Employment status: where are we now?

Employment Tax | General Features | Personal tax

27 January 2022

Employment status is at the core of the tax system. It determines the taxes that a worker, and the business the individual works for, must pay. Yet we know that the tax system, or sometimes HMRC administration, can effectively encourage some engagers to offer work on falsely self-employed terms.

In response to some concerns and recommendations made about the employment status regime in the Matthew Taylor 'Good Work' Report, the government issued a consultation in February 2018 (tinyurl.com/yv5dz2x3). This considered whether to legislate to improve the clarity of the employment status tests and whether to align the employment status regimes for both tax and employment law purposes. LITRG's response, which focused on false self-employment, can be found at www.litrg.org.uk/ref315. Over three years later, the consultation is still labelled with 'feedback being analysed'.

This is hugely disappointing, given the fact that we continue to see low-income workers grappling with false self-employment, particularly (in LITRG's experience) in the construction industry and social care.

False self-employment continues to exist, in part, because many workers think that self-employment is a choice rather than something decided by fact. Particularly in the construction industry, workers may be told that because they have a Unique Taxpayer Reference (UTR) from previous periods of self-employment, their position is temporary or lacks permanency, or because they provide their own small tools, they are self-employed.

Worryingly, there are probably some people who are falsely self-employed in the construction industry who do not even realise that they are being treated as self-

employed until something goes wrong; for example, being ineligible for the Self-Employed Income Support Scheme (SEISS) grants because they completed the Employment pages and not the Self Employment pages of their Self-Assessment tax return. Factors unique to the construction industry – self-billing invoices and the Construction Industry Scheme (CIS) (being given 'payslips' and having tax deducted at source) – mean that unscrupulous engagers can more easily disguise false self-employment.

In social care, the position (which we raised ourselves in September 2021's edition – www.taxadvisermagazine.com/se_livein_carers) is neatly summed up in a recently published 'Worker voices in the social care sector' research report (tinyurl.com/59bdynke) commissioned for the Director of Labour Market enforcement:

> 'The use of self-employment and introductory platforms in the care sector without adequate safeguards and regulation is concerning. While some of the care workers we interviewed are genuinely self-employed now, their previous experiences and the account of other participants suggest that bogus self-employment might be a significant problem in the sector, particularly in live-in care, facilitated by online platforms and introductory agencies.'

There are undoubtedly other sectors affected too. Low paid workers, who will not usually challenge engagers even if they have an inkling that something may be wrong through fear of losing the work, have limited access to recourse through the courts. So they must rely on effective state enforcement to help protect them from false self-employment. However, the problem here is that there is no body looking at the overarching issue of 'status' from an employment law perspective. Moreover, from a tax law perspective, in our experience, some engagers who take part in this practice seem to consider it unlikely that they will ever be challenged by HMRC.

This is because there is no obvious route for workers to report 'false self-employment'. There seems to be no clear protocol in place for dealing with those who telephone HMRC presenting false self-employment. There are minimal risks of HMRC investigating engagers on a self-starting basis (particularly in the construction industry, as tax is already being paid via CIS). A more proactive and visible approach to enforcement would act as a serious disincentive to those engagers seeking to gain a tax advantage and could thus cut down on numbers circumventing employment rights legislation.

We have raised these issues with HMRC, which we hope lead them to explore what more can be done in this area – without waiting for the employment status consultation to report.

We understand that HMRC would like to gather some further evidence on the scale of the problem and that they would like to further explore the insight and information LITRG have given them (around causation, sectors involved, etc.) with other stakeholders. We would be interested in hearing from any members in practice, if you have seen false self-employment in your work, e.g. when preparing CIS tax returns (which we will then share anonymously with HMRC), as this could further bolster the evidence base and help us move the issue forward.