Employment Status and Employment Rights of Agency Workers

Department of Economic Development

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1. Employment businesses

Although the term 'employment agency' is widely used, the correct term for an organisation that hires out workers on a temporary basis to other organisations is 'employment business'. An employment business typically engages a worker and then supplies him or her to work for its client (the principal) in some capacity. The employment business typically pays the worker's remuneration direct, whilst the principal pays the employment business a fee which covers the worker's remuneration, national insurance contributions etc., and a profit element for the business.

However, the term 'agency worker' is commonly used, sometimes even in legislation itself (e.g. the Minimum Wage Act 2001); so, for the individuals concerned, that term is used in this guide.

2. Employment status

The employment rights of a person working for an employment businesses depend upon the nature of the contractual relationship between the two parties and the employment status of that person. Employment status covers a spectrum of possibilities ranging from employees who have the most rights to the genuinely self employed who have the least rights. Between these two extremes there is an intermediate status, usually termed worker; such persons enjoy certain core employment rights.

Each of these categories is discussed further below.

3. Employees

Many employment rights, such as the right not to be unfairly dismissed, are enjoyed only by employees (and, in certain cases, only if they fulfil certain conditions, e.g. as to length of service). An employee is a person who works for an employer under a contract between them, called a 'contract of employment' (which may, but need not, be in writing: it may be agreed orally or simply implied by the nature of the relationship). A contract of employment is defined as 'a contract of service or apprenticeship'.

**Essential characteristics of employees**

A number of essential elements must be fulfilled in order for a contract of employment to be shown to exist:

- there must be a contract between the working person and the employer;
- there is an obligation on the working person to undertake work personally (and not to delegate it to someone else);
- the employer controls both what the working person does and the way it is done;
- the employer has an ongoing commitment to provide work, and there is a corresponding expectation by the working person of receiving work (sometimes called 'mutuality of obligation').
The last of these criteria is, in particular, a common obstacle for an agency worker being deemed to be an employee of the employment business. Whereas an agency worker might be able to demonstrate that he or she was an employee for the duration of a specific assignment it does not follow that he or she has a global contract of employment spanning periods when he or she was not working. Yet unless there is an overriding mutual obligation on the employment business to offer the individual future assignments and on the individual to accept any assignment that is offered it is unlikely that there can be a continuous employment contract.

**Implied contracts of employment with the principal**

The triangular relationship between the employment business, principal and worker can mean that it is possible that a person supplied by an employment business may be found in some rare cases, through a lengthy relationship and 'mutuality of obligation', to have an implied contract of employment with the principal.

An implied contract with the principal will be less likely if:

- the employment business has taken responsibility for the employment of the particular worker, especially where written documents refer to a contract of employment between the parties or employment by the employment business or terms and conditions of employment;
- the contract between the employment business and the principal states that the worker is not an employee of the principal;
- the employment business has disciplinary control over the worker;
- the supply of workers to the principal is rotated;
- forms such as mortgage application forms are completed by the employment business; and
- the employment business pays the worker directly.

**Determination of employee status**

An agency worker is more likely to be an employee of either the employment business or the principal if:

- he or she has worked for some time and would expect this to continue;
- the days he or she works and the terms and conditions are set by the employment business or principal;
- he or she can be dismissed by the employment business or principal;
- he or she has access to a grievance procedure under the terms of his or her contract.

In most cases, it will be clear whether or not a person is an employee of the employment business or the principal or of neither, but in borderline cases, the High Court or the Employment Tribunal will look at whether the list of essential
elements for a contract of employment are present and will, in addition, apply a number of other tests, e.g.:

- to what extent is the person integrated into the structure of the employer’s organisation?

- if the person needs clothing, equipment or materials to carry out the work, does the employer provide them?

- is the person allowed to work for others?

- how are payments to the person processed, and how are they treated for tax and national insurance purposes?

- does the person have access to benefits and sick pay?

4. Workers

Certain employment legislation, namely -

- the Minimum Wage Act 2001; and

- parts of the Employment Act 2006 and some regulations made under it;

give a number of core rights to workers. This term comprises not only employees but also individuals in a relationship with a work provider which meets the following criteria:

- there is a contract;

- the contract is for carrying out personal services;

- such services must be for another party to the contract who must not be a client or customer of the individual’s profession or business undertaking.

So, in addition to employees, the term ‘worker’ will cover, for example, casual, intermittent and some freelance workers, and most employment agency workers other than those who are truly in business on their own account. Some self employed people can also be classed as workers for the purposes of employment rights provided that the particular working relationship points to that conclusion.

Unlike the case of employees who are protected against unfair dismissal, where the contract of a worker (who is not an employee) is terminated on a protected ground (for example, for asserting a statutory right), his or her recourse will be to make a complaint to the Employment Tribunal for ‘detriment’ (which term includes termination of the contract) under Part V of the Employment Act 2006. No qualifying period is required to make a complaint of detriment, and whereas the remedy for detriment does not include re-employment, there is no limit to the amount of compensation that can be awarded in a successful case. The grounds for a potentially successful claim are, however, far more limited than for a claim under the general law of unfair dismissal.
The Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2007 apply to agency workers. These Regulations give part-time workers a broad right not to be less favourably treated than other comparable workers ('comparable' means performing the same or broadly similar work under the same type of contract). In the case of a part-time agency worker engaged under a contract for services the right conferred by these Regulations would only apply where a full-time comparator was doing the same work under the same type of contract and had been assigned to the same client of the employment business as the part-time worker.

**Limits to the coverage of legislation protecting workers**

There are two areas where a worker may be outside the scope of the legislation which usually applies to workers:

- where the individual wishes to claim in respect of an act which took place when he or she was on the books of the employment business but was not actually working, for example at an early stage of his or her relationship with the employment business or in between assignments; and

- where the individual wishes to claim against the client of the employment business, (the 'principal'), and not the employment business but is not in a contractual relationship with the principal.

However, regarding the latter point, in a number of cases the legislation allows the agency worker to assert the particular right against either the employment business or the principal, whichever is most appropriate. Under the Minimum Wage Act 2001 and the Annual Leave Regulations 2007 special provision is made so that whichever of the employment business or the client of the employment business ('the principal'), is responsible for paying or actually pays the worker, will be responsible for both paying the agency worker the minimum wage and for ensuring he or she is able to take paid annual leave.

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**5. The extended definition of 'worker'**

Parts of the Employment Act 2006 extend the definition of 'worker' beyond its usual meaning elsewhere in the Bill to give protection in respect of:

- assertion of certain health and safety rights;

- 'whistleblowing'; and

- the right to be accompanied at disciplinary and grievance hearings;

for some groups of working people (such as homeworkers) who would otherwise fall outside the definition of worker. The extended definition makes specific provision for agency workers, including those who are in business on their own account (and who would normally not be considered workers).

In addition, in the case of agency workers, the corresponding definition of employer is widened to include the person who substantially determines or determined the terms on which the worker is or was engaged. In practice this
means that agency workers will be able to assert the particular right against either the employment business or the principal, whichever is most appropriate in the particular case.

In the case of the right to be accompanied at disciplinary and grievance hearings, it should be borne in mind that the law neither imposes a statutory requirement on employers to have disciplinary and grievance procedures nor gives agency workers a right to raise a disciplinary or grievance matter with the principal. So in practice the right of accompaniment may only apply in fairly limited circumstances. Whereas it is expected that most disciplinary and grievance hearings would be between the employment business and the agency worker there may be some rare cases where an employment business had sought to pass responsibility for a particular disciplinary matter to the principal or where the employment business itself might not be in a position to deal with the particular matter (e.g. in a sexual harassment case).


Whilst using neither the term employee nor worker the Employment (Sex Discrimination) Act 2000 (ESDA) provides protection to persons under a contract of service or of apprenticeship or a contract personally to execute any work or labour. In practice this means that that people who are workers will be protected by the Act but, unlike most legislation that covers workers, ESDA does not exclude those who provide personal services for a client or customer in the course of practising a profession or running a business.

Furthermore, ESDA provides that agency workers may be able to bring claims against the employment business or the client of the employment business (the 'principal') depending on the circumstances of the particular case.

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1 The requirements of the Employment Act 2006 in this respect - which apply to employees only - are that the written particulars should include a note —
(a) specifying any disciplinary rules and procedures applicable to the employee, or referring to a document which is reasonably accessible to the employee and which specifies any such rules and procedures;
Specifying by description or otherwise -
(i) a person to whom the employee can apply if he or she is dissatisfied with any disciplinary decision relating to him or her; and
(ii) a person to whom the employee can apply for the purpose of seeking redress of any grievance relating to his or her employment; and
(iii) the manner in which any such application should be made;
(c) where there are further steps consequent upon any such application, explaining those steps or referring to a document which is reasonably accessible to the employee and which explains them.
[None of the above applies to rules, disciplinary decisions, grievances or procedures relating to health and safety at work.]
7. Self employed entrepreneurs

The final main employment status category, other than employee or worker, is that of self employed entrepreneurs who are in business on their own account and whose relationship with the organisation for whom they provide their services is that of client or customer. Examples of self-employed individuals whose contracts are with clients as opposed to employers include electricians performing skilled work for their customers and advocates representing their clients.

Although some self-employed people can be classed as 'workers' for the purposes of some employment legislation, the general rule is that genuinely self-employed entrepreneurs are not covered by employment protection legislation, with the following exceptions:

- the rights conferred by the Employment (Sex Discrimination) Act 2000 (ESDA) (see 6 above);
- the right to a safe and healthy working environment on clients' premises under health and safety legislation; and
- the possible entitlement of some self-employed women who have recently left their jobs to receive Maternity Allowance or equivalent benefits.

In addition, as set out at 5 above, even though they may be self employed, agency workers are protected against detriment for asserting certain health and safety rights or for 'whistleblowing' and they also have the right to be accompanied at any disciplinary and grievance hearings.

Just as there are cases where it can be difficult to determine whether a person is an employee or a worker there are also cases where it can be difficult to determine whether a person is a worker or self employed. In borderline cases the Employment Tribunal or the High Court will look at factors such as:

- whether the individual has a single customer or a range of customers;
- the extent to which he or she was engaged in skilled activities;
- the extent of investment in his or her business;
- the extent to which he or she carried the risk of non-performance or faulty performance of the work in question; and
- the extent to which he or she was free to negotiate the terms and conditions on services were provided.

8. Determining the employment status of agency workers

It can be seen from the preceding sections that there is no single set of employment rights which covers agency workers but that rather, the applicable rights will differ depending upon the employment status of the individual worker. In summary agency workers may be:
- employees of the employment business (or in some rare cases of the principal) employed under a contract of employment; or
- workers, engaged under a contract for services; or else
- self employed.

The rights of employment business applicants are set out in the first column of the following table.

Agency workers who are employees will, in general, have the same employment rights as other employees. These are set out in the second column of the table.

Agency workers who are neither employees nor truly in business on their own account will generally be engaged under a contract for services and have the status of 'worker' vis-à-vis the employment business. Such workers will therefore be entitled to core employment rights, most importantly the right to be paid the minimum wage and to receive paid annual leave. These are set out in the third column of the following table.

An agency worker who is truly in business on his or her own account will have only those limited rights set out at 7 above. These are set out in the fourth column of the table.
9. **Table showing the employment rights of the main categories of agency workers**

<table>
<thead>
<tr>
<th></th>
<th>Applicants for work</th>
<th>Agency employees</th>
<th>Agency workers (under a contract for services)</th>
<th>Self-employed agency workers</th>
</tr>
</thead>
<tbody>
<tr>
<td>No discrimination on grounds of sex or marital status at recruitment *</td>
<td>✓</td>
<td>✓</td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>No discrimination on grounds of trade union membership etc. at recruitment *</td>
<td>✓</td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Right to written statement of particulars of employment</td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Right to itemised pay statements</td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>No unlawful deduction from wages</td>
<td>✓ ✓</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>No detriment for trade union membership and activities etc</td>
<td>✓ ✓</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>No detriment for unlawful inducement re trade union membership etc.</td>
<td>✓ ✓</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Time off with pay for trade union duties</td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Time off for trade union activities</td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>No detriment for taking ‘protected industrial action’</td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>Time off for jury service and other</td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Applicants for work</td>
<td>Agency employees</td>
<td>Agency workers (under a contract for services)</td>
<td>Self employed agency workers</td>
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<td>--------------------------------------</td>
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<tr>
<td>public duties</td>
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<tr>
<td>Time off to look for work etc.</td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Time off for pension scheme trustees (and no detriment)</td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>Time off with pay for ante-natal care</td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Right to alternative work or remuneration if suspended on maternity grounds</td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Maternity leave (and no detriment)</td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Paternity leave (and no detriment)</td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Adoption leave (and no detriment)</td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Parental leave for parents of children with a disability (and no detriment)</td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Requesting flexible working (and no detriment)</td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>No detriment for exercising certain statutory rights</td>
<td>✓</td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>No detriment for taking actions in the interests of health and safety</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Applicants for work</td>
<td>Agency employees</td>
<td>Agency workers (under a contract for services)</td>
<td>Self employed agency workers</td>
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<tr>
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</tr>
<tr>
<td>Right to 'blow the whistle' (and no detriment) *</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Right to be accompanied at disciplinary and grievance hearing (and no detriment)</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Right to paid annual leave (and no detriment) *</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Right to minimum wage (and no detriment) *</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Right not to work on Sundays (and no detriment) (shop workers only)</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Right of part-time worker to no less favourable treatment than other comparable workers (same or broadly similar work under the same type of contract) (and no detriment)</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>No discrimination on grounds of sex or marital status *</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Right to equal pay for equal work / work rated as equivalent *</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Right to minimum period of notice on termination of employment</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Right to written statement of reasons for dismissal</td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Right not to be unfairly dismissed</td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Right to redundancy payment</td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Right to claim arrears etc. from DHSS on employer's insolvency</td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

* Rights where the legislation explicitly or overtly provides scope for the agency worker to assert rights against either the employment business or the client of the employment business (‘the principal’). Note also the possibility of an agency worker’s establishing that he or she is an employee of the principal (see section 3 of the guide).
Disclaimer

This guide, including the accompanying table, is for information purposes only. Every reasonable effort is made to make the information and commentary accurate and up to date, but no responsibility for its accuracy and correctness, or for any consequences of relying on it, is assumed by the Department. The information does not, and is not intended to, amount to legal advice to any person on a specific case or matter.
Appendix : Useful contacts

The Manx Industrial Relations Service (MIRS)

5th Floor
Victory House
Prospect Hill
Douglas
IM1 1EQ

Tel.: 672942
Fax.: 687050
Email: iro@ir.gov.im
Web: www.mirs.org.im

For:

- Provision of guidance and advice for both employers and workers on employment rights.
- Contact point for persons contemplating making a claim to the Employment Tribunal.
- For assistance in resolving disputes between employers and workers; MIRS has certain statutory conciliation functions.

The Employment Tribunal

The Clerk to the Employment Tribunal
Tribunals Office
Isle of Man Courts of Justice
Deemsters Walk
Bucks Road
Douglas
IM1 3AR

Tel.: 685941 (Mon - Fri 9 a.m. to 5 p.m.)
Fax.: 685573
Email: tribunals@gov.im
Web: http://www.gov.im/registries/Tribunals/employ.xml

For:

- The Clerk can be contacted where a claim to the Employment Tribunal has already been made.
- Persons contemplating making a claim to the Employment Tribunal may wish to seek further advice from the Manx Industrial Relations Service (see above for contact details).
Department of Economic Development
St Georges Court,
Upper Church Street
Douglas,
ISLE OF MAN,
IM1 1EX