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Working with the Self-Employed

A Best Practice Guide for Businesses



Introduction

This Best Practice Guide has been created by Creative & Cultural Skills as part of the Creative Careers Programme (CCP). It responds directly to feedback from the creative industries about the lack of clear information on working with the self-employed, despite the fact they represent 35% of the creative industries workforce.

The CCP is an integrated industry-led programme of activity across England that is working to ensure there is a larger and more diverse intake of talent and a broader range of routes into the creative industries, a commitment of the Creative Industries Sector Deal. The programme launched in March 2019 and was kick-started with funding from the Department for Digital, Culture, Media and Sport, it is being delivered by Creative & Cultural Skills, ScreenSkills and the Creative Industries Federation.

We are grateful to the legal team at Counterculture Partnership LLP, a professional services firm specialising in advice to the creative and cultural sector, for their assistance with this guide. However, this is a tool to encourage objective assessment of an organisation's current understanding and approach. It is not a substitute for legal advice, and you must not rely on it as such. Always obtain professional or specialist advice based on your organisation's specific circumstances before taking, or refraining from taking, any action on the basis of the information in this guide.

You may also find it useful to read our **Best Practice Recruitment Guide for Creative Leaders** which includes information about various types of employment status.



Working with freelancers

35% of the creative industries workforce is made up of those who are self-employed. Commonly referred to as freelancers, self employed contractors are defined as such because they run their own business and take responsibility for its success or failure.

When a business contracts a freelancer, they aren't employing the freelancer to work for them, what they are contracting is the delivery of services. This is an important distinction and one that businesses must understand if they are to safely operate within appropriate legal boundaries when using freelancers.

Self-employed workers aren't paid through PAYE, and they don't have the same employment rights and responsibilities as employees. However, this doesn't mean businesses are free to treat freelancers as they choose. Freelancers still have protection for their health and safety and, in some cases, protection against discrimination.

A freelancer's rights and responsibilities, and details of the services they will provide to you, are set by the terms of the contract that is put in place. Failing to issue a suitable contract for services could put your business at risk.

Whilst there's no statutory definition of a 'contract for services', in simple and general terms it is when someone in business for themselves agrees to provide particular services to another person or company. The key requirement is that the services are delivered: it does not necessarily have to be the specific individual delivering them.

Self-employed contractors usually offer their services to more than one organisation at once, determine how and when they will work, can send someone else to deliver the work if they feel it appropriate, manage their own tax and National Insurance obligations and charge fees that they determine for the service(s).

Engaging self-employed contractors is a common way of working in the sector: they are often specialists in their field and engaging them allows organisations to access specialist, short term, flexible services without the additional statutory obligations and costs of hiring another employee such as employers National Insurance contributions.

The use of personal service companies and the 'off payroll working' rules (commonly referred to as IR35 rules) are outside the scope of this guide. However, organisations should be aware that there are changes coming into force in April 2020 and if you engage self-employed contractors in this way you should take specialist advice.

Self-employment gives far fewer rights and protections to the individual, which is not always fully appreciated by either side. In some circumstances health and safety

legislation and equality legislation may extend to cover the self-employed, but, for example, they have no entitlement to be paid National Minimum Wage, nor to receive paid holiday, nor to receive sick pay and there is no protection from unfair dismissal.

Also, even if both sides agree at the outset that the relationship is one of self-employment, a court or tribunal can disagree. It is always the conditions within which someone is expected to operate that determines what they are to a business! If an employment tribunal decides that, in reality, someone is actually an employee with statutory rights, then they will apply those rights when making their judgement.

HMRC also pays close attention to questions of employment status when inspecting tax records, and if it rules an individual is an employee it can, and does, impose penalties and collects employer NIC.

Given this, in order to help a business understand the difference between a genuine freelancer and someone who should be hired on a fixed-term contract of employment, businesses should consider the following:

- Is it genuinely a situation of self-employment? Consider what the reality of the working relationship will be (this is explored in ‘determining employment status’ on page 6). Even if self-employment is appropriate, have you considered other options (like fixed-term employment contracts) which may encourage a more diverse range of applicants?
- Issue a contract for services before work starts, including the agreed fees, timescales for delivery, a payment schedule and acceptable expenses. Consider and include what will happen if there is a problem and the services cannot be delivered/are sub-standard.
- Issue any appropriate and relevant company policies, but be mindful that this may move you closer to having the same level of control you would have over an employee or worker. (see later guidance).
- Consider which legal obligations will apply to each self-employed contractor you engage (for example, are there specific Health and Safety or employers liability insurance requirements) and whether there are steps you need to take in relation to these.
- Ensure there is a designated point of contact in your organisation for the self-employed contractor, and where appropriate offer feedback.
- Pay on time (where there are no issues with the service delivery). A self-employed contractor may charge interest on late payments, and disputes over debts are time consuming and costly. There’s also a reputational risk.
- Charities may be subject to additional regulatory requirements when engaging self-employed fundraisers, and specialist advice should be sought in this situation.

If the following are true, then it can be reasonably assumed that someone is a freelancer:

- The freelancer is in business for themselves, are responsible for the success or failure of their business and can make a loss or a profit.
- They can decide what work they do and when, where or how to do it.
- They can hire someone else to do the work.
- They're responsible for fixing any unsatisfactory work in their own time.
- The hiring business agrees a fixed price for their work - it doesn't depend on how long the job takes to finish.
- They use their own money to buy business assets, cover running costs, and provide tools and equipment for their work.
- They can work for more than one client.

Somebody is probably self-employed if:

- They put in bids or give quotes to get work.
- They're not under direct supervision when working.
- They submit invoices for the work they've done.
- They're responsible for paying their own National Insurance and tax.
- They don't get holiday or sick pay when they're not working.
- They operate under a contract (sometimes known as a 'contract for services' or 'consultancy agreement') that uses terms like 'self-employed', 'consultant' or an 'independent contractor'.

If you contract someone to undertake work for you and you expect them to be the person that provides this work directly, you're dictating the hours and days they work for you and the way in which they must undertake this work, then it's unlikely that this person is a freelancer. It may be more appropriate for you contract them on a fixed term contract of employment.



Determining employment status

The question of employment status is often both a question of fact and a question of law. Whatever the contractual documentation states, if the status of a person engaged by an organisation is challenged by either the person or by an outside agency such as HMRC, the court will look at the reality of the relationship – not what either party calls it. As stated previously, it's not the title you give someone that determines their status, it's the conditions within which you're expecting them operate that determines this.

The test to determine an individual's employment status has been developed in the courts over many years. The court or tribunal will look at the facts of a case and apply the following tests during its deliberations:

1. Whether there is a mutual obligation between the individual and the organisation.

Does the individual have the right to a minimum amount of work or pay? Are they required to attend, or could they lawfully refuse to do the work offered? The more obligation there is upon an individual to accept work when offered, the more likely they are to be an employee.

2. Whether the individual is obliged to personally undertake the work required by the organisation.

Can the individual send someone else to deliver the services on their behalf? If there is a right of substitution, is it ever actually used? If the reality of the situation is that an alternative person could not be sent or would not be accepted in place of the individual, then the more likely the individual is to be considered an employee.

3. Whether the individual is under the control of the organisation.

How integrated into the organisation is the individual? If the business could not function without that person doing that role, the relationship is more likely to be one of employment.

Does the organisation dictate the manner in which the individual undertakes the work, or can the individual decide what to do, and how and when to do it? Are they subject to the organisation's rules such as appraisal and disciplinary procedures? Do they require training and supervision to provide the services? The more directions the organisation can enforce on the individual, the more likely they are to be an employee.

Can the individual work for other organisations at the same time as working for the organisation in question? If they do not have other clients, or they are restricted by the organisation in the engagements they can undertake now or in future, they are more likely to be considered an employee.

The three factors above are the most important considerations, but courts and tribunals must also consider the overall picture of the relationship between the individual and the organisation and so they consider other terms of the agreement such as:

- Does the agreement between the parties explicitly state that the relationship is not intended to be one of employer-employee? The court can disregard such a statement if they think it is a 'sham' designed to conceal the true nature of the relationship but including it can still add to the evidence in favour of self-employment.
- Does the agreement require the individual to assume any financial risk themselves – are they required to have their own insurance, provide their own tools/equipment, or are expected to put right any defects in their work at their own expense? If an individual is genuinely running their own business, and incurring financial costs, that would add to the evidence in favour of self-employment.
- How is the individual paid - a set sum each month or do the amounts and dates of payment vary based on an agreed schedule or record of time spent? Do they receive other benefits which are given to employees (share options, training costs, benefits in kind)? A regular fixed sum suggests an employee's salary. Varying amounts paid on receipt of an invoice may add to the evidence in favour of self-employment.
- Has the individual incorporated a service organisation through which they deliver their services? Taking steps to limit their financial liability would suggest an independent business and add to the evidence in favour of self-employment.
- Does the individual market and promote their business, and cultivate relationships with their own clients to generate future work? Independently identifying and choosing who to provide services to would add to the evidence in favour of self-employment.

It's important to remember that you cannot determine someone's employment status by simply running through a checklist: it is always dependant on the particular facts and circumstances of each individual case. The factors above will not all have the same level of importance in every situation, so an overall assessment must be made based on all the evidence and legal tests taken together.

Each time an individual is engaged, these questions should be asked, and where self-employed contractors are working in an organisation, regular reviews of their status should be undertaken.

HMRC has an employment status tool online, which companies can use to assist them in deciding the status of their staff. However, it is important to note that although the tests for employment status are applied in both tax law and employment law, one is not determinative of the other, and it is possible for a person to be considered employed by HMRC and yet self-employed for the purposes of employment law.

For further information about the different types of employment status, please read our **Best Practice Recruitment Guide for Creative Leaders**.

Creative & Cultural Skills has a range of workforce development guides, tools and resources to support organisations across the cultural and creative industries. Discover these and more at **ccskills.org.uk** and **sign-up to our sector support newsletter** for the latest news and updates.

For further information about the Creative Careers Programme, visit **DiscoverCreative.Careers**.



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