

# Worker or employee?

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## Michael Halsey considers the employment status of locums and warns of potential pitfalls

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When hiring a locum ? defined as a person temporarily fulfilling the duties of another while still governed by their respective regulatory body ? there are several important commercial considerations, so you should ask yourself the following questions.

- Will the locum be contracted for a fixed term or on a rolling basis subject to notice?
- What services are they being hired to undertake?
- Will the practice or the locum provide insurance cover for the locum?s services?
- Will you seek to restrict the locum?s activities after the contract has ended?
- Will the locum be an employee, a worker or self-employed?

It is important to establish the locum?s status, both in terms of their legal rights and the way that their income is taxed. When hiring a locum, you should be clear on this issue from the start and prepare a written contract that reflects your intentions. Practitioners have come unstuck trying to obtain the financial benefits of hiring locums on a self-employed basis when they also want the locum?s personal service, as described below, and a relatively high level of control over them.

The tests for determining employment and tax status are similar but not entirely the same; for example, the HMRC employment online status checker will not differentiate between workers and employees, which might be very important when determining the locum?s employment law rights. This article therefore describes what each different status entails.

## What is an employee?

Employee status is the gold standard in terms of rights: an employee with more than two years? continuous service has the right not to be unfairly dismissed, and to receive a statutory redundancy payment. The employer must also deduct tax and National Insurance contributions.

The definition of employment status varies depending on the claim an individual may wish to make. In most cases, the description set out in the [Employment Rights Act 1996](#) is the key. This states that an employee is someone who has entered into, or works under, a

'contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing'.

When deciding what constitutes a contract of employment, all relevant factors must be taken into account. The 3 indicators are:

- personal service

- control
- mutuality of obligation.

## Personal service

An integral part of the employment relationship is that the employee provides their own labour in return for payment. If they can send others to carry out their work, this is generally seen as being contrary to the fundamentals of the employment relationship.

Each case needs to be looked at carefully. If an individual is contractually required to provide personal service, this is consistent with a contract of employment. While a contractual right to provide a substitute may be inconsistent with employment status, much depends on the type of right being exercised.

## Control

The more control an organisation has, the more likely it is that an individual will count as an employee. This will be the case under the following circumstances, for example:

- there is a contractual right for the organisation to control their activities
- the locum is subject to daily direction and supervision and the policies in any employee handbook
- the practice controls the locum's place, days and hours of work.

## Mutuality of obligation

This is generally the obligation for the practice to provide work and the locum to accept such work. If the contract between the parties only gives a framework for what will happen if work is provided, and the individual does not have to accept such work, that is unlikely to constitute a contract of employment.

## What is a worker?

Worker status provides some statutory protection for those who may not satisfy the test for being employees, but who are not genuinely in business for themselves. Like full-blown employees, they are often in an unequal bargaining position with the organisation for which they provide services, in that the organisation will be economically dominant and able to procure services from others in the event of disagreement.

Workers are entitled to be paid the minimum wage and also accrue paid annual leave. An individual will be a worker if they work under a contract of employment or any other contract to perform work personally ? see [Personal service](#) above ? as long as there is not a genuine client-style relationship between the parties. This may be the case in situations where, for example, a locum has a wide client base of practices to whom they provide services.

Indicators of such relationships include:

- whether the relationship is at arm's length and the parties are independent, employee and worker status is more commonly characterised by dependence
- if the individual has other clients, this points towards self-employment
- the duration of the arrangement ? shorter periods indicate self-employment
- payment method ? for example, the need to submit invoices suggests self-employment
- if the individual supplies the equipment used, this points towards self-employment
- if the individual shares the financial risk of a business venture, this indicates

- self-employment
- where the individual remains outside the management structure of the wider organisation, then this also points to self-employment.

## The genuinely self-employed

For a locum to fall into this category, they must not be an employee or worker; if they do have to carry out the work personally, there must be a genuine client-type relationship with the practice. Although it may be tempting to shoehorn someone into self-employed status and thus save on accrued holiday and the need to deduct PAYE and National Insurance contributions, there are risks involved in having contracts that do not reflect the true situation, as can be seen, for instance, in the case of [Citysprint and its couriers](#) from early in 2017.

## Consider your best route

If you want your locum to provide their work personally and exclusively for you while the contract is ongoing, they will probably be an employee or worker.

- If the contract is to be less than 2 years, worker status may be the most appealing option.
- If the contract is likely to be for longer and the locum will be fully integrated into the practice, being subject to a high degree of control on a daily basis, the relationship may well be one of employer and employee. The practice must then decide whether to offer some form of employment contract, or retain the locum as a worker.
- If the written agreement diverges from the practical day-to-day arrangements, this will determine the relationship between the parties in any litigation process.
- If hired on a more open basis, the locum is free to work for other organisations, provide a substitute or refuse the work, so the self-employment model may well be appropriate.

## Top tips

- Consider the relationship as a whole before deciding on the individual's status and weigh up competing factors. Every case presents different considerations.
- Make sure that any written contract reflects the true relationship ? if a court or employment tribunal suspects that a contract is a sham, it will look behind the written terms.
- Make the parties' intention clear in any agreement where it is not intended to be a contract of employment.
- Make sure the arrangement is set down in writing.
- If you are building a right of substitution into a contract, think about how that will work in practice and how it should be expressed. For example, does it provide an absolute or conditional right to send a substitute?
- If an individual is to be a worker or self-employed, consider including an indemnity for any losses incurred if they later allege they are an employee.

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## Further information

- Related competencies include [Business planning](#)
- This feature is taken from the [RICS Property journal](#) (March/April 2018)