



HR Briefing September 2009

Employment Law Update

This month we take a look at recent updates to the status of self-employed workers

Status?

The issue of whether an individual is classed as an employee, a worker or self-employed is often an issue for employers. Despite the labels, things are not always so clear-cut.

Status is not a new issue, nor is there a conclusive answer, but there have been some recent developments dealing with status, which you should be aware of as both a worker and employer.

Self-Employed Status & Tax

The Treasury has proposed to introduce a set of new rules dealing with whether or not workers in the construction industry are self-employed for the purposes of tax and National Insurance Contributions.

The key criteria to be considered are as follows:

1. Whether the worker provides the plant and equipment required for the job (this excludes tools of the trade for which it is usual for individuals to provide themselves to enable them to do their job);
2. Whether the worker provides their own materials required to complete the job; and/or
3. Whether the worker is obliged to carry out the work themselves or can provides other workers to carry out work under the contract (and is responsible for paying them).

If none of the above criteria are met, then the proposed rules suggest that the worker should be treated as an employee, even if they would not be considered an employee under the normal tax employment status tests.

However, it should be noted that under the proposals, even if a worker is classed as an employee for tax purposes, they will not automatically be classed as an employee for employment law purposes. How confusing is that?

Although the treasury has made this proposal in relation to the construction industry, it may extend it to other industry sectors.

Key Recommendations

- It is important that you take care in establishing the true status of employees working in your business.
- This is directly relevant to the calculation and deduction of tax and National Insurance. If you have not made the right decision regarding status, this could result in additional tax, National Insurance, penalties and interest being payable. For example, if an individual is regarded as self-employed, but is subsequently found to be an employee.
- It could also result in claims before the Employment Tribunal if an employers does not appreciate that an individual has protection as an employee, rather than as a self-employed individual – for example, the right not to be unfairly dismissed.

Leeds City Council v Woodhouse and others

Y was an employee of a Company who was contracted to provide services for the Council. At the time, Y was supervising X (X was employed by the Council) and Y alleged that he had been subject to racial discrimination by X. Y brought a claim against his employer, X and the Council.

The Council denied responsibility, but the Employment Appeal Tribunal upheld the Employment Tribunal's finding that the contractor's staff were treated as the staff of the Council as they were doing work for the Council's benefit.

This highlights the scope of an employer's potential liability and is particularly relevant where employers have in place outsourcing arrangements, agency or service arrangements.

In addition, it should be remembered that whilst employees are better protected in terms of their rights in unfair dismissal and redundancy situations, the right not to be subjected to discrimination applies to employees, workers and may be applicable to some self employed individuals.

Key Recommendations

Employers

- Be aware of your liabilities in respect of employees, workers and self-employed individuals.
- Ensure that you have discrimination and harassment policies in place and that all staff are aware of these, irrespective of their status. Appropriate training should be provided.
- Be aware of the "factors" which are considered when determining whether someone is an employees/worker/self-employed and that the reality might be different to "the label" you or the individual choose to place on the working relationship.



FINAL THOUGHTS – SWINE FLU UPDATE

Whilst there have been recent reports that the number of newly reported cases is declining, if you have not already, you should certainly consider preparing your business for the potential impact, as some reports suggest there will be an increase in numbers in the Autumn.

It is important to consider the effect on the business in terms of ensuring that measures are put in place to deal with any large-scale absences. This is relevant not only in relation to Swine Flu, but also as part of any risk management plan. For further guidance on this, please go to our website.

If you have any queries on any of the above please contact **Alison Loveday** at alisonl@berg.co.uk to discuss further issues. Alternatively you contact **Alison** on **0161 833 9211**.