

Employment status, the “Gig Economy” and evolving world

Over recent months we have seen the Employment Tribunal consider the employment status of individuals for a number of high profile operatives including Uber, City-Sprint and Pimlico Plumbers. From an employment law prospective, the claimants successfully demonstrated they should be treated as workers and entitled to certain rights, including holiday and sick pay together with other protective rights. The Government announced last year that they estimated the ‘Gig Economy’ of which the Uber and City-Sprint cases are two examples will cost the Exchequer somewhere in the region of £3.5 billion in 2020/21. It is evident the Government cannot allow for a loss of this magnitude to continue.

Whilst it has been confirmed that Uber will be lodging an appeal to the Employment Appeals Tribunal it has nonetheless raised the question of employment status of workers. The question which the Courts and HM Revenue & Customs (HMRC) will consider is whether somebody is “employed” or “self-employed”. This has been the subject of much debate over the years. In recent years, we have seen a number of different ways to help service the labour market, for example:

- employment (including casual labour);
- self-employment;
- employment agencies;
- personal service companies; and
- shared working arrangements.

The following sets out a general overview for the issues which need to be considered when determining the individuals employment status.

1. Employment status

It is important to remember there is no statutory definition for income tax or National Insurance purposes as to what is employment or self-employment. Consequently, it is necessary to take guidance from case law, provided by the Courts, which has helped to identify several key characteristics to be considered in determining whether a worker is employed or self-employed. The Courts have directed that all the facts of an engagement need to be ascertained and a holistic overview taken to determine the correct and true position.

The income tax and National Insurance treatment for individuals who are either employed, or self-employed can prove significant in terms of, for example:

- date when the income tax is due for payment;
- the class of National Insurance due for payment;
- the payment of employer’s National Insurance will create an additional cost for the employer/engager;
- the nature of income tax deductible expenses which can be claimed. For example, for someone who is self-employed the expenditure must be incurred “wholly and exclusively” in the performance of the trade; whereas for an employee, the expense must be incurred “wholly, exclusively and necessarily” in the performance of the duties of the employment.

As well as the difference in the income tax and National Insurance treatment, the engager is responsible for ensuring that, where appropriate, all individuals who are deemed to be employees should be put on to the payroll. Failure to do so could expose the engager to paying any additional income tax and National Insurance as well as interest and penalty charges.

The following are various behaviours which the Courts will consider to help determine that the correct income tax and National Insurance treatment is being applied to all workers engaged by the Engager:

a) Control

Under this heading consideration is given as to whether the individual is subject to the supervision, direction or control as to what they do, where the work is done and how the work is undertaken. Control points towards employment.

b) Integration

Consideration needs to be made as to whether the individual is involved with the core business of the engager? Are they seen as being “part and parcel” of the engager organisation? Alternatively, is the individual providing peripheral services to the engager’s organisation? Integration points towards employment.

c) Mutuality of obligation

Is the worker obliged to offer their services and the engager organisation obliged to offer work? Where there is no mutuality of obligation present, its absence will suggest a contract for services in other words one of self-employment.

d) Financial risk

This is present where the individual is truly in business on their own account. For example, they may:

- purchase their own equipment although HMRC does not consider the provision of small items such as a lap top or mobile phone as being sufficient examples;
- hire others to help them provide their services and be responsible for the payment of those services;
- carry any risk associated with the provision of the services, such as covering any losses which may be incurred or taking out public indemnity insurance cover.

e) Right of substitution

The individual must have the unfettered right to provide the substitute including the responsibility for paying the substitute.

Care needs to be taken to ensure that not only the contractual terms of an engagement, but also the underlying facts of any engagement are considered in full.



2. Employment agencies

It is not uncommon for individuals to seek work on a casual basis via an agency. This is often done to help provide a 'work/life balance' for the individual.

The tax legislation contains specific rules relating to the provision of services by an individual via an agency. The agency will be required to operate PAYE and National Insurance where all of the following are applicable:

- a) where an individual personally provides services to another person;
- b) there is a contract (normally a written contract) between:
 - a. the client or a person connected with the end-user; and
 - b. a person other than the individual, the end-user or a person connected with the end-user (the agency); and
- c) under or in consequence of that contract;
 - a. the services are provided; or
 - b. the end-user or any person connected with the end-user pays, or otherwise provides consideration, for the services.

Where the agency is operating PAYE on the payments made to the worker, then the end-user will not have any additional compliance obligations outside those associated with engaging an employee. However, where this is not the case consideration needs to be given to the key attributes of the legislation set out above.

Meaning of supervision, direction or control

The agency legislation will not apply where the services provided by the worker are not subject to the right of supervision, direction or control of any person.

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- a) **Supervision** is someone overseeing a person doing work, to ensure that person is doing the work they are required to do and it is being done correctly to the required standard. Supervision can also involve helping the person where appropriate in order to develop their skills and knowledge.
- b) **Direction** is someone making a person do his/her work in a certain way by providing them with instructions, guidance or advice as to how the work must be done. Someone providing direction will often coordinate how the work is done, as it is being undertaken.
- c) **Control** is someone dictating what work a person does and how they go about doing that work. Control also includes someone having the power to move the person from one task to another.

Whilst the meaning of the words supervision, direction or control have not been considered by the Courts, they have nonetheless considered their application. In the case of *Autoclenz Ltd v Belcher and others*, the Supreme Court found that the Employment Tribunal was entitled to hold that the claimants were individuals providing their services under a contract of service, or employment contract. The control imposed upon the individuals played an important part in determining the true nature as to how the services were provided, specifically the *ability to control* how the work was undertaken.

3. Personal service companies

Over recent years the Government has overseen changes to the tax and National Insurance legislation with regards to agency arrangements, as outlined above, together with further changes to the IR35 rules which came into effect from 6 April 2017. The changes to the IR35 legislation, which relate to the personal service companies working in the Public Sector will require an engager who is a public body, as defined by the Freedom of Information Act 2000, to operate PAYE and National Insurance on payments made to the personal service company. Examples of organisations who are considered as being a public body include:

- local authorities;
- universities;
- academies;
- Bank of England;
- BBC;
- Channel 4; and
- NHS Trusts.

Where the personal service company is caught by the IR35 rules, the engager will be required to deduct PAYE and National Insurance on the net value of the invoice; the personal service company will remain accountable for the payment of VAT.

The public sector body will need to consider the following:

- identify all personal service company engagements;
- consider whether the IR35 rules apply;
- undertake periodic reviews of all engagements to ensure any decisions reached are still relevant; and
- ensure details of all costs caught by the new IR35 rules are being paid via the payroll.

HMRC also announced last autumn that it will be establishing a dedicated team to review the working practices of organisations who regularly engage a high number of freelancers undertaking roles which would normally be regarded as a full-time employment role. HMRC has also released an updated Employment Status Indicator tool which can be used to help determine whether an individual providing the services should be treated as employed or self-employed for income tax and National Insurance purposes.

4. Future developments

In March 2015, the Office of Tax Simplification (OTS) undertook a detailed review during which they collated a considerable amount of evidence relating not only to the working practices present in the UK economy, but also how other countries deal with employment status.

In December 2016, the OTS published a "Gig Economy Focus Paper" in which it considered several issues including "What is the Gig Economy?" and how working patterns are now evolving, for example:

- for some the "Gig economy" is a way of securing work, in addition to the more traditional methods;
- some employees, who may already work either full, or part-time may use the "Gig economy" as a way of supplementing their existing income; and
- For some it may be the main way they obtain their income.

Research has indicated that the number of people with multiple employments has declined to an all-time low, but there has been a considerable increase in people securing income from a combination of employed and self-employed sources. Whilst individuals have always had the flexibility as to how they seek work, the public's perception is that for many who are earning at or near to the National Living Wage they are being forced to secure work on unfavourable terms.

Furthermore, a Cross-Government Working Group on Employment Status will consider, at some stage, the potential to move to a more uniform set of tests on employment status across tax, employment rights and the welfare and social security system. The groups remit will:

- a) examine the viability of an agreed uniform set of status tests; and
- b) if viable, consider the feasibility of a statutory test, whether this would be beneficial and how it would work in practice

The Government through the Cross-Government Working Group, HMRC and the Department for Business, Innovation and Skills and the Department for Work and Pensions will be taking further steps to ensure not only the lost revenue to the Exchequer is reduced but that workers' rights are protected.

Matthew Taylor, Chief Executive of the Royal Society of Arts has been charged with leading a review into the changes to the rights of self-employed workers. The findings of the report are due to be published in the summer and it will be interesting to see what new legislation the Government will seek to introduce.

This will be an area of further development which an organisation who either uses or provides "off-payroll" workers will need to keep an eye on.



Nick Bustin, Director of Employment Taxes
T 020 7969 5578 **M** 07515 795186
E nbustin@haysmacintyre.com

