



FAQs following the sessions with LOCs, LOCSU and Andrew Brookes, Menzies LLP

Advice provided by Andrew Brookes, Menzies LLP

LOCSU has organised central professional legal and financial advice on PAYE at the request of and to support LOCs. If you have independent professional advice that differs, it is entirely appropriate for you to follow your own professional advisor's recommendations as they will carry appropriate insurance to indemnify you as their client when you follow their advice. As always, if you put two professionals in the room you may get two different answers! Please ensure you follow your own advisor's advice and simply file correspondence that demonstrates you are acting upon their instruction and seek independent advice where you remain uncertain.

Who needs to have PAYE applied

- 1. Can there be some clarification on difference between office holders and the rest of the committee and clear guidance given on PAYE obligations for both.**

If all officers/committee members properly include LOC payments/income through self-assessment/accountant, thus tax etc is paid already, is this whole HMRC issue still applicable?

PAYE applies automatically to payments to office holders or employees, including honoraria.

There is a "grey" area on whether a junior committee member is an office holder in the same way as office holders and so LOCs need to determine the status of committee members and every LOC should:

- complete the 2-page checklist provided by LOCSU in December to check employment status of all Committee members and taxation status check of all office holders.
- Undertake a taxation status check for all office holders and employees ([CEST tool](#))
- The risk-free option is to regard all committee members as office holders and to apply PAYE to all payments to committee members.

- 2. If we all err on side of caution don't we set a precedent of assumed "law" and thus put those on the other side of the grey at risk?**

The payer is the one with responsibility here and it is the payer that carries the risk of not applying PAYE when they should have done so. If you take the view that a junior committee member is not an office holder and then also you complete a status assessment showing that the relationship is indicative of business to business then you will not apply PAYE. The difficulty arises if HMRC undertake a review and conclude that all committee members are office holders and that you have failed to apply PAYE. The LOC and the committee members will be jointly and severally liable for the tax, interest and penalties arising.

A LOC taking the view that all payments are subject to PAYE does not remove the "grey" for another LOC and another LOC could conclude a different treatment is appropriate. However, the reason for the "grey area" is purely because the meaning of the term "office holder" has not been clarified beyond doubt in the tax legislation and we therefore need to rely on general law definitions. The published court cases do not relate to committee members and therefore it is uncertain whether the court would support HMRC with such a challenge or not. This does not prevent HMRC seeking to treat all committee members as office holders and if they do, the likelihood is that you would concede the point because



the costs of defending this in court are likely to far outweigh the size of the settlement and it would not be cost effective to take this action. Even if you do challenge in the courts, this is at best a 50:50 situation where you are as likely to lose as you are to win.

3. There is concern that committee members will be paying more tax

All LOC committee members will currently be paying tax on their LOC payments and so are unlikely to be paying any more tax. It's the method and timing that will be different.

National Insurance

4. Will LOC committee members be paying more National Insurance?

It is likely that there will be nil band applied to LOC payments up to a threshold, currently £12,570 for employee contributions and £9,100 for employer contributions. If the pay goes over these thresholds and so pays NI on the LOC payments, and they expect to be fully funded from a National Insurance perspective based on other income, they can apply for exception or deferment from National Insurance on this income by contacting HMRC.

5. What's the maximum amount of NI?

There is no longer an upper cap because 2% contributions apply to all earnings, but there is a maximum contribution on your total earnings and excess contributions are repayable. Where contributions are likely to result in overpayment, the individual can claim for either exception or deferment.

6. Does the LOC have to register as a business and will it be liable for employer NI

If the LOC is running its own payroll then it will need to register with HMRC and apply for a PAYE scheme so that it can pay over deduction to HMRC.

7. Greater Manchester Confederation isn't an LOC, and so do we need to apply PAYE?

This doesn't change anything if it is still making payments for the service provided by committee members. PAYE will apply automatically to payments to anyone regarded as an office holder and a status check on individuals, not regarded as office holders, needs to be done and decision made as to whether a non-office holder is an employee or an independent business and whether PAYE needs to be applied.

Payments

8. Can LOC committee members have their payments paid to their Limited Company?

If the engagement is with an individual, the tax position relates to the individual. Payments should not be made to a Limited Company unless the contractual arrangements are with that Limited Company. Even then, IR35 is likely to apply automatically to the payments if the individual is undertaking an office holder role for the LOC. Exemptions from IR35 are extremely unlikely to apply.

9. If a small practice owner is an LOC officer and attends a daytime meeting they would be paid via PAYE net of tax. If the expenses are treated as payable to the business then that can in effect come in and go back out to the locum who covered for them. However, if it's paid as PAYE, the practice makes a loss for the optom attending LOC business. Is there a way around that to avoid putting small practice off LOC work?

The payment from the LOC is for the services provided by the individual, not the business and therefore PAYE will apply to these payments. As far as the business is concerned, the locum costs will reduce the



profits (because the LOC fee is not business income and the locum is providing services to the business). Therefore, the individual will pay tax personally on the LOC fee, but the business will pay less tax because it has the locum cost, but not the income. If the business is a sole trade then this in turn directly results in less tax payable by the individual because a lower trading income is declared and the overall tax position is broadly neutral. Alternatively, if the business is a company, the individual can reduce their pay from the company by the amount now paid by the LOC and again leave themselves in a roughly tax neutral position.

10. Do direct expenses eg. travel, subsistence etc need to have PAYE deducted?

PAYE isn't due on qualifying business expenses such as travel, subsistence, parking payments etc.

11. Some LOCs hold funds for project work, such as a 'wellbeing grant' and make payment to optical practices but also pay a committee member from this fund for the time they spend on the project. Are the payments to the committee member subject to PAYE?

The nature of the payment will determine the tax position. If this is a non-taxable grant payment then it would not be subject to PAYE. Likewise if this is a payment in respect of a genuine commercial contract between a LOC and a limited company for services provided by the company, then this would not be subject to PAYE, although it would be business income for the company and VAT may be payable. However, if the payment is for services provided by an individual committee member to reflect committee duties performed then it will be subject to PAYE.

12. Can LOC committee members claim a working from home payment?

This is a decision for each LOC and is only for items such as heating, lighting, broadband etc. and the current rate is £6 per week and is tax free if the conditions are met. The LOC can make a higher payment, but some of it will be taxed unless it can be proved that it is the true working from home cost. For this payment to be tax free, there must be a requirement for the individual to work from home to perform at least some of their LOC duties.

Any specific costs such as computer software etc would be covered under the LOCs existing expenses procedure.

13. Can LOC committee members take into account the £1K traders allowance?

This is only relevant to non-office holders whose total self-employed income from all sources is very small and likely not to be applicable. The bigger question is – what trade are they performing that they are setting this allowance against? Being a committee member is not a "trade" and it is difficult to see how this allowance could apply.

Payroll

14. How onerous is PAYE going to be for LOCs?

LOCSU is looking into providing payroll services for LOCs to make this as easy as possible for them. It will be provided through the existing levy payment and so will be at no additional charge to LOCs. Alternatively, if an LOC wants to do their own payroll then it can be done inhouse using HMRC basic tools, alternative payroll software and or employ a bookkeeper/payroll service. This should not be onerous, but costs associated with this option will rest with that LOC. RTI submissions must be submitted on or before payment to the individual and it therefore sensible to standardise payments to keep the number of submissions to a minimum.



15.Can LOCs use HMRC Basic PAYE tools?

Basic PAYE Tools is free payroll software from HM Revenue and Customs (HMRC) for organisations with fewer than 10 people - <https://www.gov.uk/basic-payee-tools>

16.When to start PAYE?

PAYE should start as soon as possible, but for practicality reasons, you will probably start in line with the new tax year on 6 April 2023.

17.Does PAYE need to be applied retrospectively?

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.

18.When should payroll be run?

This is for LOCs to decide and is likely to be monthly or bimonthly. If an LOC has any employees who are paid via PAYE, then their payment period is a maximum pay period of a month.

19.Clarification on pensions and when auto-enrolment applies?

This only applies to employees. An office holder agreement, making it clear that auto-enrolment pensions and other employment rights do not apply, is recommended.

20.How to get tax codes and how will it affect people already paying higher rate tax?

Each individual will complete a new starter form. This is likely to indicate that this is not their only employment or pension and therefore BR (basic rate (20%)) code will apply. This code will only change if HMRC issue a different code. For the individual, this income will be added to their other income either through the tax return process, or by HMRC if tax returns are not required from the individual, and if tax of say 40% is due on this income, the balance will be payable by the individual. Likewise, if the individual has suffered too much tax at source, they will be entitled to a tax repayment.

Liability and further help

21.Who is legally liable if the LOC decide to continue without PAYE?

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.

22.Given that most LOCs have not done this yet, does this mean as soon as we register LOC as an employer, then HMRC will hit us for back tax and how many years can they backdate?

There is a risk of historic taxes, but you would argue that you have acted in good faith and that the individuals have declared the payments and paid their tax and consequently there has been no loss to HMRC. This defence is significantly weakened, having been through this process. A LOC should therefore think carefully before deciding to ignore the advice and not subject future payments to PAYE.

23.What would be a predicted liability fine?

The liability would be based on the loss of tax and National Insurance to HMRC, the length of time and how serious HMRC regard the problem. If payments have been made to limited companies rather than



individuals where the relationship is actually between the LOC and the individual, the liability will be higher because of the different legal entities involved.

24.Can we have a copy of the letter that was mentioned?

In the event of an enquiry by HMRC you should request that your agent prepare Demibourne letters enabling the offset of tax paid by individuals against the liability now sought from HMRC. It is not possible to provide letters now because they need to reflect the specific individual circumstances, names, addresses amounts, etc. Demibourne letters are not possible where the payments have been paid to a Limited Company because this is a separate legal entity to the individual and there is no possibility of offset.

25.If LOC committee members are concerned about PAYE, where should they be directed?

If LOC committee members want to discuss their concerns, they should contact their tax advisor. However they shouldn't be concerned as their LOC payments are taxable income and it's just the method of paying tax (and NI) that will be changing.

26.Office holder agreement

LOCSU is devising a template for LOCs to use which clarifies the role of office holders and confirms that they are not employees and therefore not entitled to sick pay, pension etc.

27.Are we looking at LOCs as business or not for profits organisation or charities, as this may vary based on the constitution of the LOC

This question does not affect the question of PAYE in any way. Regardless of whether it is a business, a not-for-profit organisation, a charity, or even an individual that is paying (either an employee or office holder) for services, they are required to apply PAYE. This applies equally to a pensioner paying a carer, to a big business employing thousands of staff. Unless there are no deductions due to HMRC for any individuals paid (e.g. because every single one of the individuals has completed a new starter form to say this is their only / main employment and they do not draw a pension and the pay is below £9,100 for every single person) then a PAYE scheme is required.

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