

## **Employed or self-employed?**

A worker's employment status, that is whether they are employed or self-employed, is not a matter of choice. Whether someone is employed or self-employed depends upon the terms and conditions of the relevant engagement. The tax and National Insurance contributions (NICs) rules do, however, contain some special rules that apply to certain categories of worker in certain circumstances. See section on special cases.

If you work for someone else, it is important to know whether you are working for that person in an employed capacity or in a self-employed capacity as an independent contractor. If you are an engager, it is your responsibility to correctly determine the employment status of your workers.

A worker's employment status will determine the charge to tax on income from that employment or self-employment. It will also determine the class of NICs, which are to be paid.

## **Employed or self-employed?**

In order to answer this question it is necessary to determine whether the person works under a contract of service (employees) or under a contract for services (self-employed, independent contractor). For tax and NICs purposes, there is no statutory definition of a contract of service or of a contract for services. What the parties call their relationship, or what they consider it to be, is not conclusive. It is the reality of the relationship that matters.

In order to determine the nature of a contract, it is necessary to apply common law principles. The courts have, over the years, laid down some factors and tests that are relevant, which is included in the overview below.

As a general guide as to whether a worker is an employee or self-employed; if the answer is 'Yes' to all of the following questions, then the worker is probably an employee:

- Do they have to do the work themselves?
- Can someone tell them at any time what to do, where to carry out the work or when and how to do it?
- Can they work a set amount of hours?
- Can someone move them from task to task?
- Are they paid by the hour, week, or month?
- Can they get overtime pay or bonus payment?

If the answer is 'Yes' to all of the following questions, it will usually mean that the worker is self-employed:

- Can they hire someone to do the work or engage helpers at their own expense?
- Do they risk their own money?
- Do they provide the main items of equipment they need to do their job, not just the small tools that many employees provide for themselves?
- Do they agree to do a job for a fixed price regardless of how long the job may take?
- Can they decide what work to do, how and when to do the work and where to provide the services?
- Do they regularly work for a number of different people?
- Do they have to correct unsatisfactory work in their own time and at their own expense?

## Overview

- **Contracts**

A contract is an agreement between two or more parties. It can be written, oral, implied or a combination of these.

The main elements of a valid contract of service (employment), or a contract for services (self-employment), are:

- the intention to enter into legal relations
- an offer (usually of work) and its acceptance (an agreement)
- consideration (for example, in return for performing work the worker receives payment).

Once it is established that a contract exists, it is then necessary to establish the terms and conditions of work agreed between the worker and the engager and, having completed this exercise, to apply case law laid down by the courts over the years. The basic approach of the courts is to identify the factors present; weigh those that point to self-employment against those that point the other way; and then stand back and consider the picture that emerges. There are, however, certain factors that must be present in a contract of service. See below the relevant factors the courts may take into account in determining employment status.

What the parties call their relationship, or what they consider it to be, is not conclusive. It is the reality of the relationship that matters.

Nevertheless, the intention of the parties has to be taken into account and can be decisive where the relationship is ambiguous and, or where the other factors are neutral.

- **Relevant factors used to determine employment status**

Recent court cases indicate there is no single satisfactory test governing the question whether a person is an employee or self-employed. One must consider all the factors that are present in, or absent from, a particular case; weigh those pointing to employment against those pointing to self-employment; and then stand back and consider the picture that emerges. The result may be that a person is considered to be in business on his own account (self-employed) or is an employee. The following factors are not an exhaustive list but they do include the more important ones.

- **Personal service**

It is a necessary condition of a contract of service that the worker is required to provide his or her services personally. Consideration must therefore be given to whether or not a worker could provide a replacement worker in his or her absence. This is usually referred to as a right of substitution.

Where both the worker and his or her engager understand that a suitably qualified or skilled person can (or must) be provided by that worker in his or her absence the situation is very likely to be self-employment.

The absence of a right of substitution (in other words a requirement for personal service) does not necessarily mean that the worker will be an employee. A requirement for personal service may exist in situations of employment and self-employment. See below for more information on substitution.

- **Mutuality of obligation**

The minimum obligations that are necessary for a contract of service are the obligation on the part of the worker to give personal service and the obligation on the part of the engager to pay the worker for that service. An employment contract will often also indicate that the engager will provide work for the duration of the contract during the agreed working hours.

- **Right of control**

The employee must be subject to a certain degree of control by the engager although control need not be exercised in practice. It is the right of control that matters. The engager may control how a worker performs his services, what tasks have to be performed, when and, or where they must be performed.

The fact that a worker may be told how to perform duties will usually be seen as a strong pointer to employment but, where the worker is an expert (For example, a ship's captain, consultant brain surgeon and so on), the absence of this aspect of control would probably not be seen as material.

The employee will usually be expected to work set hours each day or week but may be permitted to work flexible hours and to work at the employer's premises or at other places with the agreement of the employer. The self-employed person is more likely to have the freedom to do work when and where he or she wants.

- **Right of substitution and engagement of helpers**

Some contracts give the worker a right to send a replacement or engage a helper. Where the worker has to pay that person this would be regarded as an indicator of self-employment. The degree to which it points in that direction would depend on the particular circumstances of each case. Relevant considerations would include whether the engager reserved the right to reject a substitute and whether the right was exercised on a regular basis.

The worker may, however, only have a right to propose a substitute rather than a right to actually send a substitute, and this would probably be seen as only a mild pointer to self-employment.

- **Provision of own equipment**

A self-employed contractor generally provides whatever equipment is needed to do the job (though in many trades, such as carpentry, it is common for employees, as well as self-employed workers, to provide their own hand tools).

The provision of significant equipment (and, or materials) which is fundamental to the engagement is of particular importance. For example, where an IT consultant is engaged to undertake a specific piece of work and must work exclusively at home, using the worker's own computer equipment, that will be a strong pointer to self-employment. But where a worker is provided with the necessary equipment, materials and so on by the engager that points to employment.

- **Financial risk**

Individuals who risk their own money by, for example, buying assets needed for the job and bearing the running costs and paying for overheads and large quantities of materials, are almost certainly self-employed. Employees are not usually expected to risk their own capital. An example of a financial risk is where a skilled worker incurs significant amounts of expenditure on training in order to obtain the skills needed, which is used in subsequent engagements. This can be treated as a pointer to self-employment, in the same way as investment in equipment to be used in a trade, if there is a real risk that the investment would not be recovered from income from future engagements. Self-employed workers may also be required to rectify unsatisfactory work in their own time for no additional reward.

Financial risk could also take the form of quoting a fixed price for a job, with the consequent risk of bearing the additional costs if the job overruns. The risk of making a loss is a very strong indicator of self-employment and can be decisive on its own.

- **Opportunity to profit**

A person whose profit (or loss) depends on the capacity to reduce overheads and organise work effectively may well be self-employed. People who are paid by the job will often be in this position. For example, a person who quotes a fixed price may well be able to complete the task ahead of schedule or at a lower cost than originally envisaged. People who provide their own materials may be able to profit by getting a good price on the materials or by charging more for them.

- **Length of engagement**

By itself, the length of a particular engagement may have little importance in determining employment status, although it is more likely that an employee will have an open-ended contract.

It is; however, common these days for employees to be engaged on fixed term contracts. Where a person undertakes a number of short-term engagements for different engagers and runs the risk of bad debts, incurs expenditure in the course of obtaining engagements and so on, he or she may be regarded as self-employed. On the other hand, a person engaged on a short-term contract may be regarded as a casual employee. This factor must be viewed in the light of all the different aspects of a person's work.

- **Part and parcel of the organisation**

At one time this was considered to be a test of employment or self-employment, but it is now viewed as one factor to be considered with all the others.

Establishing whether a person becomes 'part and parcel' of a client's organisation can be a useful indicator in some situations. For example, someone taken on to manage a client's staff will normally be seen as an integral part of the client's organisation and this may be seen as a strong indicator of employment.

- **Employee-type benefits**

The presence, in a contract, of benefits such as paid leave, membership of firm's pension scheme, right to car park space, canteen facilities and so on is a good indicator that an employment relationship exists. A contract of employment may also contain access to a grievance procedure and the worker may be subject to disciplinary procedures. The absence of such benefits may be viewed as a pointer to self-employment but the lack of these is usually as a consequence of the intention of self-employment. It may be necessary to consider whether employees of the engager, who do similar work, have access to such

benefits. A comparison might also have to be made between the rates of pay of those employees and the 'contract' worker, as the latter may be paid a greater rate in order to compensate in part for the absence of such benefits.

- **Right to terminate contract**

A right to terminate an engagement for a reason other than serious breach, by giving notice of a specified length, may be viewed as indicative of a contract of employment, but, at best, would only be regarded as a minor factor. Such a provision is unlikely to be found in a contract for services, which usually ends on completion of the task, or if the terms of the contract are breached.

- **Personal factors**

In deciding a person's employment status it may sometimes be necessary to take into account factors which are personal to the worker and which have little to do with the terms of the particular engagement being considered. For example, if a skilled worker works for a number of clients throughout the year and has a business-like approach to obtaining engagements (perhaps involving expenditure on office accommodation, office equipment and so on) this will point towards self-employment. Personal factors will usually carry less weight in the case of an unskilled worker, where other factors, such as the high level of control exercised by the engager, are likely to be conclusive of employment.

- **Mutual intention**

The intention of both parties can be decisive where the factors pointing to employment and to self-employment are evenly balanced. But a stated intention, for example, for self-employment is of no consequence where the facts point clearly to employment.

- **Summary**

Whether a worker is an employee or self-employed depends on a range of factors, but the final opinion is not reached by adding up the number of factors pointing towards employment and comparing that result with the number pointing towards self-employment. The courts have specifically rejected that approach.

It is a matter of evaluation of the overall effect, which is not necessarily the same as the sum total of all the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another.

When the detailed facts have been established, the right approach is to stand back and look at the picture as a whole, to see if the overall effect is that of a person working in a self-employed capacity or a person working as an employee in somebody else's business. If the evidence is evenly balanced, the intention of the parties may then decide the issue

- **Casual, or part-time working**

The same considerations to determine employment status will apply even if the worker works part-time or on a casual basis.

### **More than one job**

If a worker has:

- more than one job
- works for a number of different people for a few days or weeks at a time

it is necessary to answer the questions for each job.

If the worker provides services to many people, and does not work regularly for one person to the exclusion of others, this may affect whether the work for each is as an employee, or as a self-employed person.

**Just because a worker is self-employed in one job, doesn't necessarily mean he or she will be self-employed in another job. Equally, if a worker is employed in one job, he or she could be self-employed in another.**

A worker could even be an employee and self-employed at the same time. For example, he or she could

- be employed as a part-time shop assistant and spend the rest of their time running their own business from home
- or work full-time as an employee at a company, and run a part-time business in the evening or weekends

The worker may have a number of casual or part-time activities, and may be an employee in some and self-employed in others. It all depends on the facts.