RIFT
Legal Services

WHITE PAPER
PRESENTATION

CN Construction News

Are you ready for the HMRC Crackdown?

Employment status: understanding the **risks, cost & solutions.**

A WHITE PAPER PRESENTED BY

RIFT Legal Services

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EXECUTIVE SUMMARY

Changes made to legislation two years ago could soon have major implications for construction companies.

Amendments in 2014 to Section 44 of the Income Tax (Earning and Pensions) Act 2003 could leave firms with huge bills for workers they have treated as self-employed.

As working status investigations take a long time to conclude, and many get settled pre-tribunal, there is a false sense of calm across the industry about the implications of these legal changes.

But with trade unions, the Office of Tax Simplification and tax authority HMRC both highly motivated to tackle what is often termed 'false self-employment', and with politicians and the media increasingly drawn to the issue, it is critical for companies in the industry to be prepared.

This white paper will walk you through the motive and means for a major employment status crackdown in the industry, the potential consequences, and how you can protect your company.

Motive

Data released by the Office for National Statistics this summer showed that 4.7m people were classified as self-employed across the UK in the first quarter of 2016.

Self-employment grew during the economic downturn, at the same time as government budget deficits spiked and austerity policies were introduced.

If the government can convert just one in 10 self-employed workers to employee status, and if these were earning just £500 per week each, it would receive an extra £1.5bn per year in employer national insurance contributions alone.

"I believe HMRC will be more successful in challenging self-employment than it has ever been"

KYE BURCHMORE, RIFT LEGAL SERVICES

Meanwhile trade unions are keen to see more workers classified as employees because of the legal benefits of employment rights. Financial secretary to the Treasury Jane Ellison wrote to Labour MP Frank Field in October saying the government took false self-employment "very seriously".

Means

HMRC advertised 1,000 key caseworker posts this summer and launched an employment status and intermediaries team to boost its compliance focus.

It has also published guidance explicitly demonstrating where construction companies could find themselves classified as agencies – and thus as employers for income tax purposes – under the 2014 legislation changes.

For example, HMRC says a building company using an individual tradesman to work on a homeowner's domestic extension could be classified as an agency if it is seen to represent an entity between a client and a worker.

One exception would be if the firm could prove it had no right to direct, supervise or control the manner in which the workers it used provided the service – but this could be difficult to establish in practice and leaves a significant risk in the absence of a precedent.

"HMRC now has the tools needed and I really believe it will be more successful in challenging self-employment than it has ever been before," says RIFT Legal Services tax director Kye Burchmore.

460,000
Could be falsely self-employed

Threat

Employment status enquiries look set to increase, and these can represent a major burden.

In the experience of RIFT Legal Services, it takes more than two years for the average status enquiry to be resolved, with defence fees reaching £20,000 in some cases.

If a subcontractor is reclassified by HMRC, there will be additional costs of employment such as sick leave, holiday pay, workplace pensions and national insurance

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Self-employed in UK

Self-employment since 2008

Self-employed people in UK work in the construction industry.

contributions. For example, employers currently have to pay national insurance contributions equal to 13.8 per cent of many employees' salaries, depending on age and income.

A report by Cranfield School of Management professor Andrew Burke found that freelancers created six forms of economic value in the construction sector, including reducing the upfront cost of projects, keeping build prices down and boosting competition.

"The construction industry is dependent on self-employment," Mr Burchmore says. "Stripping that away could bring the sector to its knees."

Protection

RIFT Legal Services advises firms to look in detail at the employment conditions and circumstances of all workers they pay, preferably using an expert.

The key to surviving the renewed challenge to employment status is to make sure you are confident about the reasons you do not count workers as employees.

Understanding the finer points of case law will help construction companies decide whether they could use it to challenge an employment status decision.

RIFT Legal Services believes it should be a priority for all businesses to fully review how they engage their workforces to ensure everything is correct and compliant, rather than to tackle the potentially harder task of establishing self-employed status for the individual.

"If you know you've looked at status and done everything you can, ideally keeping records of your process as a living document, then you're in a much better position than most," Mr Burchmore says.

Expert help

It is critical to really understand the law and the tax and legal systems to successfully see off employment status challenges. RIFT Legal Services is well placed to defend construction companies against such reclassifications.

The firm works on a consultancy basis, analysing working relationships and using its experience and knowledge to see where and how a non-employee status could be maintained and defended – as well as advising when a worker truly should be employed for everybody's benefit.

Once engaged, experts at RIFT Legal Services will help a company put the right contracts and other documentation in place.

"If retained, we will then defend any case from initial enquiry through to tribunal," Mr Burchmore says. "And if we lose we will pay the National Insurance liability ourselves."

"We will defend any case from initial enquiry through to tribunal. If we lose we pay the liability"

KYE BURCHMORE, RIFT LEGAL SERVICES

Myth busting

Despite all the evidence, arguments are often made that construction companies do not need to take the issue of worker status challenges seriously.

This section provides the RIFT Legal Services' myth-busting guide to clearly lay out the situation.

A spokesman for HMRC informed this white paper directly, saying: "HMRC is currently transforming its compliance approach with the creation of a new employment status and intermediaries team to focus on status and employment intermediary risks.

"This dedicated resource will allow HMRC to better focus its resources and expertise to ensure these issues are effectively tackled."

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CHAPTER 1: MOTIVE

False self-employment is firmly in the government's sights.

The volume of people declaring themselves as their own boss has soared since the beginning of the economic downturn.

In fact, as recently as November 2010, David Cameron urged "more people to make a job rather than take a job" as he launched a week of events across the country for Global Entrepreneurship Week to encourage people to become self-employed.

At the same time, the then business secretary Vince Cable expressed his support for the focus on self-employment and small business creation, pledging to tackle "onerous regulations and taxes" to encourage entrepreneurial activity that he said generated economic growth and jobs.

It seems to have worked – but maybe not in the way they intended. Data released by the Office for National Statistics this summer showed that 4.7m people were classified as self-employed across the UK in the first quarter of 2016. This was up by more than 20 per cent from the third quarter of 2008.

This has happened in parallel with a spike in government budget deficits and the strict austerity movement led by then chancellor George Osborne.

Former Labour chief secretary to the Treasury Liam Byrne's famous note that there was "no money" when he left in 2010 summed up the desperate situation.

If the government converts one in 10 self-employed workers to employee status, and if these were earning just £500 per week each, it would receive an extra £1.5bn per year in employer national insurance contributions alone.

There would be benefits in employee national insurance and income tax payments on top. And that's before backdated claims.

As well as much needed cash, there is another political motivation: worker rights. The self-employed generally aren't covered by employment law, although they retain safety protection and in some cases can bring discrimination cases.

Employees, on the other hand, are entitled to the national minimum wage, annual leave, sick pay, maternity pay, the right to request flexible working and more.

Trade unions and other workers' rights groups are actively pursuing a conversion of more people to employment status. This drive has intensified with the growth of the gig economy, which sees people make a living from various short-term assignments and has created a media buzz.

"Six million people are not covered by workplace rights. Worryingly, that continues to grow"

MATTHEW TAYLOR, RSA

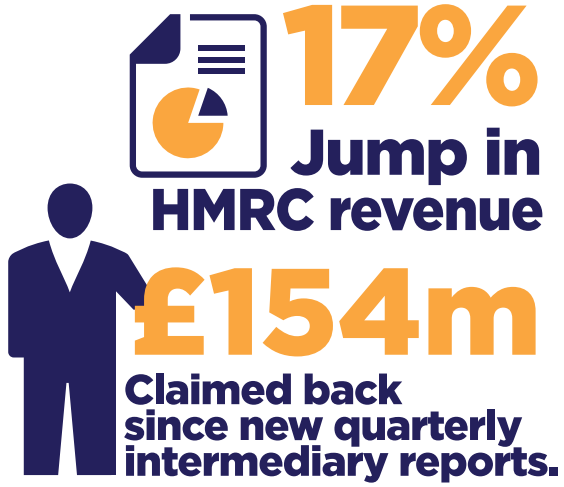
A recent employment tribunal decision that classified two people earning money driving for taxi firm Uber[1] as employees was covered across the national media.

Leigh Day employment lawyer Annie Powell, who worked on the case, said it produced a "ground-breaking" decision. "It will impact not just on the thousands of Uber drivers working in this country, but all workers in the so-called gig economy whose employers wrongly classify them as self-employed and deny them the rights to which they are entitled," she added.

Meanwhile, the *Guardian* has turned the spotlight on working practices at delivery firm Hermes[2], while it emerged in October that 100 BBC presenters were being investigated by HMRC[3] for historic practices.

All the publicity has not gone unnoticed at Westminster. Prime minister Theresa May has ordered a review of employment practices, to be written by the Royal Society for the Encouragement of Arts, Manufactures and Commerce chief executive Matthew Taylor.

Writing in the *Guardian* in October, Mr Taylor said: "Around six million people are not covered by the standard suite of workplace rights. Worryingly, that number continues to grow, and it shows how rapidly changing business models and working practices are continually stretching the limits of our employment rules."



SOURCE: UHY HACKER YOUNG

Meanwhile, also in October, the Business, Energy and Industrial Strategy Committee launched an enquiry into the future world of work.

The committee, chaired by Labour MP Iain Wright, said the review's terms of reference would include: "What should be the status and rights of agency workers, casual workers and the self-employed ... for the purposes of tax, benefits and employment law?"

Another Labour MP – and chair of the Work and Pensions Committee – Frank Field has become a parliamentary champion of employment status challenges, and has gained support from the Treasury and HMRC.

Financial secretary to the Treasury Jane Ellison wrote to Mr Field in October saying the government took false self-employment "very seriously".

The Office of Tax Simplification published a Focus paper in December 2016 intended to stimulate debate around issues of taxation with the rise of the 'flexible workforce' in the 'gig', 'platform' and 'sharing' economies.

Ministers are "committed to taking strong action where companies, to reduce their costs, force their staff down routes which deny them the employment rights and benefits they are entitled to," Ms Ellison warned.

"If the government's commitment to enforce compliance is genuine, construction must be a priority"

BRIAN RYE, UCATT

As this political movement gathers pace, construction looks increasingly vulnerable.

In addition, there seems to be have been very little consideration of the impact on people who are genuinely self-employed and wish to stay that way for a wide variety of reasons. Employers often hire the self-employed for projects that need the flexibility they can provide.

If organisations become wary of doing this due to a fear of employment status challenges, we could see much wider economic and social effects.

£1.5bn

If 1 in 10 workers converted = £1.5bn in employer NI contributions

The construction industry contains about one in six of the UK's self-employed, and these are all on a neatly contained list at HMRC due to the Construction Industry Scheme.

There is also an active, interested and growing trade union presence in the sector.

In October Ucatt, the trade union for the construction industry, wrote to Ms Ellison calling for HMRC to investigate construction firms. The union's acting general secretary Brian Rye said: "If the government's commitment to force companies to properly comply with rules on employment status is genuine, then construction must be a key priority."

Ucatt will merge with mega-union Unite in early 2017, with Mr Rye saying the industrial might of construction workers would "double overnight".

HMRC has long looked for false self-employment within construction, and there is every reason to expect this to intensify in the current climate.

As well as having a huge motivation to probe employment practices in the industry, the tax authority also has increased its means, both in terms of its own resources and with critical changes to legislation. Read the next chapter to understand more about why and how it may seek to challenge employment status in construction.

[1] Uber has previously insisted that "the main reason people choose to partner with Uber is so they can become their own boss, pick their own hours and work completely flexibly".

[2] Hermes has said it is proud to have a network of couriers "who enjoy their work and deliver high standards of service in return for good rates of pay".

[3] The BBC said that since 2013 it had adopted an employment status test that "provides a clear and consistent approach to the employment status of journalists and presenters".

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CHAPTER 2: MEANS

HMRC doesn't just have the motivation to challenge self-employment in construction – it has recently acquired the means.

The main weapon in its arsenal is the new wording of Section 44 of the Income Tax (Earning and Pensions) Act 2003. Amendments made in 2014 broadened the definition of agency employment.

The new wording effectively says a worker is employed by an agency if his or her services are carried out due to a contract between a client and a third party.

Guidance issued by HMRC explicitly shows how that could relate to common building industry arrangements.

It uses the example of a homeowner commissioning an extension to their property, a construction firm called ABC Builders winning the contract, and an individual providing services on the project. In this case, HMRC states, the homeowner is the client, the individual is the worker and ABC Builders is an agency.

The only factor HMRC need to consider is whether there is the right by anyone to supervise, direct or control the manner in which the individual provides the services, and HMRC and the tribunal will assume there is this level of control until proven otherwise by the taxpayer. These changes mean it is now much simpler for HMRC to bring an employment status challenge.

Government guidance says someone is "probably an employee" if "most of" its 14 specific statements are true. These include not being able to send someone else to do their work; being eligible to join a business's pension scheme; and only working for one business in that particular line of work.

This grey area has traditionally allowed companies to construct arguments that a worker they pay is not an employee by focusing on select points from the long list. Note that the firm should not necessarily have to establish that the worker is self-employed, just that it does not employ the individual.

A landmark ruling was made in 1967 by Lord Justice MacKenna in the case of *Ready Mixed Concrete (South East) vs the minister of pensions and national insurance*. The company successfully overturned a decision that it should treat a delivery driver as employed.

Lord MacKenna said in his ruling: "If the provisions of the contract as a whole are inconsistent with its being a contract of service, it will be some other kind of contract, and the person doing the work will not be a servant. The judge's task is to classify the contract... he may, in performing it, take into account other matters besides control."

"These changes mean it is now much simpler for HMRC to bring an employment status challenge"

What this ruling is saying in practical terms is that if the contract has features which are contradictory to an employment contract then the worker will not be counted as an employee. Control is an important factor to consider, but it isn't the only factor.

Complex consideration of these other matters could effectively be stamped out by HMRC now arguing that construction companies are agencies.

Under that definition, the only way to avoid classification of workers as employees for tax purposes is to prove they are not "subject to (or to the right of) direction, supervision or control by any person".

1000

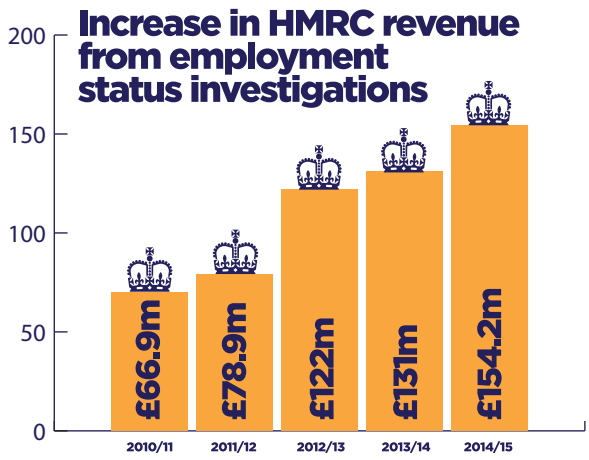
New HMRC case workers

It is difficult to imagine a working relationship where someone paying for work is unable to in some way direct or supervise it. Although many skilled trades would come and scope their own jobs on site, this may not be a watertight defence.

"If an electrician is brought in to a job then he won't need to be told how to do it," says RIFT Legal Services tax director Kye Burchmore.

"But it is about the 'right' to control. Perhaps the main contractor could tell the electrician how to do the work."

The way the legislation is worded means it could ▶



arguably be applied in a huge range of situations, Mr Burchmore warns.

"Most people doing work for anyone else would say that if they are being paid they can be told how to work. This is a tough one really and many people are sitting back and waiting to see where the line will sit as cases go through tribunals.

The courts will probably take a practical view on this; if the worker is a skilled tradesman with experience, it is unlikely there will be the need for control, but whether the client actually retains the right of control will depend on the facts of the case and the witness evidence."

This is a critical element with the new legislation: it is practically untested. Although the changes are more than two years old, HMRC status enquiries can take even longer than that to resolve, and many are settled without appearing in tribunals.

"Many are sitting back and waiting to see where the line will sit as cases go through tribunals"

KYE BURCHMORE, RIFT LEGAL SERVICES

Test cases could be months or years away, and if a judgement then finds that a certain construction firm is an agency exercising control on a worker, this could have serious ramifications across the industry.

One risk is that an unprepared contractor goes up against the tax authority with a poorly prepared argument and loses. This could create case law that makes it much easier for HMRC to use agency legislation to claim national insurance payments from other contractors.

Given what is riding on such a test case, HMRC would be well geared up to win it.

Spurred on by support from the government, trade unions and the media frenzy on worker rights, the body is taking its crackdown on what it sees as false self-employment seriously.

HMRC advertised 1,000 key caseworker posts this summer, promising training and support towards "high-quality and hard-hitting results".

"An electrician won't need to be told how to do the job he was brought in for; it is about the 'right' to control"

KYE BURCHMORE, RIFT LEGAL SERVICES

The organisation also created an employment status and intermediaries team to focus its compliance efforts.

Mr Burchmore believes the tax authority is a much stronger opponent in status challenges than it used to be.

As the name of its new unit testifies, HMRC is particularly keen to probe self-employment through intermediaries. These third-party companies have sometimes been used by firms in the construction sector to pay subcontractors, with the intermediary taking on the administrative burden and the risk of status enquiries.

HMRC has clarified that in the example of the homeowner's extension, if ABC Builders used an intermediary to pay workers, the tax body would see both the contractor and the intermediary as agencies – with the construction firm still liable for national insurance payments. It is only ever the end client who is never liable.

Further to this, HMRC has brought in reporting requirements for intermediaries. Now anyone who supplies individuals' services to clients must send reports to HMRC every three months detailing any payments made to workers that do not go through PAYE. These reports – along with the Construction Industry Scheme through which most contractors must pay their subcontractors – give the tax authority clear sight of individuals and companies to target for employment status checks.

"HMRC now has the tools needed and I really believe they will be more successful in challenging self-employment than they have ever been before," Mr Burchmore warns.

So what would such a challenge involve, and what would be the implications for construction firms? Read the next chapter to find out in detail.

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CHAPTER 3: THREAT

HMRC is highly motivated to challenge self-employment in construction and has recently acquired both the ability and the framework to do so successfully. What does this mean for contractors?

The first thing is that the likelihood of receiving a status enquiry has risen and such an enquiry can represent a major burden.

There is a substantial administrative element and the need for extremely specialist legal expertise that most organisations will not have internally. In addition, needing to find and engage legal advice at short notice comes with its own risks, as does the fact that many firms will have had no prior experience in this area.

Enquiries can last for years. A range of evidence will be gathered including meetings with business owners, records, correspondence back and forth and interviews with the workforce. If a firm disagrees with HMRC's decision, it can then appeal to a tribunal and have the case heard in front of a judge.

In the experience of RIFT Legal Services, it takes more than two years for the average status enquiry to be resolved, with defence fees reaching £20,000 in some cases. Due to a number of appeals and changes of authority, one particular dispute – not involving RIFT Legal Services – lasted 12 years.

Unsurprisingly, drawn-out legal processes such as this can have knock-on effects on construction businesses.

"HMRC can interview subcontractors, and this can make them nervous," Mr Burchmore says. "Some might prefer to go and work elsewhere.

"Word can spread and customers and partners start to know you have an HMRC enquiry. People assume you are doing things you shouldn't be – even if you're not.

"There is an additional risk of a firm's subcontractors being reclassified as employees. If HMRC successfully argues that this should happen, you could take a huge financial hit."

"Word can spread. People assume you are doing things you shouldn't be even if you're not"

KYE BURCHMORE, RIFT LEGAL SERVICES

Employers currently have to pay HMRC national insurance contributions equal to 13.8 per cent of an employee's salary unless they are on £156 or less per week or, where they are under 21 or an apprentice under 25, less than £827 a week.

For example, five eligible subcontractors on £400 a week each, who are found to be employees at a tax tribunal, would suddenly mean a firm owing £276 per week in national insurance contributions. This is more than £14,000 per year.

National Insurance liability illustrations for SMEs in the construction industry

Example 1	
Weekly workforce cost of 10 workers on £700 per week	£7,000
Annual workforce costs to company based on 48 weeks	£336,000
Weekly National Insurance Contributions	£966
If HMRC challenge employment status the potential liability on NI for these workers could be	**£43,680**

Example 2	
Weekly workforce cost of 5 workers on £400 per week	£2000
Annual workforce costs to company based on 48 weeks	£96,000
Weekly National Insurance Contributions	£276
If HMRC challenge employment status the potential liability on NI for these workers could be	**£13,248**

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This payment claim could be backdated for six years, if it is ruled that the workers should have been classified as employees for that long – meaning a bill in excess of £86,000. Interest and penalties could be added.

At this stage many employers would deem it prudent to offer these workers employment contracts to ensure they were given the full range of rights they would be entitled to if an employment tribunal followed the precedent established by the tax tribunal.

This would mean a further administrative burden as well as the financial costs of offering sick pay, annual leave, maternity/paternity pay and more. There is also now the right to request flexible working and the roll-out of auto-enrolment pensions to consider.

"Our analysis highlighted that the industry model relies on the ability to use freelancers"

ANDREW BURKE, CRANFIELD SCHOOL OF MANAGEMENT

Workers can also make their own claims.

An employee is entitled to statutory annual leave of 28 days – or 12.07 per cent of their salary. Claims can be backdated two years so a worker who earns £20,000 a year could claim £4,828. Although a worker would have to bring their own claim for such payouts, it is likely that a tribunal would find in their favour if the company has already lost a case to HMRC.

An alternative scenario could be that a union takes on a claim on behalf of its members. This means the employer will have to either deal with larger cases or many individual ones, both of which will be costly in terms of time, money and reputation.

Once a business employs people, it loses some of the flexibility to engage and disengage them as a project ebbs and flows.

There will also be a negative impact on individuals who wish to work on a contract-by-contract basis as it better suits their circumstances.

If companies become reluctant to engage workers in this way then they will find it increasingly difficult to find work.

A report by Cranfield School of Management professor Andrew Burke found that freelancers created six forms of economic value in the construction sector, including reducing the upfront cost of projects, keeping build prices down and boosting competition.

"Industry executives in our case study analysis highlighted that the industry business model relies on the ability of firms to use freelancers," the report said.

A further risk is that companies have to increase their prices after employing more workers directly, making them less competitive and reducing their chances of winning work, opening a vicious circle that will ultimately end with even more people out of work.

Construction plays a crucial role in the UK economy and was put at the heart of the country's recovery drive by former chancellor George Osborne, with his "we are the builders" mantra.

"HMRC and the government need to weigh up the threats of doing significant damage to the sector"

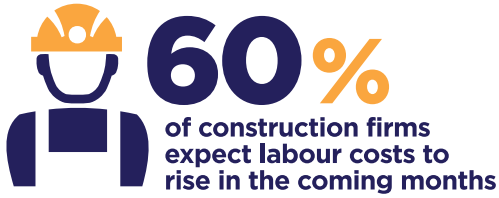
KYE BURCHMORE, RIFT LEGAL SERVICES

However, industry output was slightly lower in June and July 2016 than in the same months the previous year, according to figures from the Office for National Statistics.

With the added uncertainty of the EU referendum result, further negative shocks to the sector pose a risk to its performance.

"The construction industry is dependent on self-employment," Mr Burchmore says. "Stripping that away could bring the sector to its knees and have a huge knock-on effect.

"While HMRC and the government are keen to recoup what they perceive as 'missing' revenue, they need to weigh that against the potential threats of doing significant damage to the sector as a whole."



SOURCE: IRWIN MITCHELL

CHAPTER 4: PROTECTION

Given the serious and very real nature of the threat to the construction industry, RIFT Legal Services advises firms to make it a priority to fully review how they engage their workforce.

This includes looking in detail at the employment conditions and circumstances of all workers they pay. Expert guidance is needed, as employment status could be judged differently depending on circumstances on a case-by-case basis.

"If you know you've looked at status and done everything you can, ideally keeping records of your process as a living document, then you're in a much better position than most," Mr Burchmore says. "If a company takes the time to consider this area before an enquiry starts, that enquiry will invariably be concluded more quickly, saving the company time, money, stress and reputation.

"There is still scope to be self-employed in construction, and it is important to stand firm"

KYE BURCHMORE, RIFT LEGAL SERVICES

"However, just doing the same thing as another organisation because it was found to be compliant by HMRC does not mean that yours will be. The situation of your organisation and your workers will be different from theirs and needs its own review."

The key to surviving the renewed challenge to employment status is to make sure you are confident about the reasons you do not count workers as employees.

RIFT Legal Services does not advise blindly enrolling everyone as an employee for several reasons.

As established in earlier chapters, there can be a significant financial and practical cost to employment relationships and many companies may be far better suited to using genuine subcontractors.

On top of this, Mr Burchmore believes it is important for the industry to defend its position.

"It is harder to win cases now, but there is still scope to be self-employed in construction, and I think it is important to stand firm," he says. "We need to argue those cases at tribunal to make the law clearer."

RIFT Legal Services is passionate about challenging the tax authority. "The term 'false self-employment' should be abandoned," Mr Burchmore says.

"An individual can work in a variety of ways and just because they may not be a fully fledged business in their own right does not mean that they are an employee."

13%

of employment agencies have looked to pass associated costs from the new rules to end clients

10%

of construction companies say the new rules are making them less competitive at tender

SOURCE: IRWIN MITCHELL

He points to the 2009 case of *Sherburn Aero Club v HMRC*, where special commissioner John Clark ruled that a group of flying instructors should not be treated as employees.

One point Mr Clark made was that aircraft provided by the club merely represented location rather than the means for their job. Relating this to construction shows subcontractors do not have to provide every single element of their working environment to classify as non-employees.

Mr Clark showed the importance of Lord Justice MacKenna's 1967 ruling – from the case involving Ready Mixed Concrete (South East) – when saying in the Sherburn Aero Club case: "Having considered all three of MacKenna J's conditions, and found that two of them are not fulfilled, it is not strictly necessary for me to consider other tests."

"Since many of the workers were highly skilled, I imagine that they needed no control"

HOWARD M NOWLAN, SPECIAL COMMISSIONER

The three conditions boil down to: whether a worker has to provide a service personally; whether they are subject to a sufficient level of control; and whether there are elements of the contract that look like employment.

Case law has shown that proving one of these three factors does not exist in a working relationship is one way of challenging a decision that a worker is employed. Proving it is the tricky part, however, and relies on careful application of legal expertise.

Understanding the finer points of case law will help construction companies decide whether they could use ▶

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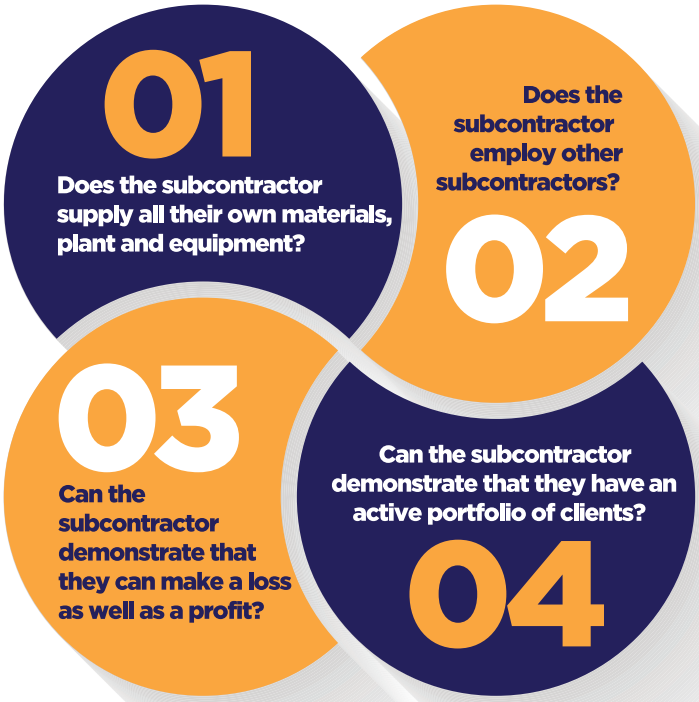
Employee Classification

To back up its arguments for reclassification, HMRC has devised a series of simplistic tests, the failing of which could lead to "status review".



If the answer to any of these questions is **NO then HRMC** are extremely likely to classify the engagement as employment, not self-employment. The impact of this on the "employing" contractor can be disastrous; massive bills for unpaid National insurance contributions, fines, and interest.

it to challenge an employment status decision.

Similarly, if HMRC classifies contractors as agencies under the amended legislation, as per its guidance notes, then companies will need to understand how to successfully argue either that they are the client in a relationship or that they do not have the right to direct, supervise or control workers they use on projects.

Whether a company is defined as an agency employer or a straightforward employer, proving that a worker is not subjected to a certain level of control – nor even potential control – can be seen as a way to prove the employment relationship does not exist.

RIFT Legal Services believes it should be a priority for all businesses to fully review how they engage their workforces to ensure everything is correct and compliant, rather than to tackle the potentially harder task of establishing self-employed status for the individual.

Two avenues that legal experts can carefully go down here are to demonstrate that any control exercised by the construction company is for health and safety reasons, or to show control is for marking out the parameters of the job rather than dictating the manner in which it is carried out.

An important judgement here comes from special commissioner Howard M Nowlan in a 2008 case between HMRC commissioners and Castle Construction (Chesterfield). Mr Nowlan found 314 of 321 construction workers – many of them bricklayers – to be self-employed in this case.

Speaking about the control test as referred to by Lord MacKenna, Mr Nowlan said in the *Castle Construction (Chesterfield)* case: "Beyond the fact that the principal contractors ensured that the architect's plans were followed, and rather obviously that walls were not put in the wrong place or built in the wrong sequence, there seems to have been little relevant exercise of control that can have much influence on my decision."

He discounted site opening hours as safety features, and staggered lunch breaks as sensible administration. "On the perhaps more critical question of whether [Castle Construction], or indeed the principal contractors, told the bricklayers how to lay bricks, it was never suggested that they did," Mr Nowlan added.

"Since many of the workers were, I understand, highly skilled and experienced, I imagine that they needed no control in this regard and would most certainly not have welcomed it."

This is critical case law identifying a potential route of defence for construction firms faced with status challenges. But it needs to be carefully prepared and managed by tax law experts, which is where RIFT Legal Services comes in.

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CHAPTER 5: MYTH BUSTING

Despite all the evidence in this white paper, arguments are often made that construction companies do not need to take the issue of worker status challenges seriously.

Here is the RIFT Legal Services myth-busting guide.

Myth **HMRC does not have the will or resources to implement employment tax law.**

Reality HMRC has recently taken on 1,000 case workers and has created a specialised unit to tackle what it sees as false self-employment, particularly through intermediaries.

It is under pressure from politicians and trade union leaders to investigate employment status and is upping its game considerably.

Myth **My company isn't big enough for HMRC to be bothered with.**

Reality The construction industry has a substantial number of small firms, and the tax authority is motivated to challenge employment statuses across the board.

It has the Construction Industry Scheme and intermediary payment reports as handy lists of names. Also, it may not be HMRC that initiates proceedings; sometimes in other industries it is workers themselves.

While people are expecting well-known firms to be high priority targets for HMRC, it may in fact be completely the reverse of this.

HMRC is keen to get case law on their side as quickly as possible. Smaller firms are likelier to be easier targets in this regard, not having the resources or internal legal expertise to be able to fight long, drawn-out cases.

Myth **It is down to workers how they classify themselves.**

Reality If HMRC decide you should have been paying workers as employees, it won't matter what the status quo is, or what the workers themselves think. Ultimately it will be decided by a tribunal and depend on complex legal reasoning.

Myth **It is easy to show that someone is self-employed; the government has a list of factors you can choose.**

Reality There are some guiding points but only 'most' of the 14 points have to be satisfied to show someone is employed – so you need quite a balance of evidence to refute it. Proving self-employment is even harder.

Meanwhile, there is a raft of case law from different social and economic eras that can be used to define worker status. There is no clear and simple dividing line. However, the wording of agency legislation has changed to potentially catch some construction firms using subcontractors within the definition of agency employers.

Myth **We are not an agency so we can ignore that law.**

Reality Guidance issued by the HMRC shows it very much believes a lot of construction companies are agencies for the purposes of this legislation.

The way the law is now worded could make it very tough for contractors to prove otherwise.

Myth **No cases have been brought yet so we're probably fine.**

Reality Although it has been around for more than two years, the newly worded agency legislation is very much in its infancy.

Status enquiries can take a long time to reach tribunals, if they ever do, but when one does it could just be the tip of a major iceberg, especially if it establishes case law in favour of the HMRC guidance.

Myth **We'll start paying national insurance in the unlikely event we lose a case.**

Reality If a tribunal establishes that you should have been paying workers as employees then HMRC can ask for backdated national insurance contributions that can add up to huge financial bills, potentially putting companies out of business.

Finally, let's hear from the horse's mouth.

A spokesman for HMRC told us: "HMRC is currently transforming its compliance approach with the creation of a new employment status and intermediaries team to focus on status and employment intermediary risks.

"This dedicated resource will allow HMRC to better focus their resources and expertise to ensure these issues are effectively tackled.

"Where companies are believed to have misclassified individuals as self-employed, HMRC establishes the facts of the case and will take steps to ensure all the appropriate tax, NICs, interest and penalties are paid.

"The agency legislation at section 44 [of the of the Income Tax (Earning and Pensions) Act 2003] applies where there is a body between the worker and the user of the labour. A construction firm engaging workers directly will need to consider whether they should be properly treated as employees and PAYE applied."

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CHAPTER 6: EXPERT HELP

The Office of Tax Simplification last year warned: "Employment status is a complex and wide-ranging subject that many have said has no real solution – and that if we did manage to 'solve it', we should immediately move on to world peace as we'd clearly be on a roll."

This is not an area for people to wade into nonchalantly. You need to really understand the law and the tax and legal systems if you want to successfully see off employment status challenges.

RIFT Legal Services is well placed to defend construction companies against the threat posed, but more importantly is working with companies to ensure compliance and mutually beneficial working arrangements for employers and workers before a defence is necessary.

The firm works on a consultancy basis, analysing working relationships and using its expertise and knowledge to advise on the correct classification of workers to best suit the needs of all parties, including when a worker truly should be employed for everybody's benefit.

Experts at RIFT Legal Services will help a company put the right contracts and other documentation in place. The company then handles any HMRC status enquiries for construction firms it is retained by, becoming the point of contact for the tax authority's inspectors.

So confident are RIFT Legal Services in their review and advice that they guarantee to pay fully any fees ultimately charged to companies it is retained by on this issue.

The firm uses its understanding of the enquiry process, along with an extensive knowledge of case law from construction tax disputes as well as all fields, to give itself the best possible chance of defending claims.

"We look at the company's relationships with individuals, speaking to the workers where we can, and piece together how the workers should be classified under the current set up using our understanding of how HMRC works and our knowledge of the legal process," Mr Burchmore explains. "We will then defend any case from initial enquiry through to tribunal – and if we lose we will pay the National Insurance liability."

This is not bravado; the company has every reason to be confident in its judgements.

The directors of RIFT Legal Services have more than 40 years of combined experience. Kye Burchmore has over a decade of experience as a tax consultant and has written extensively on the issue.

Fellow RIFT Legal Services director Dave Smith is a former HMRC status inspector who has since spent almost two decades defending the construction industry from status enquiries and has built up a wealth of knowledge from both sides of the fence.

Dave made history by becoming the first tax adviser to successfully defend an IR35 case at the Special Commissioners in the landmark case of *Lime IT v Justin*.

Sarah Carstens has extensive experience in tax consultancy, advising clients who faced HMRC enquiries, as well as having been part of a top 10 accountancy firm.

RIFT Legal Services is part of the RIFT Group, founded by Jan Post in 1999 to help individuals and businesses in the construction industry who were being disadvantaged by complex HMRC tax refund legislation.

The RIFT Group has secured more than £135m in tax refunds, primarily for construction workers and has longstanding relationships with HMRC, unions, industry and government.

For advice on straightforward, expert protection against the threat of worker status challenge, contact RIFT Legal Services on **01908 516016** or at **www.riftlegalservices.co.uk**