

# UK Independent Contractor Misclassification Issues

Labor & Employment Workforce Watch

## WRITTEN BY

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While misclassification is a well-known employer liability issue in the US in the context of wage and hour claims, the complexity of the UK legal framework concerning employment status is also worth exploring to understand the risks and potential pitfalls.

The UK has three categories of individuals who provide work for an “employer”:

- “Employees”: as understood in the traditional sense.
- “Workers”: that is an individual who works under a contract to provide personal service, but who are not providing their services as part of a business or professional undertaking with the “employer” being a client of the individual’s business.
- “Self-employed”: commonly described as an independent contractor, consultant, or freelance.

The main difference between the three categories is the sliding scale of rights attaching to the status, with employees enjoying very significant protection, workers more limited statutory rights and independent contractors/self-employed only having rights arising under the contract in question.

In practice, problems tend to arise where the parties (or more commonly the employer) incorrectly categorises an individual as being an independent contractor/self-employed, commonly with the individual’s agreement, because self-employment has significant tax advantages for both parties. The individual can offset expenses against income and pay lower social security costs. On the employer’s side, they benefit from not paying the employer’s social security, and not having to provide certain mandatory benefits. For many arrangements of this nature, everything works acceptably for both parties – until it suddenly doesn’t, usually prompted by the “employer” wishing to terminate the relationship.

In determining status, it is how the relationship operates in practice that counts. For an individual to be an “employee,” there must be an irreducible minimum of mutuality of obligation (the employer to provide work and pay and the individual to be obligated to undertake it), the individual must be obliged to personally undertake work, and they must be subject to the control of the employer as to when and how it is done.

For an individual to have “worker” status, the bar is not very high and the focus is on whether the individual meets the basic statutory definition. There must be a contract in place, although a verbal agreement will suffice, the individual must be required to carry out the work personally and in doing so the employer must not be a customer or client of the individual as part of their business. To illustrate the latter point, the commission of a professional

photographer would meet the contract and personal service points, but would fail under the requirement to not be providing the services as part of their own business undertaking, with the “employer” being treated as the client of their business.

By contrast “worker” status would be met by an individual who contracted to provide personal service to the end user “employer” but not as part of the individual running their own business, for example where the end-user “employer” was part of a portfolio of clients of the individual. Indicators to the latter point may include their having their own terms and conditions, providing their services through a corporate vehicle, charging a fee for a defined task rather than being paid by the day/hour, having their own website, and having collateral marketing material consistent with running a business.

The majority of disputes arise where an individual has been treated as self-employed/independent contractor but later asserts either employee, or more commonly, worker status, and because of the low threshold to achieve worker status, the employer is often on the losing end of the argument.

If that is the case then they will be held liable for any breach of the worker’s statutory rights, the main ones being the right to 28 days paid holiday each year, to be paid the minimum wage, the right to be automatically enrolled into the employer’s pension scheme with resulting employer contributions, and with limitations around working hours. They also enjoy statutory protection in respect of health and safety, protection from discrimination, and have rights as whistleblowers as other key protections.

Remediating this can be difficult, expensive, and time-consuming as Uber found out to its cost when it lost a UK Supreme Court case in 2021 having misclassified its drivers as independent contractors rather than workers. While the precise damages cost is difficult to come by, it is generally accepted as running to well over £1bn.

In particular, the non-payment of holiday pay for any length of time can quickly become expensive and a failure to put in place the mandatory pension provision can, in addition to being costly to resolve, lead to regulatory enforcement and risks potential criminal prosecution.

Most disputes of this type are of a more modest nature but businesses using contractor labour would be well advised to be alert to the issue and undertake a review to ensure that individuals are correctly classified, and where errors are identified, to resolve them at an early stage.

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