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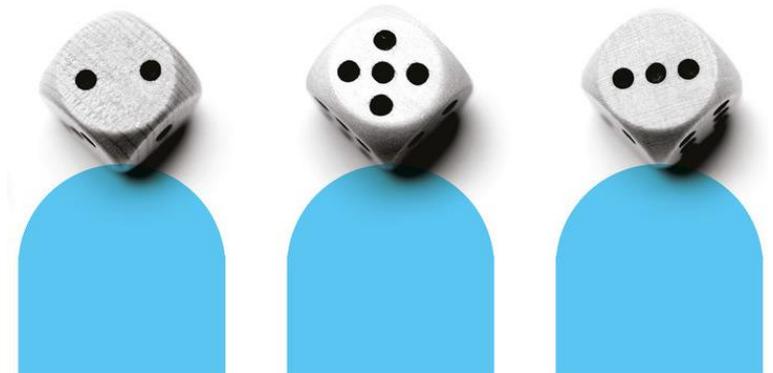
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Tax Faculty: IR35 and Employment Status
15 February 2021

Mark Hammerton

Partner, Eversheds Sutherland



Moderator



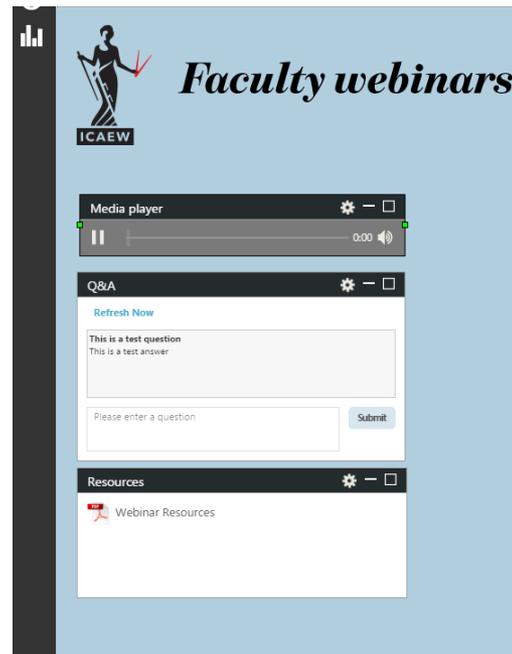
Today's moderator
Peter Bickley
Technical Manager
ICAEW Tax Faculty

Speaker



Today's speaker
Mark Hammerton
Partner
Eversheds

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IR35 - Status, Options and Implementation

Mark Hammerton

- **Employment status – common misconceptions**
 - overview of main categories of employment status (employee, worker, self-employed)
 - why does it matter?
 - employment status for tax purposes vs employment purposes

- **IR35 - Options**

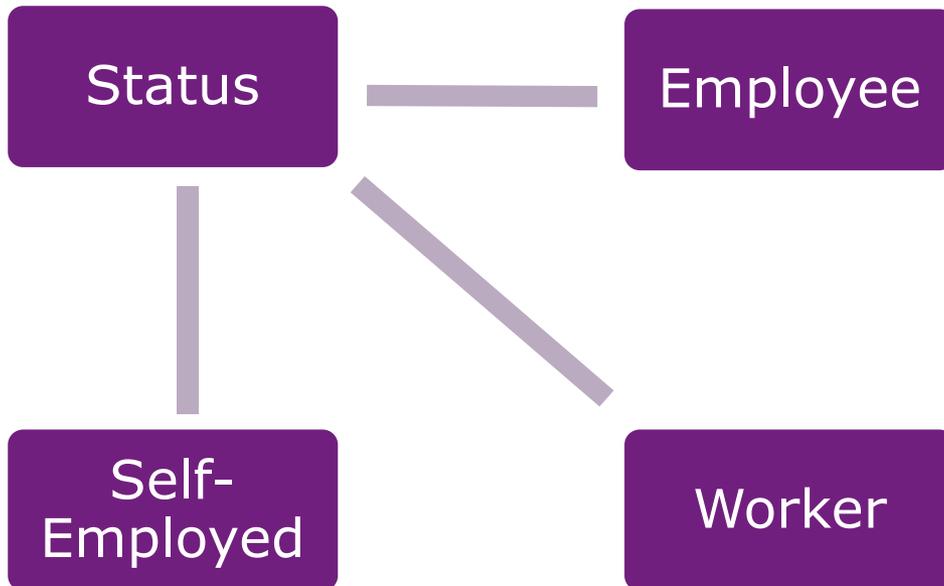
- **Agency Worker Regulations**
 - overview of “Day One” and “12 Week Rights”

- **Managing your contingent workforce & Planning for Implementation**
 - some dos and don'ts

Employment status

Common misconceptions and key questions answered

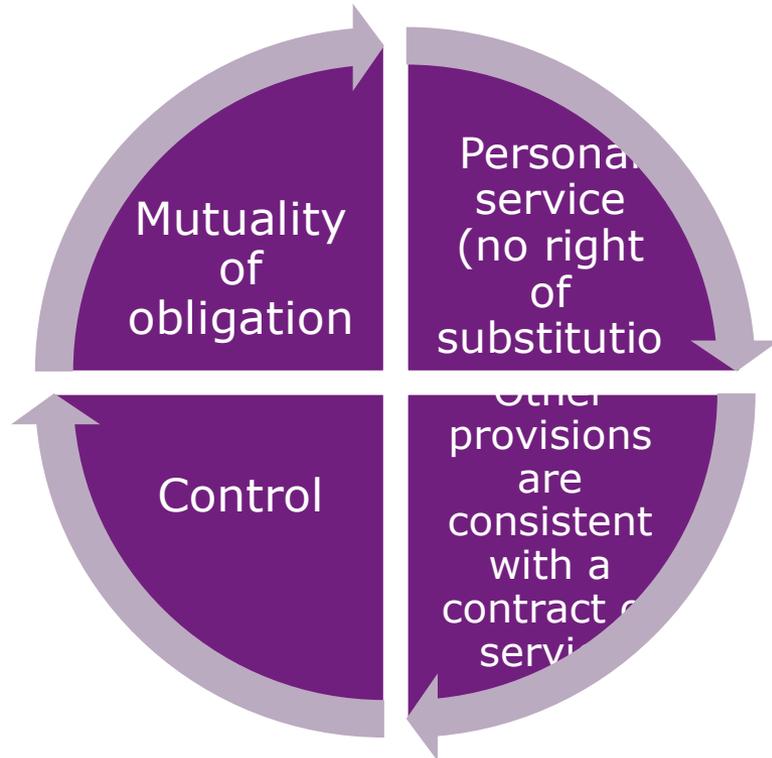
Employment status



Who is an “employee”?

Someone who works under a contract of service, whether expressly or implied

The “multiple test” key indicators for employment status:



Who is an “employee”?

Control:

- **Ready Mixed Concrete:** MacKenna J: "control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done"
- Control can be shown through the employer dictating the terms of the employment relationship, having the right to direct the employee on what to do, and being able to bring the employee up on disciplinary procedures
- **White & Anor v Troutbeck SA:** the question of control is not whether the worker has control over their own work each day but rather whether the employer has a contractual right of control over the worker. This case concerned two housekeepers with a high degree of autonomy on how they carried out their duties. The EAT determined them to be employees

Who is an “employee”?

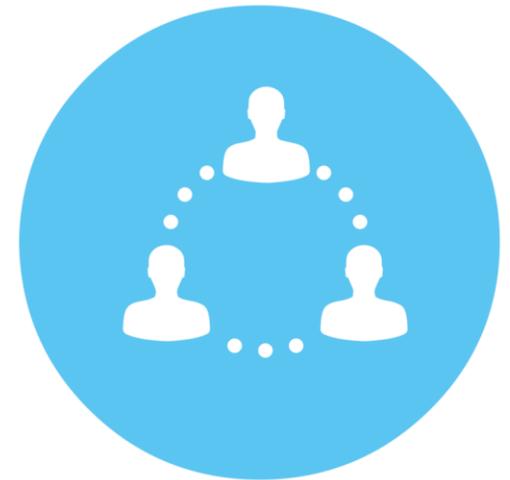
Personal Service:

- Generally, employees are required to provide personal service, whereas self-employed and independent contractors can provide a substitute worker/subcontract the work
- **Staffordshire Sentinel Newspapers Ltd v Potter:** Mr Potter, a newspaper home delivery agent, had the unqualified right to provide a substitute without giving a reason. Although the replacement had to be ‘suitable’ and the client could reject the substitute, the EAT held that Mr Potter was self-employed
- **MacFarlane and another v Glasgow City Council:** Where gym instructors could only send a substitute when they were unable to work, and there were restrictions on the replacements, the EAT held that this was capable of being an employment relationship

Who is an “employee”?

Mutuality of Obligation:

- This refers to the employer’s obligation to provide work and the individual’s obligation to accept the work provided
- **Stephenson v Delphi Diesel Systems Ltd:**
Elias J: “The significance of mutuality is that it determines whether there is a contract in existence at all”



Who is an “employee”?

Professional Game Match Officials Ltd v HMRC

- HMRC declared a group of lower-division football referees to be employees of PGMOL, their representing body, bringing a £584,000 penalty charge under IR35 (intermediaries legislation) representing underpaid income tax and National Insurance contributions
- The first-tier tax tribunal found that the arrangement lacked the necessary **mutuality of obligation**, as the referees were not obliged to accept any match offers and did not have the right to be offered any work; it lacked the necessary **control**, as the referees had full authority on matchdays and PGMOL did not have a contractual right of control; and it did not otherwise suggest employment
- On appeal, the upper tribunal agreed with the findings of the first-tier tax tribunal

Who is an “employee”?

Albatel Limited v HMRC

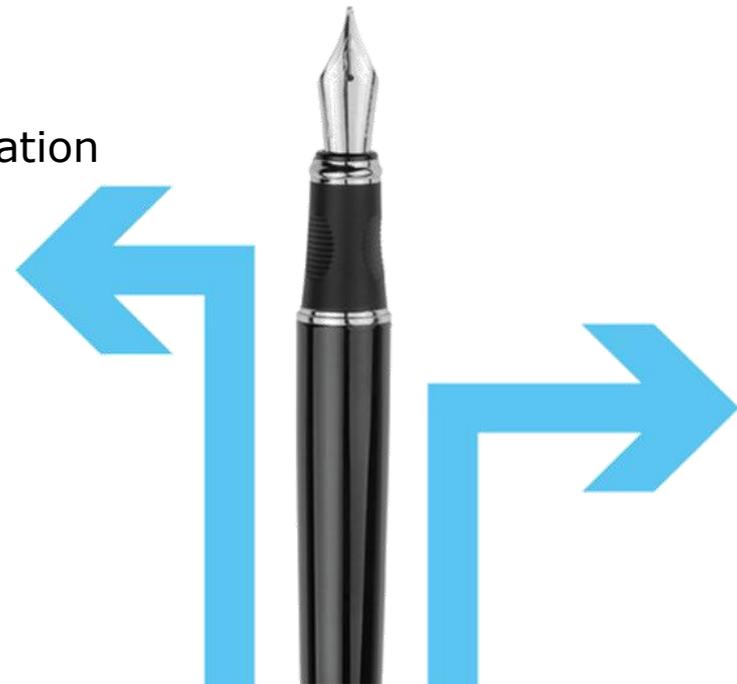
- **Lorraine Kelly**, presenter of the show Lorraine on ITV, was sent a bill of nearly £1.2m for income tax and national insurance in 2018 under IR35
- Ms Kelly appealed the bill to the first-tier tax tribunal on the basis that she was not employed by ITV
- Although there was found to be **mutuality of obligation**, Ms Kelly did not receive benefits, was allowed to and did carry out other work for other companies, was in business on her own account, and **control** of Ms Kelly’s day-to-day work lay with her rather than ITV
- The tribunal found that this constituted a contract for services, the services being Ms Kelly’s ‘brand and personality’, not an employment relationship

Who is an “employee”?

HMRC v Kickabout Productions Limited

- **Paul Hawksbee**, the Talksport radio presenter, was determined by HMRC to be an employee of Talksport and sent a tax bill of £140,000 under IR35
- The first-tier tax tribunal decided Mr Hawksbee was not an employee as Talksport did not have sufficient **control** over his duties and there was no **mutuality of obligation**
- On appeal, the upper tribunal found that **other factors** indicated employment status. These included the length of time Mr Hawksbee had been presenting the show (some 18 years), that he had not worked for anyone else during that period, that he was required to give 4 months’ notice, and that he was not allowed to provide a substitute (personal service)
- Mr Hawksbee was therefore determined to be an employee of Talksport

- Being subject to the organisation's rules and procedures
- Being integrated into the organisation's business
 - for example attending internal meetings and events, wearing uniform, being provided with equipment and business cards
- Being managed by an employee of the organisation
- Receipt of salary and benefits
- Maternity, paternity or adoption pay
- Longer, more permanent engagement
- Restrictions on working for others



Who is a “worker”?

- Someone who has a contract or other agreement to do work or services personally for a reward
- Not fully “independent”, but still entitled to some (not all) employee rights



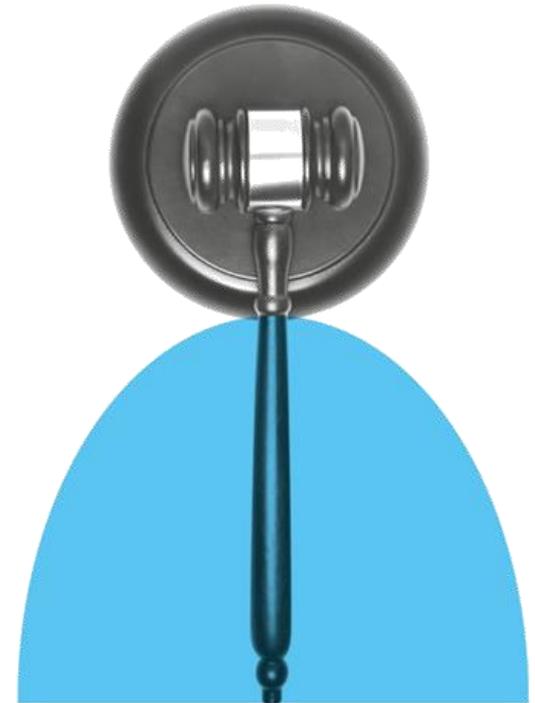
Note: If an individual is an employee then they will also be classed as a worker for the purposes of employment legislation

Factors that may determine whether someone is a worker

- Does the individual provide their own tools?
- Do they bear *some* financial risk?
- To what extent does the individual carry out their own work for other organisations?
- Do they market their services to others?
- What is the degree of subordination of the individual to the employing organisation?
- What is the degree of their integration into the employing organisation's business?
- Consider whether the contract between Client and the individual is actually a contract between two independent business undertakings

Who is classified as self-employed?

- Someone who runs their own business
- Have their own terms of agreement e.g. paid per assignment
- Bears all financial risk
- Free to decide whether/how to do the jobs
- Pays their own tax, bears their own insurance and manages their social security
- Independent and autonomous
- Do not have employment rights or protection



Why does it matter?

Why does it matter?

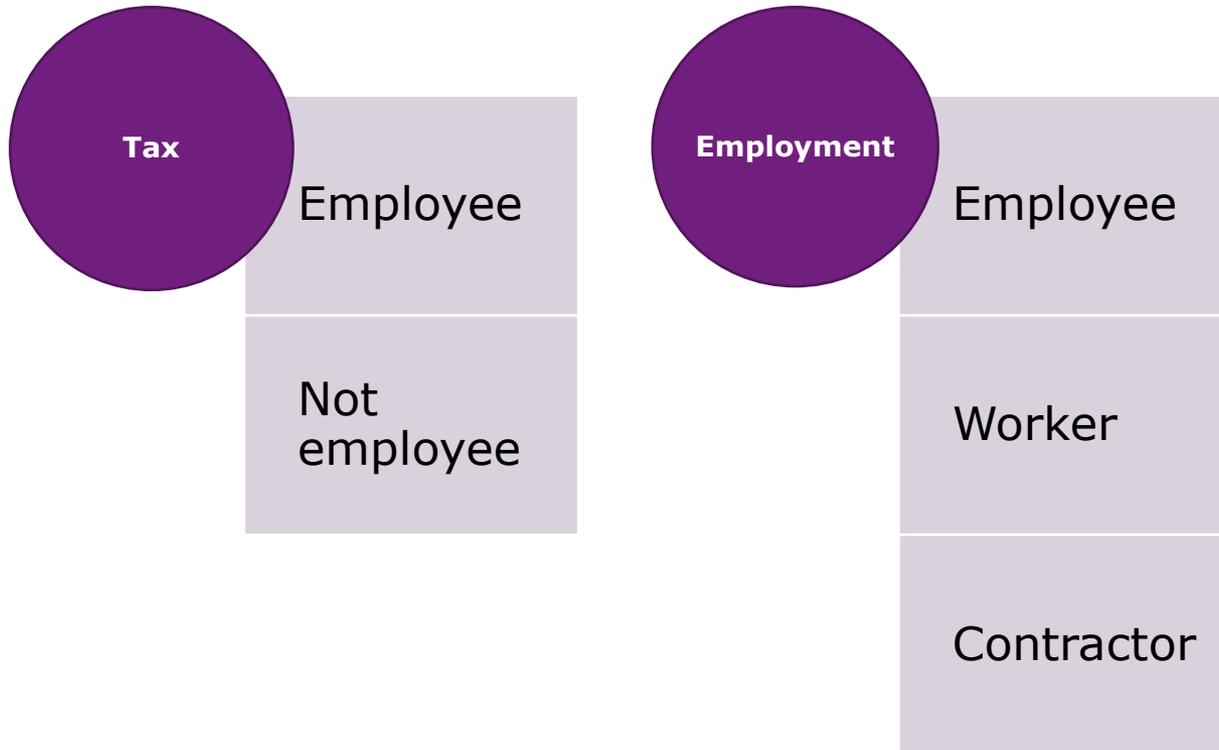
- Need to differentiate the workforce for tax purposes - IR35!
- Employers and employees have obligations implied into the employment contract (for example the mutual duty of trust and confidence)
- Different protection and rights – employees have the most protection (for example unfair dismissal rights and SRP); workers have some (hours, annual leave and pay); self-employed the least
- Only employees (and now possibly workers – Dewhurst ET?) are caught by TUPE
- Employer will be vicariously liable for the actions of its employees (for example personal injury, discrimination claims)
- Personal data handling under GDPR will have different complications depending on if the individual is an employee, worker or contractor



Employment status

Employment purposes vs tax purposes

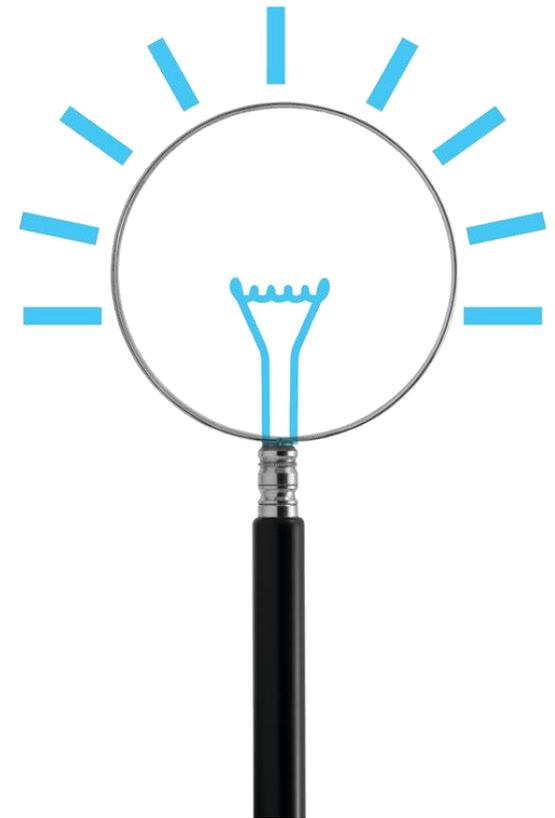
Employment status



IR35: Options

What are the options?

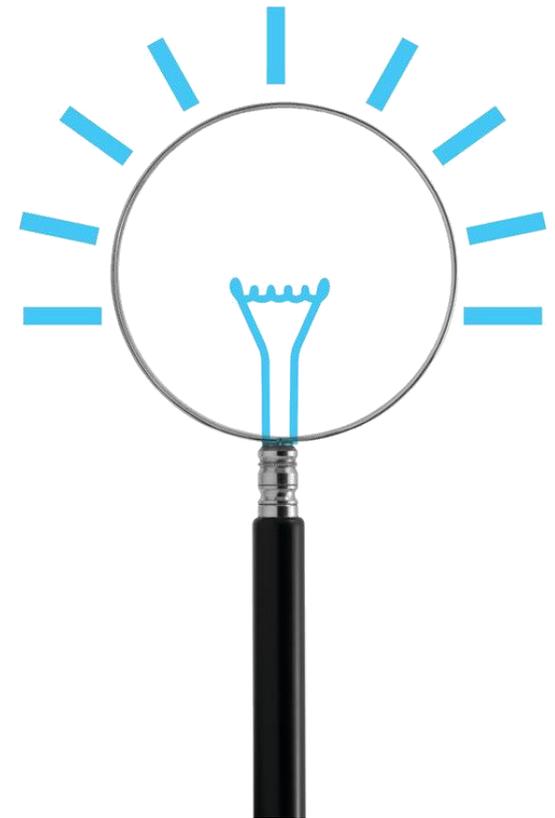
- Outright bar on personal service companies?
- Sounds attractive perhaps initially but how will you resource your organisation?
- Fundamentally, **if** there is a need for work to be done, it needs doing
- at an acceptable level of overall cost and risk



What are the options?

Moving onto direct employment, perhaps as a fixed-term employee

- increased rights for worker
- but less flexibility
- worker may not want this – lifestyle
- note fixed term workers have specific discrimination rights

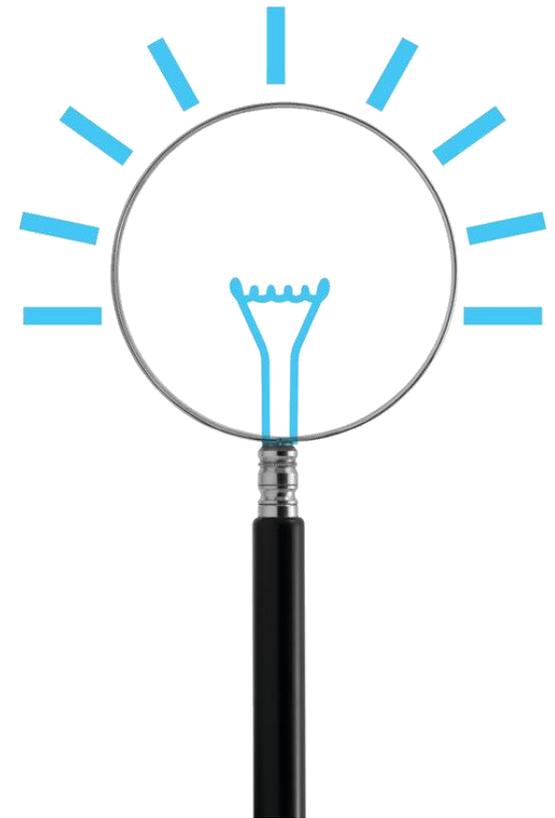


What are the options?

Moving onto PAYE payroll as direct contractor

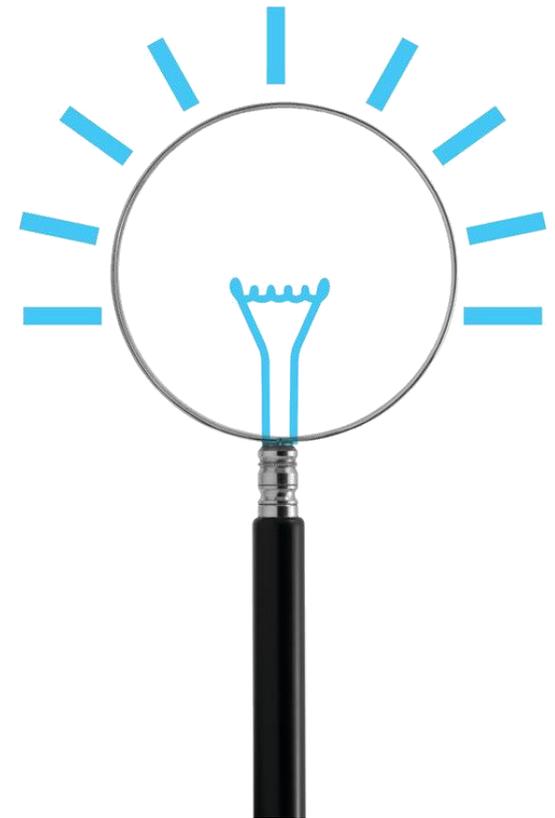
- increased fee (cost passed onto client unless negotiate to the contrary)
- less flexibility)
- avoids AWR rights,

- but increases risk of employment status claims?



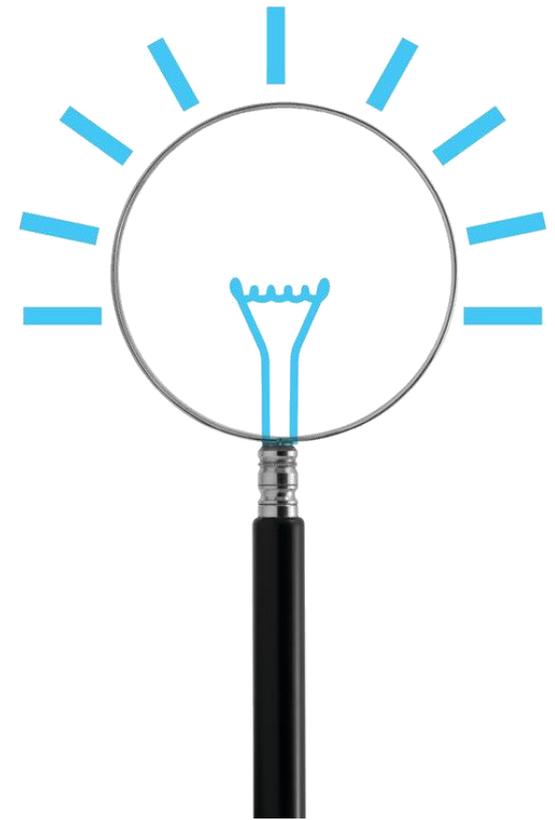
What are the options?

- **Fully-outsourced service model**
- arrangement in reality needs to reflect that on paper



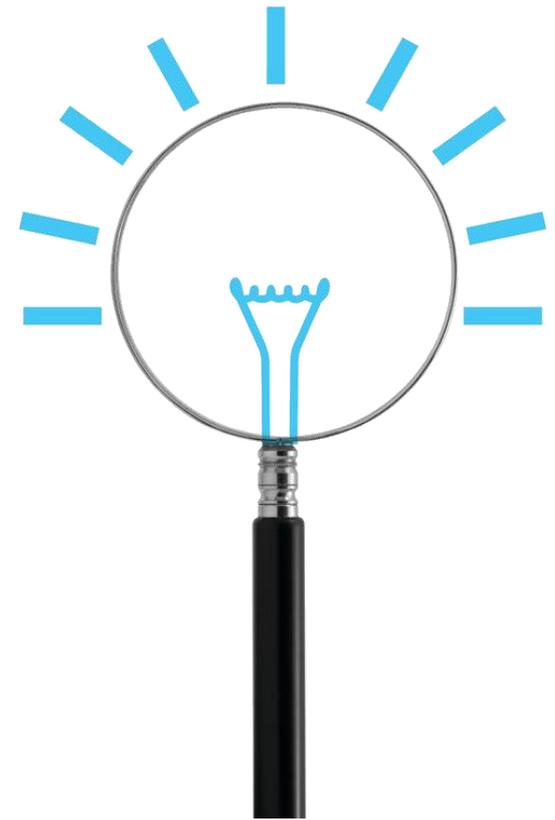
What are the options?

- **Use of umbrella companies**
- increased TUPE risk
- AWR rights



What are the options?

PS mitigation - limiting use of umbrella company contractors/AWs to 2 years:



Umbrella companies/agencies - TUPE risk if services later insourced:

- recent case law has suggested that workers (as well as employees) could come within scope of TUPE
- if Client develops practice of engaging same umbrella company/agency to provide services of certain types of roles in one area of business, on a longer-term basis => TUPE risk is higher
- indemnities in Client's contract with umbrella company/agency, to protect against the risk of TUPE-related claims and employment-status/tax-related claims

Limiting use of umbrella company contractors/AWs to two years:

- unfair dismissal rights usually acquired after two years' LOS
- Employment Tribunal usually reluctant to imply contract of employment between worker and Client, where worker is already employed by umbrella company/agency and the commercial relationship/reality reflects that

But...

- employees of agency/umbrella company could still bring claim for failure to inform and consult under TUPE
- contractors could still bring whistleblowing and/or discrimination claims
- rights to equal treatment under Agency Workers Regulations 2010

Will AWR apply?

- Worker supplied by a temporary work agency works for another (end-user client)
- Client has supervision, direction and control
- Not a truly managed service (similar to IR35)

Agency Workers Regs

Refresher

Agency workers

Overview of “day 1” and “12 week rights”

Day 1 rights

- Section 1 Statement of Particulars and worker’s “employment” rights
- Access to vacancies at hirer’s organisation
- Use of shared facilities and amenities, e.g. canteen or food and drinks machines, workplace creche, car parking

Week 12 rights

- Same basic working and employment conditions as he/she would have been entitled to for doing the same job, if hired by Client directly
- These are terms ordinarily included in Client’s contracts for employees/workers, relating to: pay, duration of working time, night work, rest periods, rest breaks and annual leave

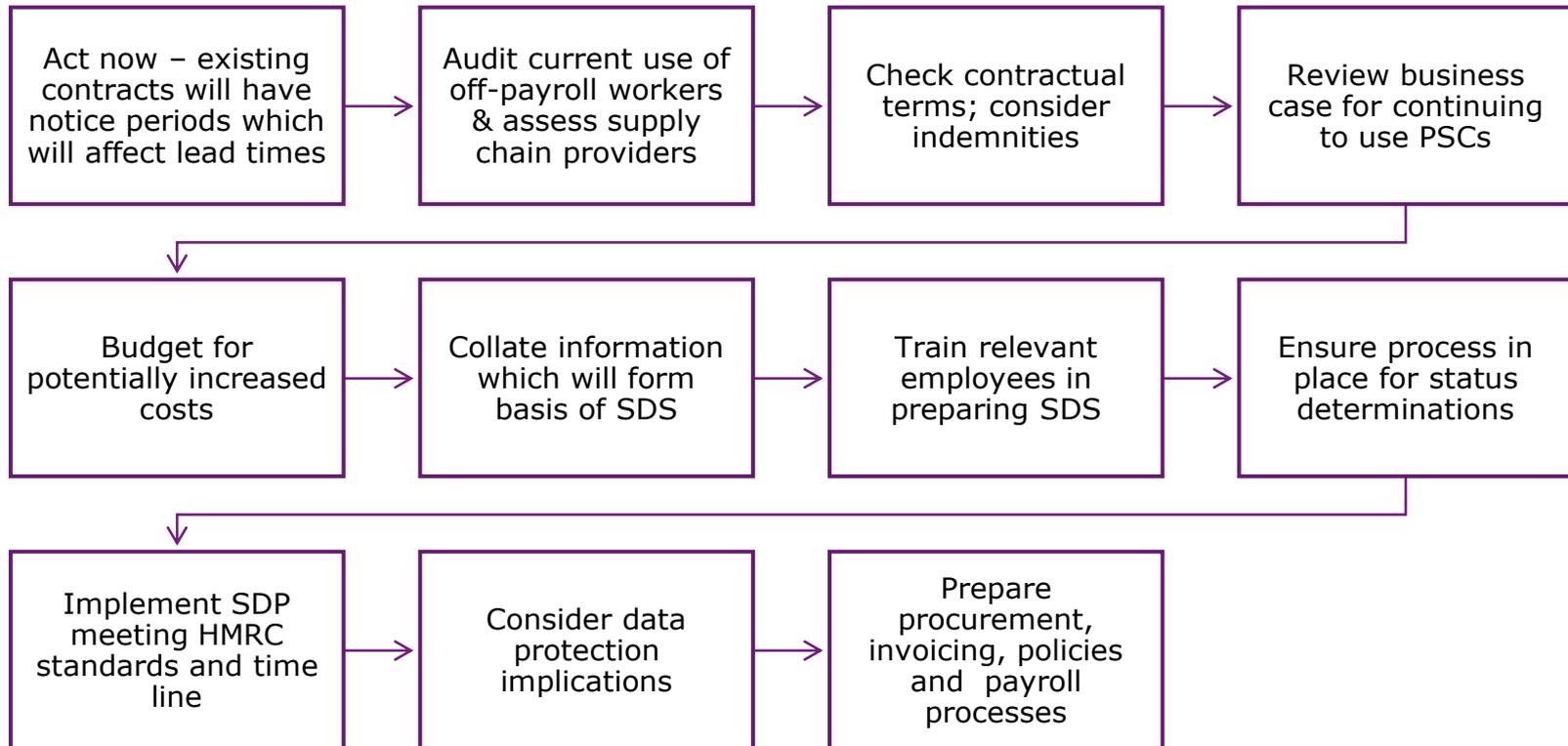
Managing your contingent workforce

Do's and don'ts

Do 	Don't 
Treat all staff (whether employees or not) in a fair non-discriminatory way	Don't directly performance manage your workers/contractors or deal with conduct issues and complaints under your disciplinary/grievance procedure
Ensure managers are aware of the different rights and obligations of employees vs workers/independent contractors	
Ensure systems and mechanisms are in place to keep track of contingent workforce within Client	Don't instruct workers/contractors to take holiday; avoid specifying exact working hours where possible (but raise any concerns re time off or wellbeing with agency/umbrella company)
Be clear if certain policies only apply to employees/consider having separate policies (or manual) for workers/contractors with references to employees/benefits etc. removed	
Consider giving separate training to contractors (e.g. compliance training)	Avoid giving business cards to workers/contractors
Limit invitations to social events/training sessions to employees	
E-mail signatures should make clear if individual is contractor	Consider whether worker/contractor should be using their own equipment
Raise performance/conduct or wellbeing concerns with the agency/umbrella company	

Planning for implementation

Planning for implementation



Planning for implementation

- Which policies/procedures
- Certain functions out of scope?
- Authority to hire and approve
- Who should undertake CEST/SDS?
- Governance
- Regular review (bad habits re-emerge)
- Ensuring consistency of operational approach



Planning for implementation

– **Internal communications**

- Senior Leaders/Executive team
- Key departments with relevant responsibilities e.g. procurement, resourcing, payroll
- Operational business and managers

– **External communications**

- Key commercial relationships e.g. agency providers
- Impacted contractors/workers
- Service providers e.g. payroll providers

– **Identify training needs**

- ensuring your business understands the key changes to off payroll rules and employment status risks
- training the business on new internal systems e.g. who will undertake your CEST/ SDS?



Mark Hammerton

Partner

Telephone: 07392 281 276

Email: markhammerton@eversheds-sutherland.com

Eversheds Sutherland LLP

Eversheds House

70 Great Bridgewater Street

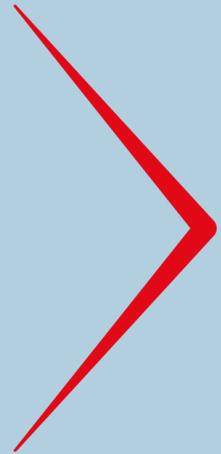
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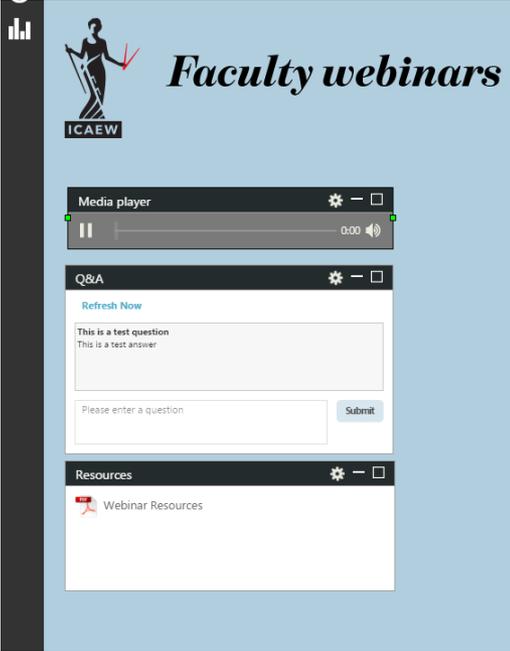
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