

D3 Employee Solutions Factsheet

No 1 Employment Status

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Why does it matter?

The primary statutes and regulations which give rights to people at work (and obligations to employers) are:

- The Employment Rights Act 1996 (ERA)
- The Equal Pay Act 1970
- The Transfer of Undertakings (Protection of Employment Regulations) 2006 (TUPE)
- The Health & Safety at Work Act
- The Trade Union and Labour Relations (Consolidation) Act 1992 (TULRA)
- The Working Time Regulations 1998
- The various Acts and regulations which prohibit discrimination and harassment
- The National Minimum Wage Act 1998

The problem is that the rights and obligation afforded by these (and other) laws depend on a person's employment status. Some apply to employees only; some apply to 'workers' of most types.

In addition, the various categories of 'worker' are not mutually exclusive – someone can, for example, be an Office Holder *and* an employee; or someone can be primarily self-employed while, at the same time, have separate, unconnected employment as an employee.

Another problem is that the Acts and regulations do not satisfactorily define 'employee' or the wider term 'worker'. 'Employee', for example, is defined in three slightly different ways by the ERA, TUPE and TULRA, and then again differently by the Social Security & Benefits Act 1992.

What are the Categories of Employment?

Employee

The legal definitions of employee are rather circular. The ERA for example defines one as 'an individual who has entered into or works under ... a contract of employment'. (See *Fact Sheet No 2*). Such a contract may not be written (indeed there is no requirement that it be so) and the determination of employee status will therefore depend on the underlying facts. In most cases, it will be obvious that the two parties intended to enter an employment contract. When there is doubt, the courts have applied a number of tests focussing on

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such concepts as the parties' intentions, the degree of control exercised by the employer over what, when and how a person carries out their work; and the obligations owed to one another. The application of these tests (and others) often amounts to the adage: 'if it looks like a duck, quacks like a duck then it probably is a duck'

Employees might be 'full-time' or 'part-time', and employed for a fixed term-period or indefinitely (often referred to as 'permanent').

The primary rights afforded uniquely to employees are:

- The right to complain of unfair dismissal
- The right to a redundancy payment
- The right to maternity, paternity and adoption leave/pay an for parents to request 'flexible working' arrangements
- The right to a minimum period of notice to terminate a contract, either by dismissal or retirement
- The right to have a written statement of certain minimum particulars of their employment terms.
- The right to claim 'equal pay'

Agency Workers

Organisations often contract with an agency to supply temporary workers. The worker undertakes work for the organisation, but is paid by the agency, which in turn is paid by its client organisation. It is accepted practice that the worker is NOT an employee of the client organisation, although there have been attempts for long-term 'temps' to seek employee rights from the organisation on the basis that the agency link is a sham.

They are also not employees of the agency even though they will usually have tax and national insurance deducted from their pay from the agency and, since they are covered by the Working Time Regulations, they are entitled the statutory minimum paid holiday entitlement.

The Government has just finished an initial consultation on the implementation of a European Directive (which must be implemented by December 2011) which seeks to give agency workers the right to equal treatment relative to an organisation's 'permanent' employees as regards pay (excluding such things as profit share) and holidays. The Government is proposing that these rights will be acquired after 12 weeks' in a particular job and that the agency will have liability for meeting the equal treatment rights. It is not proposing to alter the employment status of agency workers. However, the implication is that agency

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fees could increase for placements over 12 weeks and the worker will earn different pay depending on which client they work for.

Casual workers

Casual workers taken on to undertake task on an 'as-and-when' basis are usually regarded as independent contractors rather than employees. They are not to be confused with employees who work under so-called 'zero hours contract'. The determining factor will be the degree of obligation between the parties – whether the employer has an obligation to provide/offer work and whether the individual is obliged to accept it. Over time a pattern may develop such that an employer does in fact always offers an individual work when it exists (often on some kind of regular pattern) and the person always accepts – the courts may determine that that 'casual employment' has become 'employment'.

It will not necessarily be relevant that an individual carries out work for others or that the employer deducts tax and national insurance from a casual worker's pay.

Labour Only Subcontractors

It is common practice in some sectors (building being the prime example, but it has also become commonplace in the IT sector) for a main contractor to subcontract work to others and even for sub-contractors to further subcontract the labour. The various permutations of contractual and employment relationships then cause problems, compounded by the fact that the workers often subcontract for very short periods and regularly move from one contract to another. It is further complicated by the insertion of intermediaries – employment agencies. However, it is also the case that some so-called 'self-employed' labour contractors end up working for the same person for lengthy periods and the question arises as to their status, either by: the individual who believes they are entitled to certain employment rights (e.g. redundancy pay or holiday); by HMRC (e.g. when they believe that the person is an employee subject to PAYE), or by the relevant government department (e.g. when a redundancy payment is claimed against a person/organisation which is insolvent and the potential liability transfers to the state).

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Office-Holders

People who 'hold office' are generally not regarded as being employed. This really amounts to a tradition since it is often difficult to see the distinction. Classic examples of office holders would be: trustees; police and prison officers, magistrates; Employment Tribunal members (although full-time judges may also be employees of the Tribunal Service); club secretaries. Again, the fact that PAYE is deducted from fees paid to them does not necessarily indicate employment status; and employers of office holders must not discriminate against them. So for example a police officer has tax and national insurance deducted from their pay, has access to an Employment Tribunal to claim that (s)he has been discriminated against, but, since they are not an employee, has no access to that Tribunal to claim unfair dismissal.

Company Directors

Directors of plcs or other limited companies are a particular kind of office holder, often because they are *also* employees of the company. Their 'director hat' can be removed at any time by a simple majority of votes cast at a general meeting of the company i.e. they can be removed from office. However, if they also work as an employee they might not so easily be dismissed.

Partners

Often two or more people conduct their business as Partners under a partnership agreement. This arrangement is common in Accountancy or Legal practices, although it can operate in almost any business context. Partners are NOT employees, even those classed as 'salaried' partners. Partners are said to be '*carrying on a business in common with a view to profit*'. Sometimes there is no formality in the partnership arrangement; rather it is deduced from the facts. There are also cases where a clear employer/employee relationship changes (sometimes without the knowledge or intention of one or both parties!) to a partnership. For example, Mr Palumbo was employed as a barber by Mr Stylianou at Mr S's barbershop. Then Mr S opened and personally ran another barbershop, leaving Mr P to operate the first shop. From that point, Mr P paid Mr S a fixed weekly sum, but took the takings, met the outgoings and kept the profit – the employment relationship morphed into one of working partner/sleeping partner.

Trainees

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Where the primary purpose is training, a contract with a sponsoring organisation is one of training not employment; however some trainees may also have a separate employment contract if they undertake work as well as training. The ERA specifies that a 'contract of employment' specifically includes a contract of apprenticeship. However, the courts see an apprenticeship contract as a special kind of contract which cannot be terminated by giving notice during its term (e.g. by giving notice of redundancy).

Crown Servants

Crown servants are said to be 'appointed' rather than 'employed'. However, modern employment law makes the distinction someone irrelevant since most employment rights are expressly extended to Crown Servants, although by virtue of other Acts police & prison officers are excluded from the right to claim unfair dismissal.

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