

How to determine an individual's work status

Introduction

Before the decision to hire an individual in the workplace is made, whether hiring an "employee", a "temp" through an agency, an "independent contractor" or otherwise, an understanding of that individual's status or likely future status is important. By understanding the category in which the individual falls, the Company/hirer will better understand its legal rights and obligations and be better equipped to deal with any problems, foreseen or unforeseen, that may arise (usually on termination of the relationship). The most common categories of individual are as follows:-

- Employee
- Independent contractor
- Worker
- Part-time worker
- Agency worker

Employee

Who is an employee?

The statutory definition of an 'employee' is contained within section 230(1) of the Employment Rights Act 1996 and states that 'employee' means an individual who has entered into or works under a contract of employment. Very helpful!

Various tests have developed over the years to assist in determining whether an individual's status is 'employee'. The principle tests of employment status are as follows:-

1 Mutuality of Obligation

This is an essential feature and is commonly referred to as an "irreducible minimum" of an employment relationship. In essence it comes down to whether a would-be employer is obliged to provide work and whether the individual is obliged to accept it. Without this mutuality of obligation, there can be no relationship of employer/employee.

2 Control

This is another irreducible minimum. An individual will not be an employee unless there is a right to exercise 'control' over that individual. This may be a right to control 'what' work is done, 'when' or 'where' it is done and 'how' it is done. The greater the degree of control, the more likely it is that there is an employer/employee relationship.

3 Are the remaining factors inconsistent with a contract for services?

Even if (1) and (2) are present (i.e. there is both mutuality of obligation and control) the other aspects of the relationship must be looked at to determine whether they too are consistent with an employment relationship. Such aspects would be whether the individual receives a wage/salary rather than seeking remuneration in the form of profits; whether the individual's wage is subject to deductions under the PAYE scheme; whether the individual is obliged to perform the duties of his or her job personally and whether the Company/hirer provides the tools, equipment, premises and any other materials that are required to do the work.

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An employee has the most rights out of all of the categories discussed here, the most important being the right not to be unfairly dismissed after 1 years service (or shorter in certain cases for certain kinds of employees). The Tribunal can as of 1st February 2005 award an employee up to £56,800 in compensation if they were unfairly dismissed.

Independent Contractor

An independent contractor is an individual who enters into a contract for services as opposed to a contract of service. The Company/hirer does not buy the rights to the worker's services but to the finished product at the end of their labour.

Contractors are independent in the sense that they are responsible for making their own decisions as to how the work is done in contrast to an employee who is subject to the directions of the employer. Independent contractors are in business on their own account and bear the financial and commercial risks (and benefit) of their business activities. Such individuals do not qualify for employment rights such as unfair dismissal, but they may have "worker" rights as discussed below.

Worker

A "worker" includes anyone who has entered into, or works under a contract of employment. However, the term also applies to a wider category of individuals who enter into contracts to perform the work personally provided the contract is not akin to a client/customer contract or that of an undertaking as given by a profession/business.

Workers are in a sense hybrids, a cross between an independent contractor and an employee.

Certain 'employment rights' have now been extended to workers including the right to the National Minimum Wage, to work within the scope of the Working Time Regulations and to be protected from both sexual and racial discrimination.

Other types of workers

Part - Time Workers

An individual worker is considered to be 'part-time' if in the company in which they work they are considered to be part-time and if they are paid wholly or in part by reference to the time they work.

Under the Part-Time Worker (Prevention of Less Favourable Treatment) Regulations, part-time workers are protected from less favourable treatment than full-time workers. Remember that the term 'worker' includes employees as well as a wider category as described above.

Part-time workers now have the right to claim unfair dismissal and redundancy payment on the same terms as other full-time workers. This also includes the right to extended maternity leave.

Agency Workers

An agency worker means any person who is supplied by an employment business to do work for another person under contract or other arrangements made with the employment business. There had been confusion as to agency workers status and in particular whether the agency or its client was the employer. This position has been

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clarified in the light of recent case law and the tests as set out under the employee category above should be applied to determine that question.

Although this information sheet highlights some key issues relating to how to determine an individual's work status, it should not be considered comprehensive and is not a substitute for seeking professional advice on specific issues.

For further information and to ensure that you are sent information sheets on other employment issues, please contact Nick Hobden on 01892 510000 or by e-mail at nick.hobden@ts-p.co.uk.

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