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**Engaging consultants - Getting the
right 'tune' from the gig economy**





The gig economy is something that is here to stay. The flexibility of the arrangement is often extremely appealing to both hirers and those providing services and, done well, it can bring real value to your business by allowing you to tap into experience as and when required. However, in a world of competing time demands, founders would be well advised to take a breath and consider their contractor/gig arrangements. Failure to do so can have some significant consequences and cause some awkward conversations at key growth junctures down the line.

Who is a consultant/contractor?

To make your life that little bit easier, the UK has no legal definition of consultant or contractor for you to rely on – you simply know it when you see it. Generally, self-employed contractors run their own business, and offer their services and expertise to clients who will pay them agreed rates (often on an hourly or daily basis). Self-employed contractors are not generally paid through PAYE and they do not have the employment rights and responsibilities of employees. A consultancy (or gig) is generally a more commercial and flexible relationship than employment.

If there was one thing I should look out for, what would you suggest?

If any consultant or consultancy company provides you with the services of a named contractor on a regular basis there could be a question over this individual's employment status. The contractor could potentially assert that they are actually an employee or worker for you, and that they are not genuinely a self-employed contractor working for their own business. The longer any engagement continues, and the more time an individual spends working for you rather than other organisations, the stronger an argument there might be that they are really employed by you or have become so over time.

So what are the main risks of getting it wrong?

- IR35 legislation

In recent years, the use of consultants has come under increasing scrutiny. The main tax legislation is IR35. The IR35 legislation targets individuals seeking to avoid paying employee income tax and National Insurance contributions (NICs) by supplying their services through an intermediary (usually a personal service company (PSC)) and typically paying themselves in dividends.

The IR35 legislation came into force in 2000, with contractors responsible for assessing their own tax status, and paying any tax or NICs due. The IR35 rules ensure contractors who would be classed as employees if they were contracted directly by a client/end user pay broadly the same tax and NICs as employees.

Since 2021, “medium” and “large” companies engaging contractors via PSCs must determine whether the individual is a “deemed employee” for IR35 purposes. If so, the fee-payer (the entity which is paying the PSC, which could be the client or an agency), must

deduct tax, NICs, and any apprenticeship levy from payments made to the contractor. The Government has announced they will remove the “off-payroll working rules” from April 2023. This note will be updated in due course. Where a client/end user qualifies as a “small” company, they will be exempt but the original IR35 requirements will still continue to apply to the contractors themselves. During a 12-month period, a business is deemed to be small if it meets two or more of the following criteria: turnover of not more than £10.2 million; balance sheet total of not more than £5.1 million; and no more than 50 employees.

- Income tax, NICs and additional rights and responsibilities

When a company engages a contractor, there is always a risk the contractor (or HMRC) allege they have been misclassified and that they are actually an ‘employee’ or ‘worker’, and therefore entitled to additional rights and protections (and the employer is liable to pay income tax and NICs). Such additional protections include, amongst other things, a guaranteed minimum wage, holiday entitlement and protection from unlawful discrimination. If you have been mischaracterising an employee or worker as a contractor for some time, it is clear to see how the tax and other costs can start to mount up – an unwelcome surprise that could put you on the back foot when, for instance, going through a diligence process for funding.

What can I do to protect my business from the risks of mischaracterisation?

The tests for determining employment status for employment law and tax purposes are not identical, but they are similar. It is, for instance, possible for an individual to have employment status for tax purposes but not for employment law purposes.

HMRC does, helpfully, offer an ‘employment status for tax’ tool which can be used to help determine whether a contractor should be classed as employed or self-employed for tax purposes. This is a useful starting point and can provide some degree of comfort (although is not a guarantee).

Misclassification and employment status is a particularly complex area, and getting it wrong can have a big impact on a company. We suggest that, if it at all feels or looks like more than a ‘gig’, companies should seek a second opinion from specialist employment advisors. A second view, early in your journey, can often save significant hassle down the line.

Shepherd and Wedderburn’s corporate team combines industry knowledge and extensive experience with technical expertise, and is on hand to assist businesses at all stages of their growth journey. The team’s Start to Scale initiative, comprising written guides, video content and in-person events, addresses some of the specific challenges affecting start-ups and scale-ups throughout their lifecycle to give entrepreneurs the insight they need to scale. Visit shepwedd.com/start-to-scale for more information, or contact Neil Maclean, Partner in Shepherd and Wedderburn’s employment team, at neil.maclean@shepwedd.com.



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