



Members' guide

Atypical workers and employment status



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Introduction

An increasing number of Prospect members work on atypical contracts, including freelancers, consultants or members working on variable or 'zero-hours' contracts.

Often, members in such atypical working situations do not believe they have any legal rights. However, while their rights will depend on the exact circumstances of the work, all these workers may well have a range of employment protection rights and, in some cases, full employment status.

This guide gives information on the legal tests used to determine the level of employment rights. Atypical workers are not a single group with the same concerns and needs. So in individual cases members may need to seek more detailed advice from Prospect.

1. Employment status

1.1 The first consideration is employment status, as this determines an individual's legal rights at work.

1.2 There are three different types of employment status and identifying which category a person falls under is often difficult.

1.3 Individuals undertaking work will be either:

- Employees – with full statutory employment rights
- Workers – with more limited rights, or
- Self-employed or have no employment status – with no statutory rights, but they may have rights under their contract and will also have health and safety protection.

1.4 The table opposite shows the probable employment status for different categories of atypical worker. Whether people fall in the 'most probably to include' and 'may include' columns will depend on their individual circumstances.

Determining employment status

1.5 There is no single definitive test for determining which category an individual falls under. Courts and tribunals have held that a range of factors should be considered to determine the true status.

1.6 For instance, whether:

- There is a mutual obligation to provide and undertake the work
- There is a requirement for personal service and they are unable to send a substitute
- Tax is deducted at source by the employer
- Working hours are determined by the employer
- Tools or equipment are provided by the employer
- The individual is seen as part of the business
- There is no opportunity to profit financially from the way the work is done
- Disciplinary or grievance procedures are applied
- There is a degree of supervision, and
- The parties understand it to be a contract of employment.

1.7 Case law makes it clear that no single factor determines employment status but that a tribunal must weigh up the range of issues in all the circumstances in order to make a determination.

1.8 Prospect has a questionnaire that members can complete when seeking advice on employment status (**see section 9**). The questionnaire asks how the matters listed above apply in individual circumstances. It is

particularly important to consider the reality of the situation rather than simply how it is labelled by the employer.

Employment status	Rights	Most probably to include	May include
Employee	All statutory employment rights, including unfair dismissal, redundancy and all those below	<ul style="list-style-type: none"> • People in typical forms of employment • Apprentices 	<ul style="list-style-type: none"> • Freelancers • Consultants • Sessional workers • Contractors • Zero-hours contracts • Interns doing work themselves • Agency workers
Worker	Some rights, including: <ul style="list-style-type: none"> • Protection from discrimination • Working time rights • Minimum wage • Right to representation at grievance/disciplinary • ...and those below (See also section 3)	<ul style="list-style-type: none"> • Freelancers • Consultants • Sessional workers • Contractors • Zero-hours contracts • Interns doing work themselves • Agency workers 	<ul style="list-style-type: none"> • Volunteers • Work experience/interns (if undertaking work rather than just shadowing) • Those working through their own limited company
None	<ul style="list-style-type: none"> • Health and safety rights • Contractual protection 	<ul style="list-style-type: none"> • Genuinely self-employed • Interns/work experience not undertaking any work themselves • Volunteers 	

2. Employees

2.1 'Employees' are employed under a contract of employment and will usually be working in a typical employment pattern. For someone to be an employee there will usually be largely positive answers in respect of the range of factors referred to **in paragraph 1.6, and in the questionnaire.**

2.2 Mutuality of obligation – the requirement on the employer to provide work and the employee to undertake it – is key to determining whether someone is an employee. If there is no such obligation in practice, there is unlikely to be a contract of employment. For example, if an individual is not obliged to turn up for work, and the employer has no obligation to provide work for periods of time, they are unlikely to be an employee (although they may still be a worker – **see section 3**).

2.3 The definition of an employee under the employment rights act includes those working under a contract of apprenticeship. Apprentices should therefore have the full range of employment rights.

2.4 Those working part time or on fixed-term contracts will usually be employees. Exactly the same tests will apply as to full-time or permanent colleagues.

Employee rights

2.5 Employees are entitled to the full range of statutory employment rights including:

- Unfair dismissal
- Redundancy
- The right to a written statement of particulars of employment provided no later than their first day of employment
- Not to be discriminated against.

Employees also have all the rights of 'workers' (**see section 3**).

2.6 See Prospect's factcard *Your legal rights at work 2020-21* for a summary of the main employment rights at <http://library.prospect.org.uk/id/2006/00702>.

3. Workers

3.1 For some statutory employment rights there is a broad category of 'worker'. This applies to someone who does not necessarily meet all the usual tests for being an employee, but neither are they genuinely self-employed.

3.2 The definition of a worker under the employment rights act is someone who works under a contract of employment or *"any other contract... whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual."*

3.3 Different definitions are used in the equality act and in respect of whistleblowing legislation, but the broad effect is the same.

3.4 The Employment Rights Act definition includes people who provide work personally under a contract, where they are not genuinely operating as self-employed, even if they are not deemed to have full employee status. It is likely to include most freelancers, consultants, interns, sessional or casual workers, agency workers and those on zero-hours contracts.

3.5 All these people may be working with a greater degree of flexibility than in the traditional employee relationship, but are still working personally for someone else and cannot be said to be in business on their own account.

Workers' rights

3.6 Although workers are not entitled to the full range of employee rights, they are entitled to a number of important statutory rights. However, workers do not have the additional rights to claim unfair dismissal or redundancy and many other statutory rights that only apply to employees.

3.7 The table overleaf summarises the main legal rights and protection applicable to workers.

Legislation	Brief description of right
Working time regulations	Minimum of 5.6 weeks paid holidays a year
	Limits on working hours and entitlement to breaks
Equality Act	Not to be discriminated against on the grounds of: <ul style="list-style-type: none"> ○ age ○ disability ○ gender reassignment ○ marriage/civil partnership ○ pregnancy/maternity ○ race ○ religion/belief ○ sex ○ sexual orientation
National Minimum Wage Act	Entitlement to a minimum rate of pay (as at April 2021 – £8.91 per hour for workers aged 23 and over)
Employment Rights Act	Not to have unlawful deductions from wages
	Protection against detriment for whistleblowing
	Written statement of terms and conditions
	To not be subjected to a detriment for refusing to work, or taking appropriate steps to protect themselves or others, when facing serious and imminent danger
Part-time workers regulations	Equal treatment with comparable full-time workers
Employment Relations Act	Right to be accompanied to grievance and disciplinary meetings
Health and safety at work	To have a healthy and safe working environment

4. Those with no employment status

4.1 The genuinely self-employed are excluded from all statutory employment rights. However they have contractual rights in respect of agreements to undertake a job. Self-employment is where the person is genuinely in business on their own account.

4.2 Some contracts will be drawn up on the basis that someone is working as self-employed, when in fact they are an employee or worker and have employment protection rights. Tribunals and courts will consider the reality of the situation, rather than simply accepting the label that the parties have given to the relationship.

4.3 Many freelancers work under a contract where they provide their services through their own limited company. This may seem like self-employment, but it is always worth checking the details of the working relationship to see whether they may fall into the worker status.

4.4 Prospect offers advice and services to self-employed members. Particularly we can advise on your legal rights if someone owes you money or you need to pursue a claim to court.

See our dedicated web pages at:

- <https://prospect.org.uk/freelancers-self-employed>
- <https://bectu.org.uk/article/can-you-help-me-with-monies-owed>

5. Types of atypical worker

5.1 Distinguishing whether a particular individual has employment rights can be difficult and often there will be grey areas. There is no absolute guidance to be followed and each case needs to be considered on its merits.

Freelancers and consultants

5.2 Where members are working on a freelance or consultancy basis they are likely to be 'workers' at the very least and therefore have the statutory rights detailed in **the table in section 3**. Depending on the nature of their employment relationship they may also be 'employees' with the full range of statutory rights.

5.3 Freelancers, consultants or sessional workers usually work under contractual terms, with set obligations as to the work to be completed and specific payment terms. Typically they are seen as part of the organisation (and in some cases are indistinguishable from fully employed colleagues). They may have some flexibility about how or when they undertake the work, but often there is little else to distinguish them from employees.

Interns and work experience

5.4 The terms 'intern' and 'work experience' are often used interchangeably, but generally an internship is likely to be a more structured arrangement.

5.5 The general position is that where the intern is doing elements of the work themselves they will be a worker. In some cases, depending on the detailed nature of the working arrangements, they may be an employee. The important distinction is whether or not the intern is actually performing tasks in the workplace. In the majority of internships, other than very short placements, this will be the case.

Apprentices

5.6 An apprenticeship is a form of workplace-based training, usually in a skilled trade. It is for a fixed period or until a qualification is achieved. Those working on a formal apprenticeship should be treated the same as those on a contract of employment and have full employment protection rights in the same way as employees.

5.7 Apprentices must be paid at least the minimum wage and in unionised workplaces will often be covered by collective agreements providing for much higher rates of pay.

Volunteers

5.8 Some volunteers may be 'workers' as described above. But where someone genuinely volunteers on a casual basis with no obligation to commit to fixed working patterns and no expectation of payment they will not be employees or workers and will not be covered by any statutory employment rights.

Zero-hours contracts and casual working

5.9 Workers employed on 'zero-hours' contracts will not have a set minimum number of hours to work, but can be called in as and when required. The same tests to establish employment status will need to be applied, but usually people working on zero-hours or casual contracts are workers and may be employees.

Agency workers

5.10 Many of the above points apply in respect of agency workers, though there are specific rights to equal treatment for agency workers.

6. Health and safety

Protection for all

6.1 All workers and employees are entitled to work in an environment where the risks to their health and safety are properly controlled.

6.2 The genuinely self-employed also have duties to assess the risks to their own health and safety at work and are therefore responsible for providing their own first-aid arrangements, training, protective equipment and health checks, and for organising their own working time.

Rights and duties

6.3 Workers and employees have the right to:

- Work in places where all the risks to their health and safety are properly controlled
- Stop working and leave the area if they think they are in danger
- Inform their employer about health and safety concerns.

6.4 All workers, employees, and the self-employed have the right to claim in respect of any personal injury or illness arising through the negligence of an employer or third party. Seek advice through Prospect's legal services scheme – <https://library.prospect.org.uk/download/2015/01155>

7. Equality

Equal rights at work

7.1 The provisions of the equality act apply to all employees and workers, including all apprentices, most contract and agency workers.

7.2 The act prohibits discrimination because of a number of 'protected characteristics' – age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, sexual orientation.

7.3 Types of discrimination outlawed under the equality act are called 'prohibited conduct' – direct discrimination, indirect discrimination, harassment, victimisation, discrimination arising in consequence of disability, failure to make a reasonable adjustment. There is more detail on these definitions in Prospect's **Members' Guide to equality at work** at <http://library.prospect.org.uk/id/2008/00092>.

7.4 Protection from discrimination applies across the employment process: from the recruitment procedures and terms upon which employment is offered, through to dismissal or leaving employment and even after employment has been terminated.

Vulnerability to discrimination

7.5 Many groups described as atypical workers in this guide are vulnerable to unfair or unequal treatment from the employer. Such groups are more likely to be disproportionately represented by women, disabled people, people from black or minority ethnic backgrounds, younger or older workers.

Migrant workers

7.6 Migrant workers are more likely than other groups to be used by subcontractors or as casual or agency workers. There has been evidence of extreme abuse of migrant workers, particularly in low-paid sectors. But migrant workers are vulnerable to unfair and discriminatory treatment in any sector, ranging from differences in pay and conditions to denial of sick pay and leave entitlements. If you are a migrant worker and have concerns about the way you are being treated at work you should contact your local Prospect rep.

8. Pensions

State pension

8.1 Entitlement to state pension depends on employment status, among other factors. Being classed as employed or self-employed for National Insurance contributions (NICs) purposes has a significant impact on state pension entitlement, though it does not automatically determine your employment status. There may be cases of employees paying self-employed NICs and vice versa. You should contact HMRC if you are in any doubt about the type of NICs you should be paying.

Occupational pensions

8.2 All employers must now provide a workplace pension scheme and enrol eligible workers into it, this is called 'automatic enrolment'. Your employer must automatically enrol you into a pension scheme and make contributions to your pension if all of the following apply:

- You are classed as a 'worker'
- You are aged between 22 and state pension age
- You earn at least £10,000 per year
- You usually ('ordinarily') work in the UK.

For more information on pensions, see our web pages at <https://prospect.org.uk/topic/pensions-and-retirement>

9. Employee, worker or self-employed?

Prospect has a questionnaire to help us determine a member's employment status. A shortened version is below, but if you need advice on this please contact your Prospect representative.

Complete these questions to help us consider your employment status. Give as much detail as you can and continue the explanations on a separate sheet if necessary.

Please send a copy of your contract or any other documents concerning your employment, such as a letter of appointment.

Situation	Yes	No
Are you under an obligation to work each day that you are expected or on the rota?		
Detail/Examples		
Can you decide not to work on some days (other than through booking or taking annual/sick leave etc)?		
Detail/Examples		
Do you think the employer/company is under an obligation to offer you work each day? Could they simply tell you there is no work one week or for a few days in the week? If so, please provide details.		
Detail/Examples		

Situation	Yes	No
Is your work supervised? For example, does someone tell you what to do, or check your work? What would happen if you did something wrong – who would tell you about it?		
Detail/Examples		
Do you think colleagues or customers at the organisation/company see you as part of the organisation? Or do they think you are different to the other workers there?		
Detail/Examples		
Are you paid a fixed rate or salary? Are you paid by an agency or the organisation you are working at? Is it a set hourly rate?		
Detail/Examples		
Is tax and National Insurance deducted at source from your pay?		
Detail/Examples		
Are any other deductions made at source?		
Detail/Examples		

Situation	Yes	No
Are you paid travelling expenses?		
Detail/Examples		
Are there any other out-of-pocket expenses you would claim? If so, who pays them?		
Detail/Examples		
Are you entitled to paid annual leave? If so, how do you book leave, and who has to approve it?		
Detail/Examples		
Are you entitled to paid sick leave? If so, how much is it?		
Detail/Examples		
Are you able to join the company pension scheme?		
Detail/Examples		

Situation	Yes	No
Is there a disciplinary code that applies to you? Have you been told about it? Have you ever received a warning, if so who from?		
Detail/Examples		
Are you able to work for other agencies or companies during your work with the current organisation?		
Detail/Examples		
Is equipment needed for the job? If so, who provides it?		
Detail/Examples		
Could you send someone else in to do your job for you, if you were not able to attend yourself?		
Detail/Examples		
Could you employ someone to help you get your job done?		
Detail/Examples		

Situation	Yes	No
Do you have any degree of financial risk in how you get the work done?		
Detail/Examples		
Do you have responsibility for investment and management?		
Detail/Examples		
Have you been told your employment status? For example, have you been told you are self-employed, a contractor or an employee? Has anything about this been put to you either in writing or verbally?		
Detail/Example		



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PRO-21-02/APR21/PDF

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