

## **MORAY COUNCIL**

### **EMPLOYMENT STATUS**

#### **Guidance and Procedures for Managers**

##### **1.0 Introduction**

It is important that the Moray Council determines employment status to ensure that we are able to identify and apply individual rights and employer responsibilities as well as ensuring that the appropriate rules in respect of tax and national insurance are being adhered to.

It is possible that a person may have a different employment status in employment law from in tax law and as an employer, the Council must work out each person's status in both employment law and tax law. This document covers both and is designed to support and guide managers through the process of determining employment status on behalf of the Council.

##### **2.0 Employment Law**

The main types of employment status are:

###### **2.1 Employee – works under a contract of employment.**

Employee rights include protection against unfair dismissal, statutory redundancy payment, maternity and paternity leave and pay, parental leave, the right to request flexible working, rights under TUPE.

###### **2.2 Worker – any individual who undertakes to do or perform personally any work or service for another party, whether under a contract of employment or any other contract.**

Workers are entitled to some rights and protections, including the national minimum wage, paid annual leave, rest breaks and protections for part time workers.

Agency workers and short term casual workers are likely to be workers, unless they are found to be self-employed

###### **2.3 Self Employed and Contractor – run their own business for themselves and take responsibility for its success or failure.**

Employment Status must be determined on a case by case basis with reference to various legal tests in place as a result of case law, although only a court or tribunal can give a definitive answer.

##### **3.0 Tax Law (IR35 rules)**

IR35 rules affect contractors who supply services through their own personal service companies (PSCs) but who do not meet HMRCs definition of self-employment. The IR35 regulations increase tax and NI liabilities for those individuals who fall under the rules, because they are deemed to be employees for tax purposes, rather than genuine freelancers or contractors.

From 6<sup>th</sup> April 2017, the responsibility for deciding whether or not the IR35 rules apply has moved from the PSCs to the “paying agent”, i.e. The Moray Council. If the rules apply, The Moray Council must deduct tax and Class 1 NICs and pay and report them to the HM Revenues and Customs (HMRC). So the HMRC Employment Status Service (online tool which managers will use) assessment outcome may lead to an invoice being paid through the Council’s payroll and the contract is viewed as paid employment by HMRC.

**This does not mean, however, that the Contractor is classed by the Council as an employee nor will it provide the Contractor with any employment rights, such as paid holidays or sick leave, for example.**

#### **4.0 Scope**

On payroll means that the worker has their PAYE deducted from their income at source and is not engaged using a personal service company (PSC), a consultancy or other intermediary vehicle.

In most circumstances, therefore, The Moray Council employs individuals directly and their PAYE is deducted from their income at source.

Where individuals are engaged through an employment agency, the agency is usually responsible for the deductions.

However, if you have or intend to engage an individual who is using a personal services company (PSC), a consultancy or other intermediary vehicle, you will need to determine whether the off payroll working rules apply, using the HMRC ESS assessment tool and the guidance provided in this document (IR35)

Where you have or intend to engage the services of an individual (not a company) then you will need to determine whether this individual is an employee, a worker or self-employed following the guidance set out in this document. (Employment Status)

#### **5.0 Responsibilities**

Engaging managers are responsible for assessing the status of those they contract with who are within the scope of this guidance as described above. Engaging managers will enter into contracts and make payments to many Contractors that will not be affected by this legislation, for example, payment to companies through a procured contract or agencies. However, some Contractors will be affected, for example, payments made to individuals through an intermediary company. The law has changed which means that some current Contractors will need to be moved from payment through the council’s purchase ledger to the payroll.

Engaging managers need to undertake a review of the contractors within their service areas and check the status of these contractors for both tax (IR35) and employment purposes.

The change in the legislation is effective from 6<sup>th</sup> April 2017. It may be therefore that off payroll payments have been made which should have been classified as on payroll. In such circumstances it will be necessary to retrospectively assess the Contractor and their engagement. If you have any cases where you have paid a contractor on or after 6 April

2017 and, following your assessment, establish their status is incorrect, then you must notify [employmentstatus@moray.gov.uk](mailto:employmentstatus@moray.gov.uk).

In circumstances where you identify that the employment status of the contractor or individual is incorrect, then you must notify [employmentstatus@moray.gov.uk](mailto:employmentstatus@moray.gov.uk)

You will be contacted to discuss requirements for rectifying the situation, including communication to confirm the change to the contractor/individual.

## **6.0 Key Factors to Consider in Determining Employment Status**

Engaging managers should initially consider the nature of the relationship with reference to the following factors. This may not be definitive and in some cases an individual may have some of the characteristics of both. Where this is the case it is necessary to consider the wider picture and consider the employment relationship as a whole to determine whether on balance it is one of employment or self-employment.

<b>FACTORS</b>	<b>Employed</b>	<b>Self Employed</b>	<b>Worker</b>
<b>Substitution</b>	Has to do the work him/herself	Can hire someone to do the work or engage helpers	Work can be carried out by another individual
<b>Financial Risk/Opportunity to Profit</b>	May be paid overtime or bonus payments	Must rectify mistakes/unsatisfactory work in own time and at own cost	Paid in accordance with contractual arrangement
<b>Method of Payment</b>	Paid by hour, week or month	Agrees a fixed price of the job regardless of how long it takes – benefit from doing job quicker or under budget	Paid by hour, week or month
<b>Degree of Control</b>	Someone can tell them what to do, where to do the work, when to do the work and how to do the work. Master/servant relationship	Not supervised, his/her own boss	Supervised for the duration of the contract with the particular organisation.
<b>Mutuality of Obligation</b>	Organisation must provide work and work must be done by individual; can be moved from task to task	No ongoing obligation to provide and accept work; can decide what work to do and where to provide service	No ongoing obligation to provide and accept work other than what is specified in the contractual arrangement
<b>Contract</b>	Contract of service; works set number of hours.	Contract for services; works the number of	Contract for services; number of hours

		hours required to get the job done.	set out in contractual arrangement
<b>Provision of tools and equipment</b>	Tools/Equipment provided	Provides own tools and equipment	Tools/Equipment provided
<b>Exclusivity</b>	Works for one person/company	Regularly works for a number of different people	Works for a number of different people
<b>Length of Engagement</b>	Lengthy period	Number of short engagements	Set period of work.
<b>Part and Parcel of the Organisation</b>	Invited to staff events, receive employee type benefits, e.g. pension	Not available	Not available
<b>Right to Terminate</b>	By giving notice	Comes to an end when contract fulfilled	Comes to an end when contract fulfilled.
<b>Intention of the Parties</b>	While this can be useful it is not decisive as the intention must be supported by the facts of the actual relationship		

In summary it is important to consider the nature of the obligations.

A self-employed person will generally have a genuine, free ability to sub contract or substitute the person carrying out the work. They are in business on their own account, making profit for themselves and to re-invest, providing their own equipment and staff and free to take jobs as they wish.

A worker (as opposed to a self-employed person) is under a greater degree of control and has more of an obligation of personal service i.e. they cannot sub-contract as they see fit BUT a worker is often missing the mutuality of obligation i.e. the employer does not have to provide work and the worker does not have to take it.

By contrast, an employee is under the control of the employer and has both the obligation of personal service AND the mutuality of obligation.

## **6.0 How to determine if the off payroll (IR35) working rules apply**

HMRC has produced an interactive employment status indicator tool ([www.gov.uk/guidance/employment-status-indicator](http://www.gov.uk/guidance/employment-status-indicator)) which can be used to gain an indication of whether a worker is employed or self-employed for tax purposes.

However before using this, the following needs to be considered.

### **6.1 Employee**

Will the work or service be provided by an employee?

Yes - follow normal process for a new start.

No – go to 6.2

## 6.2 Agency

Will the work or service be provided by an Agency?

No – go to 6.3

Yes – will the agency pay the Contractor?

No – go to 6.3

Recruitment of Agency Workers – Guidance will be developed to support Engaging Managers with this process.

## 6.3 Contractor

The Engaging Manager determines the most appropriate procurement route to securing a Contractor and once this process has been completed the Engaging manager will appoint a Contractor. The next question is:

Does the work fall within the scope of HMRC's Construction Industry Scheme (CIS)?

Yes – Follow the normal CIS guidelines.

No – go to 6.4.

## 6.4 Assessing Contractor Employment Status

Before any work is undertaken by the Contractor, the Engaging manager must contact the Contractor and agree when they will assess the Contractors employment status. Engaging managers and Contractors must liaise and agree on answers posed by the HMRC ESS tool. The tool is straightforward to use and guides you through the process.

## 6.5 What to do if the rules apply

If the HMRC ESS tool and the consideration against the above factors result in a determination that the off payroll working rules apply, then the engaging manager must contact [employment.status@moray.gov.uk](mailto:employment.status@moray.gov.uk) with the Contractors Declaration Form having been completed.

## 6.6 What to do if the rules don't apply

Pay the contractors invoices as normal and retain a copy of the Contractors Declaration Form that records and supports the decision that the off payroll working rules don't apply.

## **7.0    Employment Status**

It is important to note that employment status depends on the reality of the relationship, not what the parties say they want it to be. The existence of an employment relationship always depends on the facts of the case and the various legal tests outlined.

### **7.1    Employee**

The two main factors in determining employment status are degree of control and mutuality of obligation. The higher the degree of control over what, where and how work is done, the more likely it is that an employment relationship exists. Where mutuality exists, there is likely to be an employment relationship.

In most cases, a combination of the control and mutuality factors will clearly indicate if an employment relationship exists.

Other factors to consider are those outlined above.

### **7.2    Worker**

Whilst the precise definition used varies slightly between the different rights, a worker is any individual who undertakes to do or perform personally any work or service for another party, whether under a contract of employment or any other contract. It does not matter if the contract is express or implied, verbal or in writing, provided the individual undertakes to perform the work or services personally, for an end user who is not a client or customer. This normally excludes those who are self-employed.

For example, agency workers and short term casual workers are likely to be workers, unless they are found to be self-employed.

One of the important factors in considering whether or not an individual is a worker, is the power of substitution. Where a genuine right of substitution exists, then it is unlikely there will be employee or worker status.

Any queries or concerns regarding employment status should be referred to [employmentstatus@moray.gov.uk](mailto:employmentstatus@moray.gov.uk)

**Human Resources (May 2018)**