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Good Work: the Taylor Review of Modern Working Practices
Consultation on employment status

Submission to the Department of Business, Energy, and Industrial Strategy; HM Treasury; and HM Revenue & Customs

Chartered Institute of Personnel and Development (CIPD)

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Background

The CIPD is the professional body for HR and people development. The not-for-profit organisation champions better work and working lives and has been setting the benchmark for excellence in people and organisation development for more than 100 years. It has over 145,000 members across the world, provides thought leadership through independent research on the world of work, and offers professional training and accreditation for those working in HR and learning and development.

Our membership base is wide, with 60% of our members working in private sector services and manufacturing, 33% working in the public sector and 7% in the not-for-profit sector. In addition, 76% of the FTSE 100 companies have CIPD members at director level.

Public policy at the CIPD draws on our extensive research and thought leadership, practical advice and guidance, along with the experience and expertise of our diverse membership, to inform and shape debate, government policy and legislation for the benefit of employees and employers, to improve best practice in the workplace, to promote high standards of work and to represent the interests of our members at the highest level.

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Executive summary and key messages

The Government needs to clarify what its objectives are in relation to any legislation it seeks to bring forward. One aim is clearly to demonstrate fairness in the treatment of individuals who have limited choices in relation to the type of employment contract they are offered. However the Government also needs to maintain a balance between employment rights and the role of a flexible labour market in providing a high level of employment.

Flexibility is a positive feature of the UK labour market that offers benefits for both employers and employees. In addition to providing short-term cover for sickness or other contingencies, employers may have an ongoing need for flexibility, for example to cope with fluctuating demand or to acquire specialist skills that are required on only an occasional basis. They can achieve this flexibility in a number of ways: for example, by engaging individuals as self-employed contractors, on fixed-term contracts, on an agency basis, or sometimes as "workers".

It would be unrealistic to see worker status as offering a customised, catch-all category that would suit the varying circumstances and needs of the whole of the UK's flexible workforce. Although we are aware of no specific statistics on the matter, it seems likely that most employers who currently make use of "worker" status do so on the specific recommendation, and with the support, of larger employment law firms.

Clarifying or changing the law on employment status will not significantly impact the degree of insecurity experienced by individuals. Individuals on fixed-term employment contracts, for example, although they benefit from full employment rights, have no guarantee of longer-term security. In many if not most cases, individuals who are engaged as "workers" may be unaware of this fact, but will be more interested in the specific terms and conditions of their contract, including its duration, pay and hours, than in their employment status.

More should nevertheless be done to help employers and employees understand their rights and obligations. This includes making accessible a clear statement of the rights associated with (a) employment and (b) worker status (as in table 1 of the consultation paper); and requiring both employees and workers to be given a detailed statement of their contract terms.

Most decisions about employment status are in practice taken by employers, rather than courts and tribunals. Employers' attitudes will be central to the outcome of any attempt to reform the present framework.

Employers believe that there is a limited role for legislation on employment status. For the great majority of individuals, there is no real doubt about their employment status: there is a risk that a new, unfamiliar intermediate status would increase rather than mitigate uncertainty. Employers currently use a range of existing mechanisms including employment agencies and personal service companies to provide necessary flexibility.

We do *not* believe that codification in legislation of the law on employment status would help to give employers clarity or make the law more predictable. Employers would however welcome clear non-statutory guidance in this area. Acas might have a useful role to play in publishing guidance and offering advice to employers and unions in contested areas.

Production of an on-line "tool" would not guarantee correct answers in individual cases but would be a useful exercise to help clarify the relationship between the different factors which courts need to take into account.

Employee status cannot be equated with "fairness". It provides individuals with minimum legal standards of protection: it does not guarantee that individuals will be well treated. CIPD research suggests that a majority of people working for new "platforms" are satisfied with their jobs.

Employers are looking for simplicity. **Renaming "workers" as "dependent contractors" would offer no obvious benefit but create an additional employment status. Confusion about employment status could be significantly reduced by bringing into line the definition of employment status in relation to both employment rights and tax. Legislating on employment status in relation to rights, without taking full account of the implications for tax and NI, would risk confusing employers further and would be likely to have unintended consequences.**

The definition of employee status should focus on the meaning of "control". The other tests in the "irreducible minimum" should either be subordinated to control, or dropped (mutuality), or covered in non-statutory guidance (personal service).

In terms of protecting employees, action to redefine employment status will not guarantee fair treatment. The law is not evidently deficient in this area: the courts have shown that they are willing and able to challenge attempts to downgrade employment protection in cases where employers are wrongly treating people as self-employed.

The main practical challenge in relation to employment status is helping employers and individuals make choices that best suit their circumstances. The solution is to offer better guidance and more effective enforcement. This would help reassure employers and others that there is a level playing field, and discourage abuse.

There is an issue about protecting individual employment rights in cases which do not reach the courts but where the employer offers contracts that claim to be ones of self-employment. But redefining employment status would not deal with bogus self-employment. Incentives in the tax and NI system for individuals to be treated as self-employed need to be re-examined.

The existing tests of employment status are not watertight, and will require some amendment to reflect the changing nature of employment. But the decision whether an individual is an employee, a worker or self-employed is often not straightforward and is one that courts can determine only in the light of all the facts.

The relationship between employment rights and tax is a major source of confusion, in that the treatment of individuals for tax purposes is often taken as determining their status for employment rights. Some employers mistakenly believe that if someone pays tax as self-employed they have no employment rights. Any reform will need to take full account of this if it is to have a positive influence on employer behaviour.

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Our 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?

1. We agree that this chapter outlines the main issues for employers and individuals arising from the current system of employment status. We accept (paragraph 4.2) that the key issue in practice is the distinction between self-employed individuals and limb (b) workers. However the boundary between employees and limb (b) workers is also unclear.
2. The key question raised by this chapter is whether what the OTS has criticised as a "minimalist" approach to employment status, resting on case law, is adequate. The current tests are clearly open to interpretation, and this can help unscrupulous employers to "rig the system" by miscategorising individuals as self-employed. However this does not in itself make the case for legislation: the question whether an individual is or is not self-employed may depend on a range of facts specific to their case so, as the courts have said, there can be no "magic bullet" to resolve the issue.
3. The reliance on case law to determine employment status places a substantial responsibility on the judiciary to interpret precedent in an era when working patterns have become more diverse. It can certainly be hard for employers to be clear about the employment status of individuals, and there is scope for some to play the system. However any attempt to reduce the law in this area to a set of "objective" criteria seems doomed to fail.
4. The Government should consider promoting the wider use of mediation or other methods of alternative dispute resolution to resolve uncertain or disputed issues around employment status. This would be in line with other areas of the law, including employment law, where significant efforts have been made to reduce the pressure on courts and tribunals. Focusing resources on offering advice and guidance in specific sectors could increase understanding of the choices available. Customised advice will be essential if the law on employment status is amended in any way.

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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 to put it into legislation? Why/why not?

5. It would make the law more accessible and easier to understand if it was brought together in one place, rather than being spread over numerous statutes and a significant body of case law. This should however be in the form of detailed non-statutory guidance.
6. Codifying the existing law would offer little help to employers. By definition, codification would not improve predictability. Codification would also be unable to reflect the shifting interpretation of, and emphasis on, the factors underpinning the definition of employment status.

3. What level of codification do you think would best achieve greater clarity and transparency on employment status for i) individuals and ii) businesses – ull codification of the case law, or an alternative way?

7. It would be impracticable to attempt detailed codification of the law on employment status, including case law, which in any case is continually evolving. It would in any event be unrealistic to expect that codification would be of significant help to employers in interpreting the law with more confidence. If legislation is introduced, it should set out the *principles* upon which decisions about employment status are decided. This would need to take account of existing case law, but could clearly not address the full range of situations on which it is based.
8. **In the view of the CIPD, employers would welcome non-statutory guidance, which could more readily be adapted to reflect the changing law and labour market. Acas should be asked to reinforce the existing guidance on its website, which currently outlines the rights of employees and workers but does not attempt to describe the tests distinguishing between the categories.**

4. Is codification relevant for both rights and/or tax?

9. Employers' current thinking about employment status is heavily influenced by the implications for tax and NI. There is existing guidance on the HMRC website about employment status and self-employment: whether this should be codified is a matter for HMRC. The law on employment status in relation to the perspectives

of both employment rights and tax need to be closely aligned if employers and others are to have greater clarity in this area.

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

10. CIPD members agree with Taylor's conclusion that control is the key factor, and this is consistent with the recent cases on worker status. It will however be very difficult to adequately define status in legislation, and it will be essential to provide non-statutory guidance covering the full range of factors relevant to decisions on employment status.
11. The principles incorporated into primary legislation should focus on control. These would however need to be supplemented by a fuller outline of how they have been applied, and how they might be interpreted in the light of business and labour market change. This fuller treatment should be undertaken in non-statutory guidance, rather than in legislation.

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

12. Mutuality is at best an unhelpful and confusing term. The concept of mutuality is closely linked to that of control and could easily be absorbed in the control factors listed in non-statutory guidance. Mutuality has no meaning for employers other than that given to it by lawyers. As the consultation paper points out, mutuality is used by the courts largely as a means of establishing continuity of service. Where an individual has worked for the same employer for say 12 months, or there is a clear intention to maintain the relationship over a long period of time, this might be regarded as demonstrating a degree of mutuality.
13. Although the question whether there is an umbrella agreement linking separate periods of service may be fundamental to deciding the issue of "mutuality", the discussion by the CA in Pimlico Plumbers v Gary Smith (2017) shows that this is often a matter for interpretation. This means that there may be no clarity about the existence or otherwise of worker status, on which either employer or individual can rely. This casts some doubt on the importance of mutuality as one of the key tests.

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

14. The term "mutuality" seems to be central to the uncertainty surrounding the dividing line between employment and self-employment. The term needs to be

deconstructed and given more practical meaning if it is to have any significance for non-lawyers.

15. Mutuality seems to mean basically a commitment of both sides to the relationship. However the strength of that relationship may vary, so that mutuality has been held to be required for both "employee" and "worker" status. Clearly the same level of commitment cannot in practice be used as a test of the two different statuses.

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

16. It is hard to imagine giving specific, numerical form to the dividing line between a level of mutuality sufficient for employment status and that appropriate to the status of a worker. The degree of continuity i.e. whether or not the relationship has been continuous is also relevant, and variations in employment patterns suggest any arithmetical test for distinguishing between employee and worker is unlikely to be effective.

9. What does personal service mean in the modern labour market?

17. "Personal service" may be either a contractual term, or an expectation, or a reality. In today's labour market, employers are generally buying "talent", which clearly implies the personal services of an individual. Where there is no requirement for personal service, the relationship is more likely to be a commercial one.

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

18. Personal service is required in order to establish employment status. However a duty of personal service does not necessarily mean that the individual is an employee or a worker: even if an individual is genuinely self-employed, the employer is nevertheless buying the services of a specific person.
19. Personal service is not *sufficient* to establish employment status. A professional accountant or lawyer may contract to provide personal services but may still be self-employed. Continued provision of personal service may create a prima facie assumption that an individual is an employee or a worker, but it can be no more than that. Other criteria, particularly that of control, are more significant.

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

20. The concept of personal service need not be defined in legislation, but should be explained in guidance.

12. What does control mean in the modern labour market?

21. We agree that "control" cannot be defined simply in terms of management giving orders to subordinates. Nevertheless an employer clearly "controls" an employee in the sense that he determines the work to be done and the objectives to be achieved. Control will always be a matter of degree.
22. One way of testing control is to look at the relationship from the worker's perspective and ask what freedom and choices they have to change the terms of their engagement. Can they refuse to work an offered shift, or can they move onto a fixed number of hours? It is significant that the "ABC test" for US contractors includes "free from the company's control" as one of its three main criteria.
23. "Control" remains the single most meaningful test of employment status and will be influenced by :
    - where the work is done
    - when the work is done and how regular the arrangement is
    - how it's done - how much supervision and instruction the individual is given
    - whose equipment is used, and/or what clothing is required.
24. If the individual has a genuine choice over most or all of these factors (but does not have the right of substitution) then his or her status is likely to be that of worker (or 'dependent contractor'). Whether they have a genuine choice is likely to be dependent on the reality of the arrangement as well as the terms of the contract.

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

25. Control is definitely still relevant to determining an employee's entitlement to full employment rights. It is the key indicator of employment status.

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

26. The control test may need to be reinforced by reference to a number of *supporting* tests, including:
    - whether the individual bears any significant financial risk
    - whether the individual is or is not part of the organisation (integration)

- whether the individual works exclusively for one employer, or has a wider client base.

27. These tests should be elaborated in non-statutory guidance.

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

28. Financial risk should be included when determining if someone is an employee (see under Q14 above).

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

29. Integration into a business may be a very helpful indicator of whether the individual is an employee or not (see under Q 14). However, as Lady Hale recognised in Bates van Winkelhof (2014), "one may be a professional person with a high degree of autonomy as to how the work is performed and more than one string to one's bow, and still be so closely integrated into the other party's operation as to fall within the definition". This underlines the fact that no single factor can be determining in every case.

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

30. The provision of equipment may help to indicate whether an individual is an employee or not.

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

31. "Intention" cannot be an overriding factor where it is inconsistent with the underlying reality. However it may help to throw light on what was, or is, in the minds of both employer and individual. This will be particularly the case where there has been discussion, or an understanding, of the basis of the relationship between them. Nonetheless, the inherent inequality of bargaining power between employer and individual at the commencement of the employment relationship may make this somewhat illusory.

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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?

32. Legislation should be confined to setting out key principles. The risk of including detailed factors in legislation is that it would fail to keep up with changes in employer practice.

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?

33. The publication of non-statutory guidance (see under Q4 above) would mean there was no need to consider secondary legislation.

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?

34. This question should not arise. Non-statutory guidance could be amended when needed, without need to seek Parliamentary approval.

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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?

35. "Objective" and measurable criteria can be helpful in pointing towards employment status. All the measures referred to in paragraph 6.6 may be relevant in particular cases. The length of time spent with one employer may point towards employee status. However it would make no sense to classify a self-employed person as an employee (or a worker) simply because they had been working for more than a year with the same employer.
36. The percentage of income derived from one engager may similarly suggest employee status (as is the case in France); but a self-employed person could get a high percentage of their income from one source for a period of time, so a retrospective time test would also be needed. The place where the individual carries out work may also be relevant (for example in deciding whether on-call workers at care homes should be paid for time spent on call).
37. However none of these "objective" measures can substitute for a range of tests directed at establishing the nature of the relationship as a whole.

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

38. A test such as the Statutory Residency Test (SRT) for tax is most useful when the rules are clear and capable of producing a "right" answer. It is not obvious that this is the case in relation to employment status. However a tool or algorithm on the lines of the SRT could be useful in helping to produce a *prima facie* answer (see Q28 below).

24. How could a new statutory employment test be structured?

39. The design of a test goes to the heart of the issues about employment status. Judgements are needed in order to apply the basic principles to the different facts of individual cases. So no test could be relied on to produce the right answer in particular cases.
40. HMRC guidance underlines that there is no magic formula by which a contract of employment can be identified. Rather, all the possible factors which bear on the relationship between the parties must be examined, given their proper weight, and a judgement made about their overall effect.

41. Each case must be looked at in the light of its own particular facts. In Walls v Sinnett (see ESM7130) Vinelott J stated: "The facts as a whole must be looked at, and what may be compelling in one case in the light of all the facts may not be compelling in the context of another case." This reality cannot be displaced by legislation.

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?

42. The idea of a simplified employment status test, on the lines of the USA's ABC test or Germany's "3 out of 5" test, is attractive at first sight. It could be seen as a form of alternative dispute resolution, which would be cheaper and easier to apply than a detailed consideration of the full legal tests. However, if a simplified test was to be useful, employers and employees would need to accept that the outcomes might be still less predictable than now.

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

43. It is unrealistic to believe that a "less complex" version of the current framework would achieve the same result (see Q25).

27. 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?

44. If "objective" tests were applied, these would clearly be easier to manipulate. We do not see how this could be ameliorated without detailed monitoring or legal challenge.

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)?

45. Detailed guidance on employment status cannot produce definitive answers or totally remove uncertainty in individual cases. However it would be worth setting out to design a **tool or algorithm** which could be used to produce a *prima facie* answer. This could be done on a pilot basis, with the explicit aim of seeing what can be achieved. If an online tool was produced, such an indicative assessment

would be helpful in correcting misguided approaches, and preventing employers from incurring unnecessary legal costs.

46. The CIPD agree with the Taylor review that some criteria e.g. control should be given more prominence than others: producing an online tool would help establish how this might be done without undermining the need to take into account the circumstances of specific cases.
47. It would be useful to offer general guidance, based on case law, that would help employers and others make clearer choices about the kind of employment status they intend. The "ABC" test for self-employment in US legislation could not be adopted directly in the UK but offers the kind of guidance that might be helpful to employers and others. Similarly the German social security employment status test - "2. Depends on one employer for a long time" - underlines the significance of the time dimension in deciding whether or not there is an employment relationship.

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?

48. In the view of the CIPD, workers are currently treated on a similar basis to employees for tax purposes.
49. **Decisions about amending the framework of employment status need to take full account of the implications for tax and NI. The CIPD recognises that the Government has said there are no plans to make any changes to Class 4 NICs: in our view, however, it needs to set out its future model of NI before making changes to employment status. The choice of tax and NI regime to apply to any intermediate employment status will significantly influence employers' choices about whether to use it.** If employers have to pay NI contributions for dependent contractors, they may be reluctant to consider using this status: equalising NI contributions for employees and the self-employed would remove this disincentive.

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Chapter 7: The worker employment status for employment rights

30. Do you agree with the review's conclusion than an intermediate category providing those in less certain casual, independent relationships with a more limited set of key employment rights remains helpful?

50. We agree with the Taylor review that a three-tier approach distinguishing employment, worker and self-employed status should be retained. This provides baseline protection for workers, enhanced protection for employees and no employment protection for the self-employed. Although "worker" status appears to have been adopted as something of an historical accident, it provides an intermediate category of employment status for individuals who have a contingent relationship with their work. This may be because they are unable to commit to permanent employment (e.g. for health reasons) or because their employer - in for example the NHS or higher education - is unable to commit to a long-term relationship.
51. The courts have also found the worker category useful as a means of providing some protection to people who are in a dependent relationship with their employer but don't appear to be employees. Removing worker status would take away a critical element in the judicial armoury for protecting employment rights; in its absence, more workers would be liable to be treated as self-employed and receive no employment protection. We agree also that the blurred line between worker status and self-employment is the key issue around employment status in relation to individual rights.

31. Do you agree with the review's conclusion that the statutory definition of worker is confusing because it includes both employee and Limb (b) workers?

52. Many employers are comfortable using the "binary" framework of employment and self-employment. We do not agree however that the statutory definition of worker is a serious source of confusion: few employers use the term "limb (b)", and smaller employers may often be completely unaware of the availability of worker status.

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

53. We do not support changing the definition of worker to encompass only "limb (b)" workers.

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

54. By renaming limb (b) workers and adopting a new separate category, the Government would be giving it added legitimacy and this might appeal to some employers. The risk is that some might see the new status as an invitation to recruit people as "dependent contractors" whom they would previously have recruited as employees, so reducing the level of employment protection. A key attraction of the new status for some employers might be that the individuals affected could no longer claim unfair dismissal, and would not qualify for redundancy pay either, and this could have negative consequences in terms of employment protection.

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

55. In Byrne Bros (Formwork) Ltd v Baird and others (2001), Underhill J commented that "workers ... degree of dependence is essentially the same as that of employees...Drawing that distinction [between employee and worker] in any particular case will involve all or most of the same considerations as arise in drawing the distinction between a contract of service and a contract for services – but with the boundary pushed further in the putative worker's favour". He concluded that "the basic effect of limb (b) is, so to speak, to lower the pass-mark". This suggests that the distinction between employee and worker status will inevitably continue to be largely one of degree.

35. 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?
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?
iii) Or, is there an alternative approach that could be considered? If so, how could this be set out in legislation?

56. Subject to including some reference to the contingent workforce (see our response to question 34 above), it is inevitable that the criteria for worker status

should closely mirror those for employees. A narrower range of criteria would not seem appropriate. The degree to which the "pass-mark" may be lower should be covered in guidance, not legislation.

36. What might the consequences of these approaches be?

57. Clarifying the boundary might encourage employers to make more use of worker status. However this should be done in guidance, not legislation.

37. What does mutuality of obligation mean in the modern labour market for a worker?
38. Should mutuality of obligation still be relevant to determine worker status?
39. If so, how can the concept of mutuality of obligation be set out in legislation?

58. See responses to questions 6, 7 and 8. Insofar as the degree of mutuality may differ as between employee and worker, this should be reflected in the differing pass-mark referred to by Underhill J in Byrne (see Q34 above).

40. What does personal service mean in the modern labour market for a worker?
41. Should personal service still be a factor to determine worker status?
42. Do you agree with the review's conclusion that the worker definition should place less emphasis on personal service?

59. See our responses to questions 9 to 11.
60. We see no reason why the requirement for personal service should differ as between an employee and a worker. We agree with the Taylor review that "placing greater emphasis on control and less emphasis on personal service will result in more people being protected by employment law". However this is equally true in relation to both employee and worker status. Placing undue emphasis on personal service can make it easier for unscrupulous employers to misattribute employment status.

43. Should we consider clarifying In legislation what personal service encompasses?

61. It would be helpful to clarify what personal service means, not in legislation but in guidance.

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

62. Instances have been reported where an employee is allowed to substitute a family member, for example to take their place for one or more specific shifts in a fast-food outlet. This is seen as a form of flexible working. Where such a limited right of substitution exists, it would seem not inconsistent with the requirement of personal service that such an individual should nevertheless be regarded as an employee. Case law shows that insistence in the formal employment contract that personal service is *not* required may be ignored where it is clearly at variance with the facts.

45. Do you agree with the review's conclusion that there should be more emphasis on control when determining worker status?
46. What does control mean in the modern labour market for a worker?
47. Should control still be relevant to determine worker status?
48. If so, how can the concept of control be set out in legislation?

63. We agree with the review's conclusion that there should be more emphasis on "control" when determining worker status (see also under questions 12 to 14 above).
64. It is generally accepted that the word "control" taken literally may overstate the circumstances of many employment relationships, within which the individual has significant discretion to choose how to do their job. The test for establishing the existence of an employment relationship could similarly be described as one of "subordination" or "integration".
65. The idea of dependency is implicit in that of control. Both these terms reflect the reality of an imbalance in the employment relationship, where it is the employer who is responsible for determining objectives and allocating resources.
66. In some cases "integration" may be a more appropriate word for testing the presence of an employment relationship. The issues listed in paragraph 7.24 of the consultation paper are clearly all relevant in determining the degree to which an individual's contribution is integrated into the employer's organisation. The concept of integration can be applied to smaller as well as larger businesses.
67. Although all these terms - control, subordination and integration - are useful, they are only an approximation to the idea of "employment". Equally they need to be tested against the reality of the relationship, not just the written contract. This underlines the difficulty of attempting any detailed statutory definition and the need to amplify in detailed guidance the factors that may need to be taken into account.

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?

68. The factors listed in paragraph 7.26 are all helpful in determining worker status. Many of them are simply the inverse of factors (e.g. control, personal service) tending to establish *employment* status. There would however be the familiar problems in trying to reduce them to legislation.

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?

69. The statutory definition of a limb (b) "worker" makes clear that an individual who is in business on their own account cannot be a worker. We would not seek to see this changed.

51. Are there any other factors (other than those set out for all the different tests) that should be considered when determining if someone is a worker?

70. We have no additional factors to suggest.

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?

71. The CIPD do not agree that there would be benefit in using the term "dependent contractor", to embrace those individuals who are currently defined as limb (b) workers but who have no other specified status. The Taylor review did not offer any clear rationale for creating this "dependent contractor" status.
72. A number of countries, including Canada, Italy and Spain, have introduced a new intermediate employment status but these have had, at best, mixed results. In Canada, the effect of a new "dependent contractor" category was to expand the definition of employee and bring more workers within the ambit of employment protection. In Italy, however, the introduction of a new "quasi-subordinate" category resulted in less worker protection, and subsequent statutory changes have limited its use. There was "systemic arbitrage" between the standard employment category and the intermediate category, with resulting confusion and downward misclassification of workers. In Spain also, the introduction of an intermediate category of dependent worker has produced low take-up and charges of misclassification by both trade unions and employers.

73. We would be concerned about how some employers might respond to the creation of a new intermediate status. The obvious risk is that some might see this as an invitation to reclassify individuals, who are currently employed, as "dependent contractors", so reducing the level of employment protection. A key element of the new status would be that the individuals affected could no longer claim unfair dismissal, and would not qualify for redundancy pay.
74. There is an important difference between simply retaining the existing "worker" status, and renaming it as "dependent contractor". It would not simply be a matter of supplying a new name. The Government would be focusing on this intermediate category and arguing that it was needed in order to recognise a number of jobs whose current status is difficult to establish. It could easily be interpreted as an implicit message in support of the idea floated by the Beecroft review in 2011, but rejected by the then government, for limiting or removing

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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?
54. What would the impact be of this on a) employers and b) workers?
55. How might platform-based employers respond to a requirement to pay the NMW/NLW for work carried out at times of low demand?

75. The National Minimum Wage regulations 2015 provide (reg. 32 (1)) that "Time work includes hours when a worker is available, and required to be available, at or near a place of work for the purposes of working unless the worker is at home". So far as possible, the existing principles for calculating working time should be applied to Uber drivers and others working in the gig economy.
76. In Uber v Aslam, the EAT found that the employment tribunal had not been wrong to hold that a driver would be a worker engaged on working time "when in the territory, with the app switched on, and ready and willing to accept trips". This ruling is broadly in line with case law in relation to other workers who may have intermittent calls on their time (such as security guards).
77. However the Uber v Aslam case was decided on the explicit assumption that "Uber's market share in London is such that its drivers are, in practical terms, unable to hold themselves out as available to any other PHV operator". Where a driver has more than one app open, this will not be the case and it would be inappropriate to treat the time spent before accepting a job as working time. The Uber definition would not be suitable for wider application, for the reasons set out in paragraph 8.14 of the consultation paper i.e. the app can be on at times of low demand, and when apps are open the driver is free to accept rides from other platforms.
78. It would be preferable to say that working time applies **only if the worker is actually working**, in the sense that they are booked to do a specific job. The obvious solution is to measure the actual time from acceptance of the ride. The National Minimum Wage should be calculated according to average earnings over the course of a full year.
79. It is clear from the decided cases where "on call" work is at issue that no single factor will be determining, and each case will depend upon its own facts and circumstances. A key issue in relation to platform working is, what duties does the individual owe the employer while not actually working? If the answer is "none", there is no case for payment of wages in that period.
80. It is unclear why a statutory definition of what constitutes working time for the purpose of calculating the minimum sage should require any significant change in employers' business model. The information required to support the kind of

definition suggested above will be readily available to the employer, and any impact on costs can be reflected in the price charged to customers.

56. Should government consider any measures to prescribe the circumstances in which the NMW/NLW accrues whilst ensuring fairness for app-based workers?
57. What are the practical features and characteristics of app-based working that could determin the balance of fairness and flexibility, and help define what constitutes 'work' in an easily accessible way?
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?
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?

81. App-based working takes many different forms, with varying terms and conditions of employment. In general it is *not* the case that app-based working introduces a new level of insecurity that requires to be reflected in redefining the meaning of employment. The balance between flexibility and fairness is one that many individuals are able to strike for themselves.
82. CIPD research suggests that a significant proportion of gig workers are happy with their job, and content with the existing balance between flexibility and fairness: clearly app-based working offers individuals the flexibility in relation to working time that many seek. The case of Pimlico Plumbers v Gary Smith suggests that worker status offers a fair balance between flexibility and employment protection for many app-based workers.
83. The basic issue in determining whether an individual should be regarded as "working" for the purposes of the NMW/NLW is whether they have some current obligation towards the employer. The ability to pursue other activities while waiting to perform tasks, or the ability to refuse work, are both likely indicators that they do *not* currently have an obligation towards the employer.

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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?

84. It is unclear why the factors listed under "in business on their own account" should not be relevant to establishing self-employed status. As paragraph 7.25 of the consultation paper makes clear, if the courts find that an individual does not meet the test of being in business on their own account, they will be a worker. This suggests that, if self-employment is essentially being in business on one's own account, there would be no possibility of individuals falling through the gap and having no employment status.
85. The simplest approach to defining self-employed status would be to say that, if an individual is not either an employee or a worker, they are self-employed.

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

86. It could be useful to discuss in guidance the different forms an employer might take. We see no need however to reconsider the definition of an employer. If an individual can show the existence of an employment relationship, there must clearly be an employer.

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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 should this have?

87. Legislation might be needed in order to reconcile the sometimes conflicting case law on tax and employment. However the principles on which the courts have approached the issue of employment status from the standpoint of employment and tax respectively are basically the same.
88. Employment status for the purposes of tax and employment rights should if possible be fully aligned. A Treasury Green Paper would be essential to unlock this issue.
89. It will be necessary to consider the tax treatment of workers. Alignment of the law on tax and employment rights will mean clarifying the appropriate tax status of workers. We think it likely that most individuals currently having worker status are taxed on the same basis as employees. However requiring "workers" to be employed on PAYE terms, with the employer having to pay NICs, will limit the appeal of worker status for many employers.
90. One of our members responsible for operating a platform-based business has commented: "Changing worker status so that it is broader in application without removing the risk of Class 1 NICs will mean that business will reconfigure operations so that flexible work opportunities that were previously self-employed will become a fewer number of fixed employment positions. ...We would not necessarily be against offering self-employed couriers 'worker' status with NMW and the relevant employment rights if the negative Class 1 NICs consequence of worker status were not there."

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

91. We do not agree that legislation should be amended so that those who are deemed to be employees for tax also receive some employment rights. The tax status of individuals should not drive decisions about employment rights: alignment of tax and rights should start from decisions about employment status.

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