



Department for
Business, Energy
& Industrial Strategy



HM Treasury



HM Revenue
& Customs

Employment Status: Discussion Document - Response form

The consultation is available at: www.gov.uk/government/consultations/employment-status

The closing date for responses is Friday 1st June 2018

Please return completed forms to:

Employment Status Consultation

Department of Business, Energy and Industrial Strategy

Labour Markets, Level 1 Spur

1 Victoria Street

London

SW1H 0ET

Tel: 0207 215 4586

Email: EmpStatusBEIS-HMT-HMRC@beis.gov.uk

Please be aware that we intend to publish all responses to this consultation.

Information provided in response to this consultation, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes. Please see the consultation document for further information.

If you want information, including personal data, that you provide to be treated as confidential, please explain to us below why you regard the information you have provided as confidential. If we receive a request for disclosure of the information, we shall take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the department.

I want my response to be treated as confidential

Comments: [Click here to enter text.](#)

Questions

Your name: Jo Seery

Your organisation if replying on their behalf (if applicable): Thompsons Solicitors

Your or organisation address: Congress House, Great Russell Street, London, WC1B 3LW

	Please check a box from the list of options below that best describes you as a respondent:
<input type="checkbox"/>	Business representative organisation/trade body
<input type="checkbox"/>	Central government
<input type="checkbox"/>	Charity or social enterprise
<input type="checkbox"/>	Individual
<input type="checkbox"/>	Large business (over 250 staff)
<input checked="" type="checkbox"/>	Legal representative
<input type="checkbox"/>	Local government
<input type="checkbox"/>	Medium business (50 to 250 staff)
<input type="checkbox"/>	Micro business (up to 9 staff)
<input type="checkbox"/>	Small business (10 to 49 staff)
<input type="checkbox"/>	Trade union or staff association
<input type="checkbox"/>	Other (please describe)

	Please indicate which part of the discussion document you are responding to:
<input checked="" type="checkbox"/>	Employment rights
<input type="checkbox"/>	Tax
<input type="checkbox"/>	Both rights and tax

Question 1 (Chapter 4, page 21 in discussion document)

Do you agree that the points discussed in this chapter are the main issues with the current employment status system?

Yes No Not sure

Are there other issues that should be taken into account?

Yes No Not sure

Comments: There are a number of other issues which need to be taken into account. These include how any definition of employment status must avoid the exploitation and discrimination that those working in false self-employment and non-standard employment have suffered - the majority of whom are women and young workers - and promote more secure and predictable employment. Currently there are 1.8 million workers are on zero hours contracts working an average of more than 25 hours per week¹. However, two fifths do not get holiday pay and half do not get written terms and conditions². The increased use of zero hours and other non-standard working, has led to a fall in wage growth, with the UK having the second lowest wage growth in the OECD countries³. The UK also has the lowest productivity rate of the G7 countries. Any consideration of employment status should therefore focus on providing greater protection for the growing numbers in false self-employment and non-standard working, and the creation of “good work” as advocated in the Taylor Review, as part of a wider social and economic strategy to avoid a low wage, low productivity economy. Non-standard work, which was once the preserve of a small number of unscrupulous employers undercutting the competition by transferring risk to its workforce, has now become mainstream practice for FTSE 100 companies, who increasingly engage workers in non-standard working. The other key issues which need to be addressed are the enforcement of employment status by the Director of Labour Market Enforcement and a reverse burden of proof test. The latter would redress the current imbalance in the employment relationship which presently favours the employer at the expense of the worker. The so-called ‘gig’ economy is not new. It is the technology which has encouraged some employers to exploit workers with the aim of denying them their employment rights, as recognised and succinctly described at paragraphs 4.7 and 4.8 of the consultation. We believe that the fundamental principal aim of the consultation should be to resolve the gaps in protection for workers in false self-employment and non-standard employment. The means to achieve this is through a clear, transparent and more easily enforceable legal provision. As such, the appropriate legal remedy is to have one universal definition of employment status which would provide all forms of workers with employment

¹ Office for National Statistics April 2018

² |According to a Poll conducted by the TUC in 2017

³ LSE's Centre for Economic Performance (CEP) analysis reported in the Independent 5 June 2017

rights from day one (see s. 23 of the Employment Relations Act 1999). This approach is consistent with the aim recommended by the Office of Tax Simplification, to develop a simple rule that can be readily applied and is easy to enforce. It would also comply with the fifth principle of the European Pillar of Social Rights which is intended to strike the right balance between enhancing rights for workers and maintaining the necessary flexibility for employers to adapt to change. The approach adopted by our European competitors is to extend existing minimum standards to new kinds of employment relationships in a bid to establish a level playing field. This would also ensure that UK workers are not put at a disadvantage to workers in the EU.

Question 2 (Chapter 5, page 22 in discussion document)

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?

Yes No Not sure

Please explain why/why not: Questions 2 to 5 - We do not agree that codification of the principles established by case law set out in in chapter 3 would provide clarity and certainty. The fact that the principles established by case law are set out in statute would not provide clarity since the courts would still do as they do now: apply those principles to the facts of the case. The appeals in *Pimlico Plumbers Ltd v Smith* [2017] IRLR 323 and *Uber and others v Aslam and others* UKEAT 0056/17 are unlikely to provide clarity as to how the three key principles set out in paragraph 3.20 are to be applied in other cases. This is because the courts have taken a nuanced approach to the principles according to the particular facts of the case. Experience of codification of the burden of proof test in discrimination legislation shows that this does not provide clarity or certainty⁴. The statutory burden of proof test continues to vex employment tribunals⁵. There is no foolproof method for transposing principles of case law into statute which would not create another level of uncertainty and/or inflexibility. We therefore propose a single universal definition of employment status which applies to all workers and which attracts employment rights from day one as follows: *A worker is a person who is employed. A person is employed for the purposes of this Act if he or she is engaged by another party under a contract, arrangement or other relationship, whether express or implied and whether written or oral, to*

⁴S.63A(2) of the Sex Discrimination Act 1975 (SDA), S.54A of the Race Relations Act 1976 (RRA) and S.17(A)(1C) of the Disability Discrimination Act 1995 (DDA) codified and enhanced the common law burden of proof test in *King v Great Britain-China Centre* 1992 ICR 516, CA.

⁵ See the recent decisions in *Efobi v Royal Mail Group Ltd* 2017 IRLR 956, and *Ayodele v CityLink Ltd and anor* 2017 EWCA Civ 1913. In the former case the Tribunal ruled that the burden of proof test set out in statute did not mean that the burden fell on the Claimant. This interpretation was subsequently held to be wrong in the case of *Ayodele v CityLink Ltd and anor* 2017 EWCA Civ 1913.

perform any work or services for that other party in return for remuneration, save where that other party proves that those services are provided to her or him under a commercial business contract or arrangement as client or customer of any professional or business undertaking carried on by that individual. This is both clear and transparent and properly represents the wage-work bargain struck between the worker and the employer. When we refer to employment status in this response we refer to our definition set out above. We agree with the recommendation in the Taylor Review that there should be a presumption of employment status and that the burden of proof should be on the employer to disprove this status. This is consistent with the approach taken in Autoclenz Ltd v Belcher [2011] ICR 1157 which, by focusing on the employment relationship in practice, is a move towards putting the onus on the employer to deny employment status. We consider that the definition proposed provides clarity, is transparent and can be more easily enforced. There should also be limiting provisions which prohibit employers from drafting contracts, arrangements or other relationship which would undermine the statutory employment status we propose in answer to question 2, such as the current use of “no obligation clauses” and “substitution clauses” in employment contracts.

Question 3 (Chapter 5 page 23 in discussion document)

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?

- i) individuals, please state: We refer to our answer to Question 2.
ii) businesses, please state: We refer to our answer to Question 2.

Question 4 (Chapter 5 page 23 in discussion document)

Is codification relevant for both rights and/or tax?

Yes No Not sure

Comments: We refer to our response in answer to question 2 above in relation to employment rights. As our expertise is as employment lawyers we focus our response on employment rights.

Question 5 (Chapter 5 page 23 in discussion document)

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

Yes No Not sure

Comments: We refer to our answer to Question 2.

Question 6 (Chapter 5 page 24 in discussion document)

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

Please state: Mutuality of obligation has now become the high watermark of establishing a contract of employment. It creates an obstacle for workers in the modern labour market who make themselves available to an employer in circumstances where the corresponding obligation on an employer to promise to provide work is simply denied or there is a 'no obligation' clause in the contract. The risk of the business is borne by the worker while the employer retains the benefit of having worker(s) available. In practice, workers in precarious non-standard employment rarely refuse work and so work longer hours, but are left without protection for their health and safety where the absence of mutuality of obligation is pleaded to deny that, either, there is a contract or that the worker is at the disposal of the employer for the purposes of the Working Time Regulations 1998. We believe that evidence of the obligations can be better met by extending the written statement of particulars to all workers from day one of employment as advocated in our response to the consultation on transparency and in compliance with the Directive on Transparent and Predictable Working Conditions.

Question 7 (Chapter 5 page 24 in discussion document)

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

Yes No Not sure

Comments: We refer to our answer above and at question 2.

Question 8 (Chapter 5 page 24 in discussion document)

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

Please state: Not applicable, see answers to Questions 2 and 6.

Question 9 (Chapter 5 page 25 in discussion document)

What does personal service mean in the modern labour market?

Please state: Unscrupulous employers have sought to undermine employment status by the use of substitution clauses⁶. Personal service as a criterion is not therefore appropriate since there is no corresponding provision which would limit the abuse of substitution clauses.

Question 10 (Chapter 5 page 25 in discussion document)

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

Yes No Not sure

Comments: We refer to our answer to Question 9.

Question 11 (Chapter 5 page 25 in discussion document)

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

Please state: Not applicable.

Question 12 (Chapter 5 page 25 in discussion document)

What does control mean in the modern labour market?

Please state: The courts have made clear that control means ultimate control as opposed to day-to-day control. Given that ultimate control means who controls when work is provided, where it is carried out and when it will be done, it remains firmly in the hands of the employer. It has already been downgraded as a test of employment status, see the case of *White v Troutbeck SA [2013] IRLR 949, CA* and is an inappropriate test.

⁶ See paragraph 84 of the Court of Appeal judgment in *Pimlico Plumbers Ltd v Smith [2017] IRLR 323*

Question 13 (Chapter 5 page 25 in discussion document)

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

Yes No Not sure

Comments: We refer to our answer to Question 12.

Question 14 (Chapter 5 page 25 in discussion document)

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

Please state: Not applicable, see answers to Questions 12 and 13.

Question 15 (Chapter 5 page 26 in discussion document)

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

Yes No Not sure

Please explain why/why not: We do not agree to a shopping list approach to establishing employment status.

Question 16 (Chapter 5 page 26 in discussion document)

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

Yes No Not sure

Comments: This is vague⁷ and uncertain as to how it should be assessed. Should it be a subjective or objective test? In any event, it is inappropriate for modern workplaces with multi-various contracts.

⁷ See Lord Denning summary in *Stevenson Jordan and Harrison Ltd v MacDonald and Evans* [1952] 1 TLR 101, CA.

Question 17 (Chapter 5 page 26 in discussion document)

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

Yes No Not sure

Comments: We do not believe this to be a relevant consideration in the modern labour market. Is the fact that a person accesses their workplace emails on their own mobile phone a helpful indicator of employment status? We think not.

Question 18 (Chapter 5 page 26 in discussion document)

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

Yes No Not sure

Comments: We do not consider it is appropriate to include additional criteria in legislation to address 'uncertain' cases as suggested. The benefit of our suggested approach is that it will provide the certainty and clarity that the government is seeking without the need to introduce further criteria as a back stop for those cases which the government believes, even on a codified approach, may still create a category of 'uncertain' cases.

Question 19 (Chapter 5 page 26 in discussion document)

Are there any other factors that should be included in primary legislation when determining if someone is an employee?

Yes No Not sure

Comments: We do not believe that there are any other factors which should be included in primary legislation in addition to our proposed definition in answer to Question 2. The courts have frequently reiterated that a checklist approach is not appropriate to determining employment status. As J McNeil put it at 453 Warner Holidays Ltd v Secretary of State for Social Services [1983] ICR 440, "I am not persuaded that a check-list of criteria is the proper guide, or that the court ought to be required to tick off or negative point by point the items on such a list."

And what are the benefits or risks of doing so?

Please state: We consider it is impossible to draw up one list which could be applied fairly to all forms of employment. Inevitably there will be some criteria which apply and others which do not, and it will then be left to the courts to decide. Such an approach would not prevent precarious employment, or the abuse of non-standard working. Any new proposals must seek to create a level playing field for all workers.

Question 20 (Chapter 5 page 27 in discussion document)

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?

i) be required to provide further detail on top of the main principles:

Yes No Not sure

Comments: We do not consider that secondary legislation is required to codify our proposal set out in response to Question 2.

ii) provide sufficient flexibility to adapt to future changes in working practices

Yes No Not sure

Comments: Please refer to our answer above.

Question 21 (Chapter 5 page 27 in discussion document)

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?

Yes No Not sure

Comments: We consider that our proposal would stand the test of time and so avoid the need for either individuals or employers to familiarise themselves with frequent changes to the legislation.

Question 22 (Chapter 6 page 29 in discussion document)

Should a statutory employment status test use objective criteria rather than the existing tests?

Yes No Not sure

Comments: We do not agree that an objective test based on length of engagement, an individual's income or a percentage of work carried out on the employer's premises would be appropriate for the UK employment market. In any event such so-called criteria would be open to abuse. Experience of the 12 week qualifying provision for agency workers reveals that engagements are typically short of the threshold which would engage the rights provided⁸. Adopting a percentage of income or work test would necessarily have the same result with the prospect of driving down low pay and creating a race to the bottom amongst competitors which would lead to a result the consultation is rightly seeking to redress.

What objective criteria could be suitable for this type of test?

Please state: Please refer to our answer above.

Question 23 (Chapter 6 page 30 in discussion document)

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

Please state: The statutory residence test is, as the consultation acknowledges, "more complex". It is a test which applies to tax and we do not consider that it is an appropriate test for determining employment rights.

Question 24 (Chapter 6 page 30 in discussion document)

How could a new statutory employment status test be structured?

Please state: We reiterate that the statutory employment test should be as follows: *A worker is a person who is employed. A person is employed for the purposes of this Act if he or she is engaged by another party under a contract, arrangement or other relationship, whether express or implied and whether written or oral, to perform any work or services for that other party, save where that other party proves that those services are provided to her or him under a commercial business*

⁸ |See the TUC report Ending the Undercutters Charter: why agency workers deserve better jobs

contract or arrangement as client or customer of any professional or business undertaking carried on by that individual. This would create a presumption of employment status which the employer could only overturn if the employer could prove that this was in fact a business arrangement where the individual was in business on their own account and provided services on that footing to a client or customer. This would prevent the extension of employment rights to commercial arrangements.

Question 25 (Chapter 6 page 31 in discussion document)

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?

Please state: This question is addressed to employers who have applied agency legislation tests which we do not have experience of. However, we agree that the USA test, which provides for a presumption in favour of a contractor being treated as an employee, as a starting point is consistent with our suggested universal definition of worker.

Question 26 (Chapter 6 page 31 in discussion document)

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

Yes No Not sure

Comments: We agree that an alternative test should be less complex and it is for that reason we advocate our alternative suggested definition in our answer to Questions 2 and 24 above. Furthermore we believe our proposed test is consistent with the objectives of the proposed Directive on Transparent and Predictable Working Conditions which has as the objective of reducing the possibility of excluding workers on short or casual employment relationships from employment rights.

Question 27 (Chapter 6 page 32 in discussion document)

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?

Yes No Not sure

Comments: We reiterate that our proposed test, set out in the answer to Questions 2 and 24, would limit perverse incentives and mitigates against the concerns highlighted in the consultation document. A universal definition which provides for access to employment rights to all from day one would address the growing need to define and apply appropriate rights for the false self-employed and other non-standard workers that have been disenfranchised by the current labour market. Such an approach is consistent with our European competitors and would ensure that UK workers were not subject to less favourable treatment than other European workers.

Question 28 (Chapter 6 page 32 in discussion document)

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)?

Yes No Not sure

Please state: We do not agree an on-line tool would be an effective alternative. It would create further uncertainty. What would happen, for example, if only one of the criteria was not met? Who would make that decision? How would the decision be made in a way that was transparent and would it provide clarity? Comparisons can be drawn with the Employment Status Indicator (ESI) tool used to check employment status for tax purposes. The ESI is not widely used,⁹ is subjective,¹⁰ and can be easily manipulated to get the result the user is looking for¹¹. It also lacks transparency¹². We believe that HMRC is not properly resourced to tackle issues of tax, let alone issues of employment status to determine employment rights, which we maintain should remain distinct.

Question 29 (Chapter 6 page 33 in discussion document)

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?

Yes No Not sure

⁹ See paragraph 8.29 of the OTS Employment Status Report

¹⁰ Ibid paragraph 8.25 reports evidence of individuals interpreting the same questions differently

¹¹ Ibid paragraph 8.22

¹² Ibid table 8.A

Comments: We believe this question is directed to tax issues. We confine our comments to employment status and the protection of employment rights.

Question 30 (Chapter 7 page 34 in discussion document)

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?

Yes No Not sure

Comments: We do not believe that there should be an intermediate category for casual independent relationships with a more limited set of rights. We believe that there should be a new, single definition to describe the employment relationship. This is a more coherent approach and meets the principles of certainty and clarity. It would also redress the balance so that responsibility properly rests with the employer. However, we do believe that there should be joint liability between employers and those in the supply chain for breaches of employment status and a corresponding failure to provide employment rights, which we have advocated for in our response to this consultation and in our response on the consultations on Enforcement, Transparency and Agency Workers. This though would need to be carefully drafted to ensure that liability did not rest with the very worker the provisions were intended to protect such as in those circumstances where an individual has no choice but to set themselves up as a company in order to gain employment.

Question 31 (Chapter 7 page 35 in discussion document)

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?

Yes No Not sure

Comments: We reiterate our position that there should be one universal definition of employment status as set out in our response to Questions 2 and 24.

Question 32 (Chapter 7 page 35 in discussion document)

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

Yes No Not sure

Comments: We reiterate our position that there should be one universal definition of employment status as set out in our response above to Questions 2 and 24.

Question 33 (Chapter 7 page 35 in discussion document)

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

Yes No Not sure

If yes, please state: If our definition set out above in response to Questions 2 and 24 was adopted, we do not envisage any unintended consequences.

Question 34 (Chapter 7 page 36 in discussion document)

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

Yes No Not sure

Comments: We believe the modern labour market demands a universal definition of employment which applies to all workers. This is in keeping with the European Pillar of Social Rights which, at Principle 5(d), provides that “employment relationships that lead to precarious working conditions shall be prevented, including by prohibiting abuse of atypical contracts.” We believe our definition set out in answer to Questions 2 and 24 meets that principle.

Question 35 (Chapter 7 page 36 in discussion document)

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?

Yes No Not sure

Please state: There should be one universal definition of employment status which applies to all workers as set out in answer to Questions 2 and 24 which we repeat below: *A worker is a person who is employed. A person is employed for the purposes of this Act if he or she is engaged by another party under a contract, arrangement or other relationship, whether express or implied and whether written or oral, to perform any work or services for that other party in return for*

remuneration, save where that other party proves that those services are provided to her or him under a commercial business contract or arrangement as client or customer of any professional or business undertaking carried on by that individual.

- 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?

Yes No Not sure

Please state: Please see our answer to Question 35i. above.

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

Yes No Not sure

Please state: Please see our answer to Question 35i. above.

Question 36 (Chapter 7 page 36 in discussion document)

What might the consequences of these approaches be?

Please state: Please see our response to Question 2.

Question 37 (Chapter 7 page 37 in discussion document)

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

Please state: Please see our response to Question 6 above which applies equally to employment status and worker status.

Question 38 (Chapter 7 page 37 in discussion document)

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

Yes No Not sure

Please explain why/why not: Please see our response in answer to Questions 2 and 6.

Question 39 (Chapter 7 page 37 in discussion document)

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

Please state: Please see our response to Questions 2 and 6.

Question 40 (Chapter 7 page 37 in discussion document)

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

Please state: Please see our response to Question 9.

Question 41 (Chapter 7 page 37 in discussion document)

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

Yes No Not sure

Please explain why/why not: Please see our response to Question 9.

Question 42 (Chapter 7 page 37 in discussion document)

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

Yes No Not sure

Please explain: Please see our response to Question 9.

Question 43 (Chapter 7 page 38 in discussion document)

Should we consider clarifying in legislation what personal service encompasses?

Yes No Not sure

Please explain: Please see our response to Question 9.

Question 44 (Chapter 7 page 38 in discussion document)

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

Yes No Not sure

Please state: Please see *MacFarlane v Glasgow City Council [2001] IRLR 7.*

Question 45 (Chapter 7 page 39 in discussion document)

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

Yes No Not sure

Please explain: Please see our response to Question 12.

Question 46 (Chapter 7 page 39 in discussion document)

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

Please state: Please see our response to Question 12.

Question 47 (Chapter 7 page 39 in discussion document)

Should control still be relevant to determine worker status?

Yes No Not sure

Please explain: Please see our response to Question 12.

Question 48 (Chapter 7 page 39 in discussion document)

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

Please state: Not applicable.

Question 49 (Chapter 7 page 39 in discussion document)

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

Yes No Not sure

Please state: Please see our response to Question 19.

Question 50 (Chapter 7 page 39 in discussion document)

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?

Yes No Not sure

Please state: Please see our response to Question 2.

Question 51 (Chapter 7 page 39 in discussion document)

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?

Yes No Not sure

Please state: Please see our response to Question 19.

Question 52 (Chapter 7 page 40 in discussion document)

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?

Yes No Not sure

Please explain why/why not: Simply relabelling 'worker' as dependent contractor avoids the fundamental issue and purpose of the consultation.

Question 53 (Chapter 8 page 43 in discussion document)

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?

Please state: App-based employers will need to apply the tests in Uber¹³ and inform the workers of those tests and how work will be organised in light of them. This can best be achieved through collective bargaining with trade unions where there are large numbers of workers. Employers cannot absolve themselves of the responsibilities to organise work in a more fair and structured way. A requirement on the employer to provide a written statement which also sets out any collective agreement on when, and for how long, a worker is expected to be available will go some way to addressing this. This would lead to greater transparency between the employer and worker about how work is fairly organised and to improve the quality of working time.

Question 54 (Chapter 8 page 43 in discussion document)

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

- a) Employers - please state: See our response above
- b) Workers - please state: Greater transparency and clarity for workers as to when they are treated as being available at the employers disposal and the corresponding right to be paid.

Question 55 (Chapter 8 page 43 in discussion document)

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

Please state: Employers could reach agreement through collective bargaining with the trade union(s), as has happened for other workers who are on-call, on how work can be better organised and managed to ensure an even distribution of work. This would help to create more predictable and secure work.

¹³ *Uber and others v Aslam and others* UKEAT 0056/17

Question 56 (Chapter 8 page 43 in discussion document)

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

Yes No Not sure

Comments: There could be ACAS guidance or specific industry guidance reached through tripartite consultation and negotiation with trade unions, the Labour Enforcement Agency and employers.

Question 57 (Chapter 8 page 43 in discussion document)

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?

Please state: Currently the employer receives the benefit of having workers available for work without any cost. This can lead to long periods where the worker is unpaid despite being available, or conversely to workers accepting too many hours when the employer is busy, which leads to increased health and safety risk. Better management and organisation of work should be possible so that workers are clearer about when they will be expected to be available, and employers are more certain as to who they are paying to be available. This would help to set boundaries so that workers and employers know who is available and can be called on when. We recognise that this may lead to some loss of flexibility at the margins but believe it will create greater legal certainty and more predictable and secure employment with the risk moving back to the employer not the worker.

Question 58 (Chapter 8 page 43 in discussion document)

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?

Please state: We believe that the criteria referred to have been addressed in our response on determining employment status. There must be care taken to ensure that the definition of working time is not used to undermine the employment status which we have advocated in our response to this consultation.

Question 59 (Chapter 8 page 43 in discussion document)

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?

Yes No Not sure

Comments: We believe that employers can use the data to better manage and organise work in consultation with workers and the trade unions. In its response to the BEIS Future World of Work Inquiry Uber gave evidence that it already makes use of data to organise work.¹⁴

Question 60 (Chapter 9 page 44 in discussion document)

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

Yes No Not sure

Please explain why/why not: Please refer to our definition of worker set out in the response to this consultation at Questions 2, 24 and 35.

Question 61 (Chapter 9 page 45 in discussion document)

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

Yes No Not sure

Please explain why/why not: We do not believe that a definition of employer would provide the clarity that the consultation is seeking to resolve as a result of some employers exploiting those in non-standard employment and by creating false self-employment. An example of an employer definition is in the EU Proposed Directive on Transparent and Predictable Working Conditions as meaning, “one or more natural legal persons who is or are directly or indirectly party to an employment relationship with a worker.”

¹⁴ Written evidence from Uber (WOW0096)

Question 62 (Chapter 10 page 46 in discussion document)

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?

Yes No Not sure

Please explain: We do not agree the tax and rights systems should be aligned at this stage. This may be revisited in the future but our priority is to ensure that workers in false self-employment and on non-standard contracts have access to the same employment rights as all other workers, as defined in our proposed definition of worker set out in our responses to Questions 2, 12 and 35i.

Question 63 (Chapter 10 page 47 in discussion document)

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 No Not sure

Please explain why/why not: We reiterate that our priority is that the government develops a universal statutory definition of employment, which we propose in our responses to Questions 2, 12, 24 and 35i, which entitles all workers to the same employment rights from day one.

Question 64 (Chapter 10 page 47 in discussion document)

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

Please state: Please see our response to question 63 above.

Do you have any other comments that might aid the consultation process as a whole?

Please use this space for any general comments that you may have, comments on the layout of this consultation would also be welcomed.

We believe that some of the questions posed are with one view in mind and that does not lend itself to an honest and open discussion about this important issue. In some cases we have not made a selection from the options given as we do not consider they properly

represents our response but we have provided an explanation which clarifies our position on the question posed.

We are disappointed that this is now the third consultation in as many years on the issue of employment status with no indication as to how the government will progress the issue.

We consider that there should be provision which allows for class actions to be brought on employment status where those workers are engaged in not materially different circumstances.