

FACTSHEET 4

Self Employed and Freelance Contractors

1. General points

The risk around using sub-contractors, freelancers or consultants to carry out work needs to be considered from two angles –firstly from the point of view of the payment of tax and state contributions (PAYE/NIC's) and secondly, in relation to an individual's employment rights. The 'tests' to determine the status of the individual carrying out work differs between the two, as do the risks as well as the penalties.

What needs to be determined is whether the person who is carrying out the work is doing so under a *contract of service* (employees) or under a *contract for services* (self-employed or independent contractor). For PAYE and NICs purposes, there is no statutory definition of a contract of service or of a contract for services. What the parties call their relationship, or what they consider it to be, is not conclusive. It is the reality of the relationship that matters. In order to determine the nature of a contract, it is necessary to apply common law principles. The courts have, over the years, laid down some factors and tests that are relevant and which need to be considered.

2. Status of sub-contractor

Often churches will be tempted to engage say, a cleaner, to work a few hours per week on a self employed basis.

Determining whether someone is genuinely a sub contractor as opposed to an employee, according to Her Majesty's Revenue and Customs (HMRC) rules and whether he/she is entitled to employment rights is complex and more information from the Congregational Federation's Human Resource Consultant should be sought.

As a rule of thumb, HMRC define sub contractors as those who carry out work for a number of different organisations, use their own equipment, decide how and when the work is done, and submit their own tax returns as sole traders or through their own company.

Employment legislation differentiates between an 'employee' and a 'worker'. The latter are not employees as such, may well be self employed for other purposes but receive some basic protection at work.

Recent court cases indicate there is no single satisfactory test governing the question whether a person is an employee or self-employed contractor. All the factors that are present in, or absent from, a particular case need to be weighed up.

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While every care has been taken in compiling these notes, they are not intended to be a substitute for specific legal advice. Dickinson-Flower Ltd is not able to provide legal advice but will give information based on employee relations best practice. Specific legal advice, if required, should be obtained from a qualified lawyer specialising in employment law.

The result may be that a person is considered to be in business on her/his own account (self-employed) or in reality should be considered an employee and thus put on the Church's payroll.

3. Risk

3.1 Her Majesty's Revenue and Customs

HMRC carry out regular audits on most employers; if it determines that an individual who has carried out work should be classed as an employee, rather than a self-employed, then the 'employer' is liable to pay the individual's backdated PAYE and Employer's National Insurance contributions. In extreme cases, prosecution for tax evasion can ensue too.

For the individual, if they are not classed as an employee, (and should be), they may not be able to claim certain state benefits.

3.2 Employment protection

The risk to any organization is if a sub contractor, (perhaps due to a fall out with the organization), takes a claim to an Employment Tribunal.

Claims can be made on a number of grounds, such as for payment of the National Minimum wage, or the rights to breaks, or protection from anti-discrimination.

3.3. Risk mitigation

The most effective way to mitigate any potential risk is to ensure that a clear contract or agreement is drawn up with the individual as a sub contractor. It can be written, oral, implied or a combination of these, but a written one provides the greatest clarity.

More information is available from the Human Resources Consultant.