



H M Revenue and Customs
Employment Status Team
Room 1E/10
100 Parliament Street
London
SW1A 2BQ

Dear Sir,

Off-payroll working in the public sector: reform of the intermediaries legislation

The Network Rail Group ("Network Rail") is pleased to have the opportunity to respond to the Consultation Document in respect of the above, published on 26 May 2016.

Network Rail is the owner and infrastructure manager of the rail network throughout England, Scotland and Wales. This requires day to day management, safety and operational maintenance and the delivery of Government sponsored enhancements to the network, as required, achieving Government objectives.

To be able to successfully carry out these responsibilities, Network Rail has a significant labour requirement and needs access to all elements of the labour market. This will cover short term and long term roles as well as specialist knowledge appropriate to particular projects.

As a consequence, Network Rail has and continues to use the skills of individuals provided through personal service companies and therefore, is keen to ensure that any new legislation in this area is workable thereby ensuring Network Rail's compliance. The attached document sets out the comments of Network Rail to the proposal.

I trust that you find this representation helpful and look forward to working further with you on this matter.

Yours sincerely,

[Redacted signature block]

Off-payroll working in the public sector: reform of the intermediaries legislation

Introduction

Network Rail is the owner and infrastructure manager of the rail network throughout England, Scotland and Wales. This requires day to day management, safety and operational maintenance and the delivery of Government sponsored enhancements to the network as required achieving Government objectives.

To be able to successfully carry out these responsibilities, Network Rail has a significant labour requirement and needs access to all elements of the labour market. This will cover short term and long term roles as well as specialist knowledge appropriate to particular projects.

Network Rail operates within a highly regulated environment, controlled by the Office of Rail and Road, who also provide regulated funding for the delivery of an agreed five year business plan. Although Network Rail is an arm's length body, it is also a UK corporate that is subject to operating the UK taxation system. This includes accounting for deductions on payments made to employees through PAYE.

Understandably, Network Rail is sensitive to any changes in tax legislation that may result in a substantial increase in costs which would either have to be passed on to the Department for Transport or, potentially, reduce the Group's ability to deliver Government requirements.

Consequently, Network Rail sets out its views below on the proposals contained within the consultation document issued on this subject on 26 May 2016 together with comments relating to any development of the proposals that have been described at meetings with HMRC policy team. Answers to specific questions asked in the document have been provided where considered relevant to Network Rail's comments.

IR35

Network Rail understands HMRC's concern over the non-compliance with the legislation and fully supports any proposals that will ensure that all taxpayers pay the correct amount of tax and national insurance and that there is no distortion in the labour market arising from the structure of the entity conducting business.

Whilst noting that the Government believes that public sector bodies have a duty to ensure the people working for them are paying the correct tax, it is our view that the obligation to ensure compliance should rest with HM Revenue and Customs, who are the correct body and have the necessary knowledge and legislative support to determine status and compliance. Nuances relating to structure and how they impact the taxation status of an individual cannot be definitely understood by a company that does not have access to full information or the necessary taxation expertise. The shift therefore for effectively determining IR35 compliance to the public body is not considered to be correct.

Public Body Definition

Question 4 of the document asks "are there any public bodies caught by this definition who would face particular impacts which should be considered".

Our response would be yes, Network Rail.

As previously explained, Network Rail has a significant labour requirement that is met through all methods available in the market. Whilst the Group employs employees where appropriate, there are circumstances where this is not appropriate (short term projects, absence cover, lack of relevant candidates with necessary expertise and knowledge) and in these instances Network Rail will seek to use alternatives available, of which personal service companies is one.

Network Rail is concerned that the implementation of the proposals as drafted will result in a potentially damaging loss of workforce and expertise on ongoing projects and deliverables. This is considered likely due to the potential reduction in income resulting from the operation of PAYE on invoice payments coupled with the lack of a similar regime in the private sector (discussed further below). Network Rail believes that the use of an online tool which gives a definitive ruling on IR35 status with no right to appeal could leave legitimate personal service companies disadvantaged and this will result in their withdrawing from the public sector.

Whilst committed as stated to ensuring tax compliance, Network Rail is also committed to delivering the Government's objectives relating to the upgrading and improving the rail network and can see conflicts with meeting both of these objectives.

Agents

It is fully appreciated that where there is a third party agent that stands between Network Rail and the personal service company, compliance with the proposed legislation will rest with the third party agent.

However, recent indications from HM Revenue and Customs Policy team is that there may be the need to involve the arm's length body in the process of completing the online tool that determines the personal service company's IR35 status. Given that the ultimate responsibility will remain nonetheless with the agent, the involvement of Network Rail in the process will no doubt lead to an indemnity of sorts in respect of the information provided. This is likely to necessitate discussions and contractual changes that will be costly and take time, which may not fit with the current timetable proposed by HM Revenue and Customs.

Further, it is possible that there will be agencies who do not wish to get involved in the administration resulting from the proposals. This may lead to a reduction in the market choice available to Network Rail, which in turn could impact on the ability to find relevant workforces.

The 5% Allowance

Network Rail does not believe that a 5% allowance would be relevant going forward if the new legislation is enacted as proposed.

Such an allowance would require complicated processes to be inserted into the payroll cycle. Further, if HMRC determine through the legislation that the personal service company is not a legitimate business then it would seem contradictory if, as the document states, the purpose of the allowance is "to allow for the general expenses of running a business".

The Online Tool

The use of the proposed online tool appears from discussions to be key to the successful operation of the proposed legislation. Network Rail understands that the process will be for the tool to be completed in respect of every personal service company. The tool will take the form of a questionnaire and once completed will confirm whether the personal service company is IR35 compliant. Once decided there will be no ability to appeal or change the ruling.

Network Rail has several concerns over this process

- The questions to be raised remain unpublished to date. Until known, the process relating to responding cannot be designed
- There is the possibility of ambiguous questions being asked where across the whole public sector, different interpretations are made resulting in different decisions
- Special circumstances may exist that may lead to the "wrong" answer and thereby result in an erroneous determination. This could be in areas such as use of Network Rail computers for security purposes, the need to be placed in a team environment in a Network Rail office as a part of the project or the provision and imposition of safety equipment and rules for workers with track access
- The evolution of a role. It may be that the role changes over a period of time so that if the questionnaire was revisited after as short a time as a week, the determination could be different

Network Rail acknowledges that clarity is helpful and allows good procedures to be put in place. However, we believe that there should be the scope for Network Rail to approach HM Revenue and Customs to appeal in cases where the online tool approach clearly denies the opportunity of a correct determination due to specific circumstances.

Liability

The document considers several scenarios where a liability may arise (Questions 14 and 15). Network Rail would comment as follows

Subject to the nature of the proposed online tool, the responsibility for any penalties arising through non-compliance should lie with the party that supplied the erroneous information. Network Rail does foresee an issue where any question is ambiguous and not clear as to the information required. If false information is supplied by the personal service company then any liability should fall upon the personal service provider.

Assessment of Impacts

Question 16 asks what one off and ongoing costs and burdens are anticipated as a result of the reform.

Network Rail is unable to quantify the level of additional expense at present in the absence of firm proposals, particularly those that will be necessary to implement system changes. We do believe however that any additional costs that the personal service company deems it has incurred and those of a third party agent will, in some form be passed back to Network Rail through higher charges. This coupled with the imposition of employers national insurance liabilities will potentially have an impact upon the amount of funding that Network Rail will require to deliver the Government's objectives relating to the railways or alternatively, impact upon Network Rail's ability to deliver.

Market Distortion

As previously mentioned, Network Rail believes that implementation of the proposals will create a distortion in the market place between the public and private sectors. The freedom of movement between the two sectors for a mobile workforce will lead to many abandoning the public sector with the consequences to Network Rail that has been set out previously.

Network Rail would ask HM Revenue and Customs to ensure a level playing field between all labour market participants by considering extending the scope of the regulations to the private sector.

Implementation Date of the Proposals

Network Rail would strongly recommend that the proposed implementation date of any legislation be delayed for twelve months until April 2018 to ensure that it can be compliant. The changes that will be required and the additional processes that will need to be put in place are significant. Additionally all aspects of what is to be implemented will not be known until after the Autumn Statement and the publication of the online tool. In particular

- Systems updates will be required to the Accounts Payable and Payroll systems to ensure that correct payments and deductions are made. Government tendering requirements will need to be met in respect of carrying out this work as well as the need for rigorous reviews and user testing before it can go live. The time between knowing what is required and the proposed implementation date is far too short for this to happen
- Contract reviews will be required and discussions relating to new rates will be necessary across all of the third party suppliers of labour that are utilised by Network Rail. Again, the proposed timetable is unlikely to be sufficient for efficient completion of these updates
- April 2018 should allow for inclusion of the private sector into the proposals and ensure no immediate loss of workforce
- Should Network Rail lose significant workers from the proposals in the next six months, there will be insufficient lead time for the company to plan a strategy to mitigate the impact upon deliverables. An implementation date of April 2018 will provide significant more time to develop a strategy.