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Employment Status Procedure



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Important Note: This Procedure is currently being updated to comply with imminent legislation changes relating to off-payroll workers and IR35 tax regulations. Please see Interim Guidance Note to Hiring Departments – Off Payroll Workers and IR35 Legislation Changes.

I. Introduction

- 1.1. Establishing the employment status of individuals defines the rights and responsibilities people have at work. Additionally it clarifies the responsibilities of the employer and the employee, worker or contractor in relation to their tax and National Insurance Contribution (NIC) liabilities. There are various types of Employment Status, including Employee, Worker, or Agency staff. Alternatively, if none of these apply, it might be appropriate for the work to be offered via a Contract for Services.
- 1.2. It is important that the correct processes are worked through and the appropriate checks made to ensure that RBG and Schools follow HMRC rules for engaging staff and contractors. **Where HMRC successfully challenge a worker's status, the engager will be liable for all unpaid Income Tax, NIC (both employee and employer) penalties and related interest payments.**

2. What do I need to consider?

- 2.1. For further information on how to establish the correct Employment Status please see the Flow Chart at Appendix A in the Interim Guidance Note to Hiring Departments – Off Payroll Workers and IR35 Legislative Changes.
- 2.2. The default position should be that wherever possible the requirement should be fulfilled by either a direct employment (on payroll) or a temporary off payroll engagement through the Corporate Agency Supply Arrangement
- 2.3. There are some key questions to consider prior to engaging a person or company to do work for RBG or a School:
 - Does this require a job description or a work specification?
 - How long is the duration of the work expected to be?
 - What are the people resources that are required?
 - How much flexibility is required around work periods?
 - Could the work be covered by internal resources (e.g. secondment/acting-up) or are additional resources and/or expertise required?
 - Should I engage employees, workers, agency staff or a contractor?
 - Should I consider an Apprenticeship or Placement?
 - What are the costs of the people resources and are these covered within budget?
 - What are the tax and NIC implications (HMRC regulations) and how do I make sure RBG/School is compliant
 - What is my contingency plan around compliance if the work continues beyond the original plan?
 - To establish whether you are engaging an Office Holder for the role please see Section 10 for further guidance.

2.4. As a general guide, if the answer is 'Yes' to all of the following questions, then they are 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?
- Do 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 payments?

2.5. If the answer is 'Yes' to all of the following questions, it will usually mean that this is a **contract for services**:

- 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 they need to do their job, not just the small tools 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 in their own time and at their own expense?

ROUTES WHERE WORK IS VIA A JOB DESCRIPTION

3. Employees

3.1. In RBG the default position is that people are engaged for work as employees wherever possible. However RBG also recognises that there are circumstances when it is appropriate to offer work to workers, agency staff or contractors.

3.2. When a need to engage staff resources is identified, managers should first consider whether it is appropriate to recruit on an RGB employee contract – this could be on a permanent or temporary basis.

3.3. The definition of an employee is set out in s.230 of the Employment Rights Act 1996 as “an individual who has entered into or works under....a contract of employment”. Normally this would mean that:

- There is an obligation on the employee to provide a personal service
- There is a mutuality of obligation
- The employer controls the way in which work is done

A contract need not be in writing as it exists when an employer and an employee agree terms and conditions of employment (including pay). A contract can also be implied from employer or employee actions.

Fixed Term Contracts

- 3.4. An employee may also be engaged on a fixed-term contract, which is for a period of no longer than 4 years (when they will be deemed to hold a substantive post). However the contract should be reviewed before the end of the second year and the employee given appropriate notice, as employees gain full employment rights after two years and therefore would be entitled to redundancy payments.

4. Secondments & Acting-Up

Secondments

- 4.1. Secondments into an internal post will be via the RBG/School's recruitment and selection policy and procedure and the employee will be paid at the correct grade for the post. Generally, a secondment should be for a period of no longer than two years. If the secondment lasts longer than this, due consideration should be given to whether the employee should be transferred into the role on a permanent basis. If the secondment becomes a permanent opportunity, the employee can be confirmed in post, as the recruitment and selection procedures will have already taken place. Secondments can also include when:

- An internal employee is seconded to an external organisation
- An employee from an external organisation is seconded into RBG/School

For payroll purposes the employee will be transferred into the role they are seconded to on the system and their established position will in effect remain held.

Acting-Up

- 4.2. There are two types of Acting-Up arrangements that can be utilised for short-term periods of up to 6 months' duration:

- To cover a post in its entirety for a short-term period
- To cover some of the responsibilities of a higher grade post

Informal interview arrangements within the team or section should take place if more than one employee expresses an interest in the acting-up opportunity.

If the Acting-Up lasts longer than 6 months, due consideration should be given to whether the role should be advertised, either on a permanent basis or via a secondment. **At this point the RBG/School's full recruitment and selection procedures should take place.** In exceptional circumstances the acting-up can continue for longer than 6 months e.g. when the person who is away is expected back within a very short period of time and requires senior HR approval (Deputy Head of HR).

Acting Up into the full duties of a post

For payroll purposes the employee will be transferred into the role they are acting up to on the system they will be allocated to the pay grade for the position and have an occupancy type of Acting Up and an expected end date. Their substantive position will remain vacant.

Acting up into some of the duties of a higher graded post

The employee will be paid a percentage **formula honorarium** to reflect the additional responsibilities of the higher graded post. For payroll purposes the employee will remain in their current post on the system.

Further information on Secondments & Acting Up can be found on the HR Intranet.

5. National Graduate Development Scheme

- 5.1. A fixed term contract for a minimum of two years on a fixed salary, which is set within the scheme. The graduate is engaged as an employee.

6. Intermediate Labour Market Placement

- 6.1. The ILM scheme is run locally in RBG by (GLLaB) and aims to tackle long-term unemployment. The main aim is to give those who are furthest from the job market, e.g. those unemployed for 12 months or more, a bridge back to work by providing some work experience as an employee.

7. Workers

- 7.1. An individual who is not engaged under a contract of employment may instead work under a contract whereby he or she “undertakes to do or perform personally any work or services for another party to the contract whose status is not that of a client or customer”. Such an individual will be a “worker” rather than an “employee”. One of the key points about “workers” is that there is no mutual obligation to either offer work (employer) or accept work (employee).
- 7.2. Workers have limited employment rights, such as the right to receive the National Minimum Wage and rights under the Working Time Regulations. Statutory Maternity Pay may also apply in certain circumstances.
- 7.3. Workers can be engaged full or part-time for a period of no longer than twelve consecutive weeks. (See more detailed descriptions below).
- 7.4. In RBG workers receive weekend and night enhancements when appropriate.
- 7.5. Types of worker include casual, sessional and bank staff:
- Casual - can be full-time or part-time but for a period of no longer than twelve weeks. The worker can be offered work again in the future but there must be breaks (not natural breaks e.g. summer holidays) between contracts. If there is regularity in the work the casual worker does e.g. number of hours per week or same number of hours each month or year, then they should be an employee.
 - Bank - are retained on a contract but do not work any regular hours. They would typically cover roles that are required on an ‘as and when’ basis e.g. Bar Workers (where requirements based on event bookings are not known until the day of the event), and other roles where demand may suddenly grow or be subject to fluctuations.

- Sessional - normally for roles where the work is carried out for periods known as 'sessions'. Examples would be Music Tutors, Sports Trainers etc., where the sessions are delivered over a definitive period of time for a set amount of pay.

7.6. **Employees should not be engaged to do additional work in the same role on a Bank or Casual contract. They should be paid the relevant additional hours or overtime.** If the employee is engaged in a different role then they should be engaged on the appropriate type of contract as either an employee or worker.

8. **Work Experience Placements**

8.1. All work experience placements in RBG/Schools should have a structured programme of learning which is beneficial to the individual and provides a good understanding of a professional working environment. There is no legal obligation to provide work experience placements and all are entered into on a purely voluntary basis subject to service considerations.

Schools Placements

8.2. Schools placements are unpaid and are to allow the student to gain experience in a work environment.

Higher Education Placements

8.3. For students in Higher Education placements are not paid if less than three months' duration. The quality of the experience is the most important factor for the student, as the short-term economic costs of a placement can often be offset by the long-term advantages to their career. However, for any placements agreed for a period of greater than 3 months, the student will normally be paid the London Living Wage (after the first 3 months have been completed) and engaged as an agency member of staff through the Managed Agency Contract. HR advice should be sought before entering into any agreement to such a placement.

Social Work Shadowing Placements

8.4. Social Work Shadowing placements are unpaid and are part of a Higher Education course. Students receive funding from their HE Institution.

Adult Placements

8.5. Adult placements are not paid unless greater than 3 months' duration, when the person should then be paid the London Living Wage via the Managed Agency Contract. HR advice should be sought before entering into any agreement to such a placement.

8.6. **All Work Experience Placements should be assessed for Tax and NICs implications.**

Further advice on Work Experience Placements can be found on the HR Intranet

9. **Apprenticeships**

9.1. An apprenticeship is an opportunity for people to gain experience, paid work and training in the workplace. The majority of apprenticeships in RBG are currently managed externally.

- Apprenticeships managed externally – a combination of paid training and work managed via an external organisation, (currently The London Apprenticeship Company), who undertake all recruitment and payroll activity for the apprentice. Training costs are met by the Government (depending on age).
- Apprenticeships managed internally – a combination of work and on the job learning. RBG pays a salary not less than the National Minimum Wage for the apprentice's age group. In this instance the apprentice is engaged as an employee.
- Traineeships – for training and experience in the workplace. This is unpaid and for up to six months' duration. Training costs are met by the Government (depending on age).

10. Office Holders

10.1. **All engagements related to an Office Holder role whether an individual partnership or a company must be processed via payroll for assessment / deduction of tax and NIC.** An Office Holder cannot be treated as a self-employed individual. Where an individual routing through their own Personal Service Company is engaged to cover an Office, payments to the Personal Service Company must be routed through Payroll in order that the necessary PAYE deductions can be made.

10.2. There is no statutory definition of the word 'office'. It has been judicially defined as a 'permanent, substantive position which had an existence independent from the person who filled it, which went on and was filled in succession by successive holders.' An office may be created by a charter, statute, or other document which is, or forms part of, the constitution of an organisation or which governs its operation.

10.3. Given the lack of a statutory definition and HMRC detailed guidance further information and assistance can be obtained from payrolltechnical@royalgreenwich.gov.uk In relation to RBG / School, examples of an Office Holder may include:

- School Improvement Partner
- Adoption Panel Member
- Foster Panel Member
- School Admission Appeal Panel Member
- School Governor
- Clerk to School Governor
- Independent Reviewing Officer
- Independent Person (Stage 2 Complaints)
- National Challenge Advisor

- 10.4. The holder of an Office is chargeable to tax under Schedule E (PAYE) as employment income on the emoluments from it and generally there will also be liability for NICs. It is not necessary to show, as for an employee, that an Office Holder works under a contract of service.
- 10.5. Any payment or reimbursement of expenses to an individual partnership or a limited company acting in the capacity of an Office Holder should be processed by RBG Payroll Services in order that the correct tax and NIC's assessment and deductions are made.
- 10.6. Please note - It is possible for an individual to be both an Office Holder and an employee with RBG/School if they have an existing employment contract and, in addition, carry out an Office Holder role.

Process - Individuals

- 10.7. The 'engaging department' (of an Office Holder) should email payrolltechnical@royalgreenwich.gov.uk for guidance on the completion of 'Office Holder' new starter and claim forms to ensure that an Office Holder record is correctly set up on payroll. On no account should petty cash payments or payments be made via the Council's Central Payments Team or direct from Schools bank accounts to individual Office Holders.

Governance

- 10.8. Internal Audit will undertake reviews of departments' engagement procedures / payment systems in order to highlight any individuals who should be paid through payroll as part of the audit programme to verify reasonableness regarding the engagement of workers who should be classed as office holders. This Audit review will also be included in Schools' scheduled tri-annual checks.

ROUTES WHERE A CONTRACT IS VIA A WORK SPECIFICATION

11. Off Payroll Engagements – General Information

- 11.1. Once a work specification rather than a direct employment has been determined as the appropriate route, it is essential that the HMRC ESS tool <https://www.gov.uk/guidance/check-employment-status-for-tax> is used to determine the status of the work before the engagement process has begun.
- 11.2. **This Procedure is currently being updated to comply with imminent legislation changes relating to off-payroll workers and IR35 tax regulations. Please see Interim Guidance Note to Hiring Departments – Off Payroll Workers and IR35 Legislation Changes.**
- 11.3. It is RBG/School responsibility, as the engager; to determine the correct status of the engagement and RBG/School will be held responsible for any underpaid tax and NICs

(both employees and employers), penalties and interest should HMRC subsequently successfully challenge the engagement status.

On no account should a contract (verbal or written) be agreed or work undertaken by the individual before the correct status of the proposed engagement has been determined.

Record Retention

- 11.4. In all cases the completed information to support the Supply of Services must be retained for a period of a minimum of 7 years after the conclusion of the last invoiced payment.

Compliance & Review

- 11.5. Reviews of Status will be undertaken

12. Corporate Agency Supply Arrangement (Not applicable to schools)

- 12.1. An agency worker is engaged by RBG to cover temporary requirements, and is supplied by a recruitment agency. An agency worker is not an employee of the RBG/School.
- 12.2. The Council operates an in-house agency supply arrangement, managed by the Agency & Recruitment Team in HR, using the agency supply system called Matrix.
- 12.3. Further details can be found on the HR intranet, Agency Recruitment section, Hiring Manager Guidance document.
- 12.4. The Agency Worker Regulations mean that after a 12 week qualifying period an agency worker employed by their supplying agency, is entitled to the same basic working and employment conditions, including pay, as an RBG employee in the same or similar role.

13. Agency Engagements outside of the Corporate Agency Supply Arrangement

- 13.1. **In exceptional circumstances, staff can be engaged via another agency; however this should be agreed in advance by the Chief Officer and must also be compliant with the Council's Contract Standing Orders / Financial Regulations.**
- 13.2. In particular, advice and approval should be sought prior to offering work via the use of 'off-shore' agencies, as RBG/School may become liable for tax and National Insurance Contributions on any payments made.

OTHER CONSIDERATIONS

14. Financial Procedures

- 14.1. It is essential that consistency is achieved in the application of the HMRC rules and reference should be made to the relevant RBG/Schools Financial Procedures.

15. Further Information

For further information, please contact:

Agency and Recruitment Manager sarah.thompson@royalgreenwich.gov.uk

Schools contact: Schools HR Team schools-hr@royalgreenwich.gov.uk