



LEGAL UPDATE | Employment Law

The Distinction Between Employees and Freelance Workers

I recently gave a presentation to AIM on the upcoming changes to employment law in 2026, 2027 and beyond. In the interval, one of the main topics that was raised with me was not to do with these impending changes, but about freelance workers; specifically, when is a freelancer considered to be an employee? The distinction is very important, as misclassification can expose businesses to significant liabilities.

Why the Distinction Matters?

The classification of an individual determines what rights and protections they receive. There are three classifications:

1. **Employees** are the most protected, benefitting from a wide range of statutory protections such as the right not to be unfairly dismissed. They are also covered by the employer's vicarious liability and are subject to PAYE and National Insurance contributions deducted at source.
2. **Workers** are individuals who personally perform work for another party, but there is no obligation on them to accept any offers of work (and no obligation on the business to make any offers of work).
3. **Self-employed individuals**, by contrast, are engaged under contracts for services rather than contracts of service. They have a genuine and unfettered right to send a substitute to perform the work in their place and are responsible for the performance of the contract. They are generally responsible for their own tax affairs, are not entitled to statutory employment rights (such as holiday pay), and bear the risk in the performance of their work.

Workers are entitled to certain statutory protections, including the national minimum wage, working time protections, and paid annual leave, but they do not enjoy the full suite of employee rights.



The Legal Tests for Employment Status

The courts and tribunals have developed several tests and indicators to determine whether an individual is an employee or a self-employed contractor. No single factor is determinative; rather, the assessment involves a multi-factorial evaluation of the working relationship as a whole. Tribunals and courts will look beyond the contractual documentation to examine the reality of the arrangement, rather than merely what the individual's title is under the contract.

Mutuality of obligation is the minimum for an employment relationship to exist. It requires that the employer is obliged to provide work and the individual is obliged to accept and perform it. Where there genuinely is no obligation on either side (for example, where the engaging party may offer work which the individual is free to decline), then the individual is unlikely to be an employee.

Over time however, the line between a freelancer and a worker/employee may blur. An employment relationship can arise if:

- A sufficient mutuality of obligation has developed informally over time through a regular pattern of working together, even where no express obligation exists on paper.

- The individual is heavily-integrated in the business.
- The individual is subjected to a significant level of control and loses a degree of autonomy, as the engaging party dictates how the role is performed day-to-day.
- The engaging party provides the tools and equipment to carry out the role.

It is also worth mentioning that HMRC and the employment tribunals do not necessarily have to agree on the working status of an individual. As such, even if someone is responsible for organising their own tax affairs as a self-employed individual, it will not prevent them from asserting that they do, in fact, believe that they should have instead been classed as a 'worker'. Individuals may decide to pursue such an argument in order to claim an entitlement to historic holiday pay or national minimum wage payments, so there is a significant financial risk to getting this wrong.

The distinction between employees, workers, and self-employed individuals remains a fact-sensitive area of employment law. Organisations must look beyond contractual labels and look at the true nature of each working relationship, considering the established legal tests and the practical reality of the arrangement. Given the risks associated with misclassification, it is recommended that businesses review their contracts and working relationships regularly and to seek specialist advice where the position is unclear.

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