Employment and Self-Employment

A great deal of court time has been devoted in recent years to the question of whether someone is an employee or self-employed. It is entirely possible for a business to take someone on as self-employed only for them to be sued for not paying the person their statutory rights in regard to holiday pay, sick pay, notice, etc.

This guidance is designed to help you understand the differences, the risks and try to help identify the most appropriate service model.

Disclaimer: following this guidance does not guarantee the chosen status of employee/worker/self-employed will be upheld by the courts as each case is decided on its merits and the courts enquire into the detail of the working relationship. For more direction, you should obtain professional legal advice.

Employee or worker?

An employee works under a contract of service with an employer, often it will be an exclusive contract which does not allow them to work for anyone else, and they will have to provide their labour at set times and days. They have statutory rights which they can enforce against the employer.

A worker has a similar contract, verbal or written but often it will be looser, without fixed hours, and with different terms to an employee. They also have enforceable statutory rights but not as many as an employee.

The border between employee and worker is very grey, so for the purposes of this guidance they are considered to be essentially the same.

Most of the case law in the area of self-employment has been created where a business has taken on “self-employed” people who are later found to be workers (not employees) and thus have entitlement to statutory rights such as paid annual leave and sick pay.

Key Issues in Self-employment

Is it a contract of personal service?

Do they have to do the work themselves? If they can substitute someone else to do the work, that tends to suggest self-employed contractor though this is not absolute. If you retain the right to approve the substitute in some way, then they could still be a worker.

Control

If the person has control over what they are doing (not judgment – that is different), when they do it and how they do it, then they may not be an employee. The recent Uber case set a clear precedent

on this – once the driver turned on their app and commenced work, they were under the control of Uber from that point and therefore they were workers, not truly self-employed.

Integration

Are they integrated into the organisation? Do they wear uniform, use company business cards, are they subject to the same procedures as employees such as discipline and grievance? If so, they may be employees. Staff handbooks governing their work, formal induction, training, etc., all point towards employment.

Economic Reality

Do they bear the financial risks and rewards of their work? Payment by task or commission, providing their own tools, etc., point to self-employment. If they work from their own premises, are unable to claim expenses, issue invoices to be paid, these indicate self-employment.

Mutuality of Obligation

This means a requirement on the employer to offer work, and on the employee to accept it. If the employee is free to refuse it, there will be no contract of employment.

In the case of intermittent work (frequent in the "gig" economy) the courts look at whether the contract effectively carries on between engagements.

Checklist for Self-Employment

The following table summarises the key issues in determining employment or self-employment status.

Characteristic	Tends to show employment	Tends to show self-employment
Contract with an individual not a company describing them as employed/employee/worker, i.e. a contract of employment	✓	
Business makes payments to them after deducting tax and NI	✓	
Business makes payment to them without the individual invoicing them	✓	
Contract or written agreement which does not mention employment/employee/worker, ie. a contract for services to be provided		✓
Individual invoices in their own name and receives gross payments without tax or NI deducted		✓
They work wherever and whenever they choose		✓
They use their own equipment to do the work		✓
They have to work a minimum number of hours and are paid for time worked	✓	
They can substitute another person to do the work		✓
They must do the work themselves	✓	
They are given company equipment to use	✓	
They wear uniform provided by the company	✓	

Characteristic	Tends to show employment	Tends to show self-employment
They report to and are directed by an individual manager on a daily basis	✓	
They are assigned whole projects or tasks to complete without detailed supervision		✓
They have no other clients but work only for that business	✓	
"Mutuality of obligation" – the business is obliged to provide work and the individual is obliged to do it	✓	
They use their own money to cover their running costs and are responsible for the success or failure of their business, i.e. they can make a loss or a profit		✓
They get paid holiday, sick pay, maternity pay, etc.	✓	
They can join the company pension scheme	✓	
They have to abide by the Employee Handbook and procedures	✓	
They have a separate set of procedures and policies either in the contract or labelled clearly for contractors, and are not as detailed as an employee handbook		✓
They are responsible for remedying any unsatisfactory work in their own time and at their own expense		✓
They regularly work for a number of different people		✓

Summary of Rights Connected to Employees or Workers

Rights under the Employment Rights Act 1996 (e.g. paid leave, sick pay, notice, redundancy and unfair dismissal) and the Equality Act 2010

Liability of the employer for actions of its workers

Liability of the employer for unpaid tax and national insurance

IR35 Summary

IR35 rules relate to a business engaging a worker through a Personal Service Company or other intermediary and not the client directly.

Basically, if the person would have been an employee if they had contracted directly with the client, IR35 may apply. So working full time and having to do the work personally may qualify.

From April 2021, the company has to determine if IR35 applies, not the individual. "Small" companies are exempt – currently this is defined as two of the following:

- a turnover of less than £10.2 million
- balance sheet total less than £5.1 million
- Number of employees is less than an average of 50 in the year

This is a complex area and you should obtain advice from a financial professional on whether it applies to your business. If you get it wrong, you could be liable for significant amounts of tax to HMRC.