

GLA 26/8.4

GLA Position on Checking Employment Status

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BOARD PAPER REFERENCE – GLA 26/8.4 – GLA Position on Checking Employment StatusIssue

1. This paper sets out the GLA position on checking employment status to make sure licence holders comply with the Authority's Licensing Standards (i.e. whether an individual is an employee, a worker or self-employed). It is relevant to make an assessment of status because:
 - some standards apply to all individuals regardless of employment status , by virtue of the definition of "worker" contained in s. 26 of the Act;
 - some standards apply only to employees (e.g. the right to the Agricultural Minimum Wage , by reference to the Agricultural Wages Order);
 - some standards apply only to those individuals who are a worker or an employee (e.g. right to National Minimum Wage and holiday pay, see NMW Act and Working Time Regulations)
2. Only once an assessment of status has been made can a proper check be made as to whether a licence holder complies

Recommendation

3. The Board is invited to offer views on whether:
 - The existing method used by the GLA to check employment status is appropriate to allow the Authority to discharge its regulatory functions,
 - Any improvements can be made to how the GLA checks employment status, and
 - it is appropriate for the GLA to issue guidance outlining its approach.

Background**GLA Position**

4. The GLA checks employment status to make sure a licence holder is correctly applying the Authority's Licensing Standards. This is a position the GLA has always adopted and is not something that has been introduced without warning.
5. Concern has been expressed, that the GLA does not have the power to make such checks and that its assessment methodology is inappropriate. The GLA is satisfied that it is within its power to consider the reality of employment relationships to ensure licence holders are complying with the Licensing

Standards rather than accept at face value contractual arrangements between the licence holder and worker. The legal power to do this is derived from section 1(3) of the Gangmasters (Licensing) Act 2004 which says "the Authority may do anything that it considers is calculated to facilitate, or is incidental or conducive to, carrying out any of its functions".

6. A worker's employment status is a matter of fact and law to be determined on a case-by-case basis. The GLA will review the circumstances of a worker's terms of engagement as part of its inspection process. This is essential because (see point 1 above) determining employment status is a prerequisite of establishing labour providers' obligations under the 2004 Act and by reference to employment legislation generally. For example, one of the exclusions from the licensing scheme applies only where a worker is supplied into employment while another applies when a worker used to provide a service is directly employed by the service provider.
7. Employment Tribunals, and the courts, are not the only arbiters in matters relating to employment status. Officers working on behalf of regulatory and enforcement bodies also have a recognised role in resolving this, and other matters, in making decisions appropriate to their regulatory responsibilities. In connection with this it is instructive to read the former Lord Chief Justice, Lord Bingham's remarks in his recent book *The Rule of Law*:

"This does not mean that every decision affecting the rights or liabilities of the citizen should be made by a court or tribunal, or that the criteria governing administrative decisions should be prescribed in statute or regulations made under statute. In practice, countless decisions are made every day by administrators charged with the duty of running our complex society, as, for example, on the allocation of housing to the homeless, the allocation of school places, the granting of planning permission, the granting of leave to enter the country and so on. What matters is that decisions should be based on stated criteria and that they should be amenable to legal challenge, although a challenge is unlikely to succeed if the decision was one legally and reasonably open to the decision-maker."

8. The GLA, through its inspection process, will check employment status to identify whether a person is genuinely "self-employed", a "worker" or an "employee". This will enable the GLA to correctly inspect the LP to assess how specific licensing standards should be applied (e.g. AWO, NMW, H&S legislation). From the information gathered during an inspection, which will identify the reality of the employment relationship between the business and workers, the GLA will make decisions on whether the licence holder is compliant with the Licensing Standards.
9. The decisions the GLA takes based on these matters of fact may also be issues which an Employment Tribunal may be asked to determine in respect, for example, of a claim by an individual for payment of holiday pay. In the GLA

context, the decisions can be challenged by way of an appeal, heard by an Appointed Person. All Appointed Persons are drawn from a panel of Deputy Employment Judges who routinely deal with employment status issues when sitting as Employment Judges. They are well placed therefore to scrutinise any GLA decision in respect of employment status. If either the GLA or a Labour Provider does not accept an Appointed Person's decision in respect of employment status, then that decision can be challenged by way of an application for judicial review in the High Court. Similarly, HMRC regularly make decisions about employment status in the tax and National Insurance contributions context, with a system of appeals to Tax Tribunals and then into the mainstream court system (see Lord Bingham's comments above). The onus is on the GLA to justify its decision if challenged by appeal.

How GLA examines employment status -

10. The GLA inspection process consists of interviews with LPs, LUs, and workers (see the inspection information sheet¹). This process is particularly relevant when establishing the relationship between the worker and the licence holder to obtain sufficient evidence on which to reach a balanced, and defensible, licence decision.
11. GLA inspectors will first establish the terms of engagement the licence holder has with the worker. The inspection process will then verify whether the reality of the relationship between the worker and licence holder corresponds with the stated terms. In order to do this, inspectors will want to see worker contracts and then interview a sample of workers. Those interviews will explore the reality of the employment relationship, and look at the way that the workers carry out their duties and the way in which they are treated.
12. The GLA recognises there is no individual test that is decisive in determining employment status. Just as UKBA ask questions to determine employment status for immigration purposes, and HMRC ask questions for tax and National Insurance purposes, so too does the GLA for the purpose of licensing decisions. Therefore, the GLA inspector will explore the worker's situation by asking questions that are based on established legal precedent and statute law in respect of employment status, which closely follow guidance sponsored by BIS and HMRC, which is available on Business Link.
13. When considering whether a person is "self-employed" as opposed to being a "worker" or "employee", the questions inspectors will ask include the following:
 - Is the individual subject to control and supervision
 - Is the individual told where to work/moved to new tasks?
 - Must they perform the work themselves?
 - Can they refuse to do the work?

¹ http://www.gla.gov.uk/embedded_object.asp?id=1013500

- Can they work at a time to suit themselves?
 - Can they/are they required to send a substitute if they do not work?
 - Does substitution in fact occur?
 - Does the individual take any financial risk?
 - Does the individual have to rectify faulty work/make good loss or damage in their own time at their own expense?
 - Has the individual negotiated his/her terms and conditions?
 - Has the individual provided any of his/her own equipment or tools to perform the work?
14. Records relating to the payment received by those undertaking work may also be examined. This is done to confirm any indication of self employed status and in particular the existence of invoices, which can be used as evidence to substantiate self-employed status, between workers and labour providers.
15. GLA inspectors will consider all of the evidence they gather before reporting their findings to the GLA Licensing Team. In any inspection they will also ascertain whether any workers interviewed are prepared to provide evidence at an appeal hearing, if a licence is refused or revoked, and an appeal is lodged. The Licensing Team will then come to a view as to the worker's status, seeking advice where necessary. The decision as to status will then be applied in the licensing decision, which will consider whether the licence holder complies with the relevant Licensing Standards.

Further Advice and Guidance

16. The GLA would like to issue guidance to licence holders outlining the way it determines employment status. We wish to do this because we believe strongly that it is important to provide licence holders and applicants with clarity about the way we operate the licensing scheme. The proposed guidance will be based on current best practice across Government.
17. The draft guidance the GLA will produce, to be issued as a GLA Brief, will be subject to further discussion with Defra, BIS, HMRC, and UKBA.
18. The Board is invited to confirm that it is content with this approach

Annex Work Status and Rights

Work Status	Rights
Employees	<p><u>Rights include:</u></p> <p>Employers must deduct Income Tax and National Insurance contributions (NIC) from their employees' salaries <i>before</i> they are paid.</p> <p>Employees are also entitled to all minimum statutory employment rights, including:</p> <ul style="list-style-type: none"> • maternity, adoption and paternity leave; • maternity, paternity and adoption pay • the right not to be unfairly dismissed; • Statutory Redundancy Pay; & • the National Minimum Wage; • working time limits, including rest breaks, paid holiday and limits on night work; • Statutory Sick Pay; • protection against less favourable treatment if you make a disclosure in the public interest (i.e., 'whistle blowing'); & • not be discriminated against unlawfully.
Workers	<p>Workers' rights include:</p> <ul style="list-style-type: none"> • the National Minimum Wage; • working time limits, including rest breaks, paid holiday and limits on night work; • protection against unauthorised deductions from pay; • maternity, paternity and adoption pay (but not leave); • Statutory Sick Pay; • protection against less favourable treatment if you make a disclosure in the public interest (i.e., 'whistle blowing'); & • not be discriminated against unlawfully.
Self-Employed/Independent Contractors	<ul style="list-style-type: none"> • The self-employed have no employment rights as such. • They work for themselves and can therefore decide, for example, how much to charge for their work and how much holiday to give themselves. • they are protected against discrimination and are entitled to a safe and healthy working environment on a client's premises.