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EMPLOYMENT STATUS

It is important to know whether someone who works for you is an employee a “worker” or self-employed.

If you have made someone an employee, by virtue of your contract with them, this is a straightforward matter. However, there may be situations – in both large and small organisations – where other individuals can be seen as employees, even though there is no formal contract of employment, because of the working arrangements. In such situations the intention of the parties is considered, as well as the actual situation. This distinction is important because workers (a definition that includes employees), now enjoy much greater legal protection than previously.

Is the individual an employee?

Even if the contract between you indicates otherwise, an individual may be your employee and therefore have certain statutory rights and protections. The law is remarkably unclear on how this is to be decided. However, if all the following features of the relationship between you are present, it is extremely likely the individual is your employee:

An agreement between you (express or implied) for the individual to provide their own work or skill in performance of service for you, in return for remuneration (generally, wages)

This might allow for a very limited right for the individual to have a substitute perform the services.

Control by you

If they are ordinarily subject to your day-to-day orders as to what work to perform, when and how, and subject to any disciplinary procedures, there is likely to be a sufficient degree of control to make them your employee.

The other terms of your contract are consistent with the above and show that there are mutual obligations

Where you are obliged to offer work and the individual is obliged to accept it, there are “mutual obligations”. But there is likely to be an exception where you don’t offer work, but continue to pay them.

Benefits schemes, provision of health insurance and bonus schemes, are examples of terms that would probably be consistent with an employment relationship.

If not, is the individual a worker?

Consider the following. If all of these criteria are met, the individual is a worker.

- (i) If the individual works for you under any contract (express or implied); and
- (ii) They undertake to perform the services personally; and
- (iii) The contract between you does not make you a client of their profession of business undertaking

The law regards the individual as a worker, in particular, where there are mutual obligations between you and the individual – e.g. you are obliged to offer, and they are obliged to accept, work.

If not, then the individual is genuinely self-employed.

NB: In respect of performing services personally, the individual has a very limited scope for appointing a substitute, without invalidating their worker status.

Workers' rights

If the individual is considered to be a worker, they have some of the same entitlements as employees, which include:

- Protection against unlawful deduction of wages
- Pay in line with National Minimum Wage
- Paid annual leave
- Rest breaks
- Maximum working week
- Right to be accompanied at grievance or disciplinary hearing
- Protection for making a protected disclosure
- Protection under Data Protection Act
- Rights in relation to discrimination, excluding grounds of fixed-term working or civil partnership status

They do not have an employee's rights in relation to dismissal (minimum notice, right not to be unfairly dismissed, etc.) or an employee's rights to time off (maternity/paternity leave, TU activities, etc.).

“In employment” – discrimination

This is a tricky area, where an individual who is not even a worker, might be considered to be “in employment” for discrimination purposes. This will happen where the “dominant purpose” of the contract is personal performance of the work.

Therefore, an individual who provides services to you as part of a business or profession will not be seen as a worker, and so will not generally enjoy worker's rights, except in relation to discrimination, if the dominant purpose of the contract is personal performance of the services by that individual.

Fixed-term contracts

The Regulations in this area relate only to employees under fixed-term contracts, who enjoy the usual employment rights. So, if the contract term expires and is not renewed, this will count as a dismissal.

A contract is considered a fixed-term contract where it terminates upon either:

- (i) The expiry of a fixed term;
- (ii) The completion of a particular task; or
- (iii) The occurrence (or not) of a particular event (except for reaching retirement age)

Fixed-term employees have further rights in relation to discrimination vis-à-vis permanent employees. The common areas of complaint are in relation to opportunities for training, securing a permanent position and period of service qualification relating to a condition of service.

Agency Workers

This is where the individual contracts with an “employment agency”; they send the individual (an “agency worker”) to work for you (you are the “client” of the employment agency).

Generally, you will not be regarded as the employer, because there are typically no “mutual obligations” (see above) – for example, you are not obliged to provide work and they are not obliged to accept it. You hire the agency to provide someone and the agency sorts out their pay. However, you can also take steps to ensure you are not their employer:

- Only deal with a reputable employment agency; i.e. one that will warrant that the agency workers are not to be regarded as your employee and will indemnify you against any such claims
- Restrict the agency worker’s role to specific projects and their engagement to a specific period
- Don’t involve the agency worker in training, employee briefings or social events – keep them detached from the general running of your organisation

However, note that agency workers will almost certainly be “workers” and have statutory entitlements, as above.

If you are the employment agency, you do not have day-to-day control of the individual and you are not obliged to offer work, as they are not obliged to accept it.

Agency worker’s rights (against employment agencies and their clients)

- Data Protection rights in all scenarios
- Discrimination rights
- Equal pay
- National Minimum Wage (payable by whoever is responsible for paying, or who actually does pay, the individual)
- Maternity/paternity/adoption pay (but also, in some circumstances, equivalent leave)
- Statutory Sick Pay (provided they are an “employed earner”, as most are)
- Tax and NICs generally payable by the employment agency
- Protection for making a protected disclosure
- Working Time Rights (as for workers, above) where the party responsible is whoever is responsible for paying, or who does pay, the individual)

Other distinctions

Implied terms in contracts of employment

Employment contracts contain implied terms such as the mutual duty of trust and confidence, employer’s duty to give reasonable notice, employer’s health and safety duties, employee’s duty of confidentiality, etc.

Transfer of Undertakings

Only employees will be automatically transferred to the purchaser of their employer’s business.

Vicarious liability

Generally, you’re only vicariously liable for the acts of your employee, but an individual who is even employed by someone else might be regarded as your employee for the sole purpose of liability to a third party, if their (negligent) acts occurred whilst they were under your control and following your directions.

Tax issues

You are responsible for determining the individual's employment status for tax purposes. If you are unsure, or unable to seek advice, you can ask your local tax office to rule on the point.

Employees are to have income tax (through PAYE) and NICs deducted at source, and are entitled to the benefit of NICs that you make on their behalf. The self-employed are responsible for their own tax arrangements.

NB: "Consultants" providing services through a "service company", will probably be considered employees by HMRC, where it is apparent that they would be your employee, were it not for the service company. In this instance, you are responsible for deducting income tax, through PAYE, and NICs.

Recent case on employment status

A controlling shareholder can be an employee. This issue often crops up when a company is insolvent. The date at which the issue of employment status is to be determined is that date of insolvency. The factors that affect a controlling shareholder's status include whether the employment contract they allege exists has been followed by both parties (in terms of pay, holidays, working time, etc.). If there is evidence in writing of the same, this will be a strong indicator that an employment relationship exists; likewise, without written evidence of such an arrangement, the likely inference is that no employment relationship was ever intended (*Secretary of State for BERR v Neufeld*).

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