

Employment Status

If employers use individuals they regard as self-employed, but this is subsequently challenged by HM Revenue and Customs, there may be significant financial consequences, i.e. the “employer” will be pursued for any PAYE that should have been deducted from the payments made to the “employee”. This may also apply in certain circumstances where agency workers are engaged.

Employment status cases are always fact sensitive and borderline cases can therefore be very difficult. However, there are some basic principles that apply in such cases. As a general guide as to whether a worker is an employee or self-employed; if the answer is 'Yes' to all of the following questions, then the worker is probably, but not definitively, an employee:

- Do they have to do the work themselves?
- Can someone tell them at any time what to do, where to carry out the work or when and how to do it?
- Can they work a set amount of hours?
- Can someone move them from task to task?
- Are they paid by the hour, week, or month?
- Are they entitled to receive holiday or sick pay?

If the answer is 'Yes' to all of the following questions, it will usually mean that the worker is self-employed:

- Can someone else be sent to complete the work?
- Do they risk their own money?
- Do they provide the main items of equipment they need to do their job, not just the small tools that many employees provide for themselves?
- Do they agree to do a job for a fixed price regardless of how long the job may take?
- Can they decide what work to do, how and when to do the work and where to provide the services?
- Do they regularly work for a number of different people?
- Do they have to correct unsatisfactory work in their own time and at their own expense?

There is an increasing willingness of courts and tribunals to take the reality of the situation into account and not just to focus on the terms of any written contract between the parties. This is an important trend in the case law on employment status, of which many employers may not yet be aware – the drafting of the contract will only assist if it actually reflects what goes on in practice.

For example, Weight Watchers lost a recent case (spring 2010) brought by HM Revenue and Customs in respect of their meeting leaders and now face a tax bill going back nine years at a cost of more than £23m.

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