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What is an employee?

An employee is an individual who has entered into or works under a contract of employment, whether oral or in writing. Although there are statutory definitions of employee, these are not comprehensive and in order to understand what an employee is, it is necessary to look at the additional guidance provided by court decisions, which offer a number of defining criteria.

The employment status of an individual is important because certain obligations or core statutory protections only apply if an individual is an employee (for example, protection against unfair dismissal). However, increasingly statutory rights are also being granted to workers (for example, in relation to working time and minimum wage).

There will be a contract of employment if there is:

- a) An offer;
- b) Acceptance of that offer;
- c) Consideration (some form of payment whether monetary or other); and
- d) An intention to create legal relations.

When determining whether an individual is an employee, it is considered that the following three factors must be present:

- a) Mutuality of obligation: in a contract of employment there is an obligation on the employer to provide work and an obligation on the employee to carry out work.
- b) Personal service: an employee has to personally perform the work their employer gives them and cannot hire someone to do it in their place. If the employee cannot attend work, the replacement is arranged by the employer.
- c) Control over an employee's performance of their work: an employee will generally not have a large amount of control over their schedule or tasks assigned to them.

Additional factors that are considered indicators of an employment relationship are:

- a) Where an individual is paid a fixed wage or salary.
- b) Where there has been an induction process or the provision of training.
- c) Where an individual is paid when absent due to sickness or holiday.
- d) The extent to which the individual has been integrated into the business, for example whether they carry out work substantially similar to that performed by employees, whether they have management responsibility for others, the scope of disciplinary and grievance procedures, and inclusion in benefit and bonus schemes.
- e) Where the employer has exercised disciplinary powers over the individual.
- f) Where the individual has utilised a grievance procedure.

- g) Where an individual is restricted from working for others (whether during the relationship or post termination).
- h) Where the individual does not bear the financial risk.

What is a worker?

A worker is someone who has entered into or works under:

- a) A contract of employment; or
- b) Any other contract whereby the individual agrees to do or perform any work or services for another party who is not a client or customer (whether this agreement is express or implied, oral or in writing).

An employee would fall under category (a) and therefore all employees are workers. However, the definition of worker extends also to individuals who fall under category (b). There exist various statutory definitions of workers which vary considerably, but the essential elements to satisfy the definition of a worker are:

- a) There is a contract between individual and employer.
- b) The contract requires personal service: under the contract the worker undertakes to personally perform work or services.
- c) The other party to the contract is not a customer or client of any business undertaking or profession carried out by the worker.

Worker status reflects the fact that some individuals, while not employees entitled to the whole range of employment rights, are nevertheless not fully independent and are deserving of some protection.

What is an independent contractor?

The term independent contractor is widely used, as are other similar terms such as freelancer or self-employed. These terms all refer to someone who is providing services to a company but is not an employee or worker of that company.

In determining whether someone is a contractor or employee, there are several factors that need to be considered. It is important not to view these factors as a checklist, but rather looking at the factors as whole to see, on the balance, whether the individual in question satisfies enough of these criteria to be considered an employee or contractor.

The three main factors which should be considered are as follows:

- Mutuality of obligation: contractors, unlike employees, can accept or reject work that is offered to them.
- Substitution: a contractor would often be able to substitute someone to do the work in their place if they desire. The unfettered right to appoint a substitute, usually indicates that an individual is a contractor and not an employee or worker. A conditional right to provide a substitute may or may not be

inconsistent with personal performance, but the assessment will need to be based on what happens in practice.

- Control: contractors have much more freedom over the manner in which they carry out their work, their schedule (they are free to decide when to work) and their place of work.

Additional factors that are considered pointers towards self-employment status are:

- a) The individual can work from their own premises.
- b) The individual is responsible for their own expenses.
- c) The individual works for other employers and/or organisations.
- d) The individual is paid after issuing invoices.
- e) The individual bears the financial risk of their activities.

Independent contractors generally only have contractual rights (although they may also be protected against discrimination and under data protection legislation).

What are the key differences between employees, workers and contractors?

In determining whether an individual is a contractor or employee, the courts will focus on the true nature of the agreement between the parties rather than on the written terms of an agreement: this is to say that they are going to look at what happens in practice rather than what the contract stipulates. In addition to the factors mentioned above, the table below sets out the key differences between employees and contractors which can help to determine an individual's status.

It is important for an employer to be aware of the distinction between employee and contractor as this will affect whether an individual benefits from various employment protections. Failure to correctly classify an individual could therefore result in claims against the employer by an individual.

	Employees	Workers	Contractors
Hours	Usually work set hours or a given number of hours per week or month. Required to work unless on leave. Can request flexible working. Allowed time off for emergencies. Not to work more than 48 hours on average per week or to opt out of this if they choose. Employees who work part time are entitled to the same statutory entitlements as full time employees (such as holidays), however at a pro rata amount.	While workers may have a contracted number of hours, this is not always the case. For example, they could also have a zero-hour contract.	Works as and when required and will suffer no penalty for refusing. Contract can be casual, freelance or as required.

	Employees	Workers	Contractors
Provision of work	There is an obligation on the employer to provide work for the employee to do (although this doesn't have to be a constant stream) and the employee is obliged to accept this.	<p>It is not clear whether a contract for a worker will have an obligation on the employer to provide work and for the worker to accept it.</p> <p>However, often when considering whether a worker has worker status, the court will consider whether there was an obligation to provide (and for the worker to accept) the work.</p>	There is no obligation to offer work and the contractor is not obliged to accept it.
Supervision	Under direct supervision.	While working, generally under direct supervision.	Not under direct supervision but general instructions.
Location	Works at a specific address or at places determined by the employer.	Generally works at a specific address or at places determined by the employer.	May be a set or prescribed location.
Implied terms	<p>There is an implied term in employment contracts that the employer must not behave in a manner which will likely destroy or damage the relationship of trust and confidence between employer and employee.</p> <p>Examples of this could include physical or verbal abuse and unfair working conditions.</p>	<p>If they are not already included, workers will have certain terms implied into their contracts from statute. These include the National Minimum Wage and limits on working time from the Working Time Regulations 1998.</p>	<p>If certain terms are not agreed in the service contract, they may be implied.</p> <p>For example, that the work should be done with reasonable care and skill. In addition, a reasonable time and reasonable price will be implied.</p>

	Employees	Workers	Contractors
	<p>While this obligation is required for both the employer and the employee, it is most commonly enforced against the employer. Should the employer breach this implied term, it can be considered a breach of contract.</p> <p>Employees must also act with good faith and fidelity. This means they must not place themselves in a position of a conflict of interest or act for the benefit of a third party during their employment.</p> <p>Directors of an employer also have a fiduciary responsibility toward their employer, meaning an obligation to act in the employer's best interests. The court may imply a fiduciary duty on other employees, but only if this is consistent with the rest of their employment contract.</p>		
Integration in the employer's business	An employee will likely be substantially integrated into the employer's business. For example, if the employee manages others and is subject to the organisation's	Similar to employees, while the level of integration in the employer's business can sometimes be indicative of worker status, it is not always the case.	Will likely not be substantially integrated into the employer's businesses. However, this is not always the case. For example, sub-contractors in

	Employees	Workers	Contractors
	disciplinary procedures, they are likely to be an employee.		the construction industry are often heavily integrated into the employer's business but are not always employees.
Substitute	Has to perform the work their employer gives them and cannot hire someone to do it in their place. When an employee cannot perform the work assigned to them by their employer, the employer will be responsible for arranging for a replacement.	Has to perform the work their employer gives them and cannot hire someone to do it in their place.	Has the right to appoint a substitute. There is no requirement to do the work personally.
Pay	Expect to be paid for timed work. Is paid by the hour, week or month.	Expect to be paid for timed work. Is paid by the hour, week or month dependent on their contract and how frequently they work.	Risks own money in the business and can make a loss or profit. Paid for the work completed. A price may be agreed in advance for the job as a whole – it usually doesn't depend on how long it takes to complete. Submits invoices for the work they have done.
Competitors	Restrictions around working for other people, particularly competitors. There is an implied term in employment contracts that the	Worker contracts may or may not have an exclusivity clause which details whether they can work for other employers. It should be noted that section	Is free to work for others, unless otherwise provided by contract.

	Employees	Workers	Contractors
	<p>employee's will serve "in good faith" and not work in competition with their employer or solicit their employer's customers whilst employed by the employer.</p> <p>Unless stated otherwise in the employment contract, this duty ends when the employment does.</p>	27A(3) of the Employment Rights Act 1996 prohibits employers from barring workers for working from other employers if the worker is on a zero hour contract.	
Equipment	The employer will provide everything needed to do the job.	Is generally provided with everything needed to do the job.	Has to use own money to buy equipment/tools and cover running costs.
Marketing of business and services	Employees cannot market their own business and services to their employer's clients during the course of their employment.	Generally cannot market their services to others while working.	Unless otherwise specified in the contract, independent contractors are free to market their own business and services.
Vicarious liability	Vicarious liability is when one party can be held liable for acts of another. Employers are vicariously liable for the acts done by employees in the course of their employment.	Employers may be vicariously liable for acts done by workers. For example, if the employer has a significant degree of control over the worker, they may be vicariously liable for their acts.	An organisation is generally not vicariously liable for the acts of independent contractors.
Employer's Liability Insurance	All employers must hold valid employers' liability insurance. There are certain exceptions, such	Workers are not always covered by the organisation's liability insurance.	Clients do not need to have employers' liability insurance for independent contractors.

	Employees	Workers	Contractors
	as for nationalised industries; or where the only employee owns at least 50% of the employer entity in question.		

What are the key differences between employees, workers and contractors? | Employment law protections

	Employees	Workers	Contractors
Discrimination	Protected against discrimination relating to certain specified protected characteristics. These characteristics are: age, disability, gender reassignment, marriage or civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.	Workers are also protected against discrimination (relating to the same protected characteristics as employees) by the employer. For example, a worker working at a third party's place of work will be protected against discrimination by that employer as well.	In general, contractors are not protected against discrimination.
National Minimum Wage	Have to be paid (at least) national minimum wage or national living wage. Has a right to be paid on time, by an agreed method and to receive payslips.	Have to be paid (at least) national minimal wage or national living wage. Has a right to be paid on time, by an agreed method and to receive payslips.	Can be paid less than national minimum wage or national living wage. Issues (VAT or non-VAT) invoices and has a contractual right to be paid on time, by an

	Employees	Workers	Contractors
			agreed method.
Holiday pay	Statutory paid holiday of not less than 28 days per year (including public holiday).	Statutory paid holiday of not less than 28 days per year (including public holiday).	No right to paid holiday.
Sick pay	Benefit from statutory sick pay which is payable from the 4 th day of sickness absence. The current rate is £96.35 per week for a maximum of 28 weeks.	Benefit from statutory sick pay which is payable from the 4 th day of sickness absence. The current rate is £96.35 per week for a maximum of 28 weeks.	No right to statutory sick pay.
Family friendly rights	<p>Rights to statutory maternity, paternity, adoption, parental, shared parental and bereavement leave and pay. All employees qualify for 52 weeks' maternity leave.</p> <p>The right to request flexible working and the right to take unpaid time off work to deal with emergencies involving dependents.</p>	<p>May be able to get shared parental pay, parental bereavement pay and maternity and adoption pay if the following conditions are met:</p> <ul style="list-style-type: none"> • the employer pays the worker through PAYE and deducts any tax or national insurance. • the worker has been employed by the same employer for at least 26 weeks by the end of the 15th week before the expected week of childbirth. • the worker is still employed by the same 	Contractors may be entitled to maternity or paternity pay (providing the conditions that are also required for workers to be entitled are met) but will not be entitled to parental leave.

	Employees	Workers	Contractors
		<p>employer in the 15th week before the expected week of childbirth.</p> <p>Workers are not entitled to maternity or other types of parental leave so will need to agree to some time off with their employer.</p>	
Disciplinary and Grievance Procedures	Employee complaints, poor performance or disciplinary issues should be dealt with in accordance with ACAS Code of Practice on Disciplinary and Grievance Procedures.	ACAS Code of Practice on Disciplinary and Grievance Procedures does not apply.	ACAS Code of Practice on Disciplinary and Grievance Procedures does not apply.
Pension	The right to be auto-enrolled in a compliant pension scheme (subject to eligibility requirements). The current minimum employer and employee contributions are 3% and 5% respectively.	The same pension rights apply to workers as employees providing the worker satisfies the definition of an eligible job holder.	No right to auto-enrolment in a pension scheme.
TUPE	When a business changes owner its employees may be protected under the Transfer of Undertakings (Protection of Employment) regulations (TUPE). When TUPE applies, the individuals' jobs will transfer over to the new company,	Following a recent tribunal decision of the employment tribunal, the current position is that TUPE applies to workers, however this may change in the future.	TUPE does not apply to anyone who provides services under a contract for services.

	Employees	Workers	Contractors
	<p>as do their employment terms and conditions.</p> <p>Applies to employees so that on a relevant transfer, all the transferor's rights, powers, duties and liabilities under the contracts of transferring employees pass to the transferee.</p>		
Collective rights	<p>Is entitled to join a trade union.</p> <p>All employers must inform and consult their employees on:</p> <ul style="list-style-type: none"> • Selling the business or buying a new one. • Making 20 or more redundancies in a 90-day period. • Health and safety issues. <p>Businesses with more than 50 employees may also have to:</p> <ul style="list-style-type: none"> • Consult employees on changes to their pension scheme. • Share other business information with their workforce if they request an information and consultation 	<p>Is entitled to join a trade union.</p> <p>There are no information or consultation rights.</p>	No collective rights.

	Employees	Workers	Contractors
	<p>agreement.</p> <p>An employer may have an agreement with employee representatives that allows negotiations of terms and conditions like pay or working hours.</p>		
Health & Safety	Employers owe employees statutory duties relating to health and safety.	Workers also benefit from statutory duties relating to health and safety.	<p>May not be covered under these health and safety duties, but the employer will owe contractors a duty of care and is expected to complete a number of risk management duties to protect the contractor.</p> <p>Employers have a duty to ensure that the health and safety of persons other than employees who use the premises are protected.</p>
Handling of personal data (UK GDPR)	<p>GDPR applies so employers have obligations and responsibilities in relation to how they collect, use and protect their employees', workers' and contractors' personal data.</p> <p>Employers are obliged to ensure that</p>	GDPR applies so employers have obligations and responsibilities in relation to how they collect, use and protect their employees', workers' and contractors' personal data.	GDPR applies so employers have obligations and responsibilities in relation to how they collect, use and protect their employees', workers' and contractors'

	Employees	Workers	Contractors
	<p>their employees', workers' and contractors' data is:</p> <ul style="list-style-type: none"> • Processed fairly, lawfully and transparently. • Collected and processed only for specified, explicit and legitimate purposes. • Adequate, relevant and limited to what is necessary for the purposes for which it is processed. • Accurate and kept up to date (any inaccurate data must be deleted or rectified without delay). • Not kept for longer than is necessary for the purposes for which it is processed. • Processed securely. 	<p>UK GDPR does not discuss what obligations workers have if they process other people's personal data and it is not clear whether they would be treated as an employee or a contractor for these purposes.</p> <p>The same obligations apply as to employees.</p>	<p>personal data.</p> <p>There are specific processing obligations relating to contractors.</p>

What are the key differences between employees, workers and contractors? | Termination of employment

	Employees	Workers	Contractors
Notice	<p>Minimum notice periods apply when an employee resigns, is dismissed, or made redundant, providing certain conditions are met.</p> <p>Employees with continuous employment of at least one month but less than two years are entitled to at least one week's notice from the employer. Employees with two years' continuous employment or more are entitled to one week's notice for each complete year, up to a maximum of 12 weeks' notice.</p> <p>Parties are free to negotiate a longer notice period.</p> <p>However, please note that a fixed term contract will normally end automatically when it reaches the agreed end date. The employer does not have to give any notice.</p>	<p>Do not benefit from statutory notice periods but there may be a notice period in the contract of employment.</p>	<p>Neither the contractor nor the hiring organisation have to give notice to end an assignment (unless this is written in the contract or assignment information).</p>
Reasons for termination	<p>Employer must show they have a valid reason that they can justify</p>	<p>Employer must show they have a valid reason that they can justify</p>	<p>Contract can be terminated (with or without notice, depending on</p>

	Employees	Workers	Contractors
	<p>and that they acted reasonably in the circumstances.</p> <p>By law there are 5 potential reasons for dismissing someone fairly, these are:</p> <ul style="list-style-type: none"> • Conduct: When the employee has done something that is inappropriate or not acceptable. • Capability: When the employee is not able to do the job or does not have the right qualifications. • Redundancy: When the job is no longer needed. • A legal reason: when the employee cannot do their job legally, for example a lorry driver who's banned from driving. • 'Some other substantial reason': a term used for a wide variety of other situations. <p>An employee has the right to ask</p>	<p>and that they acted reasonably in the circumstances.</p> <p>The reasons for dismissing someone fairly also apply to workers.</p> <p>A worker cannot be treated less favourably than a full-time or permanent employee.</p> <p>Workers do not have the right to receive a written statement of reasons for dismissal.</p>	<p>the circumstances) without the need for a specific reason.</p> <p>Normally the contract sets out circumstances in which termination without notice is triggered.</p>

	Employees	Workers	Contractors
	for a written statement from the employer giving reasons why they have been dismissed if they have completed 2 years' service.		
Wrongful and Unfair dismissal	<p>The employer may be liable for wrongful dismissal where the terms of an employee's contract are breached in the dismissal process.</p> <p>The employer may be liable for unfair dismissal if they do not give employees who have completed 2 years of service a fair reason for the dismissal or do not follow a fair process.</p> <p>Compensation for unfair dismissal may be awarded if an employee brings a successful claim at an employment tribunal. The compensation will be made up of a basic award and a compensatory award. The basic award will depend on how long the individual has worked for the employer, how old they are and how much their weekly pay is (before tax and national insurance are deducted). The compensatory award will</p>	<p>No right to claim unfair dismissal but can claim breach of contract.</p>	<p>Cannot make unfair dismissal claims or wrongful dismissal claims.</p> <p>Can terminate under the terms of the contract where the other party fails to perform its obligations or breaches a term of the contract.</p>

	Employees	Workers	Contractors
	compensate for the actual money lost as a result of losing the job.		
Redundancy pay	<p>Entitled to statutory redundancy pay (usually if an individual has been working for the current employer for two years or more).</p> <p>This is calculated according to an employee's age, length of service and gross weekly salary (currently capped at £544.00).</p>	No right to statutory redundancy pay.	No right to statutory redundancy pay.

What are the key differences between employees, workers and contractors? | Tax

	Employees	Workers	Contractors
Income tax and National Insurance	Employers are responsible for registering with HMRC to pay income tax and national insurance for their employees. These will be paid (under the PAYE scheme) before payment is made to the employee (via deduction at source).	<p>Tax law does not recognise worker status, it only distinguishes between employee and self-employed.</p> <p>Unless the casual worker is genuinely self-employed (according to tax rules), they will be taxed in the same way as an employee.</p>	Client is not responsible for paying tax on behalf of the contractor. Individual is responsible for the organisation and payment of their own tax by self-assessment and it will be payable under a different regime.
VAT	The company will be registered for	Tax law does not recognise worker status, it only	Individual may need to register

	Employees	Workers	Contractors
	VAT. This is not payable by or on behalf of the employee.	<p>distinguishes between employee and self-employed.</p> <p>Unless the casual worker is genuinely self-employed (according to tax rules), they will be taxed in the same way as an employee.</p>	for VAT depending on level of turnover.

Employees and contractors: advantages and disadvantages of each

For an employer, the advantages and disadvantages of hiring a contractor or employee will depend entirely on the circumstances and the specific business needs.

An employee is obliged to do the work that they are given, follow the employer's instructions on how to perform such work and to work set hours, providing certainty for an employer. Additional certainties arise from the inability of employees to work for competitors and the requirement for them to work a period of notice on resigning. An employee can be disciplined for not doing the work properly or for turning up to work late providing further control over standard of work and hours. However, the employment rights afforded to employees often leave little room for flexibility. For example, an employee can only be dismissed with good reason and set procedures have to be followed.

A contractor on the other hand can decide on the work that they want to complete, can work as and when they want to, and will suffer no penalty for refusing work. This lack of control on behalf of the employer is countered by high levels of flexibility as they can hire an individual for a specific job, there is no obligation to provide them with work, and payment is only required for work actually completed. Further, the working relationship can be terminated on short notice as minimum statutory notice periods do not apply and specific reasons for termination do not have to be given. The overall cost of hiring a contractor is likely to be lower than hiring an employee as the employer does not need to pay their national insurance contributions and there are less risks involved for the employer as the contractor will bear the financial risk.

How to ensure you don't accidentally bestow employment rights

To avoid a situation where employment rights are accidentally bestowed upon an independent contractor, it is helpful if the contractual documentation expressly states that the individual is not an employee. In addition, the exact role, scope and responsibility of the contractor should be outlined in their contract.

It is equally important that the contract is adhered to in practice. As listed above, the main indicators of employment status are personal service, mutuality of obligation and control over the employee. Should these factors begin to arise during the service contract, they may inadvertently confer employment rights to the contractor. For example, if a contractor carries out managerial-type tasks for the company, co-ordinates other employees in the company, or is subject to a high level of day-to-day control over their performance, the contractor may be able to make a claim that they became an employee of the company and are entitled to employment rights.

A clear contract from the start that is stuck to is a good way of minimising the chance that a contractor is accidentally given employment rights, but care should also be given to how the relationship is managed in practice.

IR35

As of 6 April 2021, new IR35 (or off payroll) tax rules came into force, which apply to independent contractors who operate through a business undertaking.

When an independent contractor is providing a service to a company, they may do so through a personal service company (PSC), also referred to as an "intermediary". Typically, in this case the self-employed individual would be an employee of the PSC and the client would contract with the intermediary company. The work would then be carried out by the individual. Up until April 2021, in such a situation the intermediary company would be liable to pay (deduct at source) the individual's income tax and national insurance contributions.

The new IR35 rules state that income tax and national insurance contributions need to be paid directly by the client in situations where, if the services or work had been provided directly by the individual to the client (without the intermediary), the individual would have been classified as an employee of the client.

The client will have to perform an analysis of the nature of the relationship with the contractor and issue a status determination statement (SDS) to the contractor. They must then pay (deduct at source) tax and national insurance contributions to HMRC on behalf of the contractor.

It is important to note that being classified as an "employee" for tax and national insurance contributions purposes is not the same as being classified as an employee for the purpose of employment law. This is to say that it does not automatically bestow employment rights to the individual, although it could become an indicator of employment status. Therefore, organisations need to be careful when hiring contractors using PSCs, and should consider whether, had a PSC not been used, the relationship with the contractor would have been more akin to employment.

However, small companies meeting at least two of the below criteria are exempt from this regulation:

- Turnover of not more than £10.2 million;
- Balance sheet total of not more than £5.1 million; or
- No more than 50 employees.

A company is always considered small for its first financial year, whilst public companies are excluded from the small companies regime.

For a group company to be a small company for these purposes, its parent company must also qualify as a small company according to the criteria listed above.

The introduction of this new regime has certainly made contracting with a self-employed individual via an intermediary less attractive from a tax perspective.

The Gig Economy

The gig economy is a labour market where employers favour short-term and freelance contracts over permanent jobs. This is often done with the use of digital platforms with those completing the work getting paid by the task.

The emergence of the "gig economy" over the last several years has further blurred the lines between worker and independent contractor. As mentioned above, an individual's worker status can have implications on their rights and on the employer's tax obligations, something that is often difficult to ascertain with gig economy workers.

For example, an organisation may engage a large number of independent contractors (such as, for example, riders or drivers), but because of the nature of the work required from them or the manner in which it is performed, they may be entitled to worker or employment status and all the connected benefits. This is often referred to as "hidden employment rights". For instance, if an organisation engaged a large number of self-employed contractors who were later classified as workers or employees, the organisation could face a large payout for unpaid holiday entitlement.

This guide is for information purposes only and should not be relied on as a statement of law or as a substitute for appropriate advice.

Date: July 2021