

Employment status



An individual's employment rights depend upon their employment status and so it is important to establish how an individual is engaged by a business. There are three main types of employment status; employee, worker and self-employed contractor.

Determining employment status is not always straight forward and despite decades of case law around the area, it is still impossible to set out the defining criteria for each status.

Employee status

An employee is an individual who has entered into or works (or worked) under the terms of a contract of employment. The contract can be expressly agreed (in writing or orally) or implied by the nature of the relationship. To have employee status:

- An individual must be obliged to do the work personally (rather than being able to send a substitute);
- The employer needs to be obliged to provide the work and the individual is obliged to accept the work;
- The employer needs to have some control over the way the individual carries out the work.

In addition, the following factors may also indicate employee status:

- The individual is not free to work for other organisations without the employer's permission;
- The individual is subject to restrictive covenants;
- The individual is paid a fixed amount on a regular payment date, irrespective of performance targets or completion of a specific task;
- The individual is not responsible for any payment of tax and/or NICs on their earnings.

Worker status

Worker status is sometimes seen as a "half-way house" between employee and self-employed status. Workers are entitled to fewer statutory rights than employees, but do have some key legal rights, including protection from discrimination, protection against unlawful deduction from wages and entitlement to the national minimum wage.

Self-employed status

The self-employed enjoy no statutory employment rights, although they may be protected by discrimination laws.

A self-employed individual would have the ability to determine how and when they work and is free to provide their services to any number of people or organisations (whether or not in competition with the company).

Self-employed individuals also provide their own equipment and materials in order to perform the services and are responsible for payment of their own tax and NICs (and VAT registration if the level of their supplies exceeds the relevant limit).

Same status for all purposes?

Depending on the reason for status being reviewed, a person may not carry the same status for all purposes. For example, HMRC may consider an individual as a self-employed contractor for tax purposes, but an Employment Tribunal may consider the same individual a worker for the purposes of employment legislation.

Contractual status

A contractual document will ordinarily answer any questions raised about the employment status of an individual. However, if it alleged that the contractual document does not represent or describe the true reality of the situation, a Tribunal would need to determine the status based on evidence from the parties.

It is therefore not sufficient to simply state in a contractual document that an individual is a worker or a self-employed contractor. The individual must be treated in the way which accords to their status, to better protect the business in the event of a dispute.

The significance of the distinction

Some core legal protections apply only to employees, for example the right:

- not to be unfairly dismissed;
- to receive a statutory redundancy payment;

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- to statutory maternity, paternity, adoption and shared parental pay;
- to maternity, paternity, adoption, shared parental and parental leave.

Health and safety

Employers owe employees statutory health and safety protection. Self-employed contractors may not be covered under these duties, although they will be covered under an employer's occupier's liability.

TUPE transfers

Only employees will be automatically transferred to any purchaser of the employer's business under a TUPE transfer.

Tax

An employer is responsible for deducting tax and national insurance at source (PAYE) from the salary paid to employees. Self-employed individuals are responsible for paying their own tax and national insurance under self-assessment.

Insurance

An employer must take out employer's liability insurance to cover the risk of employees injuring themselves at work. Self-employed contractors are unlikely to be covered by this type of insurance.

Liability

An employer is liable for acts done by an employee in the course of their employment. This type of liability is unlikely to extend to self-employed contractors.

Right	Employee	Worker
Not to be unfairly dismissed	Yes (after a qualifying period)	No
Minimum notice period	Yes	No
Written reasons for dismissal	Yes (after a qualifying period or if dismissed whilst pregnant or on maternity leave)	No
National Minimum Wage	Yes	Yes
Paid annual leave	Yes	Yes
Rest breaks	Yes	Yes
Maximum working week	Yes	Yes
Statutory Sick Pay	Yes	No (unless earnings are liable for class 1 NICs)
Statutory redundancy payment	Yes (after a qualifying period)	No
Statutory maternity / paternity / adoption / shared parental / parental leave	Yes	No
Statutory maternity / paternity / adoption / shared parental pay	Yes	No
Request flexible working	Yes	No
To be protected from discrimination, victimisation, harassment and less favourable treatment because of a protected characteristic	Yes	Yes
Protection for making a protected disclosure	Yes	Yes
To be accompanied at a disciplinary or grievance hearing	Yes	Yes
Protection under the Data Protection Act 1998	Yes	Yes
Not to suffer a detriment for exercising rights in respect of the Working Time Regulations 1998	Yes	Yes
Not to suffer a detriment for breaching an exclusivity term in a zero hours contract	Yes	Yes

KEY CONTACT



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Kevin is experienced in all aspects of employment law, both claimant and respondent, from drafting contracts and procedures, through to providing representation before tribunals in cases involving multiple claimants, and advising on dismissal and re-engagement procedures in relation to contract variations for 500 plus employees. He has worked across the public and private sectors, for high street practices, local authorities and RSLs. This diverse range of experience has given him a very good understanding of the different pressures and considerations that apply when providing advice to individuals, businesses and public bodies. Kevin is admired for his pragmatic approach to most problems, and for finding solutions which minimise both cost and risk to clients.

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