



briefing

construction - winter 2007

Getting away with it?

You have just won a tender for a project. You will need to engage workers for that project such as welders, bricklayers and machine operators. Do you contract with them directly as employees, engage them as self-employed contractors or through another body such as a specialist company? The answer to your dilemma is becoming more important as the legal position is shifting, making it harder for current construction industry practices to continue. From April 6th the tax position is also shifting as the CIS scheme gets revised, with HMRC also revealing an intention to focus on your industry.

If you get things wrong by treating workers as “self-employed” when the Employment Tribunals and HMRC say they actually should have been “employees” it will prove very costly: not only might you face employment claims when the relationship is terminated, liability for holiday pay, sick pay, notice pay, redundancy pay and be responsible for the acts of the worker but also penalties of up to 100%, interest and the back tax that has not been paid.

To make things even more challenging for you there are a number of factors considered by Employment Tribunals and HMRC when deciding if someone actually should be treated as an “employee”: whilst similar factors apply they aren’t necessarily consistently applied between the legal position on “status” and the tax position, making it crucial that you obtain proper advice.

These factors centre around who has “control” of the worker, how integrated into the business a worker is, the equipment and facilities applied to them and the financial risk they take. Control is probably your biggest area of exposure – you have valid reasons why, when someone is on your site you need to control what they do and how they do it but this is likely to put you in a position of becoming an “employer” at law.

For example in *Cotswold Developments Construction Limited v Williams 2006* a CIS4 carpenter working on the London Underground was paid per shift, worked and remained working for Cotswold for 21 months albeit that from time to time he declined work or no work was available. The carpenter had use of a company van and was supervised and trained by Cotswold. When he was sacked he claimed breach of contract for notice pay and unfair dismissal successfully – the Tribunal found there was “mutuality of obligation” – this refers to a minimum level of commitment between the parties, on the part of the worker to provide work in return for pay. Cotswold was also found to be in control of the worker such that he was an “employee”.

Effectively, what happens in these cases is the courts look behind the label the parties give a relationship eg: - “subbie” or “self-employed”, “CIS4 contractor” to say “actually should the worker be an ‘employee’?”. Increasingly HMRC will be doing this too: from April 6th the traditional CIS system of registration cards is being replaced with a “verification service” with the voucher system being replaced by monthly returns. When registering workers under the system HMRC will be reviewing the correct status of the worker - you might find you are told workers should be taxed as if they are employed. Part of the monthly return you will have to complete will involve you making a declaration that the status of any “self-employed” workers is correct. Financial penalties of up to £1,300 per month will apply to any erroneous returns on top of any tax charges, interest and penalties for tax owed.

It’s no secret that some contractors in the construction industry are viewed as exploiting workers whilst others are taking their responsibilities seriously. It is also clear that it is not actually something you can decide for yourself: HMRC guidance is categorical, that it is the circumstances of the working relationship that determines how it will be treated. Unfortunately workers are generally only self-employed if they are in business on their own account and bear responsibility for that business’ success and failure. Thus it is likely that HMRC will be finding employee status for lots of those who have traditionally operated on a CIS4 basis;

labourers paid by the hour, foremen and supervisors and heavy plant operators who are not owners of their plant are likely to rarely be self-employed.

Canny employers will be reviewing their working practices and the documents on which they engage staff, taking the opportunity to maximise their chances of proving the status they wish for their staff.

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