

GMS Flash Alert

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Ireland – Determination of Employment vs Self-Employment Status: Updated Guidance

There have been significant changes to the process to be adopted when assessing whether a worker should be treated as an employee or self-employed for Irish tax purposes. These changes arise on the heels of the Irish Supreme Court decision¹ on the employment status of a company's pizza delivery drivers which found in favour of Irish Revenue.

The case sets out the new five-step process which should be applied when engaging an individual, other than through a direct employment contract, to perform services.

WHY THIS MATTERS

Determining whether an individual should be treated as “employed” or “self-employed” for Irish tax purposes is a challenge for many businesses. There are several factors to consider in making that determination and the circumstances are not always straightforward. Where misclassification arises, and Irish Revenue identifies that misclassification, the business is generally required to settle the payroll withholding (PAYE) liability due on payments made plus interest and penalties. Whether or not these liabilities can be recovered from the individual will depend upon the contractual arrangements in place between the parties.

Approach for Determining Employment Status

The Supreme Court judgment provides for the following five sequential steps to be considered in assessing employment status:

1. Does the contract involve an exchange of wage or other remuneration for work?
2. If so, is the agreement one pursuant to which the worker is agreeing to provide their own services, and not those of a third party, to the employer?
3. If so, does the employer exercise sufficient control over the putative employee to render the agreement one that is capable of being an employment agreement?

4. If these three requirements are met, the decision-maker must then determine whether the terms of the contract between employer and worker interpreted in the light of the admissible factual matrix and having regard to the working arrangements between the parties as disclosed by the evidence, are consistent with a contract of employment, or with some other form of contract having regard, in particular, to whether the arrangements point to the putative employee working for themselves or for the putative employer.
5. Finally, it should be determined whether there is anything in the particular legislative regime under consideration that requires the court to adjust or supplement any of the foregoing.

Irish Revenue recently released a Tax & Duty Manual (“TDM”) entitled “Revenue Guidelines for Determining Employment Status for Taxation Purposes”². This sets out its guidance on the new framework to be applied and includes a number of examples and commentary specific to certain industries where individuals are commonly treated as self-employed, e.g., construction, media, etc.

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The Supreme Court considered the assessment of employment status and established the five-step process solely from a tax perspective. While employment law and social security (PRSI) provisions may need to be considered separately, Irish Revenue issued a further update³ to note that it will be working with colleagues in the Department of Social Protection and the Workplace Relations Commission to update the Joint Code of Practice relating to employment status. This would suggest that all parties involved in employment status assessment may look to adopt a similar and consistent approach.

Other Guidance

Irish Revenue also recently updated other TDMs to reflect the new five-step assessment process with examples. These manuals include:

- [Taxation of Couriers](#)
- [Part-Time Lecturers/Teachers/Trainers](#)
- [Agency Workers](#)
- [Individuals Described as ‘Locums’ Engaged in the Fields of Medicine, Health Care and Pharmacy](#)
- [Taxation of Exam Setters, Exam Correctors, Exam Attendants, Invigilators, etc.](#)

While the five-step process should be followed on a case-by-case basis, Revenue notes in some Manuals that its expectation is that certain types of workers should generally be considered employees, e.g., lecturers, exam setters, etc.

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Following the Steps and Intervening Circumstances

In general, where any of the first three steps in the five-step process results in a negative answer, the end-user should not need to consider employment tax risk further and the individual should be treated as self-employed. If the first three steps are all positive, the additional steps need to be considered in order to finalise the analysis. All analysis should be documented. When reviewing the position, businesses need to consider not just the contractual terms but also the actual working relationship and underlying substance of the arrangement.

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Also, where services are provided through a corporate entity by an individual, these are not generally viewed as being provided personally and therefore not within Step 2. There are two main exceptions to this:

- a. Where the services of a statutory director of an Irish incorporated company are provided through a corporate entity, payments made in respect of such services remain an Irish PAYE matter for the payer.
- b. Where an employee of a non-Irish corporate entity performs duties in Ireland (whether a group employee or not), his/her earnings can be secondarily liable to Irish PAYE withholding by the end-user unless the employee is not Irish resident and performs merely incidental duties in Ireland. The level of merely incidental duties that can be performed before a secondary PAYE withholding and/or reporting obligation arises depends upon whether the employee resides in a country with which Ireland has a tax treaty and if the conditions for a tax treaty exemption on employment income is available.

Things to Consider, Next Steps

There can be significant complexity involved in analysing contractor arrangements especially where the relationship has been in place for a number of years or has evolved over time. Specialist advice should be sought especially in non-routine cases.

Irish Revenue is encouraging all businesses that engage individuals on a self-employed basis to familiarise themselves with the tax judgment and review their workforce model. Further they are encouraging businesses to make voluntary payroll settlements in light of that review, where needed.

We are seeing a significant number of Level 1 and Level 2 PAYE compliance interventions issued to businesses in the last few weeks with a particular focus on contractor arrangements, resulting in prompted payroll disclosures for misclassified workers in some cases.

As there are reduced penalties available to businesses in making qualifying unprompted disclosures, we would recommend that all businesses actively review their current contractor profile with particular focus on:

- identifying cases at risk of employment reclassification;
- payments made to a corporate entity for directors' services which have not been captured in the PAYE system, and
- employees of foreign companies (whether group employees or not) working in Ireland for the benefit of the end-user and for whom a secondary PAYE obligation could arise.

Further, as the payroll settlement lies with the end-user in the first instance, it is also an opportunity to consider the manner in which contractors are engaged by the business including relevant contractual terms and applicable tax indemnities.

FOOTNOTES:

- 1 [Part 05-01-30 - Revenue Guidelines for Determining Employment Status for Taxation purposes](#)
- 2 [Part 04-01-1 Code of Practice on Determining Employment Status \(Employed or Self-Employed\)](#).
- 3 As noted in the section "The Code of Practice on Determining Employment Status" of Revenue's webpage "[Guide to Pay As You Earn \(PAYE\)](#)."

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