

Contractors are responsible for correctly working out the employment status of their workers

The new Construction Industry Scheme (CIS) includes a statutory declaration in the contractor's monthly return. This means that contractors must declare on their return that none of the workers listed is an employee.

There will be a penalty if a return is not submitted or if entries on the return are incorrect. That includes making an incorrect employment status declaration, so it is important that contractors correctly determine the employment status of their current workers and of workers they take on in the future.

This is not a new requirement for contractors

We have had representations from members of the construction industry about some contractors not meeting their responsibilities on employment status. Industry representatives have complained that this creates unfair competition between those meeting their responsibilities and those that are not. The declaration on the monthly return emphasises the importance of getting workers' employment status right.

Employment status is not a matter of choice

People cannot simply decide to treat working arrangements as either self-employment or employment. It is the circumstances of the working arrangement that determine how it is treated. In most cases, deciding a worker's employment status will be straightforward but sometimes it can be more difficult. This factsheet will help contractors decide their workers' employment status.

Workers are generally self-employed if they are in business on their own account and bear the responsibility for their business's success or failure. There are a number of factors which can indicate whether or not a worker is self-employed.

Right of control - the degree of control or direction a contractor has over a worker is an important factor to consider. The greater the degree of control by the contractor, the more likely it is that the worker is an employee, so it is important to establish who has control over

- what work is done
- when it is done
- how it is done.

The contractor should consider not just the degree of control, but also their **right to direct the worker** if they so choose.

If a worker is required to, and does, supply any expensive or heavy equipment that is necessary to do the work, this suggests self-employment.

On the other hand, if a contractor engages workers to operate such equipment or plant that has been hired from another source, it is much more likely that the worker will be regarded as an employee. This factor will be very important in the case of drivers and operators of heavy plant, such as lorries, heavy tarmacking equipment, demolition plant and so on.

The supply by craftspeople of small tools, which are traditional and normal in the industry, will not be of the same importance.

It is becoming increasingly common for both skilled and semi-skilled workers within the construction industry, to supply power tools such as drills, saws, nail guns, angle

Welsh language

Yr Iaith Gymraeg/Welsh language.
Ffoniwch **0845 30 21 489** i dderbyn
fersiynau Cymraeg o ffurflenni a
chanllawiau.

Large print
This factsheet is
available in large
print. If you would
like a copy, please
contact your
HM Revenue &
Customs office.

Remember

CIS is not applicable to workers who are employees.

By law, you must operate PAYE and deduct Class 1 National Insurance contributions (NICs) from your employees' pay, including that of casual workers.

If you do not follow the correct tax and National Insurance rules, you may have to pay HM Revenue & Customs for any unpaid tax and NICs. You could also be liable to a penalty and interest.

Different tax and National Insurance rules apply to employed and self-employed workers.

Employment status affects an individual worker's rights and entitlement to benefits.

The employment status of your workers may affect your responsibilities under the Employment Relations Act and your obligation to pay statutory employee benefits. You can get further information about these issues from

- the Department of Trade and Industry (for employment relations) at www.dti.gov.uk and
- the Department for Work and Pensions (for benefits) at www.dwp.gov.uk

Employment status is not a matter of choice (continued)

grinders, planes, routers, and so on. The provision and use of power tools is usually the personal preference of an individual worker and it can be common for workers to provide such tools irrespective of whether they are self-employed or employed.

While the purchase of power tools can vary in cost, and can, in some instances, represent a significant personal outlay to an individual, no monetary figure should be attached to the provision of such tools solely as a means of determining this factor. Each case must be viewed on its own merits.

The greater the degree of financial risk for the worker, the more likely it is that he or she will be self-employed. The basis of payment and the surrounding financial circumstances of the arrangement will therefore be important.

For example, if a contractor pays a worker for all hours of attendance at an hourly rate, the worker faces little, if any, financial risk, and is therefore more likely to be an employee. On the other hand, a worker may be contracted to carry out a defined task or activity at a fixed price. If the completion of this task is vulnerable to delay, for example, because of bad weather or it proves more difficult than expected, and the worker bears the financial risk of such delays, it is more likely that the worker will be self-employed.

Other relevant factors include the nature and degree of expenditure that the worker incurs on his or her own account, and whether the work contract was won as a result of a competitive tendering process.

If a worker has the right to substitute (freedom to hire and pay) someone else to do the work, that suggests self-employment.

The length of engagement may be a factor, but will not be decisive. You must consider the terms of engagement even where a worker is engaged only for a day. Long periods working for one contractor may be typical of an employment, but even a very short-term engagement could amount to employment. Regularly working for the same contractor, even under daily or weekly contracts, points to employment. The fact that a worker moves from site to site with the same contractor is also likely to suggest employment.

Summary

Common indicators of employment

- The contractor has the right to control what the worker has to do - where, when and how it is done - even if the contractor rarely uses that control.
- The worker supplies only his or her own small tools.
- The worker does not risk his or her own money and there is no possibility that he or she will suffer a financial loss.
- The worker has no business organisation, for example, a yard, stock, materials, or workers. (These examples are not exhaustive.)
- The worker is paid by the hour, day, week or month.

Common indicators of self-employment

- Within an overall deadline, the worker has the right to decide how and when the work will be done.
- The worker supplies the materials, plant or heavy equipment needed for the job.
- The worker bids for a job and will bear the additional cost if the job ends up costing more than the worker's original estimate.
- The worker has a right to hire other people who answer to him or her and are paid by him or her to do the job.
- The worker is paid an agreed amount for the job regardless of how long it takes.

To make a decision on an individual case, you will need to consider all the details, and the overall situation.

Employment Status Indicator (ESI)

The ESI is an interactive tool that can help and advise you whether your workers are employed or self-employed in all but the most complex cases. It is available at www.hmrc.gov.uk/calcs/esi.htm

Subject to certain conditions, we can provide you with a binding opinion of the employment status of your workers.

Call our CIS helpline on **0845 366 7899** for advice and more information.

Frequently asked questions about employment status

It is easier for me to take on workers as self-employed. If we agree, why can't we choose?

Engaging workers on a self-employed basis can have a number of attractive features for both parties, but whether someone is your employee or is self-employed depends on the particular working arrangements and not upon the preferences of the people involved. The tax rules for self-employed people are designed to reflect the financial risks taken by people genuinely in business on their own account and should only be applied to those people.

If there is no written contract between me and the person I take on, does that mean he or she is self-employed?

No. Workers sometimes claim that they are self-employed because they do not have a contract with the person for whom they work. What this usually means is that they do not have a written contract, but if they have agreed to work in return for payment, a contract must exist - either a contract of service (employment) or a contract for services (self-employment). It can be written, spoken, implied or a combination of all three.

The contract is an important factor in considering employment status and is particularly valuable to the worker because it determines their rights and obligations.

If workers I engage have subcontractor's tax certificates (CIS6) or registration cards (CIS4), does that mean they are self-employed?

Not necessarily. Just because they hold a certificate or card does not mean that every job they take on is as a self-employed person. It is the actual terms, conditions and facts that apply to each job that determine whether they will be employed or self-employed in that particular case.

Certificates and cards show the way that a contractor should treat payments made to the holder if the terms of the engagement are a contract for services (self-employment). If the relationship is a contract of service (employment), then the contractor must deduct PAYE and Class 1 NICs in all circumstances, even if the worker has a certificate or card.

There are no certificates and registration cards in new CIS.

If the terms of the engagement change part way through the contract, what should I do?

If the change results in a worker becoming employed, you should tell us and begin to deduct tax and NICs from his or her earnings. If you fail to do so, you could be held liable for the deductions which should have been made, and you may also be liable for interest and a penalty. If the change results in a worker becoming self-employed, he or she will be responsible for their own tax and NICs.

Frequently asked questions about employment status (continued)

An employee who took his apprenticeship with us now wants to do the same work for us but on a self-employed basis. Can we agree to this?

It is not the worker's choice. The terms, conditions and facts under which he or she is engaged should determine the employment status of the worker.

I took on a worker on a casual basis whom I genuinely regarded as self-employed, but I have subsequently made this a permanent arrangement on terms and conditions that suggest they are an employee. What should I do?

You must start to operate PAYE when you next make a payment. If the worker has been paid for past periods of engagements on terms and conditions amounting to employment you could be liable for the PAYE tax and NICs you should have deducted, so it is important that you make regular reviews of the status of your individual workers to avoid this happening.

Are there categories of worker where specific rules apply?

The same tests apply to all, including white-collar workers. It is important that you consider the status of your entire workforce, including managers, estimators, site supervisors and professional staff, as well as manual workers. However, if a worker is supplied by an agency and it is not solely on an introductory basis, special rules might apply with the result that the agency has an obligation to operate PAYE and account for Class 1 NICs.

Still not sure?

After establishing the relevant facts, we can give you a written opinion about a worker's particular employment status for tax and National Insurance contributions purposes. If you do not agree, we will reconsider it in the light of any additional information you can provide.

If we still cannot agree, you have the right to appeal.

You can get a copy of the Department of Constitutional Affairs leaflet *Tax Appeals*.

You can view it at:

www.hmrc.gov.uk/leaflets/tax-appeals.pdf

Detailed information about employment status for tax and NICs is at

www.hmrc.gov.uk/employment-status/index.htm

These notes are for guidance only and reflect the position at the time of writing. They do not affect any right of appeal.

Are there categories of worker who will always be employees?

It all depends on the facts. But, as examples,

- general labourers paid by the hour
- foremen and supervisors
- heavy plant operators who do not provide the plant

are rarely engaged on terms amounting to self-employment. But, as in other scenarios, it is the terms, conditions and facts of the individual engagement that will determine the employment status of the worker.

Does working for one employer for a long period point towards employment?

This is certainly a factor to consider in the overall picture (just as a series of short-term engagements with many different contractors may point towards self-employment), but it is only one factor. It is important to pay close attention to the status of long-term workers because of the PAYE and NICs liability which may accumulate if you do not operate PAYE when you should.

What happens if an employment tribunal finds that a subcontractor, who had been treated as self-employed, was in fact an employee?

Employment tribunal decisions are not binding on HM Revenue & Customs, but they usually take into account similar factors. So the decision is likely to be the same when considering an employee for tax purposes. If a case was brought to our attention, our policy on collecting unpaid tax and NICs in these circumstances would apply.