

What Should Employers Know Before Responding to the Home Office Consultation on Extending Right To Work Checks?

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Under current rules, a business is only liable for a civil penalty for an individual without permission for the role they are working in if they are hired under a contract of employment.

As part of its plan to clamp down on illegal working, the government published an [illegal-working impact assessment](#) (Impact Assessment) in May this year in relation to proposals to extend that liability to a wider part of the labour market to include workers, service providers matched with customers via online platforms, and individual subcontractors. Prior to these changes coming into force, the Home Office has launched a consultation, which is open to employers across the UK until 10 December 2025. Responses to the consultation are intended to inform the preparation of new Home Office guidance and the statutory code of practice that will support the new rules. Further details can be found on GOV.UK's [Extending the Right to Work Scheme](#) webpage. The Impact Assessment document is worth a read before you respond to that consultation. The lack of clarity in the document suggests a flawed understanding on the government's part of how difficult its proposals are to digest.

Why Is This Important?

The introduction to the consultation indicates that the Home Office's primary focus is businesses that use gig-economy and zero-hours workers (particularly in sectors such as construction and food delivery), but in reality, the changes in legislation will affect any business with a contingent work force, regardless of sector. We therefore recommend that all employers consider the issues highlighted below and, if they are potentially affected, that they engage loudly and clearly with the consultation to ensure that their concerns are heard.

What Are the Key Issues?

- **Is the Home Office asking the right questions?**

The proposed changes will have a significant impact on employers with a material contingent workforce because right to work checks will need to be carried out on a wider range of their workers, not just employees. This is going to require extra resources, firstly to determine who falls within scope for the checks and then to carry out the checks, if required. However, the consultation questions do not appear to address the key issues. They range from the mundane – "How many right to work checks did you conduct in 2024?" – to the unanswerable – "Do you think the change in legislation will mean your business model will now be brought into scope of right to work checks?" – and to the outright incomprehensible – "Do you agree that the Home Office should determine liability within a supply chain or where there is a chain of contracts for the provision of work or services, by focusing on the point of failure that has allowed illegal working to take place?" Our main concern is that the consultation does not set out the draft legislation or a sufficiently detailed and clear explanation of who will be in scope and who will not. Respondents cannot therefore be expected to provide an informed view on how the changes will affect them.

- **How are businesses expected to navigate the distinction between workers (who will be subject to checks) and the genuinely self-employed (who will not)?**

The underlying objective of extending the right to work scheme is obviously a worthy one – to limit the scope for side-stepping proper right to work checks by fiddling with the contractual basis on which individuals are engaged. However, it is a fundamental plank of good law that it should be clear to those affected when it applies and when it does not, and that is the last thing that can be said in relation to the question of worker status.

One of the questions the Home Office should be asking well before its guidance is prepared is therefore a much more basic one – "How will you tell the difference between workers and the genuinely self-employed?" – because this is where the principal problems with the changes will lie. That is easy, you may think – I will look at the definition of "worker" in Section 230(3)(b) of the Employment Rights Act, which says that a worker is someone who has an express or implied, oral or written contract with me under which they work personally for me, unless I am a client or customer of any business undertaking carried out by them (and the draft legislation includes a similar exclusion). That seems straightforward enough. However, assuming that the individual providing their services has a direct contract with you, the key question then becomes whether they are doing so as part of a profession or business, or just on their own account. They will likely insist that it is the former and that they are self-employed because they want you to pay them without deduction of tax, but how will you reach an informed decision on their status without carrying out a detailed assessment in each case?

The consultation exercise appears to have overlooked entirely the issue that the line between worker and genuinely self-employed is extremely thin and can depend on relatively minute facts, the existence or relevance of which could easily escape the average employer. Dozens of decided cases, including at the highest levels within the UK legal system, have failed to come up with a definitive test for what separates a worker from the genuinely self-employed.

So, a business that uses outsourced labour faces a nearly impossible choice. It has to decide between (i) maintaining the line that its associates are genuinely self-employed and so their right to work is not its responsibility on the one hand, or (ii) doing the checks as a precaution to avoid a fine of up to £60,000 (or criminal prosecution in some cases), but thereby tacitly accepting that those engaged on a self-employed basis are workers, which then pulls down upon itself all sorts of liabilities in relation to holiday pay, auto-enrolment contributions, minimum wage, etc., that it could perhaps otherwise have avoided.

If this classification issue is not recognised by the Home Office, we could end up with businesses feeling obliged to carry out checks on any individual who provides any sort of service for payment regardless of status – plumber, builder, taxi driver, etc. This may well not be the Home Office’s intention, but it is the logical extension of these new requirements unless there is the clearest line drawn in its guidance between who is covered and who is not.

One possible source of assistance here could be the HMRC online CEST test (or something similar). If you enter a description of how an individual will work in practice, then in all but the more difficult cases (approximately 1 in 6), CEST will give you a steer as to whether, for tax purposes, that individual can be treated as self-employed. Tax law only recognises employed or self-employed and does not have the intermediate status of worker. However, you could still probably rely on a CEST self-employed outcome as an indication that the individual is not a worker. Conversely, if CEST tells you that you should be taxing that individual at source, your safest bet is to assume that they are a worker for the purposes of these new rules.

- **How are gig economy workers defined?**

The consultation document defines the gig economy as “where employers and employees exchange money for labour on a per task basis usually via digital platforms that link workers with short-term tasks.” This by itself demonstrates the extent of the government’s confusion – the whole basis of the gig economy is that the parties are not employee and employer. If they were, we would not need these new rules. Further, the draft legislation brings into scope certain workers engaged as individual service providers matched to customers via an online matching service. The Impact Assessment says that this will pick up food delivery riders, but that demonstrates a fundamental misapprehension around how such services operate. The definition of “online matching service” in the draft legislation is “a ... business ... which provides an online service by which potential clients or customers can submit enquiries for the purpose of being matched with suitable service providers.” By this wording, that matching service will be deemed (for these purposes) to employ any individual whose details it provides to those potential clients or customers. But when you order your home-delivery pizza, (i) you do not submit an enquiry; (ii) you are not a *potential* customer; (iii) you are not provided with any details of the service provider; and (iv) you get no choice in relation to the individual service provider.

As the Impact Assessment itself accepts, your pizza delivery rider may well be a worker, but will not fall under the online matching service rules in the draft legislation that the government says have been specifically designed to catch them. Perhaps one early question for the consultation process would be how the government could not know that.

- **Will businesses using agency workers be affected?**

In explaining the changes, the consultation says, “The extension of the Right to Work Scheme will ensure those who engage individuals as casual or temporary workers under a worker’s contract, individual sub-contractors, and online matching services (that provide details of service providers to potential clients or customers for remuneration), are required to carry out right to work checks. The associated civil and criminal sanctions for non-compliance will be made applicable in these circumstances.”

There is no reference to the end users of agency workers being in scope in the draft legislation or consultation documentation. A frequent question since the changes were first announced in March this year has therefore been “Do the changes mean we will need to carry out our own checks on agency staff?” Agency workers are not generally considered to be working under a worker’s contract for their end user, and so, at first glance, the answer to that question is no. However, there is wording in the draft legislation that appears to extend liability for an individual personally providing work or services to parties who do not have a contractual relationship with the individual or even any knowledge that they are providing the work or services. It is not clear how this will work in practice and whether it is intended to capture to end users of agency workers.

Much of the commentary around these changes (including the Impact Assessment and the [statement to Parliament](#) made by the minister of state for border security and asylum on 29 October announcing the consultation) suggests that the government does want end-user businesses to carry out checks on agency workers, even if those checks are also conducted by the agency. Where the individual has a contract with the agency, this would seem a logistical nonsense. It would mean that every time that individual was sent off on a new assignment, of any length and potentially multiple times per year, the end user would have to carry out those same checks from scratch. Paragraph 17 of the Impact Assessment says that “A large proportion of employers using agency workers said the agency would be responsible for conducting right to work checks. This points to gaps in understanding and risks in areas this policy initiative is seeking to address.” Aside from the fact that agencies that employ workers are, in fact, currently responsible for conducting right to work checks, it is not clear whether this paragraph indicates the intention to extend liability to end users of agency workers or simply to agencies that engage individuals as workers (in addition to those who engage them as employees).

However, given the purported focus of the changes upon the engagement of otherwise unregulated individuals and the absence of any clear statement in the Impact Assessment, we have to take the view, on balance, that end users will *not* be required to carry out right to work checks on individuals who are either employed by or otherwise contracted with established employment agencies. That said, it will be a wise precaution for those end users to include in their staffing agency agreements (as many already do) an express term that the agency will carry out right to work checks on everyone it supplies and that it will provide the end user with such evidence of that as it requests.

It is possible, of course, that the government is genuinely still trying to determine its approach to these issues, and the current consultation is more of a data gathering exercise to complete a further impact assessment. However, if the Home Office genuinely intends to take into consideration employers' views on the impact of the changes, it needs to clearly set out who is in scope and liable, with multiple worked examples, and perhaps provide the equivalent of a CEST tool for immigration purposes. There should then be a further consultation exercise seeking views on how employers will fulfil their responsibilities, before anything is set in stone.

We are in the process of carrying out a detailed analysis of the draft legislation and will be preparing a response in conjunction with our clients and contacts. Please do get in touch if you are concerned about the impact of the new checks on your business (including the uncertainty around agency workers), you would like advice on preparing your own response, or in order to collaborate with us on this so we can include your views in our response on an anonymised basis (not least because some businesses will be reluctant to share information that could expose them to Home Office scrutiny).

If you need support or have any questions relating to UK business immigration matters, please contact your usual team member at the firm, or Annabel Mace, partner and head of UK Business Immigration.

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