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Employment status – and why it matters

The modern workplace has evolved rapidly, with the development of the ‘gig’ economy and new ways of working. Freelance workers, contractors working via personal service companies, and workers accessing web-based platforms, for example, are now all integral parts of the modern workforce. With the tax and employment rules struggling to catch up, employment status is very much in the public eye. It is also subject to increasing government regulation. This Briefing provides guidance in key areas.

Critical decision

Employment status affects two sets of rights and responsibilities: the employer’s and those of the person carrying out work. Errors can lead to significant financial consequences, with unpaid tax and penalties for employers. There are currently proposals for significant reforms. In its Good Work Plan, the government announced ‘the biggest package of workplace reforms for over 20 years’. It also promises a single enforcement agency which will ‘significantly change the enforcement landscape’. Timescale for action on different items varies, but the direction of travel is clear. Employers need to be confident that they can deal with the coming changes, and that they can classify the workforce correctly.

Types of status

Correctly categorising employment status means looking at the minutiae of the working arrangement: looking beyond, say, any contract or verbal understanding.

For tax purposes, there are two basic divisions: employed and self employed. In employment law, there are three main types of status:

- employee
- worker
- self employed.

Acas publishes useful guidance on employment status and associated

rights bit.ly/2FQ1skl as does HMRC bit.ly/2OKx8uR.

Employment law vs tax law

It is possible for someone to have one status in employment law, but a different status for tax purposes. This lack of alignment between employment law and tax can cause particular problems. Someone with worker status for employment rights, for example, may be treated as employed or self employed for tax purposes. HMRC challenge can arise where it thinks someone should be treated as an employee, subject to employer and employee National Insurance Contributions. Employers need to be able to categorise status for both employment law and tax law.

Employee or worker?

The difference between employees and ‘workers’ can cause confusion.

Broadly, employees have a contract of employment outlining their activities, and are entitled to certain legal rights – sometimes after a minimum period of employment. These include minimum wage and holiday pay. Employees are usually those doing regular, standard work, whether full or part-time.

‘Workers’ are a distinct legal category. Typically they are those working on a more casual basis, say job by job, who are free to accept or turn down an offer of work made to them.

Workers also have employment rights, including minimum wage and holiday pay, although they generally have fewer rights than employees.

Employed or self employed?

This is another area where difficulties can arise. Self employed people are not paid under PAYE and do not have the employment rights and responsibilities of employees. However, some health and safety and discrimination provisions may apply.

The badges of self employment include:

- being in business on your own account, responsible for business success or failure
- being able to decide what work is done – when, where and how to do it



- being able to hire someone else to do the work
- being responsible to fix unsatisfactory work in own time
- agreeing a fixed price for work
- using own money to provide business equipment
- working for more than one client.

HMRC has an online status checker tool, CEST. It can be used to help decide if someone on a specific engagement is classed as employed or self employed for tax purposes bit.ly/2CHjYtr.

IR35 regime

The issue of employment or self employment is important when it comes to applying the off-payroll working rules, sometimes known as the 'IR 35' rules. The IR 35 rules exist so that someone working for a client via an intermediary, such as a personal service company, do not thereby avoid paying tax as an employee. Changes from 6 April 2020 give medium and large private sector businesses additional responsibilities – including the responsibility for making the decision as to whether IR 35 rules apply when they engage workers.

Forthcoming change

The Good Work Plan will implement the majority of the action points raised in the Taylor Review. We outline some of the more important here, indicating timescale where known.

Written statement of employment particulars

From 6 April 2020, the right to a written statement will be extended to both workers and employees as a 'day one' right. Currently, the right only exists for employees who have worked for a month or longer for their employer.

More information on the statement will be required than at present. It will include: how long the job is expected to last; details of any probationary period; how much notice employer and worker have to give to terminate the arrangement; details of eligibility for sick leave and pay, and other types of paid leave, such as maternity or paternity leave; all remuneration (not just pay); and which days and times are to be worked.

Holiday pay

From 6 April 2020, the holiday pay reference period changes from 12 to 52 weeks for workers without normal working hours. If a worker has been employed for less than 52 weeks, the reference period is the number of weeks that they have been employed.

The government says this will ensure that those in seasonal or atypical roles are able

to access paid holiday periods. The remit of the new enforcement agency (see below) will extend to holiday pay.

Continuity of service

Employment rights are built up over time, potentially disadvantaging those with insufficient continuity of service with the same employer. The government therefore proposes to grant continuity where there is a break of up to four weeks between contracts with the same employer. The limit is at present one week.

Fixed working patterns

The government will legislate to give both employees and workers the right to request a predictable and stable contract after 26 weeks of service.

The Plan says 'Those who are content to work varied hours each week will be able to continue. However, those who would like more certainty will be able to request a more fixed working pattern'. This would extend to giving certainty, for example, in relation to the number of hours worked, or days on which work is performed.

It should be noted that this is only a right to request, not a right to receive. No timescale for implementation is yet indicated.

Agency workers

From 6 April 2020, the Swedish derogation will no longer be available. This is an arrangement whereby agency workers can exchange the right to be paid the same as permanent workers in return for a contract providing pay between assignments. The government perceives this as a legal loophole enabling some firms to pay agency workers less than permanent staff.

Agencies must give a written statement to those workers affected, explaining the change and notifying them of their entitlements under the Agency Worker Regulations 2010. This must be done by 30 April 2020.

Agency workers are to be given a 'key facts page' by the employment business placing them. This will detail the type of contract they are employed under; the minimum rate of pay; how they are paid; fees that will be deducted if they are paid through an intermediary; and an estimate or example of how this affects pay.

Staff tips

The government will legislate to ensure that employers do not make deductions from tips given for staff.

Information and enforcement

- Plans for a new, single labour market enforcement body are expected 'early' in 2019. This will provide a single point of contact for individuals and employers.

It will ensure that vulnerable workers are more aware of their rights and that businesses are supported to comply with legislation.

- From 6 April 2019, the maximum level of penalty that Employment Tribunals can impose where employers have shown malice, spite or gross oversight rises from £5,000 to £20,000.
- Employers not paying awards issued by the Employment Tribunal will face naming and shaming.
- The government will 'simplify' the user journey through the Tribunal system.
- New powers are planned to give the Employment Agency Standards Inspectorate the ability to investigate umbrella companies, especially where agency workers may have been inadequately paid.

Employment status

- The government has stated its desire to align employment status for tax and employment rights. However, there are as yet no concrete proposals as to how this can be done.
- 'Worker' status will be retained for employment law. How this can be made to fit with tax rules is not yet apparent.
- Employment status tests are to put more weight on the degree of control exercised over a worker, rather than a worker's potential right to send a substitute – the 'personal service' test.
- Government guidance and HMRC's online employment status tool are to be improved.

Voice and autonomy

From 6 April 2020, the threshold for a request to set up information and consultation arrangements will be lowered, from 10% to 2% of employees. The 15 employee minimum threshold will however remain unchanged. At present, few employees take advantage of this arrangement.

How we can help

The government is committed to increased pay compliance and transparency. Whilst timescale on some of these measures is not yet known, employers need to review systems now to ensure compliance. We should be only too pleased to help you in areas such as workforce planning, minimum wage and holiday pay compliance. Where appropriate, we can also help you manage off-payroll working procedures. Please do not hesitate to get in touch for more advice.