**A Guide to Employment Status**

Set out below is some guidance about employment status to assist in understanding the differences between employees, workers, the self-employed and volunteers, explain some commonly used phrases, such as intern, casual worker, voluntary worker, self-employed and clarify who is entitled to receive the National Minimum Wage.

The guidance is of a general nature. Please note that if you have any particular issues, you should seek professional advice.

The term 'employment status' is the arrangement under which an individual is engaged to work for an employer. There are three main categories of employment status:

* employees, hired directly by the organisation
* workers (for example, casual, agency or freelance workers, performing services personally for the organisation, or working on a seasonal basis)
* the self-employed (for example, contractors).

Employees are covered by the full range of statutory employment rights. Workers have a more limited range of employment rights. In practice the dividing line between employee and worker can often be blurred.

The common tests of whether someone is an employee or not are:

* Mutuality of obligation: this looks at the relationship of both parties and is where the employer is obliged to provide work to the individual and the individual is obliged to accept this work when offered.
* Control: this looks at whether the employer has a contractual right of control over the worker. Generally, employers will operate control over the terms of the contract, the place of work, working hours and days of work, the way the work is carried out and the rule relating to the work.
* Personal Service: this look at the right for an individual to substitute another person to carry out their contractual requirements. In most cases where this would apply to the self-employed.

**Employees**

Employees will have a contract, be controlled by their employers, provide personal service (ie. do the work themselves), be integrated into the business, and there will be mutuality of obligation. An employee is an individual who has entered into or works under a contract of employment – but note, a contract does not need to be written and can arise from actions and behaviours.

**Casual Workers**

Casual Workers are in many ways similar to employees, but with some differences. The key difference is mutuality of obligation; they are required to work as and when required, do not have not set hours; there is no guarantee of a minimum amount of work and there is no guarantee that any work will be offered. There is no penalty for refusing any work.

Typically, a worker is more transient and less integrated into the business. Workers have fewer rights (e.g. qualify for redundancy payments) but still have some – such as holiday pay and the minimum wage. They are entitled to receive a written statement of particulars and they have a right to receive a payslip.

Be aware of casual workers who start working regular hours without a break as they could transition into employee status. You should review the status of casual workers who have been working for over a year to assess whether the nature of the relationship has changed, particularly if the worker is working frequently or continuously.

**Zero hours Contracts**

Zero hours contracts do not have a specific definition in law - contracts referred to as "zero hours contracts" may differ from one organisation to another.

Zero hours staff may be engaged as employees or workers. A zero hours worker's employment status will depend on what the contract says and how the arrangement operates in practice (i.e. whether the legal tests of employment are met).Employment status is important because it determines an individual's legal rights and an employer's obligations towards that individual.

Employers should decide how the relationship will operate in practice, apply the corresponding employment status and accurately reflect this in the contract.

Contracts should specify the employment status, rights and obligations of zero hours staff and confirm basic terms, including pay, holiday entitlements, notice and other terms which relate to the way work will be managed.

Employers should regularly review working arrangements to assess whether the way in which individuals are working has implications for their employment status. If their status has changed, the employer should consider issuing a new contract to reflect this.

Exclusivity clauses in zero hours contracts, used to tie workers into working for only one employer even when no work is offered, became unenforceable in May 2015. Zero hours employees have the right not to be unfairly dismissed and zero hours workers have the right not to suffer detrimental treatment for working elsewhere.

**Self-employed**

The self-employed are individuals who assume their own financial risk and reward, often possess a specialist skill set, do not rely on a single source of income, are liable for, for example, negligence and late completion of work, and can be VAT-registered.

There is no legal definition of self-employment, but individuals are likely to be self-employed if they:

* decide how, when and where they work
* run their own business and take responsibility for its success or failure
* are free to hire other people to do the work for them or help them at their own expense
* have several customers at the same time
* provide the main items of equipment needed to carry out the work.

A service level agreement should be drawn up to agree the terms of the service being provided. Note: make sure the individual is responsible for paying all tax, as the HMRC will look behind a company to see if payments have been subject to PAYE and NICs (IR35).

**Volunteers**

Volunteers do not have a contract of employment or a contract for the provision of services. There is no obligation on either side – to provide or to perform work. There is no consideration (such as money) and there is no intention to create legal relations. Voluntary worker agreements should be drawn up to state that they are voluntary workers and set out the basis of the relationship to avoid later problems.

Don’t make payments to volunteers that could be construed as wages. It is best to reimburse expenses which are clearly identified and ideally receipted. If you are paying volunteers a lump sum, ensure it approximates to actual costs/ expenses, and is only given when a volunteer turns up. Don’t pay the same lump sum for expenses to a category of volunteer unless you are sure it is equal to or less than the actual costs/ expenses. Don’t pay an honorarium as that is the same as paying remuneration. Be careful about providing training or extra perks which go beyond the volunteering role, you should not offer training that is not directly relevant to the role as part of a package, as that sets up a contractual-type relationship.

Give volunteers the ability to refuse tasks or choose what work they will do. Threatening sanctions can set up an employment relationship.

Volunteer agreements should avoid contractual language and talk about hopes and expectations. Flexible language such as ‘usual’ and ‘suggested’ is good. Avoid mentions of sanctions for non-performance or non-attendance and avoid setting obligatory time periods for volunteering.

Keep arrangements with volunteers under review. Be especially careful if a volunteer does a bit of paid work. If you place an obligation on someone to perform certain duties, volunteering might begin to look more like employment.

**What are interns?**

There is no legal concept of an intern and no legal definition. Interns can be volunteers, or workers, or employees, depending on the arrangements. An intern’s role is more likely to carry the expectation of regular hours of attendance and consist of fixed duties than a volunteer’s role. An intern can be a junior member of staff who is there to learn and gain experience or could be someone carrying out work experience or work shadowing.

Please note that an apprenticeship is a specific employment relationship for a role where the job holder is moving towards qualifications and/or gaining skills and experience.

**Who should be paid the National Minimum Wage?**

All casual workers and employees are entitled to be paid NMW. Volunteers are not under a contract so are outside the scope of NMW legislation.

**What are zero-hours contracts?**

What constitutes a zero-hours contract is open to broad interpretation as there is no legal definition. It is a contract for casual working with no guarantee of work where the employee is only paid for work done.

A zero-hours contract is flexible (ideally for both sides), enables employers with varying work levels to operate efficiently and provides the employees with protections (such as from unfair dismissal, redundancy payments, holiday entitlement and pay) at a higher level than they would have as casual workers. They can be used by employers in an exploitative way and are inappropriate except where work really does fluctuate as they fail to inspire commitment and provide consistency.

Consideration should be given to whether it is right to use a zero-hours (or variable hours) contract. Does the individual need to be employed, or is the relationship more that of a casual worker? Can the employer set minimum hours, and bring the employee onto the permanent staff?