

# Independent contractor guidance pursuant to the Employment Act 2000

**Briefing Summary:** The question of employment status – specifically, whether or not an individual is an employee and therefore entitled to all the protections and benefits afforded by the Employment Act 2000 – has become an increasingly hot topic in recent years.

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This has been driven by a rise in flexible working arrangements and the so-called 'gig economy' as well as by employers seeking creative ways to reduce costs in a restrained economic environment. With this in mind, the Employment Act 2000 was amended in 2021 to allow the Ministry of Economy and Labour to publish guidance to assist in determining whether a person is an employee or an independent contractor.

The Ministry recently published 'Independent Contractor Guidance' to explain the key features of the employee-employer relationship and how this differs from an independent contractor relationship. The Guidance should aid employers and workers in assessing their employment relationship and reduce the misclassification of working arrangements, but it will also be taken into account by Employment Tribunals faced with determining issues of employment status. It will be particularly relevant to organisations who use temporary staff or *ad hoc* labour, including those in the retail, construction and gig economy sectors, as well as those who commonly use consultant arrangements, including IT, human resources and advertising businesses. The Guidance is expected to come into effect on 1 April 2023.

This briefing discusses the following 12 indicators set out in the Guidance as being material to differentiate employees from independent contractors:

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## 1. Continuity of work

Employees usually have an expectation of ongoing work which is continuous, while independent contractors are generally engaged for a specific task, specific advice or project.

## 2. Tools and equipment

Employees typically use the employer's materials, tools and equipment and the employer is responsible for repair, maintenance and insurance-related costs. However, while some employees may need to use their own tools, the employer typically incurs the cost. Independent contractors generally provide and incur the cost of their own tools and equipment to complete the work.

## 3. Integration

Employees perform tasks that are an integral part of the employer's business, as opposed to independent contractors who generally perform services that are not integrated into the organisation's everyday operations.

## 4. Method of payment

Employees are paid regularly, whether by hourly wage or a salary. Conversely, independent contractors can set their own fees and those fees are usually paid in intervals or at the end of a project or for specified services or advice.

## 5. Training

Employees will typically receive training on the requirements of how to do the job. Independent contractors typically require no such training.

## 6. Profit and loss

Employees generally do not share in the profits or suffer losses incurred by the employer's business. Independent contractors can increase their profits and/or decrease their expenses, for example by unilaterally setting their own fees for their service.

## 7. Contract type

Employees work under a contract **of** service (otherwise known as a contract of employment) which is an agreement between an employer and employee. Independent contractors typically work under a contract **for** service and are engaged for a fee or a set amount to carry out an assignment(s) or project(s), complete specified work or provide specific advice. A contract **for** service can be direct with the individual consultant/contractor or via a services company.

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## 8. Control over work

In an employee-employer relationship, the employer controls how the work is carried out, for example by determining the location at which the work is done and/or setting the working hours. An independent contractor has control over the work and may determine how, when and where the work is performed.

## 9. Open market competition/number of clients

If a person is required to ask permission to work for another organisation this may suggest that the person is an employee. Independent contractors can typically work with one or more clients at the same time and advertise and market their services to the general public as well as competitors of their clients.

## 10. Benefit responsibility

As employees work for an employer, the employer is responsible for providing paid leave and other benefits as well as contributing towards the employee's four statutory obligations (if applicable) – social insurance, payroll tax, health insurance and private pension. Conversely, an independent contractor is responsible for their own statutory obligations and does not receive paid leave.

## 11. Business registration

Employees generally work for someone else's business and are not required to register with the Government, as opposed to an independent contractor that is self-employed and required to register with the Government as a sole proprietor or firm.

## 12. Termination

An employee can be terminated or can end their employment while an independent contractor is responsible for completing the job as agreed and can be terminated according to the contract.

Further detail relating to the 12 indicators can be found in the Independent Contractor Guidance itself. These indicators are not conclusive to determine if someone is an employee or an independent contractor and instead the Guidance should be used as a broad reference.

For those unsure of their status, the Guidance should aid in assessing their true relationship and should also help reduce the misclassification of employees as independent contractors. The Guidance also illustrates how the Employment Tribunal might approach the issue of employment status in the future, which is significant as classification as an 'employee' is essential to accessing the benefits and protections offered by the Employment Act 2000.

Organisations that use independent contractor relationships and other types of non-standard working arrangements are advised to review their current staffing contracts in light of the new Guidance. If you would like to discuss further how the issues discussed in this briefing might impact your organisation, please contact the Carey Olsen employment team.

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