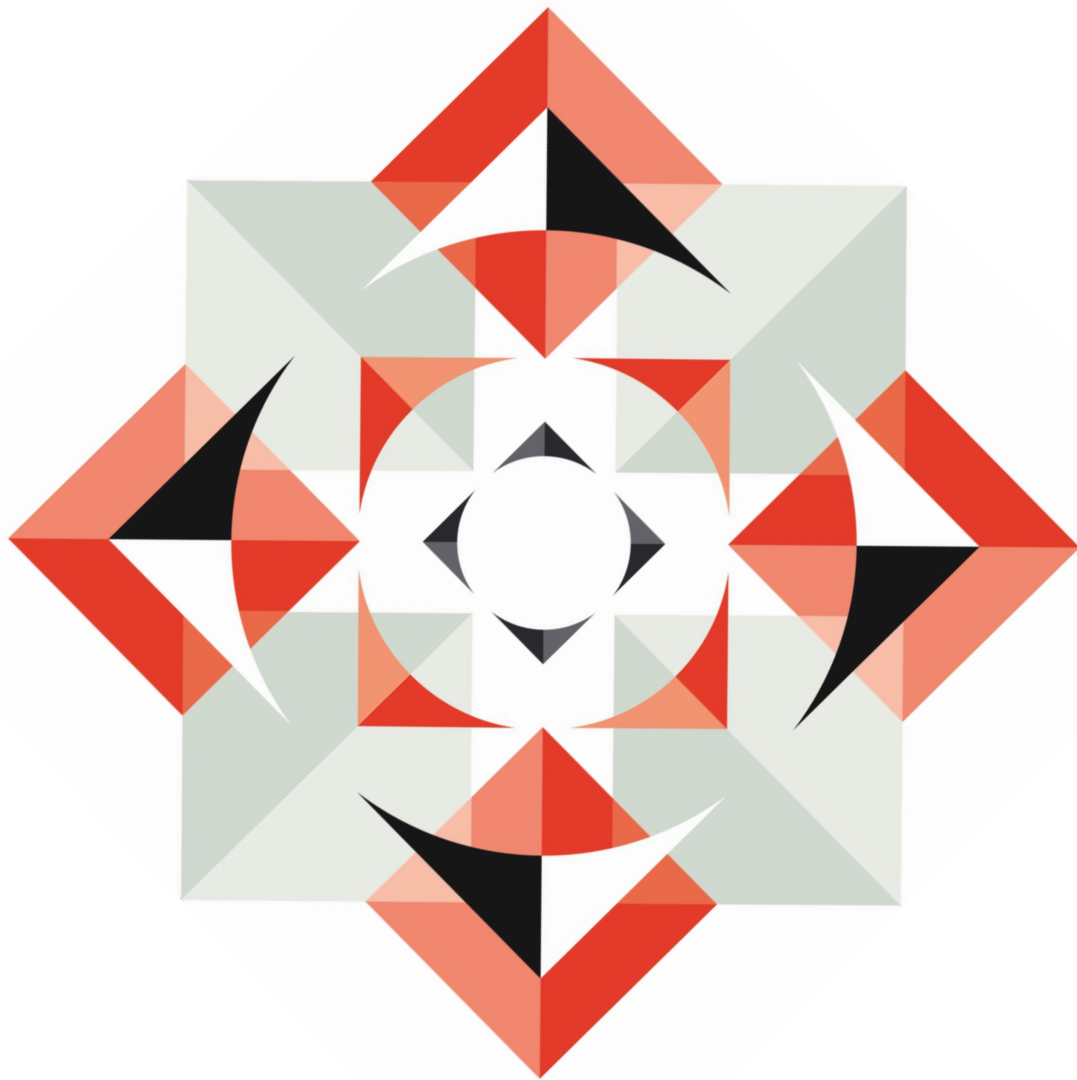


Employment status



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Introduction

There are three principal types of employment status:

- > Employees
- > Workers
- > Self-employed

Employment status is important because an individual's legal rights, protections and obligations will depend upon which class he or she falls into.

There are some special categories of working individuals, such as partners, directors, members of LLPs, apprentices and agency workers, to whom specific rules apply which are beyond the scope of this Inbrief. For more information on agency workers, please see our Inbrief on Agency Workers.

Determining employment status

Employment rights and obligations vary depending on whether an individual is an 'employee', a 'worker' or 'self-employed'. The first step is to decide which category applies.

Employees

It is not always easy to determine if someone is an employee. The statutory definition is unhelpful – according to it an employee is someone who has "entered into or works under a contract of employment", which means a contract of service or of apprenticeship. The contract does not have to be written down, it could be agreed orally. Also, the terms of the contract could be implied rather than expressly agreed. Implied terms are those which the parties can be taken to have agreed, perhaps because they are obviously necessary or because they are customary in that business.

But to say someone works under a 'contract of service' is to say little more than that he or she is an employee. How would you actually identify one?

There are three necessary ingredients for a contract of service to exist and a host of other factors that are taken into account. The three fundamentals are: (i) personal service; (ii) mutuality of obligation; and (iii) control.

Personal service - this means that the individual is obliged to perform work personally and is not permitted to send a substitute to do the work in his or her place (although a very limited power of delegation might be consistent with being an employee). Occasionally an employer will put a clause into the contract saying that the individual can appoint a substitute but with no intention that the individual should be able to exercise this right in practice. That clause would be a sham, designed to prevent an individual from benefiting from employment protections and, as such, it would be ignored by a court considering employment status.

Mutuality of obligation - this means that the employer is obliged to provide work and the individual is obliged to accept the work in return for pay. There must be a minimum degree of commitment on both sides. For example, a golf caddie who had to wear a club uniform and

could charge golfers a fee set by the club (which was collected by the club and given to him) was not an employee because the club was not obliged to give him work and he did not have to turn up for work unless he wished.

Control - for there to be a contract of employment, the employer must have sufficient control over the employee and the way the individual performs the work. For example, in deciding what should be done, the way it should be done and the time and place for performance. The employer will normally exercise this control by giving directions to the employee and using disciplinary proceedings if the employee fails to comply. Although a highly skilled or senior employee (such as a surgeon) may have a lot of discretion as to how tasks are performed, the employer will retain a right to give instructions and also to determine matters such as workplace policies, place of work and working times. An independent contractor will normally have greater freedom to decide how and when to work, although this is not universally the case.

Without these hallmarks of employment (described as an 'irreducible minimum') it is highly unlikely that an individual will be an employee. But all aspects of the relationship must be taken into account and assessed for consistency with an employment relationship. Other relevant factors to consider include:

- > whether the individual is in business on his or her own account, for example, taking financial risk, investing in the business and sharing in the profits
- > who supplies tools and equipment (an employer is likely to supply tools and equipment to its employees)
- > the level of integration into the business (employees tend to be well integrated, for example, going to the office party, subject to employment procedures and on telephone and email lists)
- > the nature and length of the engagement (very broadly speaking, employment tends to be longer and more open-ended)
- > salary and benefits received by the individual (e.g. a fixed wage, sick pay,



holiday pay, membership of employer insurance schemes, etc.).

What the parties have labelled the arrangement (whether it be employment or something else) will be relevant but it is not decisive. The parties may just be mistaken about the nature of their relationship.

Workers

All employees are workers but not all workers are employees.

A worker must have entered into or work under a contract to perform work or services personally for another party. Again, the terms of the contract may be express or implied and (if it is express) may be oral or in writing. As with employment, personal service and mutuality of obligation are necessary to find worker status. Although the contract the individual is working under need not be a contract of employment, crucially, the other party must not be a client or customer of any profession or business carried on by the individual. So, the genuinely self-employed are not 'workers'.

A profession in this context is not necessarily something that is regulated by a professional body, it can include professional services more generally. Relevant factors for determining whether an individual is carrying on a business and whether the other party is a customer of that business include:

- > the degree of control exercised by the 'employer' (less control means the individual is more likely to be in business on his or her own account and so not a worker)
- > the exclusivity of the arrangement (a self-employed person may work for several different clients or customers)
- > whether the individual is actively marketing his services to the world in general
- > the method of payment (workers are more likely to receive a regular wage)
- > who supplies any equipment used
- > the level of risk assumed by the individual (those in business on their own account assume the risk of the business failing).

Self-employed

An individual will be self-employed if he or she is not an employee or a worker. The categories of employee/worker on the one hand and self-employed on the other are mutually exclusive.

Someone who is self-employed is either:

- > not obliged to provide personal service and/or there is no mutuality of obligation; or
- > obliged to provide personal service and there is mutuality of obligation but the individual is carrying on a business and the other party is his or her client.

Rights and obligations

This section summarises the key rights and obligations of employees, workers and the self-employed.

Employees

Employees enjoy the most legal protections, including:

- > the right not to be unfairly dismissed
- > the right to receive: a written statement of terms and conditions; an itemised payslip; statutory minimum notice; a written statement of reasons for dismissal; and, in a redundancy situation, statutory redundancy pay
- > family related rights such as statutory maternity/paternity/adoption leave and pay, parental leave and the right to request to work flexibly
- > the right to transfer automatically to the purchaser of their employer's business under TUPE
- > certain rights relating to pay, for example protection from unlawful deduction from wages, statutory sick pay and the right to receive the national minimum wage
- > rights under the Working Time Regulations 1998 (to paid holiday, rest breaks and a maximum working week)
- > certain other rights to time off—such as time off for ante-natal care, care for dependants, time off for trade union and

employee representative activities

- > protection against unlawful discrimination (such as age, disability, race, sex, sexual orientation and religion)
- > protection against unfavourable treatment on grounds of part-time working and fixed term employment
- > whistleblowing protection
- > the right to pension contributions under auto-enrolment.

There are certain obligations on both employers and employees which are always implied into the contract of employment. For example, employees owe a duty of good faith and fidelity to their employers, which includes a duty of confidentiality and a (limited) duty not to compete. (Note that fiduciary duties, which may be owed by senior employees, are not covered here). Other principal obligations of employees include:

- > to obey the employer's lawful and reasonable orders
- > to exercise reasonable skill and care in their work
- > to give the contractually agreed or statutory minimum period of notice to terminate employment
- > to pay income tax under the PAYE regime and make appropriate national insurance contributions (although the obligation falls on the employer to operate this).

Employers' obligations to employees include the following:

- > to pay wages
- > to give contractual notice (or if there is none, reasonable notice), or statutory minimum notice, if longer
- > to take reasonable care of employees' health and safety
- > to provide a suitable working environment.

Workers

Workers have fewer rights than employees.

However, workers do benefit from some statutory protection which recognises that even though they are not employees, they are in a subordinate position to the person for whom they work and do not generally have equal bargaining power. These rights include:

- > certain rights relating to pay, for example protection from unlawful deduction from wages and the right to receive the national minimum wage
- > rights under the Working Time Regulations 1998
- > protection against unlawful discrimination
- > protection against unfavourable treatment on grounds of part-time working but not fixed term employment
- > whistleblowing protection
- > right to pension contributions under auto-enrolment.

Workers are obliged to:

- > fulfil their contractual obligations
- > work with due skill and diligence
- > assess what the appropriate tax arrangements should be.

Self employed

Self-employed individuals generally only have contractual rights but may be protected from discrimination in some circumstances.

Self-employed individuals are obliged to:

- > fulfil their contractual obligations
- > work with due skill and diligence
- > account for income tax and pay self-employed persons' national insurance contributions.

Tax implications

For tax purposes, individuals are either 'employees' or 'self-employed'. There is no

third category of worker (or anything else). A worker will be an employee or self-employed for tax purposes. The tax position may be different from the employment law position, for example, the individual may be 'self-employed' for tax purposes but an 'employee' (or more likely a 'worker') for employment law purposes. HMRC will look at the facts of the particular relationship to decide which category the individual falls into.

Employees

It is essential that the employer operates PAYE for its employees. All employees are liable to income tax (once their personal allowance has been exceeded) and, unless exempted, employee class 1 national insurance contributions (NICs) should be deducted at source and employer NICs paid by the employer.

Self-employed

Self-employed individuals are responsible for their own income tax, NICs and VAT arrangements. If the reality of the relationship is that of employee/employer, there is a risk that HMRC may classify the relationship as such (even if the parties have been contracting on a 'self-employed' basis for some time). In this case, the employer will be primarily liable because of its responsibility to deduct PAYE contributions and will need to account for unpaid employer NICs and employee NICs/ income tax for the current tax year and the previous four years. Interest and penalties may also be levied. The employer will, however, receive credit for any self-employed tax previously paid by the individual. It is common for self-employed contractual arrangements to include a tax indemnity under which the individual agrees to reimburse the other party for any tax and employee NICs due in this situation.

If an individual contracts via a personal service company, that company is responsible for deducting PAYE/NIC from the individual's remuneration and accounting for employer NICs. For information regarding the tax implications of this practice, please see our Inbrief on Tax rules for employment

intermediaries.

In the pipeline

Employment status has been the subject of significant media and Government focus recently, particularly in light of the emerging "gig" economy. The "gig" economy model has presented difficulties in determining employment status, resulting in a number of well-publicised legal challenges.

Matthew Taylor, Chief Executive of the RSA, published the Government commissioned Good Work Review in July 2017, which called on the Government to clarify the legislation. The Review made various recommendations to help achieve this.

In February 2018, the Government published its response and launched consultations seeking views on in a number of areas, including:

- > considering the case for legislative change and potential options for reform of the employment status "tests" to achieve clarity and certainty; and
- > extending the right to written particulars to all workers from day one.

The consultation closes in June 2018.

For further information on this subject please contact:

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