

# qLegal

## The small print for BIG IDEAS

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## qLegal Online Publication

### What to Consider When you Hire and/or Work with Others

Employing people can be deemed an uncomplicated process: hire an individual and ask them to work. In reality, it is a legally complex process for a couple of reasons. First, it includes the legal decision of whether to engage someone to work for you as an employee or as an independent contractor. Second, it involves legal rights and duties, including entering into contracts and having certain legal responsibilities, that follow from the initial decision.

Many employers find the list of employment rights and duties they are obliged to follow formidable. However, understanding complying with the law will undoubtedly help with the success of your business.

This toolkit aims to help you decide whether it is more beneficial for you to hire someone as an employee or an independent contractor. This toolkit will cover the differences between an employee and an independent contractor, advantages and disadvantages of hiring independent contractors, the important legal matters to consider when hiring people and/or working with others as an independent contractor, and the concept of “worker” status. By reading our toolkit, we hope to make working or employing people less daunting for you.

#### **The main differences between an employee and independent contractor**

Contractors and employees differ in numerous ways. Under employment law, a person’s employment status helps determine:

- Their legal rights
- Their employer’s responsibilities

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### Determining factors

The test for determining an individual's employment status depends hugely on the actual facts and scope of duties rather than on the labels given in an employment contract. When assessing an individual's employment status, courts consider the following factors:

#### Personal Service/Substitution?

- Whether the person personally performs the work, or is able to hire someone in their own right or get a substitute to carry out the work in their place;

#### Mutuality of obligation?

- Whether there is mutuality of obligation to provide and accept work;
- Whether the person provides his/her own work or skill in the performance of work for the other party in return for a wage or remuneration;

#### Control?

- Whether the employer exercises a sufficient degree of control over the manner in which the individual carries out the work, consistent with an employer/employee relationship or whether there is considerable freedom in the manner in which the work is being conducted;

#### Consistency of the other provisions of the contract?

- Whether the other provisions of the contract are consistent with it being a contract of employment, such as the risk of making a loss on the contract, termination without compensation, or an obligation to make good any defective workmanship at their own expense.

### **EMPLOYEE**

Employees have permanent positions in an organisation, which entitles them to have certain employment rights. The organisation sets their tasks, and they primarily work for one particular organisation. It's also important to remember that employee status covers

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part-time workers, those working during term time only, over the weekend, or more casual hours.

An employee, most likely:

- Will be obliged to accept work offered and the employer must provide work
- Will be subject to more control over how they perform their work
- May be subject to restrictions around working for other people during and after their employment
- Must work exclusively for their employer, at a location and for a time period determined by the employer
- Won't be able to get someone else to do the work for them
- Will likely be paid on a regular or periodic basis, i.e. by the hour, week or month, based on an annual salary or hourly rate agreed at the start of the employment.

## INDEPENDENT CONTRACTOR

An independent contractor or contractor (also referred to as a freelancer or consultant), on the other hand, is typically someone self-employed who carries out work for an organisation on a temporary/contractual basis. Typically, they'll be contracted for the specialised knowledge or skills they can provide for a defined period of time to work on a specific project. A contractor has limited rights, but they have much higher control over their work: they control the schedule, time, place, nature, and cost, and can work for numerous organisations or projects simultaneously.

A contractor is most likely to:

- Be paid per 'job' or 'project', or for a period of time, as opposed to receiving a periodically regular salary from you
- Invoice for the work they do
- Be responsible for their own taxes and national insurance contributions
- Have their own professional insurance
- Work for other companies
- Determine where they work from
- Use their own equipment
- Be responsible for their products i.e. make good any errors in their work free of charge – for example, if they forget to save a piece of work and have to re-do it, you would not have to pay for the additional time it took them to repeat the work.

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Some of the differences between employee and independent contractor are set out below using certain basic parameters of engagement between the organisation and employee/independent contractor:

	<b>Employee</b>	<b>Independent Contractor</b>
<b>Contractual Agreement</b>	Employees have a long-term, permanent commitment to an organisation for a predetermined time period. Under their employment contract (oral or in writing, express or implied), they must receive and complete work on a regular, ongoing basis.	Contractors have no permanent obligation to the organisation that requests work from them. Organisations will seek out contractors to complete set amounts of work as and when they need it, but the contractors can accept or reject requests as they choose. If they do accept the work, they are only obliged to work for the organisation for as long as that set amount of work takes.
<b>Legal Rights</b>	Employees are entitled to several legal rights, including paid annual leave (28 days minimum for full time), minimum notice periods before dismissal, statutory sick pay, protection against unfair dismissal, statutory maternity, paternity, adoption and shared parental leave and pay, flexible working, time off for emergencies, joining a pension scheme, redundancy pay, protection for whistleblowing and more.	Contractors have fewer legal rights when they carry out contractual work for a company. For example, they are not entitled to receive paid annual leave. However, organisations must fulfil health and safety and data protection laws for contractors. Employers have the option to give independent contractors additional legal rights in their written contract, depending upon the nature and tenure of work.

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	<b>Employee</b>	<b>Independent Contractor</b>
<b>Wage Requirements</b>	The organisation establishes the salary that they will pay the employee and must at least pay them statutory minimum wage.	Contractors set the amount of money they charge for each job, which can vary depending on the level of work and can be negotiable. Therefore, it is not on a salary basis and they usually issue invoices.
<b>Taxation</b>	The organisation handles employees' tax, usually through a PAYE system.	Companies who hire contractors are not responsible for their tax, as they pay a one off, set amount of money. The contractors themselves or the company who hires them out are responsible for handling their tax and may need to register for VAT depending on the level of turnover.
<b>Role Execution</b>	Employees must carry out their role themselves. They cannot send someone else in to do their work. Any substitution, if allowed, has to be agreed to by the employer.	Contractors can exchange work with other contractors if they are part of a team. They can send subcontractors to carry out the work for them if they choose.

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	Employee	Independent Contractor
<b>Ownership of Intellectual Property</b>	<p>Critical to an employer's ownership of intellectual property is a written agreement with the employee, one which specifically assigns to the organisation any and all intellectual property created by the employee during the course of his or her employment with the organisation.</p> <p>Such provisions may not only address ownership of intellectual property created during the course of employment, but they may also address ownership of intellectual property created outside company time and without the use of company resources.</p>	<p>Generally imposes less obligations on the contractor to transfer intellectual property rights to an employer.</p> <p>Typically, a contractor retains ownership of intellectual property rights arising during the contractual relationship, often even rights to works made at the employer's request. While there are exceptions, such as where a contractor is explicitly hired to produce a certain work, generally a contractor only gives up ownership rights to their intellectual property creations if the contract under which they are working obliges them to do so.</p>

### **Advantages of hiring independent contractors when possible**

- No obligation to pay the employer's National Insurance Contribution (NIC) at 13.8% of that person's earnings.
- Most independent contractors will account for their own income tax as part of their profits and loss accounts and pay class 2 NIC, which gives them entitlement to the basic state pension and statutory maternity allowance.
- There is no entitlement to statutory employment rights or social security rights.
- A business is vicariously liable for acts done by its employees in the course of their employment, which is unlikely to extend to self-employed contractors.
- A business is required to take out employer's liability insurance to cover the risk of employees and workers injuring themselves at work. Self-employed

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contractors may not, in every case, be covered by this insurance and may require independent contractors to obtain their own insurance.

### **Disadvantages of hiring independent contractors**

- The right to fire an independent contractor is restricted and depends on the written agreement. If a contractor is fired in violation of the agreement, you could be held liable for damages, whereas employers have a relatively unrestricted right to fire an employee.
- Independent contractors may hold the organisation liable for injuries suffered on the job. Contractors are not covered by workman's compensation schemes and therefore reserve the right to sue the contracting organisation for injuries suffered on the job.
- The intellectual property rights attached to the work done or created by an independent contractor will fall with the contractor unless and until agreed otherwise in the written agreement.
- Many employers use independent contractors only as needed for relatively short-term projects. This means that workers will be constantly coming and going, which may prove to be inconsistent, inconvenient and disruptive, in terms of variation in the quality of work.

It is important to note that employers can adjust their work arrangements with the people who work for them to result in the classification of people as independent contractors rather than employees depending on the nature and frequency of the work. For example, if an organisation requires a bookkeeper to keep track of the taxes once a year, it is advisable to hire an independent contractor rather than an employee and to structure the relationship with the bookkeeper to make it clear that it is one of an employer and independent contractor. This work arrangement would considerably reduce the running cost of the organisation.

Furthermore, it is possible for an employer to change the terms of engagement of an employee to an independent contractor or vice-versa.

### **Worker Status**

A worker is any individual who works for an employer, whether under a contract of employment, or any other verbal agreement where an individual undertakes to personally

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do any work or services. Their reward is for money or a benefit in kind, for example the promise of a contract or future work. Workers are entitled to core employment rights and protections.

The following groups of people are likely to be workers but not employees:

- Most agency workers
- Short term casual workers
- Some freelancers

All workers retain the right to:

- Be paid at least the National Minimum Wage
- Protection against unlawful deductions from wages
- Paid annual leave
- The statutory minimum length of rest break
- Protection from accidents at work
- Not work more than 48 hours on average per week
- Protection against unlawful discrimination
- Some protections for pregnant workers
- Protection for 'whistleblowing' - reporting wrongdoing in the workplace
- Not be discriminated against if you work part-time
- Join a trade union
- Be accompanied in grievances and disciplinary actions.

### **The importance of contracts when working with others (even and especially with friends)**

Some people might think that you do not need a contract or any formalities when working with a friend. Nevertheless, having a contract can be necessary to extend additional legal rights to someone beyond the statutory requirements, and to change the default rules about the ownership of intellectual property rights.

A well-written contract between the parties is a good starting point in determining the employment relationship but is not necessarily conclusive as other documents and the surrounding circumstances may show otherwise. Parties cannot avoid the legal consequences of the employment relationship merely by attaching a particular label to the contract. Nor does the fact that a person pays his/her own income tax and National Insurance contributions (NIC) provide conclusive evidence of self-employed status. However, having a valid and well-written contract can still provide support in a dispute for

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you and your good friends when things go wrong; and set additional rights and shift default statutory rules.

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