Criminal Finances Act 2017

Updated September 2017

This factsheet provides key information about the Criminal Finances Act 2017 and how it will apply to the recruitment sector.

1. What is the Criminal Finances Act 2017?

The Criminal Finances Act ('the CFA') is a piece of legislation that will make organisations criminally liable for failing to prevent the facilitation of tax evasion offences in the UK or overseas. It will come into force on 30th September 2017. Originally it was intended to counteract particular activities within the financial services sector but in fact it has been drafted quite broadly so it will impact across all industry sectors including recruitment. This factsheet will look at the Criminal Finances Act in more detail with a list of FAQs.

The CFA will introduce **two new offences:**

1. The failure to prevent the facilitation of UK tax evasion offences (section 45)
2. The failure to prevent the facilitation of tax evasion overseas where such evasion is criminal under local law (section 46)

The CFA will also introduce a number of enhanced investigatory and recovery powers.

Who will the CFA apply to?

An organisation (which can be a company or a partnership) will fail to prevent the facilitation of tax evasion (in the UK or internationally) if a person **associated with them** criminally facilitates a tax evasion offence.

Relevant body

The CFA will apply to a 'relevant body' which means incorporated companies or partnerships. The offence will not apply to 'natural persons' i.e. individuals.

Associated person

A person is associated with a relevant body if they are an employee, agent or any person who performs services directly for or on behalf of the relevant body. An 'associated person' can be an individual person or an incorporated body.

In the recruitment sector 'associated person' could include payment intermediaries such as umbrella companies, CIS intermediaries and similar third parties. It could also include recruitment businesses in respect of the services they provide to clients.

How facilitating tax-evasion might occur in recruitment:

Step 1: a tax evasion offence is committed by a tax payer (e.g. a payroll company, contractor, or individual)

Step 2: the tax evasion is facilitated by an associated person of the relevant body (e.g. a recruitment consultant working for a recruitment company)

Step 3: the recruitment business failed to prevent its representative/employee or agent from facilitating the tax evasion offence

The above three steps will make the relevant body criminally liable under the CFA. The criminal standard of proof 'beyond reasonable doubt' will apply.

Investigatory and recovery powers

The CFA will also enhance the investigatory and recovery powers of the enforcement bodies. These powers include unexplained wealth orders (UWOs), disclosure orders for money laundering investigations, further information notices following a Suspicious Activity Report (SAR). (Please see 'What enhanced investigatory and recovery powers will the CFA introduce?' below)

Penalties

The criminal penalties for engaging in any facilitation of tax evasion will include:

- Unlimited financial penalties
- Ancillary orders such as confiscation order or serious crime prevention orders

Obtaining a criminal conviction for any company will also have severe consequences (reputational, financial etc) including lost contracts.

2. UK tax evasion and foreign tax evasion

There are offences relating to both UK and foreign tax evasion. We summarise these below.

UK tax evasion

The CFA will define a UK tax evasion offence as:

- cheating the public revenue, or
- being knowingly concerned in the fraudulent evasion of a tax

The CFA will define a UK tax evasion **facilitation** offence as occurring by:

- being knowingly concerned in…the fraudulent evasion of a tax by another person,
- aiding, abetting, counselling or procuring the commission of a UK tax evasion offence, or
- being involved in the commission of an offence consisting of being knowingly concerned in, the fraudulent evasion of a tax.

Foreign tax evasion

The CFA will define a foreign tax evasion as conduct which:

- amounts to an offence under the law of a foreign country
- relates to a breach of a duty relating to a tax imposed under the law of that country; and
- would be regarded by the courts in the United Kingdom as amounting to being knowingly concerned with, or taking steps with a view to, the fraudulent evasion of that tax.

The following conditions must be met in order for a foreign tax evasion offence to be committed:

- the company is incorporated, or its partnership is formed under the law of any part of the United Kingdom;
- the company carries part or all of its business in the United Kingdom (note: business also includes undertakings)
- any conduct constituting part of the foreign tax evasion facilitation offence takes place in the United Kingdom

The CFA will define a foreign tax evasion facilitation offence as conduct which:

- amounts to an offence under the law of a foreign country
- relates to the commission by another person of a foreign tax evasion offence under that law; and
- would, if the foreign tax evasion offence were a UK tax evasion offence, amount to a UK tax evasion facilitation offence

The foreign or UK tax evasion facilitation offences listed above emphasises the act of commissioning a tax evasion offence by a person. For CFA purposes, you (being a company or partnership) will be criminally liable if that person is associated with i.e. acts for or on behalf of, your organisation.

3. What defences will be available?

An organisation will have a defence if it can show that:

1. it implemented 'reasonable prevention procedures' to prevent the facilitation of tax evasion; or
2. it was not reasonable in the circumstances to expect it to put such prevention procedures in place.

Prevention procedures are any procedures that are designed to prevent any associated person from committing UK tax evasion facilitation offences. The responsibility however will be with the organisation to show that it had reasonable prevention procedures in place, or that it was not reasonable to implement such procedures.

HMRC have produced draft guidance which outlines illustrative examples (see p. 9) of the different types of procedures that an organisation could implement depending on its size and industry focus.

In the draft guidance, the HMRC have also set out six guiding principles for companies to consider when setting up reasonable prevention procedures. These principles are very similar to the principles set out in the Bribery Act 2010. We summarise them below:

Principle 1 - Risk assessment

This principle will highlight the need to include tax evasion risk assessments into your general risk assessment procedures. HMRC advises that this means that employees, agents or those who provide services for you or on your behalf must be managed to ascertain whether they have the means to facilitate a tax evasion offence and steps must be taken to manage this risk. Appropriate risk assessment will need to include some of the following:

- Oversight of the risk assessment by senior management
- Due diligence enquiries
- Internal and external sources that will enable risk to be assessed and reviewed
- Documentation of the risk assessment and a clear identification of the tax evasion facilitation risks
- Periodic reviews
- Organisations should have in place procedures to identify emerging risks

Principle 2 – Proportionality of risk-based prevention procedures

This principle means that prevention procedures, in order to be reasonable, will need to be proportionate to the risks that the organisation faces. An initial assessment of the risks that an associated person of a company may facilitate a tax evasion offence should be made and reasonable, proportionate procedures should be put into place.

Any procedure that is too burdensome will not be required.

Principle 3 – Top level commitment

Top-level management should demonstrate a commitment to preventing the facilitation of tax evasion offences. This principle will aim to encourage those working in senior management to develop a culture where facilitate tax evasion is completely unacceptable.

In order to demonstrate this, senior management should:

- endorse the organisation’s stance on preventing the criminal facilitation of tax evasion; and
- be actively involved in the development and review of the company’s preventative procedures.

Formal statements made by a company could also be used. In order to be effective they will need to:

- Reflect a zero tolerance towards the criminal facilitation of tax evasion;
- Highlight the consequences of an associated person breaching the company’s policy on this offence and the benefits of not engaging in the facilitation of tax evasion (such as reputational, financial etc)
- Outline the company’s preventative procedures; and
- Demonstrate a commitment not to recommend the services of others who do not have in place reasonable preventative procedures.

Principle 4 – Due diligence

The company will need to have due diligence procedures to analyse the risks of an associated person committing a tax evasion facilitation offence. The HMRC advises in its draft guidance that merely applying old procedures and tailoring them to a different type of risk may not be adequate enough to tackle the risk of tax evasion. Companies should thus decide what new due diligence procedures may be needed in order to deal with this offence.

REC has already produced due diligence checklists for use with umbrella companies and personal service companies. We will review these to see if additional questions are required.

Principle 5 - Communication (includes training)

This principle will require companies to communicate, both internally and externally, its prevention procedures and policy against engaging in any activity which may facilitate tax evasion. This could also include internal training. Communication should be from all levels within a company i.e. those working in senior management and middle management. The purpose of this principle will be to ensure that all staff fully understand the company's approach to tax evasion facilitation.

If training is provided, then it should also be proportionate to the risk faced. You may wish to incorporate some training on tax evasion facilitation in your already existing financial crime prevention training or alternatively introduce specific training to address tax evasion facilitation risks.

Principle 6 - Monitoring and review

All companies will need to monitor and review their prevention procedures and make any improvements that are necessary. Reviews may include:

- Seeking internal feedback from staff members
- Creating a formalised periodic review with documented findings
- Liaising and working with other representative bodies facing similar risks

4. What enhanced investigatory and recovery powers will the CFA introduce?

The CFA will introduce a number of enhanced investigatory and recovery powers which will include:

(1) Unexplained wealth orders

The CFA will allow enforcement authorities to make Unexplained Wealth Orders (UWOs) against any individual who is suspected of purchasing properties with illegal funds i.e. if the individual's income is deemed to be insufficient for the purchase of the property, then a UWO will be made. An UWO will require an explanation to enforcement agencies about the origins of the funds, where they came from, how it was obtained and the level of interest in the property.

An UWO will be made if:

- The individual holds the property;
- The value of the property exceeds £50,000;
- There is reason to believe that the individual's income is insufficient to provide for the purchase of the property; and
- The individual is a politically exposed person or there are grounds to suspect that the individual is, or has been, involved in a serious crime or is connected to someone who has been involved in crime.

Enforcement authorities will include the following bodies:

- The National Crime Agency;
- Her Majesty's Revenue and Customs;
- The Financial Conduct Authority;
- The Director of the Serious Fraud Office; or
- The Director of Public Prosecutions (in relation to England and Wales) or the Director of Public Prosecutions for Northern Ireland (in relation to Northern Ireland)

(2) Disclosure orders

A disclosure orders allow enforcement authorities to require anyone to disclose any information they have that may be relevant to an investigation. Disclosure orders are already used in confiscation and fraud investigations, but the CFA will now extend them to money laundering investigations too.

(3) Information sharing and suspicious activity reports (SARs)

The CFA will allow voluntary information sharing between organisations in the regulated sector (e.g. banks) to determine any suspicious cases of money laundering. The CFA will also allow for any information provided to enforcement authorities, to be provided in a joint report (a 'super SAR') to help reduce the amount of multiple SARs on the same topic.

(4) Further information orders

Law enforcement officers will now have the ability to make an application for a further information order following a SAR.

5. Will a recruitment agency be liable in the event they suspect a company to potentially be evading tax but do not have sufficient evidence to prove this?

If the company in question, in **acting for or on behalf** of an agency, is suspected by that agency of facilitating tax evasion offences but due diligence doesn't show sufficient evidence of tax evasion, it would be important to question what type of due diligence procedures are being used. It would also be important to question whether the due diligence procedures were thorough and effective in detecting the facilitation of tax evasion. It would also be important to question what grounds you have for suspicion and to then incorporate this into your due diligence process. It would also be important to consider the six guiding principles provided by HMRC when implementing reasonable prevention procedures.

6. Will 'facilitating' a tax evasion offence include promotion/referrals?

If the promotion or referral is undertaken by an 'associated person' (i.e. an employee, agent or a person performing services directly for or on behalf of the agency) then facilitating will include promoting the services of or referring candidates to a specific company that is, in any way, involved in tax evasion. If an agency is not satisfied that any payment intermediary (whether an umbrella or personal services company) is properly complying with the relevant tax rules, our recommendation is that you do not engage with them. Instead you may have a preferred supplier list and require that individual to work through one of your selected payment intermediaries.

7. Tips and steps to take now

Recruiters must know who their payroll partners are and how they engage temporary workers/ contractors. They will also have to consider if they will allow staff to claim commission for referrals to those companies and if as an organisation they will continue to receive referral payments.

So:

- Review your current risk assessments
- Conduct appropriate due diligence to identifyany risks of an associated person committing a tax evasion facilitation offence.
- Deliver training to all staff and ensure thatall recruitment consultants understand the new offence
- Update policies, staff handbooks and contracts
- Regularly check implementation of those policies.

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