Policy Forum: Tax, Social Security, and Employment Status—Removing the Distortions in the United Kingdom

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PRÉCIS
La pandémie de COVID-19 a mis les systèmes fiscal et de sécurité sociale à rude épreuve. Des fissures qui existaient depuis un certain temps déjà se sont creusées davantage et il est peu probable qu’elles se referment sans travaux à la structure. De nouvelles connaissances sur la nature changeante du travail, combinées au développement de technologies capables de fournir des solutions modernes et pratiques à de vieux problèmes, offrent la possibilité de repenser la manière dont nous imposons les travailleurs à la demande et autres fournisseurs de travail atypiques. Cet article soutient qu’au moment d’examiner la conception des dispositions fiscales et de sécurité sociale, nous devons nous affranchir des classifications de statuts d’emploi élaborées dans d’autres domaines du droit, à d’autres fins. Afin d’accroître l’équité et de supprimer les distorsions, nous devrions chercher, dans la mesure où c’est possible concrètement, à harmoniser le traitement fiscal et de sécurité sociale de tous ceux qui fournissent un travail. Quand ce n’est pas possible, malgré les avantages que procurent les nouvelles technologies, ce sont les objectifs de la politique fiscale et des avantages sociaux qui devraient dicter les lignes de démarcation plutôt que les liens avec la jurisprudence qui a évolué dans d’autres domaines.

ABSTRACT
The COVID-19 pandemic has strained tax and social security systems. Cracks that have existed for some time have been opened up further and are unlikely to close without structural repair. New insights into the shifting nature of work, combined with the development of technologies that can provide modern, practical solutions to old problems, offer the opportunity to rethink the way we tax gig workers and other non-standard providers of labour. This article argues that we need to free ourselves from the employment status classifications developed in other areas of law, for other purposes, when we consider the design of tax and social security provisions. We should aim to harmonize the tax and social security treatment of all those who provide labour as far as is practically possible in order to increase equity and remove distortions. Where that cannot be achieved, despite the benefits of new technologies, dividing lines should be...
dictated by tax and benefits policy objectives rather than linkages to case law that has evolved in other areas.

**KEYWORDS:** EMPLOYMENT ■ TAXATION ■ SOCIAL SECURITY ■ UNITED KINGDOM ■ CLASSIFICATIONS ■ POLICY

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**INTRODUCTION**

The rise of platform working has placed new strains on an already imperfect system of classification of service providers. These strains were clearly evident before the COVID-19 pandemic. Indeed, flexible working, casual jobs, and part-time working presented challenges long before digital platforms appeared.\(^1\) The problems have been exacerbated by the technology that has made platform working so successful. The pandemic has made a difference in ways that may be more permanent than the crisis itself.

Now is the time to harness the technology that has intensified the problems and make it work for the purposes of tax and social security administration. In order to do this, we need to be prepared to move away from previous thinking about worker classification and recognize that policy areas with different objectives may require varying treatment. Simply re-examining old classifications from the case law (master and servant, employed and self-employed, dependent contractors and those doing business on their own account) and trying to tweak these boundaries to cover new situations is unlikely to provide sustainable solutions.

In many ways, these issues are not new but have been developing for years. However, the articles contributed to this Policy Forum are different from those that would have been written two years ago on the same topic. The COVID-19 pandemic has put further pressure on the rules used in most legal systems to classify types of work. The link between, on the one hand, labour and service provider classification and, on the other hand, the structures available through which to provide state support has been highlighted by the disaster that struck our societies in 2020 and that continues still. Administrative records and machinery have taken on a completely new significance in the light of the need to deliver financial assistance quickly. The cracks in our systems revealed in this way will not close up once the pandemic has retreated. Now that a torch has been shone onto them, they need to be tackled.

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\(^1\) See, for example, Organisation for Economic Co-operation and Development, *The Future of Social Protection: What Works for Non-Standard Workers?* Policy Brief on the Future of Work (Paris: OECD 2018) (https://doi.org/10.1787/9789264306943-en).
Research by the Organisation for Economic Co-operation and Development (OECD) has shown that the majority of OECD member states have utilized a pre-existing short-term work scheme in order to deliver assistance, although most of them have increased access and coverage. However, less than half of those member states have increased access for workers in non-standard jobs. The administrative issues have been a significant reason for this limited access.2

The legal distinction between the employed and the self-employed or independent contractors has been significant not only for tort law, employment law, immigration law, and other areas, but also for tax and social insurance payments in many jurisdictions. Pandemic support schemes have had to rely heavily on existing classifications and mechanisms in order to deliver aid quickly and efficiently without providing opportunities for limitless fraud. As Wei Cui3 and Graham Purse4 describe in their articles in this Policy Forum, the problems with using those classifications have exposed the fault lines in current arrangements.

This certainly has been the case in the United Kingdom. Despite an extensive furlough scheme for employees (the coronavirus job retention scheme [CJRS]) and substantial support schemes for the self-employed (the self-employment income support scheme [SEISS]), it is claimed that there are 3 million UK taxpayers who lack any assistance from the state, partly—though not exclusively—owing to definitional problems.5 Those who are unsupported include new starters in employment not reflected in filings before the cutoff date and also precarious employees, such as those on “zero hours” contracts,6 who were not offered furlough. The exclusion of these groups mirrors some of the problems noted by Cui in this Policy Forum. Some low-paid self-employed gig workers were covered by SEISS and so were possibly better off than others engaged in precarious employment. Similarly, in the United States, some Uber and Lyft drivers have been able to tap into the economic injury disaster loans program as independent contractors for grants and loans with little scrutiny, because they are not employees.7

2 Stefano Scarpetta et al., OECD Policy Responses to Coronavirus (COVID-19), Job Retention Schemes During the COVID-19 Lockdown and Beyond (Paris: OECD, October 2020), at 7, table 1 (www.oecd.org/coronavirus/policy-responses/job-retention-schemes-during-the-covid-19-lockdown-and-beyond-0853ba1d).
3 Wei Cui, “Policy Forum: Non-Standard Employment and Canada’s Initial Pandemic Response.”
4 Graham Purse, “Policy Forum: Sagaz at 20—Evaluating Employment and Independent Contractor Relationships in a Changing World.”
5 Parliament of the United Kingdom, “COVID-19: Support for Jobs,” December 20, 2020 (https://publications.parliament.uk/pa/cm5801/cmselect/cmpubacc/920/92007.htm); Excluded, “Who Is Excluded?” (www.excludeduk.org/excluded-taxpayers). Some of the exclusions are policy-based.
6 Known in Canada, more accurately, as contracts with no guaranteed minimum hours.
7 Faiz Siddiqui and Andrew Van Dam, “As Uber Avoided Paying into Unemployment, the Federal Government Helped Thousands of Its Drivers Weather the Pandemic,” Washington Post, March 16, 2021.
A vociferous excluded group in the United Kingdom has been company directors of owner-managed (usually personal service provider) companies, who have paid themselves mainly by way of dividend rather than by salary through their wholly owned companies. For this group, incorporation has been a convenient way of saving tax and national insurance (social security) contributions (NICs) since (as explained further below) it allows owner-managers to convert labour income into income from capital, by paying themselves dividends or capital income instead of receiving self-employed remuneration or employment salary. Other reasons for this arrangement are claimed as well, but tax and NICs appear to be major drivers, especially if the alternative is that the owner-manager might be classified as an employee rather than as being self-employed. Now, for some who chose to incorporate, the result is low eligibility for CJRS, since they have kept their own wages deliberately low, and no eligibility for SEISS, since they are not classified as self-employed. Despite great pressure for a support scheme to include this group of directors, the UK chancellor and treasury have so far resisted on the basis that it is not possible to find a method of differentiating dividends that are in effect remuneration from dividends that are not. Legal classifications have had a major impact here.

The number of excluded people has been reduced a little by actions taken in March 2021, but it has not been eliminated, and the owner-manager director problem has not been tackled.

THE DIFFERENT PURPOSES OF CLASSIFICATION

The legal classifications of suppliers of labour are required to serve disparate purposes. Employment law aims to counter inequalities in the labour market by supplementing contractual arrangements with statutory rights and duties, and even by overriding contracts in some cases. Tax law, on the other hand, aims to raise and sometimes to redistribute revenue; but generally, good tax policy would require that tax should be neutral as to the contractual or commercial arrangements between the parties.

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8 Known in Canada as personal services businesses. The United Kingdom does not have the equivalent of the anti-avoidance provisions regarding these companies found in Canadian legislation (such as paragraph 18(1)(p) of the Income Tax Act, RSC 1985, c. 1 [5th Supp.]), as amended [herein referred to as “the ITA”], although it does have provisions known as “IR 35” described below. For a comparative discussion, see David G. Duff, “Income Taxation of Small Business: Toward Simplicity, Neutrality and Coherence,” in Glen Loutzenhiser and Rita de la Feria, eds., The Dynamics of Taxation: Essays in Honour of Judith Freedman (Oxford, UK: Hart, 2020), chapter 4.

9 “No More Coronavirus Support To Come for Limited Company Directors, Chancellor Rishi Sunak Tells Martin Lewis,” Money Saving Expert, March 5, 2021.

10 The history of this scheme is summarized very well in Antony Seely and David Hirst, Coronavirus: Self-Employment Income Support Scheme, House of Commons Library Briefings Paper no. 8879 (London: UK Parliament, House of Commons Library, March 18, 2021).
It is generally assumed that certain aspects of social insurance, such as statutory sick pay, should piggyback on the employment-law classification since they have a similar function—the protection of certain groups—although the extent to which that is so will be discussed further below. However, this argument is much less obvious when it comes to other aspects of social protection, such as retirement pensions.

Different jurisdictions have different approaches to the provision of social insurance, but in most countries, it is very firmly linked to employment. In some systems, provision is made by the state on the basis of contributions. In others, there is more of a market-based approach using private schemes for at least some aspects of coverage, such as health and pensions. It is also possible to make more universal provision through the general system of taxation, as in the case of the UK national health system, where health care is not related to contributions at all. In the United States, health-care insurance is linked to employment.\textsuperscript{11} Which system is adopted can make a large difference to the significance of employment status, making the issue one of enormous complexity. Whichever system is adopted, perhaps the best route to simplicity and equity, as Purse points out in his article in this Policy Forum, and as has been suggested by the OECD,\textsuperscript{12} is to harmonize social security contributions across all types of providers of labour as far as possible. The contributions could continue to be earnings-related and give rise to earnings-related benefits if that was the design of the system, but they would not differ depending on the legal classification of the service provider. This solution would reduce the incentives to use independent contractors rather than employees, although engagers might still wish to escape the burdens of employment regulation. However, at least the drivers would not all be pushing in that direction.

When we move on to consider taxation, there appears to be no good argument in principle for applying a different tax rate on the basis of different worker classifications. There will be practical differences relating to the way in which the tax base is calculated and to assessment methods, depending on how payment is made. The nature of the relationship may also have an impact on the availability of a mechanism for tax collection: withholding at source is an effective method of enforcement and will result in higher compliance rates where it can be applied. But there seems to be no necessity for the rules surrounding employment protection and social insurance to dictate the practical rules about when withholding or a reporting mechanism for payments should apply. As we see in the article by Robert-Angers and Godbout in this Policy Forum,\textsuperscript{13} there may be ways to use digital platforms and other third parties for reporting and tax compliance purposes in the absence of an

\textsuperscript{11} Mical Raz, “Time To Unlink Work and Health Insurance in the US?” \textit{Futurity}, April 1, 2020 (www.futurity.org/health-care-insurance-employment-covid-19-2322532).

\textsuperscript{12} See OECD, supra note 1, at chapter 1, especially paragraph 1.8.1.

\textsuperscript{13} Michaël Robert-Angers and Luc Godbout, “Policy Forum: Promoting Tax Compliance by Regulating the Digital Economy—Quebec’s Uber Initiative.”
employment relationship. Doing so should not have an impact one way or the other on the employment relationship. The employment legislation governing this should be drafted to achieve the objectives of employment protection.

This article argues that we need to free ourselves from the view that employment status must dictate tax and social security treatment. As far as possible, we should be aiming to harmonize the tax and social security treatment of all those who provide labour, so that the classifications do not matter in any event; but if practicalities do require different treatment for different groups, the dividing lines should be dictated by the objectives of each area and the associated practicalities. One size does not fit all when it comes to worker classifications.

A CASE STUDY: THE UK SYSTEM

The United Kingdom is currently dealing with an extreme version of a problem experienced in many jurisdictions. The UK system at present results in a strong tax and social security contribution incentive not to be an employee. This is largely due to higher rates of NICs paid by the employed than by the self-employed (the main employee rate being 12 percent and the main self-employed rate being 9 percent). In addition, employers make a NICs payment of 13.8 percent above a low threshold for employees but not for others. The total difference in contributions is very significant. There is no equivalent levy on the self-employed, unlike the position in some jurisdictions, including Canada. As explained below, the differences in benefits entitlement are not sufficient to account for these contribution differences.

14 More detailed accounts of this problem can be found in Claire Crawford and Judith Freedman, “Small Business Taxation,” in James Mirrlees, Stuart Adam, Timothy Besley, Richard Blundell, Stephen Bond, Robert Chote, Malcolm Gammie, Paul Johnson, Gareth Myles, and James Poterba, eds., Dimensions of Tax Design: The Mirrlees Review (Oxford: Oxford University Press, 2010), 1028-99; Stuart Adam, Helen Miller, and Thomas Pope, “Tax, Legal Form and the Gig Economy,” in Carl Emmerson, Paul Johnson, and Robert Joyce, eds., The IFS Green Budget (London, UK: Institute for Fiscal Studies, 2017), 203-38; Dan Tomlinson and Adam Corlett, A Tough Gig?—The Nature of Self-Employment in 21st Century Britain and Policy Implications (Resolution Foundation, February 2017) (www.resolutionfoundation.org/app/uploads/2017/02/Self-employment-presentation.pdf); Abi Adams, Judith Freedman, and Jeremias Prassl, “Rethinking Legal Taxonomies for the Gig Economy: Tax Law, Employment Law, and Economic Incentives” (2018) 34:3 Oxford Review of Economic Policy 475-94 (https://doi.org/10.1093/oxrep/gry006); and Stuart Adam and Helen Miller, “Principles and Practice of Taxing Small Business,” in The Dynamics of Taxation, supra note 8, 97-116.

15 There are thresholds and other issues to be taken into account. A simplified summary of the rates can be found in Shorthouse & Martin Ltd., “National Insurance Contribution” (www.shorthousemartin.co.uk/national-insurance-contributions). See also Judith Freedman and Helen Miller, Tax and Employment Status: Myths That Are Endangering Sensible Tax Reform (London, UK: Institute for Fiscal Studies, July 2020), at 9 (www.ifrs.org.uk/publications/14957).

16 See infra note 39. Stuart Adam and Helen Miller, Taxing Work and Investment Across Legal Forms: Pathways to Well-Designed Taxes, IFS Report no. R184 (London, UK: IFS, 2021), at 38.
As in Canada, there are some computational differences when calculating taxation as between the employed and the self-employed. These are generally less significant than the impact of NICs, but in some circumstances can be very important. Broadly speaking, employees can deduct only expenses that are wholly, exclusively, and necessarily incurred in the performance of their duties, whereas self-employment expenses need only to be incurred wholly and exclusively for business purposes. The objectivity of the employment test is very strictly applied in the case law, making the expenses rule for employees in the United Kingdom very narrow.17

The largest savings can be achieved by incorporating a one-person business and converting remuneration through the company into dividend income, which is not subject to NICs. The owner will take some payment by way of remuneration to satisfy (lightly policed) minimum wage requirements and to obtain a NICs contribution record, but much of the income can escape NICs. Dividend tax rates have been increased, in part to reduce this gap, but there is still often a tax and NICs advantage to incorporation.18 In addition, tax planning by way of income splitting among family members is facilitated by incorporation.19

17 Judith Freedman and Emma Chamberlain, “Horizontal Equity and the Taxation of Employed and Self-Employed Workers” (1997) 18:1 Fiscal Studies 87-118. Since that article was written, rules for travel expenses for employees have been relaxed a little by statute, so that employees can sometimes even be better off than the self-employed in this respect, but some significant advantages for the self-employed remain. As in Canada, there are differences as a result of these rules between the employed and the self-employed when it comes to the deduction of home-working expenses, a matter of particular importance since the pandemic began.

However, in the United Kingdom, there was already a streamlined administrative process for employees claiming home-working deductions, and therefore the administrative issues raised by Bhuvana Rai in this Policy Forum do not appear to be as pressing in the United Kingdom as in Canada: see Bhuvana Rai, “Policy Forum: Write It Off (and Start Again)—Adapting Home Office Deductions for the Digital Era,” under the heading “Limitations on the Deduction of Home Office Expenses.” Since 2003, it has been possible for an employer to make tax-free payments to help employees to cover reasonable expenses incurred while working from home (for limited costs). Alternatively, employees can make the deduction, provided that it is wholly, exclusively, and necessarily incurred. To assist in administration, the employee may choose a standard amount in each case (£6 per week or £26 per month) as an alternative to actual costs incurred. During the pandemic, there has been a relaxation of the usual tests provided that the employee is working at home because of the coronavirus. If home working continues to be widely used, one can imagine pressure for relaxation of the tests to be continued also; otherwise, the requirement for the expenditure to be necessary and for the employee to have no choice about where he or she will work will remain very narrow. More detail can be found in Association of Tax Technicians, “Home Sweet Home—Tax Relief and Home Working” (www.att.org.uk/home-sweet-home-%E2%80%93-tax-relief-home-working).

18 Adam and Miller, using stated assumptions, and including NICs in their definition of tax, show that “[f]or a job generating £40,000, tax in 2020-21 is £3,300 (respectively, £4,300) (Notes 18 and 19 are continued on the next page.)
To counter the NICs advantages of incorporation, the United Kingdom has legislation to deal with these personal service companies, colloquially known as IR 35 (after the press release that first announced it). This legislation works by deeming the income from certain contracts operated through an intermediary to be employment income for tax and NICs purposes. Problematically, the tests used to ascertain whether IR 35 applies are linked to the case-law employment classification tests that apply across the board to employment law, tax, tort, immigration law, and other areas. The case law is purportedly the same in each area, although, given that the decisions are so fact-based, one can see variations in application. The use of the employment classification tests when an intermediary is involved is particularly complex and unsatisfactory, and has given rise to much litigation. HM Revenue & Customs has attempted to assist with a computer-based employment status indicator, with mixed success.

Initially this system was designed to impose on the engager the burden of deciding whether the IR 35 rules applied, but heavy lobbying resulted in a switch to placing the liability onto the engaged. This change resulted in much uncertainty and compliance cost, but raised little revenue, because the rules were not widely applied. The policy was partially changed in 2017 when it was decided to shift the burden of deciding whether IR 35 applied to engagers, if they were in the public sector. In April 2021, this shift was extended to the private sector, giving rise to much concern and many dire predictions. In some cases, businesses have moved to direct employment without an intermediary. Some contractors have announced that they are retiring or going offshore, and many will move to using what are called higher if the job is completed through an employment contract rather than by someone who is self-employed (running their own company).” See Adam and Miller, supra note 16, at 7-8 including figure ES.1.

19 There have been some attempts to prevent the use of this strategy through anti-avoidance legislation, but these have not been successful. See Jones v. Garnett, [2007] UKHL 35; and Glen Loutzenhiser, “Income Splitting and Settlements: Further Observations on Jones v Garnett” [2007] no. 6 British Tax Review 693-716. The UK general anti-abuse rule would not apply. The United Kingdom does not have legislation like the Canadian legislation dealing with tax on split income (Budget Implementation Act, 2018, No. 1, SC 2018, c. 12, sections 13(5) through (7), amending ITA section 120.4); see Duff, supra note 8, at 80.

20 The amended legislation is found in the Income Tax (Earnings and Pensions) Act (ITEPA) 2003, 2003, c. 1, part 2, chapter 8. The word “workers” is defined in ITEPA section 49, in terms similar but not identical to those used in the Employment Rights Act 1996, 1996, c. 18.

21 For a useful list of all recent IR 35 cases, see Contractor Calculator, “IR 35 Court Cases: History of All Cases and References to Judgments” (www.contractorcalculator.co.uk/ir35_court_cases_judgments.aspx).

22 United Kingdom, HM Revenue & Customs, “Check Employment Status for Tax,” March 2, 2017 (www.gov.uk/guidance/check-employment-status-for-tax).

23 For a fuller account, see H. Collins and Judith Freedman, “Section 7 and Schedule 1: Workers’ Services Provided Through Intermediaries” [2020] no. 4 British Tax Review 394-407.
umbrella companies to try to get around the problem.\textsuperscript{24} We can expect increased complexity, artificiality, and litigation. All this is bringing the issue to a head, and there is considerable pressure on the government to introduce reforms.

A further complication is that in the United Kingdom, for tax and NICs purposes, there are two classifications of worker: employed and self-employed. For employment-law purposes, legislation has added a third classification of “worker” (eligible for some, but not all, protections available to employees)\textsuperscript{25} and self-employed. A determination that a person is a worker for employment-law purposes can be made even if the person is self-employed for tax and NICs purposes.\textsuperscript{26} Thus, the recent decision by the UK Supreme Court that Uber drivers are workers\textsuperscript{27} does not prevent them from being self-employed for tax purposes. If that is the outcome, they may pay lower tax and NICs but may be entitled to the national minimum wage (NMW), although not, for example, unemployment benefit. This treatment is not as illogical as some have suggested, since the NMW comes from the engager whereas unemployment benefit comes from the state, but it does raise concerns about the complexity of the position for workers and the ways in which engagers in particular large platforms can work with the system to get to a result that keeps their payments to the minimum. Uber lost its case in the Supreme Court, but its drivers still do not have full benefits as employees, and in the pandemic it has been the state that has supported them through the SEISS.\textsuperscript{28}

\begin{itemize}
\item \textsuperscript{24} “IPSE Research: Half of Freelancers Planning To Stop Contracting in the UK After IR35 Reforms,” IPSE (Association of Independent Professionals and the Self Employed), March 15, 2021 (www.ipse.co.uk/ipse-news/news-listing/ipse-research-freelancers-stop-contracting-uk -ir35.html).
\item \textsuperscript{25} Workers are entitled to the national minimum wage and to holiday pay, but not to sick pay and parental leave pay. They do not have redundancy and unfair dismissal rights as employees do and will not be entitled to state unemployment benefits as of right.
\item \textsuperscript{26} Pimlico Plumbers Ltd v. Smith, [2018] UKSC 29.
\item \textsuperscript{27} Uber BV v. Aslam, [2021] UKSC 5.
\item \textsuperscript{28} This also happened in the United States; see supra note 7. The Uber decision in the United Kingdom was also not decisive on the value-added tax (VAT) position because it was based on a purposive interpretation of employment-law legislation and explicitly excluded consideration of VAT. (VAT is the UK version of Canada’s goods and services tax.) At present, Uber drivers are responsible for their own VAT, and most are below the United Kingdom’s relatively high VAT registration threshold of £85,000. As in Canada, with the small supplier exemption discussed by Robert-Angers and Godbout, supra note 13, this results in loss of revenue and undermines the level playing field with other taxi services. There is pressure for these concerns to be addressed in the United Kingdom, and the Supreme Court’s analysis, while not directly relevant, can only add to that: Jamie Nimmo, “Uber ‘Could Face £2bn VAT Bill,’” Sunday Times, February 21, 2021. The UK government issued a call for evidence in 2020 but as yet has not made any announcements on how it plans to proceed: United Kingdom, HM Revenue & Customs, VAT and the Sharing Economy: Call for Evidence (London, UK: HM Revenue & Customs, December 9, 2020) (www.gov.uk/government/publications/vat-and-the-sharing -economy-call-for-evidence).
\end{itemize}
Given the different levels of payment of NICs paid by the employed, the self-employed, and those operating through personal service companies, it is no surprise that the UK chancellor stated when setting up the COVID-19 support scheme:

But I must be honest and point out that in devising this scheme—in response to many calls for support—it is now much harder to justify the inconsistent contributions between people of different employment statuses. If we all want to benefit equally from state support, we must all pay in equally in future.\(^{29}\)

In 2017, a review of employment status issues was commissioned by the UK government. This report (the Taylor review) recommended that “we need to make the taxation of labour more consistent across employment forms while at the same time improving the rights and entitlements of self-employed people.”\(^{30}\)

With this I can agree.\(^{31}\) However, the report then went on to recommend replacing the “worker” classification with a “dependent contractor” category and stated that

[i]n developing the new “dependent contractor” test, renewed effort should be made to align the employment status framework with the tax status framework to ensure that differences between the two systems are reduced to an absolute minimum.\(^{32}\)

Renaming the worker category is widely considered to complicate rather than simplify the position,\(^{33}\) and it is not clear how the employment status framework and the tax status framework could be usefully aligned using this third category. Making taxation more consistent across all classifications seems to be a preferable idea. However, as at the time of writing, the government has taken no action to implement these recommendations, despite indications that doing so is on its agenda.\(^{34}\) Once the issues are examined, implementation is more complex than it seems.

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29 United Kingdom, HM Treasury, “Chancellor’s Statement on Coronavirus (COVID-19): 26 March 2020” (www.gov.uk/government/speeches/chancellor-outlines-new-coronavirus-support-measures-for-the-self-employed).

30 Matthew Taylor, Greg Marsh, Diane Nicol, and Paul Broadbent, Good Work: Taylor Review of Modern Working Practices (London, UK: Department for Business, Energy & Industrial Strategy, July 2017) (herein referred to as “the Taylor review”), at 9.

31 The Taylor review did not examine tax-motivated incorporation and so did not include this in its prescription. Tackling this problem would be more complex and would require some way of treating income of the company as employment income regardless of whether it was paid out by way of wages or in the form of dividends. This treatment is partly achieved by IR 35, but in a cumbersome and incomplete way. For other proposals, see Crawford and Freedman, supra note 14; and Adam and Miller, supra note 16.

32 Taylor review, supra note 30, at 38.

33 Adams, Freedman, and Prassl, supra note 14, at 488.

34 United Kingdom, Department for Business, Energy & Industrial Strategy, Good Work: A Response to the Taylor Review of Modern Working Practices (London, UK: Department for Business,
It is important to note the final piece of the UK jigsaw, which is that, although the UK national insurance scheme is known as a contributory one, and this has been significant in persuading the population to accept ever-increasing NICs more readily than higher income taxes, the contributory element and the earnings-related aspects have been much depleted in recent years. In part, this has been the result of a push from the Left for greater inclusion, so that non-contributory benefits have been expanded. In tension with that, but having a similar overall effect in this context, has been the push by the Right for more means testing. NICs payments are the basis for eligibility in some cases, and so remain contributory in that sense, but while the contributions are earnings-related, the benefits entitlements are not. That being the case, benefits payments are low. This has been a problem during the pandemic, hence the requirement to top up benefits through special schemes. This situation has led to calls for a move toward a more contributory, earnings-related element, now that so many more people have experienced the difficulties of living on the amounts paid.

State retirement pensions, in particular, are not earnings-related and are available to the employed and the self-employed alike provided that they have paid NICs or been credited over a sufficient period. Health insurance is universal and not related to employment. Hence, individuals incorporating a company can build up entitlement to the full state retirement pension by paying themselves a low wage and converting the rest of their income into dividends. Only job-seekers allowance (automatic entitlement for employees for the first six months, at a low flat rate) and some forms of parental pay are different as between the employed and the self-employed.

Given this, the difference between the total payments of NICs in relation to an employed person and those relating to a self-employed person or persons paying themselves via dividends is not justifiable on the basis of the differences in benefits. The value of the differences in the job-seeker’s allowance and statutory maternity/paternity/adoption/shared parental pay is small. Adam and Miller estimate that those differences would only justify setting the self-employed NIC rate at less than

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35 See Nicholas Timmins, Gemma Tetlow, Carl Emmerson, and Stephen Brien, *Jobs and Benefits: The Covid-19 Challenge: A Joint Report by the Institute for Government and Social Security Advisory Committee* (London, UK: Institute for Government and Social Security Advisory Committee, 2021) (www.instituteforgovernment.org.uk/sites/default/files/publications/jobs-benefits-covid-challenge.pdf).

36 John Hills, *Inclusion or Insurance? National Insurance and the Future of the Contributory Principle*, CASE Paper no. 68 (London, UK: London School of Economics, Centre for Analysis of Social Exclusion, May 2003).

37 See, for example, Timmins et al., supra note 35.

38 The amount of the allowance is £74.35 per week for most people. This can be topped up by a benefit known as “Universal Credit,” based on means-testing.
1 percentage point below the combined employer and employee rates. In order to remove differences based on classification, those differences could be ironed out by improvements to entitlements for the self-employed, as Taylor suggests, without costing a great deal, while softening the blow of the higher rate a little.

Nevertheless, the vociferous self-employed lobby argues that there should be large differences in the rates of NICs charged owing to the risks that the self-employed take, though this is an argument that has no basis in logic. As explained in a recent Tax Law Review Committee paper, even if it is desired to encourage or support certain working arrangements, blanket tax relief for all “self-employed” (which is bound to be a heterogeneous group, however defined) is not a well-targeted or effective way to achieve this objective.

Unfortunately, aligning the NICs payments for the employed and the self-employed has become a political hot potato. An attempt to make a very small adjustment in this direction resulted in failure in 2017 and was politically disastrous for the chancellor concerned. It seems likely that such alignment could happen only as part of a major structural reform, for which many in the United Kingdom hope, but which does not seem to be on the table for now.

The United Kingdom intends to enact legislation implementing the OECD model rules for reporting by platform operators with respect to sellers in the sharing and gig economy. This will lead to interesting developments in the collection of information from platforms such as Uber, which appears to be one way forward, but currently will still result in tax being collected on the basis that the drivers are self-employed for tax purposes, regardless of their worker status under employment law. A reporting requirement is a compliance solution along the lines of Quebec’s Uber initiative, but it does not tackle the more fundamental underlying problems. Nevertheless, it is certainly worth examining if larger reforms are not possible. The United Kingdom’s cumulative deduction at source (PAYE) system was introduced as a result of administrative need, and a similar move to deduction at source from certain types of workers should be possible even if they are not employees for any other purpose, especially using digital tax collection, which would make record keeping and tracking easier.

39 Adam and Miller, supra note 16, at 37: “That is, the combined rate on employees is 22.7%; differences in benefits would only justify reducing this to around 22% for the self-employed—still more than double the current 9% rate.”
40 Freedman and Miller, supra note 15.
41 Mehreen Khan, “Hammond Scraps National Insurance Rise at Cost of £500m a Year,” Financial Times, March 15, 2017 (www.ft.com/content/bee1bd84-d485-3af2-822b-090c77db72c).
42 See the article by Robert-Angers and Godbout in this Policy Forum, supra note 13.
43 Judith Freedman, “Tax Administration Shaping Tax Reform: Does Employment Status Matter for Tax?” Tax Journal, February 18, 2021.
There may be changes to the UK value-added tax (VAT), given that the government’s 2020 call for evidence on VAT and the sharing economy 44 includes the possibility of legislative change, but no announcement has been made on this as yet. Again, technological solutions may assist where platforms are concerned, and potential problems can be turned to advantage.

CONCLUSIONS AND THE WAY FORWARD

Tax policy responses to the changing nature of work are not straightforward. The question of worker classification intersects many areas of law. Classification of different types of work into a set of categories intended to apply for many different purposes may look like a simplification but in fact is likely to make it harder to achieve our objectives in each area. Employment law needs to protect those who have unequal bargaining power in their work relationship. Characteristics that are relevant for that purpose may not be pertinent to the question of how much tax should be paid or to compliance needs. There is no necessary relationship between the employment relationship and the social security arrangements made by the state to protect those who need support at a particular point in their lives. Contributory insurance-style social security systems that may involve a mix of state and private provision also do not need to depend on the employment relationship.

This brief discussion of the problems currently being experienced in the United Kingdom echoes with many of the issues discussed in other articles in this Policy Forum, although the combination of UK social security changes, the sharp differences between the amounts of NICs paid in relation to the employed and the self-employed, and the complex measures taken to try to deal with this have resulted in a set of problems in the United Kingdom that may be harder to unravel than in most jurisdictions.

This was a major problem before COVID-19 struck. The pandemic highlighted further faults in our systems. Finding solutions is not easy, but recognition that we are not bound to classifications developed for other situations is important for making progress. Those concerned with tax and social security payments need to go back to first principles and focus on removal of differences that cause distortion and the creation of systems that support compliance. Employment lawyers will then be able to tackle the issues that they need to deal with without tax distortions further complicating their important task.

44 See HM Revenue & Customs, supra note 28.
