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EMPLOYMENT LAW DEPARTMENT

Employed or Self-Employed? What's the difference?

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1. When recruiting, employers may be asked by a candidate if they can be hired as a self-employed contractor, rather than an employee. While this may be common practice in some industries, it is important to understand the difference between someone who is employed and self-employed, and when that difference will really matter.

The difference between someone who is employed to provide their services and someone who is self-employed and provides a specific service can be very important, particularly when a problem in the arrangement arises. Courts and tribunals can look at many factors to determine which relationship exists, but if the answers to the following questions are “yes”, the person is likely to be an employee:

- a) Does the employer control what work is done?
- b) Does the employer control where, when and how the work is done?
- c) Does the worker have to do the work themselves?
- d) Can the worker get overtime pay or bonus payments?
- e) Is the worker doing work or performing a function that is part of the regular business of the employer?
- f) Does the worker get paid whether or not there is work for them to do?

2. What are the factors that are likely to mean that a person really is self-employed? Sometimes employers will be particularly interested in considering whether the arrangement might work for a particular candidate who is well suited for a very important role in the company and who wants to be self-employed.

The most important factor is the issue of control.

If the company will exercise effective control over what the person does then they are likely to be an employee. And if the role is a critical part of the on-going operation of the company, it may not be possible for the person to do the job on a self-employed basis. However, to help consider the issue clearly, if the answer to the following questions is “yes” it will usually mean that the worker is self-employed:

- a) Can the worker hire someone to do the work or engage helpers at their own expense?
- b) Does the worker provide the main items of equipment they need to do their job, not just the small tools that many employees provide for themselves?

- c) Did the worker agree to do a job or provide a service for a fixed price regardless of how long the job might take?
- d) Does the worker regularly work for a number of different people?
- e) Does the worker have to correct unsatisfactory work in their own time and at their own expense?

3. Is it possible to just treat a person as self-employed and then leave the responsibility with them to deal with any risks, including tax payments? Or are there very critical reasons to determine whether someone is actually an employee or not?

It is important to get it right as, while one of the main differences between being employed and self-employed is the different tax treatment, there are also some important differences under employment law.

If a person is self-employed they don't get paid annual leave, sick leave or have access to an employer's pension. A self-employed person isn't protected under employment laws and can't claim unfair dismissal or redundancy. A self-employed person might receive very little notice that their contract is ending, particularly if a notice period hasn't been negotiated in advance.

There are other legal liability issues. An employer is almost always legally responsible for the actions of their employees, but not for the negligence of an independent contractor. As such, a self-employed person is responsible for any errors or mistakes that are made in the delivery of the service they are providing.

4. What happens if a person is hired on a self-employed basis but later claims to be or is found to be employed?

Getting the relationship wrong, even if by accident, can prove to be costly, particularly for the employer. There can be legal costs if a dispute arises about what relationship actually exists. But in addition, if a relationship of employment is found to exist, the employer can be found responsible for unpaid annual and other kinds of leave, unfair dismissal and redundancy costs. The employer may also face a bill for unpaid PAYE and NI.

As such if there is any uncertainty about what the correct nature of the relationship is, or if a relationship of self-employment is being considered, or offered or requested, it is always best to check first to avoid costly and time consuming mistakes.

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