



Employment Status Consultation

HM Treasury, HM Revenue & Customs and
Department of Business, Energy & Industrial Strategy
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EMPLOYMENT STATUS CONSULTATION RESPONSE

Chapter 4: Issues with the current employment status regimes		
1	Do you agree that the points discussed in this chapter are the main issues with the current employment status system? Are there other issues that should be taken into account?	Yes, we agree that the points discussed in this chapter are the main issues.
Chapter 5: Legislating the current employment status tests		
2	Would codification of the main principles – discussed in chapter 3 – strike the right balance between certainty and flexibility for individuals and businesses if they were put into legislation? Why / Why not?	<p>We are in favour of codification in terms of a comprehensive consolidation of the main principles set out in legislation and case law.</p> <p>The codification of our existing discrimination law has helped promote certainty. We believe a similar project in relation to maternity and parental rights is also long overdue and would help promote other Government objectives.</p>
3	What level of codification do you think would best achieve greater clarity and transparency on employment status for i) individuals and ii) businesses – full codification of the case law, or an alternative way?	<p>We think a full codification of case law would achieve greater clarity and transparency. We support the flexibility provided by the three categories of employee, worker and self-employed as it provides a greater range of options for both individuals and businesses.</p> <p>It would be a real benefit to align the definition of non-employee worker across the main employment protection legislation, the Equality Act and the Trade Union and Labour Relations (Consolidation) Act 1992. Currently all three groups of provisions have slightly different definitions, which adds to complexity and promotes uncertainty.</p>
4	Is codification relevant for both rights and/or tax?	<p>Yes – though a focus on the definition of worker for employment rights purposes will not really help draw the line for tax purposes between non-employee workers who are taxed as self-employed and those who are subject to PAYE or other arrangements for deduction of tax at source.</p> <p>We think realistically there will always be a need for specific tax rules to address particular industries and employment practices. It may be that this</p>

		consultation might prompt some progress, at least in making the Revenue rules more accessible to businesses and employees.
5	Should the key factors in the irreducible minimum be the main principles codified into primary legislation?	Yes.
6	What does mutuality of obligation mean in the modern labour market?	It means that there is an obligation placed on the business to provide work and in turn for the individual to carry it out.
7	Should mutuality of obligation still be relevant to determine an employee's entitlement to full employment rights?	Yes.
8	If so, how could the concept of mutuality of obligation be set out in legislation?	It should be set out in plain and easily understood terms to assist the parties and also the courts with interpretation. We do not see that there is any need when considering the definition to provide a minimum platform level of working hours
9	What does personal service mean in the modern labour market?	We believe it means that the individual is engaged to perform the service personally, and that they are not in business on their own account. There may be some room for substitution or delegation on a limited basis for non-employee workers.
10	Should personal service still be relevant to determine an employee's entitlement to full employment rights?	Yes.
11	If so, how could the concept of personal service be set out in legislation?	See response to Question 9 above.
12	What does control mean in the modern labour market?	Employment relationships are so varied, that we don't think it is useful to look at control in isolation. In general, the more unskilled the role, the greater the degree of control exercised by the entity paying for the service.
13	Should control still be relevant to determine an employee's	Yes.

	entitlement to full employment rights?	
14	If so, how can the concept of control be set out in legislation?	The concept of control should be determined by examining the extent to which an individual is integrated in the business and has the freedom to direct and influence their work weighed up against the direction provided by the business.
15	Should financial risk be included in legislation when determining if someone is an employee?	If codification is attempted, we agree that the degree of financial risk would be a relevant factor.
16	Should 'part and parcel' or 'integral part' of the business be included in legislation when determining if someone is an employee?	Yes. We do not see that any departure from the irreducible minimum is advisable when examining employment status
17	Should the provision of equipment be included in legislation when determining if someone is an employee?	Yes, this will still be an important part of determining status. If the engaging body does not supply the equipment then the individual is likely to be self-employed.
18	Should 'intention' be included in legislation when determining if someone is an employee in uncertain cases?	Yes, we agree this could be relevant, though it should not be an overriding criterion. In general, the more equal the bargaining position, the greater weight it should assume.
19	Are there any other factors that should be included in primary legislation when determining if someone is an employee? And what are the benefits or risks of doing so?	Yes, if codification is attempted the relative bargaining position of the parties should be considered.
20	If government decided to codify the main principles in primary legislation, would secondary legislation: i) be required to provide further detail on top of the main principles; and ii) provide sufficient flexibility to adapt to future changes in working practices?	Yes, we think that primary legislation would set out the principles for universal application but that secondary legislation would provide the flexibility needed to be sector specific.

21	Would the benefits of this approach be outweighed by the risk of individuals and businesses potentially needing to familiarise themselves with frequent changes to legislation?	Yes. We think codification would bring greater clarity as it would set out the main principles and draw on recent decisions.
Chapter 6: A better employment status test?		
22	Should a statutory employment status test use objective criteria rather than the existing tests? What objective criteria could be suitable for this type of test?	<p>If the aim is simplicity and certainty of application, then "yes". This should come in two parts, a presumption of employment in the absence of work being undertaken in the course of a business conducted by the individual; the second stage, if the presumption were challenged by the "employer" would be on the basis of:</p> <ul style="list-style-type: none"> i) Mutuality of obligation ii) Personal service iii) Control
23	What is your experience of other tests, such as the Statutory Residence Test (SRT)? What works well, and what are their drawbacks?	Not in a position to comment
24	How could a new statutory employment status test be structured?	See above at 22
25	What is your experience of tests, such as the Agency Legislation tests for tax, and how these have worked in practice? What works well about these tests in practice, and what are their drawbacks?	Not in a position to comment
26	Should a new employment status test be a less complex version of the current framework?	Yes – it would give greater certainty and limit the opportunity for avoidance.
27	Do you think a very simple objective or mechanical test	Such a reaction is possible – there will be those who attempt it. The suggested test at Q22 could be

	would have perverse incentives for businesses and individuals? Could these concerns be mitigated? If so, how?	undermined by an employer seeking to avoid one of the elements. The German 3 out of 5 test has much to recommend it.
28	Are there alternative ways, rather than legislative change, that would better achieve greater clarity and certainty for the employment status regimes (for example, an online tool)?	This is an important issue and one for which primary legislation ought to be introduced.
29	Given the current differences in the way that the employed and the self-employed are taxed, should the boundary be based on something other than when an individual is an employee?	Ideally there should be alignment between the tax and employment models but it is accepted that may not be feasible (see above). The boundary as suggested appears to this Committee to be the only workable approach.
Chapter 7: The worker employment status for employment rights		
30	Do you agree with the review's conclusion that an intermediate category providing those in less certain casual, independent relationships with a more limited set of key employment rights remains helpful?	Yes although greater clarity around the divide between the three categories would be preferable.
31	Do you agree with the review's conclusion that the statutory definition of worker is confusing because it includes both employees and Limb (b) workers?	Yes.
32	If so, should the definition of worker be changed to encompass only Limb (b) workers?	Yes
33	If the definition of worker were changed in this way, would this create any unintended consequences on the employee or self-employed categories?	Not if the necessary clarity between the three tiers were otherwise in place.

34	Do you agree that the government should set a clearer boundary between the employee and worker statuses?	Yes
35	<p>If you agree that the boundary between the employee and worker statuses should be made clearer:</p> <ul style="list-style-type: none"> i. Should the criteria to determine worker status be the same as the criteria to determine the employee status, but with a lower threshold or pass mark? If so, how could this be set out in legislation? ii. Should the criteria to determine worker status be a selected number of the criteria that is used to determine employee status (i.e. a subset of the employee criteria)? If so, how could this be set out in legislation? <p>Or, is there an alternative approach that could be considered? If so, how could this be set out in legislation?</p>	<p>We believe that (ii) is the correct approach We believe the key differentiator would be mutuality of obligation</p>
36	What might the consequences of these approaches be?	As with any change in legislation there is the risk of further litigation as status is challenged under the new provisions.
37	What does mutuality of obligation mean in the modern labour market for a worker?	That when work is offered or required there is an obligation that it be undertaken.
38	Should mutuality of obligation still be relevant to determine worker status?	Yes but it should not be as fundamental as with employees.

39	If so, how can the concept of mutuality of obligation be set out in legislation?	By adopting a statutory definition of that obligation for the purposes of this legislation.
40	What does personal service mean in the modern labour market for a worker?	Our view is expressed above – "You are required to undertake tasks personally as and when you agree to undertake the relevant work".
41	Should personal service still be a factor to determine worker status?	If there are to be workers then yes. The absence of that obligation is an indication that there is an element of a broader business operation – others are employed to do task or the tasks are subcontracted externally.
42	Do you agree with the review's conclusion that the worker definition should place less emphasis on personal service?	No. If an individual is entitled to procure and goes on and procures that someone else can do work assigned to them then they should not be entitled themselves to benefit from the protection and rights afforded to a worker (see the Deliveroo case in the CAC).
43	Should we consider clarifying in legislation what personal service encompasses?	Yes. It is our suggestion that it should encompass the right to substitute and the active exercise of that right. We have considered but have rejected a threshold percentage of case in which that right can be exercised before it is lost.
44	Are there examples of circumstances where a fettered (restricted) right might still be consistent with personal service?	Not in the view of this Committee. If you are entitled to have someone else perform the task given to you, and you exercise that right then there is no concept of "personal service"; you have agreed to procure the performance of the task and that is all.
45	Do you agree with the review's conclusion that there should be more emphasis on control when determining worker status?	Yes, but it goes further than that. However if the control is as set out in para 7.24 then the individual has no room for manoeuvre – what is the objective difference between them and an employee?
46	What does control mean in the modern labour market for a worker?	That they are to perform the task assigned in a manner specified by the employer and, in many cases, in the livery mandated by that employer.

47	Should control still be relevant to determine worker status?	If the status is retained then it is fundamental. The properly self-employed are retained to deliver an outcome without prescription as to how it is achieved. Workers have to act as directed.
48	If so, how can the concept of control be set out in legislation?	It is part of the test (but only one part). The issue of "Is the worker subject to the control of the employer" is a factual issue for an ET unless legislation is used on the basis that if a threshold number of issues/element are present then control is deemed.
49	Do you consider that any factors, other than those listed above, for 'in business in their own account' should be used for determining worker status?	The suggested list is adequate.
50	Do you consider that an individual being in business on their own account should be reflected in legislation to determine worker status? If so, how could this be defined?	If an individual engagement meets the factors set out in Para 7.26 then they cannot be regarded as a worker.
51	Are there any other factors (other than those set out above for all the different tests) that should be considered when determining if someone is a worker?	We have not identified any at this point. Of those listed it is our view that the work pattern of the individual is to be given prominence. If they "work" for many employers/customers then it points to self-employment; if they work consistently for only one, or one which dominates their work volume/remuneration then they ought to be regarded as an employee of the entity for that work. This does not limit the ability of individuals to have multiple sources of work/employment/employers but does ensure that they have a full range of employee rights.
52	The review has suggested there would be a benefit to renaming the Limb (b) worker category to 'dependent contractor'? Do you agree? Why / Why not?	We see no benefit whatever in this new terminology. It would in fact be confusing – the use of "contractor" implies independence both of mind and in economic terms; "contractor" (like "building contractor") in common parlance suggests someone in business on their own account able to negotiate for work should they want

		to do so. A "dependent contractor" confuses that issue. The use of "dependent" in the sense of "reliance" if allied to worker might avoid that issue – it is someone who is not an employee but is reliant on work from a primary source.
Chapter 8: Defining working time		
53	If the emerging case law on working time applied to all platform based workers, how might app-based employers adapt their business models as a consequence?	<p>Employers might limit a worker's ability to log on to only when a job is available. This carries the risk that workers will still be waiting to be available for a job, but not being paid at all for that time.</p> <p>Employers might demand a minimum percentage of acceptances of available tasks, and therefore fetter the ability to refuse work.</p> <p>They are also more likely to require exclusivity for fear of abuse of the system by the worker being logged on with other platforms/app-based employers simultaneously, and therefore being able to claim NMW from more than one employer for the same period of waiting.</p> <p>Employers are likely to pass on increased costs to the consumer.</p>
54	What would the impact be of this on a) employers and b) workers?	<p>This reduces flexibility in the labour market in which is potentially detrimental on both employers and workers.</p> <p>There is the potential for abuse of the system by workers by logging on but not actively performing work, or logging on to multiple platforms, or logging on and doing other work for another employer.</p> <p>A positive impact will mean workers are paid whilst available for work, but there is a risk that employers will change practices (see response above) so that workers continue to be unpaid for waiting time.</p>

55	How might platform-based employers respond to a requirement to pay the NMW/NLW for work carried out at times of low demand?	See response to Q53 above.
56	Should government consider any measures to prescribe the circumstances in which the NMW/NLW accrues whilst ensuring fairness for app-based workers?	<p>Yes – to provide certainty, as reliance on case law leads to a lack of clarity for workers and employers alike.</p> <p>One possible provision may be introduction of 2 levels of NMW/NLW – one for active work and one for being “on call” (passive work).</p> <p>This would work well for some sectors, such as live-in carers.</p>
57	What are the practical features and characteristics of app-based working that could determine the balance of fairness and flexibility, and help define what constitutes ‘work’ in an easily accessible way?	App-based working generates easily collated data between active work and passive work.
58	How relevant is the ability to pursue other activities while waiting to perform tasks, the ability of workers to refuse work offered without experiencing detriment, requirements for exclusivity, or the provision of tools or materials to carry out tasks?	<p>Very relevant.</p> <p>If a worker can perform tasks for other employers whilst waiting “on call”, they will receive a windfall or have the ability to abuse a minimum standard offering. Therefore, employers may insist on exclusivity or insist on minimum periods of activity.</p> <p>Workers should be able to refuse work without detriment – that’s what creates the flexible labour force. However, if employers are having to pay NMW/NLW, they will start to insist on volume activity at peak times, and therefore fetter the ability to refuse work. This may impact on working time.</p> <p>If detriment arises when a worker does not meet with minimum levels of activity or refuses work, this will be an indirect restraint, leading to exclusivity by default, which is detrimental to the flexible labour force.</p>

59	Do you consider there is potential to make use of the data collected by platforms to ensure that individuals can make informed choices about when to log on to the app and also to ensure fairness in the determination of work for the purposes of NMW/NLW?	<p>It would appear to be in the interest of the employer to make this data available, to encourage workers to log on at peak demand, as this would mean that there would be fewer workers logged on at periods of low demand for which they would have to pay NMW.</p> <p>It would also benefit workers as they will be able to identify when it is most remunerative to log on and work.</p>
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Chapter 9: Defining 'self-employed' and 'employers'

60	Do you agree that self-employed should not be a formal employment status defined in statute? If not, why?	<p>Yes, "self employed" should not be defined. "Employee" status and "worker" status confer specific statutory rights, and so they need to be defined. This does not apply to the genuinely self-employed.</p> <p>Self-employed should be the residual status if someone is not an "employee" or "worker" as defined. Otherwise, there is a risk that if there is a statutory definition of self-employed, that some individuals will fall outside of scope of all three definitions, and so there will evolve a new fourth category determined through case law.</p>
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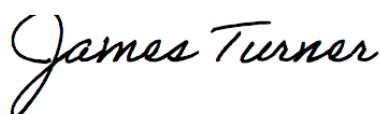
61	Would it be beneficial for the government to consider the definition of employer in legislation?	The Employment Rights Act 1996 minimalist definition of "employer" is sufficient. What needs clarity is the definition of "employee". Having two separate definitions runs the risk of adding a level of complexity and confusion in an already difficult area.
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Chapter 10: Alignment between tax and rights

62	If the terms employee and self-employed continue to play a part in both the tax and rights systems, should the definitions be aligned? What consequences could this have?	Yes, they should be aligned as the current system adds to the lack of clarity. It is a single legal and regulatory system and the definitions should be aligned to ensure all parties have certainty and to ensure consistency. The tax regime is outdated in failing to recognise a third category. There would need to be transitional provisions to deal with change from self-assessment to PAYE for Limb (b) workers.
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63	Do you agree with commentators who propose that employment rights legislation be amended so that those who are deemed to be employees for tax also receive some employment rights? Why/why not?	<p>Yes for the reasons given above – consistency, transparency and fairness for all. If treated as an employee for tax, they should receive employment rights.</p> <p>However, if HMRC deem that someone is an employee or worker, there should be a simple mechanism for the employer (or deemed employee) to challenge that decision which is binding on all parties and the HMRC.</p> <p>We envisage an extension of jurisdiction of the employment tribunal to determine such challenges as the tribunal has expertise in considering employment and worker status.</p>
64	If these individuals were granted employment rights, what level of rights (e.g. day 1 worker rights or employee rights) would be most appropriate?	<p>If deemed by HMRC to be an employee, they should receive all rights as any other employee from the commencement of the relevant engagement.</p> <p>However, there would need to be a mechanism to challenge the issue of status in the employment tribunal – see response above.</p>

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