks could be aligned", in Great Britain and Northern Ireland, and
 - reconsiders the recommendation regarding the fiscal imbalance between different employment statuses made by Matthew Taylor in his *Good Work* report of July 2017, cited at Recommendation 26 on page 49 of the Government's *Good Work Plan* of 17 December 2018, (such a review would need to consider the structure of the tax system as it affects work, not just rates).

1c. What response have you observed by the enforcement bodies to identify and address these issues?

11. HMRC's OPW focused enquiries appear to not just be looking at IR35 but expanding to the broader labour supply chain; further increasing the burden on businesses.

2. Workforce

Looking at the experience of people engaged in or available for work, either in a specific geographical location or in a particular firm or industry sector.

2a. What has been the experience of workers arising from changes to the labour market? Please provide specific evidence.

2b. Have changes in the immigration rules in 2021 impacted on workers' experience and has this differed between migrant or domestic workers?

2c. Are these impacts consistent across the board or do they vary by sector? If the latter, then how?

2d. Is there any evidence to suggest additional threats to workers associated with labour shortages?

12. Changes since the UK's withdrawal from the EU (Brexit) are having a big impact. Increased visa requirements mean that it takes a long time to fill roles with people from the EU and is increasing the cost of secondments/assignments and permanent moves. This creates

difficulties for human resources teams working with others in the business who want roles filled quickly and is discouraging the recruitment of certain otherwise suitable candidates.

13. We welcome the proposed planned extension to banning exclusivity clauses for workers earning below the lower earnings limit (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1073073/exclusivity-clauses-consultation-government-response.pdf). However, this will not automatically apply in Northern Ireland (and there is currently no ban on exclusivity clauses for zero-hours workers in Northern Ireland).
14. We therefore believe that reviews of worker protections need to engage with all four nations of the UK, in particular Northern Ireland which has its own legislation, as inconsistencies create confusion for employees and employers.

3. Workforce Engagement

Looking at evidence of how workers gain understanding and enforce their employment rights.

3a. What examples can you share of initiatives that have assisted workers to understand and enforce their rights – particularly as regards harder to reach workers?

15. Where employees rely on employers for information about rights, failing separately to consider Northern Ireland may result in employers being under the impression that a measure applicable only to Great Britain applies in Northern Ireland too, creating confusion for employees.

4. Business Engagement

Various mechanisms initiated or supported by the enforcement bodies encourage, influence and embed good practice, eg Responsible Car Wash Scheme, Construction Protocol and the Apparel and General Merchandise Public/Private Protocol, The National Minimal Wage Naming Scheme and the Good Business Charter.

4a. What impact do you think these interventions have had? ie are they effective?

16. We are commenting here only on national minimum wage (NMW) enforcement.
17. NMW naming has become less impactful over time, especially after respected household names have been included for technical breaches of the rules or where it is known that employers realised there was an issue and disclosed voluntarily.
18. A significant number of those named are not purposely avoiding NMW or exploiting employees. The complexity of the legislation means that it is too easy to trip up without realising it. The legislation is also too draconian and sometimes has a detrimental impact on those who it is intended to protect.
19. We agree with the principle behind having a NMW but the way in which the law is framed means that HMRC is unable to adopt a flexible, behaviour-based approach to enforcement and penalties and, instead, is obliged to penalise employers for unintended and unexpected technical non-compliance as well as deliberate underpayments.
20. For example, Iceland Foods and Middlesbrough Football Club were penalised respectively for running a voluntary savings club from which employees could withdraw their money at any time and enabling employees to buy season tickets, on the grounds that the deductions from pay, which had been willingly approved by affected employees, reduced earnings to below NMW.
21. It is also very complicated to determine what pay elements count towards the NMW; for example, premium payments, such as unsocial hours payments, have to be ignored, and the definition of bonuses is tightly drawn.

22. The strict definition around “salaried workers” also increases the complexities for employers who have to run NMW checks for each pay reference period for employees who are treated as (and usually believe that they are) salaried.
23. HMRC’s zealous approach to enforcement coupled with the non-alignment of NMW rules with those used to calculate payroll impose disproportionate administration burdens on employers and is counterproductive.

4b. Why? What would make them more effective?

24. NMW law does not provide for discretion in its application. The legislation also fails to account for accepted tax-efficient arrangements and benefits designed to help staff, which means that it penalises the very group (low-paid workers) that it is intended to protect.
25. We therefore recommend that a power of collection and management, similar to that for tax, needs to be introduced into NMW law as a matter of urgency. Section 1 Taxes Management Act 1970, governing income tax, capital gains tax and corporation tax, and section 5 Customs & Revenue Commissioners Act 2005 could be used as a model.
26. This would allow, and encourage, HMRC to distinguish between unintended technical breaches and deliberate exploitation by employers and would help to ensure that only the latter category of employers is penalised and/or named and shamed.
27. Thought should be given to carve-outs for benefits provided by employers which involve deductions from net pay and are designed to help staff, for example discounted staff purchases, savings clubs, etc, but which employers are prevented from providing to their low-paid employees because of NMW rules.

4c. Are there any other examples of good practice? These can be drawn from across the regulatory landscape.

28. We have no comments on this question.

5. Recruitment

5a. What changes have you observed to recruitment patterns and practices. For example, online recruitment and offshore recruitment.

5b. Do any of these trends you observe raise concerns about compliance?

5c. Do you have any evidence to share in respect of recruitment fraud?

29. Recruitment has become harder over the past couple of years.
30. The number of roles to fill is higher and individuals have the upper hand in bargaining, so organisations are struggling to get people to accept offers on a timely basis, particularly in the knowledge industries. In other areas of shortage, such as HGV drivers, there are huge numbers of companies/agencies and different schemes/options out there for the drivers to pick and choose from to their advantage. Not all available options are compliant, and more government education and publicity is needed to help individuals to make better choices.
31. Employers do recruit from a wider selection of candidates as a result of accepting working from home. However, an employer in England who recruits someone working from home in, say, Wales, has to have regard to employment laws applicable to the UK, Great Britain and Wales.
32. The off payroll working reforms appears to have resulted in:
 - greater use of umbrella companies,
 - more outsourcing arrangements,
 - more use of partnerships rather than personal service companies (PSCs), and
 - new ways of attempting to avoid the legislation.

6. Employment models

What evidence can you present as regards compliance of newer models of employment – for example gig economy workers, employment through umbrella companies*, joint employment models**

****Umbrella company is a term used for company that employs a temporary worker (an agency worker or contractor), often on behalf of an employment agency. The agency will then provide the services of the worker to their clients. Umbrella companies do not find work for the workers they employ.***

*****Joint employment model: An example of this is an employee formally employed by one employer the (primary employer) may be deemed constructively employed by another employer (secondary employer) for example an employer and a contractor or subcontractor performing services for the employer or a staffing agency providing employees to the employer.***

6a. Do you have evidence of these being associated with worker exploitation?

6b. Do you have evidence of other employment models that might give rise to compliance concerns?

33. Models seen, primarily through agencies or umbrella companies, include individuals having an employee contract and a separate self-employed contract with an umbrella company with pay split between the two contracts (NMW for employment and balance self-employed), and another where the arrangements were structured to be outside IR35/ off-payroll rules on the basis of substitution, except that in practice such engagements did not always operate as stated in the contract.
34. We think there is a difficulty with the terminology. The question refers to “*Joint employment model*”. An employee can have a joint employment contract, i.e. one employment contract with two employers under which the employee works for both employers. There is no deeming involved. There are also cases where the legal employer is not in practice the entity that manages the day-to-day work of the employee and does not receive the benefit of the employee’s performance. HMRC when interpreting international tax treaties uses the term “economic employer” for such situations. We are not clear exactly which situation the question is trying to address.

7. Enforcement resourcing

All 3 enforcement bodies [HMRC NMW; GLAA; EAS] engage in educational activity, promotion of compliance, enforcement and support to workers.

7a. What assessment do you make of how these 3 bodies operate?

7b. Provide evidence and examples of best practice to address labour market non-compliance that you would like to highlight to the Director?

35. We are commenting here only on national minimum wage (NMW).
36. The support that HMRC provides is, in some areas, not good enough.
37. It is virtually impossible for organisations outside of the customer compliance manager (CCM) taxpayer population to speak to someone knowledgeable at HMRC and obtain a considered opinion. We accept that HMRC provides extensive guidance online and in webinars, but it does not cover in sufficient depth complex circumstances that do not fit the norm and which are the most complicated to deal with, for example employment status.
38. Most of HMRC’s webinars and guidance tend to be basic and, although adequate for those who are new to a topic, do not pick up nuances or areas of complexity, with questions raised often not properly addressed.

39. As a rule, organisations want to do the right (and compliant) thing. Unfortunately, HMRC does not always provide guidance or give clearance in a timely manner.
40. Please also see para 30 above (Recruitment Question 5) on suggested education and guidance.

Other issues

8. Over and above the issues raised above, are there any other relevant issues you would like to bring to my attention for this strategy? For instance, effectiveness of labour market enforcement and how this could be improved, allocation of resources and good practice that can be drawn from across the regulatory landscape.

41. Labour market enforcement should be consistent across the four nations of the UK. For example, Northern Ireland employment related legislation (including on rights such as statutory leave and payments) is separate from that which applies to Great Britain and is not necessarily consistent.

APPENDIX 1

ICAEW TAX FACULTY'S TEN TENETS FOR A BETTER TAX SYSTEM

The tax system should be:

1. Statutory: tax legislation should be enacted by statute and subject to proper democratic scrutiny by Parliament.
2. Certain: in virtually all circumstances the application of the tax rules should be certain. It should not normally be necessary for anyone to resort to the courts in order to resolve how the rules operate in relation to his or her tax affairs.
3. Simple: the tax rules should aim to be simple, understandable and clear in their objectives.
4. Easy to collect and to calculate: a person's tax liability should be easy to calculate and straightforward and cheap to collect.
5. Properly targeted: when anti-avoidance legislation is passed, due regard should be had to maintaining the simplicity and certainty of the tax system by targeting it to close specific loopholes.
6. Constant: Changes to the underlying rules should be kept to a minimum. There should be a justifiable economic and/or social basis for any change to the tax rules and this justification should be made public and the underlying policy made clear.
7. Subject to proper consultation: other than in exceptional circumstances, the Government should allow adequate time for both the drafting of tax legislation and full consultation on it.
8. Regularly reviewed: the tax rules should be subject to a regular public review to determine their continuing relevance and whether their original justification has been realised. If a tax rule is no longer relevant, then it should be repealed.
9. Fair and reasonable: the revenue authorities have a duty to exercise their powers reasonably. There should be a right of appeal to an independent tribunal against all their decisions.
10. Competitive: tax rules and rates should be framed so as to encourage investment, capital and trade in and with the UK.

These are explained in more detail in our discussion document published in October 1999 as TAXGUIDE 4/99 (see <https://goo.gl/x6UjJ5>).