

THE "GIG ECONOMY" – UNDER ATTACK?



New technology combined with new business models has led to a rise in workers doing short-term, casual work and the growth of what has become known as the "gig economy". The growth of this sector has led to concerns that up to half a million workers in the UK may be wrongly classified as self-employed, meaning they are being deprived of employment rights they would otherwise be entitled to, including rights to be auto-enrolled into a workplace pension scheme. Moreover, the Chancellor indicated in early 2017 that the gig economy is beginning to affect budget revenues, as incorrectly classified self-employment and casual work significantly reduces the amount of tax being paid. We look at the recent developments in the area, and consider what might be in store in respect of pensions and tax legislation.

The "changing economy"

On 1 May 2017 the House of Commons Work and Pensions Committee (**Committee**) published a critical report following its inquiry into the sector. Its findings included:

- ▶ That the current ways of categorising workers are "creaking under the weight of the changing economy"
- ▶ Increasingly, some gig economy companies are using a "bogus" self-employment model to evade their legal obligations and maximise profit through the avoidance of National Insurance Contributions (NICs), pension auto-enrolment obligations and the Apprenticeship Levy
- ▶ Recent cases involving drivers, couriers and plumbers, whilst extremely fact-specific, have shown the "myth" of self-employment frequently fails to stand up in court when challenged, despite the use of carefully constructed terminology by gig businesses designed to present a picture of independent self employment
- ▶ An assumption of "worker" status by default would protect workers and the public purse. Companies wishing to deviate from this would need to present the case for doing so and would also bear the burden of proof from a tax perspective
- ▶ The self-employed form a large and growing part of the UK labour force, but this presents fundamental challenges for the welfare state. To address this (with David Cameron's "tax lock" out of the way) the incoming government needs to look to equalise self-employed and employee NICs.

What is worker status?

The concept of worker status under the legislation is effectively to lower the "pass mark" so that where an individual is, on balance, a self-employed contractor but there are some factors which point towards employment status (e.g. an element of

personal service), they qualify for minimum employment protections such as the national minimum wage, paid annual leave and "whistleblowing".

It is unclear precisely how an assumption of worker status would work. Presumably the Committee envisages that Employment Tribunals would still be the forum in which businesses would present their case to deviate from the default, however individuals might then have much more confidence in making a claim with the starting point under law effectively on their side.

Future of auto-enrolment

Separately from the Committee's inquiry, on 12 December 2016, the government announced an inaugural review of auto-enrolment. This is with a view to encouraging more people to save into a workplace pension – securing their own financial future, and also alleviating the expected burden on the welfare state. Part of the review was intended to consider how the growing numbers of self-employed people within the gig economy can be helped to save for their retirement.

The possibilities include:

- ▶ automatically deducting pension contributions from self-employed contractors through new digital tax accounts which are currently being rolled out – potentially making use of NEST, the National Employment Savings Trust, which is the workplace pension scheme set up by the government when auto enrolment was first introduced or
- ▶ bringing businesses who engage self-employed contractors within the scope of the existing auto-enrolment regime through bespoke legislation i.e. without treating those contractors as workers for auto-enrolment (or any other) purposes.

Future of IR35

The developments described above also interlink with a broader effort to combat tax avoidance in the self-employment sector.

The intermediaries legislation (often referred to as IR35) was introduced a number of years ago to prevent workers avoiding employee income tax and national insurance contributions by supplying their services through an intermediary and paying themselves in dividends. However the Government has long had concerns about widespread non-compliance with IR35, meaning that over time, further layers of legislation (such as that covering so-called "managed service companies") have been added to catch persons working via intermediaries.

The latest change came into force on 6 April 2017, which requires public sector bodies that contract with personal service companies (and some other vehicles) for the supply of workers to consider whether employment status does in fact apply.

Where the public sector body pays the personal services company directly, it is required to deduct employee tax and NICs from the payments they make to the service company accordingly. In such circumstances, the changes also oblige the public sector employer to account for employer NICs in place of the service company.

Where the personal service company is paid by another UK-based person, such as an agency, the responsibility for accounting for PAYE/NICs falls instead on that other person, assuming the public body has complied with the relevant notification requirements.

Although the new rules will currently only apply for intermediaries contracting with the public sector, it would be unwise for private sector engagers to ignore it. Whilst, typically, engaging workers through intermediaries does provide some additional comfort on PAYE/NICs risk versus engaging them directly on terms that they are self-employed, the position is not absolutely clear cut. Also, it would not be entirely surprising were the scope of the new rules to be extended beyond public sector engagers.

Why does it matter?

If the Committee's recommendation for an assumption of worker status is taken forward, it will be much more difficult for gig economy companies to characterise staff as self-employed. They will face increased costs arising out of national minimum

wage compliance and being brought within the scope of the auto-enrolment regime. They may need to pass these on to the ultimate consumer of the gig services, although the Committee's view was that business models would still be viable, it was just that businesses might simply be less profitable.

Whilst the high-profile growth of the gig economy has brought worker status issues to the fore, the question of whether an individual is employed or self-employed is not a recent issue. The evolution of the IR35 legislation, most recently through the April 2017 changes, is certainly something for workers and businesses in the gig sector to take heed of, but in time it may also impose extra compliance burdens on companies outside of that sector that regularly engage consultants through managed service companies.

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