



Procedures for deciding the employment status of Bucks New University workers.

Introduction

In recent years HM Revenue & Customs (HMRC) have employed a new risk-based assessment for tax compliance. The greater that an organisation is perceived to be a tax risk the more likely that HMRC will investigate its taxation affairs. It is in the University's interest to be perceived as a low tax risk institution. It is imperative that the University tighten its procedures in this area to protect itself from disruptive tax visits and inadvertently incurring financial penalties.

HM Revenue & Customs ("HMRC") are targeting employers such as schools, colleges, universities and local authorities on the issue of the status (PAYE and NIC treatment) of visiting teachers, lecturers and instructors ("lecturers"). It is clear that most of these employers are not applying the correct treatment.

The financial penalties can be significant. As the following example illustrates:

Example

A person that the University was paying by invoice at the rate of £1,000 per month is identified by HMRC as an 'employed' and the University is assessed for unpaid PAYE, NI, together with interest and penalties.

As a result, an example for 2013/14, the total payments for a year of £12,000 are deemed to be net of PAYE (20%) and employee's NI (12%). Therefore, the gross 'salary' becomes £17,647, on which the PAYE due is £3,530 and the employee's NI due is £2,117. In addition, the University must pay employer's NI of 13.8%, which will amount to £2,435. This gives a total additional charge of tax and NI of £8,082.

If this had been outstanding for a year then interest of up to 5% pa will be levied on this amount, which is an additional cost of £401. There will also be a penalty of a minimum of 30% of the tax and NI due, which amounts to £2,425. This gives a grand total of £10,908 financial penalty on an initial cost of £12,000.

In this example, the University had only been paying this person for a year, but the penalty would have been much larger if this situation had been going on for longer. HMRC are not restricted to looking at the previous year. They can look back for a total of six years.

It must also be noted that with the introduction of auto-enrolment into pensions, the University may be at risk if a worker's status is incorrectly assessed.

Why we need to establish employment status

In addition to the financial risks above there are additional consequences and potential risks for non-compliance:

There is a risk of inadvertently forming an employment relationship with someone engaged as a 'supplier' and as such giving them a legal entitlement to service conditions and employment rights.

Suppliers are also not subject to the usual recruitment processes and checks, eg immigration checks.

Self-employed and external contractors undertaking work for the University are not covered by the University's insurance in general and in particular its liability and professional indemnity insurance.

Employed versus Self-employed

An employment contract is a "contract of service", which describes the nature of the appointment, and details the terms of control, hours of work, and rates of pay. Such contracts will also provide sick, holiday, and maternity pay, and will explain both the machinery for resolving disputes and termination arrangements.

A company, self-employed individual or consultant provides a "contract for services", whereby they provide services to another organisation.

It is not a straightforward process of saying, I want to be paid as self employed; whether someone is employed or self-employed is not a matter of choice. Their status depends upon the terms and conditions of their engagement. 'Consultant' and 'Self-employed' are both terms that are applied quite loosely, but in all cases the key to correct treatment for tax purposes is not what they are called but the nature of the service or services they provide. This can differ significantly from one job to another, even for the same individual. A person can be self-employed in respect of the work done for one organisation, but employed (for tax purposes) for work done for another. It is necessary, therefore, to consider each job or contract in its own right.

Full details of the proposed work or activity should be documented, including the nature of the work, terms and conditions that will apply, responsibilities and expected outputs. This should be in the form of a contract or agreement which is then assessed against the University's process to determine employment status.

Over the years court cases have laid down tests that people must pass to qualify as self-employed. These tests are as follows:

- Can they hire someone to do the work or engage helpers at their own expense?
- Do they risk their own money?
- Do they provide the main items of equipment that they need to do their job, not just the small tools and equipment that many employees provide for themselves?
- Do they agree to do a job for a fixed price regardless of how long the job may take?

- Can they decide what work to do, how and when to do the work and where to provide the services?
- Do they regularly work for a number of different people?
- Do they have to correct unsatisfactory work on their own time and at their own expense?

Similarly, if a worker can satisfy all or most of the following conditions, then they are probably an employee:

- Do they have to do the work themselves?
- Can someone tell them at any time what to do, where to carry out the work or when and how to do it?
- Can they work a set amount of hours?
- Can someone move them from task to task?
- Are they paid by the hour, week or month?
- Can they get overtime or bonus payments?

In addition to these tests there are other questions that need to be addressed to reach a conclusion whether a person is self-employed or an employee. It is Finance / Payroll's responsibility to weigh up all the answers in the Questionnaire, which is part of the procedures, and decide whether the individual needs to go on the payroll or can be paid on invoices.

Letters from accountants etc are not acceptable as proof of self-employment.

Having a Unique Reference Number (UTR) itself is not proof of self employment for any particular contract; this only shows that the individual has submitted self-assessment tax returns.

It is very unlikely that work carried out by a current or an ex-employee will be deemed as self employment if it involves carrying out similar duties at this University. However each case is judged on its own merits.

The university's default position is that all "workers" are employees. If there is any dispute about this position, it is essential that employment status is confirmed in advance of commencement of duties.

If the individual still insists on being paid as self employed, Finance/Payroll will request details of the difference between the two roles, therefore it is imperative these details and copy of the contract, are supplied along with the questionnaire to save any delays.

Disputes about employment status.

Where a worker wishes to dispute the university's decision, she/he should seek an indicative employment status ruling from the HMRC website <http://www.hmrc.gov.uk/calcs/esi.htm>

It should be remembered that if the University treats a worker as self-employed when the reality of the situation is that the worker should have been treated as an employee, HMRC reserves the right to retrospectively seek payment of the appropriate levels of income tax for up to 6 years.

Failure to deduct tax may expose the university to the payment of arrears of PAYE plus interest and penalties. The liability for this payment rests with the recruiting department rather than the worker.

Lecturers

Quite clearly, where lecturers are engaged under a Contract of Service, whether full or part-time, supplying services on terms similar to other lecturers, they will be deemed to be employees for PAYE and Class 1 NIC purposes.

If a lecturer is engaged on terms *not* similar to other lecturers, the tax treatment depends on a number of factors and each engagement should be considered on its own facts, taking into account such matters as:

- Control (or right of control) over conduct and discipline, hours of attendance, where and when lessons are given, course content, preparation, assessment and marking requirements, etc.
- Whether the teacher must undertake the lecturing and other related duties personally or whether the teacher can send a replacement
- Who is to supply the equipment necessary (e.g. overhead projector, course materials) and at whose expense
- Whether any financial risk attaches to the engagement and who bears the risk
- The intention of the parties to the engagement

Where a lecturer works for more than one school, they are deemed employees at each school at which they provide their services.

If the part-time lecturer can demonstrate to HMRC that they have a series of similar short-term engagements at different establishments and they adopt a business-like approach, HMRC may issue an NT (no tax) PAYE code and payment can be made gross. If HMRC is not convinced the lecturers have similar income from other establishments or other income from providing similar lessons say, in their own home, HMRC will issue an appropriate PAYE code for tax to be deducted from the payment.

It has been suggested that if a part-time lecturer is engaged on a very short engagement of minimum hours they can be paid gross (and no Class 1 NIC is payable) and the lecturer can be deemed as self-employed; **this is incorrect**.

When engaging special teachers such as invigilators, peripatetic teachers, sports coaches, etc the guidelines above need to be followed.

The relevant HMRC regulations are available to view on the HMRC website under reference ESM4504.

Employed by BNU or Subsidiaries and Self-employed

It is possible to be both employed and self-employed; however, where the University is concerned we must be cautious. Any self-employed duties would need to be specific and distinct so there is a clear demarcation of duties. HMRC would probably regard such income as "income from employment" as it is an extension of their pre-existing employment relationship with the University. It would also be suggested that they are only getting the work because they work for the University so the earnings should be subject to PAYE.

To manage the risk appropriately, members of staff cannot be treated as employed and self-employed by the University at the same time. (This would be in direct breach of the University's Financial Regulations). Therefore, if an existing employee undertakes additional work that in other circumstances may be assessed as being carried out as an independent contractor, they will be paid via payroll. eg, consultancy, lecturing and other duties.

If they are full time already we would pay as an honorarium, and it would not attract additional pension contributions - based on the normal hourly rate applicable for the work being carried out. If they were part time we would pay as an additional contract and pensionable.

For anyone who claims the work is self-employed they should provide us with their HMRC unique self-employed tax payers' reference, complete a status factfinder form, supply a copy of the contract and also evidence of the appropriate insurance cover they hold.

If the University contracts with a Limited Company to provide their services then normal supplier and purchasing processes apply. See Finance/Procurement.

Overseas workers working in the UK

Refer all cases to BNU Human Resources and Finance Directorate before engaging.

Procedures

New consultants, lecturers and other individuals must go through the following process, which can be seen at a glance on the attached **Self-Employment Contractor Approval Process Flow Chart**:

The following must always be undertaken in advance of the contract being awarded and the start date of the individual. You must allow enough time for administrative processes and checks to be completed.

- a) Planning stage: A formal request is made to engage a consultant / lecturer / individual and a draft contract is drawn up.
- b) Where it is obvious that the individual should be paid through payroll, submit the required starter forms to HR and Payroll and normal recruitment procedures will apply.
- c) Where the employment status of is unclear, or the individual claims self-employment ask the individual to complete a Status Factfinder form. A self employed status is automatically rejected, where the individual does not quote their HMRC Unique Tax Reference Number (UTR) and HR and payroll forms should be completed.
- d) Complete the status questionnaire, copy attached, and forward it to Finance/Payroll.
- e) Finance/Payroll reviews the status questionnaire, and advises the outcome. Further information may be requested at this stage, for example, request a copy of the draft contract.
 - a. Employee: If the consultant/lecturer/individual is clearly an employee, then department is notified that he/she will have to go on the payroll and PAYE/NI will be applied to all fees. Complete new employee forms and submit to HR.

- b. Self employed: If the answers on the status questionnaire satisfy the tests for self-employment then the requestor is notified.

The following applies where it is assessed from the Status Factfinder form that the contract can be self employment. It now needs to pass the procurement checks.

- f) The requisitioner completes a new supplier form and requests bank details on headed notepaper, signed by the individual. Complete a Prock5 as necessary for the whole of the contract. Send all to Procurement.
- g) Procurement undertakes the required checks to ensure value for money, risk etc. and from the new supplier form and the contractor will be set up as a supplier.
- h) Raise a Purchase Order (PO).
- i) The consultant's/individual's invoices are submitted directly to Accounts Payable in the normal manner. An invoice received by Finance, will compare it with the PO and obtain authorisation for payment.
- j) After 12 months supplier accounts will expire. Status will need to be reassessed. If invoices are still being submitted more than one year after the original approval, then payment should be suspended until approval is renewed for another year.

National Insurance (NIC) Treatment

The relevant legislation is at *paragraph 4 of Part 1 of Schedule 1 to the Social Security (Categorisation of Earners) Regulations 1978*. How widely can these provisions be applied? In very simple terms, where instruction is given at an educational establishment for more than 3 days in a 3 month period, the teacher is an employee for NIC purposes and Class 1 NIC is payable.

For the purposes of this legislation, an educational establishment is defined as including “a place where instruction is provided in any course or part of a course designed to lead to a certificate, diploma degree or professional qualification”.

Careful reading of the provisions shows that it is not the instruction or the qualification that is relevant, but where it is given. Any instruction in an educational establishment makes the teacher an employee irrespective of what is taught. Such a wide interpretation is supported in a NIC appeal case concerning St John's College School.

This also applies where, for example, a local authority runs an evening class in a school, the teacher should be treated as an employee. The only exception to this is where the attendees pay the teacher directly.

In essence, a school will always be an educational establishment and any lecturer or teacher engaged should be treated as an employee and Class 1 NIC deducted. Many schools and authorities have not been paying Class 1 NIC in such circumstances and so may be exposed to considerable arrears and penalties.

How invoices should be addressed:

You should advise all suppliers that their invoices should be addressed and sent directly to Finance Directorate OH4 at the address below – or via email to accountspayable@bucks.ac.uk.

Buckinghamshire New University
Finance Directorate OH4
Queen Alexandra Road,
High Wycombe,
Bucks HP 11 2JZ

Tel: 01494 605083
Fax: 01494 605032

Important things to note

- Individual employee names and departments should not form part of the address
- Names and departments can be shown in the body of the invoice or as a separate reference
- Please provide an purchase order number to your supplier, so they can quote this on their invoice

The benefits of electronic invoices are:

- No lost invoices - all invoices delivered directly in to our Accounts Payable workflow system
- Easier to locate and read in our system – our system can read all formats
- Savings on paper and postage
- Invoices can be processed more quickly, faster payment can be made
- This process will reduce carbon dioxide emissions and save trees

Suppliers who change their bank account details for Bacs receipts should send a separate letter on their company letterhead, signed by an authorised signatory confirming the changes. We can accept a pdf copy of this. We will contact the supplier to confirm any changes.