



Guide to employment status

Preventing People Problems

Determine employee rights and your responsibilities

One of the difficult decisions when taking on more resource for your business can be deciding the new person's employment status. Getting this wrong can be expensive in terms of potential employment tribunal claims and subsequent awards.

Employment status is a high-risk area of HR. Several high-profile employment law cases have shown the repercussions of incorrectly classifying employees and workers as self-employed.

Employers engaging independent contractors or seeking to change a working relationship with an existing employee need to be especially cautious with employment status.

What is employment status?

Employment status helps to determine a person's employment rights and the employer's responsibilities. In UK employment law the main types of employment are:

- Employee
- Worker
- Self-employed

What is an employee?

The key part in deciding if a person is an employee is the mutuality of obligation. The employer has to provide work and pay for it and the employee has to do the work personally. The employer has a high level of control about how and when the work is done which is set out in an employment contract.

In return, the employee has the right to a raft of employment rights, such as: entitlement to the national minimum/living wage, paid holiday, statutory sick pay, maternity pay and the right not to be unfairly dismissed. An employee can be full time, fixed term or part time.

What is a worker?

This category was introduced as part of the Working Time Regulations in 1998 and has caused confusion ever since. It is often seen as a halfway house between employee and self-employed.

Frequently these people are on zero-hour or casual contracts under which, although they have to perform the work personally if they have accepted it, they do not get full employment rights. They do have the right to national minimum / living wage and paid holiday, but they do not get continuity of employment so are unable to make an unfair dismissal claim.

Worker status is regularly confused with self-employed status. So we have clarified this further below.

What determines whether someone is self-employed?

A self-employed person would be classified as self-employed if they:

- Are truly in business for themselves and are responsible for the success or failure of that business.
- Invoice you for the work they perform.
- Choose when and how they work.
- Are able to send someone else to complete the work for them.
- Work with multiple different clients.
- Are not entitled to national minimum/living wage, sick pay or holiday pay.



E info@hrdept.co.uk
W hrdept.co.uk



This is where it gets confusing...

Many employers classify employment status for tax reasons using CEST (Check Employment Status for Tax). However, this limited classification can open an employer up to employment tribunal risk. This is because employment law has different definitions, particularly relating to the level of control within the relationship.

As a general guide, CEST classification can help highlight if a person is self-employed. But if the working relationship does not include the following, they could be deemed an employee or a worker:

- Mutuality of obligation – no ongoing obligation for the company to offer work and no need to accept work offered.
- Control – not working under the control of the business and are able to work when and how they like.
- Substitution – not providing a personal service and must have an unfettered right to send a substitute who is suitably qualified to carry out the work; not subject to agreement by the employer. The self-employed arrangement is providing a service to the company – not an individual engaged to perform the work personally.

In a landmark Uber ruling, the determining factor which stated the drivers as “workers” was the lack of control of their own day-to-day work.

An “employee” would be the opposite of the above. And a “worker” is likely to have some, but not all, of the above characteristics.

Courts will look not only at the contract between the parties but at the reality of how the work is performed. So simply calling someone self-employed and providing a contract with the right to substitute will soon be seen as a sham if it does not reflect the true working relationship between the parties.

How to be confident in your classification

To avoid the incorrect classification of employment status and encountering greater risk in the future, contact your local HR Dept for professional advice.

E info@hrdept.co.uk
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