



Assessing Employment Status Policy and Guidelines (ESI HMRC)

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POLICY PURPOSE/BACKGROUND

A Her Majesty's Revenue & Custom's (HMRC) review, in 2014, highlighted weaknesses in Corporate Policy and associated procedures. Scottish Borders Council (SBC) frequently employs self-employed individuals.

The objective of this policy is to achieve best practice and compliance i.e. ensuring that all self-employed individuals, completing work for the Council, have been assessed through an employment status procedure (ESI) as per HMRC guidelines: www.hmrc.gov.uk/employment-status

POLICY

1) Employment Status Overview

- 1.1) The determination of a worker's employment status is the responsibility of the employer (Council Officer or equivalent Managerial post) and not the individual being employed. An individual may claim to be self-employed but Procurement & Payment Services (PPS) will do a number of checks to determine if this status is correct or in fact the person is engaged as an employee.
- 1.2) Determination of employment status will conclude whether the payment to the individual should be made via Pay As You Earn (PAYE) for employees, so deducting tax and national insurance contributions or by payment of an invoice for self-employed workers, whereby the payments of tax and national insurance contributions are the responsibility of the individual.
- 1.3) The consequences of determining incorrectly that an individual is self-employed are that:
 - a) Individuals who believe that they should be treated as an employee may seek to assert their rights, by making claims to employment tribunals.
 - b) The Council will become liable for all contributions that should have been made via PAYE plus interest if appropriate.
 - c) A penalty charge may be made by HMRC if it is deemed that there was a deliberate intent to avoid paying employer tax and National Insurance contributions.
 - d) The Council may be in breach of the Pension Act 2008 Auto-enrolment Regulations.
 - e) The Pension Regulator may issue penalty charges for failure to comply with the Pensions Act 2008.

2) Definitions

“Self-Employed”- an individual is likely to be classed as self-employed if they:

- have the final say in how their business is run.
- agree to do a job for a fixed price regardless of how long it may take.
- risk their own money in the business if they fail to deliver the service.
- are responsible for the losses as well as profits of their business.
- provide the main items of equipment needed to do their job and not just the small tools.
- are free to hire other people on their own terms to do the work they have taken on and pay them at their own expense. (If the worker has a right to send a substitute in his/her place this would indicate self-employment).
- are responsible for correcting unsatisfactory work in their own time and at their own expense, whilst incurring overheads such as premises and equipment costs.
- offer services to numerous organisations i.e. not exclusively to the one organisation.
- can decide what work to do, how and when to do it and where to provide the services.

“Employed” - an individual is likely to be classed as employed if:

- they do the work themselves and can be told how, when and where the work is to be carried out and be moved from one task to another.
- they have a set amount of hours.
- they are paid by the hour, week or month.
- they are seen as part of the organisation.
- there is a mutual obligation for the organisation to offer regular work and the worker to accept it.
- the service department provides all the major tools or equipment to do the job.

3) Self Employed or Employee? - Determining Status

3.1) A person's employment status will depend upon which of the above definitions the contractual arrangements and working terms and conditions most closely meet.

3.2) A self-employed worker/contractor will:

- a) Have health and safety protection.
- b) Have protection against discrimination.
- c) Be issued with a standard contract for the provision of services which should not include terms which indicate employment such as sickness, holidays, discipline and grievance etc.
- d) Not be referred to as an employee.
- e) Be paid a fee, not a salary/wage.
- f) Public liability insurance.

3.3) An employee will:

- a) Have a range of employment rights determined in a contract of employment.
- b) Be paid a salary/wage through Payroll.
- c) Be entitled to contractual enrolment in a pension scheme and subject to automatic enrolment if they opt out and meet the qualifying criteria.

3.4) Further guidance can be found on the HMRC web site at: www.hmrc.gov.uk/employers. The site also has an Employment Status Indicator (**ESI**) tool. After completing the questionnaire an indication will be made to whether the individual is likely to be self-employed or an employee. ESI is an essential tool which will provide a general guide as to whether the status of non-employees is correct at present. Please however be aware that the output is not guaranteed and the onus is still on the employer to determine employment status. This can be found at: www.hmrc.gov.uk/calcs/esi.htm.

4) Employment Status Procedure

3.5) Before a contract for service is issued, Council Officers must request that Procurement & Payment Services check the employment status of the individual. To do this the Council Officer should submit an “Employment Status Form – Part 1” to PPS. It is important that the check is carried out even if the individual has declared themselves as self-employed. The onus is always on the Council to determine this.

3.6) If the individual is employed in more than one job then the same exercise has to be undertaken for each job or each establishment i.e. an individual may work in 3 different locations on the same basis but each location must make an assessment of the employment status of the person. A person may be self-employed in one job but an employee in another (e.g. a self-employed tradesman may also work as a janitor in a school as an employee).

3.7) If a worker is not paid through the PAYE system, and is eligible for auto-enrolment to a pension scheme there will be practicalities to be overcome as to how pension contributions can be made to an appropriate scheme and how the Pension Act can be complied with.

3.8) The Council will seek an HMRC “view” of the employment status of all their current self-employed workers. Procurement & Payment Services will visit the HMRC website and use the Employment Status Indicator (**ESI**) Tool to assess each individual contract. If there is any doubt then the individual should be classed as an employee regardless of what the individual claims their status is.

3.9) Procurement & Payment Services (PPS) can be contacted for general advice based on the information and questionnaire provided and will give an opinion on whether a payment should be processed through PAYE or not. If any doubt arises the PAYE process should be used.

3.10) The above process will be documented and the form retained by PPS as a Register of Employment Status for potential HMRC inspection.

3.11) A journey map documenting the Employment Status process is detailed in the document Appendix 2b. Further details of the process can also be seen in the SBC HR Policies, Procedures and Guidelines (Engaging the Services of Business Management Consultants).

FREQUENTLY ASKED QUESTIONS ABOUT EMPLOYMENT STATUS

- a) It is easier for us to take on workers as self-employed. If HMRC agree, why can't we choose?**

Engaging workers on a self-employed basis can have a number of attractive features for both parties, but whether someone is an SBC employee or is self-employed depends on the particular working arrangements and not upon the preferences of the people involved. The tax rules for self-employed people are designed to reflect the financial risks taken by people genuinely in business on their own account and should only be applied to those people.

- b) If there is no written contract between SBC and the person we take on, does that mean he or she is self-employed?**

No. Workers sometimes claim that they are self-employed because they do not have a contract with the person for whom they work. What this usually means is that they do not have a written contract, but if they have agreed to work in return for payment, a contract must exist – either a contract of service (employment) or a contract for services (self-employment). It can be written, spoken, implied or a combination of all three.

The contract is an important factor in considering employment status and is particularly valuable to the worker because it determines their rights and obligations.

- c) If the terms of the engagement change part way through the contract, what should we do?**

If the change results in a worker becoming employed, you should tell HMRC and begin to deduct tax and NICs from his or her earnings. If you fail to do so, your department could be held liable for the deductions which should have been made, and you may also be liable for interest and a penalty from HMRC. If the change results in a worker becoming self-employed, he or she will be responsible for their own tax and NICs.

- d) An employee who took his apprenticeship with SBC now wants to do the same work for us but on a self-employed basis. Can we agree to this?**

It is not the worker's choice. The terms, conditions and facts under which he or she is engaged should determine the employment status of the worker.

- e) SBC took on a worker on a casual basis whom we genuinely regarded as self-employed, but we have subsequently made this a permanent arrangement on terms and conditions that suggest they are an employee. What should we do?**

You must start to operate PAYE when you next make a payment. If the worker has been paid for past periods of engagements on terms and conditions amounting to employment you could be liable for the PAYE tax and NICs you should have deducted, so it is important that you make regular reviews of the status of your individual workers to avoid this happening.

- f) Are there categories of worker where specific rules apply?**

The same tests apply to all. It is important that you consider the status of your entire workforce, including Council Officers, Estimators, Site Supervisors and professional staff, as well as manual workers. However, if a worker is supplied by an agency and it is not solely on an introductory basis, special rules might apply with the result that the agency has an obligation to operate PAYE and account for Class 1 NICs.

g) Does working for one employer for a long period point towards employment?

This is certainly a factor to consider in the overall picture (just as a series of short-term engagements with many different contractors may point towards self-employment), but it is only one factor. It is important to pay close attention to the status of long-term workers because of the PAYE and NICs liability which may accumulate if you do not operate PAYE when you should.

h) What happens if an employment tribunal finds that a subcontractor, who had been treated as self-employed, was in fact an employee?

Employment tribunal decisions are not binding on HM Revenue & Customs, but they usually take into account similar factors. So the decision is likely to be the same when considering an employee for tax purposes. If a case was brought to HMRC's attention, HMRC's policy on collecting unpaid tax and NICs in these circumstances would apply.

Still not sure?

Contact Procurement & Payment Services (PPS).

After establishing the relevant facts, HMRC can give you a written opinion about a worker's particular employment status for tax and National Insurance contributions purposes. If you do not agree, HMRC will reconsider it in the light of any additional information you can provide.

If HMRC still cannot agree, you have the right to appeal.

<http://www.hmrc.gov.uk/employment-status/index.htm>

Version Number	Nature of Major Amendment	Date of Change	Author of Change
PPS006	Starting Points - Report for Assessing Employment Status which has created this Policy.	03/12/2014	JP