

# Employment Status: Employed or Self-employed advice for Engagers

## Status is not a matter of choice...

The facts surrounding a working relationship will determine whether the worker is an employee or self-employed. However, the working relationship between the worker and the engager **IS** a matter of choice.

Getting the employment status position wrong can have serious financial consequences for an engager. If HMRC reviews the engager's or employer's records and considers that the consultant was not genuinely self-employed but rather the terms and conditions were that of an employee, the engager or employer will be liable for the PAYE tax and national insurance contributions (NIC) considered due in respect of the payments made. HMRC can look to go back a number of years to recover the tax and NIC considered due. In addition to the tax and NIC liabilities, interest and penalties will also be due.

Therefore it is crucial that the correct employment status is established at the start of the engagement and that clarification is sought in areas of concern as this should help to prevent disputes with HMRC at a later date.

The law does not define 'self-employment' or 'employment' so it is the terms and conditions of the particular engagement that determine whether the contract is one of employment or self-employment. If the individual is engaged under 'a contract of service' then they will be an employee and PAYE would apply. Only genuine self-employed consultants should be paid outside of the PAYE payroll system.

The onus is on the engager or employer to ensure that they are applying the

correct employment status. The fact that an individual may say they are self-employed or that they have worked previously as a self-employed consultant is irrelevant in determining their employment status as the decision must be made on the current terms and conditions of the engagement at the point of engagement.

The legislation does not define what constitutes a 'contract of service' or a 'contract for service' but guidance from employment status case law as handed down by the Courts over the years is used to determine the correct status to be applied. The Courts have identified various factors that help to determine whether a contract is one of employment or self-employment.

When looking at these relevant factors there are certain indicators that help to determine whether the particular engagement is one of employment or self-employment.

### Common indicators of employment

- The contractor has the right to (even if that right is rarely used) control what the worker has to do, where the work is carried out, when the work is done and how the work is carried out
- The worker supplies only his or her own small tools, and no significant equipment or materials
- There is no possibility that the worker will suffer a financial loss, for example the worker does not risk any of his or her own money
- The worker has to provide personal service. That is, he or she is expected to carry out the work him or herself and cannot provide a substitute and/or additional help to carry out the work

- The worker has no business organisation, for example business premises, stock, materials or own workforce
- The worker is paid by the hour, day, week or month

### Common indicators of self-employment

- Within the overall project deadline, the worker has the right to decide how the work is carried out and when the work will be done
- The worker tenders for a job and if the job ends up costing more than originally estimated, will bear any additional costs
- The worker has the right to hire other people to either carry out the work or work with him or her, those individuals being answerable to, and being paid by him or her, to do the work
- The worker is paid an agreed amount for the job regardless of how long it takes
- The worker supplies the materials, plant or heavy equipment needed for the job

Once the terms and conditions of the engagement have been established and all the relevant factors considered, then the engager or employer should be in a position to make the decision as to whether the overall effect is that of an individual in business on his or her own account (self-employed) or that the individual is actually an employee of the business.

Whilst there are various factors to consider when looking to establish the appropriate employment status position, HMRC has a tendency to place greater emphasis on certain areas and these

are the right of control as to what, when, where and how the work is carried out, whether the worker has the right to provide a substitute and whether through sound management and working efficiently would it be possible to make a profit (and/or make a loss) - thus financial risk.

This is borne out by HMRC's own tool that is used to establish the employment status position. This tool is accessible through the Gov.uk website and is available for anyone to use to check an employment status position. This tool is the Employment Status Indicator (ESI).

The ESI can be used as part of the process when engaging sole traders and will ask a series of questions regarding the working arrangements of the consultant and once completed the ESI tool will provide an opinion of the individual's employment status position.

Clearly the questions need to be answered accurately to reflect the

terms and conditions under which the individual is providing their services otherwise any opinion will be invalid. HMRC will usually be bound by the ESI outcome provided it was completed accurately.

A copy of the status outcome should be downloaded and kept for future reference as this will need to be produced if HMRC questions the employment status position. HMRC may still look to challenge the employment status position even with an ESI outcome of self-employment but nevertheless it would be for HMRC to show that the results cannot be relied upon.

Ultimately getting the employment status position wrong can have disastrous consequences for an engager's or employer's business if HMRC is successful in re-classifying the self-employed workforce as employees.

Our Employment Status Team, have years of experience of dealing with

HMRC across all aspects of self-employment status and can offer a range of services and products including:

- Draft contracts
- Guide to self-employment status
- Review of current contracts and documentation
- Handling your HMRC enquiry
- Representation at the tax tribunals

We would strongly recommend that where you are re-engaged on a self-employed basis following a period of employment that the terms and conditions of the engagement are set out in a contract for services and that due consideration is given to the areas of supervision, direction, control, personal service, financial risk and mutuality of obligation on all parties.

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