

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.**

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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. Although what the contract says was agreed between the parties will be taken into account when assessing employment status, it will not be conclusive. Courts and tribunals will look at many factors to determine what the status of the relationship is, and what is agreed at the outset will only be one of those factors to be taken into account. If the answers to the following questions are “yes”, the person is more likely to be an employee than a self-employed contractor:

- a) Does the end user client control what work is done?
- b) Does the end user client control where, when and how the work is done?
- c) Does the worker have to do the work themselves or can they bring someone else in to do the work on their behalf?
- 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 end user client?
- 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?**

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Probably the most important factor which distinguishes a person who is an employee from someone in business on their own account is the extent to which their actions can be controlled by others..

If the end user of the services provided by the worker exercises effective control over what they do then they are likely to be an employee. It is usual for an employer to be able to dictate to an employee what they do, where they do it, when they do it and how they do it. 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. Alternatively if the worker can decide when, where, how and who does the work, with the end user merely interested in the end result of the work rather than the process by which that end result is achieved then the necessary level of control present in an employment relationship may not exist.

To help consider the issue clearly, if the answer to most of the following questions is “yes” it will make it more likely than not 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?**

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It is important to get the question of employment status right at the outset of a relationship. 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.

In relation to tax treatment changes to the IR35 processes for medium and large businesses from April 2020 means that consideration of employment status will have to be resolved prior to commencement of the contract and may require the end user client to make relevant tax deductions prior to payments being made to the limited company invoicing on behalf of the worker.

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 protection 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. The risk of assuming someone is self employed who subsequently turns out to be an employee is that these rights will not have been considered at an appropriate stage which could result in costly liability for the end user client.

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. For this reason it is usual to require a contractor to have their own indemnity insurance in place.

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

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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 income tax and National Insurance contributions.

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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