

# Employment Status and Rights for Agency Workers

## Overview

Our Island Plan sets out a vision of a secure, vibrant and sustainable Island, with a commitment for the Department for Enterprise to deliver reforms to employment legislation, ensuring the Island is aligned with international standards and remains a competitive and attractive place to work.

Though in 2017 the Equality Act made a number of significant changes to employment law in the Island in relation to discrimination, over a number of years the Isle of Man has been falling behind international standards in relation to employment rights. The Department intends to make a number of changes to employment law in the current administration.

In 2022, the Department consulted on a number of topics that came to make up the Employment (Amendment) Bill 2023 that completed its progress through the Legislative Branches earlier this year. Those measures, which focused mainly on family leave rights and whistleblowing, will be implemented in the spring of 2025.

## Why your views matter

The Department now seeks to make further improvements to Employment legislation on the Isle of Man. **This consultation seeks views on the different status of worker and employee and the difference in rights afforded to these groups including statutory provision for the right to time off for antenatal appointments for agency workers.**

This consultation is issued in tandem with a series of other consultations that can be found on the Consultation Hub in relation to employment rights.

Throughout this consultation, the UK's legislation may be referenced. It should be noted that now the UK is under a Labour Government, that this may change in the future.

Following this consultation, the Department will review the responses and use this information to inform the development of the Employment (Amendment) Bill that will be brought forward in 2025.

A summary of responses will be published on this page within 12 weeks of the consultation closing.

If you would like to find out more about the Island's current statutory employment rights, please visit the [Guides to Employment Rights page on gov.im \(opens on a new tab\)](https://www.gov.im/categories/working-in-the-isle-of-man/employment-rights/guides-to-employment-rights/) <<https://www.gov.im/categories/working-in-the-isle-of-man/employment-rights/guides-to-employment-rights/>> .

More information on the [Employment \(Amendment\) Bill 2023 \(opens in a new tab\)](https://www.gov.im/categories/working-in-the-isle-of-man/employment-rights/employment-amendment-bill-2023/) <<https://www.gov.im/categories/working-in-the-isle-of-man/employment-rights/employment-amendment-bill-2023/>> .

## Reasonable adjustments and alternative formats

The Department is committed to equal opportunities and our aim is to make our documents easy to use and accessible to all.

We will take steps to accommodate any reasonable adjustments and provide such assistance as you may reasonably require to enable you to access or reply to this consultation.

If you would like to receive this document as a paper copy, in another format or need assistance with accessing or replying to this consultation, please email [jasmine.cowin@gov.im](mailto:jasmine.cowin@gov.im) or telephone +44 1624 686559.

## Responding to this consultation

You can respond to this consultation online by clicking on the 'Online Survey' link below.

## About you

Please note that most questions on this consultation are **optional**, with the exception of the consent question below 'May we publish your response'. There are multiple text boxes provided throughout the consultation, but you are not required to complete them unless you want to explain your view.

What is your name?

Name

What is your email address?

Email

Are you responding on behalf of an organisation?

*Please select only one item*

- Yes
- No

Organisation

## In what capacity are you responding as:

For clarity, an **employee** is someone who works under a contract of employment and perform their services personally for the employer.

**Workers** are people who are engaged on a contract for services. The term 'worker' can be used to cover a wide range of working relationships e.g. casual workers, freelance workers, employment agency staff and some independent contractors.

*Please select only one item*

- Employer
- Employee
- Worker
- Self-employed
- Other (please specify)

Other:

## If you employ other people, how many employees & workers do you have?

*Please select only one item*

- 0
- 1 to 10
- 11 to 25
- 26 to 50
- 51 to 100
- 100+

## May we publish your response?

Please read our [Privacy Policy](#) for more details and your rights.

### More information

- Publish in full – your first name and surname, organisation name, along with full answers **will** be published on the hub (your email will **not** be published)
- Publish anonymously – only your responses **will** be published on the hub (your name, organisation and email will **not** be published)
- Do not publish – **nothing will** be published publically on the hub (your response will only be part of a larger summary response document)

*(Required)*

*Please select only one item*

- Yes, you can publish my response in full
- Yes, you may publish my response anonymously
- No, please do not publish my response

## Employment status

The legal rights enjoyed by a person flow from their employment status. This covers a spectrum of possibilities ranging from 'employees' who have the most rights to the genuinely self-employed who have the least rights. Between these two extremes there is an intermediate status, usually termed 'worker'; such persons enjoy certain core employment rights. Each of these categories is discussed further below.

### Employees

Many employment rights, such as the right not to be unfairly dismissed, are enjoyed only by 'employees' (and, in certain cases, only if they fulfil certain conditions, e.g. as to length of service). An 'employee' is a person who works for an employer under a contract between them, called a 'contract of employment' (which may, but need not, be in writing: it may be agreed orally or simply implied by the nature of the relationship). A contract of employment is defined as 'a contract of service or apprenticeship'.

A number of essential elements must be fulfilled in order for a contract of employment to be shown to exist:

- there must be a contract between the working person and the employer
- there is an obligation on the working person to undertake work personally (and not to delegate it to someone else)
- the employer has an ongoing commitment to provide work, and there is a corresponding expectation by the working person of receiving work (sometimes called 'mutuality of obligation') and
- the employer controls both what the working person does and the way it is done

In most cases, it will be clear whether a person is or is not an employee, but in borderline cases the High Court or the Employment and Equality Tribunal will look to see if these elements are present and will, in addition, look at a number of factors, e.g.:

- to what extent is the person integrated into the structure of the employer's organisation?
- if the person needs clothing, equipment or materials to carry out the work, does the employer provide them?
- is the person allowed to work for others?
- how are payments to the person processed, and how are they treated for tax and national insurance purposes?
- does the person have access to benefits and sick pay?

### Workers

Certain employment legislation, namely:

- the Minimum Wage Act 2001 and
- parts of the Employment Act 2006 and some regulations made under it

give a number of core rights to 'workers'. This term comprises not only employees but also individuals in a relationship with a work provider which meets the following criteria:

- there is a contract
- the contract is for carrying out personal services
- such services are for another party to the contract who is not a client or customer of the individual's profession or business undertaking.

So, in addition to employees, the term 'worker' will cover, for example, casual, intermittent and some freelance workers, and most employment agency workers other than those who are truly in business on their own account. Some self-employed people can also be classed as workers for the purposes of employment rights provided that the particular working relationship points to that conclusion.

Unlike the case of employees who are protected against unfair dismissal, where the contract of a worker (who is not an employee) is terminated on a protected ground (for example, for asserting a statutory right), their recourse will be to make a complaint to the Employment and Equality Tribunal for 'detriment' (which includes termination of the contract) under Part V of the Employment Act 2006. No qualifying period is required to make a complaint of detriment and compensation can be awarded in a successful case. The grounds for a potentially successful complaint are far more limited than for a complaint under the general law of unfair dismissal.

### **The extended definition of 'worker'**

Parts of the Employment Act 2006 extend the definition of 'worker' beyond its usual meaning elsewhere in the Act to give protection in respect of:

- assertion of certain health and safety rights
- 'whistleblowing' and
- the right to be accompanied at disciplinary and grievance hearings

to both 'workers' and the following categories of working person which might otherwise fall outside the usual definition of 'worker':

- home workers
- NHS primary care providers
- certain trainees and persons on work experience and
- agency workers, including those who are in business on their own account (and who would normally not be considered 'workers')

In addition, in the case of agency workers, the corresponding definition of 'employer' is widened to include the person who substantially determines or determined the terms on which the worker is or was engaged. In practice this means that employment agency workers will be able to assert the particular right against either the employment agency or the principal, whichever is most appropriate in the particular case.

In the case of NHS primary care providers and trainees the definition of 'employer' includes, respectively, the Department of Health and Social Care and the person providing the work experience or training.

Some of these categories are also entitled to rights under other legislation such as the minimum wage under the Minimum Wage Act 2001.

## **Self employed persons**

The final main category of employed persons, other than 'employee' or 'worker', is that of self-employed persons, that is, persons who are in business on their own account and whose relationship with the organisation for whom they provide their services is that of client or customer. Examples of self-employed individuals, whose contracts are with clients or customers as opposed to employers, include electricians performing skilled work for their customers and advocates advising or representing their clients.

Although some self-employed people can be classed as 'workers' for the purposes of some employment legislation, the general rule is that genuinely self-employed entrepreneurs are not covered by employment protection legislation, with a number of exceptions, the main ones being as follows:

- the rights conferred by the Equality Act 2017
- the right to a safe and healthy working environment on clients' premises under health and safety legislation and
- the possible entitlement of some self-employed women who have recently left their jobs to Maternity Allowance or equivalent benefits

In addition even though they may be self employed, agency workers are protected against detriment for asserting certain health and safety rights or for 'whistleblowing' and they also have the right to be accompanied at any disciplinary and grievance hearings.

## **Distinguishing between workers and self-employed persons**

Just as there are cases where it can be difficult to determine whether a person is an employee or a worker there are also cases where it can be difficult to determine whether a person is a worker or self-employed. In borderline cases the High Court or the Employment and Equality Tribunal will look at the features of the particular contract and factors such as:

- whether the dominant feature of contractual arrangement was the obligation to personally perform work or whether it was a business outcome or objective
- whether the individual has a single customer or a range of customers
- the extent to which he or she was engaged in skilled activities

- the extent of investment in his or her business
- the extent to which he or she carried the risk of nonperformance or faulty performance of the work in question and
- the extent to which he or she was free to negotiate the terms
- and conditions on services were provided

### **Issues with the current employment status regimes**

In 2018 the UK Government consulted on employment status and identified the following main issues with the current regimes:

- 'Open to interpretation' - that there can be ambiguity in the application of the case law tests when determining status
- 'Complexity' - the difficulty in applying the rules to novel circumstances, and the lack of clarity between statuses
- 'Difficulties resolving disputes' - the difficulties individuals can face when seeking a final decision on status, and the cost to all parties of resolving those disagreements

In its manifesto for the 2024 general election, the Labour Party stated that it would 'move towards a single status of worker and transition towards a simpler two-part framework for employment status' and 'consult in detail on how a simpler framework that differentiates between workers and the genuinely self-employed could properly capture the breadth of employment relationships in the UK'.

What are your views on creation of statutory definitions of 'employee' and 'worker'?



Do you have any views on what the definitions should be?

What are your views on creation of a single employment status of 'worker'?

## Agency worker's right

Although the term 'employment agency' is widely used, strictly speaking it refers to a business which matches up employees and employers. The correct term for an organisation that hires out workers on a temporary basis to other organisations is 'employment business'. However, the term 'agency worker' is commonly used to mean workers hired out by an employment business.

An 'employment business' typically engages a worker and then supplies him or her to work for its client (the 'principal') in some capacity. The employment business typically pays the worker's remuneration direct, whilst the principal pays the employment business a fee which covers the worker's remuneration, national insurance contributions etc. and a profit element for the business. Normally there are contracts between the employment business and the agency worker, and between the employment business and its client, but not between the agency worker and the principal. However, in rare cases a lengthy relationship and 'mutuality of obligation' may create an 'implied contract of employment between the agency worker and the principal. The High Court or Employment and Equality Tribunal can determine the matter depending on all the facts of the particular case.

The employment status of agency workers is determined by reference to the general principles set out above.

Agency workers may be:

- employees of the employment business (or in rare cases, of the principal) employed under a contract of employment or
- workers, engaged under a contract for services or else
- self-employed

Agency workers who are employees will, in general, have the same employment rights as other employees. Agency workers who are neither employees nor truly self-employed will generally be engaged under a contract for services and have the status of 'worker' vis-à-vis the employment business. Such workers will therefore be entitled to core employment rights, most importantly the right to be paid the minimum wage and to receive paid annual leave. It is to be noted that in a number of cases the legislation allows the agency worker to assert the particular right against either the employment business or the principal, whichever is most appropriate.

In the UK, in addition to the above rights, agency workers have rights to time off for ante natal care, to attend ante natal appointments with their partner and to attend adoption appointments.

Do you think that the rights to time off for ante natal care, attendance of ante natal appointments with a partner and attendance at adoption appointment available to agency workers in the UK should be introduced in the Isle of Man?

*Please select only one item*

- Yes
- No
- Neither

Please explain your view:

Additional comments

Do you have any other comments?