

Financial Procedure Note 2

Employment Status and Payment for work

Issued by Director of Finance
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This Financial Procedure Note provides additional guidance and supplementary information to the University Financial Regulations.

The requirements set out in this document are drawn from Financial Regulations which may be updated from time to time. The requirements of Financial Regulations supersede these requirements.

Compliance with these Financial Regulations is mandatory and non-compliance is liable to be treated as a disciplinary offence.

Financial Regulations apply to:

- all staff of the University
- all budget holders meaning any member of staff who has been given delegated budgetary authority or funds to manage, including staff who hold budgets by virtue of their office, such as Executive Deans and Heads of Departments/Sections as well as individuals to whom specific budgets have been allocated.

1. **General principles**

1.1 This guidance applies to situations where it is proposed that payment will be made in respect of services provided by an individual or personal services company. Any persons involved in the recruitment (either formally or informally) of individuals for work or the delivery of tasks/projects via an individual or personal service company must read and comply with the guidance.

1.2 The purpose of this guide is to set out:

- Why determining employment status correctly for payments to individuals is so critical
- What factors determine employment status
- What the University procedure is for determining employment status, including managing IR35.
- Identify certain key staff groups that have a pre-defined status

2. **Importance of determining the employment status**

2.1 The University is legally obliged to determine the employment status of any individual where it is proposed that payment will be made in respect of services provided by an individual or personal services company.

3. **Financial risk**

3.1 The cost to the University of making an incorrect determination can be a significant amount on top of the fee that has already been paid. If the University is deemed to not have applied the correct deductions, HMRC will consider the University liable for any underpaid Tax or National Insurance from the individual and the associated employer costs will then be added. Penalties will then be applied on that amount:

3.2 For example:

- if a penalty arises because of a lack of reasonable care, the penalty will be between 0% and 30% of the extra tax due
- if the error is deliberate, the penalty will be between 20 and 70% of the extra tax due
- if the error is deliberate and concealed, the penalty will be between 30 and 100% of the extra tax due

4. **Parity of esteem**

4.1 By establishing the employment relationship the University can be assured that all individuals are being treated fairly and receive their employment rights and contractual entitlements, if applicable. Any individual coming into the University will be subject to a transparent, uniform process of employment status assessment that will ensure compliance with legislation. This approach minimises the risks to the University associated with incorrect determination of employment status.

5. **Responsibilities**

5.1 Any individual who is engaging a person to deliver a task for payment is responsible for ensuring the employment status is considered, defined and communicated to the individual prior to the work being completed. Once status is properly determined the University compliance with UK Visa and Immigration legislation will need to be adhered to for any person undertaking work with the University. No person can start work unless a valid Right to Work (RTW) check has been undertaken prior to their employment start date.

The individual cannot determine or choose the employment status; it is the representative of the University who must make that determination.

6. **Employment Status**

6.1 Employment status: determining the characterisation of an arrangement between an employer and individual for legal purposes. Employment status is not the choice of the individual or employer but defined by what happens in practice and the relationship that develops.

6.2 There are three main categories of employment status:

1. Employee
2. Worker
3. Self Employed

6.3 **Employee**

6.4 An employee will work to the terms within a contract of employment, and will carry out the work personally. An employment contract may exist when terms such as pay, annual leave and working hours are agreed. The contract doesn't have to be written down to be valid. It is best practice to record the main terms and conditions of employment in writing. The employee must accept and intend to carry out the work offered and the University must offer ongoing work until the contract terminates.

6.5 Employees are entitled to a wide range of employment rights, including all those to which a worker is entitled. Employees and employers must adhere to a contract until it ends (e.g. by an employer or employee giving notice to terminate or through summary dismissal without notice) or until the terms are changed (usually by agreement between the employee and employer).

6.6 Examples of employee rights include:

- written statement of particulars
- itemised pay slip
- the national minimum wage/national living wage
- holiday, maternity and paternity, redundancy pay etc
- the right to request flexible working hours
- the right not to be discriminated against because of a protected characteristic
- the right not to be unfairly dismissed

7. **Worker**

7.1 A worker will have an agreement to carry out the work personally. However, unlike an employee, the worker does not have to accept work, nor do we have to offer work. Where an individual is offered work, they are able to turn it down without this affecting work offers in the future. The work they undertake is occasional with significant breaks between engagements and does not constitute mutuality of obligation.

7.2 Workers could include those who undertake:

- casual work
- agency work
- freelance work
- seasonal work

7.3 Workers are entitled to some employment rights including:

- the national minimum wage
- holiday pay
- protection against unlawful discrimination
- the right not to be treated less favourably if they work part-time
- the protection of health & safety legislation including those afforded by the Working Time Regulations

Both of these categories have tax and NI deducted by the employer.

8. Self Employed (Contractor, Freelance, Consultants)

- 8.1 A self-employed person will run their own business and take responsibility for the success of the business. Self-employed people are more likely to be contracted to provide a service and the University will have little day to day control over the work. They will not be paid through PAYE and do not have the same employment rights and responsibilities as employees or workers. However, a self-employed person:
- still has protection for their health and safety on a client's premises
 - in some cases will be protected against discrimination
 - will have their rights and responsibilities set out in the terms of the contract with their client
 - in general will not have right to holiday pay
 - They are responsible for paying their own tax and NI

Determining the correct employment status is not a matter of choice but a legal determination based on all of the attributes of the relationship. Therefore the employment status must be determined prior to the engagement of an individual.

9. Factors in determining employment status

- 9.1 The main four factors that help determine employment status are:
1. Control
 2. Integration
 3. Mutuality of obligation
 4. Economic reality

This list is not exhaustive but provides the key points for how a relationship should be assessed for employment status. Any challenge would review all elements of the arrangement to determine the status as it cannot be decided on one element alone. The assessment would need to reflect the actual engagement terms. This would include what had been documented in the contract for services but also what would actually happen in reality.

Control

- 9.2 Control is the extent to which the employer can decide what work should be undertaken and how:
- could the individual choose whether to do the work themselves or can they send someone else?
 - in reality would the University accept another person performing the services without going through a selection process?
 - can the individual choose how, when and where to do the work? Are they required to attend to a schedule determined by the University?

Integration

- 9.3 Integration is the extent to which the individual is part of the organisation:
- are they responsible for hiring other people and setting their terms of employment?
 - are they excluded from internal company matters such as corporate training and staff meetings?
 - do they have direct reports or budgetary responsibility?
 - do they have a University email account?
 - are they free from having action taken against them using the University disciplinary procedure?
 - are they excluded from University benefits and pension schemes?

Mutuality of obligation

- 9.4 Part of mutuality of obligation is the extent to which the University is required to offer work and whether the individual is expected to accept it:
- does the University offer work only if and when it is available?
 - can the individual decide when they will work and can they turn down work when offered?

Economic reality

- 9.5 Economic reality refers to the extent to which the individual bears the financial risk:
- is the individual responsible for meeting the financial losses as well as taking the profits?
 - is correcting unsatisfactory work done at their own expense?
 - do they send an invoice to the University in order to be paid?
 - is their payment fixed for a job (including materials and labour)?
 - does the University provide the main items of equipment needed to do the job?
 - does that individual work for a range of different organisations?

10. IR35 (Off payroll working, intermediaries' legislation)

- 10.1 Sometimes an individual (sole trader) who is self-employed will have registered as a personal services company; this previously meant that the University would have engaged a company to deliver an interim role or project; a role that would normally be an employee role, but as the University engaged a company, not an individual, it would pay the company for the services. This bypasses any obligation on the University to assess an individual for self-employment and the individual would pay themselves directly from their personal services company. HMRC sees this as disguised employment.
- 10.2 Changes to the way the public sector engages personal services companies were introduced in April 2017. Under the new rules certain personal services companies are to have tax and NI deducted from them via the University payroll. This does not apply to all personal services companies only those which fall into scope of IR35.

Working out the employer and individual relationship

- 10.3 When deciding if IR35 applies to a contract it is important to establish what the underlying relationship (the employment status) is between the University and the supplier for each contract or engagement. It may be that for one engagement the arrangement will fall outside the scope of IR35 and for another, within it.
- 10.4 There is usually a contract between an intermediary and the client, either directly or through another party such as:
1. a staffing agency
 2. a recruitment agency
 3. an employment business
- 10.5 It is the facts and not the labels which determine whether the engagement is within the scope of IR35. The principles of whether an engagement or contract is within IR35 are based upon the same principles as those which determine self-employment.

Examples of scenarios

Example 1: a lecturer has retired and the position needs to be replaced. It is quickly determined that this is an employee due to the nature of the relationship – there is an on-going requirement where the University commits to providing regular work and the individual is expected to commit to providing it. Therefore the normal recruitment processes are followed.

Example 2: a number of windows need to be replaced and a Glazier is required. This is not a permanent role at the University. The work needs to be undertaken by a specialist and the skills are not available within the University. There is no further work to be offered. The work will be carried out under the supervision of the specialist not the University. This would not fall under the employee or worker definition. This work is self-employment.

The examples above are clear cut in the interpretation, but this is not always the case.

Example 3: a member of staff leaves their University role but there is a requirement for this person to share their knowledge and expertise on an on-going basis for a period of time. This type of arrangement is not uncommon but it is more complicated to determine the employment status. The on-going requirement is related to their previous full time employment. Therefore if the need is on-going, even for a small fixed period, this would indicate an employer and employee relationship. If the requirement of the individual is significantly different to their old substantive post, and does not fit within the employee or worker guidance, then use the HMRC employment status tool to help define the relationship. If any doubt exists always apply caution and assume an employment relationship exists.

Example 4: a permanent position has remained vacant after the University has been unable to recruit a permanent member of staff. There is an on-going campaign to recruit but this may take a few months. In the meantime the University has engaged an interim to fill the vacant position and take on the responsibilities of the role. The individual is providing their services through their own personal services company and wants to submit an invoice. In this instance the individual is undertaking an employee role within the University. Therefore this would fall into scope of IR35. The HMRC employment status tool should be completed to confirm the arrangement is within scope and Tax and NI will be deducted as per the HMRC guidelines.

Example 5: the University requires some training to be delivered to a group of staff on a new piece of machinery. The machinery is a specialised piece of equipment. The University identifies an individual who delivers training on this equipment. The individual is a freelancer/sole trader and does not have their own personal service company. The training would be written and delivered by this person but on the University campus. The person would be paid an agreed amount to write the training, prepare handouts and deliver the course. Any changes to the training or amendments to handouts would not incur further payment; they would have to ensure it is correct and ready to deliver. The HMRC employment status tool should be completed to confirm the arrangement is classed as self-employed as per the HMRC guidelines. This outcome would then be attached to the supplier form and the contractor would be paid by submitting an invoice.

Example 6: A lecturer, already employed by the University, has been asked to deliver a lecture on their specialist subject in another area of the University. The lecturer already has an employment contract, the work being requested to do is directed by the University. This is indicative of an employment relationship and is directly linked to their employment at the University. This would not be classed as self-employed.

Example 7: An employee of the University has been asked by the department to take some photographs of an event the department are holding. The employee has an interest in photography and runs their own photography business outside of the University. This request for services has no relation to their employment with the University. The services provided would be under the direction of the individual and not indicative of an employment relationship. Therefore, in this instance the employment status could be classed as self-employed.

To assist you in the decision making a number of tools are available:

[Employment status decision tree](#)

[Visiting Lecturer/Guest Speaker decision tree](#)

[FPN 2a IR35 guide](#)

[Causal payroll or University Monthly payroll Decision tree, including flow chart](#)