

Employment status



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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 they fall 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 they are 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 also 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 their 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, which means 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/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.

Although there must be a contract, it is not necessary for the worker to have committed to a minimum level of work or be obliged to accept future work.

As with employment, personal service is necessary to find worker status. If there is a genuine and unrestricted power to appoint a substitute to do the work, there is no obligation of personal service and so the individual cannot be a worker.

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 their 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 their 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 they are 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; or
- ▶ obliged to provide personal service, but the individual is carrying on a business or profession on their own account and the other party is a client or customer.

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:

- ▶ the right to receive a written statement of terms and conditions and an itemised payslip
- ▶ 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:

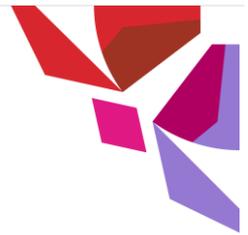
- ▶ fulfil their contractual obligations
- ▶ work with due skill and diligence
- ▶ account for income tax and pay self-employed persons' national insurance contributions.

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 either be an employee or self-employed for tax purposes. Confusingly, the tax position may be different from the employment law position. The tests are similar, but the fact an individual has been found to have one status for tax law does not mean they will have the same status for employment law purposes. 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, the IR35 rules will apply. If the contractor would be an employee for tax purposes if hired directly by the end user, PAYE and NICs must be operated by the end user in respect of the fees paid to the personal service company. For more information, see our [Inbrief on the IR35 rules](#).

Future reforms

Employment status has been the subject of significant media and government focus for some time. The “gig economy” model has presented particular difficulties in determining employment status, resulting in a number of well-publicised legal challenges.

Despite various reviews and consultations, no actual changes have been made. There are currently no government proposals to simplify the test for employment status or unify the tests for employment and tax law.

The Labour party has said it will create a single status of “worker” for all but the genuinely self-employed if they win the next election. It is expected that all individuals in this new worker category would have the same level of protection as employees currently enjoy as well as any additional protections proposed by Labour.

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Right/Protection	Employee	Worker
Right to not be unfairly dismissed (after 2 years' service)	Yes	Yes
Right to receive written statement of terms & conditions	Yes	Yes
Itemised payslip	Yes	Yes
Statutory minimum notice	Yes	No
Statutory redundancy pay (after 2 years' service)	Yes	No
Protection from discrimination in the workplace (as long as individual is obliged to perform work personally)	Yes	Yes
Protection from unfavourable treatment on grounds of part time working	Yes	Yes
Protection from unfavourable treatment on grounds of fixed-term employment	Yes	No
National minimum wage	Yes	Yes
Protection from unlawful deduction from wages	Yes	Yes
Paid annual leave	Yes	Yes
Right to daily & weekly rest breaks	Yes	Yes
Pension auto-enrolment	Yes	Yes
Right to be accompanied at a disciplinary or grievance hearing	Yes	Yes
Whistleblowing protection	Yes	Yes
To receive statutory sick pay	Yes	Possibly (a technical question which is outside the scope of this Inbrief)
Statutory maternity, paternity, adoption leave & pay	Yes	No
Unpaid time off to care for dependents	Yes	No
Right to request flexible working	Yes	No
Time off for ante-natal care	Yes	No
Time off for trade union activities	Yes	No
Covered by the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE)?	Yes	Possibly (the position is unclear and outside the scope of this Inbrief)
Health & safety in the workplace	Yes	Yes