



HM Government

Employment Status consultation

Government Response

July 2022



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Introduction

The UK has one of the best employment rights records in the world and maintaining a strong, flexible, and well-functioning labour market will be essential to building back better from the pandemic. This Government is committed to building a high skilled, high productivity, high wage economy that delivers on our ambition to make the UK the best place in the world to work and grow a business.

Employment status is at the core of both employment law and the tax system. Employment status determines the rights that an individual gets, and the taxes that they and the business they work for, or with, must pay. There are two tax statuses; self-employed and employed and three statuses for rights; self-employed, limb (b) worker and employee.

In response to the Taylor Review, the previous Government published the Good Work Plan and the Department for Business, Energy and Industrial Strategy (BEIS), Her Majesty's Revenue and Customs (HMRC) and Her Majesty's Treasury (HMT) carried out a joint consultation on employment status.

The consultation sought to explore in a greater level of detail how wider employment status reform, including recommendations from the Taylor Review, could work, both in legal terms and in relation to the realities of the modern labour market, as well as seeking to understand the potential impacts and implications of those proposals. It also considered whether there are alternative approaches that could better achieve the aims of providing individuals and businesses with greater clarity and certainty. For both the employment rights and tax frameworks, the consultation considered the legislative tests that define the boundaries between the different statuses. It did not consider the issue of reforming the rights themselves, creating new rights or changes to the National Insurance Contribution (NICs) rates or reliefs. However, the consultation did consider a related issue of what constitutes working time for the purposes of National Minimum Wage/National Living Wage (NMW/NLW), specifically for those working via an online platform.

This publication summarises the responses to the consultation and provides an update on the Government's position to support an employment status framework that strikes the right balance between flexibility and protection.

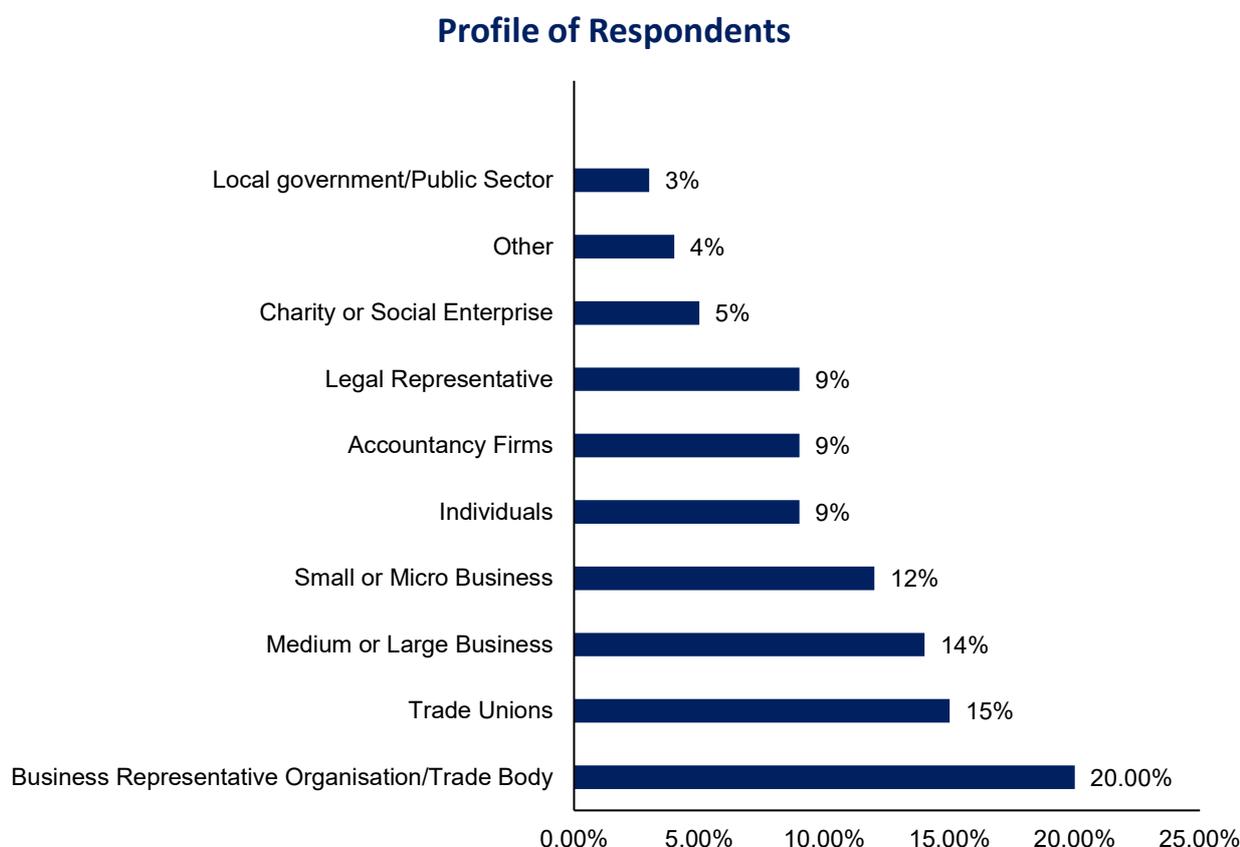
This Government is committed to ensuring the UK's employment and tax regulatory frameworks deliver a labour market that is fair, flexible and keeps pace with the needs of modern workplaces.

Conducting the consultation exercise

In total there were 162 formal responses to the consultation. The largest number of formal responses to the consultation came from Business Representative Organisations and Trade Bodies (20%), with the second largest number of responses coming from Trade Unions (15%). 14% of responses were from medium or large business while 12% of responses were from small or micro business. The remaining responses came from individuals (9%), Accountancy firms (9%), Legal Representatives (9%), Charity or Social Enterprise (5%), Local Government/Public Sector (3%) and other (4%).

Not everyone responded to all questions, instead some focused their responses specifically around employment status for employment rights' issues and others around reforms to the tax framework. A large number of stakeholders also shared their views at face-to-face meetings during the consultation process and were considered in the policy development phase, but this summary focuses on written submissions.

Figure 1: Profile of written respondents, categorised by sector



NB: Respondents could only choose one category

Analysis of responses

The chapter subheadings in this section refer to those used in the original consultation document, which have been included in this response document for ease of reference. Chapters 1-3 in the consultation document covered introduction, background and context of the legislation and frameworks, with questions for respondents starting at chapter 4.

Issues with the current employment status regimes (Chapter 4)

This chapter set out three key issues that are commonly raised with the current employment status regime:

'Open to interpretation' - that there can be ambiguity in the application of the case law tests when determining status.

'Complexity' - the difficulty in applying the rules to novel circumstances, and the lack of clarity between statuses.

'Difficulties resolving disputes' - the difficulties individuals can face when seeking a final decision on status, and the cost to all parties of resolving those disagreements.

Question 1: Do you agree that the points discussed in this chapter are the main issues with the current employment status system? Are there other issues that should be taken into account?

The vast majority of respondents agreed that there are issues with the current employment status system. The main concerns raised by stakeholders were the following:

The current system

- Some stakeholders saw the current employment status tests as outdated and not relevant to modern working practices.
- Some respondents thought that current employment status tests do not cover enough factors to encapsulate changes in ways of working practices (potential additional factors are explored later in this document).
- A few respondents commented that it was usually the current employment status tests (determined by case law) and their application that created complexity. This impacted both individuals and engagers when seeking to determine status.
- Some respondents also highlighted that due to uncertainty of the frameworks some individuals can find themselves missing out on the rights they are entitled to.

Reform

- A large number of respondents had appetite for employment status reform but there was no overall consensus on what action the Government should take. Respondents agreed that there was no easy solution, and it would be complex to implement any reform around employment status.
- Some respondents highlighted that even with legislative and policy changes there will always be borderline cases which will require a court to determine the result.
- Respondents said that any reform should not be rushed, with time taken to develop proposals fully. There needs to be wider consideration of how statutory payments, employment rights and tax link currently and how they might be affected by any changes.
- A handful of respondents highlighted that some changes may be needed for specific sectors, with examples referencing hairdressing, insurance and those working in the music and entertainment industry.

Enforcement

- Some respondents highlighted that, in their view, Government enforcement of employment status needs to be tougher to clamp down on unscrupulous employers. Improvements were suggested to the current enforcement system including more visibility, and a stronger, more pro-active approach.
- Respondents also identified the difficulties which individuals can face when trying to enforce their rights, including when taking a claim to an Employment Tribunal. In particular, there were suggestions around making changes to the tribunal system, to make it quicker and easier to bring a challenge and obtain a ruling.

Self-employment

- Some respondents noted that any policy interventions to tackle false self-employment should not affect genuinely self-employed individuals who are running their own businesses.
- Most respondents agreed that there were issues with the self-employed and limb (b) worker boundary. It was also commented that it would be useful to have greater clarity on what it means to be self-employed. However, responses to other parts of the consultation¹ showed that most respondents felt this should not be achieved by setting out a formal definition of self-employed in statute.

As set out above, the vast majority of responses to the Government's consultation on employment status agreed that there are some issues with the current employment status frameworks. While many were in favour of legislating to address them, some stakeholders were concerned about the implications of this approach, and the risk of unintended consequences. Overall, no consensus emerged on the right legislative approach.

¹ Q 60, "Do you agree that self-employed should not be a formal employment status defined in statute?"

Legislating for the current employment tests (Chapter 5)

This chapter considered whether the current case law tests to determine employee status should be legislated and, if so, how. It outlined the three main employment status tests and asked whether they remain relevant to the determination of employee status.

It outlined several other factors which have been referred to by the judiciary and asked whether and to what extent these should also be legislated. The chapter concluded with a discussion of how secondary legislation could be used to support a legislated employment status test.

Principles for codification into primary legislation

Q2: Would codification of the main principles – discussed in chapter 3 of the consultation– strike the right balance between certainty and flexibility for individuals and businesses if they were put into legislation? Why / Why not?

Q3: What level of codification do you think would best achieve greater clarity and transparency on employment status for i) individuals and ii) businesses – full codification of the case law, or an alternative way?

Q4: Is codification relevant for both rights and/or tax?

Q5: Should the key factors in the irreducible minimum be the main principles codified into primary legislation?

The majority of respondents did not think codification of the current test would strike the right balance between certainty and flexibility for individuals and businesses. However, of the respondents who supported codifying the current tests in legislation, many said that any primary legislation could be supported by secondary legislation to enable adaptability and resilience as modern working practices evolve. Alternative suggestions included supporting legislation with comprehensive guidance or a code of practice.

Of those respondents who said codification was inappropriate, most cited a perceived negative impact on the adaptability and resilience of the current system, specifically in the application of the rules by the courts with respect to new business models including in the gig economy.

Respondents also suggested that:

- codification could have a negative impact on flexibility within the workforce;
- they were dissatisfied with the current tests;
- tests are a ‘snapshot’ in time and would remove the flexibility of courts in the future; and
- a codified test would make it easier for the rules to be manipulated.

Respondents who did not agree that legislation is appropriate still broadly felt that if the Government decided to legislate, the irreducible minimum (i.e. personal service, mutuality of obligation, and control) would be the preferred option.

Mutuality of obligation

Q6: What does mutuality of obligation mean in the modern labour market?

Q7: Should mutuality of obligation still be relevant to determine an employee's entitlement to full employment rights?

Q8: If so, how could the concept of mutuality of obligation be set out in legislation?

Where respondents were in favour of legislating the current employment status tests, the vast majority said that mutuality of obligation should be a relevant factor for employee status. However, as set out previously, the majority of respondents were not in favour of codifying the current status test. Of those who said that an alternative legislated test would be preferable, the majority said that mutuality of obligation is not relevant. However, there was not a clear consensus on what an alternative legislative test should look like.

Where respondents said that mutuality of obligation was a relevant factor, some felt that its absence can provide a determinative ruling on status, rather than its presence; they felt that if mutuality of obligation is absent, then there cannot be an employer-employee relationship.

Some respondents disagreed with the Government's view of mutuality of obligation, or felt that it should not continue to be a relevant test for tax purposes on the basis that it is no longer relevant in the modern gig economy where individuals do not necessarily have an obligation to accept work. However, the majority of respondents believed that mutuality of obligation is still relevant in determining an individual's entitlement to full employee rights. This view was consistently held by business representative groups, medium and large businesses, and legal and accountancy representatives.

Although trade unions were split on this issue, some trade union responses stated that businesses can look to avoid mutuality of obligation by inserting a clause into contracts, which state that the employer is not obliged to offer work and the individual can refuse work.

Personal service

Q9: What does personal service mean in the modern labour market?

Q10: Should personal service still be relevant to determine an employee's entitlement to full employment rights?

Q11: If so, how could the concept of personal service be set out in legislation?

The most common view of personal service was that the individual should undertake the work themselves without the right to substitute and that in circumstances where an individual has an unlimited right to substitute, it means that personal service will not be satisfied.

The questions around personal service received a range of views, including:

- A large majority of respondents feeling that personal service was relevant to determine an employee's entitlement to full rights. A number of respondents noted that personal service is often expected of self-employed people.
- Several respondents expressed that the right to substitute or delegate should be real as opposed to a term in a contract that could never be applied in practice.
- Many respondents were concerned that employers can, and do, rely on such terms in contracts to exploit individuals. This risk was raised most commonly by trade union respondents, but was also mentioned by a number of business representatives and medium/large businesses.
- Amongst those who felt that a reformed legislated test would be preferable, there was a fairly even split between those who felt that personal service was relevant and those that did not.

Control

Q12: What does control mean in the modern labour market?

Q13: Should control still be relevant to determine an employee's entitlement to full employment rights?

Q14: If so, how can the concept of control be set out in legislation?

Most respondents who answered this question agreed with the meaning of control in the modern labour market set out in the consultation document: the right to control how, when and where the work is done, rather than the way control is exercised in practice. There were a range of comments from respondents, including:

- Direction of 'how' work was done is not necessarily always important in establishing whether there was control, as highly-skilled individuals are often allowed to perform the work in the way they deem best but can still be subject to the right of control.
- There will always be an element of control where an individual or engager has to submit to certain obligations, such as Health and Safety requirements, use of specific soft/hardware and the adherence to certain regulations and codes. However, others felt that this was not necessarily indicative of control existing.
- Some respondents said flexible working arrangements (e.g. working remotely/irregular hours) can make it more difficult to tell whether an individual is subject to control.

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- Respondents also suggested additional factors that could be considered as an indication of control, including whether an engager can negotiate or set the pay-rate or move an individual onto a completely different task.
 - A majority of respondents felt that control was still a relevant factor in response to Q13, and many said it was a determinative factor between being employed or self-employed.

This was expressed across the sectors, notably by business representative groups, individuals (including contractors) and accountancy representatives.

Other provisions

Q15: Should financial risk be included in legislation when determining if someone is an employee?

When comparing the response rate of all questions relating to 'other provisions', financial risk was the question with the largest response rate. There were a range of responses with various interpretations of what financial risk means, including:

- The majority of the respondents who said that the irreducible minimum should be codified stated that financial risk was a relevant factor when determining employee status. However, there was some disagreement on how much weight it should be given.
- Many respondents who did not feel that the Government should legislate still felt that financial risk was a relevant factor in determining employment status, particularly if used as a key indicator pointing away from being an employee.
- Few respondents felt that financial risk was not a relevant factor, stating that financial risk is a broad concept and is too difficult to give a precise definition. These respondents also stated that this is only a relevant consideration for tax assessment purposes and should have no bearing on employment rights.

Q16: Should 'part and parcel' or 'integral part' of the business be included in legislation when determining if someone is an employee?

Just over half of respondents who answered this question felt that 'part and parcel' or 'integral part' of the business should be included in legislation when determining if someone is an employee. As with financial risk, the interpretation of this varied throughout the responses, with views including:

- Most respondents who said that the irreducible minimum should be codified stated that 'part and parcel' or 'integral part' of the business is a relevant factor to determine employee status.
- Most respondents who felt that the Government should legislate, but not necessarily all the factors in the irreducible minimum, said that that 'part and parcel' or 'integral part' is a relevant factor and should be included in legislation.

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- The majority of respondents who did not feel the Government should legislate still felt that ‘part and parcel’ or ‘integral part’ was a relevant factor in determining employment status.
 - Few respondents felt that ‘part and parcel’ was not a relevant factor, reasons cited included that it:
 - is another form of ‘control’ and not a separate factor;
 - is largely disregarded in recent case law and unpopular with some judges;
 - is a subjective term and too open to interpretation; and
 - doesn’t reflect that individuals can be integrated into a business on a short-term basis.

Q17: Should the provision of equipment be included in legislation when determining if someone is an employee?

There was a fairly even split of those who responded, but marginally more respondents said that the ‘provision of equipment’ should not be included in legislation when determining if someone is an employee. Although there was little consensus on whether to legislate this factor, most respondents said that it is a relevant factor when determining employee status. This belief was strongest amongst legal representatives and accountancy bodies. The majority of trade unions did not think this factor should be relevant.

Additional views included:

- Some respondents who stated that the irreducible minimum should be codified, also said that ‘provision of equipment’ is a relevant (but minor) factor to determine employee status. Some suggested it should constitute part of the financial risk test.
- Other respondents said Government should legislate but not necessarily all the factors in the irreducible minimum, as ‘provision of equipment’ was not a relevant factor.
- Of those respondents who felt that ‘provision of equipment’ was not a relevant factor, reasons cited included:
 - In some work environments it is difficult to work without appropriate equipment provided, but it was not felt that this indicates employment status.
 - Using this as a factor could lead to manipulation, for example engagers insisting that individuals hire or pay for equipment to demonstrate self-employed status.
 - It is not a relevant factor to all sectors and could complicate employment status tests.

Q18: Should ‘intention’ be included in legislation when determining if someone is an employee in uncertain cases?

Just under half of respondents who responded to this question felt that the ‘intention’ of the parties should be included in legislation. Most said that it is a relevant factor when determining employee status, although this was not a large majority. Trade unions and legal representatives were the most likely to say that intention is not a relevant factor, though there was not a clear consensus in either group. There were a range of views, including:

- Most of the respondents who felt that the irreducible minimum should be codified, also stating that ‘intention’ is a relevant factor to determine employee status.
- Of those who said that the Government should legislate some of the factors in the irreducible minimum, several respondents said ‘intention’ was not relevant. The majority of respondents who did not feel that the Government should legislate either for the irreducible minimum or a reformed employment status test still felt that ‘intention’ was a relevant factor in determining employment status.

Q19: Are there any other factors that should be included in primary legislation when determining if someone is an employee? And what are the benefits or risks of doing so?

Some respondents said that the duration of the contract could be legislated but recognised that there was a risk that codification could create an incentive for engagers to terminate the contract before reaching the prescribed minimum term. Other suggestions included:

- Is there exclusivity, or can the individual work for multiple engagers?
- Does the individual draw most or all income from one engager?
- Does the individual pay for their own training?
- Does the individual receive any benefits such as holiday pay?
- Is the individual in business on their own account?

Most respondents did not outline the benefits or risks attached to their suggestions. However, those who did, highlighted some of the following:

- Percentage of income from one engager – risk that many individuals have a multitude of small engagements, would mean they received no rights using this as a test.
- Proportion of work on the engager’s premises – could exclude some categories of workers (such as home care workers).
- Percentage of time working for one engager – can be difficult to establish at the start of a contract and may change throughout the duration.
- A factor based on employment type benefits offered might discourage them being offered to avoid the classification.
- Detailed factors could risk the legislation falling behind changing working practices, creating less flexibility going forward into the future.

Secondary legislation

Q20: If Government decided to codify the main principles in primary legislation, would secondary legislation: i) be required to provide further detail on top of the main principles; and ii) provide sufficient flexibility to adapt to future changes in working practices?

Q21: Would the benefits of this approach be outweighed by the risk of individuals and businesses potentially needing to familiarise themselves with frequent changes to legislation?

Many respondents who favoured legislating the current employment status tests were positive about using secondary legislation to support primary legislation, with most citing flexibility as the main reason. Some respondents saw the use of secondary legislation as undesirable, making the point that clear primary legislation should be sufficient. Most respondents did not comment on whether the benefits of using secondary legislation outweighed the cost of having to keep abreast of changes. Of those that did, most felt the benefits outweighed these costs.

Some respondents suggested using guidance for additional detail, either as well as or instead of using secondary legislation. They suggested that guidance should give examples showing how to apply the rules to different scenarios.

A better employment status test? (Chapter 6)

This chapter introduced legislating an alternative, or reformed, employment status test for employment status, in particular one based on objective factors. It outlined some factors which could be used in an objective test and considered the structure of tests used abroad.

Respondents were invited to share their experiences with different styles of test that are in use in the UK: the Statutory Residence Test (SRT) and the Agency Legislation. It went on to consider whether any non-legislative options could be used to determine status, and briefly whether the tax system should still depend on whether an individual is an employee or self-employed at all.

A more precise test or a less complex employment status test

Q22: Should a statutory employment status test use objective criteria rather than the existing tests? What objective criteria could be suitable for this type of test?

Most respondents expressed an opinion on whether objective criteria (through an alternative or reformed test) rather than the existing tests would be more appropriate. However, this was fairly evenly split with roughly the same amount being in favour as not. Some respondents suggested it would be hard to identify appropriate criteria that could not be manipulated. Some respondents in favour of objective criteria felt there would be significant risks. The majority of the respondents who said that a reformed employment status test would be preferable were in favour of a test that used objective criteria.

Q23: What is your experience of other tests, such as the SRT? What works well, and what are their drawbacks?

Most respondents either did not respond to the questions about the Statutory Residence Test (SRT) and the Agency Legislation test or said that they did not have any experience with these tests. Where respondents were able to answer the question about the SRT, they said that it provides certainty to individuals and is an example of an occasion when existing rules from case law were codified successfully.

However, some respondents said that the SRT is underpinned by a significant amount of guidance, and it is not always straightforward to ascertain the facts required to apply the test. Some respondents also said that they did not think that an SRT style approach would work for employment status determinations.

Q24: How could a new statutory employment status test be structured?

A small number of respondents supported using tests based on those used in Germany and the USA. Others said that the objective criteria should be based on the current irreducible minimum factors but did not elaborate further on how this might work.

There was also a variety of suggestions for other tests including the length of time working for an engager, the percentage of income coming from a single engager, whether the individual pays for their own training, whether the individual has their own insurance and whether the individual gets sick leave/holiday pay.

Q25: What is your experience of tests, such as the Agency Legislation tests for tax, and how these have worked in practice? What works well about these tests in practice, and what are their drawbacks?

There was little consensus in the few comments made about the Agency Legislation.

Q26: Should a new employment status test be a less complex version of the current framework?

The three most common reasons for a reformed employment status test were to increase simplicity, certainty and clarity. Other respondents said that the current tests are out of date and a new test is needed in the modern working environment. Some respondents made suggestions for how a reformed employment status test could be implemented. For example, by basing it on a 'Gateway' style test in a similar style to Statutory Residence Test or using the supervision, direction and control test which forms part of the conditions for whether the agency tax legislation applies. However, some respondents were explicitly opposed to this, because they felt that this would require extensive guidance and/or would still not be certain in its application.

Some respondents set out reasons against having an alternative test (and therefore keeping the existing employee status tests). These included:

- Risk of unintended consequences for groups of workers on the boundary i.e. could have "hard edges" where individuals just fall on one side of the line.
- The current employee test works well and is based on a wealth of established case law.
- It would not necessarily make determining employment status less complicated.
- A prescriptive test would remove the courts' ability to interpret and adapt case law.
- It would create short-term uncertainty until people were familiar with new rules.
- Longer term there would still be a body of interpretive case law built up around a new test, creating uncertainty.

Q27: Do you think a very simple objective or mechanical test would have perverse incentives for businesses and individuals? Could these concerns be mitigated? If so, how?

The majority of respondents felt an objective test would potentially create perverse incentives for individuals and businesses. The biggest concern was that a simplified system could provide less clarity and certainty than there is at present. Several stakeholders also felt that whatever changes were made there would always be unscrupulous employers or individuals who would

seek to manipulate the system. The role of the courts was also seen as necessary to be able to look at the reality of the relationship, a function that a simple objective or mechanical test cannot serve.

Some respondents suggested solutions to mitigate risks of an 'objective test', which focused on better enforcement and anti-avoidance measures. However, these were not detailed enough for the Government to consider in detail.

Non-legislative approaches

Q28: Are there alternative ways, rather than legislative change, that would better achieve greater clarity and certainty for the employment status regimes (for example, an online tool)?

Many respondents were in favour of introducing improved guidance. Some respondents specified this should be statutory, or suggested a new Code of Practice as an alternative to legislating the current or a reformed employment status test. Some responses from trade unions suggested that Acas should have the responsibility for drafting either of these options.

The idea of an online tool to support the rules on status was received with a mixed response among respondents. Most respondents favoured an online tool that gave an indicative result rather than one which was binding, with the caveats that it would need to be reliable, accurate and thoroughly tested. Some respondents suggested that it could also incorporate some sector-specific factors.

Some respondents also commented on the disadvantages of an online tool which included previous experiences of ambiguity using online tests or creating confusion as there is already a tool for tax available (Check Employment Status for Tax (CEST)).

Should tax liabilities still depend on being an employee?

Q29: Given the current differences in the way that the employed and the self-employed are taxed, should the boundary be based on something other than when an individual is an employee?

This question provided an opportunity for respondents to consider whether someone's tax liabilities should still depend on whether they are an employee at all, or whether there are other tests that should determine which of the two current tax regimes should apply. Most respondents did not engage with this question. A minority of respondents suggested that reform to tax rates was needed, however this was not within the scope of the consultation.

Worker employment status for employment rights (Chapter 7)

This chapter discussed the test for limb (b) worker status in the employment rights regime. It asked whether having this intermediate status between employment and self-employment is still relevant, and whether there are any other factors which should be considered.

Is the worker status still relevant for employment rights?

Q30: Do you agree with the review's conclusion that an intermediate category providing those in less certain casual, independent relationships with a more limited set of key employment rights remains helpful?

The majority of respondents felt that the worker category remained helpful and should be retained, with some citing the flexibility it allows individuals and businesses in an evolving labour market. Overall support for the retention of the worker status came from almost all stakeholder groups.

Some respondents, including individuals and trade unions, believed the third 'worker' category caused confusion and trade unions in particular favoured a binary system under which those currently in the worker category would have access to full employment rights.

Is the definition structured in the right way?

Q31: Do you agree with the review's conclusion that the statutory definition of worker is confusing because it includes both employees and Limb (b) workers?

Around two thirds of the respondents said that the statutory definition of worker is confusing because all employees are workers but not all workers are employees. Some thought that the different definitions in legislation (such as EU derived legislation) can add to this confusion. Businesses, individuals and business representative groups in particular reported that they felt that the worker definition is not easy to understand.

Some respondents stated that the terms have existed for a long time, and it is not the worker category that causes confusion, rather the intentional mis-categorisation by employers and engagers. These respondents felt the use of worker status allows for flexibility within the labour market.

Q32: If so, should the definition of worker be changed to encompass only Limb (b) workers?

The majority of respondents did not answer this question, but of those that responded slightly more felt that the definition should be changed to only encompass Limb (b) workers. Some respondents felt that reform to the definition of worker would address the issue of clarity, however some urged caution on possible unintended consequences on personal service companies and the self-employed.

Q33: If the definition of worker were changed in this way, would this create any unintended consequences on the employee or self-employed categories?

The majority of respondents either did not answer or did not know. However, of those that responded, a slight majority felt that it would create unintended consequences. Respondents outlined risks including the possibility of falling between the definitions, sector specific issues and the perception that individuals may risk losing out on rights.

Are the tests for the worker employment status right?

Q34: Do you agree that the Government should set a clearer boundary between the employee and worker statuses?

A majority of respondents said that they felt the Government should set a clearer boundary between employee and worker status to help with clarity, but some felt there were no issues between the employee/worker boundary and that the main issue was the worker/self-employed boundary.

Q35: If you agree that the boundary between the employee and worker statuses should be made clearer:

- i. Should the criteria to determine worker status be the same as the criteria to determine the employee status, but with a lower threshold or pass mark? If so, how could this be set out in legislation?**
- ii. Should the criteria to determine worker status be a selected number of the criteria that is used to determine employee status (i.e. a subset of the employee criteria)? If so, how could this be set out in legislation?**
- iii. Or, is there an alternative approach that could be considered? If so, how could this be set out in legislation?**

Only a third of total respondents engaged with the question. There was a mixed view on part (i) of the question. More than half of the respondents said that this should not be the criteria, with a further group saying they were unsure. There was concern that setting criteria out in the same legislation for the worker test as the employee test would not provide any clarity and would create a blurred line between employee/worker similar to the issues on the boundary of worker/self-employed. There was a concern that more people would be pushed away from employee status and towards the worker category.

In respect of part (ii), the majority of respondents felt that the criteria for determining worker status should not be a subset of the employee criteria. Some respondents mentioned that the system would be unable to deal with flexibility and would need to be weighted to be able to reflect the reality of various working patterns. Some respondents also acknowledged it could potentially work if there were clearer definitions and supporting guidance.

The majority did not answer part (iii) of the question, however some respondents suggested a reformed statutory test.

Q36: What might the consequences of these approaches be?

Most respondents did not outline the consequences of alternative approaches. There was a suggestion that making the boundary clearer could encourage employers to make more use of worker status.

The tests for worker

Mutuality of obligation

Q37: What does mutuality of obligation mean in the modern labour market for a worker?

Q38: Should mutuality of obligation still be relevant to determine worker status?

Q39: If so, how can the concept of mutuality of obligation be set out in legislation?

Many respondents referred back to the responses they had given to Q6 and Q7 in respect of employee status and did not see a significant difference with the definition of this factor between the employee and worker status.

Some respondents did set out a separate view of what they felt mutuality of obligation means (or what they felt it should mean) for 'worker' status. These differing views included:

- Mutuality of obligation exists if at any time the employer has offered work to the worker who has accepted the offer.
- An ongoing obligation to offer or advertise work on a basis of pre-qualification, but no obligation (by the worker) to accept or bid for work is a hallmark of worker, but it is not determinative of this status.
- Both parties have obligations to each other, and the relationship is more than working together on an occasional basis.
- Approximately two thirds of respondents felt that mutuality of obligation was relevant to determine worker status. This was particularly the case for business representative groups, medium and large businesses and legal representatives. However, as noted above, there was not a consistent view on what mutuality of obligation means or should mean.

Trade union and staff associations and small and micro businesses were split on whether it should be considered relevant.

Personal service

Q40: What does personal service mean in the modern labour market for a worker?

Q41: Should personal service still be a factor to determine worker status?

Q42: Do you agree with the review’s conclusion that the worker definition should place less emphasis on personal service?

Some examples of what personal service means in respect to worker status were outlined by respondents including that personal service means undertaking the work personally, and buying "talent" clearly implies the personal services of an individual.

The responses were similar to those given for Q6 or Q7 for employee status and many referred back to their previous answers, with most respondents feeling that personal service was relevant to determine worker status.

Over half of those who responded agreed that the Government should place less emphasis on personal service. The majority were from trade unions who raised concerns about the overuse of false substitution clauses in contracts and the over reliance of focusing on personal service, citing the recent ‘gig economy’ employment tribunal cases.

The majority of those who felt that worker status was still relevant felt that personal service was a relevant factor to determine worker status, and felt placing less emphasis on personal service would blur the line further between worker and self-employed.

Q43: Should we consider clarifying in legislation what personal service covers?

Over half of respondents did not answer this question. Of those who did, there was an even split of those who thought personal service should be clarified in legislation, and those who did not.

Those who favoured legislating felt that it could provide some clarity for businesses and help reduce the misclassification of individuals - both intentionally and by mistake. Some respondents saw the benefit of legislation but suggested that guidance would be a better choice.

Those who were against legislating felt it would be hard to find a definition to cover all circumstances.

Q44: Are there examples of circumstances where a fettered (restricted) right might still be consistent with personal service?

The majority of respondents did not answer this question. Of those who did the majority felt there were legitimate circumstances where a restricted right was consistent with personal service (without being misconstrued as being an example of ‘control’). For example, when someone is off sick for a short period of time or relevant skills, qualifications or experience are required.

Control

Q45: Do you agree with the review’s conclusion that there should be more emphasis on control when determining worker status?

Around half of respondents agreed that there should be more emphasis on control when determining worker status. Some respondents linked this to the recent rise in the 'gig economy' and advancement in technology and app-based working.

Some respondents raised the issue of highly skilled workers who are hired for a job but have high levels of autonomy. The issue was raised that when an individual becomes competent at a role, over time they need less control so could possibly be deemed a worker at the start but then self-employed by the end.

Q46: What does control mean in the modern labour market for a worker?

Q47: Should control still be relevant to determine worker status?

Q48: If so, how can the concept of control be set out in legislation?

Some examples of what control means in respect to worker status were outlined by respondents including:

- Control relates to the timing and manner in which the work is carried out.
- Engager setting terms such as days to be worked, where to work, scope of work with minimal negotiation.
- Compliance with internal disciplinary and grievance policies, training, appraisal of work, performance ratings, equipment, uniform/branding etc.
- Should not include mandatory control for regulatory compliance.

There was a similar split to the responses given for whether the test was relevant for employee status, with the majority of respondents feeling that control was relevant to determine worker status. Many respondents referred back to the responses they had given to these questions and did not see a difference with this factor between employee and worker status.

The majority of those who felt that the worker status was still relevant felt that control was a relevant factor to determine worker status.

In business on their own account

The consultation set out that the Government could consider providing this definition in legislation. However, a balance would need to be found to ensure a definition is not so prescriptive that it encourages manipulation or gaming of the system.

Factors that indicate an individual is in a business on their own account might include:

- Who is responsible for the success or failure of their business and can the individual make a loss or a profit?
- Who can decide what work the individual carries out and when, where or how to do it? Can they work for more than one client?

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- Can someone else be hired to carry out the work? Who is responsible for fixing any unsatisfactory work in their own time?
 - Can the individual negotiate a price for their work? Or is it fixed by the work provider?
 - Does the individual use their own money to: buy business assets, cover running costs, and provide tools and equipment for their work?

Q49: Do you consider that any factors, other than those listed above, for ‘in business on their own account’ should be used for determining worker status?

Q50: Do you consider that an individual being in business on their own account should be reflected in legislation to determine worker status? If so, how could this be defined?

Q51: Are there any other factors (other than those set out above for all the different tests) that should be considered when determining if someone is a worker?

The vast majority of respondents felt that being ‘in business in their own account’ was a relevant factor to determine worker status. Several respondents commented on the importance of financial risk as a part of this test. Some suggested other characteristics that are important such as marketing, maintaining a website, business cards, own headed paper, own business email, address VAT registration and use of an accountant.

Renaming the Limb (b) worker category

Q52: The review has suggested there would be a benefit to renaming the Limb (b) worker category to ‘dependent contractor’? Do you agree? Why / Why not?

A large number did not engage with the question, and of those who did, over half of the responses did not support a name change. Of the remaining respondents that said there would be a benefit to changing the name, around two thirds supported the change to dependent contractor, and the remaining third suggested a change to an alternative definition. Examples of alternative definitions given included ‘employed contractor’ and ‘semi-dependent employee’.

Defining working time (Chapter 8)

This chapter looked at how the National Minimum Wage/ National Living Wage applies in some parts of the gig economy and app-based working. In the context of app-based working in particular, one of the emerging issues was how time spent waiting for tasks while logged in to the app is classified in terms of working time.

Q53: If the emerging case law on working time applied to all platform-based workers, how might app-based employers adapt their business models as a consequence?

Q54: What would the impact be of this on a) employers and b) workers?

Q55: How might platform-based employers respond to a requirement to pay the NMW/NLW for work carried out at times of low demand?

Q56: Should Government consider any measures to prescribe the circumstances in which the NMW/NLW accrues whilst ensuring fairness for app-based workers?

Q57: What are the practical features and characteristics of app-based working that could determine the balance of fairness and flexibility, and help define what constitutes work in an easily accessible way?

Q58: How relevant is the ability to pursue other activities while waiting to perform tasks, the ability of workers to refuse work offered without experiencing detriment, requirements for exclusivity, or the provision of tools or materials to carry out tasks?

Q59: Do you consider there is potential to make use of the data collected by platforms to ensure that individuals can make informed choices about when to log on to the app and also to ensure fairness in the determination of work for the purposes of NMW/NLW?

Most consultation respondents highlighted that their biggest concern was that increasing platform employers' liability to pay the NMW/NLW would require them to limit the flexibility inherent in their apps. A number of companies and individuals told us we could expect to see platform employers exercising greater control over workers in relation to when and how they can perform work, for example by:

- Restricting access to log into the platform solely during peak hours of customer demand.
- Requiring exclusivity to that platform, in order to limit the number of individuals they would need to pay the NMW/NLW.

Some respondents raised concerns that extending the existing legal framework to all platform workers could detriment platform employers, workers and customers. To manage when to allow workers to log into the app, responses indicated that platform employers would increase monitoring to accurately predict times of high and low demand. Respondents also highlighted that platforms may also try to monitor when platform workers are deemed to be working, rather than waiting to carry out their next task which could lead to increased costs for employers and therefore higher prices for customers and/or higher costs on equipment hire for workers.

If platform businesses were to move to a more traditional business model with predictable shift patterns, respondents told us that platform workers would benefit from increased security and consistency of pay. On the other hand, respondents noted that workers may lose the freedom to choose when they can and cannot work – a key reason for many individuals working in the gig economy. Respondents suggested that this may have a negative impact on the job market in the gig economy, with fewer jobs offered by platform employers in times of low demand and a consequently lower appeal for working on a platform for individuals who place value on flexibility.

Respondents considering whether the Government should prescribe when NMW/NLW accrues for platform workers gave mixed views:

- Over one-third of respondents addressing this question indicated that the Government should consider action, with less than one-quarter suggesting we should not.
- Of those that advocated Government action, many suggested that providing a definition of 'work' or 'working time' for platform workers would be helpful.
- Caveats included that such a definition would be difficult to prescribe, and could be overly complex for platform employers and workers.

Defining self-employed and employers (Chapter 9)

This chapter of the consultation outlined the Government's view that 'self-employment' should not be defined in legislation and explained the justification for this. It then examined the current position of 'employer' in legislation and asked whether this should be revised.

Self-employed

Q60: Do you agree that self-employed should not be a formal employment status defined in statute? If not, why?

The majority agreed with the Government's position that self-employment should not be defined in statute. This was consistent across all stakeholder groups. Concerns were expressed that if all the employment status categories were defined in statute, there may be some individuals for whom no definition fits their working practices. This risk was also articulated in the consultation document itself.

Respondents in favour of defining self-employment fell into two groups:

- The first wanted either employee or worker to be a default employment status. Individuals would then be self-employed if they met the statutory definition of self-employment.
- The second believed it would provide more clarity and wanted to define all three statuses in statute, despite the risk outlined above.

Employers

Q61: Would it be beneficial for the Government to consider the definition of employer in legislation?

Most respondents were not in favour of making any changes to the current position and most of these respondents were also not in favour of defining self-employment in legislation either. The level of opposition was broadly consistent across stakeholder groups, though legal representatives and trade unions were particularly opposed to introducing a definition of employer.

Few respondents outlined the rationale for their views on this question. Some were concerned that if 'employer' was given a more detailed definition there was a risk that individuals could in some circumstances find themselves without an employer, as defined in statute, against whom to bring a case.

Alignment between tax and rights (Chapter 10)

This chapter of the consultation sought views on whether there should be alignment between the employment tests used for tax and employment rights, how this might be achieved and what consequences this could have.

Q62: If the terms employee and self-employed continue to play a part in both the tax and rights systems, should the definitions be aligned? What consequences could this have?

Just over half of those who responded expressed a view, with most favouring alignment of the employment status test for rights and tax. It was thought that removing differences between the regimes would improve simplicity and help individuals have clarity of their status.

There were different views about what 'alignment' meant. Views were based on certain assumptions of how this might look in practice. Assumptions included:

- Aligning at the self-employed boundary, so that those who are workers and employees for rights would all be employees for tax.
- Removing the middle 'worker' category for employment rights and then aligning with the two-tier employment status tax system.
- Employment status for tax purposes aligning with employment rights and introducing an intermediate tier of "worker".

There was also no consensus amongst those favouring alignment as to how it should be achieved, with many respondents not giving a view. The most commonly cited reasons to align were that it would simplify the current position and reduce distortion between the rules for tax and for rights.

Despite the overall consensus for alignment, the majority of trade unions and business representative groups did not support alignment. These respondents recognised the attraction of how alignment would achieve the ambition of simplification and clarification, but thought that there would be wider impacts and unintended consequences. Some respondents remarked that they are two distinct systems for two distinct purposes which do not naturally sit together.

Deemed employees

Q63: Do you agree with commentators who propose that employment rights legislation be amended so that those who are deemed to be employees for tax also receive some employment rights? Why / why not?

Q64: If these individuals were granted employment rights, what level of rights (e.g. day 1 worker rights or employee rights) would be most appropriate?

These questions had a low response rate, with only half of respondents giving a view. The majority were in favour of deemed employees having access to some degree of employment rights. Most stakeholder groups were agreed on this, with trade unions, small businesses and business representatives all overwhelmingly in favour. Over half of these responses advocated full employment rights. Trade unions suggested almost unanimously that these individuals should have full employment rights.

Respondents that were not in favour were split equally between those who favoured alignment and those who did not. Those who did not favour alignment reiterated the view that decisions on status should not be driven by an individual's tax position – i.e. that tax law is a result of fiscal policy and should not dictate whether an individual is entitled to employment rights. Those in the former group said that giving rights to deemed employees would increase costs for businesses and decrease flexibility for individuals.

Government Response

Employment status is at the core of both employment law and the tax systems – it determines the rights that an individual gets, and the taxes that they and the organisation they work for, or with, must pay. There are two tax statuses; self-employed and employee and three statuses for rights; self-employed, limb (b) worker and employee.

We believe that our three-tiered employment status framework for rights provides the right balance for the UK Labour Market by allowing flexibility – for both employers and individuals - whilst ensuring workers in more casual employment relationships have core protections such as the minimum wage and the right to holiday pay. The UK is one of few countries to have an intermediate status between employee and self-employed for rights, ensuring that we combine employment rights and protections with the tech-driven innovation we see from areas of the labour market such as the gig economy. This has been reinforced by the Uber Supreme Court judgment² which upheld the law that subject to relevant conditions being met individuals in the gig economy can qualify for limb (b) worker status under the current employment status tests and be entitled to the same employment rights and protections as limb (b) workers in other parts of the economy. By championing a dynamic labour market that supports flexible working, we saw significant increases in employment from 2010, reaching the highest employment rate on record, and halving the unemployment rate. The flexibility and dynamism of our labour market, of which the limb (b) worker status is an important element, will be essential to building back better from the pandemic.

The 2018 Employment Status consultation explored issues with the current employment status framework, focusing on its complexity, the fact that it was open to interpretation, the difficulty to resolve disputes and alignment between the frameworks for tax and rights. A large number of respondents were supportive of employment status reform but there was no overall consensus on what action the Government should take. In determining whether a person is an employee, the courts apply a number of tests which are similar across the tax and rights frameworks. The irreducible minimum of tests are ‘personal service’ (whether an individual must do the work themselves or whether they can send a substitute), ‘degree of control’ between the business and the individual, and ‘mutuality of obligation’ (an employer’s obligation to provide work, and/or to pay for work done, and the employee’s obligation to perform that work) and in addition other provisions in the contract are consistent with it being a contract of employment. When determining employment status for employment rights, many of the same factors will be considered when determining if someone is an employee or a limb (b) worker, but with a higher threshold for an employee. The weighting of each factor will vary depending on the relationship in question and is a judgment based on the whole picture of the individual case. In 2018, the Government commissioned independent research to better understand the worker population, which has been published alongside this Government response. However, as this research was conducted before the

² Uber BV and others v Aslam and others, 19 February 2021

Covid pandemic, which has had significant impacts on the labour market, it is a less accurate representation of the labour market in 2022.

In the Good Work Plan (2018), the previous Government committed to legislate to improve the clarity of employment status tests, and to work towards alignment between rights and tax. Since the Good Work Plan was published, the UK labour market has evolved, the country has faced an unprecedented economic challenge as a result of the coronavirus pandemic and significant uncertainty in the global economy has led to increased costs for businesses. In the face of the pandemic, the government provided an exceptional package of support to shield business and jobs. Over £350 billion of support has been provided by the Government to protect jobs and businesses through cash grants, loans, tax deferrals and tax cuts. In July 2020, the Government launched the Plan for Jobs – one of the most comprehensive and ambitious plans in the world to protect, support and create jobs across the country. This Plan has supported a strong labour market, with the total number of payrolled employees now over 600,000 above pre-pandemic levels. Following the pressures that people across the UK are facing with the cost of living, the Government is also providing £37bn of support this year, targeted at those who are most in need.

The Government recognises that, whilst the Employment Status framework for rights works for the majority, boundaries between the different statuses can be unclear for some individuals and employers. However, the benefits of creating a new framework for employment status are currently outweighed by the risk associated with legislative reform. Whilst such reform could help bring clarity in the long term, it might create cost and uncertainty for businesses in the short term, at a time where they are focusing on recovering from the pandemic. Questions also remain around legislating, including how a test could be drafted which doesn't unduly limit the ability of the courts to rule against unscrupulous employers engineering employment relationships that circumvent the law. The system has evolved over many decades, adapting to the challenges placed before it and it continues to adapt given the new forms of employment relationships. The Uber Supreme Court judgment provided more clarity about the approach to take when determining an individual's Employment Status, including taking the legislation's intention of protecting vulnerable workers as the starting point, as opposed to the written contract. It is appropriate to allow for the impact of such rulings to flow through to marketplace practices before considering any further interventions.

The Government wants to increase transparency for individuals on their employment status, empowering them to claim the rights they deserve whilst providing enhanced clarity on what employers' rights and responsibilities are. Most businesses want to comply with the law and do their best to ensure they deliver their statutory obligations, and we want to enhance their understanding of how the law works in practice. There is a need for enhanced detailed guidance to help people work out which category they fall into and to demystify case law from the courts.

We have therefore published employment status guidance for employment rights, alongside this response. This guidance will make it easier for individuals to work out their

own status whilst ensuring that the employment status system remains flexible and continues to adapt to modern working practices.

To provide greater clarity for businesses and individuals on the correct legal interpretation of working time for National Minimum Wage purposes for platform workers, the Government is updating its ‘Calculating the Minimum Wage’ guidance.

Individuals working in the gig or platform-based economy will be entitled to the minimum wage if they are considered a worker for minimum wage purposes. Once an individual is deemed to be a worker, their working time needs to be calculated. The guidance describes times that are likely to count as "working time" for gig economy workers, such as waiting for a customer after accepting a job.

The Government also wants to make it more difficult for unscrupulous employers to deny rights to individuals. We have extended entitlement to a written statement on day one of a job to limb (b) workers to ensure they are aware of their rights and entitlements from the start of the employment relationship. The Government has also quadrupled the maximum limit of aggravated breach penalty to £20,000.

The Government is also addressing delays in the Employment Tribunal System to provide speedier resolution of cases for businesses and individuals alike. We recently implemented measures to help Employment Tribunals hear more cases, enable deployment of a greater range of judicial expertise, and support greater use of virtual hearings – with £110 million being invested in a range of emergency measures in total. Recruitment is also underway so that a further 75 (FTE) employment tribunal judges can be deployed in 2021/22 to help reduce delays and deliver swifter access to justice.

For tax, the majority of status cases are simple and clear, and HMRC’s Check Employment Status for Tax (CEST) tool helps support status determinations. However, the Government accepts that there will inevitably be borderline cases, where the facts of the employment relationship make status determinations complex. Further uncertainty can be caused by the non-alignment of the status frameworks for tax and rights, which means that in some instances, an individual holds the status of self-employed for tax, but not for employment rights. This lack of clarity can create fiscal risk for the Exchequer, where individuals are misclassified (intentionally or unintentionally) as self-employed.

The Government recognises that whilst the employment status frameworks for rights and tax serve different purposes, there could be some benefits to greater alignment between the two systems. Stakeholders’ views on alignment ranged from removing limb (b) worker status for rights, to making all workers employees for tax, or creating a third tax status. Stakeholders also acknowledged that proposals for alignment would be complex and would need to be considered carefully. Noting the lack of consensus around alignment, the ongoing economic recovery from the pandemic, and the wider economic context, the Government has decided that now is not the right time to bring forward proposals for alignment between the two frameworks. We will, however, work closely with stakeholders to explore longer-term options to improve the employment status system for tax to ensure it is as clear as possible and usable for all parties.

The Government now focuses on building back better and will rely on the strengths of the UK economy to meet the challenges posed by Covid-19 disruption, increased costs for businesses, and the economic adjustments due in the coming decades. We remain committed to an open and dynamic economy. The UK has a flexible labour market that has generally seen lower unemployment than many of its European competitors over the last few decades. It is one of the best places in the world to start a business, with a stable regulatory environment and one of the highest birth rates of enterprises in the OECD. Now is not the right time to overhaul the employment status frameworks for rights and for tax but we are delivering greater clarity around the frameworks for individuals and employers by publishing guidance for status and working time for minimum wage purposes.

We remain committed to monitoring changes and working with stakeholders to ensure that the employment status frameworks remain fit for purpose and uphold their policy intent. This includes ensuring the tax system is fairer and fit for modern ways of work, and building a high skilled, high productivity, high wage economy that delivers on our ambition to make the UK the best place in the world to work and grow a business.

This publication is available from: www.gov.uk/government/consultations/employment-status

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