What is the Criminal Finances Act 2017?

The Government has introduced new corporate offences of failure to prevent the criminal facilitation of tax evasion contained in the Criminal Finances Act 2017 which came into force on 30 September 2017.

The Act makes businesses liable for the actions of their employees and other 'associated persons' who intentionally facilitate tax evasion. Businesses will be liable even in cases where senior management were either uninvolved or unaware of the acts. Those found guilty will potentially face unlimited fines, a criminal record, and will be barred from public sector procurement.

In Summary

The offences cover both UK and foreign tax evasion and there are separate offences for:

- Facilitating the evasion of UK taxes by anyone, anywhere in the world, and;
- Facilitating the evasion of overseas taxes by UK persons anywhere in the world.

Three elements are required in order for the offences to apply:

1. Fraudulent tax evasion by a taxpayer (either an individual of a legal entity) under existing law.
2. The criminal facilitation of the tax evasion by a person associated with the relevant body who is acting in that capacity.
3. The relevant body failed to prevent the person associated with it from committing the criminal facilitation act.

The relevant body has a defence if:

- It has put in place 'reasonable prevention procedures' to prevent associated persons from committing tax evasion facilitation offences; or
- It is unreasonable to expect the relevant body to have such procedures in place

'Relevant body' means incorporated bodies and partnerships (i.e. not individuals)

'Associated person' is widely drawn and means a person who is an employee, agent or other person who performs services for or on behalf of the relevant body. The associated person can be an individual or an incorporated body.

The need to make preparations

The offences came into force on 30th September 2017 so recruiters need to act now to assess what steps they need to take to enable them to comply with the legislation. The legislation overlaps with both the Bribery Act and Anti-Money Laundering policies and procedures.

Risk assessment

The first step on the journey is to carry out and document a risk assessment identifying potential areas of risk. As the definition of 'associated person' is widely drawn it will cover both your employees, contractors, freelancers, and other suppliers. As the definition includes both individuals and corporate bodies you can no longer rely on the corporate veil. The assessment needs to identify areas of risk that senior management may not know about or have turned a blind eye to in the past.

Some examples:

- Employee accepting incentive payments and not declaring and tax and NI due.
- Employee accepting incentive payment to refer contractors to tax evasion schemes.
- Business paying an intermediary which facilitates tax evasion (e.g. disguised remuneration).
- Business referring contractors to a tax evasion scheme in return for timesheet rebate.
- Business continuing to trade with contractors/freelancers knowing they participate in a tax evasion scheme.

Prevention procedures

In particular recruiters should focus on having appropriate prevention procedures in place. The guidance note is clear that in the event that a facilitation offence takes place, it is a defence for a business to show that reasonable prevention procedures were in place. Guidance is formulated around six guiding principles for the prevention procedures:

1. Risk assessment
2. Proportionality
3. Top level commitment
4. Due diligence
5. Communication and training
6. Monitoring and review

How can these risks be managed?

The larger and more complex the business, the greater the risk. Recruitment agencies need to take action to mitigate their risk, being unaware of potential issues is not a defence. These are the steps that FCSA recommends you take urgently:

1. **Risk assessment.** If you haven't yet considered how the Criminal Finance Act might affect your business, you should undertake a risk assessment as soon as possible. Ensure that the mitigating measures identified in your risk assessment are actually implemented in practice.
2. **Regularly review policies and risk assessments.** Don't allow your policies and risk assessments to become documents that are never used or referred to. You should regularly review and update them to ensure they stay relevant for your business.
3. **Communicate regularly with your whole team.** In addition to deciding policies and procedures you should communicate these regularly to your whole team, and make it part of your induction for new staff. You could still be at risk if only one person unwittingly facilitates tax avoidance, just once, perhaps on their first day at your firm.

4. **Audit your PSL.** When did you last review and do due diligence on your PSL? Do you really know that your chosen partners are not facilitating tax avoidance? You must be confident that any firm being recommended to contractors via your business is not a tax avoidance scheme. If this is too big a task, simply stick with firms that have proven their credentials, such as FCSA Accredited Members who have been independently audited by regulated accountants and solicitors.
5. **Enforce your PSL.** If you already have a preferred supplier list of firms that you have already done due diligence and know they operate compliantly, make sure you enforce it. Your staff need to know about the PSL and the importance of sticking only to audited companies on the PSL. You need to have a policy in place governing this, otherwise there is a risk that you have not prevented tax evasion.
6. **Manage all referrals and incentives associated with your business.** Decide on your policy and ensure that your whole team knows what is expected of them. For example, some recruitment agencies operate a zero-tolerance approach where their staff are expressly not allowed to receive any incentives directly, and some will only permit vouchers or similar.
7. **Ensure that tax is paid by firms offering incentives.** In addition to your referrals policy, if you decide vouchers or similar are acceptable incentives you will want to ensure that the firm providing these is paying tax appropriately.

Summary

The new legislation is significant, it is very broad and could have dramatic consequences. Doing nothing is not an option. Ignorance is not a defence. However, undertaking due diligence and having policies and processes that minimise your risk should enable you to prove you have taken reasonable steps to prevent the facilitation of tax evasion by your business.

About FCSA

The Freelancer & Contractor Services Association is the market-leading independent trade association for umbrella firms and specialist contractor accountants. We are commintted to raising standards and minimising risk, which is why FCSA Accreditation is the preferred compliance standard for many agencies.