



Department for
Business, Energy
& Industrial Strategy



HM Treasury



HM Revenue
& Customs

Employment Status: Discussion Document -

Response form

The consultation is available at: www.gov.uk/government/consultations/employment-status

The closing date for responses is Friday 1st June 2018

Please return completed forms to:

Employment Status Consultation

Department of Business, Energy and Industrial Strategy

Labour Markets, Level 1 Spur

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London

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Please be aware that we intend to publish all responses to this consultation.

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Questions

Your organisation if replying on their behalf (if applicable): name:
Your or organisation address:

	Please check a box from the list of options below that best describes you as a respondent:
<input type="checkbox"/>	Business representative organisation/trade body
<input type="checkbox"/>	Central government
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<input type="checkbox"/>	Medium business (50 to 250 staff)
<input type="checkbox"/>	Micro business (up to 9 staff)
<input type="checkbox"/>	Small business (10 to 49 staff)
<input checked="" type="checkbox"/>	Trade union or staff association
<input type="checkbox"/>	Other (please describe)

	Please indicate which part of the discussion document you are responding to:
<input type="checkbox"/>	Employment rights
<input type="checkbox"/>	Tax
<input checked="" type="checkbox"/>	Both rights and tax

Question 1 (Chapter 4, page 21 in discussion document)

Do you agree that the points discussed in this chapter are the main issues with the current employment status system?

Yes No Not sure

Are there other issues that should be taken into account?

Yes No Not sure

Comments: The most troubling aspect of denial of employment status relates to those miscategorised as self-employed and their lack of basic employment rights and the impact on their tax profile. In our experience, particularly in the independent care sector, employers are pushing the financial burden and risk back to the employee so as to avoid the financial consequences of granting basic employment rights and failing to provide any or adequate indemnity insurance arrangements.

Question 2 (Chapter 5, page 22 in discussion document)

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?

Yes No Not sure

Please explain why/why not: In our view the interpretation of the courts is the best protection afforded to employees in relation to these types of disputes and codification would limit that ability. Also, there is no one size fits all approach to determining whether a person is an employee or not. Codification would provide further scope for employers to circumvent the current tests using contractual loop holes and sham contracts to disguise employment.

Question 3 (Chapter 5 page 23 in discussion document)

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?

- i) individuals, please state: An alternative way.
- ii) businesses, please state: An alternative way.

Question 4 (Chapter 5 page 23 in discussion document)

Is codification relevant for both rights and/or tax?

Yes No Not sure

Comments: Tax is a matter for HMRC and the confusion of tax and employment status has only led to more uncertainty given the different tests applied by the Revenue and the Employment Tribunal so further guidance that could be used by both seems the most sensible way forward.

Question 5 (Chapter 5 page 23 in discussion document)

Should the key factors in the irreducible minimum be the main principles codified into primary legislation?

Yes No Not sure

Comments: Please see the answer to question 2 above.

Question 6 (Chapter 5 page 24 in discussion document)

What does mutuality of obligation mean in the modern labour market?

Please state: An obligation upon the employer to provide work and an obligation on the employee to accept that work.

Question 7 (Chapter 5 page 24 in discussion document)

Should mutuality of obligation still be relevant to determine an employee's entitlement to full employment rights?

Yes No Not sure

Comments: It is a fundamental principle in any employment relationship.

Question 8 (Chapter 5 page 24 in discussion document)

If so, how could the concept of mutuality of obligation be set out in legislation?

Please state: As stated at question 2 above we are not in support of codification via primary legislation.

Question 9 (Chapter 5 page 25 in discussion document)

What does personal service mean in the modern labour market?

Please state: This is a contractual obligation to personally supply the services in question.

Question 10 (Chapter 5 page 25 in discussion document)

Should personal service still be relevant to determine an employee's entitlement to full employment rights?

Yes No Not sure

Comments: The degree of personal service should remain relevant to an employee's entitlement to employment rights as it demonstrates the degree of control and the level of integration within the employer's organisation.

Question 11 (Chapter 5 page 25 in discussion document)

If so, how could the concept of personal service be set out in legislation?

Please state: As stated at question 2 above we are not in support of codification via primary legislation.

Question 12 (Chapter 5 page 25 in discussion document)

What does control mean in the modern labour market?

Please state: Control is ultimate authority over the employee's performance of his/her duties.

Question 13 (Chapter 5 page 25 in discussion document)

Should control still be relevant to determine an employee's entitlement to full employment rights?

Yes No Not sure

Comments: Again this demonstrates the level of integration into the employer's business and if there is no control of any kind there can be no employment relationship.

Question 14 (Chapter 5 page 25 in discussion document)

If so, how can the concept of control be set out in legislation?

Please state: As stated at question 2 above we are not in support of codification via primary legislation.

Question 15 (Chapter 5 page 26 in discussion document)

Should financial risk be included in legislation when determining if someone is an employee?

Yes No Not sure

Please explain why/why not: Although we are not in support of codification the provision of equipment, tools, uniform, taxation and indemnity insurance are all relevant factors in determining if someone is an employee or not.

Question 16 (Chapter 5 page 26 in discussion document)

Should 'part and parcel' or 'integral part' of the business be included in legislation when determining if someone is an employee?

Yes No Not sure

Comments: Although we are not in support of codification this is highly relevant to determining whether someone is an employee. In particular are they subject to the employer's disciplinary and grievance policies, do they have to report in if sick and do they have to request annual leave etc.

Question 17 (Chapter 5 page 26 in discussion document)

Should the provision of equipment be included in legislation when determining if someone is an employee?

Yes No Not sure

Comments: Although we are not in support of codification if an employer is supplying either the transportation or equipment to facilitate the work that is an important factor in determining whether someone is an employee.

Question 18 (Chapter 5 page 26 in discussion document)

Should 'intention' be included in legislation when determining if someone is an employee in uncertain cases?

Yes No Not sure

Comments: Although we are not in support of codification the reality of the situation should be the determining factor as employers could simple state it was never their intention to enter into an employment relationship and use that labelling as a get out clause to disguise employment.

Question 19 (Chapter 5 page 26 in discussion document)

Are there any other factors that should be included in primary legislation when determining if someone is an employee?

Yes No Not sure

Comments: No comment.

And what are the benefits or risks of doing so?

Please state: No comment.

Question 20 (Chapter 5 page 27 in discussion document)

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?

i) be required to provide further detail on top of the main principles:

Yes No Not sure

Comments: We are not in support of primary legislation in the first place.

ii) provide sufficient flexibility to adapt to future changes in working practices

Yes No Not sure

Comments: We are not in support of primary legislation in the first place.

Question 21 (Chapter 5 page 27 in discussion document)

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 No Not sure

Comments: If codification were to be introduced by primary legislation, if that needs to be amended at a later date to adapt to changes in technology or the modern workplace that should be scrutinised by parliament rather than providing an open door to amend via secondary legislation at will.

Question 22 (Chapter 6 page 29 in discussion document)

Should a statutory employment status test use objective criteria rather than the existing tests?

Yes No Not sure

Comments: Although an objective checklist by way of guidance would assist, there will always be a need for a subjective analysis of the particular circumstances a

Claimant finds themselves in if employment status is disputed and Employment Tribunals should retain the power and discretion to analyse that subjectively.

What objective criteria could be suitable for this type of test?

Please state: No comment.

Question 23 (Chapter 6 page 30 in discussion document)

What is your experience of other tests, such as the Statutory Residence Test (SRT)? What works well, and what are their drawbacks?

Please state: We have no knowledge or experience of the Statutory Residence Test.

Question 24 (Chapter 6 page 30 in discussion document)

How could a new statutory employment status test be structured?

Please state: We are not in support of a statutory test being implemented.

Question 25 (Chapter 6 page 31 in discussion document)

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?

Please state: We have no experience of the Agency Legislation tests for tax.

Question 26 (Chapter 6 page 31 in discussion document)

Should a new employment status test be a less complex version of the current framework?

Yes No Not sure

Comments: By its very nature employment status is complex and we don't believe its evaluation should be dumbed down as it may prevent Claimants who are employees relying on relevant evidence to support their case.

Question 27 (Chapter 6 page 32 in discussion document)

Do you think a very simple objective or mechanical test would have perverse incentives for businesses and individuals? Could these concerns be mitigated? If so, how?

Yes No Not sure

Comments: Please see our answer to question 26 above.

Question 28 (Chapter 6 page 32 in discussion document)

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)?

Yes No Not sure

Please state: A Code of Practice that still provides Employment Tribunals with the opportunity to interpret the same may assist.

Question 29 (Chapter 6 page 33 in discussion document)

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?

Yes No Not sure

Comments: It needs to be appreciated the issue is no longer black and white i.e. employed or self-employed, there is an ever increasing flexible and transient workforce that falls between the two labels and therefore, it may be that creating a worker category for taxation purposes would address this problem.

Question 30 (Chapter 7 page 34 in discussion document)

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 No Not sure

Comments: We believe all workers regardless of the nature of their working relationship are entitled to basic employment rights.

Question 31 (Chapter 7 page 35 in discussion document)

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 No Not sure

Comments: Yes because all employees are workers but not all workers are employees. There is also the added confusion given the different definitions of worker and employee in the Employment Rights Act 1996 and the Equality Act 2010 and they too need to be aligned.

Question 32 (Chapter 7 page 35 in discussion document)

If so, should the definition of worker be changed to encompass only Limb (b) workers?

Yes No Not sure

Comments: Both the Employment Rights Act 1996 and the Equality Act 2010 could be amended to refer to both workers and employees.

Question 33 (Chapter 7 page 35 in discussion document)

If the definition of worker were changed in this way, would this create any unintended consequences on the employee or self-employed categories?

Yes No Not sure

If yes, please state: No comment.

Question 34 (Chapter 7 page 36 in discussion document)

Do you agree that the government should set a clearer boundary between the employee and worker statuses?

Yes No Not sure

Comments: A clearer boundary is required between workers and the self-employed.

Question 35 (Chapter 7 page 36 in discussion document)

If you agree that the boundary between the employee and worker statuses should be made clearer:

- 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?

Yes No Not sure

Please state: It should remain as per the current and emerging case law.

- 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?

Yes No Not sure

Please state: Please see the answer above.

- iii. Or, is there an alternative approach that could be considered? If so, how could this be set out in legislation?

Yes No Not sure

Please state: Please see the answer above.

Question 36 (Chapter 7 page 36 in discussion document)

What might the consequences of these approaches be?

Please state: No comment.

Question 37 (Chapter 7 page 37 in discussion document)

What does mutuality of obligation mean in the modern labour market for a worker?

Please state: As has been demonstrated with the platform gig economy workers, mutuality of obligation arises once the platform is engaged i.e. when a worker identifies himself as available and from that time until the worker log offs, declares himself unavailable or the work is completed. During the engagement period there is a contractual relationship with the obligation to offer work and for that work to be accepted.

Question 38 (Chapter 7 page 37 in discussion document)

Should mutuality of obligation still be relevant to determine worker status?

Yes No Not sure

Please explain why/why not: Although not as determinative a factor as with an employee, it does still have a bearing on whether an individual is a worker or self-employed and the corresponding entitlement to basic employment rights and the treatment of taxation.

Question 39 (Chapter 7 page 37 in discussion document)

If so, how can the concept of mutuality of obligation be set out in legislation?

Please state: We don't believe it is capable of being set out in the legislation as each case turns on its own particular facts.

Question 40 (Chapter 7 page 37 in discussion document)

What does personal service mean in the modern labour market for a worker?

Please state: As set out in s.230(3)(b) Employment Rights Act 1996 the worker must do or perform personally the work or services required under the contract. Case law has demonstrated this is the case even when there is a conditional right of substitution or limited power of delegation.

Question 41 (Chapter 7 page 37 in discussion document)

Should personal service still be a factor to determine worker status?

Yes No Not sure

Please explain why/why not: Personal service should still be a factor to the extent it demonstrates whether the other party to the contract is a client or customer of any business carried out by the worker and therefore self-employed.

Question 42 (Chapter 7 page 37 in discussion document)

Do you agree with the review's conclusion that the worker definition should place less emphasis on personal service?

Yes No Not sure

Please explain: Given employers are relying upon sham substitution clauses in order to misclassify workers as self-employed.

Question 43 (Chapter 7 page 38 in discussion document)

Should we consider clarifying in legislation what personal service encompasses?

Yes No Not sure

Please explain: Again this is a subjective exercise that needs to be undertaken having considered all the facts and evidence and clarification may impede Claimants adducing relevant evidence that should be taken into consideration.

Question 44 (Chapter 7 page 38 in discussion document)

Are there examples of circumstances where a fettered (restricted) right might still be consistent with personal service?

Yes No Not sure

Please state: If a worker is unable to provide personal service due to ill health or if there is a conditional approval of a substitute. Both in our view are consistent with personal service.

Question 45 (Chapter 7 page 39 in discussion document)

Do you agree with the review's conclusion that there should be more emphasis on control when determining worker status?

Yes No Not sure

Please explain: No as it is not a necessary element of worker status as established by case law and it would be to the disadvantage of certain categories of workers such as agency workers (who may be controlled by the end users) or those on zero hours contracts.

Question 46 (Chapter 7 page 39 in discussion document)

What does control mean in the modern labour market for a worker?

Please state: The degree of autonomy enjoyed by the worker and the person who receives their services.

Question 47 (Chapter 7 page 39 in discussion document)

Should control still be relevant to determine worker status?

Yes No Not sure

Please explain: To a certain extent to determine whether a worker is in fact truly self-employed in line with the current and emerging case law.

Question 48 (Chapter 7 page 39 in discussion document)

If so, how can the concept of control be set out in legislation?

Please state: We don't believe it should be codified we believe it should continue to be developed by the courts.

Question 49 (Chapter 7 page 39 in discussion document)

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?

Yes No Not sure

Please state: Who is responsible for providing indemnity insurance and would be responsible for any negligence claim should it arise.

Question 50 (Chapter 7 page 39 in discussion document)

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?

Yes No Not sure

Please state: We do not believe it should be codified we believe it should continue to be developed by the courts.

Question 51 (Chapter 7 page 39 in discussion document)

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?

Yes No Not sure

Please state: No comment.

Question 52 (Chapter 7 page 40 in discussion document)

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?

Yes No Not sure

Please explain why/why not: We believe the term worker is sufficient and amending it would only lead to further confusion.

Question 53 (Chapter 8 page 43 in discussion document)

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?

Please state: No comment.

Question 54 (Chapter 8 page 43 in discussion document)

What would the impact be of this on a) employers and b) workers?

a) Employers - please state: No comment.

b) Workers - please state: It would be to their distinct benefit given they are all plainly workers for the purposes of working time and/or the national minimum or living wage.

Question 55 (Chapter 8 page 43 in discussion document)

How might platform-based employers respond to a requirement to pay the NMW/NLW for work carried out at times of low demand?

Please state: No comment.

Question 56 (Chapter 8 page 43 in discussion document)

Should government consider any measures to prescribe the circumstances in which the NMW/NLW accrues whilst ensuring fairness for app-based workers?

Yes No Not sure

Comments: Unfortunately, as the case law has demonstrated, consideration of the reality of each app-based workers circumstances is required to determine whether they are engaged in working time and they all differ.

Question 57 (Chapter 8 page 43 in discussion document)

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?

Please state: At its most basic the worker logs onto the app and makes themselves available for work. However, for most the ability to decline work or have any autonomy is exceptionally limited during that period. There are also requirements to wear uniforms, an inability to refuse jobs and adherence to codes of practice that ensure they are representative of and present as an integral part of the business. The mere fact they have to wait for assignments to be allocated to them is a necessary part of their role and although we have no direct knowledge of this type of work the suggestion they are logged on to several apps simultaneously is in our view unrealistic and another loophole to avoid providing these workers with their basic employment rights.

Question 58 (Chapter 8 page 43 in discussion document)

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?

Please state: None of the recent case law has established that the workers engaged by City Sprint, Addison Lee or UBER were in practice able to pursue other activities whilst working nor were they able to refuse work without detriment therefore, these factors are relevant. They were all also provided with the materials i.e. vehicles to carry out their duties so that too is relevant as is exclusivity.

Question 59 (Chapter 8 page 43 in discussion document)

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?

Yes No Not sure

Comments: Once a worker has logged on that is sufficient as agreed by the Employment Tribunals and Employment Appeal Tribunal.

Question 60 (Chapter 9 page 44 in discussion document)

Do you agree that self-employed should not be a formal employment status defined in statute? If not, why?

Yes No Not sure

Please explain why/why not: We agree that employers would design their contracts with the principles defined in the statute in mind and it would make it more difficult for workers to establish their true status.

Question 61 (Chapter 9 page 45 in discussion document)

Would it be beneficial for the government to consider the definition of employer in legislation?

Yes No Not sure

Please explain why/why not: No comment.

Question 62 (Chapter 10 page 46 in discussion document)

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 No Not sure

Please explain: We believe they should as the disparity between the two just adds further confusion to the boundaries of employee, worker and self-employed.

Question 63 (Chapter 10 page 47 in discussion document)

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?

Yes No Not sure

Please explain why/why not: They should not be deprived of employment rights if they are being treated as employees for tax purposes.

Question 64 (Chapter 10 page 47 in discussion document)

If these individuals were granted employment rights, what level of rights (e.g. day 1 worker rights or employee rights) would be most appropriate?

Please state: Employee rights would be the most appropriate again if they are being treated as employees for tax purposes.

Do you have any other comments that might aid the consultation process as a whole?

Please use this space for any general comments that you may have, comments on the layout of this consultation would also be welcomed.

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