
Briefing

Is your worker an employee or a contractor?



INSTITUTE OF DIRECTORS
IN IRELAND

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Where a company engages workers, it is necessary for directors to ensure that those working in the company are properly classified in terms of employment status (so that the company can comply with relevant employment law where appropriate) and that related tax and social security treatment is correct. Significant civil and criminal consequences can arise for companies and directors in respect of those matters so the issue is of particular importance where a company sues contractors.

The Minister for Social Protection, Heather Humphries, recently published an updated Code of Practice on Determining Employment Status (the “Code”), the third version since 2001. The Code was updated by an interdepartmental working group comprising the Department of Social Protection, the Office of the Revenue Commissioners and the Workplace Relations Commission. The basis for the latest update centred on concerns around newer business models and forms of work, such as the ‘gig’, ‘digital’ and ‘platform’ economies, leading to an increasing number of individuals being categorised as ‘self-employed’ where in reality, ‘employee’ status would be more appropriate. These sectors are contributing to the evolution of the concept of an ‘employee’ as they rely heavily on short-term, flexible arrangements, rather than traditional permanent employment. The Code is intended to be a ‘living document’, which will continue to be updated to reflect future, relevant changes in the labour market, relevant legislation and case-law.

The Code maintains the binary distinction between employee status and independent contractor/self-employed status, unlike other jurisdictions, such as the UK, where a third, intermediate “worker” category of employment status has been developed through statute. In the UK, an individual with “worker” status is entitled to certain basic employment rights, such as the national minimum wage, pension contributions, working time rights and statutory holiday pay. However it does not entitle a person to the full range of protections available to those with “employee” status. Other jurisdictions have introduced a similar hybrid employment status, including Germany, Canada, France and Italy.

¹ The Code of Practice on Determining Employment Status can be accessed [here](#).

Employment Status

The Code reiterates the position that there is no single, clear legal definition of ‘employee’ or ‘self-employed’ under Irish or EU law. When determining employment status, both the contract of employment, and the reality of the relationship between the parties must be considered, and the terms of the written contract alone are not determinative.

The Code lists a number of factors/characteristics that indicate employee status on the one hand, and self-employed status on the other, and also includes important caveats in respect of both lists.

As set out in the Code, factors indicating each status include:

Factors Indicating Employee Status	Factors Indicating Self-Employed Status
Working under the control of another person who directs them as to how, when and where the work is to be carried out.	Controlling what, when, where, and how the work is done, and whether they do it personally.
Receiving a fixed hourly/weekly/monthly wage, working set hours per week/month and receiving expenses.	Owning their own business.
Inability to subcontract the work.	Ability to provide the same services to more than one person or business at the same time and No obligation to take on specific work offered to them.
Only supplying labour and not the materials or equipment for the work (other than the ‘small tools of the trade’).	Providing the materials and equipment for the job.
No exposure to personal financial risk in carrying out the work.	Exposure to financial risk and assuming the responsibility for the investment and management of the enterprise.
Receiving expense payments to cover subsistence and/or travel expenses.	Providing their own insurance cover.
No opportunity to profit from sound management in the scheduling and performance of the work.	Opportunity to profit from sound management in the scheduling and performance of the work.
Having tax deducted from wages through the PAYE system.	Being registered for self-assessment tax returns or VAT.

Legal Tests

The Code sets out the key legal tests in making a decision on employment status, which are:

- (a) **Mutuality of obligation** - whether and to what extent there is an obligation on one party to provide work and on the other party to accept and perform the work. This is usually the first test that an adjudication body will consider when determining employment status;
- (b) **Substitution** - whether and to what extent the individual can send another person (a substitute) to carry out the work, and who engages and pays the substitute. The ability to provide a substitute and delegate/sub-contract the work is usually not consistent with an employer/employee relationship;
- (c) **The Enterprise Test** - whether and to what extent the individual who has been engaged to carry out the work is in business on their own account, and has the ability to profit from their own efficiency/entrepreneurial skill, or carries the risk of suffering a financial loss. Where these factors are present, this would suggest the individual is self-employed;
- (d) **Integration** – the extent to which an individual has become an integral part of a business, as opposed to carrying out work that is peripheral or accessory to the business. The more the individual is integrated into the business, the more likely they will be found to be an employee; and
- (e) **Control** – the extent to which the individual has control over what work to do, in addition to where, when and how to do the work. The more control the business exercises over the work and the individual, the more likely an employer/employee relationship exists.

The Code emphasises that none of these tests is determinative on its own. It is necessary to take them all into account and to weigh them up in a rounded manner, taking into account the specific facts and circumstances in each case, when making a determination as to the correct employment status of an individual.

Why is this important for organisations?

Whether an individual is classified as an employee or self-employed (often referred to as an “independent contractor”) is an important distinction as it will have implications for the individual’s employment law rights and entitlements (statutory and otherwise), tax treatment, PRSI class and contributions, and social welfare benefits. The classification of an individual as an employee or independent contractor will also impact an organisation’s insurance policies and the issue of vicarious liability.

What are the potential consequences for organisations of misclassifying an individual(s) as an independent contractor rather than an employee?

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| 1. The individual(s) will be entitled to full employment law rights and benefits |
| 2. Exposure to employment law claims |
| 3. Liability to pay PRSI contributions for the full period in question |
| 4. Penalties under Social Welfare legislation |
| 5. Additional tax liabilities, interest and penalties |

Therefore, it is important for organisations to ensure that their workers are correctly engaged and classified in a way that reflects the reality of the relationship between the individual and the business. It is also important to note that even if an individual is correctly engaged as a self-employed contractor at the outset, this does not mean they will remain as such, as employment status can evolve over time. This area of law is further complicated by the fact that an individual may be deemed to be an employee for tax and/or social insurance purposes but this is not determinative of the issue of their general employment status for the purposes of employment law. We recommend that all organisations should audit and evaluate the employment status of their workers, from a tax, social insurance and employment law perspective, taking into account the updated Code and seek appropriate professional advice.

How can we help?

Our Employment, Pensions & Incentives Team along with our Tax Group have significant experience in advising organisations on the complex issues and risks in relation to employment status including analysing the current classification of individuals, assisting organisations with the correct categorisation of individuals, drafting employee and contractor agreements, and advising on the risks and benefits when engaging independent contractors. We would be happy to discuss the consequences of the updated Code for your organisation. For further information, please contact the individuals below. Alternatively, your usual contact would be happy to assist.

Further information is available from



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Alternatively, your usual contact in McCann FitzGerald will be happy to help you further.



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