

ICAS Webinar

Employment
status for tax
purposes:
Policy and
practice

Tuesday 24 September 2024



Ethical
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Your ICAS expert for today



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Topics for today



- Employment status in the UK - What are the main stumbling blocks?
- Employment Law
- Employment Rights
- Employment Taxes
- Case Law
- Intermediaries' Legislation
- CEST tool and HMRC guidance
- Auto-enrolment for pension and other matters
- What is the new UK government saying about employment status?
- What is ICAS advocating about employment status?
- How should employers and agents approach employment status?
- Advising clients on employment status/PCRT
- Q & A



Employment status in the UK



- Employment status is and always has been a very complex matter in the UK. However, in the years leading up to 1996, one could reasonably conclude that it was markedly less complex than it is now, in 2024.

What are the main stumbling blocks?

The main stumbling blocks with making employment status decisions that are commonly encountered by employers, individuals and agents alike are:

- Misunderstanding the terms around employment status;
- Making assumptions and not having the whole fact pattern to hand;
- Trying to (consciously or unconsciously) make the role fit the preferred status;
- Not being told the whole truth by someone about the role and the terms of engagement;
- Not seeking expert advice;
- Trying to do things too quickly and missing things.

Employment Law



- The legislation concerning itself with the employment law part of employment status is overseen by the Department for Business & Trade (DBT) and is contained within the Employment Act, and several other pieces of legislation which compliment it, such as the Employment Rights Act. This legislation is further supplemented by Employment Tribunal case law precedents from the Employment Appeal Tribunal and higher courts. In employment law, since 1996, there have been three statuses – employed, self-employed and “worker”.
- The term ‘worker’ is not helpful, since in everyday language, a ‘worker’ is a word which can appear in discussions concerning individuals or groups of individuals who may be employed or self-employed – for example, the Cambridge Dictionary defines a worker as someone who a) works ‘in a particular job’ (i.e. skilled or unskilled), or b) works ‘in a particular way’, such as a good/tireless/skilled worker. It can also mean someone who works for a company or organization as an employee but does not have a powerful position.
- By contrast, for employment law purposes, a "worker" is defined by section 230(3) ERA 1996 as: "an individual who has entered into or works under (or, where the employment has ceased, worked under) –
 - a. a contract of employment; or
 - b. any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual."

Employment Law



- ACAS tells us that someone is likely to be legally classed as a “worker” if most of these things apply:
 - their work for the organisation is more casual, for example work is less structured or they do not have a regular working pattern
 - they're usually required to personally do the work
 - they're not offered regular or guaranteed hours by the employer
 - they have very little obligation to make themselves available for work, but should do work they've agreed to
- If most of these do not apply, someone is more likely to be an employee or self-employed.
- So essentially, worker status falls in between employed and self-employed status. Workers have some employment rights, but not as many as employees. They have a more flexible arrangement, but with fewer statutory rights.
- Workers are sometimes referred to as 'limb (b)' workers. This term comes from the Employment Rights Act 1996.

Employment Rights



- **Workers are entitled to:**

- a written statement of employment particulars outlining their job rights and responsibilities
- National Minimum Wage
- paid holiday
- payslips
- protection for whistleblowing
- protection against discrimination
- protection from less favourable treatment for working part time

- **Workers are not usually entitled to:**

- a minimum notice period if their employment is ending, for example if their employer is dismissing them
- protection against unfair dismissal
- make statutory flexible working requests
- time off for dependants
- statutory redundancy pay

Employment Taxes



- ‘Employment taxes’ is a very wide-ranging term for a host of different pieces of legislation covering different aspects of employment and working arrangements, such as payroll, National Minimum Wage (NMW), Income Tax (PAYE), National Insurance contributions (NICs), Pension arrangements, benefits in kind, remuneration planning, share schemes and reward, working time, termination payments, Construction Industry Scheme (CIS), Optional Remuneration Arrangements (OpRA), off-payroll working arrangements, to name but a few.
- The employment status legislation for tax purposes is essentially, and unhelpfully, non-existent, because there is nothing set down in legislation which points the researcher to a definitive set of rules and guidance which sets out when someone is classified as employed or self-employed.
- So, how is employment status for tax determined?
- Employment status for tax is determined by referring back to tax case law precedents and HMRC guidance (generally understood to be HMRC’s own interpretation of the legislative provisions and case law) on the subject, as well as some supplementary legislative provisions set out at Part 2 of ITEPA 2003, chapters 7,8,9 & 10. HMRC has also produced guidance in the form of their Employment Status Manual on GOV.UK, as well as a status determination tool, known as Check Employment Status for Tax (CEST).

- The most important case law precedent in terms of employed v self-employed dates back to the Ready Mixed Concrete case of 1968. McKenna J issued a decision containing the following wording on his definition of a ‘contract of service’ (an employment contract), which has been and still is today referred to in 99% of employment status cases by other judges:
- *“I must now consider what is meant by a contract of service.*
- *A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service.*
- *I need say little about (i) and (ii).*

*As to (i). There must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind. The servant must be obliged to provide his own work and skill. Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be: see Atiyah's *Vicarious Liability in the Law of Torts* (1967) pp. 59 to 61 and the cases cited by him.*

As to (ii). Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. The right need not be unrestricted.”

Point I refers to what is known as Mutuality of Obligation (MOO), which is, put simply, when someone provides their labour in return for remuneration. Point II refers to the presence of control.

Intermediaries' Legislation



Part 2 ITEPA 2003 Chapters 7,8,9 &10 – also known as the “intermediaries’ legislation”

- There are some legislative provisions which have evolved since 1999/2000 which aim to capture alternative working arrangements such as working through a limited company or LLP (an ‘intermediary’), or an agency, or perhaps through a Managed Service Company (MSC) or via an Umbrella Company.
- All of these pieces of legislation have been introduced to try to combat various methods of working which have attempted to circumvent the normal “employed v self-employed” rules. These rules tie in with or must be considered before (“trump”), other aspects of employment taxes legislation.

Simplifying a complicated matter



1 Is the individual working as a sole trader? If so, are they employed or self-employed for tax purposes?

2 Is the individual working through a Limited Company, partnership or LLP?

3 Consider whether the intermediaries' legislation should apply. Would they be an employee if the intermediary entity wasn't standing in the way?

Where to find the legislation



Don't forget – Intermediaries legislation TRUMPS the CIS legislation – whatever clients may tell you

- **Ch. 7 Part 2 ITEPA 2003 - this is the Agency rules.**

Where Chapter 7 applies, the agency is treated as the worker's employer and has tax and NICs withholding obligation.

- **Ch. 8 Part 2 ITEPA 2003 – this is the "IR35" rules.**

Where Chapter 8 applies, private sector clients are supplied with work by an intermediary (usually a Personal Service Company or PSC). The PSC decides if IR35 applies to them

From 6 April 2021, Chapter 8 only applies where the services are provided to private sector clients that are **small** or have no UK connection.

- **Ch. 9 Part 2 ITEPA 2003 is the Managed Service Companies (MSC) rules.**

Where Chapter 9 applies, the intermediary providing the labour is classified as a MSC.

Chapter 9 trumps Chapter 8.

- **Ch. 10 Part 2 ITEPA 2003 - this is the Off Payroll Working rules.**

Where Chapter 10 applies, from 6 April 2017, a public sector body must apply the rules to intermediaries supplying workers' services.

From 6 April 2021, it applies where the work is provided to **medium and large** UK connected private sector clients.

The engager decides if OPW applies

CEST tool and HMRC guidance



The first thing to note is that the CEST tool is to be used to determine employment status for tax only.

- The CEST tool was born in the millenium years, when HMRC decided that instead of using a paper- based questionnaire, employers should have access to an interactive tool which assisted them to quickly and efficiently determine employment status for tax purposes, and by doing so, employers could obtain a decision which HMRC would honour based on the facts supplied at the time of completing the tool. Obviously, should the facts not match the reality, HMRC would not honour the decision.
- However, it is very difficult to produce a tool which can determine employment status without considering a whole host of facts, and each case is different. The guidance on employment status produced by HMRC can be found at <https://www.gov.uk/hmrc-internal-manuals/employment-status-manual> - and yet, this is not the only guidance which needs to be looked at, because it is about taxation and not employment rights. Ideally, the two parts of employment status should not be considered in isolation, but in tandem. This helps to avoid problems further down the line and also helps to eradicate exploitation of immigrants and low-paid workers, and indirectly tackle issues such as modern slavery.

Auto-enrolment for pension and other matters



Other considerations which come with employment status decisions are issues such as:

- Auto-enrolment for pension – employees must be enrolled from day 1 of employment
- Working Time Regulations – employers must adhere to these
- National Living/Minimum Wage – all employees who qualify for NMW must be paid it
- Automatic right to request flexible working from day 1 across the UK (N.B. slightly different in NI)
- Just because an employer *does not wish to have* these responsibilities doesn't mean to say they can recruit everyone as self-employed!

What is the new UK government saying about employment status?



- Labour’s Plan to Make Work Pay sets out a reform agenda which targets boosting worker protection, ensuring fair pay, and modernising workplace practices. If they are implemented, these revisions will significantly impact employers cross-sector. They seem to want to achieve the revisions with lightning speed, too – Labour has committed to consulting on these reforms within the first 100 days of its new government.
- Labour are proposing to merge together the existing ‘employee’ and ‘worker’ categories – returning to pre-1998 times. The consequence of such a change would significantly extend vital rights (e.g. paid holidays, statutory sick pay, and anti-discrimination protections) to many more individuals who are currently classified as workers including agency and zero-hours contracts workers (also known as ‘casual’ contracts). The work needed to do this will involve unpicking several legal precedents. Changing over the contracts to employment contracts will be complex, and it is not currently clear whether some individuals will be able to retain self-employed contracts while gaining a suite of employment rights.
- In spite of challenges, the proposals around a “single worker status” isn’t all doom and gloom – because the outcome may be to finally achieve simplification of what is a universally acknowledged complex area, and provide some stability into the bargain.
- Labour are also proposing to abolish the two-year qualifying period for a full suite of employment rights such as parental leave and unfair dismissal claims for all employees, which would align them more with European models. Whilst this sounds good, one unintended consequence could be that there is an increase in Employment Tribunal claims – unless another intervention can be mandated instead such as Alternative Dispute Resolution.
- The involvement of Trades Unions in the workplace has been in steady decline since the 1970s, but Labour appear, possibly unsurprisingly, to be planning to unpick that decline and reinvigorate the union movement, union recognition and lift restriction on union activities and the concept of collective bargaining may well see another dawn.

What is ICAS advocating about employment status?



- ICAS responded to a joint HMRC/BEIS (now DBT) /HMT consultation in 2018, setting out a series of points in relation to employment status decision-making and explaining why in its current form, it is never going to serve the UK properly.
- Despite asking many times for the UK government to respond to the consultation and consult further, nothing has been done.
- ICAS advocates for tax simplicity across all taxes, and it is clear the current situation relating to determining employment status is far too complex, onerous, burdensome and a barrier to doing business, detrimental to a flexible labour market and doing nothing to boost the UK economy. Coupled with Brexit, which has affected many sectors of the labour market including the NHS and social care, it is clear something needs to be done.
- In an attempt to tackle this, I've set up the Employment Status Consultative Committee (ESCC) which is a collective of expert representatives from a number of different professional, representative and industry bodies who are hoping to work with the UK government to consider the whole of employment status and consider how it could be reconfigured to attain a workable and viable, future-proof solution. A letter has been written to the Exchequer Secretary to the Treasury (XST), James Murray MP and a copy of this can be [found here](#).
- The latest case to be decided on employment status was issued by the Supreme Court on 16 September 2024
- We are no further forward - the case has been remitted back to FTT

How should employers and agents approach employment status?



- To really get employment status right, what strategies should employers and agents adopt?
- It's not always possible to determine employment status quickly. In many cases, it's possible to tell immediately whether someone is employed or self-employed for tax purposes. However, others are less clear-cut and need further examination.
- There is a tendency to try to rush employment status decisions because there is a perceived need to recruit someone “yesterday” for the role. It's always best, therefore, that agents and their employer clients plan well, understand that recruitment is necessary, and talk through the issues around whether the person required is to be classified as employed or self-employed, ensuring they are comfortable with their decision-making process and the fact pattern fits the eventual contractual terms of engagement.
- Given the various punitive measures adopted by HMRC if an incorrect classification is made, as well as potential other measures such as falling foul of The Pensions Regulator for failing to auto-enrol someone, or non-payment of National Minimum Wage/non-adherence to Working Time Regulations etc, there is clearly a lot to consider and the days of slap-dash recruitment are long gone.
- Never forget that the employment law side must also be given due consideration – self-employed workers can also appeal to the Employment Tribunal if they feel they should have been classified as an employee all along!

Advising clients on employment status/PCRT



- ICAS members should always be aware of Professional Conduct in Relation to Taxation when advising clients on any tax matter – and employment taxes are no exception.
- Given that employment taxes is such a fast-changing area of tax, Members should know their own limits and seek advice from a suitably qualified professional when the need arises.

Q&A



Further information and guidance

ICAS website: **[icas.com/professional-resources](https://www.icas.com/professional-resources)**

Technical Helpdesk: **Contact us on [icas.com](https://www.icas.com)**

X: **@ICASaccounting**

LinkedIn: **ICAS – The Professional Body of CAs**

What's coming up



Online

26 September Making Tax Digital for Income Tax: Get your practice ready

22 October Key employment tax cases: A year in review

19 & 20 November CA Summit 2024

In person

8 October Beyond the Numbers

Register at
[icas.com/
events](https://www.icas.com/events)

