

# Employment Status: Briefing

This Briefing explains the significance of the distinction between employees, workers, self-employed contractors and it also highlights the legal status of volunteers and consultants.

## Employee status

An employee is an individual who has entered into or works under the terms of a contract of employment. The contract can be expressly agreed (in writing or orally) or implied by the nature of the relationship. To have employee status:

- An individual must be obliged to do the work personally (rather than being able to send a substitute).
- The employer needs to be obliged to provide the work and the employee is obliged to accept the work.
- The employer needs to have some control over the way the employee carries out the work.

## Employees' rights

For example, these rights include:

- Protection from discrimination.
- Not to be unfairly dismissed.
- Protection against unlawful deduction from wages.
- Health & safety protection.
- Entitlement to the national minimum wage.
- Entitlement to redundancy pay.
- Automatic transfer of their employment to any purchaser of the employer's business under the TUPE rules.

## Volunteers

The legal status of volunteers is not clear cut, as there is a vast range of different types of relationships, from the purely voluntary to those that are clearly contractual and those in between, which are difficult to define. This ambiguity makes it difficult for organisations taking on volunteers to appreciate any legal obligations that they may owe them.

Organisations can reduce the risk of creating a legally binding contract with volunteers by:

- Avoiding making payments to volunteers that could be construed as wages. Payments to cover actual expenses should be clearly identified as such and ideally reimbursed against receipts.
- Removing, or at least minimising, any perks that could be regarded as remuneration.
- Reducing obligations on the part of the volunteer (for example, give the volunteer the ability to refuse tasks and choose when to work).
- Avoiding using language in documents that makes the arrangement sound contractual and adopting instead flexible language, such as "usual" and "suggested".
- Treating volunteers fairly. Having clear procedures for dealing with problems and grievances should help reduce the likelihood of disputes with volunteers.

## Consultants

People often think that by simply calling themselves 'a consultant', it avoids the PAYE and NIC regulations. Not so - if a consultant spends almost all his time working for one employer this suggests he is an 'employee consultant' rather than self-employed, in which case he is taxable as an employee under the PAYE rules. To be classed as self-employed the consultant (as with most other self-employed people) would usually need to offer his services to other businesses.

If a formal agreement (contract of service) is entered into between the company and the self-employed consultant, it is advisable to have the document drafted by your solicitor.

Points to consider include:

- The contract of a 'self-employed' consultant would not usually provide for reimbursement of expenses or provision of benefits such as a company car.
- A self-employed individual cannot be a member of the company superannuation scheme.
- Documentation relating to the consultancy should refer to 'fees' or similar terms rather than to a 'salary'.
- Fees or charges should be based on an hourly/daily or even weekly rate or for completion of a particular project. Fees or charges should not be expressed as an annual rate as this could be taken to mean a salary.
- The document should not include holiday or sickness provisions.
- The document should not be too restrictive about other types of work that can be carried out by the individual.
- Wording such as 'duties to be performed' should not be used as this could imply the position of employee, (references to the consultant being 'contracted to perform services' is a better expression).

### *Construction industry*

The general rule is that people are self-employed if they are in business on their own account and bear the responsibility for their business's success or failure. There are a number of pointers that would indicate whether or not your worker is self-employed, such as:

- Right of control - the degree of direction or control a contractor has over a worker is an important factor to consider. The greater the degree of control by the contractor, the more likely it is that the worker is an employee. It is important to establish who has control over what work is done, when it is done and how it is done. You should consider not just the degree of supervision, but also your right to direct the worker if you so choose.
- If a worker supplies any expensive or heavy equipment, which is necessary to do the work, this suggests self-employment. But, if you engage workers to operate such equipment or plant that you have hired from another source, it is much more likely that the worker will be regarded as an employee. The supply by craftspeople of small tools that are traditional and normal in the industry will not be of the same importance.
- The greater the degree of financial risk is for the worker, then the more likely it is that he or she will be self-employed. The basis of payment and the surrounding financial circumstances of the arrangement will therefore be important.
- If a worker has the freedom to hire and pay someone else to do the work, that suggests self-employment.
- The length of engagement may be a factor, but won't be conclusive. You must consider the terms of engagement even where a worker is engaged only for a day. Long periods working for one contractor may be typical of an employment, but even a very short-term engagement could amount to employment. Regularly working for the same contractor, even under daily or weekly contracts, points towards employment. The fact that a worker moves from site to site with the same contractor is also likely to suggest employment.
- Where individuals are engaged on a casual or zero-hours basis, employers will usually argue that they cannot be employees because there is no mutuality of obligation. However, the workers may still be able to show that they are in fact employees, either because their work has been carried out under an "umbrella" contract of employment that governs the relationship, or because each individual assignment amounts to a contract of employment.

HMRC believe that the following three criteria meet those requirements and are reliable indicators, within the context of the construction industry, of a worker being in receipt of self-employment income:

1. Provision of plant and equipment – that a person provides the plant and equipment required for the job they have been engaged to carry out. This will exclude the tools of the trade which it is normal and traditional in the industry for individuals to provide for themselves to do their job;
2. Provision of all materials – that a person provides all materials required to complete a job; or
3. Provision of other workers – that a person provides other workers to carry out operations under the contract and is responsible for paying them.

A worker will have to meet one or more of the three criteria in order not to be deemed to be in receipt of employment income.