

Employment status

This guidance has been prepared by BMA Law for the BMA. It is intended as a general overview of the law. It is recommended that specific legal advice is sought in individual cases.

An individual's employment status is important for the purposes of determining, amongst other things:

- a. liability to account for income tax (via PAYE) and national insurance contributions (NIC).
- b. statutory protection afforded to employees and 'workers'.

Employees will qualify for statutory employment protection, such as the right to claim unfair dismissal, a redundancy payment, statutory sick pay, and statutory maternity leave and pay. They will also qualify for statutory protection afforded to workers.

Workers are broadly defined as individuals who are working under an employment contract or any other contract under which they are obliged to provide their services personally. The Working Time Regulations (including the right to paid holiday) and the Equality Act 2010 are rights afforded to this wider category of individual. Employees will necessarily be classed as workers and therefore qualify for such rights. Workers will not, however, qualify for statutory employment rights.

The question of an individual's employment status depends on the particular circumstances and is ultimately determined by HM Revenue and Customs (HMRC) for tax purposes, or a court or employment tribunal for the purposes of determining whether they qualify for statutory employment protection. They may take into account a variety of factors when considering this question (see our employment status checklist below).

It should be noted that it is a question of substance, rather than form, and while the terms of any formal contract will be crucial, they may also look at what happens in practice where the reality of the relationship differs from the contractual terms, or where no formal contract exists. This may be because the parties have not agreed one or because the individual is contracting through an intermediary, such as a personal service company, for IR35 purposes.



Employment status checklist

The following are a non-exhaustive list of factors which may be taken into account by HMRC or the courts when determining an individual's employment status.

1 Are there mutual obligations?

In an employment relationship the employer is under an obligation to provide the employee with regular work and the employee is under an obligation to make themselves available to do the work where provided.

Under a contract for services, on the other hand, the company is not obliged to offer work on a regular or frequent basis and the individual is not obliged to accept any work where offered.

2 Is the individual obliged to provide their services personally? Can they use their own staff to support them?

An employee is required to provide their services personally and cannot themselves employ/engage staff to support them in doing so. There is either no right to appoint a substitute or it is a fettered one, that is, it is subject to the organisation's approval and may only be used in limited circumstances (usually sickness or incapacity).

A self-employed individual is not required to carry out the services personally and has an unfettered right to appoint a substitute, and they may engage/employ staff to support them (at their own cost).

3 Is the individual under the control of the organisation?

An employee is under the employer's control in terms of what they do, how they do it and when they do it, although professional or skilled individuals can exercise considerable control over their own work and yet still be classed as employees. An employee is also subject to the employer's policies and procedures, such as those relating to disciplinary and grievances and dress code.

A self-employed individual has the ability to determine when and how they work and is not under the direct control or supervision of the organisation.

4 How is the individual paid? Are they entitled to benefits?

An employee is paid a regular salary or wage irrespective of performance targets or completion of a specific project or task (although shift or commission workers can still be employees). They are entitled to paid holiday and sick pay, and they may also be entitled to benefits such as pension, health insurance and a company car.

A self-employed individual is paid on raising an invoice following the completion of a specific project or task, or they may be paid a commission. They are not entitled to sick pay, paid holiday, overtime or benefits.

5 Is the individual taking financial risk? Do they have the opportunity to profit?

An employee does not take any financial risk in working for the organisation; they are paid even if there is insufficient work for them.

A self-employed individual takes a degree of financial risk. For example, they may invest their own capital in the venture and incur personal liability for losses arising from their work. Conversely, they may have the opportunity to profit from the success of the project or assignment which they have been engaged on.

6 What is the nature and length of the engagement?

Except in the case of fixed-term contracts, an employee is employed for an indeterminate period.

A self-employed individual is engaged for a fixed period to carry out a specific project or task.

7 Can the individual work for other organisations?

An employee cannot generally work for other organisations without the consent of the company and their employment contract may contain restrictive covenants which prohibit them from working in competition with the organisation and soliciting its clients or staff.

A self-employed individual is free to work for other organisations without needing the company's consent.

8 Is the individual integrated into the organisation?

An employee is integrated into the organisation. For example, they work in a similar way to other employees, have an organisation email address, uniform, name badge and business card.

A self-employed individual operates independently of the organisation.

9 Who provides the facilities and equipment?

Where the organisation provides the facilities and equipment required by the individual to carry out their job, they will more likely be an employee.

A self-employed individual provides their own equipment and materials in order to perform the services.

10 Who is responsible for payment of tax and NIC? How do the parties 'label' the relationship?

In the case of an employee, the organisation operates PAYE and deducts income tax and NIC on their earnings at source.

A self-employed individual is registered as self-employed and responsible for payment of their own income tax and NIC on their earnings.

How the parties categorise the individual may be a relevant consideration, but it will not in itself be decisive.

The guidance above is indicative only and the existence of individual indicators of either employment or self-employment does not by themselves necessarily mean that the individual would be considered an employee or self-employed (as the case may be) overall. In practice, where an individual is working on a self-employed basis, it is rare that all of the above indicators will point to them being self-employed and some may in fact point to employment. This is generally because the desire to protect the individual's self-employed status needs to be balanced against other competing commercial considerations.

Consequently, the question of a self-employed individual's status can often be uncertain. The more indicators that point to self-employment, the lesser the risk that they may be considered a de facto employee by HMRC or an employment tribunal.

It should finally be noted that the question of an individual's employment status for tax and NIC purposes, and the question of their employment status for the purposes of statutory employment protection, are distinct from one another. Just because HMRC concludes that an individual is an employee (or would have been if they had been working directly for the intermediary), it does not in itself mean that an employment tribunal would reach the same conclusion. It is possible that HMRC could find that an individual is an employee for tax purposes, but for an employment tribunal to decide that they are not an employee. However, the tests used by each are similar and, therefore, a finding by HMRC may be indicative of what an employment tribunal would decide (and vice versa).

From April 2017 where a public sector body or (if it uses one) recruitment agency treats an individual it engages via an intermediary (such as a personal service company) as an employee for IR35 purposes, it is unlikely that the individual would be considered as an employee of the public sector body or agency for the purposes of statutory employment protection where they are working under a contract with the PSC (provided that it is a genuine relationship and not a sham).

Getting advice

The BMA offers support for members with employment issues. Call 0300 123 1233 or email support@bma.org.uk

See also [our guidance on IR35](#).