



BRIEFING PAPER

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Employment status

By Doug Pyper

Contents:

1. Introduction
2. The legal framework
3. Employment status and tax
4. Growth in self-employment
5. Areas of difficulty
6. Reviews and consultations
7. The Taylor Review
8. Government response to Taylor
9. Select Committee inquiries

Employment Rights Act 1996

CHAPTER 18

ARRANGEMENT OF SECTIONS

PART I

EMPLOYMENT PARTICULARS

Right to statements of employment particulars

- Section
1. Statement of initial employment particulars.
 2. Statement of initial particulars: supplementary.
 3. Note about disciplinary procedures and pensions.
 4. Statement of changes.
 5. Exclusion from rights to statements.
 6. Reasonably accessible document or collective agreement.
 7. Power to require particulars of further matters.

Right to itemised pay statement

8. Itemised pay statement.
9. Standing statement of fixed deductions.
10. Power to amend provisions about pay and standing statements.

Enforcement

11. References to industrial tribunals.
12. Determination of references.

PART II

PROTECTION OF WAGES

Deductions by employer

13. **Right not to suffer unauthorised deductions.**

Contents

Summary	3
1. Introduction	4
2. The legal framework	7
2.1 Employment Rights Act 1996	7
2.2 Common law tests	8
Employee status	8
Worker status	11
2.3 Employment Relations Act 1999	13
3. Employment status and tax	16
4. Growth in self-employment	19
Number of workers who are self-employed	19
Proportion of workers who are self-employed	19
Characteristics of those who are self-employed	20
Location of self-employed workers	20
ONS analysis of trends in self-employment in the UK	21
5. Areas of difficulty	22
5.1 Agency workers	22
Prevalence of agency work	22
Resolution Foundation report on agency workers	23
5.2 The gig economy	24
Prevalence of gig working	26
5.3 Zero-hours contracts	27
Prevalence of zero-hour contracts	27
6. Reviews and consultations	29
6.1 DTI consultation (2002-2006)	29
6.2 Employment status review (2014-16)	33
Stakeholder views	34
Options for reform	35
7. The Taylor Review	37
7.1 Taylor's recommendations on employment status	38
Employment status tests should be set out in primary legislation	38
Rename limb (b) workers 'dependent contractors'	39
Personal service should not be necessary for dependent contractors	40
Aligning tax and employment law	42
Online tool	43
Determination of status without tribunal fees	44
Reversed burden of proof	44
Penalties for ignoring tribunal decisions	44
8. Government response to Taylor	46
9. Select Committee inquiries	47
9.1 Taylor Review of modern working practices inquiry	47
9.2 Self-employment and the gig economy	47
9.3 The future world of work and rights of workers	49

Summary

This briefing provides an overview of the concept of employment status and recent reviews of the law in this area.

Employment law has several mechanisms for determining whether or not an individual is eligible for any particular employment right. The primary mechanism is the individual's status. While there are a variety of statuses under employment and related areas of law, the main ones in employment law are: employee, worker and self-employed independent contractor. Employees have the full range of employment rights; workers have fewer rights although retain many of the most basic entitlements; and the truly self-employed, in business on their own account, are largely outside the scope of employment law.

There have long been calls for reform. Both employer and employee representatives describe the law as overly complex, with its consequences difficult to predict. Atypical workers - such as agency workers or those working under zero-hours contracts - find it particularly difficult to acquire rights due to the way the law applies to their circumstances.

Successive governments have reviewed and consulted on the law around employment status. None of the recent government reviews yielded any fundamental change. All emphasised the need to balance individual rights with preserving labour market flexibility. Most recently, the Prime Minister commissioned Matthew Taylor, the Chief Executive of the Royal Society for the encouragement of Arts, Manufactures and Commerce, to lead an independent review of modern employment practices. The Taylor Review [reported](#) on 11 July 2017. The Government published its [response](#) on 7 February 2018, along with a [consultation document](#) on employment status. The consultation closes on 1 June 2018.

The following provides an outline of the relevant law; sets out data on the growth in self-employment and atypical working; and discusses recent reviews, consultations and inquiries.

1. Introduction

The employment rights available to individuals are determined by the types of contracts under which they work. In broad terms, there is a legal distinction between individuals who are in some way dependent on their employers and independent persons in business on their own account. The law accords employment rights to the former not the latter. Classically, this distinction has been expressed as the difference between contracts of service, under which individuals are subordinate and dependent, and contracts for services, under which labour is provided by independent contractors.

Legislation refers to those working under contracts of service as **employees**.¹ Employees have access to the full range of employment rights, although some rights have qualifying periods.² The law then distinguishes between two types of persons who perform personally services for another party to a contract.

First, those that are not in business for themselves. These individuals are known as **workers**.³ They have fewer employment rights than employees although retain many of the most basic protections, such as the right to the minimum wage, working time limits and annual leave.

Second, **self-employed** persons who serve customers, or contract with clients as professionals, and are in business for themselves. These individuals are largely excluded from employment rights.⁴

The table below shows some differences in the availability of rights to employees and workers:

	Employees	Workers
Annual leave	✓	✓
National minimum wage	✓	✓
Protection from wage deductions	✓	✓
Whistleblowing rights	✓	✓
Working time rights	✓	✓
Part-time workers rights	✓	✓
Written particulars of employment	✓	
Maternity/paternity/adoption leave	✓	
Unfair dismissal rights	✓	
Redundancy rights	✓	
Right to request flexible working	✓	
Notice periods	✓	
Protection from dismissal on the transfer of a business	✓	
Unpaid parental leave	✓	
Fixed-term employee rights	✓	

¹ Most importantly section 230 of the *Employment Rights Act 1996*

² E.g. the right not to be unfairly dismissed is available only after two years' continuous service

³ Or, more accurately, 'limb b workers', to distinguish them from employees, who also qualify for worker status – see below section on the legal framework

⁴ Self-employed contractors may be entitled to certain related rights, e.g. health and safety rights

While employee, worker and self-employed are the three main categories used to determine access to most rights, the full legal picture is more complex. There are in fact a variety of statuses used in employment law and related branches of law. As Deakin and Morris note:

The boundary between dependent and independent labour shifts according to the particular statutory context which is being considered. There is no universal dividing-line of general application⁵

Thus, equality law's definition of employment differs from the definition of employee used in the *Employment Rights Act 1996*.⁶ Social security legislation, which provides the basis for rights to statutory payments, such as sick pay and maternity pay, uses its own particular definition of employment.⁷ In the whistleblowing and discrimination contexts, 'worker' is given an extended meaning.⁸ And agency workers, who typically do not have contracts with end-user hirers, are nonetheless afforded certain rights in particular contexts, e.g. discrimination, whistleblowing and minimum wage rights.⁹ In addition to these various employment law categories, tax law uses a binary distinction between employee and self-employed which does not map on to employment law's main tripartite classification of employees, workers and self-employed. As such, individuals regarded by employment law as 'workers' may be either employed or self-employed for tax purposes depending on the circumstances.

In addition to complexity caused by defining status differently for different purposes, there is occasional practical difficulty in identifying whether an individual has any given status. This is due, in part, to the fact that the legal tests for employment status are contained in various judicial decisions. This can cause uncertainty about an individual's access to rights prior to determination by a tribunal, which gives rise to litigation. To a degree, this is an inevitable consequence of the common law approach. Broad principles are laid out in statute with case law filling the gaps. Case law can be contradictory, and different tribunals and lawyers can come to different conclusions about its effect. However, the benefit of the common law approach is that it allows a great deal of flexibility; the courts and tribunals can deploy and develop principles in response to particular factual circumstances. Bright line legal tests set out in statute may be relatively clear but they are less adaptable, and invite the ingenuity of lawyers who seek to relieve their employer clients of legal obligations. Nonetheless, the upshot of relying on case law tests for determining employment status is that working individuals, and the firms that engage them, may be unclear about their legal positions.

⁵ Deakin, S., Morris, G., *Labour Law*, 6th Ed, 2012, p146

⁶ See *Employment Rights Act 1996*, section 230; *Equality Act 2010*, section 83

⁷ *Social Security Contributions and Benefits Act 1992*, section 2

⁸ *Employment Rights Act 1996*, section 43K &

⁹ *Equality Act 2010*, section 41; *Employment Rights Act 1996*, section 48(1AA); *National Minimum Wage 1998*, section 34

6 Employment status

Recent uncertainty about the status of workers in the gig economy, and in particular the Employment Tribunal and Employment Appeal Tribunal judgments in *Uber v Aslam*, provides a high-profile example.¹⁰ In that case Uber drivers argued they were workers, while Uber regarded them as self-employed contractors. The Employment Tribunal and Employment Appeal Tribunal applied the statutory framework and a range of legal tests established by case law to a detailed analysis of the facts, and determined that the drivers were in fact workers. This has implications for Uber drivers' access to rights and, given that Uber was held to be "in the business of providing transportation services",¹¹ may have sizeable VAT consequences for Uber.¹² Similar issues were raised recently by Pimlico plumbers before the Court of Appeal,¹³ and by CitySprint couriers in the employment tribunal,¹⁴ among others. In each of these cases there was uncertainty as to whether the individuals in question were workers or self-employed. Following the Court of Appeal's decision in the Pimlico case, the firm's founder said "we can't get our heads around this word 'worker' and what it means."¹⁵

These cases, and questions about the law's ability to keep pace with new forms of working, have impelled a policy response. In October 2016 the Prime Minister commissioned Matthew Taylor, the Chief Executive of the Royal Society for the encouragement of Arts, Manufactures and Commerce (RSA), to lead a review of modern employment practices. The Taylor Review reported on 11 July 2017.¹⁶

The Prime Minister's announcement coincided with Select Committee interest in the issue. The Business, Energy and Industrial Strategy Committee held an inquiry into the 'The future world of work and rights of workers',¹⁷ which was cut short by the 2017 general election. The Work and Pensions Committee undertook an inquiry into 'self-employment and the gig economy', also curtailed by the election, and published an abridged [report](#) on 1 May 2017.¹⁸ These reviews and inquiries follow earlier reviews of employment status by successive governments which did not yield any fundamental alteration of the statutory framework.¹⁹ It is, however, becoming increasingly likely that there will be some amendment to the law in this area. The following summarises the current law and some of its more problematic aspects, before discussing proposed solutions to those problems.

¹⁰ [Aslam & others v Uber BV and others](#) 2202550/2015;

¹¹ [Uber BV v Aslam & Ors](#) [2017] UKEAT 0056_17_1011 (10 November 2017)

¹² Maugham, J., 'Why I'm Challenging Uber', *Tax Journal*, 2 June 2017, p7

¹³ [Pimlico Plumbers v Gary Smith](#) [2017] EWCA Civ 51

¹⁴ [Dewhurst v CitySprint UK Ltd](#) ET/2202512/2016

¹⁵ [Exclusive: Charlie Mullins says Pimlico Plumbers will "more than likely" appeal court decision](#), *City A.M.*, 10 February 2017

¹⁶ [Taylor review on modern employment practices launches](#), Gov.uk, 30 November 2016 [accessed 19 July 2017]

¹⁷ [The future world of work and rights of workers inquiry](#), Parliament website [accessed 19 July 2017]

¹⁸ Work and Pensions Committee, *Self-employment and the gig economy*, Thirteenth Report of Session 2016–17, HC 847, 1 May 2017

¹⁹ For example: BIS, [Employment Status Review](#), December 2015; DTI, [Employment Status Review - Summary of Responses](#), March 2006; DTI, [Discussion document on employment status in relation to statutory employment rights](#), July 2002

2. The legal framework

Employment law has several mechanisms for determining whether or not an individual is eligible for any particular employment right. The primary mechanism is the individual's status. Another is continuous service. For example, the right not to be unfairly dismissed is available only to someone with the status of 'employee' and then only if that employee has worked continuously for the same employer for two or more years.

As discussed above, various statuses exist under employment and related areas of law, such as tax, equality and social security law. In employment law, the main ones are 'employee', 'worker' and 'self-employed':

- **employees** have the fullest complement of employment rights
- **workers** have fewer rights than employees, although have many of the most basic ones (e.g. the minimum wage) - the worker category provides a floor of rights to those who do not satisfy the tests for employee status but are not in business for themselves
- the truly **self-employed** are outside the scope of employment law.

Employment law in this area is essentially a system for classifying different types of contracts. Thus, an employee is a person who works under a contract employment, and there are legal tests for identifying whether a contract is one of employment. These tests take account of, but look beyond, the express terms of the contract. What matters is the reality of the agreement in practice; clauses drafted to avoid conferring employment status will be disregarded by the courts if held to misrepresent the true relationship.²⁰ Without a contractual relationship though, an individual cannot have either worker or employee status. This can cause difficulties for certain types of workers, for example agency workers, because they rarely contract directly with the end user of their work.

The following sections outline the tests for each of the main statuses in employment law. Before discussing the case law tests, the following sets out the key statutory definitions of employee and worker.

2.1 Employment Rights Act 1996

The main employment rights statute is the *Employment Rights Act 1996*. [Section 230](#) of the Act provides the definitions for employee and worker. For the most part, other employment rights legislation uses the same definitions.²¹ Section 230 defines employee as follows:

²⁰ [Consistent Group Ltd v Kalwak](#) [2007] IRLR 560; [Autoclenz Ltd v Belcher & Ors](#) [2011] UKSC 41

²¹ For example, *Health and Safety at Work etc. Act 1974*, s. 53; *National Minimum Wage Act 1998*, s. 54; *Working Time Regulations 1998*, r. 2; *Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000*, r. 1(2)

8 Employment status

(1) In this Act “employee” means an individual who has entered into or works under ... a contract of employment.

(2) ... **“contract of employment” means a contract of service** or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

By defining a contract of employment as a contract of service, section 230 relies on the common law definition of contract of service. Thus, common law tests for identifying a contract of service, developed over decades, determine whether a contract of employment exists so as to confer employee status.

‘Worker’ is defined by section 230(3). As can be seen below, in section 230(3)(a), a person with employee status will automatically also be a worker, and be entitled to any rights available to workers as well as those reserved for employees. When lawyers use the term ‘worker’ they typically mean the discrete category of worker, different to employees, otherwise known as ‘limb (b) workers’, defined in section 230(3)(b).

(3) ... “worker” ... means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

(a) a contract of employment, or

(b) any other **contract**, whether express or implied and (if it is express) whether oral or in writing, whereby **the individual undertakes to do or perform personally any work or services** for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

and any reference to a worker’s contract shall be construed accordingly.

Thus, limb (b) workers work under contracts for services but are not in business on their own account (i.e. not truly self-employed). The clearest way to think of limb (b) workers is as individuals who exhibit some characteristics of self-employment and some of employment but do not quite satisfy the ‘pass mark’ for acquiring employee status. Limb (b) worker status sits at the legal dividing line between some employment rights and almost none. As such, and partly because that dividing line can be unclear, individuals are sometimes treated by hiring organisations as self-employed, without employment rights, whereas on a proper analysis they are in fact workers and due rights.

2.2 Common law tests

Employee status

The courts have established a range of tests for identifying the existence of a contract of employment/service. The key case is [*Ready Mixed Concrete \(South East\) Ltd v Minister of Pensions and National Insurance* \[1968\] 2 QB 497](#). That case identified features of a contractual relationship that must be present if the contract is to be regarded as a contract of service/employment. Subsequent cases have built on this.

From the case law, one can derive that a contract of service has the following elements:

- the individual agrees to **work personally** for pay
- there is a **mutuality of obligation** between the parties
- the employer exerts a sufficient degree of **control** over the work
- the **provisions of the contract are consistent with it being a contract of service**

Each of these elements are summarised below.

Personal service

An individual cannot be an employee unless contractually required to provide personal service to his or her employer. If the contract provides the working individual with unfettered discretion over whether to undertake work personally or send in a substitute to undertake the work in their place, the contract cannot be an employment contract.²²

A limited right of substitution that is qualified in some way (e.g. the right is only exercisable in the event of illness), will not bar employee status.²³ Moreover, as courts are concerned with the reality of the agreement in practice, a contractual right of substitution will not bar employee status if the parties have no intention of relying on it:

The concern to which tribunals must be alive is that armies of lawyers will simply place substitution clauses ... in employment contracts, as a matter of form, even where such terms do not begin to reflect the real relationship

...

In other words, if the reality of the situation is that no one seriously expects that a worker will seek to provide a substitute, or refuse the work offered, the fact that the contract expressly provides for these unrealistic possibilities will not alter the true nature of the relationship. But if these clauses genuinely reflect what might realistically be expected to occur, the fact that the rights conferred have not in fact been exercised will not render the right meaningless.²⁴

Mutuality of obligation

Every contract, whether of employment or another kind, requires the presence of mutual obligations. The mutuality of obligation test is therefore relevant to whether or not a contract exists. This can be important when assessing whether periods of work are connected by a single overarching contract of employment:

The issue of whether there is a contract at all arises most frequently in situations where a person works for an employer, but only on a casual basis from time to time. It is often necessary then to show that the contract continues to exist in the gaps between the periods of employment. Cases frequently have had to decide whether there is an over-arching contract or what is

²² [Express & ECHO Publications Ltd v Tanton \[1999\] EWCA Civ 949](#)

²³ See, e.g. [Macfarlane & Anor v Glasgow City Council \[2001\] IRLR 7](#)

²⁴ [Consistent Group Ltd v Kalwak \[2007\] IRLR 560](#), paras 57-58

10 Employment status

sometimes called an "umbrella contract" which remains in existence even when the individual concerned is not working.²⁵

In the employment context, mutuality of obligation also has a more specific meaning, in that there must be "mutual obligations to work, and to pay for (or provide) it: to what is known in labour economics as the 'wage-work bargain'."²⁶ Thus, while any type of mutual obligations may be enough to demonstrate the existence of a contract, in order for a contract to be one of service/employment regard must be had

to the nature of the obligations mutually entered into to determine whether a contract formed by the exchange of those obligations is one of employment, or should be categorised differently. A contract under which there is no obligation to work could not be a contract of employment.²⁷

An absence of an obligation to pay for work will negate the existence of a contract of employment.²⁸ A truly casual work arrangement, where an individual is not required to accept work and/or the company is not obliged to provide work, will fail this test.²⁹ This can cause difficulties for some workers who wish to claim rights reserved for employees. In particular, zero-hours contracts workers have difficulty satisfying the test between periods of work given their (often notional) freedom to decline work when offered, and their 'employer's' freedom not to provide work. If there is truly no obligation to provide or accept work, the contract cannot be a contract of employment. If there is a general freedom to decline work, subject to a requirement that at least some work must be done, this may be sufficient to satisfy the test:

it does not deprive an overriding contract of such mutual obligations that the employee has the right to refuse work. Nor does it do so where the employer may exercise a choice to withhold work. The focus must be upon whether or not there is some obligation upon an individual to work, and some obligation upon the other party to provide or pay for it.³⁰

Control

The employer must enjoy a contractual right of control over the work to a sufficient degree. This requirement developed from the conception of employment as being characterised by a master and servant relationship, whereby the servant was "a person subject to the command of his master as to the manner in which he shall do his work".³¹ Day-to-day factual control of work is not strictly necessary to satisfy this test, however the employer must have ultimate control by retaining a right to give instructions.³² By and large, an employer will control an employee's time and place of work, the manner in which

²⁵ *Stephenson v Delphi Diesel Systems Ltd* [2003] ICR 471

²⁶ *Cotswold Developments Construction Ltd v Williams* [2006] IRLR 181, para 48

²⁷ *Ibid.*, para 54

²⁸ *Stringfellow Restaurants Ltd v Quashie* [2012] EWCA Civ 1735

²⁹ *Carmichael v National Power plc* [2000] IRLR 43

³⁰ *Cotswold Developments Construction Ltd v Williams* [2006] IRLR 181

³¹ *Yewens v Noakes* (1880) 6 QBD 530, 532

³² *Troutbeck SA v White & Anor* [2013] EWCA Civ 1171; *White & Anor v Troutbeck SA* [2013] IRLR 286

work is undertaken and the means employed in doing it.³³ By contrast, a self-employed person is more likely to provide at their own expense the necessary tools for work, to determine their own working patterns and be free from disciplinary rules.

Other factors

Personal service, mutual obligations and control are the ‘irreducible minimum’ elements of a contract of employment. However, their presence does not ineluctably lead to employee status. Once these elements are present, a court or tribunal will look at whether the provisions of the contract and circumstances indicate that the contract is one of employment. This involves having regard to all the relevant surrounding facts, such as whether the individual is entitled to sick pay; contractual holiday pay; the method of payment; and whether any other benefits, associated with employment, are present. It may also be relevant to consider whether the individual is performing services as a person in business on his or her own account. This requires an assessment the economic reality of the relationship, involving consideration of details such as

- whether the person performing the services provides his or her own equipment
- whether the individual hires help
- the degree of financial risk he or she takes
- the degree of responsibility for investment and management; and
- whether and how far he or she has an opportunity to profit from sound management in the performance of the task.³⁴

Worker status

As noted in the above overview of section 230 of the *Employment Rights Act 1996*, all employees also have worker status. This is simply a device for ensuring that where legislation confers rights on workers those rights apply automatically to employees. Employees are therefore entitled to the basic rights available to workers as well as those reserved for employees. This reflects a policy of according the fullest complement of rights to those most clearly in a “subordinate and dependent position vis-à-vis their employers”.³⁵

The term “worker” tends not to be used in the strict statutory sense as including employees, but in a narrower sense, referring to those workers who are not also employees, as defined by section 230(3)(b). Limb (b) workers are those that do not quite meet the threshold for employee status but cannot sensibly be regarded as sufficiently independent of hiring organisations to be considered self-employed:

The basic effect of limb (b) is, so to speak, to lower the pass-mark, so that cases which failed to reach the mark necessary to qualify

³³ See [Ready Mixed Concrete \(South East\) Ltd v Minister of Pensions and National Insurance \[1968\] 2 QB 497](#), 516

³⁴ [Market Investigations Ltd. v Minister of Social Security \[1969\] 2 QB 173](#), 185

³⁵ [Byrne Brothers \(Formwork\) Ltd v Baird & Others \[2002\] ICR 667](#), para 17

12 Employment status

for protection as employees might nevertheless do so as workers.³⁶

A limb (b) worker is an individual that:

- works under a contract personally to do work; and
- the work is done for another party to the contract that is not a customer or client of a profession or business undertaking carried on by the individual.

Thus, those who contract to provide their services as independent professionals – e.g. barristers, accountants, architects, etc. – will generally not, vis-à-vis the person with whom they contract, be regarded as limb (b) workers. Similarly, those who operate business undertakings and actively market their services to customers in general will fall outside the scope of the definition. Conversely, a person who “is recruited by the principal to work for that principal as an integral part of the principal’s operations” will likely meet the threshold for limb (b) worker status.³⁷ A good example of the dividing line between workers and the self-employed is contained in the Employment Appeal Tribunal’s judgment in *Byrne Bros v Baird* [2002]:

Self-employed labour-only subcontractors in the construction industry are, it seems to us, a good example of the kind of worker who may well not be carrying on a business undertaking in the sense of the definition; and for whom the “intermediate category” created by limb (b) was designed. There can be no general rule, and we should not be understood as propounding one: cases cannot be decided by applying labels. But typically labour-only subcontractors will, though nominally free to move from contractor to contractor, in practice work for long periods for a single employer as an integrated part of his workforce: their specialist skills may be limited, they may supply little or nothing by way of equipment and undertake little or no economic risk. They have long been regarded as being near the border between employment and self-employment: it is for this reason that their status has for many years been a matter of controversy with the Inland Revenue and has also given rise to a string of reported cases ... which “could have gone either way” under the old test ought now generally to be caught under the new test in “limb (b)”.³⁸

The statutory criteria for worker status are:

- the individual works under a contract;
- personal service is required; and
- the other party to the contract is not a customer or client (i.e. the individual is not in business on their own account).

Unlike with contracts of employment, there is no requirement for the worker to subordinate to an employer’s control to a sufficient degree,

³⁶ Ibid.

³⁷ [Cotswold Developments Construction Ltd v Williams](#) [2006] IRLR 181, para 53

³⁸ Ibid., para 18

although the presence of some element of control helps to distinguish between workers and those in business for themselves.³⁹

Additionally, while there is some case law indicating that mutuality of obligation (in the sense of requirements to work, and to provide and pay for that work) is relevant to the determination of worker status,⁴⁰ it does not appear to be a strictly necessary requirement.⁴¹

2.3 Employment Relations Act 1999

Under [section 23](#) of the *Employment Relations Act 1999*, the Government has a broad delegated power, as yet unexercised, to extend employment rights to those who do not currently qualify for them, for example, by reason of their status.

The Secretary of State may by order define who are to be considered employers of those individuals. Thus, in the agency work context, an order could extend employment rights to agency workers and provide that either the agency or the end-user is deemed the agency worker's employer; or it could allow for a functional test, attributing the role of employer to whomever is responsible for a particular function.⁴²

Section 23 contains a Henry VIII power, enabling an order under the section to amend primary legislation (see s. 23(5A)). The key parts of section 23, as amended, are reproduced below:

23 Power to confer rights on individuals

(1) This section applies to any right conferred on an individual against an employer (however defined) under or by virtue of any of the following—

- (a) the Trade Union and Labour Relations (Consolidation) Act 1992;
- (b) the Employment Rights Act 1996;
- (ba) the Employment Act 2002;
- (c) this Act;
- (d) any instrument made under section 2(2) of the European Communities Act 1972.

(2) The Secretary of State may by order make provision which has the effect of conferring any such right on individuals who are of a specified description.

(3) The reference in subsection (2) to individuals includes a reference to individuals expressly excluded from exercising the right.

(4) An order under this section may—

- (a) provide that individuals are to be treated as parties to workers' contracts or contracts of employment;

³⁹ See, for example, *Pimlico Plumbers Ltd & Anor v Smith* [2017] EWCA Civ 51, paras 114-115

⁴⁰ *Secretary of State for Justice v Windle & Arada* [2016] EWCA Civ 459, para 23

⁴¹ *Cotswold Developments Construction Ltd v Williams* [2006] IRLR 181

⁴² For example, under [section 34](#) of the *National Minimum Wage Act 1998*, an agency worker's employer for the purposes of paying the National Minimum Wage is whichever of the agent and the principal who pays the agency worker's wages

- (b) make provision as to who are to be regarded as the employers of individuals;
- (c) make provision which has the effect of modifying the operation of any right as conferred on individuals by the order;
- (d) include such consequential, incidental or supplementary provisions as the Secretary of State thinks fit.

(5) An order under this section may make provision in such way as the Secretary of State thinks fit.

(5A) The ways in which an order under this section may make provision include, in particular—

- (a) amending any enactment;**
- (b) excluding or applying (whether with or without amendment) any enactment.**

(5B) In subsection (5A) “enactment” includes an enactment comprised in subordinate legislation made under an Act.

Section 23 was amended, in particular, by section 39 of the *Employment Relations Act 2004*. [Section 39](#) of the 2004 Act inserted subsections (5A)-(5B), enabling an order under section 23 either to amend primary legislation to confer rights on new categories of individual, or to confer rights by way of a free-standing order which does not amend primary legislation. The result was to create a broad power that could confer most types of existing employment rights on any description of worker by way of secondary legislation. An order made under the section would be subject to the affirmative resolution procedure, requiring a positive vote from both Houses.⁴³

The rationale underpinning section 23 is set out in the Explanatory Notes to the 1999 Act as follows:

The Government considers it desirable to clarify the coverage of the legislation and to reflect better the considerable diversity of working relationships in the modern labour market. Currently, significant numbers of economically active individuals - including for example many home workers and agency workers - are either uncertain whether they qualify or else clearly fail to qualify, for most if not all employment rights. Some work providers offer jobs on the basis of contracts under which the workers, although acting in a capacity closely analogous to that of employees and not genuinely in business on their own account, are technically self-employed or of indeterminate status according to the established common law criteria, and are thus effectively deprived of the rights in question.

...

The Government envisages using this new power to ensure that all workers other than the genuinely self-employed enjoy the minimum standards of protection that the legislation is intended to provide, and that none are excluded simply because of technicalities relating to the type of contract or other arrangement under which they are engaged.⁴⁴

⁴³ *Employment Relations Act 1999*, [section 42](#)

⁴⁴ *Employment Relations Act 1999*, [EN 230-232](#)

During Committee debate on the *Employment Relations Bill*, the Minister for Small Firms, Trade and Industry, Michael Willis, indicated that the Government would consult on the use of the power:

We certainly believe that no one should be denied the protection of employment rights without good reason, but we need to take into account all relevant policy considerations in each case—and, of course, all responses to the public consultation document that we are committed to publishing.⁴⁵

During the Lords debate on the Bill, Lord Simon, the Minister of State for the Department of Trade and Industry said the Government intended to use the power “to rationalise and update the coverage of the existing body of employment rights”⁴⁶ and repeated the commitment to issue a consultation on draft regulations.⁴⁷

In July 2002 the Department for Trade and Industry (DTI) issued a consultation, without draft regulations, seeking views on whether the power in section 23 should be exercised.⁴⁸ Prior to the consultation’s publication, the judiciary suggested that section 23 could usefully be relied on to extend employment rights to agency workers. In the Employment Appeal Tribunal’s decision in *Montgomery v Johnson Underwood*, handed down on 18 April 2000, Mr Justice Charles said:

This requires the urgent attention of Government Departments and legislators.... it seems to us that it would be sensible for the relevant Government Departments and Parliament to give further consideration to the position of employment agencies, their clients and the individuals who work for such clients on the introduction of the agency ... Indeed we comment that the power conferred by s. 23 of that Act on the Secretary of State for Trade and Industry to extend the protection of employment legislation to a specified description of individuals might be put to important use in this respect.⁴⁹

During debate on the *Employment Relations Bill 2003-2004*, which, as mentioned above, went on to amend section 23, the Government again singled out agency workers, and perhaps the clergy, as being potential beneficiaries of the new power.⁵⁰ As during earlier debates, the Government said it “would not use the power in section 23 to confer rights on a group of workers without full prior consultation”.⁵¹ The DTI had issued its consultation document in 2002, but had not responded to it. The Government’s response came later, in March 2006, and declined to exercise the power, having concluded that the existing rights framework “meets the labour market’s current needs and there is no need for further legislation in this area”⁵² (the consultation and its response are discussed later in this briefing).

⁴⁵ [Employment Relations Bill Deb 2 March 1999 \(afternoon\)](#)

⁴⁶ [HL Deb 10 May 1999 c967](#)

⁴⁷ Ibid.

⁴⁸ DTI, [Discussion document on employment status in relation to statutory employment rights](#), URN 02/1058, July 2002

⁴⁹ [\[2000\] UKEAT 509_98_1804](#), paras 8-9

⁵⁰ [Employment Relations Bill 10 February 2004 c141](#)

⁵¹ Ibid.

⁵² DTI, [Success at Work - Protecting vulnerable workers, supporting good employers](#), March 2006, pp16-17

3. Employment status and tax

An individual's employment status has important implications for the way in which they are taxed, both in relation to income tax and to National Insurance contributions (NICs). Tax law distinguishes between employees and the self-employed - someone working for their own unincorporated business as a self-employed sole trader or a partnership.

Employees will pay income tax and primary Class 1 NICs on their earnings, deducted at source by their employer under PAYE. Their employer will be liable to pay secondary Class 1 NICs on the employee's earnings. By contrast, self-employed persons providing their services to a client company will receive any payments gross of tax, and be responsible for paying income tax and NICs on their annual profits. Profits from self-employment are liable to Class 2 and Class 4 NICs. There is a significant financial advantage to individuals working this way. The rate of NICs that the self-employed pay is lower than the rate paid by employees, and the self-employed face no equivalent to employer NICs.

It is important to make the distinction between individuals running their own unincorporated business and an incorporated business or company. The growth of the gig economy in recent years has seen significant number of individuals deciding to set up a limited liability company that they run as a company owner-manager. While these two groups are often considered together, there are important differences in their treatment by tax and legal systems – so that, in the case of incorporated companies, the profits the company makes are liable to corporation tax, while its employees will be liable for income tax and NICs on their earnings. Company owner-managers may choose to pay themselves dividends to realise a further tax saving as dividend income is subject to income tax but not NICs.

The Institute for Fiscal Studies has published some analysis to illustrate the tax drivers to self-employment and incorporation.⁵³ For a person generating £40,000 of income per year, the total tax liability, taking into account both employer and employee NICs as well as the individual's income tax, would be £12,146 if that person worked as an employee. The tax liability would be £8,713 if this income was earned through self-employment, and £7,358 if someone provided their services through a company, and paid themselves dividends rather than wages. The IFS note that the figures will understate the potential tax advantages. The self-employed will have more scope to deduct work-related expenses from their income, and both self-employed persons and company owner-managers will have greater opportunities to (legally) avoid or (illegally) evade tax.

⁵³ [Tax, legal form and the gig economy, Institute for Fiscal Studies, February 2017](#); and, Helen Miller, "Tax in a changing world of work", *Tax Journal*, 21 April 2017. These estimates are for 2017/18.

There is no statutory test to determine employment status for tax purposes. The question whether someone is employed or self-employed is determined on the basis of criteria established by judicial decisions.

With regard to **income tax**, section 4 of the *Income Tax (Earnings & Pensions) Act (ITEPA) 2003* states that "employment" is to include "any employment under a contract of service, any employment under a contract of apprenticeship, and, any employment in the service of the Crown." The explanatory notes to the Act explain why the legislation adopts this approach:

The decisions of the courts have given rise to a number of different tests, none of which has proved to be definitive. Given the diversity of approach in the courts it seems unlikely that an exhaustive definition of 'employment' could be produced, or indeed that one could produce more than an incomplete list of criteria that might or might not be useful in a given case for determining whether employment exists.

On the other hand it is thought that it would be helpful to have a non-exhaustive explanation which gave an indication of the *core* meaning of 'employment' by listing certain arrangements that on any view constitute an employment. As such, it would not attempt to delineate the boundary between employment and self-employment.⁵⁴

This definition is used in determining whether payments made by an employer should be taxed under PAYE.⁵⁵ In one leading case in this area, the tribunal noted, *ITEPA 2003* "affords no further definition of [employment], and it is common ground that recourse must be had to the common law's understanding of the meaning of employment, and of contract of service, and in particular, the well-established distinction between those concepts and self-employment, independent contractor and contract for services."⁵⁶

With regard to **National Insurance contributions**, section 2(1) of the *Social Security Contributions and Benefits Act (SSCBA) 1992* distinguishes between "employed earners" and "self-employed earners", defining these terms as follows:

- "employed earner" means a person who is gainfully employed in Great Britain either under a contract of service, or in an office (including elective office) with general earnings
- "self-employed earner" means a person who is gainfully employed in Great Britain otherwise than in employed earner's employment (whether or not he is also employed in such employment).

Further to this, s122(1) of *SSCBA 1992* defines a "contract of service" as "any contract of service of apprenticeship whether written or oral and whether express or implied." As with income tax, the crucial

⁵⁴ [ITEPA 2003 Explanatory Notes, March 2003 \(Annex 2: Note 1\)](#) The text goes on to explain that "employment in the service of the Crown" is specifically included here "because it is not settled that all Crown servants have contracts of service."

⁵⁵ Under the *Income Tax (Pay as You Earn) Regulations* SI 2003/2682

⁵⁶ *Weightwatchers & Ors v HMRC* [2011] UKUT 433 (TCC) (14 October 2011) para 19

18 Employment status

question is whether an engagement is a contract of services, or a contract for services.

In a report on employment status published in 2015, the Office for Tax Simplification (OTS) found that “there appears to be a general perception ... that the classification of an individual’s status for either tax or employment rights is a choice”:

This perception is mainly held by individuals rather than businesses, but evidence⁵⁷ shows that some businesses will offer a choice of whether to contract as a self-employed worker with a tax free rate, as opposed to being offered employment. Equally, there are businesses that genuinely believe the arrangement is not an employment relationship and classify the individual as self-employed simply because the work is not permanent, but the classification of an individual’s employment status does not rely on the permanency of the position.

Employment status is not, however, a choice. It is a mixed question of fact and law that ultimately is for the courts to decide upon. In the absence of court action, however, businesses and individuals are expected to decide upon the ‘correct’ employment status themselves. This incurs time and cost, and is a continual process, because if the facts change, the status may change too. Businesses may consult their accountant or lawyer, which again increases the cost of the decision, but the penalties for getting the decision wrong are not just punitive, they can also affect the reputation of a business.⁵⁸

Over the last few years there have been concerns about the scale of ‘false’ self-employment, particularly in the construction industry – where employers have sought to ensure that workers they have engaged are treated as self-employed. There has been some debate as to whether this problem could be tackled by having a statutory definition of employment status, or by reforming the way that different legal forms are taxed. This issue is discussed in detail in, [Self-employment in the construction industry, Commons Briefing paper CBP196](#), 9 June 2017.

⁵⁷ Clark T (2014b) ‘Unwilling freelancers give the lie to unemployment statistics’, *Guardian*, 28 October 2014.

⁵⁸ [Employment Status report](#), March 2015 para 2.14-5

4. Growth in self-employment

Number of workers who are self-employed⁵⁹

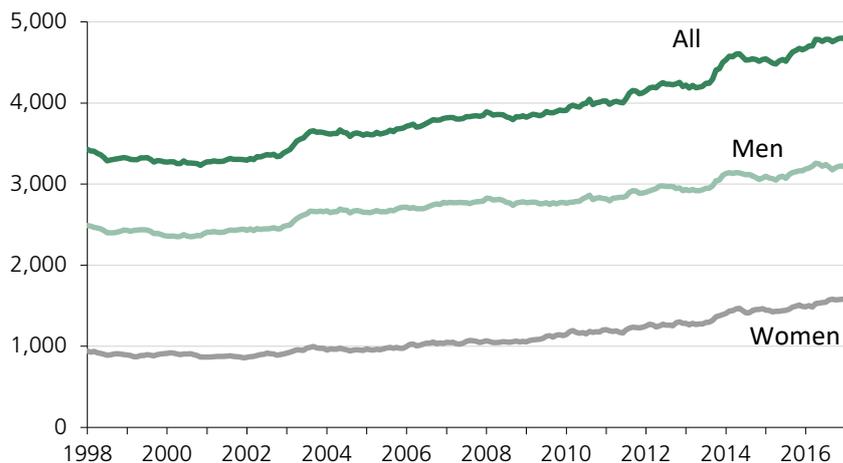
There were 4.8 million people in self-employment in February-April 2017, which is the highest level since comparable records began in 1992. The number who are self-employed has been generally increasing since 2003.

In the ten year period from February-April 2007 to February-April 2017, the level of self-employment rose by 1.0 million people (an increase of 26%). Over the same period the number of employees increased by 7%.

Over this period the groups that have seen the largest increases in the numbers of self-employed workers are women, those who work part-time and those working in London.

The chart below shows how the number of people who are self-employed has changed over the last twenty years:

Self-employed, UK, 1998-2017, thousands



Source: ONS Labour Force Survey

Proportion of workers who are self-employed

The proportion of those in employment who are self-employed has also increased over the last ten years. In February-April 2017, 15.0% of workers were self-employed, up from 13.6% in the same period in 2011 and 13.1% in 2006.

In February-April 2017, 19.0% of men in employment were self-employed, up from 17.6% in February-April 2007. The proportion for women in employment increased from 7.8% in February-April 2007 to 10.6% in February-April 2017.

⁵⁹ Data in this and the next section are based on estimates from the Labour Force Survey (LFS).

Characteristics of those who are self-employed⁶⁰

Gender

Although more men than women are self-employed, between 2006 and 2016 there was a considerably larger percentage increase for the number of **women** who were self-employed than the increase for men.

The number of self-employed men increased from 2.7 million in 2006 to 3.2 million in 2016 (an increase of 18%), while the number of self-employed women increased from 1.0 million to 1.6 million (an increase of 52%). Over the same period, the number of male and female employees also increased but by smaller proportions (5% for males and 7% for females).

The proportion of self-employed workers who are female has gradually been increasing, from 27% in 2006 to 33% in 2016.

Part-Time/Full-Time

The percentage change between 2006 and 2016 was also higher for **part-time workers**.

Over the last five years the number of full-time self-employed workers increased by 15% from 2011 to 2016, while the increase for part-time workers was 26%. In contrast, the number of full-time employees increased by 7% while the number of part-time employees only increased by 3%.

In 2016, 71% of self-employed people worked full-time compared to 74% of employees.

Age

Between 2011 and 2016 the change in the number of self-employed workers **above the age of 40** (19%) was slightly higher than the increase for those who were 40 or younger (16%).

Workers who are self-employed are more likely to be older than those who are employees. While half of employees are below 40, only a third of self-employed workers are also below this age.

Location of self-employed workers

Workers in London are most likely to be self-employed (17% were in 2016) while workers in the North East were least likely to be (10%). Over the last ten years the number of self-employed workers in London has increased by 50% (compared to an increase of 21% for employees).

The table below shows the increase in the number of self-employed workers in each region.

⁶⁰ Data on characteristics based on estimates from the ONS Annual Population Survey

Self-employed by region, 2006 to 2016

	Jan-Dec 2006	Jan-Dec 2016	Volume change	% Change
London	568	851	283	49.8%
South East	575	749	174	30.3%
Yorkshire and The Humber	274	354	80	29.2%
South West	355	457	103	28.9%
North East	103	131	27	26.4%
Scotland	264	327	63	23.8%
North West	366	445	79	21.6%
West Midlands	299	358	60	20.0%
East	402	479	77	19.1%
East Midlands	264	314	50	18.8%
Wales	169	200	31	18.5%
Northern Ireland	124	127	2	1.8%
United Kingdom	3,762	4,791	1,028	27.3%

Source: ONS Annual Population Survey

ONS analysis of trends in self-employment in the UK

In July 2016 the ONS published an [analysis of trends in self-employment](#) between 2001 and 2015. The main findings of this analysis were that:

- Between 2001 and 2015 the growth-rate of part-time self-employed workers (88%) has been much higher than those working full-time (25%).
- In general, self-employed workers are broadly content with their labour market status, and few of them are looking for alternative work.
- The majority of part-time respondents indicated that they were not looking for full-time work.
- The recent growth in self-employment is, in part, related to workers managing their retirement in a different way to previously.

5. Areas of difficulty

Some observations can be made about the law on employment status as regards its application to agency workers, those in the gig economy and zero-hours workers.

5.1 Agency workers

The requirement for a contract to exist between the parties as a basis for employment status typically means agency workers lack employment status as against end-user hirers. The individual contracts with the agency; the agency in turn contracts with the hirer. It is a triangular relationship. The worker generally does not contract directly with the hirer, which means he or she will lack either employee or worker status as against the hirer. Agency workers may have some rights against hirers by virtue of the [Agency Workers Regulations 2010](#), as rights under the Regulations do not depend on the existence of contract.⁶¹ However, such rights may be excluded where an agency provides for pay between assignments, making use of an exception known as 'Swedish derogation'.⁶²

Agency workers may have employment status vis-à-vis the agency with whom they contract. However, the factual circumstances of agency work can mean that the contract with the agency is not a contract of employment. A necessary component of a contract of service is sufficient control of the employee by the employer (see above). In the agency context, the hirer normally exercises day-to-day control not the agency. This absence of control may bar an agency worker from having employment status as against the agency.⁶³ The courts have explored the possibility of implying contracts between agency workers and hirers, but have concluded that this is not normally possible.⁶⁴

Prevalence of agency work

It is not easy to estimate how many agency workers there are in the UK. This is because surveys we would normally rely on to provide estimates for employment statistics are not as adept at capturing atypical types of working (see box below for an explanation).

There is currently no official figure published by the Office of National Statistics on the total number of agency workers.⁶⁵ The Labour Force Survey only publishes data on the number of temporary agency

⁶¹ Under the *Agency Workers Regulations 2010 (SI 2010/93)*, once an agency worker has been on assignment in the same role for the same hirer for a period of 12 continuous calendar weeks, he becomes entitled to the same basic terms of employment as if he had been directly recruited by the hirer.

⁶² For information about how the exception works, see section 1 of [Key Employment Rights](#), Commons Briefing papers CBP-7245

⁶³ [Montgomery v Johnson Underwood Ltd \[2001\] EWCA Civ 318](#)

⁶⁴ [James v London Borough of Greenwich \[2008\] EWCA Civ 35](#). A contract will only be implied where it is necessary to do so to make business sense of the circumstances – the Court found that an agency contract can make sense without implying a contract between worker and hirer.

⁶⁵ Resolution Foundation, [Secret Agents: Agency workers in the new world of work](#), December 2016. p12

workers. The official statistics therefore do not cover agency workers who identify as permanent workers, as self-employed, or those working for an agency in a second job.

Why do traditional surveys struggle to capture atypical work?

The reasons why traditional labour market surveys struggle to capture atypical work are multifaceted. A major part of the problem is that these surveys have been running for a number of years and they do not ask all the right questions that help us understand new types of working. As survey data is most helpful when it allows comparison across time periods, resolving this problem is not as simple as just changing the survey's questions.

Another problem is that these surveys are asked to a relatively small number of people. Relatively few survey respondents may work 'atypically'. Making estimates about the whole population from these responses can therefore be inaccurate.

The surveys ask individuals about their employment status. They therefore rely on people knowing exactly what their contract type is in order to be accurate. Many people will be unaware or mistaken about their contract type. This problem may grow as the labour market and employment status becomes more complex.

Resolution Foundation report on agency workers

[The Resolution Foundation](#) (an economics think tank) published a report in December 2016 that estimated the total number of agency workers based on an interpretation of data from the Office for National Statistics' [Labour Force Survey](#).

The Resolution Foundation estimates that there are **865,000 agency workers** in the UK, around **3%** of the UK workforce. Among these agency workers were:

- 340,000 temporary agency workers
- 440,000 permanent agency workers
- 66,000 workers whom identify as self-employed but are paid through an agency
- around 20,000 who work for an agency in a second job.⁶⁶

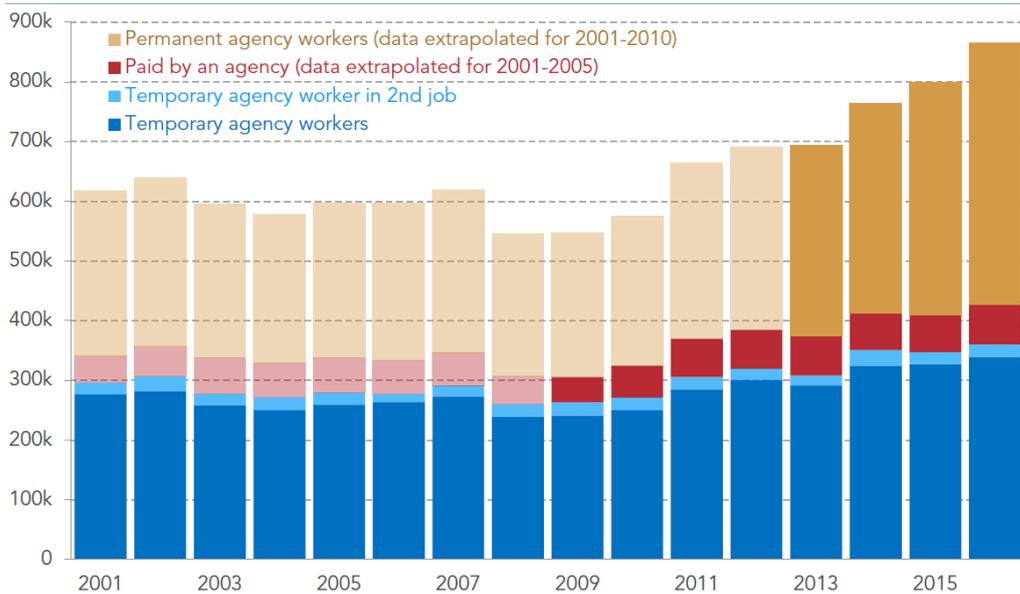
The Resolution Foundation estimates that the number of **agency workers increased by over 200,000 between 2011 and 2016**. The figure below shows the Resolution Foundations estimates of the number of agency workers in the UK since 2001.

The Resolution Foundation inferred from the answers respondents gave whether they were working through an agency or not. The Resolution Foundation did this by looking at responses to sub questions not published in public releases and questions about how the participants in the survey were paid. The Resolution Foundation describe the figures they ended up with as a 'best estimate' of the number of agency workers.⁶⁷

⁶⁶ Resolution Foundation, [Secret Agents: Agency workers in the new world of work](#), December 2016, p12 to 17

⁶⁷ Resolution Foundation, [Secret Agents: Agency workers in the new world of work](#), December 2016, p12

Resolution Foundation agency workers estimates, UK, 2001- 2016



Source: Resolution Foundation, [Secret Agents: Agency workers in the new world of work](#), December 2016, p17

Notes: 'Permanent agency worker' back series is extrapolated by applying five year average 'temporary to permanent agency worker' ratio to 'temporary agency worker' data. 'Paid by an agency' worker back series is extrapolated using a similar method.

Office of National Statistics 'temporary agency worker' estimates

The Office of National Statistics does publish an estimate of the number of 'temporary agency workers' in the UK.

Survey respondents are asked whether or not they are temporary workers and if so what type of temporary worker they are, with agency worker being one of five options.

In Q1 of 2017 there were **314,000 'temporary agency workers'** (1% of total employment) in the UK. Temporary agency workers made up **21% of all temporary employment** (1.53 million people).⁶⁸

5.2 The gig economy

In the gig economy, it is relatively straightforward to argue that individuals are not employees: companies tend not to exert sufficient control over their work and there is often a lack of mutuality of obligation between the parties. For example, Uber drivers have a large amount of control over when they work compared to employees, and they are not obliged to work.

The thornier issue is whether these individuals are limb (b) workers or self-employed, although recent case law has consistently found gig workers to qualify for worker status. Companies, such as Uber, seek to categorise them as being self-employed, arguing that they serve their own clients. On this analysis, Uber drivers run their own micro-

⁶⁸ ONS, Labour Force Survey, EMP07 and EMP01 Not Seasonally Adjusted,

businesses. That contention was given short shrift by the Employment Tribunal in *Aslam v Uber*:

...it seems to us that the Respondents' general case and the written terms on which they rely do not correspond with the practical reality. The notion that Uber in London is a mosaic of 30,000 small businesses linked by a common 'platform' is to our minds faintly ridiculous. In each case the 'business' consists of a man with a car seeking make a living by driving it. Ms Bertram spoke of Uber assisting the drivers to "grow" their business, but no driver is in a position to do anything of the kind, unless growing his business simply means spending more hours at the wheel. Not can Uber's function sensibly be characterised as supply drivers with "leads". That suggests that the driver is put into contact with a passenger with who he has the opportunity to negotiate and strike a bargain. But drivers do not and cannot negotiate with passengers ... Uber's case is that the driver enters into a binding agreement with a person whose identity he does not know (and will never know) and who does not know and will never know his identity, to undertake a journey to a destination not told to him until the journey begins, by a route prescribed by a stranger to the contract ... from which he is not free to depart (at least not without risk), for a fee which (a) is set by the stranger, and (b) is not known by the passenger (who is only told the total to be paid), (c) is calculated by the stranger ... and (d) is paid to the stranger

... For all these reasons we are satisfied that the supposed driver/passenger contract is a pure fiction which bears no relation to the real dealings and the relationships between the parties.

...turning to the detail of the statutory language, we are satisfied, having regard to all the circumstances and, in particular, the points assembled above, that the drivers fall full square within the terms of the 1996 Act, s230(3)(b). It is not in dispute that they undertake to provide their work personally ... we are clear that they provide their work 'for' Uber. We are equally clear that they do so pursuant to a contractual relationship ... We are entirely satisfied that the drivers are recruited and retained by Uber to enable it to operate its transportation business. The essential bargain between driver and organisation is that, for reward, the driver makes himself available to, and does, carry Uber passengers to their destinations. Just as in *Autoclenz*, the employer is precluded from relying upon its carefully crafted documentation because, we find, it bears no relation to reality.⁶⁹

Uber appealed the decision to the Employment Appeal Tribunal, which dismissed the appeal. Her Honour Judge Eady QC agreed with the Employment Tribunal's analysis, holding that Uber drivers are workers, and working for the purposes of the National Minimum Wage and *Working Time Regulations 1998* for the time during which they have the app switched on and are available to work.⁷⁰

There have been other similar cases relatively recently. In *Dewhurst v CitySprint UK Ltd* ET/2202512/2016 the Employment Tribunal held that a CitySprint courier was a worker:

Mr Brennan warned against paraphrasing the statutory test, which is of course helpful advice. However, I do think that whilst

⁶⁹ [Aslam & others v Uber BV and others](#) 2202550/2015, paras 91-96

⁷⁰ [Uber BV v Aslam & Ors](#) UKEAT 0056_17_1011

it is necessary to look at the separate limbs of the test, it is also important to look at the relationship as a whole. This is not least because where an individual is not working for themselves or supplying services to a customer the changes are they they will be performing the work personally and vice versa. In this case Ms Dewhurst is in a simple binary relationship with the respondent; one courier working personally for one organisation at any one time and any concept of her operating a business is a sham.

Another way of putting it is that the claimant is both economically and organisationally dependent upon CitySprint not only for her livelihood but also for how it is earned.⁷¹

While these cases suggest a trend of the tribunals finding that gig economy workers are ‘workers’ in the legal sense of the word, they are all fact-specific judgments. The variety of business models in the gig economy is such that it is not possible to state as a general rule that all those working in the gig economy are workers. The tribunals will apply the relevant legal tests to the detailed facts of the cases that come before them, and attempt to identify the true reality of the relationship, irrespective of how carefully drafted contractual documents seek to represent that relationship.⁷²

Prevalence of gig working

As with agency workers it is not easy to estimate the number of people working in the gig economy. The problem is compounded by the fact that the ‘gig economy’ has no formal or agreed definition. However some think tanks and research centres have estimated the size of the gig economy using their own small scale surveys.

Research by the Royal Society for the encouragement of Arts, Manufactures and Commerce (RSA) and Ipsos MORI estimated that **1.1 million people work in Britain’s gig economy**. This estimate was based on a survey of 8,000 people aged 15 and enhanced by data shared with the RSA by ‘gig platforms around the UK’.⁷³

The Chartered Institute of Personnel and Development (CIPD) estimated that **1.3 million people in the UK work in the gig economy**. This is equivalent to 4% of UK workers aged between 18 and 70.⁷⁴ This estimate is based on a survey of 400 gig economy workers and more than 2,000 other workers as well 15 ‘in-depth’ interviews with gig workers.

Research conducted by the European Commission and Eurofund, and cited by the OECD suggested that nearly 5 million adults in the UK say they have worked via the “sharing economy”.⁷⁵ This estimate is based on an online survey of 2,238 UK adults aged 16-75. The definition of the “sharing economy” could be interpreted as being significantly wider

⁷¹ [Dewhurst v CitySprint UK Ltd ET/2202512/2016](#), paras 56-57

⁷² See [Uber BV v Aslam & Ors](#) UKEAT 0056_17_1011, para 99; [Autoclenz Ltd v Belcher & Ors](#) [2011] UKSC 41

⁷³ RSA (2017) [Good gigs: A fairer future for the UK’s gig economy](#), p5.

⁷⁴ CIPD, [To gig or not to gig: stories from the modern economy](#), March 2017.

⁷⁵ OECD (2016) [Working Party on Measurement and Analysis of the Digital Economy: New Forms of work in the digital economy](#), p10,

than the gig economy which may explain why this estimate is a lot higher than the other estimates in this section.

5.3 Zero-hours contracts

For similar reasons to those who work in the gig economy, those working under zero-hours contracts have difficulty establishing employee status due to a lack of mutuality. By definition, employers are not obliged to provide work to zero-hours workers. As such, there is generally no obligation on the part of the worker to do at least some work (although there may be an obligation to undertake work if offered). As a consequence, by and large, zero-hours workers will be just that – workers – rather than employees.

In rare cases, mutuality might be inferred from the factual circumstances of a working relationship. The circumstances in which it will be considered by the Employment Appeal Tribunal (EAT) in [Pulse Healthcare v Carewatch Care Services Ltd & Ors \[2012\]](#).⁷⁶ In *Pulse Healthcare* the EAT concluded that the claimants were employees, and that there was mutuality of obligation, notwithstanding that the written terms of the contract suggested otherwise. When deciding whether a zero-hours contract constitutes a contract of employment, conferring employee status, the wording of the contract will not be determinative of whether there is, in practice, mutuality of obligation. The tribunal will look closely at the reality of the agreement. If the reality is that there is a pattern of regular work which is regularly accepted, the tribunal may deem the contract to be one of employment.⁷⁷

By contrast, the EAT again considered the employment status of zero-hours workers in 2014, in [Saha v Viewpoint Field Services Ltd UKEAT/0116/13](#). In *Saha* the EAT concluded that the claimant (a telephone interviewer) was not an employee due a lack of mutuality. Material to that decision was the fact the claimant lacked a set working pattern and was free to decline shifts.

When looked at together, *Pulse Healthcare* and *Saha* show that the factual working pattern of a zero-hours worker will play a significant part in determining their employment status.

Prevalence of zero-hour contracts

ONS estimates there were around **1.7 million** zero-hours **contracts** in November 2016, based on its latest survey of UK businesses. This was equivalent to approximately **6%** of all employment contracts at the time.⁷⁸

The table below shows the estimates from the ONS business survey over time. Although the number of zero-hour contracts has remained relatively stable the percentage of businesses using them has reduced.

⁷⁶ UKEAT 0123_12_0608

⁷⁷ See also: *St Ives Plymouth Ltd. v Haggerty* [2008] All ER (D) 317; [Wilson v Circular Distributors Ltd](#) [2005] EATS/0043/05

⁷⁸ ONS, Contracts that do not guarantee a minimum number of hours: May 2017, 11 May 2017

This would indicate that a smaller number of business are using zero-hour contracts more heavily.

Zero-hour contracts, ONS business survey estimates

	Number of zero-hour contracts (millions)	% of all contracts that are zero-hour	% of businesses making some use of zero-hour contracts
2014-Jan	1.4	5	13
2014-Aug	1.8	6	11
2015-Jan	1.5	6	11
2015-May	2.1	7	11
2015-Nov	1.7	6	10
2016-May	1.7	5	8
2016-Nov	1.7	6	7

Source: ONS, Contracts that do not guarantee a minimum number of hours: May 2017

ONS also collects statistics on zero-hours contracts as part of the Labour Force Survey (LFS), which asks workers (rather than employers) about their employment arrangements. The people who are identified by ONS as being on a zero-hours contract are those in employment who are aware that their contract allows for them to be offered no hours.

Estimates for October- December 2016 suggested that **905,000** people were on zero-hours contracts – representing **2.8%** of all people in employment.⁷⁹ This was **13%** higher – or **101,000** more people – than the same period a year before.

This estimate is less than the ONS business survey estimates as employers and employees may have differing perceptions and awareness of their employment contract. Also the employer survey counts the number of employee contracts rather than the number of people, and so the same person may be included multiple times.

The Library has published a briefing paper about [zero-hours contracts](#). This contains more statistical information on zero-hour contracts and further information on policy.

⁷⁹ ONS, Contracts that do not guarantee a minimum number of hours: March 2016, 15 March 2017, p2

6. Reviews and consultations

6.1 DTI consultation (2002-2006)

As discussed above, [section 23](#) of the *Employment Relations Act 1999* provides a power to confer employment rights on individuals not currently covered by those rights. In July 2002 the Department of Trade and Industry published a [Discussion document on employment status in relation to statutory employment rights](#).⁸⁰ The consultation document aimed to elicit views on whether to exercise the power under section 23, and sought to identify whether the coverage of employment rights “reflects the underlying economic reality of the employment relationship” or “whether a different coverage would better meet its aims for the labour market”.⁸¹ The Labour Government emphasised the importance of encouraging labour market flexibility:

The aim of the review is to seek views on the scope of statutory employment rights and in particular on whether the current framework encourages participation in the labour market, especially in flexible forms of work and whether it promotes a wide range and diversity of employment opportunities.⁸²

The document set out the Government’s view of the benefits and problems associated with employment status:

Statutory individual employment rights have been introduced over several decades and provide a framework of minimum standards for those working people who are not self-employed. Employment rights apply to differently defined groups of people, depending on the aims of the right in question. Different working people may require different levels of protection, depending on the nature of the relationship with their work provider, in particular the degree of control the working person has over how they do their work and when they do it and the degree of mutual obligation between them and their work provider. The Government considers that certain rights, such as the rights to receive the national minimum wage and not to suffer unlawful deductions from wages should apply to a broad category of working people, in order to ensure that work pays for all. This is in line with the aim behind the Working Families Tax Credit, which is to make work pay for people who are in remunerative work, with dependent children. By contrast, other rights, such as rights to minimum notice periods and the right not to be unfairly dismissed, provide protection for employees with a contract of employment placing particular duties on them and their employers. The advantage of this approach is that it ensures that the framework of statutory employment rights reflects the variety of different arrangements between work providers and working people.

However, this ‘targeted’ approach inevitably means that the coverage of rights varies. The Government is reviewing this coverage to ensure it reflects the underlying economic realities of the employment relationship. In addition, the varied coverage of rights and the different definitions used may be confusing for all

⁸⁰ DTI, [Discussion document on employment status in relation to statutory employment rights](#), URN 02/1058, July 2002

⁸¹ *Ibid.*, p2

⁸² *Ibid.*, p5

concerned and it is necessary to ensure that the confusion does not outweigh the benefits of a targeted approach. Confusion could arise as a result of a lack of knowledge of which rights apply to which category of person or because the definitions of 'employee' and 'worker' in legislation are not sufficiently clear and 'user-friendly'.⁸³

Section 3 of the paper was entitled "The case for and against extending statutory employment rights".⁸⁴ The arguments made for extending coverage were as follows:

- There may be a fairness case for extending rights to working people who may, in practice, do the same work as employees although due to technicalities in the law are excluded from employment rights.
- It might "increase working peoples' willingness to take up atypical work, knowing their rights are secured".⁸⁵
- It might encourage diversity at work by, for example, encouraging those with caring responsibilities to maintain an attachment to the labour market.
- It could increase clarity in the law. In particular, it could increase certainty for those on the employee/worker borderline, and for their employers.
- Additional rights could ensure workers feel more valued and might encourage employers to integrate more peripheral workers into their permanent workforce.

The arguments against were:

- If non-employees were afforded greater rights this might increase the demands made on them by employers which might in turn reduce workplace flexibility.
- It may reduce employers' willingness to offer atypical working arrangements, and may increase the administrative burdens on business.
- Extending rights to workers would not significantly improve clarity, as ultimately disputes over status would still be decided by a tribunal (there could still be uncertainty as to whether someone is a worker or self-employed).

The government published its response four years later, in March 2006, within the DTI paper [*Success at Work - Protecting vulnerable workers, supporting good employers*](#). The Government concluded that there was no need to amend the law:

We have been considering the current framework and coverage of employment rights to see if they are still appropriate and fair and support our aim of high participation in work. We published a consultation on the issue of the differing rights and responsibilities in employment law of "employees" and "workers" in July 2002. We had over 400 responses to this consultation and separately had a wide range of discussions with stakeholders. The responses

⁸³ Ibid., pp6-7

⁸⁴ Ibid., p26

⁸⁵ Ibid., p27

provided a range of views from individuals, representative bodies, businesses and trade unions. Workers have access to a range of minimum standards including the National Minimum Wage and the right to four weeks' paid holiday. They are likely to be the largest numbers benefiting from our commitment to make time equivalent to bank holidays additional to annual holiday entitlement. They have the right to limit their working hours to 48 on average or to work longer, including in a range of jobs, if they choose to opt out. They are protected from discrimination on grounds of gender, age, race, disability, sexual orientation and religion or belief.

We found that temporary work, such as agency work, is greatly valued by employers and many individuals. We were given examples of some abuse and lack of knowledge about existing rights but there was a lack of evidence suggesting the only appropriate remedy for this was wholesale change to the current system.

The main additional rights sought by some respondents were to give workers, after 12 months in a job, protection from unfair dismissal and to give pregnant women the right to return to a job after they have had their baby. But there are practical objections to such an extension of rights. It would be unfair to employees to give unfair dismissal rights to workers – who unlike employees do not have to give notice if they wish to leave a job – and employers would be likely to respond by requiring workers to give notice, undermining the very flexibility we know both employers and workers value. Moreover, by its nature temporary work rarely lasts for 12 months; and we have protected people on fixed-term contracts from constant extension of such contracts. Therefore it is not possible or practical to give a worker a right to keep or to return to a job which by its very nature is no longer likely to exist. Nor is it within an agency's capacity to promise to place a worker in a similar job on her return from maternity absence as the availability of such a similar job is also not within an agency's control. However, a pregnant agency worker or one returning from time away from work when she has a baby is not unprotected. She cannot be discriminated against and has every right to go back on the books of the agency which placed her, or any other agency, and to seek work for any hours she wishes. Agency workers are used to changing assignments, indeed many choose to do so. Several employers commented that extending all rights would be likely to result in a reduction in temporary work and that all these lost jobs would not be replaced by permanent ones.

Having reviewed the evidence provided in responses to the consultation and taken account of action already undertaken since 1997, we believe changes to the legal framework would not prevent instances of abuse or lack of awareness. It could however damage labour market flexibility and result in a reduction in overall employment. We have concluded that the present legal framework reflects the wide diversity of working arrangements and the different levels of responsibility and rights in different employment relationships. **The Government believes that it meets the labour market's current needs and there is no need for further legislation in this area.**⁸⁶

⁸⁶ DTI, [Success at Work - Protecting vulnerable workers, supporting good employers](#), March 2006, pp16-17

The Government published a [separate document](#) summarising responses to the consultation.⁸⁷ Employers and their representatives said:

- the law on employment status worked well and “often viewed their relationship with atypical workers as informal and thought that atypical arrangements were also flexible for workers, requiring fewer obligations to an organisation”.⁸⁸
- Business valued the freedom to vary workforce numbers as and when required.
- Any extension of employment rights would mean additional costs and burdens for businesses, particularly those industries with established traditions of atypical work.
- Businesses might be more cautious in hiring workers and offer fewer jobs - more rights would mean more potential tribunal disputes about breaches of those rights - and might expect greater commitment from workers in return for rights.
- Businesses reported that it could sometimes be difficult “to obtain clear information about employment status and that the different rules on status in employment and tax law in particular created confusion.”⁸⁹
- They argued that one of the reasons for the success of the UK in world markets was its flexible workforce and that any extension of employment rights which limited this flexibility would risk undermining this.
- Public sector employers’ views largely echoed those of businesses. They voiced uncertainty about their responsibilities towards agency workers.
- Temporary work agencies said that any additional costs created by an extension of employment rights would be passed on to their clients.

Workers and trade unions said:

- Some workers wanted additional rights and were confused about their existing rights, while others were happy with their situation and pro-actively chose not to be employed.
- Unions did not support the view that extending the coverage of employment rights would lead to a reduction in jobs. Unions wanted “all employment rights to be extended to all working people except the genuinely self-employed through a new, broad statutory definition of “employee” which would cover agency workers, homeworkers, “casual” workers, officeholders, freelancers and the nominally “self-employed” who are economically dependent.”⁹⁰
- Unions argued that the common law tests could exclude unfairly certain types of worker or make it difficult for atypical workers to

⁸⁷ DTI, *Employment Status Review - Summary of Responses*, March 2006

⁸⁸ *Ibid.*, pp2-3

⁸⁹ *Ibid.*, p4

⁹⁰ *Ibid.*, p7

build up sufficient continuity of service to access certain rights. Moreover, the law incentivised employers to set up employment relationships deliberately to preclude workers from qualifying for rights.

- Unions said that “atypical employment arrangements are prevalent among ethnic minorities, female workers and the lower paid, many of who are not members of unions. They argued that some workers may not be able to find permanent work but may instead move between insecure and low paid atypical jobs, which has implications for their social inclusion.”⁹¹

Lawyers said it would be helpful to have greater certainty about employment status, and thought the definitions of “employee” and “worker”, and the associated common law tests, were interpreted unpredictably by tribunals.⁹²

Organisations that advised workers (e.g. Citizens Advice) argued in favour of extending greater rights to workers, and said atypical workers and smaller employers are often confused about the implications of employment status.

6.2 Employment status review (2014-16)

On 6 October 2014 the Department for Business, Innovation and Skills (BIS), under the Coalition Government, launched a review of employment status. The [press release](#) announcing the review suggested that the Government would seek to determine:

how clear the current employment framework is, what the options are to extend some employment rights to more people and whether there is scope to streamline this very complex area of employment law, thus simplifying and clarifying rights for both employers and employees.⁹³

The review was completed and submitted to the Minister for Employment Relations (Jo Swinson) in March 2015.⁹⁴ The document was updated in December 2015, although was not published until 9 February 2017.

The [review document](#) lacked any concrete conclusions beyond noting that “employment status is an incredibly complex issue and any reforms will be challenging”⁹⁵ and “in order to assess the viability, benefits and impacts of any change in this area, a substantial amount of further work is required”.⁹⁶ While the document identified problems with law, it argued that the

current framework is highly flexible and allows for a variety of employment relationships to exist For those who choose not to make the most of this flexibility and participate in traditional, permanent roles, there is relative clarity over what their

⁹¹ Ibid., p8

⁹² Ibid.

⁹³ Employment review launched to improve clarity and status of British workforce, Gov.uk, 6 October 2014 [accessed 19 July 2017]

⁹⁴ [Employment status review \(2015\)](#), Gov.uk [accessed 18 July 2017]

⁹⁵ BIS, [Employment Status Review](#), December 2015, p51

⁹⁶ Ibid.

employment status is and therefore a great deal of certainty about what employment protections they enjoy ... for some who decide to make the most of the flexibility, this can be at the expense of clarity.⁹⁷

It did however suggest that the existing framework may pose difficulties for those in atypical work:

for a small but growing section of the UK labour market, the lines between statuses are not clear and so understanding which rights and responsibilities apply may be harder to determine. Whether that is someone working on a zero hours contract during school holidays, or a contractor engaging in a long-term agreement with a single employer, more people are starting to participate in atypical, nonstandard relationships. While some individuals and employers would welcome more certainty up front about what their rights and responsibilities are, and more could be done to address some of the specific abuses, there are questions as to how this could be achieved without a wider negative impact on the flexibility of the labour market.⁹⁸

Stakeholder views

The paper noted stakeholder views, which echoed those recorded in the 2002 consultation document. Business groups

were keen that the flexibility afforded by the current system was maintained although they did see a case for additional clarity when hiring. They were also clear that any changes to the current system should not increase the regulatory burden or cost on employers as this could have a wider impact on job creation and market flexibility⁹⁹

Trade unions

believed that businesses were using the complexity around status to deprive individuals of their core rights either through sham contracts or designing them in such a way as to make it difficult for individuals to enforce their rights. They believed the framework should be based more on the presumption of employment, with the distinction between 'worker' and 'employee' erased so that all individuals working in the UK benefitted from the same level of statutory protections.¹⁰⁰

The view from lawyers was mixed:

they believed the system is working well and felt that there was a certain amount of clarity for legal practitioners and the courts – although they did accept it was not always clear for employers and individuals up front. An approach of considering the whole framework rather than just some small element of it was regarded as being preferable. However, there was scepticism over whether anything could actually be done to change the system without a wider impact on the flexibility of the labour market. There was some concern around any attempts to tweak around the edges of the current system with many pointing to the associated risks of further complexity and litigation as a result.¹⁰¹

⁹⁷ Ibid., p38

⁹⁸ Ibid., p36

⁹⁹ Ibid., p18

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

Public sector employers

believed that the system worked well. However, there was interest in options that could bring greater clarity to both public sector employers and the individuals they hired.¹⁰²

Options for reform

Part 3 of the document examined the challenges for reforming the current approach to employment status, setting out a range of options, but noting that any change would likely produce uncertainty at least in the short-term:

Any changes to the definitions and tests would result in years of litigation and uncertainty. As such, there are no “quick wins”. Even small tweaks to the framework could take years to deliver and ultimately have subsequent effects that undo any intended good work¹⁰³

The options considered are summarised as follows:

- Removing the distinction between worker and employee, which could mean extending all employee rights to workers. It suggested that this might simply shift “unscrupulous employers’ avoidance efforts elsewhere”.¹⁰⁴
- Create discrete statuses for different types of workers, enabling a bespoke package of rights to attach to each status. This could include: a separate status for limb (b) workers “for instance an independent contractor status”;¹⁰⁵ a statutory test for self-employment; and a statutory test for volunteer status.
- Define employment statuses more clearly in legislation by incorporating case law principles into statute, thereby providing more detailed statutory tests for employment status. The document warned that, while this might increase clarity for some, it would risk ossifying principles in legislation, leaving the courts less room for manoeuvre and potentially creating “a framework for unscrupulous employers to consider when drafting contracts that seek to circumvent employment protections.”¹⁰⁶
- Review the interaction between qualifying service periods and atypical work. Due to breaks in their working patterns atypical workers (e.g. zero-hours contracts workers) often find it difficult to accrue sufficient continuous service so as to qualify for rights (e.g. rights to leave that require 26 weeks’ service or unfair dismissal rights that require two years’ service). Qualifying service periods for certain rights could be removed such that the right would be available from ‘day one’. Alternatively, the law on continuous employment could be amended so that continuity is not broken by certain types of gaps; or “a targeted solution could be used. For instance, a contract for intermittent employment or adding up how many hours a person has worked in a particular time period regardless of the pattern worked”.¹⁰⁷

¹⁰² Ibid., p19

¹⁰³ Ibid., p38

¹⁰⁴ Ibid., p39

¹⁰⁵ Ibid.

¹⁰⁶ Ibid., p40

¹⁰⁷ Ibid., p41

- A lack of understanding about employment status could be addressed via better education in schools; development of an online tool similar to, or an extension of, the existing [employment status indicator](#) for tax purposes; and the provision of a tailored helpline that could, in response to a series of questions, provide individuals and employers with a probable employment status.
- Reform fundamentally the current framework, implementing a statutory presumption that a working individual is automatically entitled to the full suite of employment rights. The document supposed that a necessary corollary of this would be a need to define particular statuses that would not be entitled to full rights (e.g. 'self-employed', 'volunteer') so as to "avoid severely damaging the flexibility of the labour market".¹⁰⁸ It cautioned that a detailed collection of statutory tests would likely introduce rigidity into the system, and may tie the hands of employment tribunals when determining status. It did not explore in any detail other potential statutory presumptions (e.g. a presumption of 'worker' status when determining whether someone is a worker or self-employed). However, it did suggest the possibility of a rebuttable presumption against self-employment, and a clear statutory test for self-employment, so that in order to prove self-employment "the employer would have to show all aspects of a self-employment arrangement had been met".¹⁰⁹
- Other actions to deal with employment status issues, which the document suggested might be undertaken alongside or instead of reforms to employment status, were considered:
 - Targeted guidance, building on that currently provided by ACAS.
 - Extending to workers the right to a statement of initial employment particulars. Currently this right is available only to employees, under section 1 of the *Employment Rights Act 1996*.¹¹⁰
 - Provide zero-hours contracts workers with the right to permanent contracts after a set period of work, unless the employer has sound business reasons for persisting with the zero-hours arrangement. The right could be modelled on the existing right for fixed-term employees, who become entitled to permanent contracts after four years.¹¹¹

The document suggested that if fundamental reform is to be attempted "one way forward would be to consider an independent review or commission to evaluate the options."¹¹² This proposal appears to have been acted on with the appointment of Matthew Taylor to lead the Taylor Review into Modern Employment Practices.

¹⁰⁸ Ibid., p42

¹⁰⁹ Ibid., p48

¹¹⁰ For further information on the right, see section 24 of the Library's briefing [Key Employment Rights](#).

¹¹¹ See: [Fixed-term Employees \(Prevention of Less Favourable Treatment\) Regulations 2002 \(SI 2002/2034\)](#). The right is summarised in section 11 of [Key Employment Rights](#).

¹¹² Ibid., p44

7. The Taylor Review

On 1 October 2016 the Prime Minister commissioned Matthew Taylor, Chief Executive of the Royal Society for the encouragement of Arts, Manufactures and Commerce (RSA), to assess the implications for employment regulation of new forms of work, driven by digital platforms. The Independent Review of Employment Practices in the Modern Economy launched on 30 November 2016.¹¹³ The report, entitled [*Good Work: The Taylor Review of Modern Working Practices*](#), was published on 11 July 2017.

The Taylor Review's terms of reference addressed six areas, some of which related directly to the law on employment status (in bold text):

Security, pay and rights

- To what extent do emerging business practices put pressure on the trade-off between flexible labour and benefits such as higher pay or greater work availability, so that workers lose out on all dimensions?
- **To what extent does the growth in non-standard forms of employment undermine the reach of policies like the National Living Wage, maternity and paternity rights, pensions auto-enrolment, sick pay, and holiday pay?**

Progression and training

- How can we facilitate and encourage professional development within the modern economy to the benefit of both employers and employees?

The balance of rights and responsibilities

- **Do current definitions of employment status need to be updated to reflect new forms of working created by emerging business models, such as on-demand platforms?**

Representation

- Could we learn lessons from alternative forms of representation around the world?

Opportunities for under-represented groups

- How can we harness modern employment to create opportunities for groups currently underrepresented in the labour market (the elderly, those with disabilities or care responsibilities)?

New business models

- How can government – nationally or locally – support a diverse ecology of business models enhancing the choices available to investors, consumers and workers?¹¹⁴

¹¹³ [Taylor review on modern employment practices launches](#), Gov.uk, 30 November 2016

¹¹⁴ [Employment Practices in the Modern Economy](#), Gov.uk [accessed 19 July 2017]

7.1 Taylor's recommendations on employment status

The Taylor Review recommended various amendments to employment law, alongside suggestions for strengthening enforcement and guidance more generally.¹¹⁵ The following outlines Taylor's recommendations on employment status and some of the responses to them. Many of the recommendations are similar to ideas floated in the BIS Employment Status Review, discussed above.

Employment status tests should be set out in primary legislation

Taylor recommended:

Government should replace the minimalistic approach to legislation with a clearer outline of the tests for employment status, setting out the key principles in primary legislation, and using secondary legislation and guidance to provide more detail.¹¹⁶

For the most part, the tests for employment status are found in case law. This permits judges to develop and add to the law without the constraining effect of statute, while guarding against lawyers' ingenuity; statutory tests give lawyers and their clients "a clearer target to aim at" when seeking to avoid conferring employment status.¹¹⁷ However, this comes at the cost of obscuring principle in volumes of text accessible only by those with professional legal skills. Taylor recommended steering a path that seeks clarity, by stating high-level principles in primary legislation, while retaining flexibility to depart from or modify those principles via secondary legislation. On one view, this proposal goes towards addressing widespread concern that the law on employment status is excessively complex and inaccessible to workers and the firms that engage them.¹¹⁸ On another, it is not clear that legislation is materially more accessible to non-lawyers than is case law, and will in any event require to be interpreted in light of a new accretion of case law. By and large, commentators have cautiously welcomed this proposal. The general tenor of their responses is that the devil will be in the detail, given Taylor is silent on which principles should find their way to legislation.¹¹⁹ As with many of Taylor's recommendations, employee representatives and lawyers argue that changing or clarifying definitions will do less to protect rights than

¹¹⁵ For good summaries, see: [Taylor Review published: recommended changes to employment status](#), Simmons & Simmons website, 12 July 2017; Darren Newman, [The Taylor Review – the good, the bad and the cosmetic](#), A Range of Reasonable Responses blog, 11 July 2017

¹¹⁶ [Good Work: The Taylor Review of Modern Working Practices](#), 2017, p35

¹¹⁷ Darren Newman, [Employment Status – in praise of fuzziness](#), A Range of Reasonable Responses blog, 30 June 2017

¹¹⁸ See, for example, [Independent Review of Employment Practices in the Modern Economy - Law Society response](#), 20 June 2017

¹¹⁹ [Taylor review will 'further complicate' employment law](#), *People Management*, 11 July 2017

would abolishing or reforming tribunal fees and strengthening enforcement of existing laws.

Rename limb (b) workers ‘dependent contractors’

Taylor recommended:

Government should retain the current three-tier approach to employment status as it remains relevant in the modern labour market, but rename as ‘dependent contractors’ the category of people who are eligible for worker rights but who are not employees.¹²⁰

As set out in the section of this briefing on the legal framework, the definition of worker in [section 230](#) of the *Employment Rights Act 1996* includes both employees and those who work personally for others but are not in business on their own account (limb (b) workers).¹²¹ Thus, all employees have both employee and worker status, and are entitled to the basic rights conferred on workers plus those reserved for employees. Limb (b) workers are those who are entitled only to worker rights.

The current definition of ‘worker’, and what it includes

Worker status includes both employees and limb (b) workers. The definition of employee is found in the *Employment Rights Act 1996*, [section 230\(1\)-\(2\)](#). Limb (b) workers are those who have worker status, but are not employees – see [section 230\(3\)\(b\)](#).

Worker status <i>(Employment Rights Act 1996, section 230(3))</i>	
Employees <i>(Employment Rights Act 1996, section 230(3)(a))</i>	‘Limb (b)’ workers <i>(Employment Rights Act 1996, section 230(3)(a))</i>

When lawyers refer to ‘workers’ they often mean those workers who are not also employees (i.e. limb (b) workers), rather than workers in the overarching statutory sense. Taylor believes this is confusing, and that limb (b) workers should have a new name: dependant contractors.

Taylor’s recommended redrafting of worker status

Taylor recommends giving ‘limb (b)’ workers a name: dependent contractors.

Worker status	
Employees	Dependent contractors

¹²⁰ [Good Work: The Taylor Review of Modern Working Practices](#), 2017, p35

¹²¹ Named after the part of the legislation that defines their status: *Employment Rights Act 1996*, s. 230(3)(b)

This is one of the more controversial - and often misunderstood - of Taylor's recommendations. Some commentators have criticised it as being purely cosmetic, insofar as it simply renames an existing category of working individual.¹²² Others take issue with the language of the term 'dependent contractor' rather than the concept, *per se*, of naming limb (b) workers, given that it could imply a degree of subordination that is not part of the current legal test for limb (b) worker status. Those who have misunderstood the recommendation appear to believe Taylor recommends renaming worker status (i.e. the broad status that covers both employees and limb (b) workers) rather than renaming only limb (b) workers.¹²³ That misunderstanding is perhaps unsurprising, as the report uses inconsistent language on this point.¹²⁴ Ultimately, though, the broad consensus among stakeholders appears to be that, while there is merit in giving a specific name to limb (b) workers, this change would make little practical difference to the current situation.

Personal service should not be necessary for dependent contractors

Taylor recommends:

In developing the test for the new 'dependent contractor' status, control should be of greater importance, with less emphasis placed on the requirement to perform work personally.¹²⁵

At present, the requirement to perform work personally is necessary for both employee and limb (b) worker status. An unfettered right of substitution (the right to send in another worker in one's place) would defeat both employee and worker status. Additionally, one of the criteria for employee status is that the employer must control the individual to a sufficient degree; the employer must have ultimate contractual authority to direct the work, although need not exercise day-to-day factual control. There is no strict control requirement for limb (b) worker status, although the existence of some 'employer' control helps separate limb (b) workers from the genuinely self-employed, as part of a multifactorial test that looks at various aspects of the relationship.

Taylor believes the requirement for personal service - for limb (b) workers/dependent contractors - is unnecessary. In particular, he sees as problematic the fact employers can draft contracts to include substitution clauses, solely to defeat employment rights. As discussed above, if a contractual right of substitution exists only to relieve the employer of legal obligations, with no expectation of it ever being relied upon, the courts would disregard it when determining status. Taylor

¹²² Darren Newman, [The Taylor Review – the good, the bad and the cosmetic](#), A Range of Reasonable Responses blog, 11 July 2017

¹²³ For example, [The Taylor review overlooks the big issue – clarifying what self-employment is](#), *Guardian*, 12 July 2017; [Taylor review seeks new status for 'gig economy' employment](#), *The Law Society Gazette*, 1 July 2017; [Taylor review will 'further complicate' employment law](#), *People Management*, 11 July 2017

¹²⁴ For example, Taylor recommends on p35 renaming as dependent contractors "the category of people who are eligible for worker rights but who are not employees", while on p62 states "dependent contractors which we have suggested replaces the current category of worker."

¹²⁵ [Good Work: The Taylor Review of Modern Working Practices](#), 2017, p36

argues that, while courts may well disregard such terms, they only have the opportunity to do so if the individual challenges their status; they are unable to prevent employers from including substitution clauses in contracts and categorising their workforce as self-employed. This, Taylor contends, makes it too easy for employers to avoid obligations:

Currently, an individual can have almost every aspect of their work controlled by a business, from rates of pay to disciplinary action and still not be considered a worker if a genuine right to substitution exists. We do not think this is fair, or reflects many of the opportunities presented in the modern world of work. The key employment protections which are available to 'workers' are there to support anyone who is not genuinely self-employed and it should not be that easy for employers to avoid any responsibilities in this way. We therefore think that it is important for Government to ensure that the absence of a requirement to perform work personally is no longer an automatic barrier to accessing basic employment rights.

Ultimately, if it looks and feels like employment, it should have the status and protection of employment.¹²⁶

As something of a *quid pro quo* for removing the requirement for personal service, Taylor suggests importing a form of control test into the test for limb (b) worker/dependent contractor status:

we believe the principle of 'control' should be of greater importance when determining dependent contractor status, with the legislation outlining what it means in a modern labour market and not simply in terms of the supervision of day-to-day activities. We don't envisage a significant departure from the approach currently taken by the courts where control is often a key factor when deciding if someone is a 'worker' or 'self-employed'. We believe that, if done correctly, placing greater emphasis on control and less emphasis on personal service will result in more people being protected by employment law. While this number is likely to be very small in the overall context of employment levels nationally, we believe it is fairer. It will also make it harder for some employers to hide behind substitution clauses which can only be challenged effectively through the courts.¹²⁷

As with much in the report, this recommendation's potential impact is difficult to gauge absent specifics of the proposed control requirement. Moreover, the report does not substantiate with evidence (e.g. anecdotal evidence of the prevalence of substitution clauses) its contention that the proposal would result in more people being afforded employment rights. Business commentators have reacted with caution. The CBI said the "proposals to rewrite employment status tests will ring alarm bells in many firms. Starting from scratch will increase uncertainty".¹²⁸ Unions and employer representatives have also voiced scepticism. For example, while welcoming the reduced emphasis on personal service, the Independent Workers Union of Great Britain said

¹²⁶ [Good Work: The Taylor Review of Modern Working Practices](#), 2017, p36

¹²⁷ Ibid.

¹²⁸ [CBI response to Taylor review](#), CBI website [accessed 18 July 2017]

that placing too much emphasis on control would mean employers focus all their energies on “disguising the true nature of that factor”.¹²⁹

Aligning tax and employment law

Taylor recommends:

In developing the new ‘dependent contractor’ test, renewed effort should be made to align the employment status framework with the tax status framework to ensure that differences between the two systems are reduced to an absolute minimum.¹³⁰

As detailed above,¹³¹ tax law lacks the tripartite classification of employee, worker and self-employed, having instead a binary distinction between employee and self-employed. As such, limb (b) workers, under employment law, can fall into either category for tax purposes. Taylor recommends that both employees and limb (b) workers/dependent contractors should be regarded as employed for tax purposes. The report also suggests that the Government should consider permitting employment tribunal determinations on status to be read across to the tax tribunal, and vice versa, such that determination in one forum would be binding on the other. The report argues that this would reduce confusion. Some commentators on tax law suggest that, prior to implementing any such change “it is hoped that a full review of the tax system will be imminent so that the issues can be properly considered”.¹³²

The proposal to align tax and employment law was somewhat overshadowed by another of the Review’s related recommendations. The report recommended that “The level of NI contribution paid by employees and self-employed people should be moved closer to parity”, endorsing a similar proposal in Spring Budget 2017, which was not proceeded with.¹³³ Stakeholders – particularly business commentators - have cautiously welcomed the tax proposals. For example, the CBI stated:

reforms should not be rushed and be part of a long-term holistic review to ensure that the tax incentive for entrepreneurial activity is enhanced rather than lost

The Work and Pensions Select Committee made a similar recommendation in its report *Self-employment in the gig economy* (see below).¹³⁴

¹²⁹ Independent Workers Union of Great Britain, [Dead on Arrival: The IWGB’s reply to the Taylor Review on Modern Employment Practices](#), p33

¹³⁰ Ibid., p38

¹³¹ See section entitled ‘Employment status and tax’

¹³² Highlights from the Taylor Report, *Tax Journal*, 14 July 2017, p6

¹³³ [U-turn over Budget plan to increase National Insurance](#), BBC News online, 15 March 2017

¹³⁴ House of Commons Work and Pensions Committee, [Self-employment and the gig economy](#), Thirteenth Report of Session 2016–17, HC 487, 1 May 2017

Written statement

Taylor recommends:

Government should build on and improve clarity, certainty and understanding of all working people by extending the right to a written statement to 'dependent contractors' as well as employees.¹³⁵

Section 1 of the *Employment Rights Act 1996* currently provides employees with a right to a written statement of particulars of employment. The statement must contain the basic terms of the employment as listed in section 1; for example, the rate of remuneration and hours of work. Employees whose employment continues for less than one month are excluded from this right.¹³⁶ The statement must be given to the employee within two months of the beginning of the employment. There is no freestanding right to claim compensation for failure to provide particulars, although a tribunal may award compensation for failure to provide particulars if raised as part of a wider claim (e.g. for unfair dismissal).¹³⁷

Taylor argues that employers should be required by statute to provide all workers with a written statement, on day one, setting out details of statutory rights together with the information that must already be provided to employees under a section 1 statement. The report also recommends introducing a freestanding right for compensation for failure to provide a written statement, acknowledging that the current obligations are "widely ignored".¹³⁸ Commentators have welcomed the proposal, including business groups.¹³⁹

Online tool

Taylor recommends:

Government should build on legislative changes to further improve clarity and understanding by providing individuals and employers with access to an online tool that determines employment status in the majority of cases.¹⁴⁰

There is already an [online tool](#) that indicates employment status for tax purposes.¹⁴¹ Taylor recommends creating something similar for employment law purposes, suggesting that the tool could link to advice about rights and, in time, as machine learning develops, provide an enforceable early determination of status. The recommendation is one of many in the report that resemble ideas suggested in the Employment Status Review, discussed in the previous section of this briefing.

¹³⁵ Ibid., p39

¹³⁶ So too are certain classes of mariners. *Employment Rights Act 1996*, ss. 198-199

¹³⁷ For an overview of the law on this, see [Key Employment Rights](#), Commons Briefing papers CBP-7245, p48

¹³⁸ [Good Work: The Taylor Review of Modern Working Practices](#), 2017, p39

¹³⁹ For example, see [CBI response to Taylor review](#), CBI website [accessed 18 July 2017]; Independent Workers Union of Great Britain, [Dead on Arrival: The IWGB's reply to the Taylor Review on Modern Employment Practices](#), pp37-38

¹⁴⁰ Ibid.

¹⁴¹ Check employment status for tax, Gov.uk [accessed 18 July 2017]

Determination of status without tribunal fees

Taylor recommended:

Government should ensure individuals are able to get an authoritative determination of their employment status without paying any fee and at an expedited preliminary hearing.¹⁴²

The report expressed regret that “it is unlikely that the Government will move to abolish [tribunal] fees”.¹⁴³ This recommendation has since become somewhat redundant. During the period 2013-2017 claimants were required to pay fees to take their claims to employment tribunals. However, in July 2017 the Supreme Court declared such fees to be unlawful, and abolished them. For further information see the [Library's briefing](#) on tribunal fees.

Reversed burden of proof

Taylor recommends:

The burden of proof in employment tribunal hearings where status is in dispute should be reversed so that the employer has to prove that the individual is not entitled to the relevant employment rights, not the other way round subject to certain safeguards to discourage vexatious claims.¹⁴⁴

At present, if an individual claims a particular status, they shoulder the burden of proving this in the tribunal. Taylor argues that this is unfair, and that it should be for the employer to disprove entitlement to a particular status. The proposal is similar to a recommendation in the Work and Pension Select Committee's report *Self-employment in the gig economy* (see below).¹⁴⁵

Responses to the proposal have been mixed. Some business groups argue that reversing the burden of proof will “increase uncertainty”.¹⁴⁶ A number of legal commentators argue that the proposal is “essentially meaningless”¹⁴⁷ insofar as judges tend not to be overly concerned with who has the burden of proof, preferring to find facts and apply law without presuming one way or another. Conversely, some lawyers suggest that the proposal may change employers' appetite to argue against a particular status.¹⁴⁸

Penalties for ignoring tribunal decisions

Taylor recommends:

Government should create an obligation on employment tribunals to consider the use of aggravated breach penalties and costs orders if an employer has already lost an employment status case on broadly comparable facts – punishing those employers who believe they can ignore the law.¹⁴⁹

¹⁴² Ibid., p62

¹⁴³ [Good Work: The Taylor Review of Modern Working Practices](#), 2017, p62

¹⁴⁴ [Good Work: The Taylor Review of Modern Working Practices](#), 2017, p62

¹⁴⁵ House of Commons Work and Pensions Committee, [Self-employment and the gig economy](#), Thirteenth Report of Session 2016–17, HC 487, 1 May 2017

¹⁴⁶ [CBI response to Taylor review](#), CBI website [accessed 18 July 2017]

¹⁴⁷ Independent Workers Union of Great Britain, [Dead on Arrival: The IWGB's reply to the Taylor Review on Modern Employment Practices](#), pp45-46

¹⁴⁸ Weightmans employment law ([via Twitter](#))

¹⁴⁹ [Good Work: The Taylor Review of Modern Working Practices](#), 2017, p63

The Review report highlights that tribunal decisions are binding on the parties to a claim, but not on wider workforces. It cites Uber as an example:

The recent case against Uber raised questions about the applicability of tribunal rulings to the wider workforce. While many have suggested that the judgment (which is being appealed) means all Uber drivers are workers, the reality is that the ruling only applies to the two drivers who brought cases. It is neither just nor efficient for the system to operate so that every single person in an organisation has to bring a case to be recognised as a worker for the judgment to apply to the whole workforce.

Some legal commentators have pointed out that the tribunals are already required to consider whether to make a costs or preparation time order where a claim has no reasonable prospect of success, as would likely be the case if an employer has already lost a case on broadly comparable facts.¹⁵⁰ Thus, whether or not this recommendation would, if implemented, take the law much beyond the present position would depend on the phrasing of its translation into statute, and whether this confers on tribunals powers beyond those which they already possess.

¹⁵⁰ *Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013* (SI 2013/1237), [Schedule 1](#), rule 76

8. Government response to Taylor

The Government published its [response](#) to the Taylor Review on 7 February 2018.¹⁵¹ The response was accompanied by four consultations on areas covered in the Review, including [one on employment status](#). The consultation closes on 1 June 2018.¹⁵²

The Taylor Review's recommendations on employment status, together with the Government's responses to them are set out below.

Recommendation	Response
The government should replace their minimalistic approach to legislation with a clearer outline of the tests for employment status, setting out the key principles in primary legislation, and using secondary legislation and guidance to provide more detail	Take forward further work on the case for legislative change and potential options for reform
The government should retain the current threetier approach to employment status as it remains relevant in the modern labour market, but rename as 'dependent contractors' the category of people who are eligible for worker rights but are not employees	Test relevance of current approach and nomenclature
In developing the test for the new 'dependent contractor' status, control should be of greater importance, with less emphasis placed on the requirement to perform work personally	Consult on the detailed tests to determine a worker (or dependent contractor)
In developing the new 'dependent contractor' test, renewed effort should be made to align the employment status framework with the tax status framework to ensure that differences between the two systems are reduced to an absolute minimum	Take forward further work on the case for legislative change and potential options for reform
The government should build on and improve clarity, certainty and understanding of all working people by extending the right to a written statement to 'dependent contractors' as well as employees	Agree to extend to 'workers' and consult on what information to include
The government should build on legislative changes to further improve clarity and understanding by providing individuals and employers with access to an online tool that determines employment status in the majority of cases	Accept and will be taken forward once status changes are agreed
The government should ensure individuals are able to get an authoritative determination of their employment status without paying any fee and at an expedited preliminary hearing	There are currently no fees in the ETs following a recent Supreme Court judgment. If fees are reintroduced we will consult on this
The burden of proof in employment tribunal hearings, where status is in dispute, should be reversed so that the employer has to prove that the individual is not entitled to the relevant employment rights, not the other way round, subject to certain safeguards to discourage vexatious claims	Return to this recommendation after an online tool has been developed
The government should create an obligation on employment tribunals to consider the use of aggravated breach penalties and cost orders if employer has already lost an employment status case on broadly comparable facts - punishing those employers who believe they can ignore the law	Accept the need for strong punishment for those who ignore the law. Consultation on how to extend the use of sanctions. New proposal put forward to increase level of penalty for aggravated breach

¹⁵¹ HM Government, *Good Work A response to the Taylor Review of Modern Working Practices*, February 2018

¹⁵² BEIS, HM Treasury & HMRC, *Employment Status Consultation*, February 2018

9. Select Committee inquiries

9.1 Taylor Review of modern working practices inquiry

On 20 November 2017 the House of Commons Business, Energy and Industrial Strategy Select Committee, and the Work and Pensions Committee, published a [joint report](#) in response to the Taylor Review.¹⁵³ The report followed two earlier separate inquiries held by the committees (see below).

On the issue of employment status, the committees recommended:

Clearer statutory definitions of employments status

...

We recommend the Government legislates to introduce greater clarity on definitions of employment status. This legislation should emphasise the importance of control and supervision of workers by a company, rather than a narrow focus on substitution, in distinguishing between workers and the genuine self-employed

Worker by default

...

We recommend the Government legislate to implement a worker by default model ... This would apply to companies who have a self-employed workforce above a certain size defined in secondary legislation.

The report contained a draft Bill¹⁵⁴ providing a suggested means of implementing these proposals. The draft Bill would amend the *Employment Rights Act 1996*, replacing section 230 with a far more detailed definition of “worker” and a new status of “independent contractor”. The Bill would also require employers to provide workers with a statement of their status within seven days of starting work. The worker-by-default clause in the draft Bill would require employment tribunals, in employment status cases, to presume that the individual is a worker unless the contrary is established.

9.2 Self-employment and the gig economy

On 1 December 2016 the Work and Pensions Committee launched an inquiry into self-employment and the gig economy.¹⁵⁵ Following the announcement of the 2017 General Election and the unexpected

¹⁵³ Work and Pensions and Business, Energy and Industrial Strategy Committees, *A framework for modern employment*, Second Report of the Work and Pensions Committee and First Report of the Business, Energy and Industrial Strategy Committee of Session 2017–19, HC 352, 20 November 2017

¹⁵⁴ *Ibid.*, p28

¹⁵⁵ [Self-employment and the gig economy inquiry launched](#), Parliament website, 1 December 2016

dissolution of Parliament, the inquiry was cut short, although the Committee published an abridged [report](#) on 1 May 2017.¹⁵⁶

The Committee report made two principal recommendations in relation to employment status, both of which were to an extent echoed by the Taylor Review report:

- The Government should seek to equalise National Insurance contributions between employees and the self-employed, given that HMRC estimates “that the effective NICs annual subsidy to the self-employed relative to the employed exceeds the value of their reduced benefit entitlement by £5.1 billion”.¹⁵⁷
- All individuals engaged by a firm should have the employment status of worker by default:

An assumption of the employment status of “worker” by default, rather than “self-employed” by default, would protect both those workers and the public purse and would put the onus on companies to provide basic safety net standards of rights and benefits to their workers. This assumption would entitle workers to employment rights commensurate with “worker” status. As there is no “worker” status in tax law, tax status would be unaffected. Companies wishing to deviate from this model would need to present the case for doing so, in effect placing the burden of proof of employment status on the company.¹⁵⁸

The Committee’s report also made a number of observations about the state of the law on employment status. It noted that the line between employment and self-employment is often unclear:

The different entitlements of employees, workers and the self-employed are clear. We heard much to indicate, however, that the boundaries between the categories are not. A wide range of practices that seemed to blur the line between “employment” and “self-employment” were brought to our attention. These included

- a) Aspects of control by the contracting company over working patterns: for example, being assigned shifts or rounds, with the risk of work being permanently withdrawn or charges levied if workers failed to fulfil them;
- b) Workers who carried out regular working hours over substantial periods of time, up to periods of years for one company;
- c) An inability on the part of workers to negotiate or set pay;
- d) Workers experiencing difficulties in having “substitute” workers accepted by the contracting company, if they were unable to work their scheduled shifts; and
- e) Guidance given to salaried staff on how to avoid referring to their workers in terms that might imply an employer-employee relationship, in light of their employment model¹⁵⁹

¹⁵⁶ House of Commons Work and Pensions Committee, [Self-employment and the gig economy](#), Thirteenth Report of Session 2016–17, HC 487, 1 May 2017

¹⁵⁷ *Ibid.*, p5

¹⁵⁸ *Ibid.*, p14

¹⁵⁹ *Ibid.*, p9

The report also highlighted consequences of the fact tribunal rulings are binding only on the parties to a dispute:

Questions of employment status are often only finally resolved in court, with reference to swathes of case law. In a number of recent court cases self-employed contractors have successfully challenged their self-employed status. Yet the outcomes of these cases generally only apply to the particular company and group of workers under consideration: what applies to one company does not necessarily have any implications for those working for other organisations with, potentially, very similar business models. There is, therefore, a substantial burden on workers if they wish to challenge their status: one that those in vulnerable or isolated positions may be very hesitant to bear.¹⁶⁰

These observations are similar to those made in the Taylor Review report, informing Taylor's recommendations on penalties and costs orders (see above section on Taylor, under 'penalties for ignoring tribunal decisions').

9.3 The future world of work and rights of workers

On 26 October 2016 the House of Commons Business, Energy and Industrial Strategy (BEIS) Select Committee announced an inquiry into the future world of work.¹⁶¹ The inquiry was cut short, and concluded without the Committee publishing a report, due to the dissolution of Parliament on 3 May 2017 prior to the general election. A number of questions about employment status featured among the inquiry's terms of reference. In particular, the Committee was interested in whether worker status is defined sufficiently clearly in law and what rights should be afforded to agency workers, casual workers and the self-employed. The Committee took oral evidence and a received a considerable amount of written evidence, which is available on [the Parliament website](#).¹⁶²

¹⁶⁰ Ibid., p10

¹⁶¹ [Future world of work and rights of workers inquiry launched](#), Parliament website, 26 October 2016

¹⁶² [The future world of work and rights of workers inquiry](#), Parliament website [accessed 19 July 2017]

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