

## Summary

Over the past 18 months LOCSU has received a number of enquiries from LOCs about LOCSU's guidance to LOCs on payments to office holders. LOCSU guidance is:

HMRC guidance makes clear that the posts of chair, vice chair, treasurer and secretary are office holders and therefore the payments they receive for attending meetings etc are subject to the deduction of PAYE and NIC.

LOCSU was asked to ensure that the guidance was current and engaged Menzies LLP who confirmed that HMRC rules and requirements have not changed and so the LOCSU guidance is current and correct. This information was shared with LOC treasurers at their sessions in July 2022 and a summary of the sessions is in appendix 1. Answers to the questions raised at these sessions have been prepared by Menzies LLP and are in appendix 2.

LOCSU were asked to get a second opinion and Hill Dickinson were engaged to review LOCs status for taxation and employment law purposes. Their report agreed with previous guidance and concluded that:

individuals holding the following roles – (Vice)Chairman, (Vice)Treasurer, Secretary (and possibly others, depending on the circumstances) - would be considered office holders and should ordinarily be subject to PAYE for taxation purposes (unless in exceptional circumstances), but are not considered 'employees' in relation to employment rights unless there is a specific contract of employment in place defining otherwise or, in reality, have become employees due to their role expanding beyond that of an office holder.

The full report from Hill Dickinson can be found in appendix 3.

## Next Steps

LOCSU has produced guidance on steps for LOCs to take, including a simple 2-page LOCSU template to check employment status of all Committee members and taxation status check of all office holders. This is in appendix 4.

## Online Treasurer Forums – January 2023

LOCSU are convening online Treasurer Forums (with professionals present) on Monday 23, Thursday 26 and Monday 30 January 2023 to discuss this guidance and ascertain appetite for LOCSU provided payroll services. If you would like to attend please email [jacquefooks@locsu.co.uk](mailto:jacquefooks@locsu.co.uk)

There will be a further session in early February for other LOC Committee members to attend. Date to be confirmed.

Appendix 1: Summary of Treasurer Sessions – July 2022

Appendix 2: FAQs arising from Treasurer Sessions

Appendix 3: Guidance from Hill Dickinson

Appendix 4: Next Steps and Checklist

## Appendix 1

### Treasurer Sessions – July 2022



#### Overview

During July, four virtual sessions were held for LOC treasurers to enable networking and to share ideas.

LOCSU has sought advice from an independent tax advisor following queries at previous treasurer sessions on the need to LOCs to deduct PAYE (tax and NI) from payments to LOC office holders.

The advice received by LOCSU was shared as noted below and sessions used as consultation with LOC treasurers to determine the support that LOCs would like to fulfil their obligations.

#### Summary of advice

The independent tax advisor examined the HMRC rules and confirmed that the requirements on this have not changed and LOCSU's previous guidance is correct and so **LOCs should pay Office holders (Chair, Secretary, Treasurer) net, deducting PAYE at source.**

#### What payments does this include?

PAYE is deducted on attendance payments, honorariums and payments for work eg. set amount for treasurer role.

PAYE **does not** need to be deducted from direct expenses eg. Travel, subsistence, parking which are a direct reimbursement.

#### LOC Committee members

This is a "grey" area under HMRC rules as it can depend on the nature of the committee. The tax advisor's recommendation and low risk approach is that all LOC committee members are treated equivalent to office holders and have PAYE deducted at source.

#### Can we pay a LOC office holder/ committee member via a company and so pay gross?

LOC officer payments must be subjected to PAYE. For all other committee roles, as it is an individual that is elected to a LOC committee, not a company, it is the individual that should be paid as it is a business to individual relationship.

#### Employee status?

The rules for tax and the rules on employment status are not identical and the requirements under each differ. A LOC deducting PAYE does not mean that the office holder or committee member is an employee in terms of employment status. LOCSU is working on resources to ensure this is clear for both the LOC and those agreeing to be LOC members.

#### Financial obligation to LOC / LOC Committee member

- NI is likely to be £0 or very little as payments are unlikely to be above the earning threshold. (Note this may not be the case in all circumstances)
  - If LOC committee member NI is £0, so is LOC NI.
- Tax: LOC member will be paying this either way, whether PAYE or self-employed.

#### Other payments

If there is an organisation eg. IT company that runs the website, then these payments don't include PAYE as it's a business-to-business relationship.

### **Payment Frequency**

Payments can be made at whatever interval the LOC agree, and so could pay quarterly. This means it could be less onerous to the Treasurer as a process that happens 4 times a year.

### **Possible challenge from LOC committee members**

Noted that there might be challenge from committee members on receiving their payment net. Resources from LOCSU and statement that it is information from HMRC might help with this.

### **Comments from LOCs already paying office holders PAYE:**

- An LOC noted that they use a bookkeeper to process all committee payments. There hasn't been a big change in cost overall as whilst there is a cost for the bookkeeper, the Treasurer costs have gone down. Bookkeeper is c. £800 per year.
- One LOC uses a bookkeeper to do PAYE and also end of year accounts and finds it really efficient.
- Another LOC uses an accountant to do accounts and also monthly PAYE run for the LOC office holders which works very well.

### **Possible Solutions suggested**

LOC Treasurers asked for support and help with processing PAYE and there is concern about the amount of time and cost that this will place on the Treasurer and LOC.

Can LOCs who are running PAYE or using bookkeepers/ accountants for PAYE share their experiences and setting up tips.

Suggestions included:

- **Regional resource** – could LOCs have access to a shared bookkeeper who processes LOC PAYE payments and charges their time back to the relevant LOC.
  - **LOCSU** – could LOCSU provide central resource for PAYE payments?

If an LOC wanted to organise PAYE themselves:

- **HMRC free tool** – online resource for organisations with less than 10 individuals.

### **Questions raised and to be resolved for next session**

#### **Is this information correct?**

- HMRC haven't queried any payments or contacted LOCs and so is this advice correct? Is it national approach or should LOCs approach their local tax office for help?
- Can LOCSU get a second opinion? It was confirmed that the current advice is a second opinion, as the current tax advisor advising LOCSU is a different person to the one that gave the original advice over 6 years ago.

#### **Other payments**

- Are vice roles classed as office holders?
- Payments to non-LOC committee members who may attend committee meetings? eg. minute taker, business manager – does PAYE apply?
- LOCs sometimes hold monies for non-LOC work eg. Well-being grants, project work etc and payments are made to LOC committee members and non-LOC committee members – does this need to have PAYE deducted?
- LOC committee member/ office holder donates payment to charity, which the LOC pays direct. Can this continue?

### **Personal Tax questions**

- Home office expenses – are these able to be claimed and can they be netted off against tax liability and what's the limit?
- There is a Traders allowance of £1K a year which does not need to be declared, so how does that work with this system?
- If office holder/ committee member isn't resident in the UK, does PAYE still apply?

### **Liability/ when to start**

- What are the consequences of not following this guidance?
- Who is legally liable?
- Who is the main contact for HMRC?
- When to start? Do PAYE payments need to be made in retrospect?

### **Queries on specific details**

- What rate will NI be deducted at and how do we determine tax codes?
- Will LOCs need to register as an employer with HMRC?
- What's the process for LOC to take tax and NI and pass to HMRC?
- Will we need to do real-time reporting?
- Recommendations on software to use.

### **Other areas of discussion**

#### **Correct process for accounting records**

Noted that most LOCs use a simple excel spreadsheet to record expenses and income. These are then independently inspected at the end of the financial year prior to being presented at the AGM.

Guidance is that approved accounts should be submitted to the NHS regional team.

**Club Treasurer** - North Yorkshire LOC use this programme <https://www.clubtreasurer.com/#about> which is a cloud-based system and is used to input income and expenditure and can generate profit and loss reports etc. For further information contact Philip Angel: [philip.angel@me.com](mailto:philip.angel@me.com)

#### **LOC Income**

Are LOCs allowed to raise funds other than from the statutory levy? LOCs do get other income eg. Sponsorship (AGM/ CET), interest on bank accounts, fee for processing DBS checks etc. One LOC is looking at having two bank accounts to keep statutory levy and other income separate. LOCSU Head of Policy to clarify.

#### **PCSE-Online**

For access to the LOC treasurer account on PCSE-Online, email [pcse.optomengagement@nhs.net](mailto:pcse.optomengagement@nhs.net)  
If there are any queries regarding levy payments, they should be submitted via the [online enquiry form](#) in the first instance.

#### **Levy Alteration**

There has been a change of personnel at some NHS regional offices and LOCSU is working with them to help resolve issues that LOCs are having in getting their levy changed.

If you are having any issues relating to the levy, whether it's getting the rate changed, not receiving statements etc, please contact [lisastonham@locsu.co.uk](mailto:lisastonham@locsu.co.uk) who can escalate the issue with the NHS regional teams and PCSE.

### **Additional help for LOC Treasurers**

With potential increase in work around PAYE, there could a LOC Vice-Treasurer role or someone shadowing the treasurer role. This also helps with succession planning.

### **Next steps**

- LOCSU will seek further advice from the tax advisor to answer questions raised.
- LOCSU to look at solutions for LOCs to fulfil their PAYE obligation.
- Circulate LOC accounting spreadsheet with notes of sessions.
- Include benchmarking document from March 2021 with notes of sessions.
- Look into LOC receiving income other than statutory levy.

LOCSU will continue to facilitate regular virtual meetings for Treasurers to enable networking and sharing of ideas and resources.

The [Treasurer guidance](#) will be regularly updated and if there is anything that you would like to see included please [contact us](#).



## Appendix 2

### Queries from Local Optical Committees:

Q1 - General over-arching query re is this right? (that PAYE should be applied) Do other 'committees' (not registered companies) operate in this way? (such as a book club etc)

A1 – PAYE applies automatically to payments to office holders or employees, including honoraria. The only reasons this would not be the case is either:

- o No payroll is required for anyone because the organisation holds a new starter form for every individual stating that they have no other employment or pension income, and the entity is not paying anybody above tax or National Insurance thresholds and therefore does not need to operate a PAYE scheme. However, if one person is required to go through the scheme then the entity must process all payments to other individuals through the scheme, even if no deductions are required.
- o The payments are exempt from PAYE (for example they relate to work undertaken outside of the UK by and non-UK tax resident.

Q2 - HMRC haven't queried any payments or contacted LOCs and so is this advice correct? Is this the national approach or should LOCs approach their local tax office for help?

A2 - While HMRC have not challenged this to date, this does not mean they are happy that the treatment is correct. If they have not undertaken a review, they will not know whether the treatment is correct or not. There is no local discretionary leeway here and local tax offices do not have the ability to exempt an organisation from applying the correct rules. I would not contact HMRC to ask for an exemption from applying the rules because this should result in HMRC opening a PAYE audit to check procedures and ensure compliance.

Q3 - LOCs are concerned about how to treat payments to the non-office holder committee members. We've noted that it is a 'grey' area and the low risk approach is to treat via PAYE – how strict or risky is this area? (refer next query below also)

A3 - The "grey" area is whether a junior committee member is an office holder in the same way as the Chair, Secretary, etc. The reason this is important is because office holders are automatically caught for PAYE (or IR35 if they operate via an intermediary). However, if not an office holder and therefore PAYE is not automatic, you then need to look at whether the relationship is indicative of employment or a business-to-business arrangement. If indicative of employment, PAYE is still applicable. The risk for the paying entity is that if they do not apply PAYE when required to, HMRC will seek to recover the tax and National Insurance that should have been withheld by them. This is probably on a grossed-up basis significantly increasing the liability and then adding interest and penalties. There is no automatic offset for taxes paid by the individual and it should not be assumed that credit will be given for this because without jumping through some hoops and HMRC securing written assurances from the individual, offset is not available.

Q4 - Committee members are elected - they all become contractors for a 3-year period to do the "work of the committee", same terms and can substitute for one another. Officers are then appointed from the committee – their officer duties covered under an honorarium. Is this why there is a tax difference (different treatment for PAYE) or can the Officer still declare income as part of self – assessment?

A4 - Unless there are contracts for the works, this is unlikely to satisfy HMRC that this is a commercial arrangement. If there are contracts then we can move onto the "substitution" point and this could be relevant where a member is contracted to undertake work, but the member pays someone else to undertake the work and becomes commercially responsible for the work undertaken on their behalf. HMRC will not accept that this is genuine substitution if the entity pays the replacement directly. They are also unlikely to regard this as substitution where the work has been undertaken by someone that the organisation is already engaged with and they could simply have asked that person to do the work in the first place. Anyone receiving an honorarium will either be an office holder or an employee. For National Minimum Wage and employment rights purposes, it is

[menzies.co.uk](https://menzies.co.uk)



important that this is an office rather than employment. Honoraria payments are liable to PAYE. Whether there is an ability to separate roles whereby one part is liable to PAYE and another is liable to be treated as business to business will depend on the nature of the works but must be considered high risk. This has no prospect of success though unless several hoops are cleared, one of which is that there are clear and separable written contracts in place for the office holder and non-office holder roles.

Q5 - Are vice roles classed as office holders?

A5 - Vice roles are likely to be regarded as an office because they come with a title and responsibilities. An "office" is a position that exists independently of the present incumbent and would be regarded as vacant if not currently filled.

Q6 - Payments to non-LOC committee members who may attend committee meetings? eg. minute taker, business manager – does PAYE apply?

A6 - Probably, but this will depend on the title of the position and the nature of the relationship.

Q7 - LOCs sometimes hold monies for non-LOC work eg. Well-being grants, project work etc and payments are made to LOC committee members and non-LOC committee members – does this need to have PAYE deducted?

A7 - The holding of funds by LOCs is not a PAYE point, the question of PAYE is applicable when payments are made, i.e. who to and why?

Q8 - LOC committee member/ office holder donates payment to charity, which the LOC pays direct. Can this continue? (Does PAYE still apply regardless of the end bank account?)

A8 - This is likely to be problematical. You probably do not have a payroll giving arrangement in place with HMRC and therefore if the member is choosing where the funds are going this does not remove the PAYE obligation. Waiving before entitlement could remove the obligation, but this cannot be in return for a payment to a particular charity, it would be a pure waiver. The organisation could have a policy where any waived entitlements go into a charitable fund and the committee as a whole determine which charities receive payments from time to time. The nature of the question suggests that the correct treatment should be to make the payment, subject to PAYE and for the individual to make their own gift aid payment to take advantage of the tax relief available.

Q9 - What steps can be taken to make clear that the agreement with the individual does not constitute an employment relationship?

A9 - An office holder service agreement should be put in place setting out the relationship and entitlement to remuneration for this.

#### **Personal tax questions:**

Q10 - Home office expenses – are these able to be claimed and can they be netted off against tax liability and what's the limit?

A10 - If the individual is required to undertake work from home and there is no workplace provided that they could work from if they wish, the organisation could make a working from home payment. The current rate is £6 per week and this is tax free if the conditions are met.

Q11 - There is a Traders allowance of £1K a year which does not need to be declared, so how does that work with this system?

A11 - This is irrelevant if this is an office holder appointment. It will only be relevant if this is a non-office holder commercial arrangement and the total self-employed income from all sources is very small (i.e. below the £1,000)

Q12 - If office holder/ committee member isn't resident in the UK, does PAYE still apply?

A12 - If all duties are performed outside the UK by a non-UK tax resident, then PAYE is not applicable. Local advice should be obtained to determine whether any obligations arise in the country where the work is performed because these will depend on local rules rather than UK rules. If the work is undertaken in the UK by a non-UK tax resident, the starting position is that PAYE will apply unless there is an exemption from this, for example a Short-Term Business Visitor Agreement in place with HMRC or HMRC have issued an NT (no tax) code to you for this individual and the individual provides you with an A1 certificate for National Insurance purposes.



## **Liability/ when to start**

Q13 - What are the consequences of not following this guidance?

A13 - The organisation is at risk of liability to the tax, National Insurance that should have been paid to HMRC. Interest and probably penalties will also be charged. This liability relates to the organisation, but it is the committee members that are personally liable on a joint and several basis if HMRC seek to recover the liability from them.

Q14 - Who is legally liable if treated incorrectly?

A14 - The committee members in post at the time the settlement becomes due. It is however possible that the liability could be transferred to former committee members if HMRC regard them as culpable. Former committee members are only likely to be affected if either HMRC take the view that morally the liability and punishment is appropriate with them, or HMRC cannot recover the full liability from current committee members because they are for example made bankrupt.

Q15 - Who is the main contact for HMRC?

A15 - You can choose whoever is most appropriate at your organisation as to who HMRC use as a contact point. If you have multiple payrolls then you can nominate a different person for each if you wish, or you can centralise the contact so everything comes through one person. Whoever you choose, please be aware that communications such as new coding notices must be actioned straight away and it is therefore usual to nominate the person running the payroll as the contact point.

Q16 - When to start? Does PAYE need to be applied retrospectively?

A16 - If there is a requirement to subject payments to PAYE, this should be undertaken immediately. The committee will presumably take a view about the historic position, consider whether there has been a loss to the Exchequer and determine whether action is appropriate to correct the position or not.

## **Queries on specific details**

Q17 - What rate will NI be deducted at and how do we determine tax codes? Is it correct that the NI will be low or nil because payments are unlikely to be above the earnings threshold?

A17 - A new starter form should be completed by every office holder or employee not already on the payroll. This will determine the tax rate to be applied, but I would expect this to be BR (basic rate 20%) initially, although HMRC may issue amended codes later if they do not believe that BR will collect the correct amount of tax. HMRC will seek to collect additional tax from the individual if the overall income level of the individual requires tax at a higher rate than has been applied through the payroll. As long as this is not linked to another employment (unlikely) the normal nil bands for National Insurance will apply and therefore if the payments to each individual are small, the National Insurance liability may be very small, or even nil. This will have some impact on the question of whether tax has been lost to the Exchequer.

Q18 - Is there a way to reduce an impact on tax and NI fluctuations for the individual? (with their LOC work not being their main source of income in the majority of cases) (does monthly or quarterly payments make a difference?)

A18 - PAYE will be applied at the earlier of the time of payment and the entitlement to payment. The pay period will determine availability of National Insurance bands and the tax code will determine the amount of tax due. If the individual expects to be fully funded from a National Insurance perspective based on other income, they can apply for exception from National Insurance on this income. Whether this is worthwhile will depend on the likely level of income they are seeking exception on.

Q19 - Will LOCs need to register as an employer with HMRC?

A19 - Whichever entities are making payments will need to register for a PAYE scheme with HMRC, but this could be centralised so all payments go through one payroll rather than lots of local payrolls if you prefer.

Q20 - What's the process for LOC to take tax and NI and pass to HMRC?

A20 - Register for the PAYE scheme, process the RTI returns and submit these to HMRC on or before the day of payment to the individual. Tax and Employees National Insurance will be withheld from the payment to the individual and this is payable to HMRC with the Employers National Insurance due on these payments by 19<sup>th</sup> of the month. Tax months run to the 5<sup>th</sup> of a





month and therefore any deductions in respect of payments during the month to 5<sup>th</sup> January 2023 will be payable to HMRC by 19<sup>th</sup> January 2023.

Q21 - Will we need to do real-time reporting?

A21 - Yes, real time information (RTI) applies

[menzies.co.uk](https://www.menzies.co.uk)

## Local Optical Committee Support Unit

### **Determination of employment status for taxation purposes, and in consideration of wider, employment law related issues- Local Optical Committees' Members**

Hill Dickinson LLP

24 November 2022

#### **Background and scope**

HD LLP have been engaged to assist the Local Optical Committee Support Unit (LOCSU) with a review of the engagement of the Local Optical Committees' Members (LOCs Members). The purpose of the engagement is to assist LOCSU in:

- providing a clear, concise guidance to the LOCs on a point of determination of their Members' employment status for taxation and other, employment law related, purposes
- providing LOCs with a practical support by setting out recommendations in relation to steps that need to be taken going forward
- recommending the best options in terms of providing LOCs Members with payments/remuneration etc

Our opinion and advice below is based on the information provided and the discussions held.

## Executive Summary

Historically, people who hold office have not generally been viewed as employees, as the rights and duties of an office holder are defined by the office itself. However, certain office holders may hold office as part of a contract of employment or may even have a parallel, enforceable contract of employment separate to their office fulfilment. Whilst it is possible for organisations to make honoraria payments to office holders free from tax and National Insurance Contributions, that normally requires quite unique circumstances, as discussed below.

There is a presumption by HMRC that any payments, made to the LOCs' office holders, that are not associated with reimbursement for their expenses genuinely incurred in holding office and/or compensation for the lost employment income, should be taxed and subjected to NI deductions.

Put simply, we conclude that based on the information provided, individuals holding the following roles – (Vice)Chairman, (Vice)Treasurer, Secretary (and possibly others, depending on the circumstances) - would be considered office holders and should ordinarily be subject to PAYE for taxation purposes (unless in exceptional circumstances), but are not considered 'employees' in relation to employment rights unless there is a specific contract of employment in place defining otherwise or, in reality, have become employees due to their role expanding beyond that of an office holder.

## The Current Position

LOCs' employment and taxation practices in relation to their members' engagement are disparate, causing uncertainty and confusion amongst the Committees.

LOCSU aims to support LOCs by producing a more comprehensive and universal guidance in relation to the above, as well as suggesting potential ways forward and practical solutions to the current issues.

### **We have ascertained the following in relation to the current framework**

We understand that the following points are correct in relation to the functions of the Chairman, Treasurer, Secretary and Vice-Chairman and Committees:

- the functions of the LOCs are (more or less) defined in the Revised Guidance Model LOC Constitution (2017) at paras 1-9.
- Committee members will inevitably take part in fulfilling these functions, some members will also engage in other activities as prescribed by the nature of their particular roles (for example in complaints handling).
- As per para 4.4 of the Model Constitution Local Optical Committees 2016 document, a *Chairman, Treasurer and Secretary (where a lay secretary has not been appointed) shall be elected by the committee at the first meeting following the Annual General Meeting. They shall serve for one year and be eligible for re-election. A Vice-Chairman may also be elected on the same terms.*

We will assume that the above or similar apply to all LOCs for the purposes of advice below.

### Employment status assessment

A person who's been appointed to a position by a company or organisation but does not have a contract or receive regular payment may be an office holder. Some Committee members will be considered as office holders.

From the information provided, we conclude that individuals holding the following roles - Chairman, Treasurer, Secretary and Vice-Chairman (and possibly others), would be considered as office holders.

Historically, people who hold office have not generally been viewed as employees, as the rights and duties of an office holder are defined by the office itself.

Employment law cases have established that there are three categories of officer-holder:

- Those whose rights and duties are defined by the office they hold and not by contract (such as a police officer).
- Those who have the title of officer-holder, but who in reality are employees with a contract of service.
- Those who are both office holders and employees, such as company directors.

As the rights and duties of an office holder - such as Secretary, Treasurer, Chair & Vice-Chair, are defined by the office itself, office holders are usually not viewed as employees or workers. This would mean that they are not entitled to holiday pay, maternity leave, sick pay and other rights conferred on employees.

However, certain office holders may hold office as part of a contract of employment or may even have a parallel, enforceable contract of employment separate to their office fulfilment.

For example, regular remuneration received by office holders may be closer to earnings for work done than to an honorarium for tenure of office.

In order to determine whether a particular office holder or a Committee member is also an employee, the following factors should be taken into account, as they may indicate employment status:

**Question of remuneration & benefits;** is there a right to payment? If so:

- Is the payment fixed in advance or does it relate to the amount of work done?
- Is it paid by way of salary or an honorarium (a grant)?
- How much is the person being paid?

**The extent and weight of the person's duties performed** (the lesser the duties, the less likely the person is to be an employee).

**Question of control;** is the individual exercising the functions of an independent office or are they subject to close control; does the Committee control what the individual does, how they do it, where they do it and when they do it?

**Question of service;** is the individual in question required to provide their services personally, do they have a right to appoint a substitute?

**Nature and length of the engagement;** a period of employee's engagement does not normally relate to the performance of a specific task, or production of specified deliverable

**Integration;** is the individual working as part of a team within the organisation or an independent person holding an office within the committee?

**Financial risk assumptions associated with the role;** in employment an individual is paid even if there is not sufficient work to keep them fully occupied, thus, the individual assumes no financial risk in working for the employer.

To put the above into a more practical perspective, if individuals work full-time for the Committee in return for a substantial remuneration, including pension and/or any other benefits, which cannot be described as an honorarium, they are likely to be deemed employees.

Similarly, if their duties go well beyond what the Constitution requires of them, they cannot be considered to be defined by their office and will amount to duties fulfilled in a course of an employment.

**Therefore, determination of individuals' status of employment will be subjected to the above scrutiny and depend on many factors which will need to be assessed on a case-by-case basis.**

### **Determination of employment status for tax purposes**

It is important to note that it is possible for a person to be considered as an employee in employment law but have a different status for tax purposes. Employers must work out each office holder's status in both employment law and tax law.

For tax purposes, there is no statutory definition of the word 'office'. It has been judicially defined as a 'permanent, substantive position which had an existence independent from the person who filled it, which went on and was filled in succession by successive holders.'

Office holders are treated in the same way as employees for income tax and NICs purposes.

**The HMRC's Employment Status Manual states the following:**

*'(...) Officials elected under the constitution of bodies such as social clubs hold offices. But they will not be taxable on employment income/liable for Class 1 NICs unless it can be shown they are receiving emoluments(earnings)/in gainful employment. If all that happens is that an official is reimbursed the extra costs he or she is put to for doing that work for NICs purposes there is no gainful employment. The cost of travelling from home to the place where the work is done is such an extra cost.*

The only income that would not be subjected to NIC deductions and taxation is that paid in respect of the expenses incurred while fulfilling the duties of the office. Therefore, if the office holder's income is limited to reasonable expenses incurred, then such payments will

not be subject to tax. Any payment over and above expenses incurred will be subject to taxation and NICs in the usual way.

However, in particular circumstances applicable to LOCs, those who 'sacrifice their employment income', for the reasons associated with fulfilment of their office duties, may receive compensation for lost employment income payments. These will also not be subjected to taxation and NI deductions. For further information, see the Enactment of Extra-Statutory Concessions Order 2018 which provide:

**-that no liability to income tax arises in respect of a payment made by a relevant authority to a person if—**

*(a)the person holds a voluntary office with the authority,*

*(b)the person carries out duties of the office in a period in which he or she is also employed, and*

*(c)the payment is made solely to compensate the person for lost employment income for the period (and accordingly does not exceed the amount of that income).*

*(2) For the purposes of subsection (1) a person holds a voluntary office if, at the time the payment referred to in that subsection is made, the person—*

*(a)is not entitled to any payment or benefit in connection with carrying out the duties of the office,*

*(b)has not received any such payment or benefit, and*

*(c)does not expect to receive any such payment or benefit.*

*(3) For the purposes of subsection (2)(a), (b) and (c) disregard—*

*(a)a payment in respect of reasonable expenses incurred in carrying out the duties of the office, and*

*(b)a payment to which subsection (1) or section 16A of ITTOIA 2005 applies.*

*(4) In subsection (1)(c) "lost employment income" means the difference between—*

*(a)the amount of employment income, after deduction of tax and national insurance contributions, that the person would have received from the employment for the period if he or she had not carried out the duties of the office, and*

*(b)the amount of employment income, after deduction of tax and national insurance contributions, that the person did receive from the employment for the period.*

*(5) In subsection (1) "relevant authority" means any of the following*

*(...)*

*A body (other than a company) that is established by or under a statutory provision for the purpose of carrying out functions conferred on it by or under a statutory provision..’<sup>1</sup>*

The compensation for lost employment income payments is very circumstance-specific and need to meet the aforementioned criteria. Tax advice should be taken before relying on such concessions.

## **Our Opinion & Recommendations**

Every LOC’s member(s) should be subjected to the above scrutiny for the purpose of determining their employment status in employment law as well as for taxation purposes

In relation to employment status, whether the LOC considers an individual is an office holder and/or an employee, it is important to document that relationship in a written agreement.

All employees have the right to a written statement setting out the basic particulars of employment required to be given to employees under section 1 to section 3 of the Employment Rights Act 1996.

It is important to understand that employees have the right to annual leave, rest break, maternity leave/pay and the right to a fair dismissal. These and other rights should be set out in the contract of employment or a policy document.

Should LOCs have concerns about underpayment of income tax and/or NICs, obviously, specific advice should be taken. HMRC may impose penalties where there has been a failure to notify chargeability to income tax, e.g. a former employee becoming self-employed and failing to notify that they are subject to self-assessment. The amount of the penalty is calculated with reference to a percentage of the potential lost revenue.

However, there is an opportunity to satisfy HMRC that it took reasonable care to comply with the relevant regulations and that the failure to deduct the income tax was due to an error made in good faith. If these circumstances apply, HMRC may direct that the LOC is not liable to pay the under-deduction.

Should LOCs have concerns regarding either the employment and/or tax status of LOC Committee members, specific legal or accounting advice should be taken.

---

<sup>1</sup> In relation to the last point, it is understood that LOCs are bodies created by statute under s.125 of the NHS Act 2006.

## Useful links

<https://www.gov.uk/employment-status#content>

<https://www.gov.uk/government/collections/employed-or-self-employed>

<https://www.gov.uk/government/publications/employment-status-factsheet-esfs1/employment-status-factsheet-esfs1>

<https://www.gov.uk/guidance/check-employment-status-for-tax>

<https://www.gov.uk/hmrc-internal-manuals/employment-status-manual/esm2502>

<https://www.gov.uk/guidance/understanding-off-payroll-working-ir35>



### LOC Office Holder Guidance

#### Employment & taxation status - next steps and useful links

##### Next steps for LOCs

- 1) Every LOC should undertake an employment status check against the points above (simple 2-page LOCSU template checklist provided for ease) for each of its Committee members to ensure status as Committee member, employee or office holder. The results should be documented and held on file.
- 2) Every LOC should undertake a taxation status check for all office holders (following guidance above) and employees (CEST tool) to ensure appropriate tax and NICs have been applied to honorarium and expenses/reimbursement payments. The results should be documented and held on file.
- 3) Where PAYE applies but has not been previously paid, LOCs should rectify this situation immediately to mitigate future risk and include the risk of potential HMRC clawback to their risk register (HMRC can clawback up to 6 years tax and NICs).
- 4) Where a Committee member or office holder is funded via a limited company/practice, different rules may apply (including IR35). It is important that the LOC is satisfied the 'company' receiving income is aware they are responsible for all tax and NICs and that this is not the responsibility of the LOC. This should be documented and held on file.
- 5) LOCs should seek LOCSU and/or appropriate professional legal and financial advice.
- 6) In exploring future PAYE/payroll provision, there are a few options open to LOCs. LOCs can run this in house or many accountants/bookkeepers can run this service simply and inexpensively (consider approaching LOC accountant or a member practice accountant for support). Alternatively, please contact LOCSU for support. If sufficient LOCs require payroll services, LOCSU will provide this support as a national service or via 'batch' purchasing to reduce the cost and demand for LOCs. LOCSU will provide this service free of charge to member LOCs (the cost will be absorbed in the existing levy payments).
- 7) LOCs should run the 'status check' process on an annual basis/for each newly elected office holder. If the role of a Committee member changes to include specific duties/title, again this 'status check' should be re-run to ensure a new 'office holder' position has not been created. Results should always be documented and held on file.

## Next steps for LOCSU

- 1) In redrafting the Constitution and guidance, LOCSU will ensure that the above information is clearly reflected. Particularly in relation to the officer holder roles and election guidance
- 2) LOCSU will explore central payroll options and provide payroll services (potentially via an external company) at no additional cost to member LOCs should LOC demand be sufficient.
- 3) LOCSU to convene online Treasurer Forums (with professionals present) 23, 26 and 30 January 2023 to discuss this guidance and ascertain appetite for LOCSU provided payroll services.
- 4) Recognising potential wider impact, LOCSU to convene an additional webinar, early February, for all LOC officers for further discussion and address outstanding questions.
- 5) LOCSU will provide case by case support and advice for LOCs, in particular their Treasurers, to ensure this advice is put into action and to mitigate further risk.
- 6) LOCSU will provide FAQs and template checklists (both provided with this guidance) and election letters to assist process and documentation to office holder roles.
- 7) LOCSU to review this advice annually and revise as appropriate

## Useful links

<https://www.gov.uk/employment-status#content>

<https://www.gov.uk/government/collections/employed-or-self-employed>

<https://www.gov.uk/government/publications/employment-status-factsheet-esfs1/employment-status-factsheet-esfs1>

<https://www.gov.uk/guidance/check-employment-status-for-tax>

<https://www.gov.uk/hmrc-internal-manuals/employment-status-manual/esm2502>

<https://www.gov.uk/guidance/understanding-off-payroll-working-ir35>

## LOC Office Holder Guidance

### Employment/PAYE Status Checklist



*Working through this checklist will give an indication on status and PAYE requirements for your Committee Members and Office Holders. This checklist should be retained for your records and reviewed annually and/or with any change in duties or arrangements. This checklist is not definitive legal advice but will help inform your decision making and is a useful tool when seeking further professional advice should this be required.*

Name: ..... Role: ..... Date: .....

Consideration	Yes	No	Unsure
<b>Remuneration &amp; benefits</b>			
Is there a right to payment?			
Is the payment fixed in advance?			
Does payment relate to the amount of work done?			
Is payment by way of salary or honorarium (do not include grants)?			
Does the individual receive pension?			
Does the individual receive other benefits (do not include expenses)?			
<b>Extent and weight of duties performed</b>			
Is there a contract of service?			
Is there a contract of employment?			
Are the rights and duties defined by the office itself rather than the individual?			
Do the duties go beyond those defined in the Constitution and/or role description templates provided by LOCSU?			
<b>Control</b>			
Does the Committee control what the individual does?			
Does the Committee control how they carry out their duties?			
Does the Committee control location of work?			
Does the Committee control when they do their work?			
<b>Nature and length of the engagement</b>			
Does the period of engagement relate to the performance of a specific task?			
Does the period of engagement relate to production of specified deliverables?			
Are the duties fulfilled under the engagement being discharged on a regular basis?			

Consideration	Yes	No	Unsure
<b>Service</b>			
Is the individual required to provide their services personally?			
The individual CANNOT provide/appoint a substitute in their place to carry out the duties?			
<b>Integration</b>			
Is the individual working as part of a team within the organisation?			
Is the individual holding a defined constitutional office within the committee?			
<b>Financial risk assumptions associated with the role</b>			
Is the individual paid even if there is not sufficient work to keep them fully occupied?			
Can it be assumed by the individual that there is NO financial risk associated with their role, as payment(s) will be made and/or benefits provided to them irrespective of work undertaken?			
<b>Outcome</b> (total columns)			

Every 'yes' points to PAYE being the appropriate route for payment. Where the majority of answers are yes, please consider the additional questions below then seek additional advice from LOCSU and/or professional advisors. You should also consider the following questions should your tally have no clear majority.

### Further considerations if unclear outcome

How much is the individual being paid?

(Substantial payment is more likely to point to an employment than not)

How many hours does the individual work?

(Full time or large proportion of defined working hours is more likely to point an employment relationship than not)

Is the individual exercising functions of an independent office?

(They decide and control their workload and working arrangements)

### General summary of PAYE applicable payments

Payment by way of honorarium, salary, 'retainer' for office holder and/or employer roles

**= PAYE (tax & NICs applicable)**

Payment by way of reasonable expenses to fulfil duties

**= NOT subjected to taxation & NICs**

Payment by way of compensation for lost income

**= MUST seek further professional tax advice, no taxation & NICs applicable in specific circumstances.**

**IMPORTANT NOTE:** LOCSU does not provide legal or financial advice and, thereby, excludes all liability whatsoever arising where any individual, person or entity has suffered any loss or damage arising from the use of information provided by LOCSU in circumstances where professional legal or financial advice ought reasonably to have been obtained. LOCSU strongly advises individuals to obtain independent legal/financial advice where required.