

Employment Status Consultation
Department for Business, Energy & Industrial Strategy,
Labour Markets,
Level 1 Spur,
1 Victoria Street,
London,
SW1H 0ET

1st. June 2018

**Submission from the Institute of Interim Management
in response to the Consultation on
Good Work: The Taylor Review of Modern Working Practices – Employment Status.**

Introduction

1. This submission is from the Institute of Interim Management (“the Institute”, “the IIM”, “we”, or “us”), a professional membership organisation for independent Interim Managers and Executives (“IMs”), in response to the consultation on Employment Status.
2. Background information on the Institute and on Interim Management is given in the Appendix attached.

The Issues

Applicable Scope

3. As noted in the introduction to the consultation on employment status, the Taylor Review published in July 2017 saw this as central to both employment rights and the taxation system. In some cases, the report found that the current approach was leading to confusion over interpretation. It also questioned the balance of legislation in the area and whether more primary and/or secondary legislation would be beneficial.
4. The Taylor Review was of the opinion that a clearer system was required that more accurately reflected the needs of the changing UK labour market in its entirety.
5. The Review made several recommendations related to the whole issue of employment status and all related legislation and government is seeking opinions across a wide range of views and recognising that it needs to question the current approach at a fundamental level to be able to meet the challenges in the review.
6. The IIM is responding to this consultation on behalf of the interim profession and this continues previous submissions called for by the department previously when legislative changes have been proposed.
7. The IIM notes the continued desire of BEIS to ensure that the UK flexible labour market continues to operate efficiently and fairly. This balance is felt to be out of kilter currently, particularly for those flexible workers who are not able to ensure enforcement of reasonable and fair terms and conditions with some employers.

8. The IIM views the flexible workforce in the UK to operate along a continuum or spectrum, where at one end there are many low skilled workers who either operate in seasonal work areas or undertake activities where relatively large numbers of workers are required to undertake similar tasks. At the other end of the same spectrum are IMs. These are relatively few in number across the whole profession, are highly experienced executives who are in business on their own account and are perfectly capable of negotiating their own contractual terms with any potential client. They have no desire to be confused in any way with employees. There is no need therefore to enforce any form of employment rights as they are totally irrelevant to the IM business model. IMs contract with clients to deliver assignments with agreed objectives. They usually charge a day rate for their services and senior IMs would certainly not charge less than £500 per diem. IIM surveys show average fees typically 50% above this figure, rising well beyond £1000 per diem. IMs operate in positions that have a significantly positive impact on the UK economy. Clients see a return on their investment in an IM of many times the scale of the fees invoiced.
9. IM terms and conditions are very clear about who pays, when, how much and what for. Negotiations can be robust, but the final agreement is a business to business transaction and the parties will not sign this if they are not comfortable with the outcome. Additional regulatory enforcement is largely unnecessary, notwithstanding occasional late invoice payment but this issue exists across the whole UK SME community.
10. Whilst the IIM recognises the general labour market benefit of the consultation proposals, the complex work end of the flexible worker spectrum does not need further protection of this sort. Indeed, it needs to be removed from the remit of any proposed changes given they would be completely inappropriate for the profession. We therefore urge BEIS to ensure that changes proposed will include clear boundaries that allow IMs to be able to show they are in business on their own account. This will avoid considerable potential collateral damage to practicing IMs and enable the government to focus on that part of the workforce that would benefit significantly from its endeavours.
11. It is with the approach outlined above that the IIM has responded to the consultation questions, set out below.

Consultation Paper Questions

Employment Status Consultation Questions

Chapter 4: Issues with the Current Employment Status Regimes

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

The Institute recognises the range of issues discussed in the chapter which we agree constitute the main points to be considered. Our view is how clear we can be about the next steps in the process.

Our summary starting point is as follows:

- Employment status and tax status should be aligned as much as possible, with the logic being:
employed = employment rights = employment tax regime
self-employed = zero employment rights = corporate tax regime
- The key issue is defining true self-employment: being in business on one's own account
- Primary legislation will confer constraint on labour market development which will restrict perfectly legitimate flexibility being introduced. This will damage UK competitive advantage in international markets just at the wrong time.
- Whatever regulation is produced, lines will be drawn and the opportunity for people to try and fudge them for their own benefit will exist. The IIM knows of no system created that is impervious to this type of human creativity. Achieving clarity and a straightforward approach minimises the opportunity for fudge – which is the best that can be done.
- Well thought through secondary regulation is much preferred, such that it truly reflects the needs of the labour market as the 'client'. Top quality clarity at this stage, reflecting the real range of the whole labour market will allow a more straightforward application, which in turn should relieve growing pressure on the tribunal systems.
- The labour market is no longer simple and is unlikely to ever become so again, which is a function of the UK's response to massive technological, disruptive change. This will almost certainly remain the state of affairs looking forward.
- The process for resolving tax and employment status disputes needs to be done, prior to the courts, through clear independent means. This is currently achieved through the Employment Tribunal system, but not for tax status, where HMRC are regulation producer, 'police force' and trial system. This cannot be seen as in any way fair from the top deck of the Clapham omnibus.

The IIM's responses will focus on the needs of the profession of interim management. We represent a particular group of highly skilled individuals in business on their own account. Having said this, we recognise the government's need to deal with the whole labour market spectrum but in doing so, we ask that whatever response is developed eventually, the interim profession is not damaged further but is helped in its contribution to UK plc.

Chapter 5: Legislating the Current Employment Status Tests

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

The IIM are not in favour of primary legislation as it will introduce an unnecessary constraint on the development of the UK labour market. As stated earlier, we are in favour of well thought through secondary regulation that brings a straightforward approach to bear that is seen as fair across the labour market spectrum. The current balance is close to optimal. What needs to be improved is the quality and applicability of secondary regulation to the various parts of the labour spectrum. This will keep the regulation responsive to any rapid change and able to reflect any significant change

in case law without having to revert to primary legislation on a more frequent basis.

3. *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?*

See Q2. We do recognise that improving certain definitions would be helpful in interpretation of any regulation. This could be the subject of primary legislation to achieve a lexicon that can be used across the full range of relevant government activity. Any change needs to reflect the needs of the client rather than being convenient for any current individual government departmental thinking. If combined into primary legislation, any definition needs to be seen as something that will stand the test of time and not the next 2-3 years or a single parliamentary election cycle.

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

The same approach should be adopted for both aspects. The IIM prefers a more flexible approach being adopted with any legislation so that a timely response can be made to market changes that facilitates a balanced approach.

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

Given our position, we would not advocate any codification into primary legislation beyond useful definitions that can be applied to relevant legislation.

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

Our view is that it means what it does now. That is: there is an expectation and a delivery of obligations in both directions beyond that laid down in the basic contract of employment, which rests on legal rights as specified under the body of employment law.

What it does **not** mean is that any contract or agreement written between two parties (or more) represents an automatic mutuality of obligation in this context. A supplier/client contract is a narrow arrangement where one company says it will pay an amount in return for a product and/or service, which may be determined in scope by the agreement, or referred to as an appendix or separate document. There is no other commitment on either side. Such an arrangement is free of mutuality of obligation as used in the context under discussion. Such an agreement is subject to commercial law, not employment law.

A contract *for* service in this respect, represents a commercial contract and as such demonstrates no mutuality of obligation.

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

Yes. Where a contract *of* service exists, written or in practice, an employee has a clear and reasonable right to access relevant employment rights under the law.

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

As indicated in our response to Q6, the distinction rests in the use of a commercial contract, where no mutuality of obligation exists between the parties beyond the stated transaction. Where distinctions between various forms of employee exist beyond this on the labour spectrum, we believe that mutuality of obligation starts to take immediate effect. The question then becomes one of the level of mutuality for employment law purposes, and our logic requires that tax treatment would be scaled accordingly, consistent with the view that employment taxes should coincide with increased rights acquisition.

The point at which an individual becomes entitled to apply for unemployment benefits when not engaged in a revenue earning activity or work would be a key pointer in determining their tax and employment rights status.

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

Personal service is a tradable commodity in the same way that any product or item is saleable. What is being offered is immaterial in our view: it is the context of the relationship between buyer and seller that matters.

What is being traded can be simple, such as selling firewood or packing shopping bags at supermarket checkouts, or complex such as selling a super computer or providing turnaround expertise as an interim CEO. We see no material difference in these examples as far as the selling process is concerned and regard the attempt to create a distinction as being unhelpful and confusing.

In trying to use 'personal service' as a label to indicate that the individual(s) is/are really disguised employees, largely because they operate as an individual seems to us to be the cause of many of the problems associated with the interpretation of current regulations.

The person provides a service, of whatever type, under a particular form of contract.

The nature of the service offered by the supplier should be something that either does not exist within the client organisation currently, or where there is insufficient of that expertise available within the organisation at that time.

The nature of the relationship intended by the parties and then defined by contract terms tells us about the nature of the intended and expected relationship. If this drifts with time, such that the form of the agreement is no longer representing the actuality of the arrangement, this should result in a review and an adjustment to either the agreement itself, or what is being done and how it is being done. This change should be the subject of a formally concluded change of contract, with any required changes in administration (e.g. switch to payroll, change in fee payment terms, etc.).

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

No. What is relevant is the nature of the relationship contractually and its expression in practice.

What is also relevant is the track record of the individual, in terms of the sequence of organisations worked for, timings, gaps in work, etc. In essence, is it evident that the individual operates as a business on their own account or have they engaged with one organisation over an extended period, or regularly with gaps for seasonality and so on.

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

Not applicable.

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

The use of the concept of supervision, direction and control is helpful as it tests the nature of the relationship between parties. It is more difficult to determine real differences these days due to the nature of flexible working for all people, due to the application of technology on a universal basis. However, we still reasonable expect that an organisation to determine what an employee will do as a job, through a job description, with more focussed objectives/targets agreed with the employee for the coming period, typically for annual review.

The organisation will provide all equipment required to do the job, be clear about employment protection, right to join a union where appropriate, provide an employee handbook, specify holiday

entitlement, sick leave processes and so on.

The individual will have a manager, a reporting line and importantly, can be moved to another manager or role within the organisation that is equivalent in skill and content. The organisation can also promote the individual, discipline them, recognise issues through a grievance process, etc.

The way the relationship works in practice is evident and this reinforces the contract of employment.

On the other hand, a person operating in business on their own account has a client relationship: they work according to the terms of their supply agreement, delivering the agreed objectives only. They can say 'no' to the client with the only ramification being, in extremis, the client terminating the contract. This also works for the supplier if they do not like the behaviour of the client. There are no other ramifications under employment law as it does not apply.

At the 'high end' of the contract for service spectrum, where professional interims operate, control starts to shift and the balance, for the period of the contract moves towards the supplier. For an interim CEO to operate, typically engaged when organisational conditions are stressed, they need to be able to have control of the organisation for the contract period. The major stakeholders knowingly relinquish control by agreement through the contract for service. This does not constitute an employment relationship: it is simply a recognition that to deliver the narrow focus of the supplier agreement, certain tools are required, one of which is the ability to make decisions and have them carried through.

This example is at the heart of the way that the profession works. If this is not understood and room found within the regulatory framework to accommodate it, government will effectively destroy the high end of the labour market spectrum, eliminating one of the UK's world leading industries. We do not believe that this is the intention and ask that such collateral damage is carefully avoided as the main thrust of the legislative work is undertaken.

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

Yes. It should be clear where an employment relationship exists. It should be very clear where a contract for service exists. Control is a good indicator of the nature of the relationship.

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

By concentrating on the nature of the relationship, a range of questions can be asked that will provide a fuller picture of whether the arrangement is as a supplier or as an employee.

The IIM has produced a set of questions (including those on control) that it uses to help determine whether a member would be clearly a services supplier in business on their own account. It recognises the current case law, how interpretations need to be considered and the complexity of the situation in today's flexible UK labour market. It is not a short list of questions but answering them does enable the user to obtain a much clearer view of the relationship in practice. We have attached this questionnaire as appendix 2 in this document, for your use.

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

Yes. This is assuming that a representative understanding of what constitutes financial risk and how it is expected to be seen, is followed. Appendix 2 has a section related to this issue. Obvious indicators are: possessing professional indemnity insurance; able to show an aged debtors profile; year end accounts recognising company debt levels (to suppliers and from clients); any outstanding bank loans or similar; employers liability insurance; directors and officers insurance; written off debt, etc. Presence of any and all of this confirms being in business on one's own account.

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

Yes, as per appendix 2 attached to this response.

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

Yes. As per Appendix 2 attached to this response.

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

Yes. Also covered in appendix 2.

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

We view the process overall as defining who is not an employee. The questionnaire attached in appendix 2 operates on the basis of identifying the traits being displayed by the user, with a view to determining tax status, where a high mark overall indicates the user is demonstrating a clear approach to being in business on their own account, with a lack of mutuality of obligation, supervision, direction & control, whilst taking financial risk, plus alignment of the written contract with working practice.

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

Our view is that, for primary legislation to be meaningful, a significant amount of substance would be required at this level. Operating with less than this would add little to the current approach as a large amount of secondary regulatory detail would be required to achieve straightforward clarity over what is a complex situation.

As expressed elsewhere, beyond some definitions alignment, primary legislation will bring an element of sclerosis to the process and not be compatible with enabling the continued development of the UK's flexible labour market.

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

Chapter 6: A Better Employment Status Test?

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

No, in general. 'Objective' criteria will represent, in general, a 'force fit' for determining whether an individual is an employee of some form, or in business on their own account. Our approach remains looking at the relationship as the best test.

It is possible to use certain quantitative criteria as a part of this guide. For example; has the relationship lasted more than 2 years against one contract (grounding in major transformational change can take this period as a case in point); are fees paid at a high rate, say over £500 per diem; is the company registered for VAT; can the individual show financial independence through a significant reserve in the company they operate (say over £50,000), is the working capital value showing higher than 100% of monthly revenues? This can be a long list. Any given criterion does no more than act as a pointer.

In aggregate, an understanding of the company finances gives a good overview but it refers the reader back to the nature of the relationship and the tests that underpin the appendix 2 questions.

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

As per Q22 comments.

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

See appendix 2.

This approach is designed to:

- Cover existing case law and regulation
- Focus on building a picture of the supplier/client relationship
- Be flexible so that questions can be added (or subtracted) to reflect new case law or regulation
- Use a points scoring system to reflect that flexibility
- Operate with 'compulsory' answers being required so that major elements can be used as 'gating' factors as identified under (changing) case law
- The current test is used to identify being in business on one's own account versus any form of being an employee. However, it is perfectly possible to use the system, with some modification, to align with various forms of being an employee as well.

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

The IIM has no direct experience to contribute.

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

Our expressed opinion is that given the complex nature of the UK labour market, a simple test is unlikely to be possible with added value and clarity for the user. The best to be hoped for is something that is clear and straightforward to use.

Our approach has been crystallised in appendix 2, bearing in mind that it is focussed on tax status in the first instance. Our logic anticipates much closer alignment of tax and employment status as identified at the start of this questionnaire.

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

It could well, because it does not allow the depth of understanding of the relationship to be revealed. The best opportunity to avoid 'perverse incentives', or people getting away with trying to fudge the system, is to have a process that allows the depth of the relationship to be explored by any third party with a mind and reason to do so, applying a little common sense on the way.

The upside of such a process is that it produces an informed description which should make it clear what the real nature of the relationship is. Applying common sense tells us whether the individual is in business on their own account, perhaps for some time displayed through track record of the assignments undertaken, or whether they are employees of some description as the law currently allows for variations on that theme.

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

We remain positive about the most helpful approach being the availability of a status test tool.

This needs to reflect the real-world factors that distinguish someone in business on their own account from employees in general and variations on the employee theme as may be described in

legislation.

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

Currently, tax depends upon whether an individual is perceived as an employee, or self-employed.

We see the boundary initially as being between someone in business on their own account and therefore self-employed, versus someone who is an employee according to the employment status regulations.

By determining those who show the nature of the relationship to be that of one in business, it becomes a simple matter to apply commercial law and the corporate tax system. This means taxation through VAT collection, corporate tax on profit and tax on income paid to the individual from the company. This is clearly associated with zero employment rights, including inability to claim unemployment benefit when not earning client fees.

Aligning the remainder of the labour market into employee variants becomes the secondary task. Our logic refers to aligning more employment rights with paying more through the employed tax system. If government wanted to maintain a simple approach to taxing employees, then all paying the same would naturally mean all having equal rights. Fewer rights – less tax paid relative to those with access to all employment rights.

Given the current tax levels applied, we see the need to change the access to rights, including unemployment benefit.

Chapter 7: The Worker Employment Status for Employment Rights

30. *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?*

Not necessarily. Our logic requires a graded tax system for graded rights acquisition. See above.

31. *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?*

No. The term 'Limb' worker seems rather obscure but in the end it is simply a category label.

Neither do we have a problem with all employees being workers, but not all workers being employees, as the definition of the term 'worker' is clearly not the word employee.

On the other hand, we have no objection to changing the lexicon as long as it is done once and left alone for a long time, with fixed definitions.

We do wish that phraseology did not confuse employment and the employed state with people who operate under commercial law, being in business on their own account. Our point about personal service causing confusion in this respect is the classic example.

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

See above.

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

Our view is demonstrated in Q31 and previously. Clear definitions that do not mix up employment

and in business on one's own account will help enormously.

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

If government is keen to use the word 'worker' in a definition that allows its generic use to reflect the activity undertaken by any individual, then so be it. We maintain that any definition set would benefit from terminology that helps maintain the boundary line between employed status and those in business on their own account.

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

i. Should the criteria to determine worker status be the same as the criteria to determine their employee status, but with a lower threshold or pass mark? If so, how could this be set out in legislation?

No, not if the words carry differing definitions.

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?

No, according to our response logic or anyone being an employee, they should enjoy full rights.

However, if the approach of our logic for more than one type of employee stands, then graded rights will require appropriate terminology, the development of a more extended lexicon and the alignment of graded employment taxation to recognise the acquisition of employment rights.

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

See earlier comments, where we start from the 'in business' end of the process and work towards the 'traditional' employee.

36. *What might the consequences of these approaches be?*

Clearly, the tax approach would need significant modification to be aligned to employment status. The system could be made to better reflect the reality of the labour market and to distinguish between those who want employment rights at some level and those who don't.

37. *What does mutuality of obligation mean in the modern labour market for a worker?*

It should mean the same as we have described earlier. Applying different definitions to different groups of people for the same phrase will only cause immense confusion.

38. *Should mutuality of obligation still be relevant to determine worker status?*

Our approach has been clearly laid out above and the term worker has not proved necessary.

39. *If so, how can the concept of mutuality of obligation be set out in legislation?*

See above.

40. *What does personal service mean in the modern labour market for a worker?*

See above.

41. *Should personal service still be a factor to determine worker status?*

See above.

42. *Do you agree with the review's conclusion that the worker definition should place less emphasis on personal service?*

Our approach to personal service removes this as an issue in our opinion.

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

Yes, as per our approach above.

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

We are not sure about the meaning of this question. However, assuming that this is referring to an employment right, we see the term as not being relevant for the reasons given in this determination.

45. *Do you agree with the review's conclusion that there should be more emphasis on control when determining worker status?*

This should be an integral part of the balanced approach to determining the nature of the relationship that we advocate. We see the important element being that the supplier exerts control over the contract, the way the work gets done and the delivery of the output agreed with the client. In general, senior interims exert significant control over all these aspects and expect the client to hand over control to enable them to deliver what they have agreed to do. Control is one tool in the kit bag to get the results agreed upon.

46. *What does control mean in the modern labour market for a worker?*

We expect the term to have the same meaning and therefore to be applied with that meaning to the fore. We described its application earlier.

47. *Should control still be relevant to determine worker status?*

It is a core item in determining the relationship between client and supplier (employer/employee).

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

As per our response above.

49. *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?*

We have included the questionnaire we have produced to guide the determination of the relationship between the parties to the agreement.

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

We are of the opinion that whatever is done needs to use clear terminology, with helpful definitions, so that the boundary between employment legislation and commercial law is kept obvious. It is not about what is offered; it is about the relationship between the parties.

51. *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?*

We refer the reader to our logic and approach above.

52. *The review has suggested there would be a benefit to renaming the Limb (b) worker category to 'dependent contractor'? Do you agree? Why / Why not?*

No. We think this term confuses employed status and working in business on one's own account.

Any term should refer to employed activity, not mix it up with anything else. Semi-dependent

Employee.

Chapter 8: Defining Working Time

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

No opinion.

54. *What would the impact be of this on a) employers and b) workers?*

No opinion.

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

No opinion

56. *Should government consider any measures to prescribe the circumstances in which the NMW/NLW accrues whilst ensuring fairness for app-based workers?*

No opinion

57. *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?*

No opinion

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

If the individual is in business on their own account, the above points are all relevant and should be the subject of a negotiated agreement. Where the engaging organisation refuses to negotiate, the individual has two choices. The interpretation of the contract form is also informed about the nature of the relationship!

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

No opinion

Chapter 9: Defining 'Self-employed' and 'Employers'

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

Yes, we agree with the statement, based on the definition of self-employed referring to people who are in business on their own account.

As described above, we subscribe to the view that it is the nature of the relationship in the round that is at the heart of the matter.

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

Yes.

Chapter 10: Alignment Between Tax and Rights

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

We have advocated alignment of the tax and employment rights systems at length.

We have also emphasised the need to make a clear boundary between various potential forms of employment and being in business on one's own account. We see this as straightforward but not simple, requiring taking a little time to get to the heart of the relationship.

Once the 'in business' people, with zero employment rights as they are irrelevant, are separated from the range of employees, we advocate alignment of tax and employment rights.

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

Yes. See above comments driven by our presented line of logic.

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

This depends entirely on how government wishes to correlate rights and tax. It seems logical for more rights to be consistent with paying more employment taxes. A particular bridging point may be the right to claim unemployment benefit (pay income tax). Other rights might be aligned to sliding NI contributions for example.

If you have any queries on the foregoing, please do not hesitate to contact us. We would be very pleased to meet with you as necessary. Could you please add our contact details to your mailing list for any future related consultations?

We should be grateful if you would please acknowledge this reply.

Yours sincerely,

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APPENDIX 1

Background to the Institute of Interim Management

The Institute of Interim Management (“the Institute” or “IIM”) is a membership organisation for Interim Managers and Executives (“IMs”). It was established in 2001 with the principal aims of championing quality standards and best practice for its members.

The membership is drawn mainly from IMs resident in the UK, although their assignments can take them world-wide. There are also overseas members drawn principally from other EU Member States. The IIM has ongoing relationships with similar organisations internationally, including Italy, Germany, Netherlands, Poland, USA, Canada, Singapore, Czech Republic, Slovakia and Balkan states.

In addition to its website (www.iim.org.uk), the Institute has a significant web presence through its on-line LinkedIn group, Interim Management IIM (www.linkedin.com/groups/Interim-Management-IIM-2339933/about). The group is open to all-comers with an involvement or interest in Interim management, and therefore comprises a cross-section of all participants in the industry.

The on-line group currently has just under 15,000 members, comprising principally IMs (76%) and niche agencies (known in the industry as “Providers”) that specialise in ‘matching’ IMs with clients (11%). The remaining 13% consists of clients, management consultants and others. The on-line group remains the largest group globally dedicated to the Interim management industry.

The Institute conducts annual surveys of the Interim industry, and the 2018 IIM interim management survey is currently ‘live’ (<https://www.surveymonkey.co.uk/r/iim2018p>). The conduct of the survey is overseen by independent external scrutineers. This annual survey benefits from several thousand responses each year and has become the UK industry standard for ‘Provider’ service performance assessment.

About Interim Management

Interim management is a proven and highly effective way for organisations to utilise the high end expertise and skills of independent senior and experienced professional managers and subject matter experts.

IMs come from a variety of backgrounds but are mainly highly experienced business executives and are frequently professionally qualified. They deliberately choose to work as independent freelance suppliers of their specific management skills, knowledge and experience to fee paying clients, either for a period of time or for defined scopes of work.

IMs are not temporary employees, but are professionals running micro businesses on their own account, accepting the associated risks and rewards which being in business implies.

IMs are different from management consultants, who limit themselves to gathering information, giving advice and guidance, and recommending action. Whilst IMs can and usually do provide advice and develop solutions, and, indeed, often play a key role in mentoring and coaching the client’s staff, their strength and benefit lies in their independent decision making freed from office politics, plus skill in delivering results-driven implementation. Interim executives contract with the client such that the client surrenders line authority for the period of the assignment and within that contracted brief. Contractually and in practice, interims do not come under any form of supervision, direction or control. In practice, the client accepts that the IM carries the power to deliver the contracted assignment objectives.

IMs are a key part of the UK’s flexible economy, particularly adding value to organisations in both public and private sectors which require temporary, but high impact, interventions, without involving on-going and unnecessary ‘employment’ costs for the client such as pensions, or ‘disengagement’ issues such as wrongful dismissal claims. They are a resource that can be turned on and off like a tap, to the mutual benefit of the client and the IM.

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At one time, the UK's use of IMs matched that of all the other EU Member States in aggregate. Interim management has long been an established feature in The Netherlands and Belgium, but recently, given changes in employment legislation across the EU, the Interim management market in other EU countries is considered to be growing rapidly, particularly in Germany, Poland and France.

Overseas working is common amongst IMs. According to earlier research (*The International Interim Market 2012*) published in March 2012 by Russam GMS (a leading UK Provider) international assignments made up around 11% of the overall activity of UK-based IMs. Out of the 460 IMs who responded to Russam's survey, 80% had completed assignments overseas, and 67% of them had clocked up between five to 10 years of international Interim experience. This proportion has remained fairly stable with time.

The 80% also said that demand for UK Interims overseas is strong because international firms need specialist skills on a temporary basis when they can't resource projects locally. Half of them also said that UK qualifications and the 'British' Interim manager 'brand' was prized highly abroad.

How do IMs operate, and why?

IMs find their assignments in a variety of ways. There are no hard and fast figures, but it is thought that, as a rule of thumb, about 60% of assignments are found by the IMs themselves through contacts in their own personal networks. The remaining 40% of assignments are sourced through Providers, and through introductions from other intermediaries such as banks, venture capitalists, law firms, and accountants.

However, there is anecdotal evidence to suggest that corporate governance requirements dictate that assignments at the most senior levels are more likely to be placed through Providers. This is likely to be true particularly in the public sector, where procurement procedures are more constrained than in either of the other sectors.

Contractual Basis

IMs operate through contracts for services (commercial contracts), rather than contracts of service (employment). IMs form part of (or possibly even lead) the client's management team, and expect to have delegated and to exercise the appropriate line authority required to fulfil their role (including at 'C' level in the public sector). Depending on the circumstances of the client and the assignment, this can include becoming an officer of the company through formal appointment as director and/or company secretary for the duration of the assignment.

It is nevertheless important to understand that IMs are not employees of the client. IMs are typically operating in circumstances which are not 'business-as-usual'. They are usually providing specialist skills and knowledge on an outsourced basis. It is essential that they stand apart from the client's staff, and are perceived by the staff as 'different'. If this is not possible, their ability to provide independent advice and voice controversial opinions is jeopardised, and the growth and development of the organisation will be hindered.

Where the IM finds his/her assignment through their own network or through an intermediary which is not a Provider, the IM will negotiate the contract for services direct with the client. Where a Provider acts as the intermediary, there are two models:

- Usually there will be an 'upper' contract between client and Provider, and a 'lower' contract between Provider and the IM's legal entity. The terms of the two contracts should mirror one another in all material respects (save as to the day-rate fee level), but do not necessarily do so.
- Less frequently but becoming more common, there will be no contract of any sort between the Provider and the IM's PSC or other legal entity. The client will contract direct with the IM's PSC or other legal entity and will pay the IM's day-rate fees direct; the client will have a separate

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contract with the Provider for its 'introducer's' fees.

Business and Financial Risks

From a legal standpoint, IMs operate through a variety of legal structures. The Institute's 2013 survey data suggest that the vast majority (88%) of IMs work through their own PSCs. About 7% of IMs operate as sole traders or in partnership, including limited liability partnership ("LLP"), but these tend to be IMs drawn from the accounting and similar professions, where such legal structures are commonplace for all practitioners, not just IMs. The remainder operate through umbrella companies.

IMs are not employees of the organisations to which they provide their services. If an employee makes an error which causes loss to their employer, the employer bears the loss and any cost of rectification. By contrast, if an IM makes an error, the loss and cost of rectification is their responsibility, increasing their financial risk compared with an employee.

Typically IMs have to determine what needs to be done, in the same way and with the same risks as a management consultancy firm if they get the advice wrong to the detriment of the organisation. Having decided what needs to be done, they are responsible for implementation with further financial risks involved, both as to negligence and breach of contract.

IMs therefore understandably protect themselves by operating through the corporate structures mentioned above. In addition, they usually seek further protection through professional indemnity insurance ("PII"). Most clients in both the public, private and not-for-profit sectors insist on such cover as a term of the contract for services, but senior IMs carry it anyway, even if not contractually required.

IMs are also not employees because they do not approach work in the same way. IMs are paid by day rate to their PSC, reflecting the fact that they do not enjoy the benefits and protections of employment. Furthermore, they have no interest in becoming permanent employees – indeed, their business model requires the delivery of outcomes, so that, in effect, an IM's *raison d'être* is to achieve their own 'redundancy' – not the behaviour of a typical employee seeking permanency of employment.

In addition, having made her or himself 'redundant', the IM must then bear the sales and marketing costs of finding their next assignment, and face the real financial risk that this may take some time. It is rare for an IM to move from one assignment to another without a gap between each client. However, keeping this to a minimum is an indication of effective marketing, not a clue to someone being 'employed'.

The Institute's 2013 survey shows that the average assignment lasts 7.2 months, 66% of assignments are completed in less than 12 months, and 94% in less than 24 months. In the last 12 months, the IMs who responded averaged only 161 billable days out of approximately 230 workable days (after allowing for bank and other holidays), and the average time between one assignment ending and the next starting was between two and three months.

In other words, the typical IM's life is one of relatively short term assignments, interspersed with significant periods of 'down time'.

The use of PSCs enables IMs to manage the financial risk of these periods of 'down time'. The receipts from its invoiced sales will be used by the PSC to meet the expenses of running the IM's business, which will normally include payment of a salary to the IM on which PAYE and NI is accounted for. The level of salary will be such that reserves are built up, so that, should a period of down time occur, the expenses of the business, including the sales and marketing cost of obtaining the next assignment, can continue to be met. The retention of profits in this way enables the IM to continue in business and means that they do not claim state benefits.

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Institute of Interim Management Interim Executive IR35 Tax Status Assessment

1. Basic Legal Operation	Score	Pref. Answer
1.1 Do you operate as a limited company?		
1.2 Are you a UK tax payer?		
1.3 Are you registered for VAT?		
1.4 What is your VAT registration number?		
1.5 Are you up to date with company filings?		
1.6 Do you have any outstanding court judgements for you or your company?		
Total		

2. In Business on Own Account Evidence	Score	Pref Answer
2.1 Is the work % found directly through your own company >35%?		
2.2 Is the current/new contract found directly?		
2.3 Are your services independently marketed via a range of channels?		
2.4 Can you show evidence of a business brand?		
2.5 Do you actively operate the Agency Workers Directive 'Opt out' Clause?		
2.6 Are you/your company registered under the Money Laundering Regulations?		
2.7 Do you have company assets that allow you to choose your work?		
2.8 Are your fees charged as a day rate?		
2.9 Is your day rate over £500?		
2.10 If the current/new contract is via a provider, do you invoice the end client?		
2.11 As in 2.10, is your contract with the end client directly?		
2.12 Are you a member of a professional institute, e.g. IIM, ICAEW, CIPD etc?		
2.13 Have you agreed to a formal code of professional conduct?		
2.14 Do you provide the form of contract for use with the assignment?		
2.15 Can you show IP owned by your company?		
2.16 Do you operate more than one revenue stream or client in parallel?		
2.17 Do you carry professional indemnity insurance?		
2.18 Does your own company provide a pension scheme?		
2.19 Does your company engage accountants, IT, legal support, web services, etc?		
2.20 Can you demonstrate the financial risk of running your own business?		
2.21 Can you demonstrate what determines contract length?		
2.22 Can you show how you remain independently up to date in your field?		
2.23 Is there a distinction between the assignment & a routine job in the client?		
2.24 Is the contract based on your Ts & Cs?		
2.25 Can you describe your 'USP'?		
2.26 Can you show periods of no revenue and changes of client?		
2.27 Have you provided a fixed price quotation for any work?		
2.28 Have your invoiced payments ever been delayed?		

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2.29 Has legal action ever been required for debt recovery?		
2.30 Have you ever had to write off payments due as bad debt?		
2.31 Can fees be withheld for any reason?		
2.32 Have you incurred additional expense for kit or training to deliver the work?		
2.33 Does your company have logo, letterhead business cards and stationary?		
2.34 Does the company have a phone line(s), email addresses, bank accounts?		
2.35 Do you have dedicated office space?		
2.36 Are you paid only on job completion or specific milestones?		
2.37 Do you have tax investigation insurance?		
Total		

3. Tools Required for Client Delivery

**Score Pref
Answer**

3.1 Do you provide all the tools necessary to perform your assignment?		
3.2 If the client provides tools, is this clearly for security or overriding reasons?		
3.3 If acting as a director, is this required to deliver the assignment objectives?		
3.4 Is line authority required to deliver assignment objectives?		
3.5 Is the client clear about handing over authority & control to you?		
Total		

4. The Written Contract

**Score Pref
Answer**

4.1 Does the contract preclude you from paid work elsewhere whilst 'live'?		
4.2 Is there any obligation for the client to provide work?		
4.3 Is there a specific clause stating the intention for a supplier/client contract?		
4.4 Is there a clause enabling the right of substitution?		
4.5 In the event of substitution, is it clear you are the supplier & payer?		
4.6 Is there a specific clause(s) that state autonomy to decide what work is done?		
4.7 Is there a specific clause(s) that state autonomy to decide how work is done?		
4.8 Is there a specific clause(s) that state autonomy to decide when work is done?		
4.9 Is there a specific clause(s) that state autonomy to decide where work is done?		
4.10 Is there a notice period in the contract on either side?		
4.11 Has the client the right to require further work outside the contract remit?		
4.12 Is there a right to terminate the contract early?		
4.13 Did you negotiate the contract directly?		
4.14 Is there a clause that enables you to engage 3 rd parties to work alongside you?		
4.15 Is there any reference to hours worked in the contract?		

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4.16 Do you need to seek permission to take time off?		
4.17 Is that time paid for by the client?		
4.18 If contracted work is paused, can the client redirect you to other work?		
4.19 If you are unable to work due to illness, can you invoice for this time?		
4.20 Is there a clause(s) handing over control for the assignment to be executed?		
4.21 If a bonus is contracted, is it specific to the assignment brief?		
4.22 Is there a clause stating you comply with employee policies, beyond H.&S.?		
4.23 Is there a clause(s) stating liability for correcting faulty work?		
4.24 Is there a clause(s) for invoicing legitimate expenses incurred for the client?		
4.25 Is there a clause(s) stating you have sole responsibility for your tax affairs?		
4.26 Is the contract length defined?		
4.27 If a 'top level' provider contract exists, does it recognise your IR35 status?		
4.28 If 4.27 is not shared, is a side letter stating no conflict with your IR35 status?		
4.29 If a public-sector contract, have you provided an IR35 status letter?		
Total		

5. Assignment Practice ("Hypothetical Contract"), "Part & Parcel"	Score	Pref Answer
5.1 Does the way the assignment operates accurately reflect the contract?		
5.2 Can you demonstrate an example of substitution in practice?		
5.3 Do you represent yourself during the assignment?		
5.4 Is representing the client's interests to third parties essential for the contract?		
5.5 Can you demonstrate economic independence from the client?		
5.6 Can you show no client employee benefits accrue or are part of the contract?		
5.7 If appearing in client structures and lists, is it clearly as a supplier?		
5.8 Do you obtain client site access as a supplier/contractor?		
5.9 If you are a director or form of 'office holder', or have line authority to deliver the assignment, can you show the difference from a permanent job holder?		
5.10 Is any specialist equipment to be bought for you by the client?		
5.11 Has anyone undertaken an appraisal or similar with you as per employees?		
5.12 Does the client have employees who could do the assignment?		
5.13 Have you refused to do work as it was outside the contract remit?		
5.14 Do you require client permission to take time off?		
5.15 Are you limited to service delivery from the client site only?		
5.16 If 'yes' to 5.15, is this due to overriding client need e.g. security?		
5.17 Is there an expectation that the client will provide more work, post contract?		
5.18 Has there been a succession of contracts with the same client?		
5.19 Is the client your last employer?		

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5.20 Is your training self-funded?		
5.21 Are you expected to attend functions paid for by the client?		
5.22 Do you operate with an internal job title?		
5.23 Do you have to attend staff meetings where the focus is employee issues?		
Total		
	Score	Pref. Answer
Overall Assessment Total		

Assessment Methodology

1. Questions to be answered in line with the 'preferred' answer indicator to achieve the points allocated.
2. The points awarded are designed to reflect existing case law and the weight of practical evidence you can provide to demonstrate the high level business services interim executives are in business to supply.
3. All questions highlighted green need to be answered to obtain the points. Failure to answer any of those questions positively indicates you are working inside IR35.
4. All questions highlighted red must be answered so that the negative total is not accrued to avoid falling inside IR35.
5. Question 3.3 must be answered positively if you need to operate as a director for the assignment. If this is not required, then the score is neutral.
6. Assuming you are able to answer points 2, 3 (and 4 if required), then a net score over 80 points indicates that you operate outside IR35, based upon clearly being in business on your own account; lack of mutuality of obligation, supervision, direction & control; taking financial risk; plus alignment of the written contract with working practice.