TUC
Changing the world of work for good

Taylor Review: Employment Status

TUC response to the BEIS/HMT/HMRC Consultation

Introduction

The Trades Union Congress (TUC) is the voice of Britain at work. We represent more than 5.5 million working people in 48 unions across the economy. We campaign for more and better jobs and a better working life for everyone, and we support trade unions to grow and thrive.

We appreciate the opportunity to respond to the BEIS/HMRC/HMT consultation on employment status following the Taylor Review of modern employment practices.

The issue of employment status has long been a problem for workers and their employers.

The current rules on status are complex and confusing. The current uncertainty means that individuals can miss out on their rights at work. It is also all too easy for employers to devise sham arrangements so as to deprive workers of their rights. It is not uncommon for unscrupulous employers to tell zero hours contract workers and agency workers that they have no rights – even though the legal reality may be very different. Employers also seek to avoid their employment and tax obligations by misclassifying staff as self-employed.

In recent years, the issue of the employment status has become more complex, with the growth in zero hours working, agency worker and platform working. Thanks to several union-backed cases, the courts and tribunals have rightly concluded that staff employed in the gig economy have many of the features of standard employment relationships and are therefore entitled to rights. These developments are welcome. But this does not mean that the issue of status is finally resolved. The problems relating to employment status are also not limited to the so-called gig economy but can be found across more traditional workplaces and sectors.

The current three-tier approach to employment rights means those in insecure work, who are most in need of protection, are the very people who miss out key workplace rights, because they don't qualify as employees. As a result, they can be hired and fired at will. They miss out on parental rights so find it difficult to balance work and family life and are not entitled to redundancy pay if work dries up.

Key TUC views in summary

The TUC believes that there is a compelling case for the government to reform employment status rules so they reflect the reality of the workplace and raise the floor of rights for working people.

The government should adopt an ambitious programme of reform:

Modernising the rules on employment status in employment law

The TUC believes:

- All workers including agency workers, zero hours contract workers and casual workers, should be entitled to the same floor of rights currently enjoyed by employees.

- A new single and broad 'worker' definition should be adopted in UK employment law. The new worker test should determine access to all statutory rights. The government should establish a commission, comprised of representatives of the social partners and employment lawyers, to advise on and devise the new 'worker' definition.

In the interim, the government should:

- Extend key employee rights to all workers, including family-friendly rights, trade union rights and job security protections.
- Ask ACAS to draw up a statutory Code of Practice which provides clearer guidance for employers, union reps and workers on existing status rules.
- Crack down on bogus self-employment, by creating a statutory presumption that all individuals will qualify for employment rights unless the employer can demonstrate they are genuinely self-employed.
- Promote the key role played by unions in representing workers, by creating rights for unions to access workplaces to tell people about the benefits of union membership and to negotiate for better pay and conditions.

Review and reform of the tax and benefits system

- The government should also conduct an in-depth review of the tax and welfare system with a view to removing the financial incentives for employers to use self-employment, or agency, zero hours and short-hours working and to ensure that all forms of employment are fairly taxed.
- Those who are 'not employed' for tax purposes, whilst not qualifying for full employment protection, should still benefit from an improved safety-net of work-related benefits, including statutory maternity, paternity and adoption pay, statutory sick pay and auto-enrolment into pensions.

Recommendations from the Taylor Review

The TUC however does not support several recommendations on employment status set out in the Taylor review on modern employment practices.

We **do not** agree that:

- The existing common law tests on employment status in employment law or tax law should to be codified in legislation. Codification would restrict the ability of the courts to adapt and apply the tests to new emerging forms of work, including platform work.
- Workers should be renamed as 'dependent contractors'. This proposal would create further legal uncertainty.
- The status tests used in tax law and employment law should be aligned.

Responses to the consultation questions

Raising the floor of rights for all

Question 1 (Chapter 4, page 21 in discussion document)

Do you agree that the points discussed in this chapter are the main issues with the current employment status system?

No

Are there other issues that should be taken into account?

Yes

The TUC is disappointed by the narrow focus of the current consultation.

Raising the floor of rights for all workers

The proposals outlined in the Taylor Review and in this consultation will do little to improve the rights of working people.

It is welcome that the Taylor Review recommended that the right to a written statement and to itemised payslips should be extended to all workers. But these rights - by themselves - will not change the balance of power in the workplace or provide individuals with increased choice over the type of work available to them.

Proposals to create a right to request a stable contract would not amount to a genuine right or guarantee the hours and regular income which workers and their families need to manage their life away from the workplace and to budget for household bills.

The TUC believes that the government should modernise the law on employment status to reflect the reality of working life. The floor of rights should also be raised for all working people.

Currently, in the UK, the range of employment of rights to which an individual is entitled varies substantially depending on whether they qualify as an 'employee', a 'worker' or as 'self-employed'.

The self-employed have few rights at work. They are covered by health and safety standards and protection from discrimination in some circumstances. But even these limited rights have been eroded in recent years.

Those classified as 'workers' fare slightly better, qualifying for the right to be paid at least the national minimum wage, holiday pay and working time rights, protection from discrimination and some union rights.

But, core protections including job security rights, family-friendly rights and protection from arbitrary treatment are reserved for 'employees', who also tend to be entitled to benefits associated with stable employment, such as enhanced sick pay and pensions.

As a result, those in insecure work, who are most in need of protection, are the very people who miss out on workplace rights. The TUC estimates that least 1.8 million workers are at risk of losing out on key employment protections because they fail to qualify as employees. As a result, they can be hired and fired at will and have no guaranteed hours at work. They miss out on family friendly rights so find it difficult to balance work and family life and are not entitled to redundancy pay if work dries up.

Summary of key TUC recommendations

The TUC believes the government should adopt an ambition approach when reforming employment status rules. Our key proposals can be summarised as follows.

a) a single worker' test

The TUC believes that the current three tier approach in employment law should be replaced by a binary system.

All workers should be entitled to the same floor of rights currently enjoyed by employees.

To this end, the government should establish a commission on employment status comprised of representatives from the social partners and employment lawyers, to advise on and devise a new single statutory definition of 'worker'. This new 'worker' definition should determine who is entitled to all statutory employment rights.

The new 'worker' test should be defined in broad and general terms to ensure that:

- It spans the myriad of employment relationships existing in the UK
- It can anticipate and accommodate new and emerging forms of employment
- It prevents employers from devising new contractual devices to avoid their employment responsibilities.

b) Extending 'employee' rights to all 'workers'

While the commission is undertaking its work, the government should take early action to extend key 'employee' rights to all 'workers', including rights to:

- A written statement of pay and conditions, as recommended by the Taylor Review
- Paid time to attend ante-natal appointments
- Maternity, paternity and adoption leave ensuring that parents so they have a right to return to their job after having a family
- Statutory redundancy pay, ensuring all workers can pay their household bills and access training when looking for another job and are protected if their company goes insolvent.

- Paid facility time for union workplace reps, safety reps and learning reps, so all workers can benefit having a voice and effective representation in the workplace
- Statutory or contractual notice before a contract can be terminated
- Protection from unfair dismissal

c) Protecting agency workers

The government should also ensure that agency workers are properly protected when at work and benefit from the same decent floor of rights as employees.

Too often, agency workers are denied basic rights because of the tripartite nature of their employment. For example:

- Agency construction workers, blacklisted for their trade union activities, have been unable to take successful claims against construction firms, under the 2010 Blacklisting Regulations because they could not establish they had a contract with the end user.
- Agency workers are unable to claim for unfair dismissal against hirers, even though it is usually the end user who decides when their assignment should be terminated. The courts have decided agency workers do not have a contract with the hirer and therefore do not qualify as their employee, even where they have worked in the same organisation more than two years. Similarly, agency workers may find it difficult to prove they are an employee of the agency due to the lack of control or direction over their work.
- The government should legislate so that agency workers are deemed to be the employee of the end user for the purposes of statutory employment rights and that the end user should be held jointly and severally liable with the agency for any breaches of employment law.

d) Ending bogus self-employment

The government should crack-down on bogus self-employment, including by:

- Creating a statutory presumption that all individuals will qualify as employees unless the employer can demonstrate in an employment tribunal that they are genuinely self-employed. This approach already applies in national minimum wage legislation.
- Penalising employers who misinform workers about their employment rights or seek to devise contractual arrangements to avoid their employment responsibilities.
- Asking Acas to prepare a statutory code of practice which clarifies employment status rules and provides clear guidance for employers, individuals and unions.

Recognising and promoting the role of unions

The government should recognise and support the role that unions play in:

- advising working people about their rights
- helping them to enforce their rights and

- negotiating improvements in pay and conditions

In recent years, unions have won a series of historic victories on employment status in the courts and tribunals. Thanks to these cases, workers in the so-called gig economy have gained key employment rights, including the rights to be paid at least the national minimum wage, rest breaks and holiday pay.

Unions also resolve disputes in the workplace and to ensure that all working people benefit from their workplace rights.

The government should introduce legislation which enables unions to represent working people by introducing a new framework of rights, including:

- A right for unions to access workplaces, so that they can tell workers about the benefits of union membership
- Strengthening the right to be accompanied so that all workers have a right to be represented by an independent union, including when seeking an improvement in pay and conditions
- Measures which promote and extend collective bargaining
- Taking forward proposals for elected worker representatives on company boards

Reforming the tax and benefits system

The current tax system creates clear incentives for employers to hire staff on a self-employed basis. Self-employment is taxed significantly more lightly than employment. The tax liabilities for employers hiring the self-employed is also far lower, with those choosing to take on an employee paying employer National Insurance Contributions (NICs) of 13.8 per cent, while those employing someone as a contractor pay no NICs at all.

Employers can also achieve significant cost advantages by hiring staff on a zero-hours or short-hours basis. For example:

The lower earnings limit for the payment of employer NICs (known as the secondary threshold) is £162 a week. If employers employ staff for fewer than 20 hours a week on the National Living Wage they will be exempt from paying any NICs.

Employers who pay staff less than the lower earnings limit (currently £116) can avoid certain social security benefits, including sick pay (which can no longer be reclaimed from the state) and maternity and paternity pay (which can be reclaimed to some extent, though can be very complex to administer).

The government should carry out a dedicated review of the tax and benefits system with a view to:

- Removing any financial incentives which are driving the growth in self-employment and insecure forms of work, including zero hours contracts and short hours working.
- Ensuring that all forms of employment are fairly taxed

- Ensuring those in self-employment benefit from an improved safety net of work-related benefits, including statutory maternity, paternity and adoption pay, statutory sick pay and auto-enrolment into pensions.

The review should involve representatives from business, trade unions and relevant government agencies.

Codification of existing common law tests in legislation

Question 2

Would codification of the main principles – discussed in chapter 3 – strike the right balance between certainty and flexibility for individuals and businesses if they were put into legislation?

No

Please explain why/why not:

The TUC recognises that the current rules on employment status are complex and can be confusing for workers, union reps and employers.

As a result, workers can miss out on the rights to which they are legally entitled. Employers are also able to exploit the uncertainty to avoid their employment and tax obligations. It is not uncommon for employers to falsely classify workers as self-employed or to inform those on zero-hour contracts or working through agencies that they do not have rights at work - even though the legal reality may be very different.

The TUC recognises rules on employment status should be clarified and employers, workers and their union reps should have more certainty over who qualifies for employment rights.

But we do not agree with the Taylor review recommendation that codification of the existing common law tests in legislation is the solution.

Codification could have significant negative consequences for working people. For example, it is likely to:

- Mean the rules on status are not future-proofed. The existing tests would be 'frozen in time' meaning that the courts would have less flexibility to adapt the tests in response to emerging forms of employment.
- Create a fixed target which would be easier for employers' lawyers to evade.
- Lead to a tick-box exercise, with less attention being paid to the reality of the individual's employment relationship
- Mean that existing case-law, including important union wins in cases involving the Uber, Citysprint, and Pimlico plumber could be reopened or overturned.

Rather the TUC supports the introduction of a new 'worker' test which spans the current worker and employee statuses. The new worker status should be clearly and broadly defined so as to reduce complexity and the scope for legal disputes.

Whilst work is undertaken on a new definition, the TUC believes that the existing statutory definitions should be retained. The definitions have proved sufficiently flexible and resilient to accommodate new forms of employment in the so-called 'gig economy', including platform work. The Supreme Court's decision in *Autoclenz Ltd v Belcher & Ors* [2011] UKSC 41 also means that courts no longer look solely the terms of contract when determining an individual's status, but consider the reality of an individual's employment relationship as a whole. This means it is harder for employers to 'contract out' of their employment responsibilities.

The government should also ask Acas to draw up a statutory Code of Practice on employment status to assist employers, workers and union reps to navigate the existing statutory tests and case law.

Question 3

What level of codification do you think would best achieve greater clarity and transparency on employment status full codification of the case law, or an alternative way for individuals and businesses?

For the reasons outlined in response to Question 2, the TUC would not support the codification of common law tests in legislation.

Question 4

Is codification relevant for both rights and/or tax?

No

The TUC would not support the codification of common law tests in legislation for the purposes of either tax or employment rights law.

We are concerned that this approach would ossify the exiting common law tests and make it easier for employers to devise new contractual devises to avoid their employment law and tax obligations.

Question 5

Should the key factors in the irreducible minimum be the main principles codified into primary legislation?

No

As noted above, the TUC is firmly opposed to the proposed codification of statutory tests on employment status in legislation. This approach would be too restrictive. It could mean that many workers who are currently protected lose out on their statutory rights.

The TUC would be particularly concerned if any codified tests were limited to the minimum requirements of mutuality of obligation, personal service and control.

Other factors are often relevant when assessing whether an individual qualifies as an employee or worker. These include:

- Whether an individual is integrated into a business
- Whether an individual has multiple engagers
- Who bears the financial risk and who is responsible for covering costs if work needs to be redone?
- Who benefits from any profits derived from the work?
- Whether an individual is economically dependent on an employer

However, it is important that the following factors are NOT taken into consideration when assessing whether an individual qualifies for employment rights:

- *Whether an individual provides equipment or tools needed to undertake the work*. Some employers have sought to manipulate this test to create sham self- arrangements. For example, delivery and courier firms may require individuals to hire vehicles or bikes needed for the job from the firm. Similarly, hairdressers are required to hire a chair in salons. The employers then label the individuals as self-employed even though hiring of the equipment was a condition of being offered work.
- *The intention of the parties:* This would introduce a subjective element to the test. It would mean employers could secure a 'get out clause' from employment law by arguing it was never their intention that workers should accrue any rights in the workplace. This approach would also undermine the Supreme Court decision in *Autoclenz Ltd v Belcher & Ors* [2011] UKSC 41 which confirmed that courts should consider the reality of an individual's employment relationship, rather than focusing on the terms of the contract, when determining an individual's status.

Mutuality of obligation

Questions 6 to 8 and 37 to 39

What does mutuality of obligation mean in the modern labour market?

Should mutuality of obligation still be relevant to determine an employee's or worker's entitlement to full employment rights?

No

The TUC does not support the proposed codification of existing common law tests in legislation.

The test, which first emerged in the 1980s, permits employers to evade their employment obligations by simply inserting a boiler-plate clause into contracts stating that the employer is not obliged to offer work and that the individual can refuse work when offered. The mere presence of such a clause can prevent individuals from being classified as employees, even

though the economic reality of the employment relationship may be very different. In practice, most employers using zero hours contracts rely on a regular supply of so-called casual workers to maintain their business or service delivery. Similarly, workers may have a theoretical right to turn down work. But few do so, for fear of losing out on future shifts.

Even more worrying is the suggestion, found in some case-law, that mutuality of employment should be a necessary factor in assessing whether an individual is a limb (b) worker. This approach would mean that those in insecure work, including independent contractors, could be denied worker protections - including rights to the national minimum wage, holiday pay and basic trade union rights - simply because they are not guaranteed future work with the employer.

The requirement for mutuality of obligation can also make it difficult for those in insecure work to accrue sufficient continuous service to qualify for 'employee' rights such as unfair dismissal, statutory redundancy pay and maternity and paternity leave.

The courts have partially addressed this issue by finding that an umbrella contract spans any gaps between work in some cases. This has assisted zero-hours and casual workers with relatively regular working patterns. But with more varied or random working patterns continue to lose out.

The TUC believes that the law should be amended to make clear that mutuality of obligation should not be considered when assessing whether an individual qualifies as an employee or worker. It should also be disregarded when considering whether an individual has continuous service with an employer.

Personal service

Questions 9 to 11 and 40 to 43

What does personal service mean in the modern labour market?

Should personal service still be relevant to determine an employee's or worker's entitlement to full employment rights?

Should we consider clarifying in legislation what personal service encompasses

The TUC does not support the proposed codification of existing common law tests in legislation.

But we recognise the need for personal service is a long-standing condition for a contract of employment and an express requirement in the limb (b) worker definition. The TUC is concerned that this requirement permits employers to avoid their employment obligations by inserting a substitution clause in individuals' contracts.

The courts have decided that where an individual can send someone else to do their behalf, this may not be consistent with the need for personal services - at least in some cases. A limited power of delegation may not prevent personal service. But, where an individual has

an unlimited power to delegate work, this is likely mean that they will not qualify as an employee or a worker. Whether a substitution clause will be effective in preventing an individual from qualifying for employment rights can often only be decided by an employment tribunal or court. This inevitably creates uncertainty and can be exploited by unscrupulous employers.

Question 42 and 44

Do you agree with the review's conclusion that the worker definition should place less emphasis on personal service?

Are there examples of circumstances where a fettered (restricted) right might still be consistent with personal service?

The TUC does not support the proposed codification of existing common law tests in legislation.

We also disagree with the Taylor review recommendation that more emphasis should be placed on control when assessing whether an individual qualifies as an employee or worker, for the following reasons:

- A control-led test is likely to disadvantage individuals who have some autonomy over when or how they work, but are still economically dependent on an employer. This includes higher skilled workers who direct their own work and those in managerial positions, but who are nevertheless classified as employees.
- The courts have decided that agency workers have no contract with, and are therefore not employees of, the hirer. As a result, agency workers currently claim their employment rights from agencies or umbrella companies. While agencies and umbrella companies are technically deemed to employ agency, they rarely supervise, direct or control work done by the agency workers. A control-led test could mean that many agency workers could lose their already limited employment rights.

Control

Questions 12 to 14 and 45 to 48

What does control mean in the modern labour market?

Should control still be relevant to determine an employee's or worker's entitlement to full employment rights?

Do you agree with the review's conclusion that there should be more emphasis on control when determining worker status?

Question 15

Should financial risk be included in legislation when determining if someone is an employee?

The TUC does not support the proposed codification of existing common law tests in legislation.

However, we recognise the question of who bears the financial risk and who is responsible for covering costs if work needs to be redone can be significant relevant factors when determining status in some cases.

Question 16

Should 'part and parcel' or 'integral part' of the business be included in legislation when determining if someone is an employee?

The TUC does not support the proposed codification of existing common law tests in legislation.

However, we recognise that issues of whether an individual is integrated into a business, (for example, whether the company disciplinary code applies to them and whether they wear company uniforms, uses company logos) can be significant relevant factors when determining status in some cases.

Question 17

Should the provision of equipment be included in legislation when determining if someone is an employee?

The TUC does not support the proposed codification of existing common law tests in legislation.

But in our opinion whether an individual provides equipment or tools needed to undertake the work should not be a principal factor for determining employment status for the purposes of employment law.

Some employers have sought to manipulate the equipment test to create sham self-arrangements. For example, delivery and courier firms may require individuals to hire vehicles or bikes needed for the job from the firm. Similarly, hairdressers are required to hire a chair in salons. The employers then label the individuals as self-employed even though hiring of the equipment was a condition of being offered work.

Question 18

Should 'intention' be included in legislation when determining if someone is an employee in uncertain cases?

No

Including the parties' intention in any test would introduce a subjective element. It would mean employers could secure a 'get out clause' from employment law simply by arguing it was never their intention that workers should accrue any rights in the workplace. This approach would also undermine the Supreme Court decision in *Autoclenz Ltd v Belcher & Ors* [2011] UKSC 41 which confirmed that courts should consider the reality of an individual's employment relationship, rather than focusing on the terms of the contract, when determining an individual's status.

Question 19

Are there any other factors that should be included in primary legislation when determining if someone is an employee?

And what are the benefits or risks of doing so?

As noted above, the TUC would not support the codification of existing common law tests in legislation. Codification could have the effect of ossifying the law on status.

However, we would support the adoption of a new, single statutory definition of 'worker' which, as a minimum, encompassed all individuals covered by the existing employee and workers tests.

Questions 20 to 21

If government decided to codify the main principles in primary legislation, would secondary legislation: i) be required to provide further detail on top of the main principles; and ii) provide sufficient flexibility to adapt to future changes in working practices?

Would the benefits of this approach be outweighed by the risk of individuals and businesses potentially needing to familiarise themselves with frequent changes to legislation?

The TUC recognises that the current rules on employment status are complex and can be confusing for workers, union reps and employers.

But we would not support the codification of existing common law tests in legislation. Codification would mean the existing tests would be 'frozen in time' and the courts would have less flexibility to adapt the tests in response to emerging forms of employment.

A better employment status test

Questions 22 to 25

Should a statutory employment status test use objective criteria rather than the existing tests?

What objective criteria could be suitable for this type of test?

What is your experience of other tests, such as the Statutory Residence Test (SRT)? What works well, and what are their drawbacks?

The TUC agrees that it is important for employers, unions and workers to know whether an individual or groups of workers are protected by statutory rights. Increased certainty can reduce disputes and tensions in the workplace and can avoid the costs of litigation. It can also prevent unscrupulous employers from gaining competitive advantage by misleading workers about their rights or avoiding paying tax.

However, the TUC would counsel against a pursuit for over-simplicity or clear-cut tests when it comes to defining employment status. Employment relationships in the UK can take many different forms. It is important therefore that any statutory tests are flexible and defined in general terms which can be applied to multiple circumstances.

We do not support the suggestions for simpler tests set out in chapter six of the consultation document.

It is important that a new test is not solely based on the following factors:

- The length of time the individual has worked for an engager
- The percentage of an individual's income which comes from one engager.
- Whether an individual carries out a certain proportion of their work on an employers' premise

See the response to question 27 for more detail.

Question 24

How could a new statutory employment status test be structured?

The TUC would call for the adoption of a new broad single definition of 'worker'. This single test should determine who qualifies for all statutory employment rights. The new test should, as a minimum, encompass all individuals currently covered by the existing 'employee' and 'worker' tests, including agency workers, zero-hours contract workers and freelancers.

The new 'worker' test should be defined in broad and general terms to ensure that:

- It spans the myriad of employment relationships existing in the UK
- It can anticipate and respond to new and emerging forms of employment and
- It prevents employers from devising new contractual devices to avoid their employment responsibilities.

A return to a binary test would remove any uncertainty over whether an individual qualifies as an employee or is a limb (b) worker.

The TUC recognises that the creation of a new single worker category would require careful consideration. Any inadvertent mistakes could have significant negative consequences, depriving working people of their existing rights. Any new test must be the subject of detailed consultation with the social partners and employment lawyers.

In the interim, the government should act to improve awareness of and clarify employment status rules. They should also clamp down on the use of bogus self-employment and on employers who seek to dodge their employment responsibilities.

Key measures would include:

- There should be a statutory presumption that all economically dependent workers are employees and qualify for the full range of statutory employment rights. The onus should rest on employers to demonstrate that an individual is genuinely self-employed.
- The government should penalise employers who misinform workers about their employment rights or seek to devise contractual arrangements to avoid their employment responsibilities.

Question 25

What is your experience of tests, such as the Agency Legislation tests for tax, and how these have worked in practice? What works well about these tests in practice, and what are their drawbacks?

The TUC is concerned that increasingly agency workers are taxed as if they are employed. But they do not qualify for most employment rights, even though they have many of the characteristics of employees.

The TUC believes it is important that no one should be taxed as if they are employed but not benefit from employment protections. Following the mantra of 'no taxation without representation', in our opinion, there should be 'no taxation without full employment rights'.

Unions also report that agency workers employed via umbrella companies face significant problems. They are often misinformed about how much they will be paid, with workers frequently not receiving the advertised rate of pay or the rate that was agreed with the employment business. The hourly or daily rate for the agency worker which is agreed with the employment business is paid to the umbrella company, as the umbrella company's income. The umbrella company then deducts their administrative costs and sums to cover employers' National Insurance Contributions, pension contributions, the apprenticeship levy and holiday pay (as the umbrella company is the employer). The remainder is then classed as the work-seeker's gross pay, from which income tax and employees' National Insurance Contributions are deducted, with the work seeker receiving the resultant net pay.

Question 26

Should a new employment status test be a less complex version of the current framework?

Yes

The TUC recognises that the current employment status tests are complex and can be confusing for employers, workers and union reps.

We would support the adoption of a single, clear and broad definition of 'worker' which should determine access to all statutory employment rights.

Employment relationships in the UK can take many different forms. It is therefore important that a future statutory test for employment rights us flexible and defined in broad terms which can be applied to multiple circumstances and all forms of employment relationship.

Ideally the test should not be based on contractual tests or the type of contractual relationship an individual has with an employer.

Question 27

Do you think a very simple objective or mechanical test would have perverse incentives for businesses and individuals? Could these concerns be mitigated? If so, how?

The TUC would not support the adoption of clear-cut tests which determine status on the basis of a single factor, such as:

- *The length of time the individual has worked for an engager,* as this would automatically exclude those on short term or transient employment from rights at work
- *The percentage of an individual's income which comes from one engager*. Although the TUC recognises that this may be one of the factors taken into consideration when determining an individual's status. Many workers, including cleaners and agency workers, to work for many different employers during any one week. This is not a reason to exclude them from rights.
- *Whether an individual carries out a certain proportion of their work on an employers' premise*, as this could exclude mobile technicians and even home care workers from rights.

The use of narrow and overly simplistic tests would provide employers' lawyers with a clear target and such tests would be easy to avoid. Recent legal cases, involving companies such as Uber, Deliveroo and DPD, highlight the lengths to which employers are prepared to go to devise new contracts specifically designed to avoid tax and employment law obligations.

Question 28

Are there alternative ways, rather than legislative change, that would better achieve greater clarity and certainty for the employment status regimes (for example, an online tool)?

Employers, workers and union reps would benefit from clearer guidance on employment tests and how they apply in different circumstances.

The government should ask Acas to prepare a statutory Code of Practice on employment status to assist employers, workers and union reps to navigate the existing statutory tests and case law.

The Code should:

- Provide practical examples of how the current statuses should be applied to different types of employment relationship.
- Confirm that most zero hours contract workers will qualify as employees when in the workplace and that freelancers qualify for workers' rights
- Explain how any new revised continuity of employment rules will work in practice

Where an employer fails to comply with the Code or actively seeks to manipulate a worker's status to avoid their employment obligations, workers should be entitled to a 25 per cent uplift in compensation from an employment tribunal – as is the case where employers fail to follow the Acas Code on grievance and discipline.

The TUC is firmly opposed to the creation of a 'check employment status on-line app' for employment. The current HMRC online app has proved highly unreliable and imprecise. The factors which should be considered when assessing status for employment law are also more varied and nuanced than for tax. The current tool is therefore unlikely to provide accurate outcomes. Employers and workers are also likely to disagree about the nature of the employment relationship. An online tool would not be able to judge between contested facts.

The TUC believes the government should drop this proposal. But if an app is to be created, it is vital that any findings are not determinative or taken into account by enforcement agencies, in Acas early conciliation or in the courts or tribunals.

Question 29

Given the current differences in the way that the employed and the self-employed are taxed, should the boundary be based on something other than when an individual is an employee?

No

The TUC would be concerned about any changes to the existing tests created an incentive, or made it easier, for employers to force individuals into false self-employment in order to avoid employment law obligations.

The government should crack-down on bogus self-employment, including by:

- Creating a statutory presumption that all individuals will qualify as employees unless the employer can demonstrate in an employment tribunal that they are genuinely self-employed. This approach already applies in national minimum wage legislation.
- Penalising employers who misinform workers about their employment rights or seek to devise contractual arrangements to avoid their employment responsibilities.

- Asking Acas to prepare a statutory code of practice which clarifies employment status rules and provides clear guidance for employers, individuals and unions.

The government should also conduct an in-depth review of the tax and welfare system and remove the financial incentives for employers to use self-employment, or agency, zero hours and short-hours working and to ensure that all forms of employment are fairly taxed.

Those who are 'not employed' for tax purposes, whilst not qualifying for full employment protection, should still benefit from an improved safety net of work-related benefits, including statutory maternity, paternity and adoption pay, statutory sick pay and auto-enrolment into pensions.

The worker employment status for employment rights

Question 30

Do you agree with the review's conclusion that an intermediate category providing those in less certain casual, independent relationships with a more limited set of key employment rights remains helpful?

The TUC does not support the current three-tier approach to employment. The current system means those in insecure work, who are most in need of protection, are the very people who miss out on statutory rights. We estimate that at least 1.8 million 'workers' are at risk of losing out on key employment protections because they fail to qualify as employees. As a result, they can be hired and fired at will and have no guaranteed hours at work. They miss out on family friendly rights so find it difficult to balance work and family life and are not entitled to redundancy pay if work dries up.

We believe that the intermediate 'worker' and 'employee' tests should be combined into a new broad 'worker' category. The new 'worker' status would determine access to all statutory employment rights.

The TUC recognises that a new worker status will require careful consideration and detailed consultation with employers, unions and employment lawyers.

In the meantime, we believe that the current intermediary 'worker' test should be retained. The existing test has worked relatively well.

Question 31

Do you agree with the review's conclusion that the statutory definition of worker is confusing because it includes both employees and Limb (b) workers?

The TUC does not agree that the existing 'worker' definition is confusing because it includes both employees and limb (b) workers. The combined test ensures that all workers continue to benefit from minimum worker rights. If the tests were separated, there is a risk that some

individuals would fail to meet the requirements for either test and so would not qualify for any statutory rights.

Questions 32 & 33

If so, should the definition of worker be changed to encompass only Limb (b) workers?

If the definition of worker were changed in this way, would this create any unintended consequences on the employee or self-employed categories?

The TUC does not agree that the 'worker' definition should be changed to encompass only limb (b) workers. Dividing the 'worker' test is likely to contribute to growing labour market segmentation, with different categories of workers benefiting from very different ranges of rights.

It is important that the government does not give into the special pleadings of platform companies and create a new distinctive statutory category of 'dependent contractors' who benefit from fewer rights than other workers.

Questions 34 to 36

Do you agree that the government should set a clearer boundary between the employee and worker statuses?

Or, is there an alternative approach that could be considered? If so, how could this be set out in legislation?

What might the consequences of these approaches be?

The TUC also does not agree that the government should create a clearer boundary between the 'employee' and 'worker' statuses. Such an approach would make it harder for those in insecure worker to qualify for full employee rights including family friendly rights, protection from unfair dismissal and statutory redundancy pay.

Questions 49 & 50

Do you consider that any factors, other than those listed above, for 'in business in their own account' should be used for determining worker status?

Do you consider that an individual being in business on their own account should be reflected in legislation to determine worker status? If so, how could this be defined?

The TUC recognises that whether an individual is running a business on their own account is likely to remain a key factor when assessing whether a person is self-employed.

In our opinion, this concept is adequately captured in the current limb (b) definition in section 230 of the Employment Rights Act 1996. There is no need for further amendment.

Question 51

Are there any other factors (other than those set out above for all the different tests) that should be considered when determining if someone is a worker?

No. We recognise that the current worker test has worked reasonably well and that courts have been able to apply in response to new forms of employment relationship within the gig economy.

Question 52

The review has suggested there would be a benefit to renaming the Limb (b) worker category to 'dependent contractor'? Do you agree?

The TUC is firmly opposed to the Taylor recommendation that limb (b) workers should be renamed 'dependent contractors'.

This change could further muddy the legal waters.

The new name would also be misleading as it is not simply independent contractors who rely on the limb (b) test. Agency workers and those on zero hours contracts also depend on this test to secure basic worker rights. And you would be hard pressed to find many zero-hour workers who would consider themselves to be 'contractors'.

Defining working time

Question 53

If the emerging case law on working time applied to all platform based workers, how might app-based employers adapt their business models as a consequence?

The courts and tribunals have taken a consistent approach to the meaning of working time when calculating the national minimum wage for platform workers.

For workers offered work via a platform, working time should include all the time that workers are logged on and ready and willing to accept tasks provided by the employer. The government should update its guidance to reflect these decisions.

The TUC does not believe platform companies need to adjust their business models in response to these judgments. They should however ensure that workers are paid at least

the national minimum wage for all time they work for their employer and where necessary workers receive full back pay.

Question 54

What would the impact be of this for employers and workers?

The TUC is concerned that platform companies will seek to adjust their business models to drive down costs and to avoid their employment responsibilities. This would have negative consequences for employers and workers.

Such practices would create unfair competition for reputable businesses who comply with the law.

Such practices could also mean that workers are denied the national minimum wage and receive poverty wages.

The government should ensure that the statutory enforcement agencies have adequate resources to enforce the law and ensure that platform workers are paid at least the national minimum wage.

The government should also update its national minimum wage guidance to reflect these decisions.

Question 55

How might platform-based employers respond to a requirement to pay the NMW/NLW for work carried out at times of low demand?

The fact that an employer is experiencing low demand is no justification for employers not to pay workers the national minimum wage. All employers are required to pay workers the national minimum wage for all the time that they work for their employer.

Questions 56 and 57

Should government consider any measures to prescribe the circumstances in which the NMW/NLW accrues whilst ensuring fairness for app-based workers?

What are the practical features and characteristics of app-based working that could determine the balance of fairness and flexibility, and help define what constitutes 'work' in an easily accessible way?

The TUC does not believe there is a case for reform the rules on defining working for the purposes of the calculating and paying the national minimum wage to accommodate the so-called special requirements of the gig economy. Work is work regardless of whether it provided via supervisor or an app.

As the courts have repeatedly confirmed, all workers including those employed through platforms in the gig economy are entitled to be paid at least the national minimum wage for all the time that they work for their employer.

For those being offered work via a platform, this should include all the time that they are logged on to the platform ready and willing to accept tasks provided by the employer.

As with many other employee jobs it is common for there to be an element of 'waiting to be called to action'. Such a requirement is a fundamental part of the employees' duties and enable companies to provide a swift service for customers. It is therefore right that workers are paid at least the national minimum wage for such time.

Question 58

How relevant is the ability to pursue other activities while waiting to perform tasks, the ability of workers to refuse work offered without experiencing detriment, requirements for exclusivity, or the provision of tools or materials to carry out tasks?

Many platform companies exercise significant control over their staff. The disciplinary effect of employing individuals on zero hours contracts or an 'as and when required' basis should not be underestimated. As the Uber case revealed, companies have the ability to 'deactivate' staff who refuse work – in the case of Uber declining three jobs in one shift was sufficient for a worker to be logged off the system.

Workers are also dependent on such companies to make a living. They are deterred from turning down jobs for fear they will not be offered future work.

Question 59

Do you consider there is potential to make use of the data collected by platforms to ensure that individuals can make informed choices about when to log on to the app and also to ensure fairness in the determination of work for the purposes of NMW/NLW?

The TUC agrees that workers should be provided with additional information by the platform companies about when most work is likely to be available. This will assist individuals to make inform decisions when to offer for work.

Defining the self-employed and employers

Question 60

Do you agree that self-employed should not be a formal employment status defined in statute? If not, why?

The TUC agrees with the government's view that there should not be a separate statutory status for self-employment in employment law, for the following reasons:

- Introducing a statutory definition would create a fixed target, making it easier for employers and their lawyers to game the system and force more individuals into self-employment even though they have all the characteristics of employees.
- There is a risk that individuals would fail to meet the statutory tests for either self-employment or workers, meaning they would find themselves in a form of 'no man's land'.

Question 61

Would it be beneficial for the government to consider the definition of employer in legislation?

The TUC does not believe there would be merit in creating a statutory definition for an 'employer'. This would only generate litigation and create further legal uncertainty.

However, the law should be reformed to extend the circumstances when organisations or persons will be deemed to be an employer for the purposes of employment law. The law should be amended to state that where an individual is employed via an intermediary (including an agency, umbrella company or a platform company - such as Task Rabbit), then the end user shall be deemed to be the individual's employer for the purposes of employment law.

Here, whistleblowing legislation (section 43k of the Employment Rights Act 1996) provides a useful precedent.

The EU Commission's proposal for a Directive on Transparent and Predictable Working Conditions offers an alternative approach defining employers to mean 'one or more natural or legal person(s) who is or are directly or indirectly party to an employment relationship with a worker.'

In addition, the government should amend the law to ensure that principal companies are jointly and severally liable for any breaches of employment law throughout their supply chains.

Question 62

If the terms employee and self-employed continue to play a part in both the tax and rights systems, should the definitions be aligned? What consequences could this have?

The TUC recognises that the existence of different but overlapping statuses in employment, tax and social security legislation can cause confusion and uncertainty for employers, workers and unions. But the TUC does not currently support the alignment of the tests.

The various tests serve different policy objectives and there is a risk that aligning tests could have negative policy outcomes. For example, the current binary status tests in tax law have

proved a relatively blunt tool. They tend to lack the wider nuances found in employment related case law. Extending the existing tax status tests to employment law could mean workers would inadvertently lose out on rights.

There are also legitimate reasons why some workers may be classified as 'self-employed' for tax purposes but should still qualify for employment rights.

By way of example:

- The entertainment industry contains many workers, including most performers, who operate on a self-employed basis for tax purposes but who qualify as limb (b) workers for employment rights. This status position has proved both beneficial and effective for both workers and engagers and helps underpin the entertainment sector's world-leading role. On latest figures released by DCMS in November 2017 the creative industries contributed £91.8 billion in Gross Value Added (GVA) to the UK economy.
- Technicians working in the entertainment sector are one clear example. Camera operatives often need to provide their own expensive equipment to do their jobs. They also work for a variety of companies. They are therefore rightly classified as self-employed for tax purposes. Nevertheless, they are classified as limb (b) 'workers' for the purposes of employment and benefit from key rights, including protection from excessive working hours and holiday.

Question 63

Do you agree with commentators who propose that employment rights legislation be amended so that those who are deemed to be employees for tax also receive some employment rights? Why / Why not?

The TUC believes it is important that no one should be taxed as if they are employed but not benefit from employment protections. Following the mantra of 'no taxation without representation', in our opinion, there should be 'no taxation without full employment rights'.

Employment law should be amended to confirm that where an individual is taxed as an 'employee' they should also qualify for the full range of statutory 'employee' rights. This would particularly benefit:

- Workers in the construction sector who are taxed as employees but classified as self-employed for employment law.
- Agency workers who are similarly taxed as if they are employees but often lose out on key employment rights.

Alongside these reforms, the government should carry out a dedicated review of the tax and benefits system with a view to:

- Removing any financial incentives which are driving the growth in self-employment and insecure forms of work, including zero hours contracts and short hours working.

- Ensuring that all forms of employment are fairly taxed.
- Ensuring those in self-employment benefit from an improved safety net of work-related benefits, including statutory maternity, paternity and adoption pay, statutory sick pay and auto-enrolment into pensions.

Question 64

If these individuals were granted employment rights, what level of rights (e.g. day 1 worker rights or employee rights) would be most appropriate?

The TUC believes that all workers should benefit from the same floor of rights currently enjoyed by employees.