

AISMA Guide to...



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October 2018

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EMPLOYMENT STATUS IN PRIMARY CARE

In a bid to clamp down on tax avoidance, HMRC may challenge the status of sessional GPs and locum doctors who are registered as self-employed, if their services provided to practices are used as if they were employees.

This means the practice will have to pay employer's National Insurance (NI) contributions, as well as deducting the employee's NI and PAYE from the payment to the locum.

This guide gives advice to GPs and practice managers on how to ensure that the employment status of their sessional GPs and locums stands up to scrutiny.



What do practices have to do?

The responsibility for deciding whether a sessional GP or locum is genuinely self-employed, or should be treated as an employee rests with the practice.

Other healthcare professionals who provide services to the practice, for example counsellors, nurses, pharmacists and paramedics, may also be affected, as could workers such as cleaners. The GP partners themselves aren't affected.

Sessional GPs working through limited companies

Often sessional GPs and locums provide services to GP practices through their own limited company, also known as a personal service company (PSC). It used to be the case that it was the doctor's responsibility to ensure their employment status was correct. Since the introduction of the off-payroll working legislation for public sector employees on 6 April 2017, it is the responsibility of the practice –



whether the doctor operates through a PSC or not.

If a sessional GP or locum using a PSC is deemed by the practice to be employed by the practice, then the practice must deduct 32% from the payment to the doctor (direct or to the PSC) and pay that to HMRC. This comprises basic rate tax at 20%, plus employee's NI at 12%. The practice must also pay any employer's NI to HMRC.

Sessional GPs supplied by agencies

If the locum is paid by an agency, the practice will need to tell the agency paying the locum that, in their view the off-payroll working rules should apply.

What are the penalties for getting it wrong?

Where a practice engages directly with an individual, there are two possibilities if HMRC, following an enquiry, finds that a self-employed doctor should have been employed. The default position is that the practice will have to pay not only the employer's NI, but also the employee's NI and income tax. HMRC can go

impose the duty of determination and deemed employment payment calculation on the service company itself. Regulation 72 (see previous paragraph) could also be used in this instance to transfer the liability to the worker.

But what about general medical practice? GP surgeries are considered as part of the public sector. Schedule 1 of the Finance Act 2017 brings us new legislation entitled "Workers' services provided to public sector through intermediaries." This contains its own clauses describing how the responsibility for payment of the PAYE deductions can shift through the supply chain depending upon which organisation or person has or has not met its obligations.

In a standard situation of practice – PSC – locum doctor, it is the practice responsibility to determine the status and, if deemed employed, deduct tax and NI. If, however, the locum doctor has provided fraudulent information, the liability can fall to the individual. There are significant responsibilities for practices in this are which should not be taken lightly.



back a number of years to recover the tax and NI it considers due. Getting the employment status position wrong can therefore have serious financial consequences for the practice, although HMRC should provide a credit in their settlement figure for any self-assessment income tax already paid by the doctor.

In certain circumstances, however, HMRC may direct under regulation 72 of the PAYE regulations 2003 that the liability will fall to the 'employee.' For this to happen the practice must have taken reasonable care to comply with the regulations and acted in good faith and/or the doctor accepted payments knowing they should have been paid as an employee.

It is this possibility that makes due diligence so important in the engagement of sessional doctors. In other words, as long as the practice has taken advice and recorded its reasons for acting as it did, HMRC may seek recourse from the engaged doctor.

What if a PSC is involved?

In non-public sector cases, the IR35 rules

Employed v self-employed explained

The law does not define 'self-employment' or 'employment' so it is the terms and conditions of a particular engagement that determine whether the contract with the sessional GP or locum is one of employment or self-employment.

If the doctor is engaged under 'a contract of service' then they will be an employee, and should be paid through the payroll. Only genuine self-employed doctors should be paid outside the payroll.

The fact that a sessional GP or locum may say they are self-employed or that they have worked previously as a self-employed doctor is not a decisive factor in determining their employment status. The decision must be made on the current terms and conditions of the engagement at the point of the doctor's engagement with the practice.

The engagement will be deemed to be one of employment if:

- There is a mutual obligation for the GP to provide their personal service to the practice and for the practice to provide work.



- The practice must have a sufficient amount of control over what the doctor has to do, where the work is carried out, when the work is done and how the work is carried out. The first three of these may well be obvious from the nature of the work and surgery based locations, so by far the most important factor is the 'how'.
- The other provisions of the, perhaps implied, contract are consistent with it being a contract of service.

Personal service

The first bullet point above refers to the provision of personal service. The ability to provide a substitute is therefore frequently included in contracts to circumvent personal service and thus support a self-employed status. Sessional GPs in general practice, nevertheless, are almost certainly not permitted to do this. Part 4 of schedule 6 of a standard GMS contract, for instance, provides that a practice agreement with a sub-contractor to provide clinical services MUST prohibit that sub-contractor from sub-



contracting those services. There is a similar clause in PMS agreements.

Mutuality of obligation

The first bullet point above also covers mutuality of obligation (MOO), a term used to test whether there is an obligation on the worker, in this case the locum or sessional GP, to work and an obligation on the other party, in this case the practice, to pay him or her.

But at what point does MOO have to be considered? Is the criteria based on the time between separate engagements or each time work is offered and accepted? Of course this will turn on the facts, but most doctors in general practice, both the engaging practice GPs and the sessional worker, would probably consider each engagement as a separate ad hoc arrangement to cover a different requirement at a different time, even if close together. Agreement terms should reflect that there is no obligation to offer or accept further engagements outside the agreed appointment.

Possibly the lead case that considered MOO was

the House of Lords case of Carmichael, but others continue to test tribunals and courts alike. The case of Hafal v Lane-Angell¹, recently heard by the Employment Appeal Tribunal, illustrates how mutuality of obligation can affect employment status.

Is the absence of mutuality fatal to the establishment of a deemed employment? The majority of court decisions would appear to say 'yes', which makes it all the more surprising that HMRC's online employment status checker described below does not include any questions on the matter.

It is important that practices do not underestimate the importance of MOO in determining employment status. Advice should be sought from specialist medical lawyers and accountants.

Contracts – written or implied

There are several issues that should be addressed within a contract to distinguish how the terms and conditions of a particular engagement for a locum or sessional GP differ from those of a salaried GP to maintain

a self-employed status.

These issues include mutuality of obligation and also the extent of the control the locum or sessional GP has over when, where and how the work is carried out. The tasks that the locum would undertake should also be set out in the contract.

There should, however, be an overall impression given to anyone involved with the practice, including patients, that a salaried GP is part of the team (attends meetings, makes decisions, contributes to the running of the surgery etc) and that a sessional GP is responsible for the 'how' part of the control issue (exercises their professional clinical judgement without supervision or direction), but otherwise is outside of the practice's organisation.

An interesting recent case in the First-tier Tribunal for tax looked closely at whether an IT professional was part and parcel of the Department of Work and Pensions unit he was working in. Although not binding, the case (Jensal Software Limited v HMRC) provides an interesting example of the depth of analysis that now goes into cases,

¹ CASE REPORT:
<https://bit.ly/2x2XUqC>



even in lower courts, but also references many precedents that the decision was drawn from.

Some practices work with locums and sessional GPs on the basis of implied contracts. Other practices prefer formal written contracts which should be drawn up in conjunction with a specialist medical solicitor.

See the box at the end of this document for links to BMA guidance for locums and sessional GPs, including contracts.

HMRC online employment status checker

HMRC has developed an online employment status checker which practices can use to find out if their locums and sessional GPs should be classed as employed or self-employed for tax purposes.

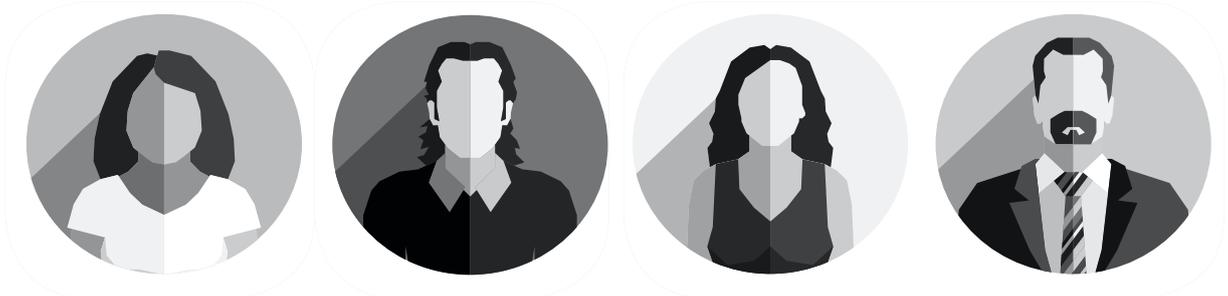
The terminology used in the status tool can be confusing since it is designed to cover both the situation where a practice pays a doctor directly and also where a doctor is providing their services through a PSC.

- Who provides the equipment to carry out the work?
- What financial risk is borne by the locum and his/her company (if he or she is working through a limited company)?
- To what extent is the locum part of the practice's organisation?
- Does the locum have his or her own business structure (characterised by medical defence cover, need to promote and advertise)?

Using the online checker

The online checker takes practices through a series of questions and it is essential that these are answered accurately.

Anyone on the practice team can use the online checker. However, an administrator may answer the questions raised during the process very differently from the practice manager, a senior GP or the GP locum themselves. Consistency is the answer and ideally the practice manager and the locum or sessional GP should work through the checker together.



The status tool assesses a number of aspects including the following:

- The tool asks whether a substitute can be sent if the sessional GP can't attend the session. As described above, this is generally specifically excluded from being permissible by virtue of the practice NHS contract. Check the contract under the specific heading of "sub-contracting of clinical matters."
- Does the practice have the right to exercise control over when, where and how the work is carried on? In practice, the schedule of agreed work and surgery site should determine when and where, but check what controls are in place on the 'how'. Note that the important thing here is not the exercise of control. It is often the case that there is actually no need for a practice to exercise such control, but the key to the test is whether they have the right to do so.
- Is the work paid purely on a time basis, or on the basis of work done?

Throughout the process the person using the online checker should link their answers back to the contract – either written or implied through other supporting evidence of what actually happens in practice.

The online checker is anonymous and won't store any information you enter or the result given. Results can be printed out for your own records.

Make a note of any questions where there is uncertainty over the correct answer. If, having completed the online checker, the answer is that the doctor should be treated as an employee, go back and change the answers to those uncertain answers to see if this gives you a different result.

A number of users have reported that the result is given as 'Unable to determine the tax status of this engagement'. In this instance practices should seek advice from a specialist accountant or contact the HMRC IR35 helpline to get a determination.



EXAMPLE

Dr A is well known and liked by the practice and generally works every Monday. She tells the practice when she doesn't wish to work due to holidays and training commitments, but by and large works most weeks. She does locum work for other practices during the rest of the week, but not on any regular basis.

The practice manager used the HMRC online checker to establish her employment status. Both the doctor and the practice wanted the end result to be 'self-employed'.

Here's how the practice manager worked through the online checker questions:

Q1: Which of these describes you best?

- The worker
- **The end client**
- The agency paying the worker
- None of the above

Q2: Has the worker already started this particular engagement for the end client?

- **Yes**
- No

Note: The practice manager isn't sure. The locum has worked for the practice for many months so the answer could be Yes. But if each week is a distinct engagement the answer could be No. The practice manager says Yes for now.

Q3: How does the worker provide their services to the end client?

- As a limited company
- As a partnership
- Through another individual (not an agency)
- **As a sole trader**

Q4: Will the worker (or their business) perform office holder duties for the end client as part of this engagement?

- Yes
- **No**

Note: The locum doesn't hold any offices or regulatory positions within the practice.

Q5: Has the worker's business arranged for someone else (a substitute) to do the work instead of them during this engagement?

- **Yes** – and the client agreed
- **Yes** – but the client didn't agree
- **No** – it hasn't happened

Note: On one occasion Dr A was unwell and rang the practice to let them know she could not attend, but advised that her friend, Dr B, was available as a replacement. The practice must engage directly with Dr B. Dr A cannot be paid for those sessions and then pay Dr B as a sub-contractor. See the reference above relating to standard practice clauses on this matter.

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Q6: If the worker's business sent someone else to do the work (a substitute) and they met all the necessary criteria, would the end client ever reject them?

We need to know what would happen in practice, not just what it says in the worker's contract.

- **Yes** - the end client has the right to reject a substitute for any reason, including if it would negatively impact the work
- **No** - the end client would always accept a substitute who met these criteria

Note: Even if Dr A suggested an alternative locum it would be up to the practice to decide whether or not to accept the alternative.

Q7: Has the worker's business needed to pay a helper to do a significant amount of the work for this engagement?

- **Yes**
- **No**

Note: While Dr A's husband organises her diary and books appointments, this is not significant.

Q8: Can the end client move the worker to a different task than they originally agreed to do?

- **Yes** - but only with the worker's agreement
- **Yes** - without the worker's agreement (if the worker doesn't want to change, the end client might end the engagement)
- **No** - that would need to be arranged under a new contract or formal agreement

Note: Imagine the practice at short notice needs Dr A to work at a branch surgery further away from her home because they don't need a locum at the main surgery. Either of the Yes answers may apply, but the second one is probably more appropriate because if Dr A doesn't agree she won't be used that week because she's not needed in the main surgery.

Q9: Once the worker starts the engagement, does the end client have the right to decide how the work is done?

- **Yes** - the end client decides how the work needs to be done without input from the worker
- **No** - the worker decides how the work needs to be done without input from the end client
- **No** - the end client can't decide how the work needs to be done because it's a highly skilled role
- **Partly** - the worker and other people employed or engaged by the end client agree how the work needs to be done

Note: A locum doctor is a highly skilled role and patient consultations will take place without any control by the practice.

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**Q10: Can the end client decide the schedule of working hours?**

- **Yes** - the end client decides the worker's schedule
- **No** - the worker decides their own schedule
- **Partly** - the worker and the end client agree a schedule
- **Not applicable** - no schedule is needed as long as the worker meets any agreed deadlines

Note: Yes - the practice will determine the length of the session, although it is likely that this will be agreed with the doctor at the outset of the contract, together with the number of sessions.

Q11: Can the worker choose where they work?

- **Yes** - the worker decides
- **No** - the end client decides
- **No** - the task determines the work location
- **Partly** - some work has to be done in an agreed location and some can be done wherever the worker chooses

Note: The practice will decide which surgery the locum needs to work in, so the task determines the location.

Q12: What does the worker have to provide for this engagement that they can't claim as an expense from the end client or an agency?**These are things that:**

- the worker has to provide to complete this specific engagement
- aren't provided by the end client
- could place the worker at financial risk if the cost isn't regained

They don't include expenses incurred by being based away from home for the engagement.

Select all that apply

- **Materials** - items that form a lasting part of the work, or an item bought for the work and left behind when the worker leaves (not including stationery, and most likely to be relevant to substantial purchases in the construction industry)
- **Equipment** - including heavy machinery, industrial vehicles or high-cost specialist equipment, but not including phones, tablets or laptops
- **Vehicle** - including purchase, fuel and all running costs (used for work tasks, not commuting)
- **Other expenses** - including significant travel or accommodation costs (for work, not commuting) or paying for a business premises outside of the worker's home
- **Not relevant**

Note: Not an easy question to answer. Dr A is unlikely to supply any materials. She will have basic medical equipment in her "doctor's bag" but does this meet the criteria for high-cost specialist equipment? Unless she is required to carry out home visits she won't need a vehicle for the session. She will have other expenses such as professional indemnity costs although this may change if the NHS moves to cover indemnity costs centrally. For now, select just other expenses.

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**Q13: What's the main way the worker is paid for this engagement?**

- **An hourly, daily or weekly rate**
- A fixed price for a specific piece of work
- An amount based on how much work is completed
- A percentage of the sales the worker makes
- A percentage of the end client's profits or savings

Note: A rate is agreed for the session, so this would fall under the first category.

Q14: If the end client isn't satisfied with the work, does the worker need to put it right at their own cost?

- **Yes** - the worker would have to put it right without an additional charge, and would incur significant additional expenses or material costs
- **Yes** - the worker would have to put it right without an additional charge, but wouldn't incur any costs
- **No** - the worker would put it right in their usual hours at the usual rate of pay, or for an additional fee
- **No** - the worker wouldn't be able to put it right because the work is time-specific or for a single event
- **No** - they wouldn't need to put it right

Note: Dr A may be asked to explain more fully what went on in a specific consultation if another doctor didn't fully understand her notes or wanted more information which possibly might fall into the 2nd Yes category. On balance though the second No answer is probably more relevant.

Q15: Is the worker entitled to any of these benefits from the end client?

- Sick pay
- Holiday pay
- A workplace pension
- Maternity/paternity pay
- Other benefits (such as gym membership, health insurance, etc.)

These don't include benefits provided by a third-party or agency.

- **Yes**
- **No**

Q16: Is the worker responsible for any of these duties for the end client?

- Hiring workers
- Dismissing workers
- Delivering appraisals
- Deciding how much to pay someone

- **Yes**
- **No**

Q17: Does the worker interact with the end client's customers, clients, audience or users?

- **Yes**
- **No**

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Q18: When the worker interacts with the end client's customers, clients, audience or users, how do they identify themselves?

- They work for the end client
- **They're an independent worker acting on behalf of the end client**
- They work for their own business

Note: It will be clear to the patient that Dr A is a locum working for the practice so the second answer should be selected.

Finally we get to the answer provided by HMRC's tool which in this instance is:

“This engagement should be classed as employed for tax purposes”

This means the practice should be treating Dr A as an employee – not the answer the practice or Dr A wanted.

What can be done?

Start by revisiting the checker and changing some of the answers which were not easy to answer.

Q2 asked whether the engagement has already begun.

The practice manager answered Yes. Changing the answer to No means Q5 and Q7 are omitted.

However, if the practice manager gives identical responses through the rest of the checker the result is the same – the engagement should be classed as employed.

Next step: try again by still answering No to Q2, but at Q12 say Yes to providing own equipment as well as saying Yes to other expenses.

The checker then doesn't ask any more questions and states:

“This engagement should be classed as self-employed for tax purposes”

The answer to Q12, then, is clearly key to the outcome.

A locum GP will need to provide their own doctor's bag. The typical cost of a fully equipped bag and contents might be around £2,000. Without any case law or HMRC enquiries considering what is considered to be “high-cost specialist equipment” it is not possible to know for certain whether HMRC would accept this point. It is however quite distinct from, for example, a builder's small hand tools that are relatively inexpensive and unlikely to be considered specialist, so the point is at least arguable.

Note that self-employment is indicated if the answer to Q12 is equipment alone not just when combined with expenses. Self-employment is also indicated when vehicle and other expenses are ticked together, but more questions arise when either on their own are ticked.

It is important to note that there are many grey areas and HMRC are likely to challenge the equipment angle in the future. For the most up-to-date advice, talk to a specialist medical accountant before using the online checker.



Next steps

If the online checker confirms that the locum is classed as self-employed for tax purposes, then the practice must keep evidence to prove this. HMRC has confirmed that keeping a print-out of the online checker results would be sufficient evidence for this purpose.

Self-employed locums will be responsible for paying their own tax and NI. They should tell HMRC as soon as they begin to provide locum

services so that HMRC can assess the type of tax and NI that should be paid.

If the locum using a PSC has to be treated as employed, the locum will need to be set up as a new category of employee on the practice payroll system called an 'off payroll worker' which does not come with the same rights as an employee. The locum should keep track of the tax and NI deducted at source and adjust their tax return to get credit for the tax paid.

Links

- HMRC online employment status checker
<https://www.gov.uk/guidance/check-employment-status-for-tax>
- BMA locum agreements guidance
<https://www.bma.org.uk/advice/employment/contracts/sessional-and-locum-gp-contracts/locum-agreements-in-general-practice>
- BMA handbook for locums (BMA members only)
<https://www.bma.org.uk/advice/employment/contracts/sessional-and-locum-gp-contracts/locum-gp-handbook>
- BMA IR35 guidance
https://www.bma.org.uk/connecting-doctors/the_practice/b/weblog/posts/a-locum-s-guide-to-the-changes-to-ir35-legislation



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