

AUTO ENROLMENT AND THE EMPLOYEE DUTIES – IDENTIFYING WORKERS FACTSHEET

The auto enrolment legislation sets out the duties that employers will have for individuals who are classed as workers. This means employers will have to assess their workforce to identify which individuals are classed as workers in order to determine the duties they'll have to perform. This factsheet details the different factors that employers will have to consider when they are identifying workers.

We've based this factsheet on our current understanding of the relevant legislation and regulations (including drafts) which might change in the future.

THE DEFINITION OF A WORKER

A worker is defined in The Pensions Regulator's (TPR) guidance as any individual who:

- works under a contract of employment (an employee) or,
- has a contract to perform work or services personally (i.e. they cannot send a substitute or sub-contract the work) and is not self-employed.

PEOPLE WHO ARE NOT CLASSED AS WORKERS

There are certain people who are not classed as workers by TPR:

- The self-employed.
- Members of the armed forces.
- Directors of companies unless they have a contract of employment to work for that company and there is someone else employed by the company under a contract of employment.
- Office-holders such as non-executive directors, company secretaries, board members of statutory bodies and trustees.
- Volunteers.
- In certain circumstances, workers employed under a contract of service and whose place of work under that contract is in another European Union country.

EXCLUSIONS TO THE EMPLOYER DUTIES

There are certain people who are classed as workers but are not covered by the employer duties:

- Those who do not work or ordinarily work in the UK.
- Those under age 16.
- Those aged 75 and over.



ASSESSING WHETHER A WORKER IS WORKING OR ORDINARILY WORKING IN THE UK

For most employers it will be easy to determine whether an individual is wholly working in the UK. However, there are circumstances where this may be complicated, for example where workers regularly move between countries as part of their employment. The main issue is determining where the worker is based.

ORDINARILY WORKING IN THE UK

If a worker is not wholly working in the UK, the employer will have to check if the worker is ordinarily working in the UK. The employer should check if the contract of employment confirms where the worker is based. If not, the employer should consider:

- where the worker begins and ends their work
- where their private residence is, or is intended to be
- where the worker's headquarters are
- whether they pay National Insurance Contributions in the UK
- what currency they are paid in.

TPR have confirmed that these are only guidelines and that if employers are having difficulties in determining whether a worker is working or ordinarily working in the UK they should seek legal advice.

ORDINARILY WORKING IN THE UK – A SIMPLE EXAMPLE

- Jamie is an airline pilot and works out of Edinburgh Airport.
- He flies long haul flights to the USA for SunShine Airways and is away for four days at a time.
- Sunshine Airways' headquarters is in Edinburgh and his contract of employment is with them.
- Jamie is paid in sterling and pays tax and National Insurance Contributions from his salary.

It's likely that Jamie ordinarily works in the UK.

NOT ORDINARILY WORKING IN THE UK – A SIMPLE EXAMPLE

- Sean is an airline pilot and works out of London Gatwick Airport.
- He flies long haul flights for Zealander Airways to New Zealand and is away for five days at a time.
- Sean lives in Dublin and commutes to Gatwick to start work.
- Zealander Airways has offices at Gatwick, but its headquarters is based in Dublin.
- Sean is paid in euros and doesn't pay National Insurance Contributions in the UK.

It's likely that Sean does not ordinarily work in the UK, even though he begins and ends work in the UK.



CONSIDERATIONS

In some circumstances it may not be immediately clear if someone is classed as a worker and employers will need to consider a number of different factors. We've detailed some examples below which will help employers. However, as this is a matter of employment law employers should always check the contract of employment and seek legal advice if they have any doubts.

AGENCY WORKERS

Agency workers are generally treated as workers for the employer duties. However it might not be clear who should perform the employer duties for them. Normally, if there is a contract of employment in place, the employer named on the contract must carry out the employer duties for the worker. If there is no contract in place, whoever is responsible for paying the worker under the agency agreement is treated as the employer. If it's not clear from the agreement who is responsible for paying the worker, then the person who actually pays the worker is treated as the employer and must carry out the employer duties for them.

IDENTIFYING WORKERS IN PRACTICE – AGENCY WORKERS EXAMPLE 1

- FastPak is an agricultural employment agency that supplies agency workers to farms around the country.
- FastPak has contracts of employment with a pool of workers that they assign to farms when required.
- FastPak invoices the farms for the work done then pays the workers when the money comes in.
- Because FastPak has contracts of employment with the workers and pays them, they are treated as the employer for the employer duties and not the farms they work with.

IDENTIFYING WORKERS IN PRACTICE – AGENCY WORKERS EXAMPLE 2

- Jim is an IT specialist who has signed up with ITexpertise recruitment agency. ITexpertise secure temporary contracts for freelance IT specialists.
- ITexpertise is contacted by Unique Dressmakers as they need a Web Manager to build a website for them.
- ITexpertise puts Jim forward for the position of Web Manager and following a successful interview with Unique Dressmakers, he accepts the position.
- ITexpertise are paid a finders fee by Unique Dressmakers.
- Unique Dressmakers employs Jim on a six month contract and pays his salary.
- Unique Dressmakers are treated as the employer for the employer duties as they actually pay Jim's salary.

PERSONAL SERVICE WORKERS

Personal service workers are contracted to perform work or services personally. This is sometimes referred to as a 'contract of services' and not a contract of employment. But they could still be treated as workers.



TPR has given some guidance to help employers decide whether individuals are personal service workers or not. Individuals are likely to be considered as personal service workers, if most, or all, of the following statements are true:

- The employer relies on the individual's expertise and expects them to perform the work themselves.
- There is an element of subordination between the employer and individual for example, the individual reports to the employer's managers or directors in respect of the specific operation or project on which they are contracted to work.
- The contractual provisions state that the contract is not a contract for services between the employer and the individual's own business.
- The contract provides for employee benefits such as holiday pay, sick pay, notice, fees, expenses etc.
- There is a mutual obligation set down in the contract to provide or do the work.
- The individual does not incur any financial risk in carrying out the work.
- The employer provides tools, equipment and other requirements to the individual to carry out the work.

There may be other factors that employers will have to consider and TPR have confirmed that the above list is not exhaustive. Where there is any doubt, the employer should seek legal advice.

SECONDEES

People who are working on secondment from one company to another will remain a worker for the company they are on secondment from.

SEAFARERS

An individual employed in any capacity on board a ship or hovercraft will be treated as a worker.

HOW BECKETT CAN HELP

As you can see, there is a lot for employers to consider when assessing their workforce for auto enrolment. TPR have given some guidance around identifying workers. However employers should take legal advice if they have any doubts in this area.

Beckett can discuss this area of auto enrolment with you during the scheme design and implementation process.

WITH THANKS TO ROYAL LONDON FOR TECHNICAL CONTENT

