

Employment status and off-payroll (IR35) rules from April 2021

10 March 2021

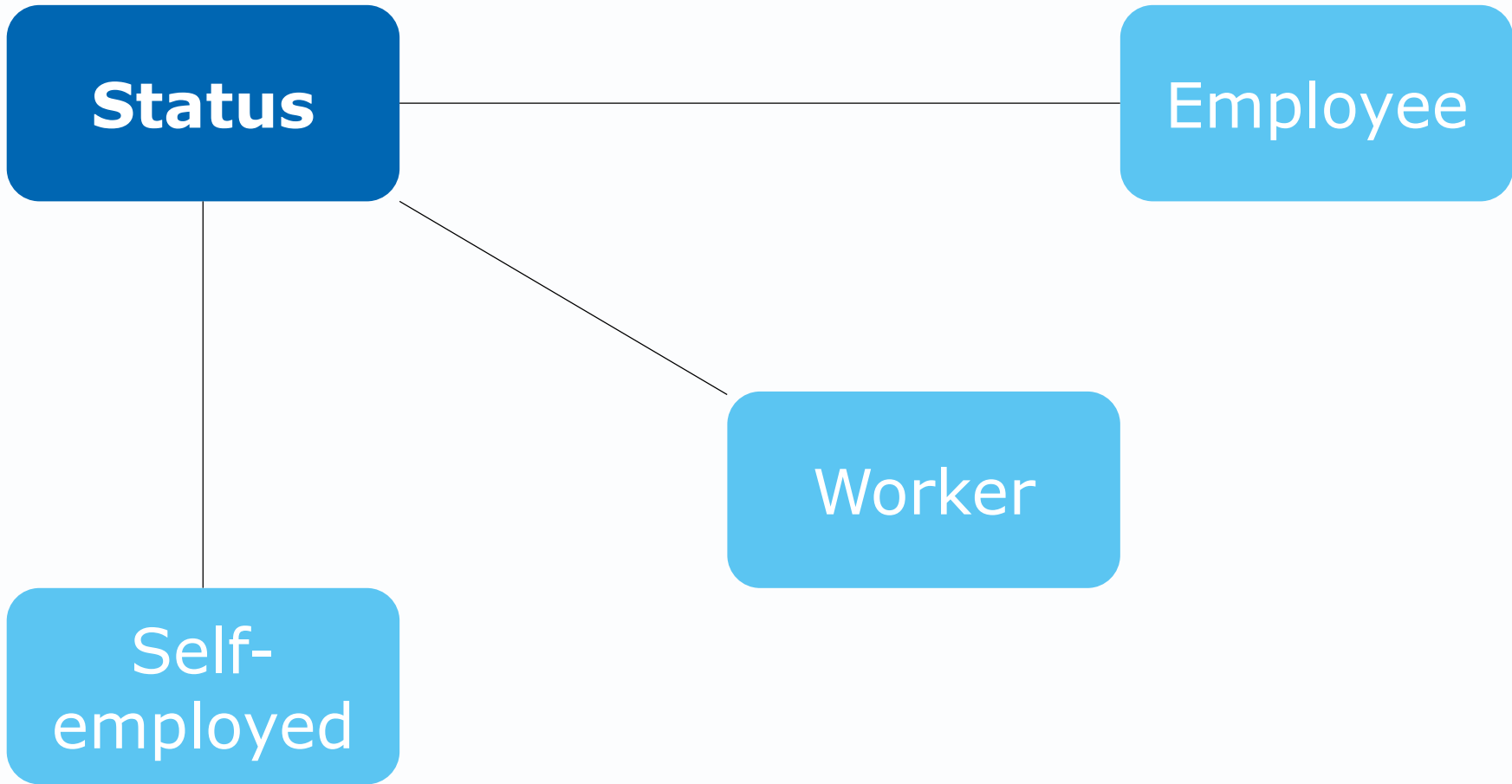
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Agenda

- **Employment status**
- **IR35 from an employment perspective**
- **Agency Worker Regulations**
- **Managing your contingent workforce**
- **Questions**

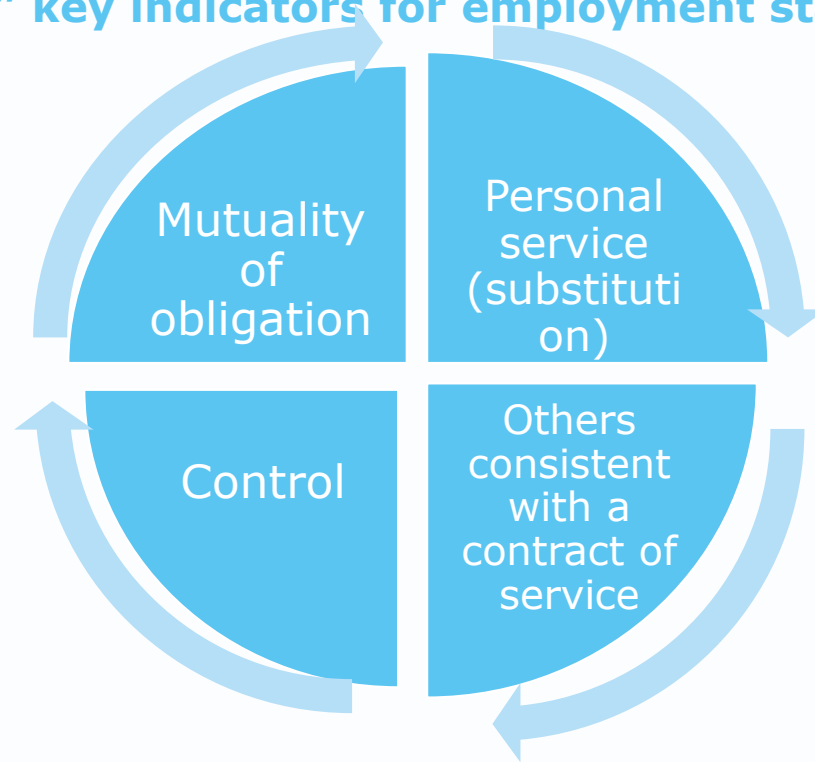
Employment status



Who is an employee?

- Someone who works under a contract of service, whether expressly or implied

The “multiple test” key indicators for employment status:



Employees: mutual obligations

For the relationship to be one of employee/employer:

- **employee's** obligations under the contract must include an obligation to work for the employer
- **employer's** obligations comprise an obligation to provide work or pay (must be sufficiently related to work)

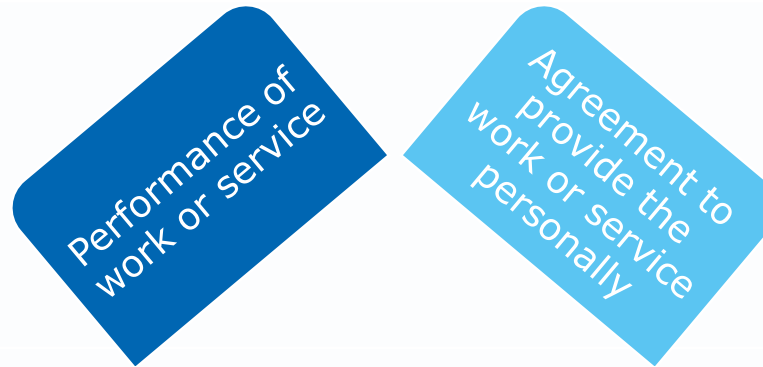
Factors that point towards an employment relationship include:

- Receipt of salary and benefits
- Maternity, paternity or adoption pay
- Being managed by an employee of the organisation
- Being subject to the organisation's rules and procedures
- Being integrated into the organisation's business
 - e.g. attending internal meetings and events, wearing uniform, being provided with equipment and business cards



Who is a worker?

- Someone who has a contract or other agreement to do work or services personally for a reward
- Not fully “independent”, but still entitled to some (not all) employee rights



Note: If an individual is an employee then they will also be classed as a worker for the purposes of employment legislation

Factors that may determine whether someone is a worker

- Does the individual provide their own tools?
- Do they bear *some* financial risk?
- To what extent does the individual carry out their own work for other organisations?
- Do they market their services to others?
- What is the degree of subordination of the individual to the employing organisation?
- What is the degree of their integration into the employing organisation's business?
- Consider whether the contract between is actually a contract between two independent business undertakings

Worker status – new update

Uber BV v Aslam Supreme Court 2021

U contended drivers are contractors who contract with passengers

No agency relationship between U and D

Do not start with written contracts but with legislation – purpose

- U sets fare with no right for A to increase
- Contractual terms imposed by U
- once logged in, D constrained on accept trips
- U exerts control over delivery (passenger rating)
- U restricts comms between D and passengers to bare minimum

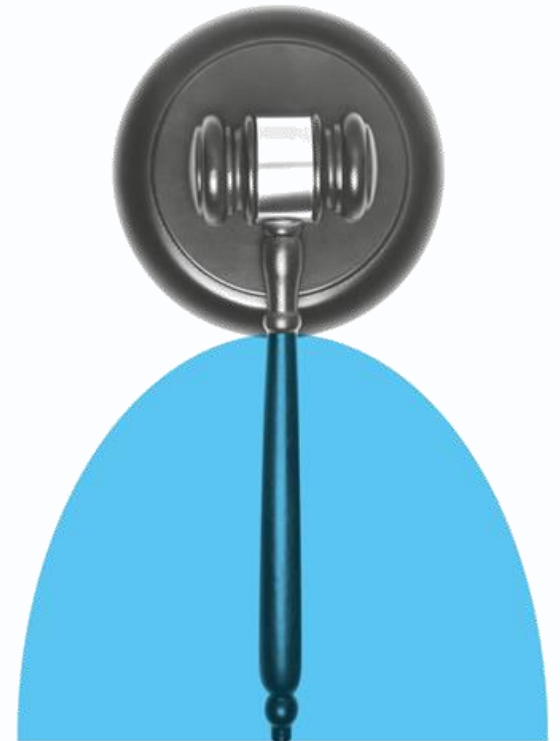
U control D, D subordinated to U. Can only earn more through working longer hours and adhering to U's standards

D working when logged in and available for trips



Who is classified as self-employed?

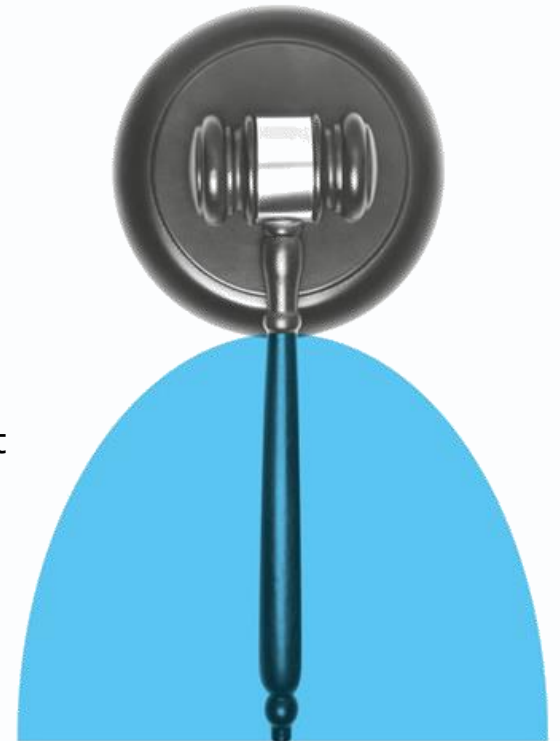
- Someone who runs their own business
- Have their own terms of agreement e.g. paid per assignment
- Bears all financial risk
- Free to decide whether/how to do the jobs
- Pays their own tax, bears their own insurance and manages their social security
- Independent and autonomous
- Do not have employment rights or protection



Who is an employee?

Control:

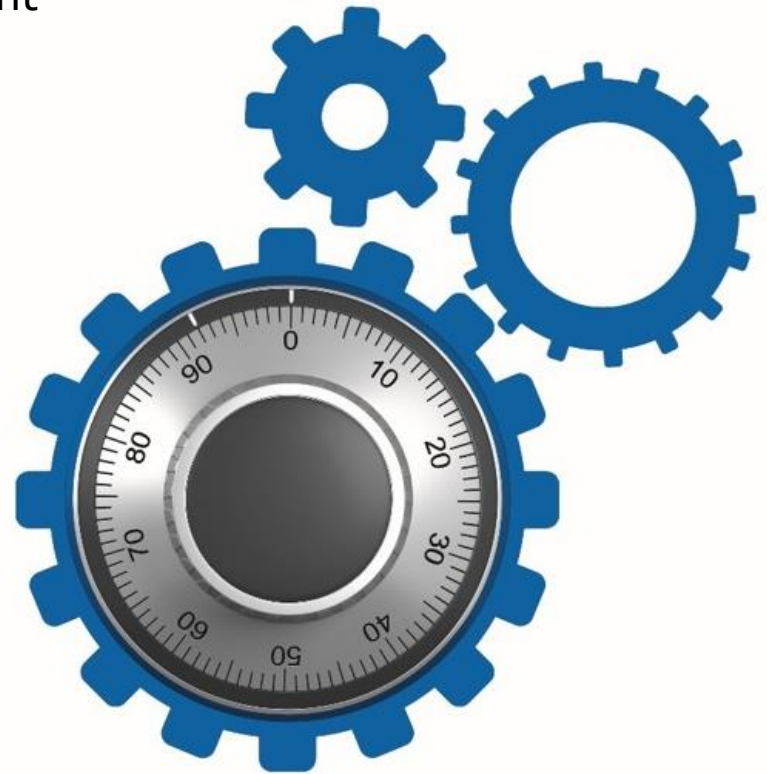
- **Ready Mixed Concrete:** MacKenna J: "control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done"
- Control can be shown through the employer dictating the terms of the employment relationship, having the right to direct the employee on what to do, and being able to bring the employee up on disciplinary procedures
- **White & Anor v Troutbeck SA:** the question of control is not whether the worker has control over their own work each day but rather whether the employer has a contractual right of control over the worker. This case concerned two housekeepers with a high degree of autonomy on how they carried out their duties. The EAT determined them to be employees



Sufficient control?

3 key principles:

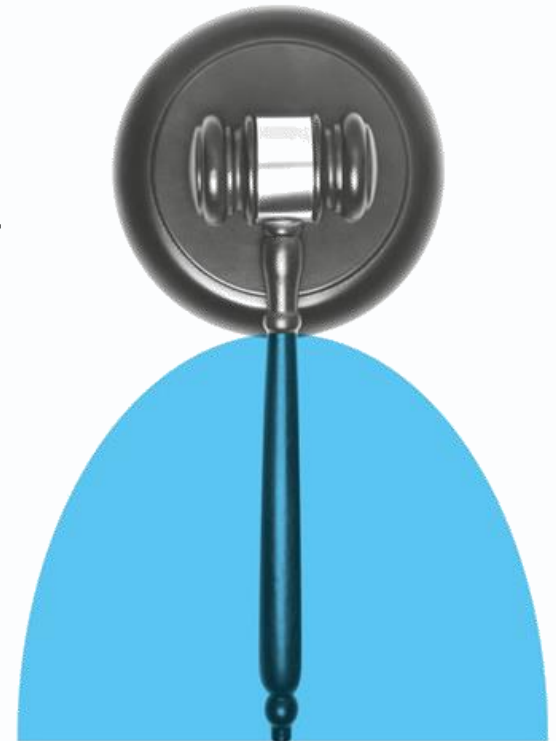
- Power to control is essential
- Exercise of that right is not essential
- Control over incidental matters sufficient



Who is an employee?

Personal Service:

- Generally, employees are required to provide personal service, whereas self-employed and independent contractors can provide a substitute worker/subcontract the work
- **Staffordshire Sentinel Newspapers Ltd v Potter:** Mr Potter, a newspaper home delivery agent, had the unqualified right to provide a substitute without giving a reason. Although the replacement had to be 'suitable' and the client could reject the substitute, the EAT held that Mr Potter was self-employed
- **MacFarlane and another v Glasgow City Council:** Where gym instructors could only send a substitute when they were unable to work, and there were restrictions on the replacements, the EAT held that this was capable of being an employment relationship



Pimlico principles for personal services

If the right to substitute is....	...then it is [] with providing personal services
unfettered	inconsistent
conditional	possibly inconsistent
limited to when the worker is unable to work	consistent
exercisable provided the replacement is qualified	inconsistent
conditional on employer's absolute discretion	consistent

Who is an employee?

Mutuality of Obligation:

This refers to the employer's obligation to provide work and the individual's obligation to accept the work provided

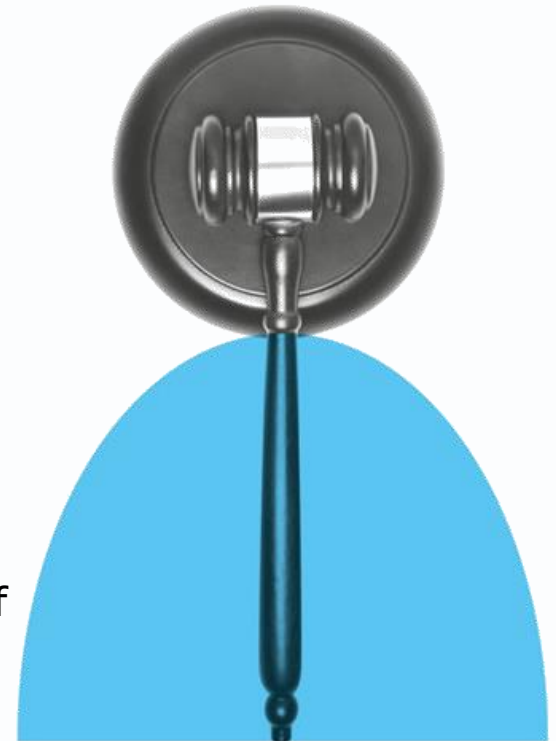
Stephenson v Delphi Diesel Systems Ltd: Elias J:
"The significance of mutuality is that it determines whether there is a contract in existence at all"



Who is an employee?

Professional Game Match Officials Ltd v HMRC

- HMRC declared a group of lower-division football referees to be employees of PGMOL, their representing body, bringing a £584,000 penalty charge under IR35 (intermediaries legislation) representing underpaid income tax and National Insurance contributions
- The first-tier tax tribunal found that the arrangement lacked the necessary **mutuality of obligation**, as the referees were not obliged to accept any match offers and did not have the right to be offered any work; it lacked the necessary **control**, as the referees had full authority on matchdays and PGMOL did not have a contractual right of control; and it did not otherwise suggest employment
- On appeal, the upper tribunal agreed with the findings of the first-tier tax tribunal



Other factors to consider

1. Basis of payment – salary
2. Employee like benefits
3. Pattern and length of engagement
4. Exclusivity
5. Integration – internally (e.g. performance) and externally
6. Financial risk
7. Substitution
8. Equipment
9. In business on own account (Hall v Lorimer)
10. Taxation
11. Nature of work
12. Contract

Determining Status

Case law

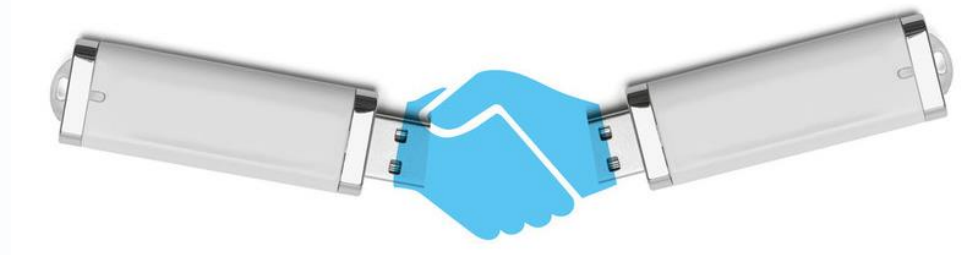
Ansell Computer Services Ltd v Richardson [2004] STC

- Y was director and shareholder of a PSC that provided services to a client as an experienced engineer specialising in defence work.
- Y worked at the client's premises but could and did work from home on occasion. He could take time off as he wished. Brought his own reference materials.
- Provided personal service. His work was overseen by a manager but he did not require instruction or control.
- Did not take any real financial risk and not much opportunity to profit from sound management in the performance of the task.
- Could suggest a substitute and did not receive the same benefits as employees.
- Held to be self employed. It was significant in the instant case that the client was not obliged to keep Y in work during his engagements; Y had not been obliged to perform a particular amount of work; Y had not needed permission to take time off; Y could have been substituted, although the situation was very unlikely to have arisen; and Y had not been entitled to employee benefits

Why does it matter?

Why does it matter?

- Employers and employees have obligations implied into the employment contract (e.g. the mutual duty of trust and confidence)
- Different protection and rights – employees have the most protection (e.g. unfair dismissal rights and SRP); workers have some (hours, annual leave and pay); self-employed the least
- Only employees (and now possibly workers?) are caught by TUPE
- Employer will be vicariously liable for the actions of its employees
- Need to differentiate the workforce for tax purposes
- Personal data handling under GDPR will have different complications depending on if the individual is an employee, worker or contractor

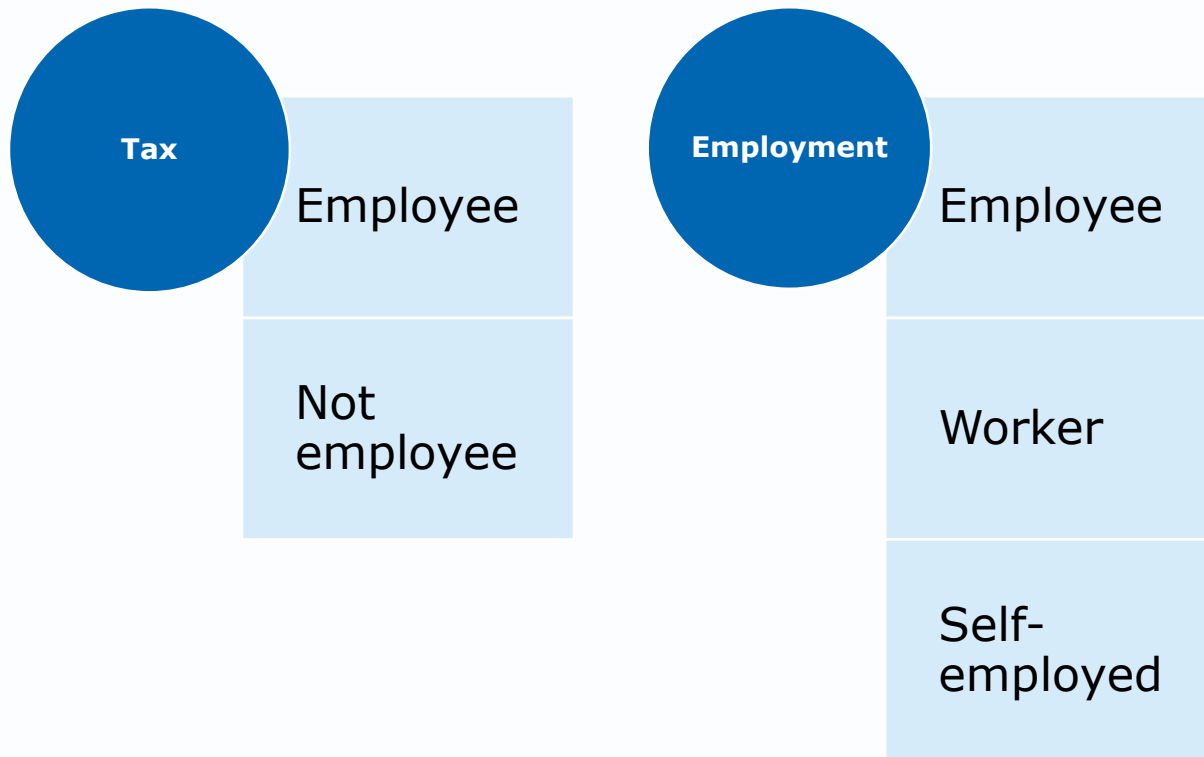


Employment status

Employment purposes vs tax purposes

Employment status

Tax purposes vs employment purposes



IR35 regulations

from an employment perspective

What are the off payroll rules ?

- Tax legislation designed to stop 'disguised employment'
- Aimed at workers who provide their services via intermediaries, typically their own personal service company ("PSC"), who would be regarded as employees if engaged directly
- Where the worker is genuinely self employed providing their services via their PSC allows them to pay less tax
- Where the IR35 rules apply the worker pays broadly the same employment taxes as they would if they were an employee

When does IR35 apply?

- When a business receives services from a worker
- The services are provided under arrangements involving an intermediary (which can be another individual or a company or partnership) in which the worker has a material interest (for the purposes of this presentation we refer to the intermediary as the “PSC” as this is the most typical arrangement)
- The worker personally performs, or is under an obligation personally to perform, the services for the business
- The circumstances are such that if the services were provided under a contract directly between the business and the worker, the worker would be regarded for tax purposes as an employee of the business

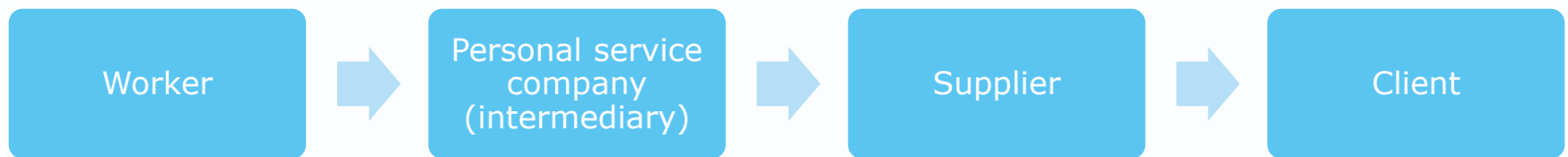
Which arrangements are not caught by the IR35 rules?

The IR35 rules do not therefore apply in the following circumstances:

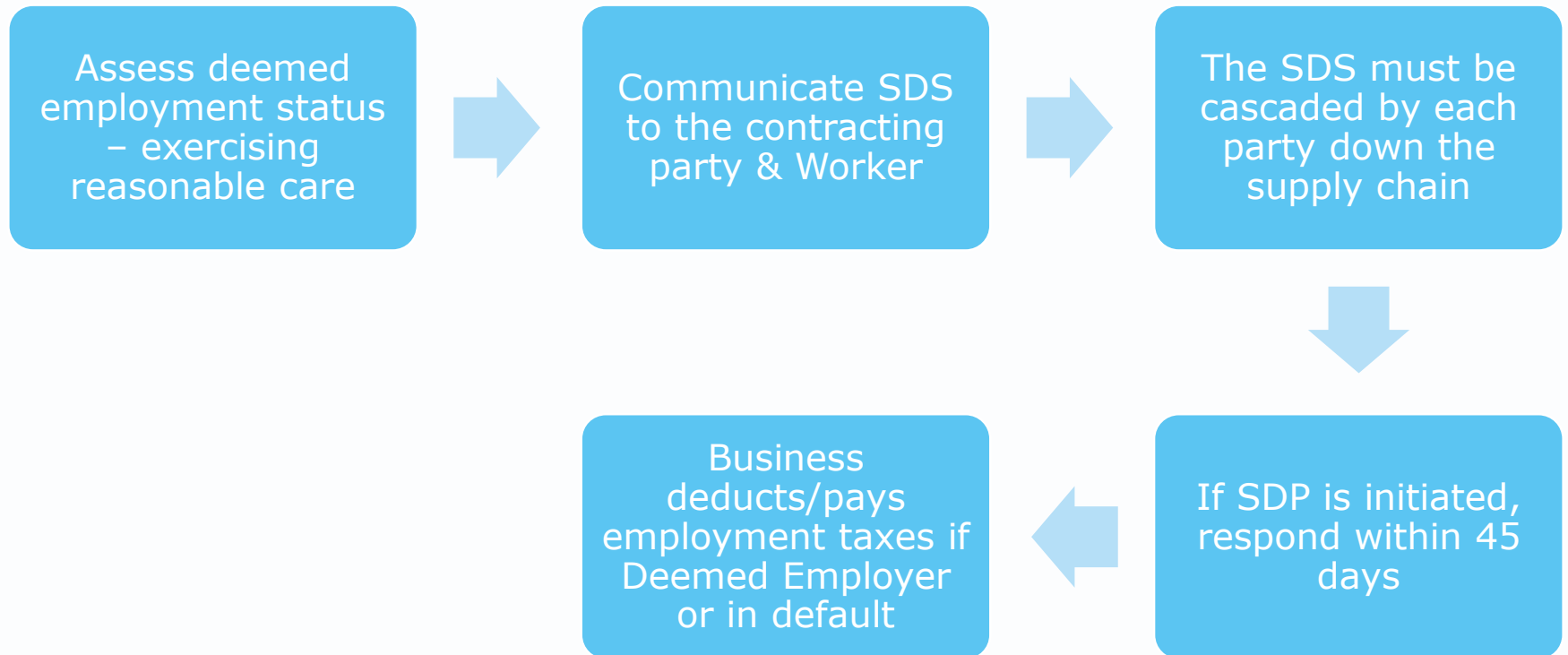
1. If the Worker is engaged directly by the Client
2. If the Worker does not provide their services to the Client via an Intermediary
3. If the Client contracts with an agency for the supply of the Worker and the Worker is on the Agency's payroll so that the Agent is responsible for the employment taxes
4. If the Worker is employed by an umbrella company which is responsible for the employment taxes
5. The Client has fully contracted out the services and there is no personal service being provided by the Workers performing the contracted out service

IR35 – key points

- End-user/client (and not worker's PSC) must decide whether the worker would be an employee (and have employment status for tax purposes) if the business were to contract with them directly. Reasonable care must be exercised
- Business responsible for paying the PSC (Fee Payer), also responsible for deducting income tax and employee's NICs from the fees paid to the PSC, and for paying employer NICs (and any Apprenticeship Levy)
- Each party in the supply chain will be responsible for passing on End-user's status determination (and its reasons) to the next party in the chain. E.g.:



Key points (continued)



Assessing IR35 Status

Key steps

How to undertake an employment status determination:

- HMRC Guidance
- Case law
- the HMRC CEST tool
- other tools or seeking advice from professional advisers
- outsourcing the responsibility



Assessing IR35 Status

Key steps

Format of the SDS – what constitutes a valid SDS?

- requirements that must be met to be a valid SDS:
 - it must include a statement as to whether the worker is an officeholder or deemed employee/officeholder
 - it must give reasons for coming to that conclusion
 - reasonable care must have been taken in coming to that conclusion
 - no format prescribed by the legislation or HMRC guidance
 - advertising a role as inside or outside IR35 will not suffice
 - using the output from the CEST tool will suffice
 - using a separate written statement will suffice
- Use your own internal precedent that incorporates the CEST tool.

Assessing IR35 Status

Key steps



Method of distributing the SDS:

- no format prescribed by the legislation or HMRC guidance
- e-mail or post will suffice
- uploading to a portal which worker has access to will suffice
- important to have a record that SDS has been issued

The duty of 'reasonable care' (1/2)

What does this mean?

- No legislative definition;
- HMRC guidance has been published on what they regard as taking 'reasonable care':
 - act in a way would be expected of a prudent and reasonable person in the Client's position
 - higher degree of care expected from larger multi-national companies;
 - ignorance of the law is no excuse
 - must carry out complete and thorough determination for each contractor
 - document preservation



The duty of 'reasonable care' (2/2)

What does this mean?

- Examples of reasonable care:
 - advice from professional advisors
 - training
 - robust processes
 - checking and reviewing processes adopted by sub-contractors engaged to do the status determination
- Examples of what will not be reasonable care:
 - blanket determinations
 - no training given to key personnel
 - failing to reconsider the status determination where there is a material change to the terms of engagement



Determining Status

HMRC Guidance

- Personal Service
- Mutuality of Obligation
- Integration in the organisation
- Control
- Financial Risk and Reward
- Resources
- Length of engagement
- Benefits
- Right to terminate
- Intention of the parties

Determining Status

Case law

Christa Ackroyd Media Limited v HMRC [2019]

- Presenter on the BBC supplied via a PSC.
- No provision in contract regarding control.
- However, Tribunal could still consider the issue of control by looking at the circumstances
- Individual did not have control over her work or the last say on issues. BBC had the right to decide the stories to run and in what priority. BBC could direct the individual as to what day she worked, what she did, who she would interview and could edit her materials.
- Found would have been engaged under a contract of employment.

Determining Status

Case law

Albatel Limited v HMRC [2019]

- Lorraine Kelly was the presenter. The client was ITV.
- Services were the “brand and personality” of Ms Kelly.
- Ms Kelly carried out a wide variety of work for other clients than ITV. Clearly in business on its own account.
- Ms Kelly had significant control – over programmes, running orders, featured items, angles to take at interviews.
- Judge commented:

“In looking at the overall picture we were wholly satisfied from the evidence that contrary to being part of a jigsaw, Ms Kelly was the jigsaw.”

Determining Status

Case law

Kickabout Productions Ltd v HMRC [2020]

- KBL was a PSC established by Paul Hawksbee. KBL provided PH to TalkSPORT as a radio presenter. Engagements covering 18 years. Had freedom to decide format and content of each show.
- No employee benefits. Earned income outside of the show. Had to provide personally 222 shows per year, for which he was provided a minimum fee. Days not worked had to be agreed with TS. Had to present a 3 hour show at a time, day and location as determined by TS. Had restrictions in respect of presenting other radio shows.
- Said there was mutuality of obligation did not point to employment as TS was not obliged to provide work. The agreement was for H to be paid only for shows he provided. Initial decision: self employment.
- On appeal, the upper tribunal found that other factors indicated employment status. These included the length of time Mr Hawksbee had been presenting the show, that he had not worked for anyone else during that period, that he was required to give 4 months' notice, and that he was not allowed to provide a substitute (personal service)
- Mr Hawksbee was therefore determined to be an employee of Talksport

Operating a status disagreement process

Operating a status disagreement process

Client must:

- Establish a “client-led status disagreement process” (SDP)
- Apply the SDP if A, the worker, or the deemed employer, (i.e the person that pays B) disagrees with the SDS
- Reconsider the worker’s employment status in light of the worker/deemed employer’s representations and respond within 45 days of receiving the disagreement
- If it determines that its original determination is correct, inform the person who raised the grievance giving reasons
- If it determines that its original determination was wrong, issue a new SDS to the worker and deemed employer

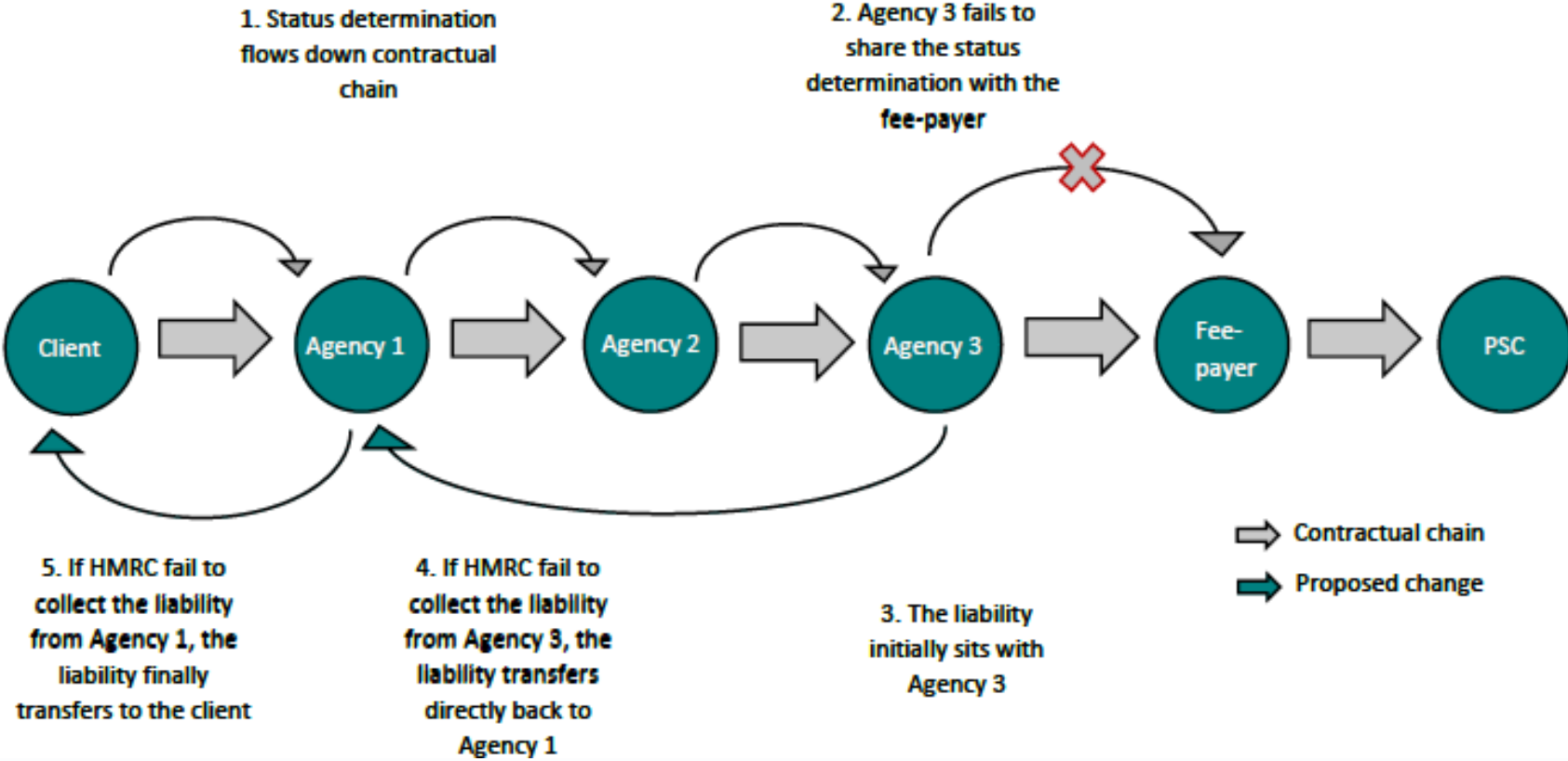
Liabilities

Off-payroll working rules

Transfer of liability – incentivising compliant supply chains

- Originally, the basic principle has been that the party paying B, the PSC, is liable for deducting and paying employment taxes to HMRC (some exceptions, eg offshore fee payers)
- **the client** will become liable if it:
 - fails to provide compliant SDS (including exercising reasonable care in determining the status of the worker) to the worker and contracting party, or
 - fails to comply with SDP
- **another party in supply chain** will become liable if it:
 - fails to cascade SDS to next party in supply chain
- Proposed that HMRC will have power to recover unpaid employment taxes from others in supply chain, such as first agency at top of chain or client, where party responsible for making such payments fails to do so

Diagram: Transfer of liability across the labour supply chain



IR35: Options

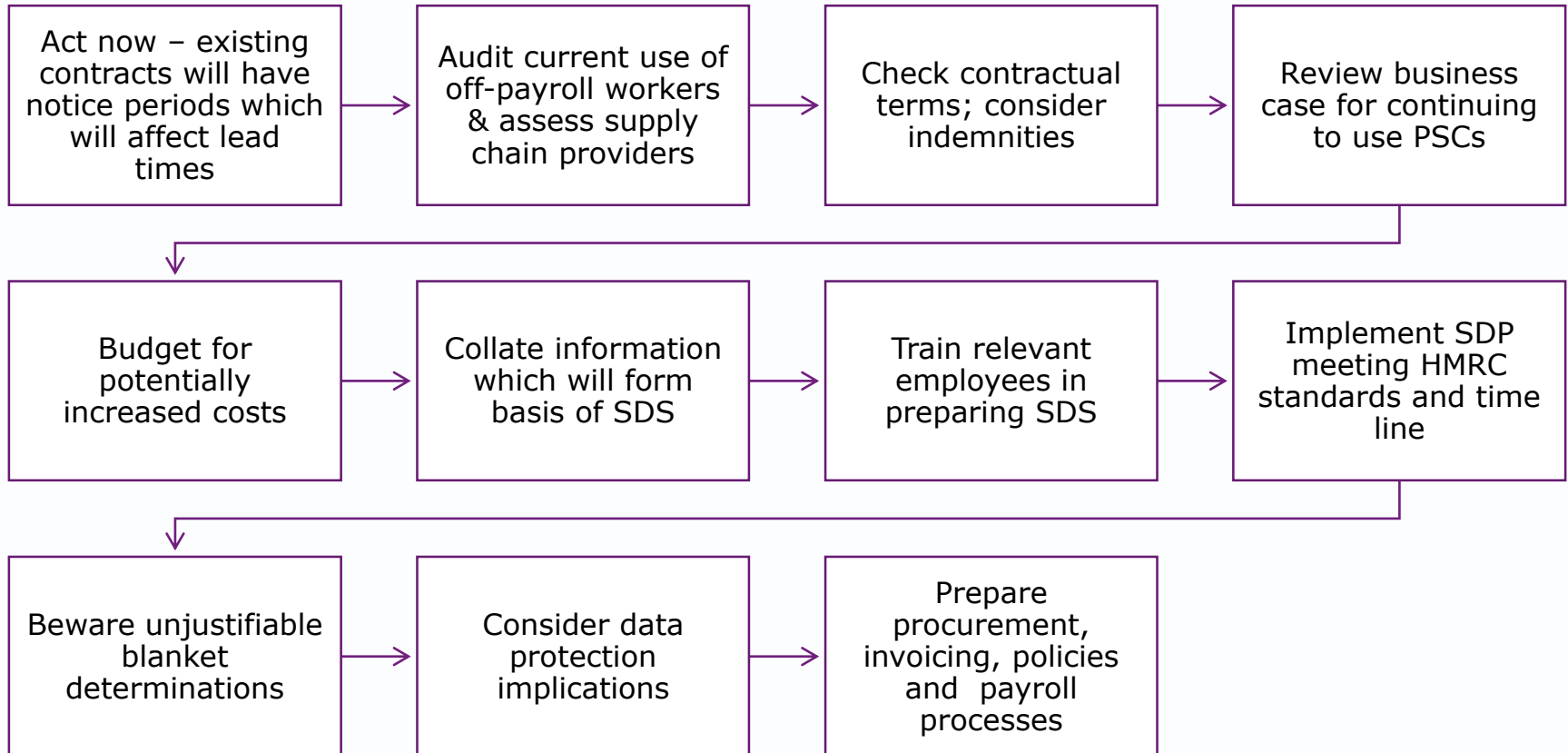
What are the options?

- Outright ban on PSCs
- Move onto payroll as direct contractor
- Direct employment
- Use of umbrella companies
- Fully outsourced service model

Practical implications

Off-payroll working rules

Client action planning



Agency workers

Agency workers

Overview of “day 1” and “12 week rights”

Day 1 rights

- Section 1 Statement of Particulars and worker’s “employment” rights
- Access to vacancies at hirer’s organisation
- Use of shared facilities and amenities, e.g. canteen or food and drinks machines, workplace creche, car parking or transport service

Week 12 rights

- Same basic working and employment conditions as he/she would have been entitled to for doing the same job, if hired directly
- These are terms ordinarily included in contracts for employees/workers, relating to: pay, duration of working time, night work, rest periods, rest breaks and annual leave

What constitutes “pay”?

- Any sums payable to the worker in connection with the worker’s “employment”, e.g.:
 - basic pay
 - overtime pay
 - shift or unsocial hours allowances
 - payment for annual leave
 - bonuses or commission payments - which are directly attributable to the amount or quality of the work done
 - vouchers or stamps with a monetary value but which are not provided through "salary sacrifice" schemes, e.g. luncheon vouchers or childcare vouchers

But not, for example...

- Occupational sick pay
- Pensions (although still have auto-enrolment rights)
- Occupational maternity, paternity or adoption pay
- Redundancy pay (statutory or contractual)
- Notice pay (statutory or contractual)
- Payments or rewards linked to financial participation schemes (e.g. share ownership schemes or phantom share schemes)
- Bonuses not directly linked to the contribution of the individual
- Discretionary, non-contractual bonus payments (provided not custom and practice)
- Most benefits in kind (usually given as an incentive or reward for long-term service)
- Payments where the agency worker has not fulfilled qualifying conditions (including length of service) or if the agency worker is no longer on assignment when the bonus is paid (assuming this also applies to permanent employees)
- Advances in pay or loans (e.g. season ticket loan)
- Expenses (e.g. accommodation or travel expenses)

Permanent comparator requests

Who is responsible?

- Agency is responsible for providing terms and conditions to the agency worker
- Hirer is required to provide certain information to the agency, to enable it to provide the terms and conditions
- Hirer is responsible for breach of “Day One” rights
- Both hirer and agency can be responsible for breach of “Week 12” rights (hirer solely responsible if agency shows it took reasonable steps to obtain relevant information from hirer and acted “reasonably” in determining basic T&Cs)
- Anti-avoidance provisions to prevent depriving worker of equal treatment

Remedies/liabilities

- Right not to be dismissed or subjected to a detriment for making allegations or asserting rights or giving evidence under the AWR
- Right to equal treatment in respect of Day One and Week 12 rights
- Remedies similar to those in a discrimination claim. Compensation for underpayment potentially unlimited, plus possible compensation for injury to feelings
- Additional award of up to £5,000 where assignments structured with intention to deprive worker of equal treatment rights

Permanent comparator requests – points to consider

- Recruitment process – flag on system that individual is not employee
- Plan ahead – who are the comparator(s)? Hypothetical comparator? Run through their “pay” and compare each term
- Wait for agency to request details - but have comparator information ready:
 - standard T&Cs re pay and hours, annual leave and pay grades/scales
 - ensure contract with agency includes adequate confidentiality provisions
 - update privacy notices?
 - check LSM’s contractual obligations to agency (e.g. ongoing obligation to update?)
- Robust system to keep track of agency workers and 12 week mark
- Note any changes in pay, e.g. salary increases for comparator
- Be aware of breaks in continuity/previous assignments
- Undertake audit of agency staff and their basic terms - how do they compare with equivalent employees/workers?

Managing your contingent workforce

Do's and don'ts

- ✓ Treat all staff (whether employees or not) in a fair non-discriminatory way
- ✓ Ensure managers are aware of the different rights and obligations of employees vs workers/independent contractors
- ✓ Ensure systems and mechanisms are in place to keep track of contingent workforce
- ✓ Be clear if certain policies only apply to employees/consider having separate policies (or manual) for workers/contractors with references to employees/benefits etc. removed
- ✓ Consider giving separate training to contractors (e.g. compliance training)
- ✓ Limit invitations to social events/training sessions to employees
- ✓ E-mail signatures should make clear if individual is contractor
- ✓ Raise performance/conduct or wellbeing concerns with the agency/umbrella company

- ✗ Don't directly performance manage your workers/contractors or deal with conduct issues and complaints under your disciplinary/grievance procedure
- ✗ Don't instruct workers/contractors to take holiday; avoid specifying exact working hours where possible (but raise any concerns re time off or wellbeing with agency/umbrella company)
- ✗ Avoid giving business cards to workers/contractors
- ✗ Consider whether worker/contractor should be using their own equipment



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