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# **RISK AND REWARD: TAX, EMPLOYMENT AND IMMIGRATION CONSIDERATIONS IN ENGAGING CONTRACTORS**

Lee Harding, Neil McKnight, Jennifer Connolly  
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# Presenters



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# Today's agenda

- Pros and cons of using contractors rather than employees
- Re-classification risk (employment and tax)
- Brexit and bringing talent to the UK
- The use of agile working as an alternative to bringing people physically to the UK
- Challenges with protecting confidential information, IP and enforcing restrictive covenants when using contractors or an agile work force



# Contractors vs. Employees

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# Employees vs. Contractors

Despite codified definitions, employment status is primarily determined by case law. UK courts look at substance not form.



## Employee

An individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment



## Worker

An individual who has entered into or works under: (1) a contract of employment **or** (2) any other contract



## Independent Contractor

No statutory definition for a consultant. A consultant cannot simultaneously be a worker/employee. An individual who is neither an employee nor a worker will be self-employed for employment law purposes.

# Employees vs. Contractors – Key Rights and Responsibilities

Green = applies  
 Yellow = may/will  
 apply in the future  
 Red = does not apply

Statutory right/responsibility	Summary	Employee	Worker	Independent Contractor
Written particulars of employment	A right to a written statement setting out the key terms and conditions of employment	Green	Yellow	Red
Health and safety duties	A duty to provide a safe workplace, including a safe system and place or work (including safe and competent colleagues) and safe equipment, plant and machinery	Green	Green	Green
Vicarious liability	Employers can be held liable for the tortious or discriminatory acts of their staff that are committed during the course of their employment	Green	Yellow	Yellow
National minimum wage	A right to be paid a wage no less than the minimum amount prescribed by law	Green	Green	Red
Statutory sick pay	A right to continue receiving payments while absent from work for a sustained period due to sickness of a minimum value	Green	Yellow	Red
Right to pension contributions and auto-enrolment	A right to be automatically enrolled into a workplace pension scheme and for the employer to make minimum levels of contributions	Green	Green	Red

# Employees vs. Contractors – Key Rights and Responsibilities

Statutory right/responsibility	Summary	Employee	Worker	Independent Contractor
Paid annual leave	Guarantee paid holiday for minimum number of working days	Green	Green	Red
Protection for whistleblowing	Right not to be dismissed or subjected to detriment for making a protected disclosure	Green	Green	Red
Protection from discrimination/harassment/victimisation	Right not to be subjected to discrimination/harassment, or be subjected to a detriment for making/assisting with such a complaint	Green	Green	Yellow
Parental rights	Right to statutory paternity/maternity leave and pay for	Green	Red	Red
Statutory notice periods and redundancy payments	Right to receive minimum period of notice in most cases and rights to severance payment following redundancy dismissal	Green	Red	Red
Unfair dismissal protection	Requirements to dismiss employees with two years' continuous service for a potentially fair reason, and to follow a fair process	Green	Red	Red



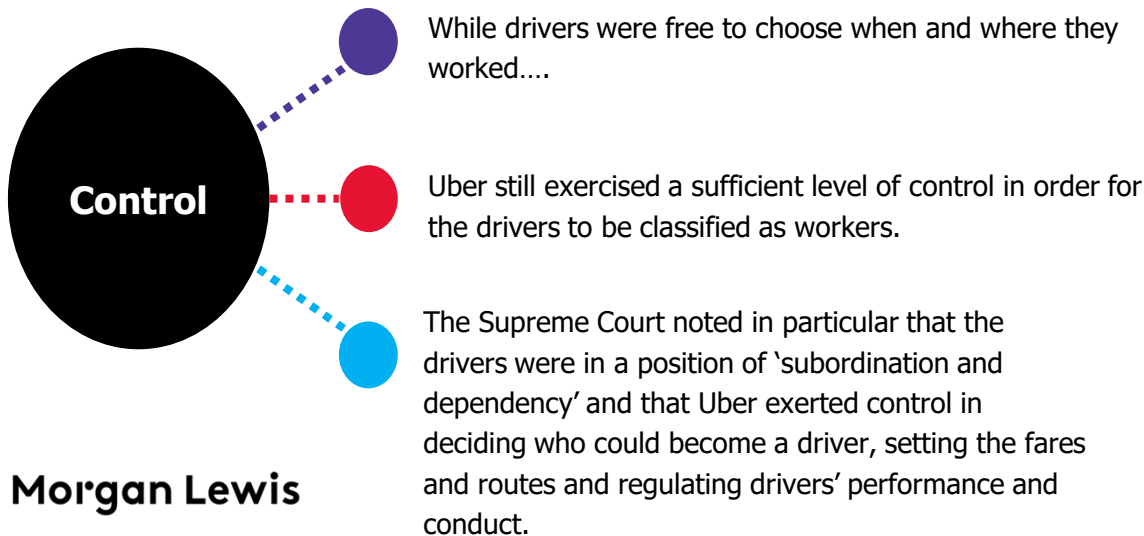
# Employees vs. Contractors – Advantages and Disadvantages

Type of engagement	Advantages	Disadvantages
Employees	Stability	Significant employment rights (unfair dismissal, discrimination, whistleblowing, notice, holidays, automatic enrolment, etc)
	Loyalty	PAYE/administrative burden
	Retained skills/experience	
Workers	Flexibility	Some employment rights (discrimination, holidays, automatic enrolment)
		The risk that they are actually employees
Independent contractors	Flexibility	No employment rights (but note the wide definition of "employee" under the Equality Act 2010)
	Specialist skills and expertise	The risk that they are actually employees
		They own their copyright unless stated otherwise in the contractual agreement

# Employees vs. Contractors

## Uber v Aslam

The Supreme Court stated that the degree of control exercised by the employer over the work or services performed by the individual concerned is **critical** to the assessment of the reality of the working arrangements. The greater the level of the employer's control, the stronger the case for classifying the individual as a "worker".



Also important to consider the **purpose** behind the legislation. The focus of the assessment should be on the **true nature of the relationship**. The **critical** question being whether the **true relationship** is within the scope of the protection of the statutory regime.

# Employees vs. Contractors

## Other key employment status cases



### Pimlico Plumbers

No unfettered right to substitute someone else to personally perform the work. This led to the conclusion that the individual in question was a worker, not an independent contractor



### Deliveroo

Unfettered right of substitution meant that there was no obligation of personal service, and so the individuals were not workers

# Employees vs. Contractors

## Key Take-Aways from Case Law

1


Employers should place greater weight and effort into aligning the written agreement with the actual practical aspects of how workers work

2

For employers engaging in the gig economy and aiming to use an independent contractor model, a further crucial consideration is assessing the level of control the employer wants to exercise over the individuals

# Employees vs. Contractors – Tax Considerations

Employment status is important when determining which party is required to account for income tax and national insurance contributions (NIC)



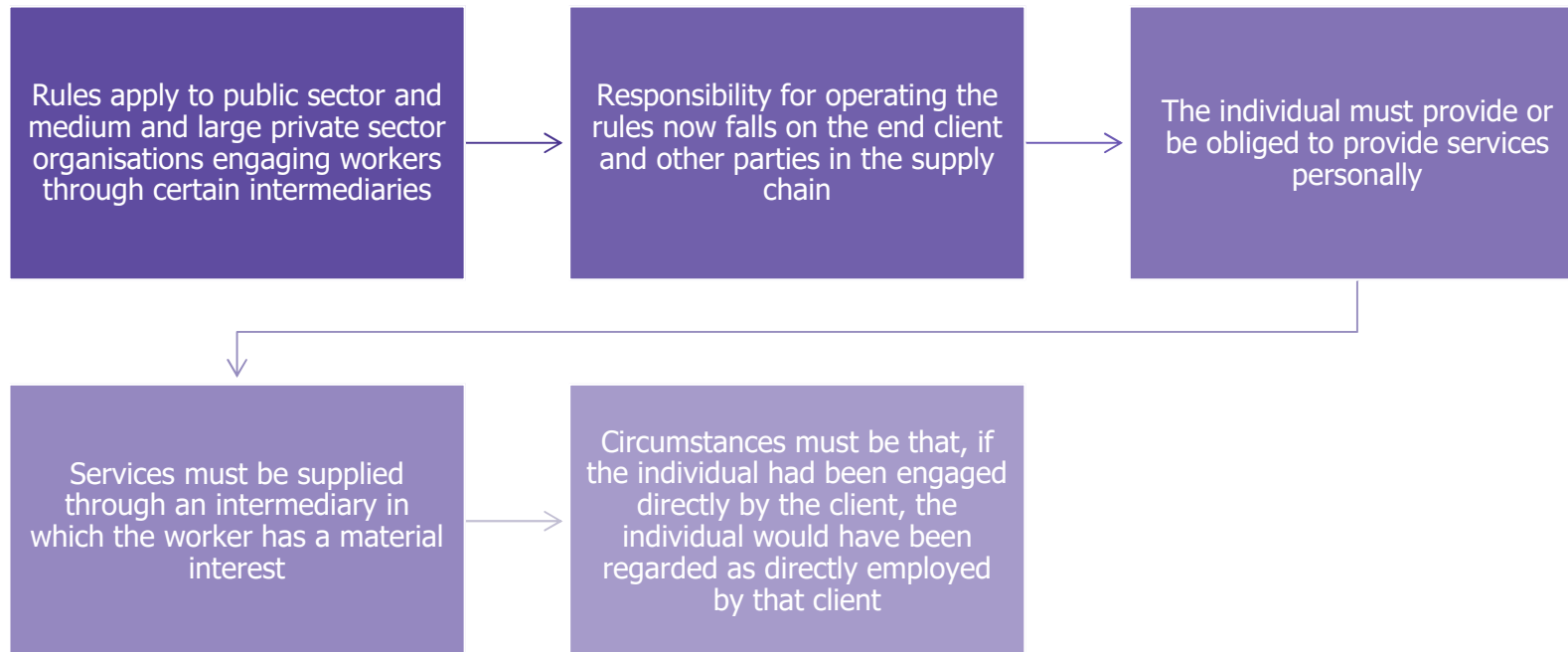
Some aspects of HMRC approach to employment status for tax purposes differs to that for employment rights purposes



HMRC offers an online tool (CEST) that helps users check employment status for tax purposes

# Employees vs. Contractors

## Off-payroll working rules (IR35)



# Employees vs. Contractors

**The client will be required to**

Make a determination on the employment status of an individual supplied via an intermediary

Communicate the determination directly to the intermediary and individual (with reasons on request)

Make deductions for income tax and NICs and pay any employer NICs in certain circumstances



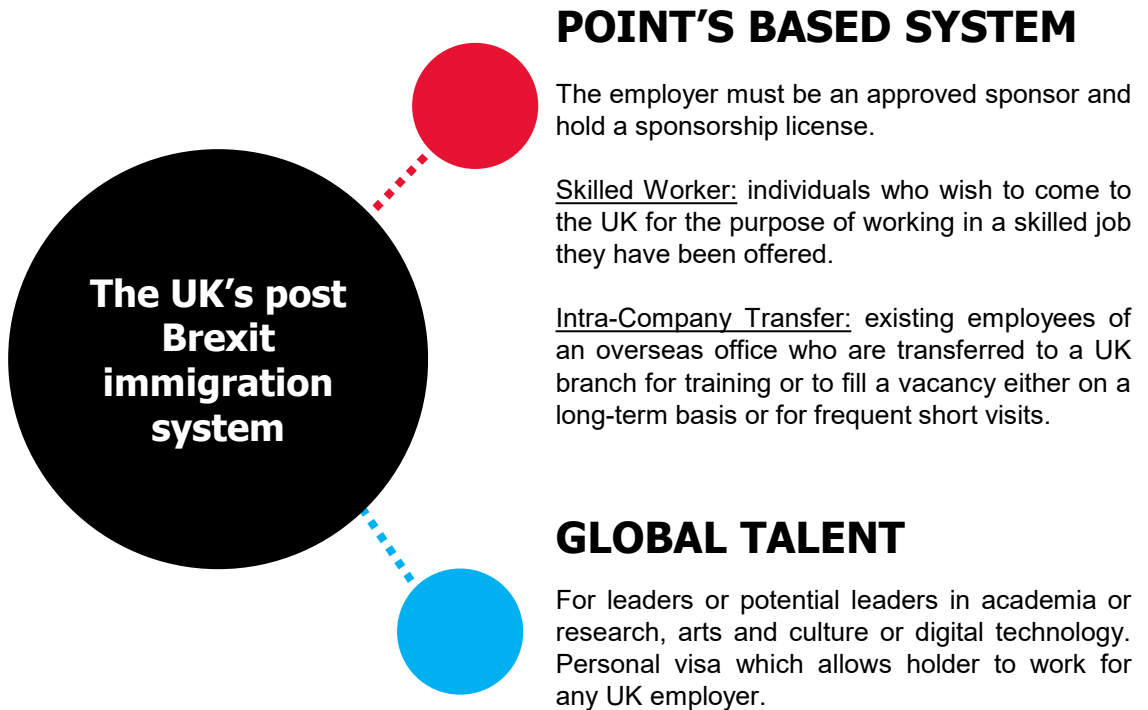
# Hiring talent outside of the UK in a post- Brexit world

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Effective from 1 January 2021, the new immigration system applies to both EU citizens and non-EU citizens equally.

EEA and Swiss nationals who lawfully entered the UK before 31 December 2020 are able to remain in the UK indefinitely. They will be required to make an application under the EU Settlement Scheme **before 30 June 2021**.



# Immigration Considerations

- Hiring of sponsored contractors only permitted in limited circumstances
- Must be contracted to provide a service or project which has a specific end date
- The sponsor must retain full responsibility for all the duties, functions and outcomes of the job the worker will be doing
- The worker cannot fill a position with the third party, whether temporary or permanent
- New points-based route that does not require sponsorship will launch March-May 2022

# Agile Working

A photograph of a modern building's glass and metal facade at dusk. The building features a prominent grid pattern of windows and a large, curved, metallic structure on the right side. The sky is a deep blue, and the overall scene is illuminated with a cool, blue light.

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# Agile Working & Cross-border Issues



**Employee requests**



**Agile working**



**Legal and regulatory issues**



**Unexpected liabilities**



**Costs**

# Agile Working: Risks

## Permanent Establishment & Tax liabilities

Difficulties arise when companies do not have a permanent presence in the jurisdiction that its employees wish to relocate to. The presence of employees may create a taxable presence for corporate tax purposes and require employers to operate payroll withholding.

## Local Employment Laws

An employee could gain employment rights from another jurisdiction which could be more favourable to the rights provided under the law of their home country, such as rates of pay, annual holidays and, importantly, rights on termination.

## Data Protection Concerns

If an employee's role involves processing personal data, this could give rise to data protection issues, especially if the employee is requesting to work from a country outside of the EEA which is not subject to the General Data Protection Regulation (GDPR).

## Immigration Issues

An employer should consider whether the employee requires a work permit and/or visa as well as any issues that could arise on an employee's return to the UK. Depending on the employee's activities, it may be possible to characterise their stay as a business visit, however, restricting the employee in this way may be impractical and become difficult to justify for longer periods of time and can raise concerns at immigration control.

# Will Agile Working Last?



## 12-months+ of remote working

The fact that many of the world's largest economies have remained in some form of lockdown for more than a year has dispelled any doubts that the shift to remote-working is a short-term phenomenon.



## Shift in employee expectations

Employers should be contemplating their future flexible working policies, taking into account their individual business needs, the needs of their employees and the need to remain competitive against their peers.



## Agile working?

Employers should carefully consider the issues associated with agile working prior to allowing an employee to work remotely from a different jurisdiction to their home location. Indeed, many employers are likely to implement policies which expressly provide that such practices will not be permitted on a long-term basis.

# Flexible Working Requests

## The legal position

- Employees with at least 26 weeks' continuous employment can make a statutory request, in writing, for flexible working, for any reason
- Employer then has three months to make its decision
- Employer can only refuse a request for one or more of the eight reasons set out in legislation
- Only one request can be made in any 12-month period

## Workers and consultants?

- Only employees are eligible to make statutory flexible working requests
- The right does not apply to self-employed contractors, consultants or agency workers

## How should requests be dealt with?

- In a reasonable manner
- Notify the employee of its decision within the three-month period
- Only refuse a request on one or more of the following grounds: (1) the burden of additional costs; (2) detrimental effect on ability to meet consumer demand; (3) inability to reorganise work among existing staff; (4) inability to recruit additional staff; (5) detrimental impact on quality; (6) detrimental impact on performance; (7) insufficiency of work during the periods the employee proposes to work; or (8) planned structural changes



# Confidential information, IP and enforcing restrictive covenants

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# Protecting confidential information and trade secrets with an agile workforce

- Increased remote working may have weakened loyalty between employer and employee
- Employees may have more opportunities to take confidential information and store it on personal devices at home
- Consider how to mitigate the risk of misuse of confidential information
  - Prevention is better than a cure
  - Regular team calls to maintain employee relationships
  - Maintain positive culture
  - Engender loyalty



# Protecting confidential information and trade secrets when hiring consultants

## Consultants

- Consultants are generally under no implied obligation of confidentiality
- Rights in the product of consultancy work will belong to the consultant unless there is a contractual agreement to the contrary
- Consultants will by default own the copyright in the works they create during the consultancy. If this is not the desired outcome, then an assignment of the copyright should be put in place and the terms and scope of licence should be clearly defined



# Restrictive Covenants

## Restrictive Covenants and Independent Contractors/Workers

**Workers:** Generally inappropriate to include or enforce restrictive covenants. UK courts are likely to consider that the employer is trying to have it both ways - denying them full employment rights, but seeking to treat them as employees when also seeking to restrict their activities

**Independent contractors:** Restrictive covenants can be permissible in consultancy agreements as there is more of an equal balance of power – however, onerous restrictive covenants can be indicative of worker/employee status

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### **Pimlico Plumbers case**

Key factor in finding that self-employed plumber was a worker was due to an **onerous restrictive covenant** attempting to preclude individual from working in any part of Greater London for three months post-termination.

**N.B.** UK Gov has launched consultation on non-competes. This may prohibit their use or make them subject to mandatory compensation for employees. This in turn may lead to increased engagement of independent contractors

# Coronavirus COVID-19 Resources

We have formed a multidisciplinary **Coronavirus/COVID-19 Task Force** to help guide clients through the broad scope of legal issues brought on by this public health challenge.

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To help keep you on top of developments as they unfold, we also have launched a resource page on our website at

[www.morganlewis.com/  
topics/coronavirus-  
covid-19](http://www.morganlewis.com/topics/coronavirus-covid-19)

If you would like to receive a daily digest of all new updates to the page, please visit the resource page to [subscribe](#) using the purple "Stay Up to Date" button.



## Biography



**Lee Harding**

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Lee Harding has a broad and versatile practice that goes beyond the provision of traditional legal services. Lee's practice is focused on the myriad legal implications arising out of a rapidly changing workplace: flexible working, five generations in the workplace, giving workers a voice, and the crossover between employment and the regulatory environment, to name but a few. The nontraditional legal services that Lee offers require a proactive approach to managing workplace issues before they escalate. He engages with a wide range of stakeholders to deliver sophisticated and actionable solutions that resonate across the entire business.

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## Biography



### **Neil McKnight**

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Neil advises on a full range of corporate, finance, real estate and employment tax matters. This includes corporate mergers and acquisitions and reorganisations, real estate acquisitions, disposals and investment transactions and international mobility of employees. Neil has a particular interest in cross-border transactions (particularly in the TMT sector), eCommerce, and financial services.

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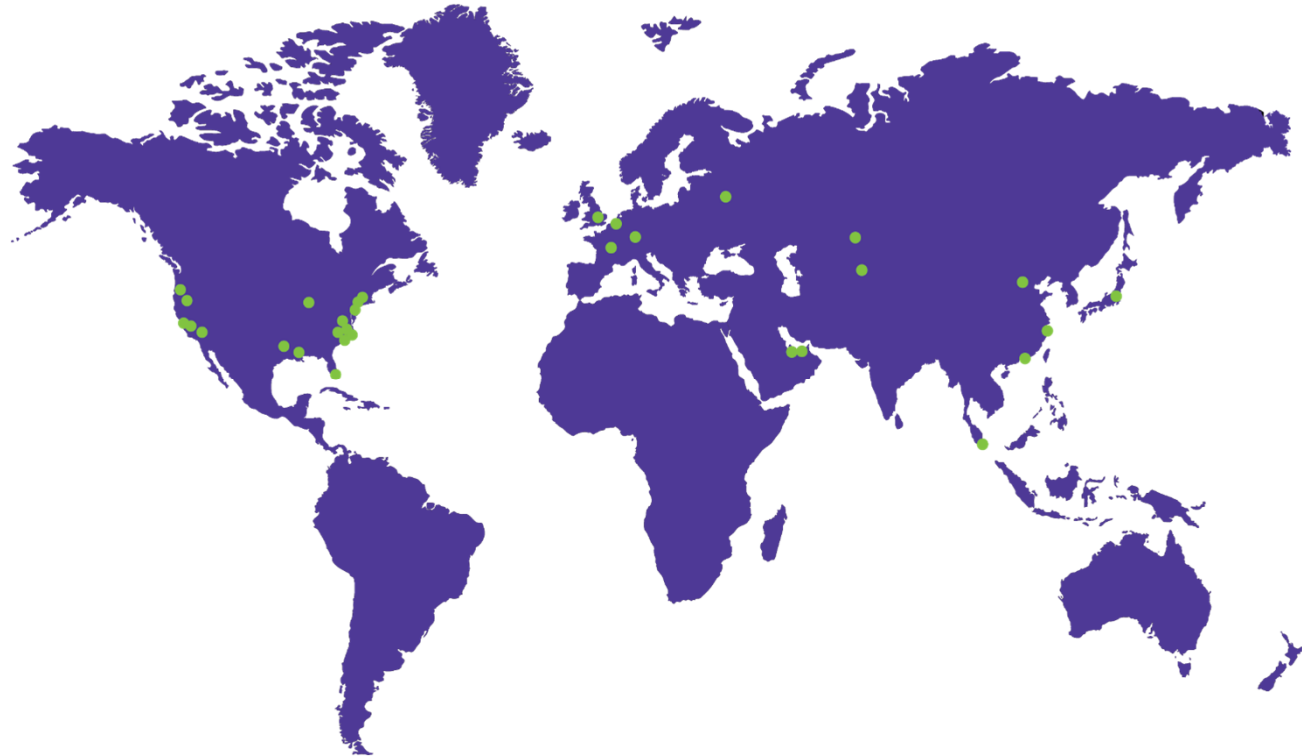
Jennifer Connolly is a member of the firm’s immigration and global mobility team. Jennifer advises businesses of all sizes from a variety of sectors on the full range of UK immigration permissions as well as global immigration matters for the EMEA region. This includes prevention of illegal working, Tier 2 of the points-based system, sponsor license applications, business visitors, preparations for Brexit and other UK employment-related immigration categories.

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Europe  
Latin America  
Middle East  
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