



EMPLOYMENT STATUS POLICY

JANUARY 2016

Review - Jan 2019 (or earlier if there are statutory changes)

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This policy mirrors that of the Rochdale MB Council agreed via Service Consultative Group (SCG) and Teacher Association representatives on 10th December 2012 (SCG) and 12th December 2012 (Teacher Association).

1.0 INTRODUCTION

Deciding someone's employment status can be complicated and there are different factors to consider when deciding on an individual's status. There are 3 types of working individuals:

- An Employee
- A Worker (someone who works on a casual basis or Agency Temp)
- Someone who is Self Employed (a freelancer or contractor)

There is a need to establish someone's status as:

- Employees - who have more employment rights than Workers or those who are Self Employed. There is a difference in national insurance contributions, tax and benefits between Employees/Workers and those who are Self Employed

For an individual to be an Employee there must be mutuality of obligation between the parties. The employer must be under obligation to provide work and the Employee to accept that work and perform it personally. If an individual is free to simply send someone else to perform the work if they choose, they will more than likely be Self Employed.

It is important to determine the correct employment status of each person, and then apply PAYE and National Insurance (NIC) correctly; otherwise HM Revenue & Customs will impose interest fines and penalties as well as charge for any underpaid PAYE and NIC.

Employment status is not a matter of choice, you cannot simply decide to treat working arrangements as either self-employment or worker. It is the circumstances of the working arrangement that determine how it is treated. In most cases, deciding someone's employment status will be straight forward but sometimes it will be more difficult.

2.0 EMPLOYMENT STATUS

Employee

There is no single test to determine whether a person is an Employee. The following should be considered in making the determination:

- The Employer provides the work, any tools (apart from any small tools that employees customarily provide) and equipment for it and they decide how and when the Employee does the work (this is known as the What, Where, When and How test)
- The Employee has to do the work themselves (they cannot send a substitute)
- The Employer and Employee have mutuality of obligation and the Employee must undertake their obligation on a personal basis
- The Employer usually provides a written contract (although a verbal contract is a contract in law)
- The Employee will undertake the work personally and could be moved to different tasks directed by the Employer
- The Employee usually has a set number of hours to work and receives a regular salary, even when no work is available, and receives benefits such as paid leave or pension as part of the contract
- The Employer will provide regular payments to the Employee based on the hours worked through the Pay As You Earn (PAYE) system so tax and national insurance is deducted

- The employee does not risk his or her own money and there is no possibility of a financial loss
- Anyone regularly working for the same Employer, under daily or weekly contracts points towards employment

It is also worth noting that someone who works for a limited company or other separate legal entity could still be classed as an Employee if most of the above apply.

Worker

The term Worker is much broader. Workers are usually:

- Agency Workers (Temps). The Agency finds the work and pays the Worker's wages. The Agency is paid by the Academy for the service provided by the Worker, including their Agency fees
- Short term casual Workers. These staff may be hired directly by the Employer but their services are irregular or flexible without any guarantees of employment by the Employer or requirement to work from the Worker
- Freelancers and Contractors. There are times when those who are Self Employed for tax purposes may be classified as Workers for employment rights purposes

Self Employed

A Self Employed person is required to register themselves with HM Revenues & Customs (HMRC) as soon as their self-employment commences, they are responsible for paying their own tax and national insurance contributions on any income they earn and complete self-assessment tax returns. In addition, the following are usually indicators of Self Employment, a Self Employed person:

- runs their own business and take responsibility for its success or failure and can make a profit or loss
- has several customers at the same time (therefore likely to work in more than one location)
- decides how, when and where they do their work
- is free to hire other people who answer to him or her to do the work or assist at their expense
- is paid an agreed fixed price irrespective of how long the job takes to finish
- provides the main items of equipment to do the work required
- uses their own money to buy business assets, pay for running costs, etc
- is responsible for putting right any unsatisfactory work, at their own expense and in their own time
- there was a bidding process for the job/work

If the activity being undertaken meets one, or more, of the following criteria, their status should **not** be considered as Self Employed.

If the activity is:

- undertaken during the academy day as part of the academy's timetabled teaching week,
- undertaken to meet curriculum requirements (including creative curriculum),
- contributing to improving the progress of pupils at the academy

The person should be classed as an Employee and arrangements made for them to be paid, with the appropriate deductions, through the Academy Trusts payroll.

3.0 EMPLOYMENT STATUS INDICATOR (ESI) TOOL

HMRC provides an online tool to assist in determining employment status and can be used by Employers in addition to Employees, Workers and those Self Employed. [Go to the Employment Status Indicator tool](https://esi2calculator.hmrc.gov.uk/esi/app/index.html) (https://esi2calculator.hmrc.gov.uk/esi/app/index.html).

The Employment Status Indicator (ESI) is an online interactive tool that asks a series of questions about the working relationship between the Employer and the Worker. It is the quickest way of getting HMRC's view on whether a Worker is employed or Self Employed. If you consider that someone is Self Employed you will need to complete the HMRC Employment Status Indicator Tool to support that conclusion. HMRC will usually (but not always) accept the tool's outcome as binding, as long as the answers accurately reflect the terms and conditions under which the Worker provides their services. As evidence to support the decision to treat someone as Self Employed, you must also retain a printout of:

- the ESI result screen
- the Enquiry Details screen showing your replies to the questions asked

In addition to the HMRC considerations about someone's employment status, there are significant HR and health and safety implications. Detailed at appendix 1 are a number scenarios and the ESI tool's outcome on their employment status.

4.0 HUMAN RESOURCE CONSIDERATIONS

Each type of employment status has different legal rights, so it is important to know which category the person falls in to. The employment status determines the person's rights at work. Various factors will determine the employment status; some of the tests referred to earlier in this document should assist this assessment.

Ultimately, only a court or Employment Tribunal can make a final decision on someone's employment status. They will base their decision on a number of different factors, which are in line with legal tests developed through case law. An Employment Tribunal will look at how an employment relationship works in practice to determine the employment status.

Where someone is self-employed for tax purposes, they will be self-employed in relation to their employment rights. However, if they are self-employed for tax purposes it will not prevent an Employment Tribunal from finding that they are an 'Employee' or a 'Worker' for employment law purposes. HMRC decisions are not binding on Employment Tribunals.

Employees

All employees are Workers, but an Employee has a wider range of employment rights and responsibilities from the Employer. Someone who is an Employee is entitled to the following:

- An employment contract (also known as a contract of service)
- Contractual holiday rights
- Right to not be unfairly or wrongfully dismissed
- Access to an occupational pension scheme
- Statutory Sick Pay
- Minimum notice periods if the employment ends (e.g. in a redundancy situation)
- Statutory Maternity, Paternity and Adoption leave and Pay
- Request flexible working

- Statutory Redundancy Pay
- Whistle blowing protection
- Receive the National Minimum Wage
- Protection against unlawful deduction from wages
- Minimum length of rest breaks

Some of these rights require a minimum length of continuous service before qualification.

Any employee who works in an academy and is paid through the academy payroll will be classed as undertaking regulated activity and therefore will require an enhanced DBS with a barred list check.

An Employee should have a full induction upon their appointment to the role; this should be undertaken as a priority with safeguarding being covered on the first day of employment. If, during the course of employment a complaint or allegation is made against a member of staff, the Headteacher/Chair of Governors should deal with the matter in accordance with the Trust's Procedure for Managing Allegations in relation to Child Protection Matters.

Workers

'Workers' are defined more widely than Employees and are different from the genuinely selfemployed. Someone who is a Worker is entitled to the following:

- Receive the National Minimum Wage
- Protection against unlawful deduction from wages
- A minimum period of paid holiday
- Minimum length of rest breaks
- Not work more than 48 hours on average per week or to opt out of this right if you choose
- Protection against unlawful discrimination (including less favourable treatment on the grounds of part-time status)
- Protection for 'whistle blowing'
- Statutory Maternity, Paternity or Adoption Pay
- Statutory Sick Pay

Some of these rights require certain criteria to be achieved before qualification.

A Worker in the academy undertaking an activity which is classed as regulated activity will require an enhanced DBS check with a barred list check. The employing organisation will be required to provide the academy with a compliance letter confirming:

- 1) that their recruitment and selection processes are in accordance with the Safeguarding Children and Safer Recruitment in Education statutory guidance, and
- 2) that their Workers are in possession of the relevant checks. It is the academy's responsibility to ensure receipt of the compliance letter, to be held with the academy's single central record, for any organisations they use to provide staff.

Where the academy has appointed their own short term casual Workers, it is their responsibility to ensure that they have undertaken all the required recruitment and selection processes in accordance with the Safeguarding Children and Safer Recruitment in Education statutory guidance.

A Worker should have an induction upon the commencement of their work in the academy. Their induction may differ from that of an Employee, dependant on the type of role and duration of work available, but should still cover the Trust's safeguarding arrangements and their safeguarding responsibilities whilst in the academy. If, during the course of the work, a complaint or allegation is made against a Worker, the Headteacher/Chair of Governors should liaise with the service provider (where appropriate) and notify the Trust's Head of HR who will make an initial determination on the next stages and provide advice and support where appropriate.

Self Employed

There is no employment relationship with a genuinely Self Employed person and therefore there are limited HR implications in relation to self-employed people working in the academy.

A Self Employed person being paid through the academy's payroll will be classed as undertaking regulated activity and therefore require an enhanced DBS with a barred list check.

A Self Employed person receiving payment through invoices undertaking an activity within a school/academy, which is classed as regulated activity, will require an enhanced DBS check with a barred list check.

A Self Employed person receiving payment through invoices undertaking an activity within a school/academy, which is not classed as regulated activity, will require an enhanced DBS check but this will be without a barred list check.

Portability of DBS's is not in existence and therefore anyone Self Employed working in any of the academies will require a Trust DBS check. This can be undertaken by the Trust. DBS, please contact the Trust's Head of HR in the first instance to discuss further. There will be a charge applied for providing this service. Once undertaken, a clear DBS will enable them to work within all Wardle Trust academies.

Further information on the scope of regulated activity is included at appendix 2.

A Self Employed person should have an induction upon the commencement of their work in the academy. Their induction may differ to that of an Employee, dependant on the role they are undertaking, this should still cover the Wardle Academy Trust's safeguarding arrangements and their safeguarding responsibilities whilst in the academy. If, during the course of the work, a complaint or allegation is made against a Self Employed person, the Headteacher/Chair of Governors should notify the Trust's Head of HR who will make an initial determination on the next stages and provide support where appropriate, the Trust's Head of HR will also liaise with the LAs HR Services, if deemed necessary .

Irrespective of the employment status of Worker, the academy has a responsibility to adequately risk assess their role and the activity they are undertaking on the school/academy premises.

5.0 HEALTH AND SAFETY

All Employees, Workers and Self Employed Persons within the academy should be provided with an induction. An Employee should receive a full induction, incorporating health and safety. Self Employed Persons and Workers within a school/academy environment should be made aware of the Trust's/Academy policies and procedures in relation to health and safety, including evacuation procedures, no smoking policy and restricted areas etc. Academies should ensure that people

unaccompanied on site, other than staff, are competent Workers who are monitored whilst on site to ensure they are not causing any health and safety hazards whilst working in the academy.

6.0 INSURANCE

If staff are contracted to work for academies within the Wardle Academy Trust then the Trust will consider them to be an employee during this time. The definition of employee includes any person under a contract of service with Wardle Academy Trust. Employers Liability & Public Liability insurance is in place for employees of the Trust. It is highly unusual that a claim would be made against a specific employee and if that was the case, the Trust, having considered that employee as an employee during their time working for them, would indemnify the said employee and the claim would be on the Wardle Academy Trust policy.

Where contractors have their own Public Liability insurance this would refer to labour contractors where in effect a site being worked upon becomes a site for which the contractors are responsible and therefore a claim would be made against the contractor before being made against Wardle Academy Trust.

In terms of checks that should be made, the usual qualifications and DBS checks are imperative. A Self Employed person could be asked if they have their own public liability/professional liability cover and where this is the case, it is the academy's responsibility to check insurance policies are relevant and up to date. Evidence should be obtained and retained by the academy.

7.0 ACADEMY IMPLICATIONS/ACTIONS

Academies should undertake a review of their use of Workers and those utilised on a Self Employed basis to determine their status. The use of the various tests, the online ESI Tool referred to earlier in this document and the frequently asked questions at appendix 3 could be used to assist classification of the employment status.

If the Worker is employed by you

If the Worker is a Trust Employee, then you must use the PAYE system to deduct and pay HMRC any tax and national insurance contributions that's due on their earnings.

Where a determination is made that someone is an Employee, they should be contracted appropriately for their services in accordance with the relevant terms, conditions and contractual entitlements for the position.

If the Worker is employed by a third party

If the Worker is employed by a third party i.e. Agency, then the Agency is responsible for the PAYE system, deductions and to pay HMRC any tax and national insurance contributions due on the earnings. Please note, there may be procurement implications and you should refer in the first instance to your contract procedure rules.

If the person is self-employed

If the person is self-employed, you don't need to operate PAYE on their earnings. Self-employed individuals are responsible for calculating and paying their own tax and national insurance contributions on any payments you make to them. You may need to pay VAT on the payment to the self-employed person. If the person is self-employed then they are required to provide a

written statement confirming that, where appropriate, they will be responsible for the relevant tax/NI contributions. A sample pro-forma is available at appendix 4 to this document.

Where a determination is made that someone is a Worker or Self Employed, decisions should be clearly recorded with a record of any information used to make the decision about someone's employment status. This information can, and will, be used by HMRC as part of their compliance activity check. HMRC will check a person's employment has been correctly classified and, where they find incorrect classification, they will rectify any past errors and ensure correct classification for the future.

Where an academy has incorrectly classified a person as Self-Employed as opposed to as an Employee, any costs including penalties fines and interest associated with re-imburement to HMRC will charged to the academy, not the Trust.

It is possible for Self Employed people to be paid through the payroll system as Consultants. Where this is the case, tax and national insurance deductions will be made from their payment. The Trust's Payroll Team will request basic personal details for the person to be set up on the payroll system i.e. personal details, bank details etc.

8.0 FURTHER INFORMATION

Wardle Academy Trust

- HR/Finance/Payroll and Procurement Service – 01706 373911

The following Appendices have been provided by Rochdale MB Council and therefore may need some slight adjustments for the context of the Academy Trust.

APPENDIX 1

SCENARIO 1

- A drama specialist attends a primary school/academy every Tuesday afternoon and undertakes drama activities throughout school/academy
- This time is allocated every week and is part of the schools/academy's timetabled teaching week and is in accordance with the National Curriculum
- The drama specialist cannot send another person to undertake the drama in his/her absence
- At the beginning of the academic year the Headteacher agrees the drama activities with the drama specialist for every Tuesday afternoon throughout the academic year and provides him/her with a brief of what is required to be covered throughout the year and the timetable of year groups
- The drama specialist then decides how to deliver the work
- The school/academy provides the equipment and materials
- The rate for the afternoons work is set as £125.00
- This is a set amount paid to the drama specialist, for labour only, and is paid to them on a 4 weekly basis
- The drama specialist receives the payment irrespective of the standard of work
- The drama specialist can only undertake the activities in the school/academy and cannot undertake the work in another location

The status of this person is **EMPLOYED**

SCENARIO 2

- An Out of School Club Manager runs an out of school club before and after school every day during term time
- The times of the club are set by the school/academy, the Manager provides the service during the hours required by the school/academy
- The Manager can send another person to undertake the role in their absence
- The Manager has to pay for the replacement undertaking the role in their absence
- The Manager decides on the activities undertaken during the club

The status of this person is **SELF-EMPLOYED**

SCENARIO 3

- An IT Technician attends a Primary School/Academy all day, every Tuesday, throughout the academic year agreed with the Headteacher, undertaking an IT Technician role
- The Technician is paid a fixed price for the day's work of £120, this payment is regular
- When in school the Headteacher determines the work required on the day, and moves them from task to task, as required, depending on the work required. The Technician is also required to troubleshoot problems when on site
- The IT Technician cannot send another person to undertake the duties in his/her absence
- The school/academy meets the cost of all the materials and equipment, the IT Technician provides labour only
- The IT Technician may receive a fixed payment irrespective of the standard of work
- The IT Technician can only undertake the activities in the school/academy and cannot undertake the work in another location
- The IT Technician may be registered for VAT, may operate a business bank account and may be required to possess public liability insurance or professional indemnity insurance at their own expense
- The status of this person is **EMPLOYED**

A NEW DEFINITION OF REGULATED ACTIVITY

Regulated Activity in relation to Children: scope

Regulated activity is work that a barred person must not do. This note provides information on the scope of Regulated Activity in relation to children, defined in the Safeguarding Vulnerable Groups (SVG) Act 2006 and the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007; both as amended (in particular by, respectively, section 64 and Schedule 7, Protection of Freedoms Act 2012). This note is about the law in England and Wales, and in Northern Ireland.

Summary

The new definition of regulated activity (i.e. work that a barred person must not do) in relation to children comprises, in summary:

- (i) unsupervised activities: teach, train, instruct, care for or supervise children, or provide advice/ guidance on well-being, or drive a vehicle only for children;
- (ii) work for a limited range of establishments ('specified places'), with opportunity for contact: e.g. academies, children's homes, childcare premises. Not work by supervised volunteers;

Work under (i) or (ii) is regulated activity only if done regularly: "regularly" is defined in detail on the following pages under items (a) to (f).

- (a) Teaching, training or instruction of children, carried out by the same person frequently (once a week or more often), or on 4 or more days in a 30-day period, or overnight. Day to day management or supervision on a regular basis of a person providing this activity which would be regulated if unsupervised
- (b) Care or supervision of children if carried out by the same person frequently (once a week or more often), or on 4 or more days in a 30-day period or overnight. Day to day management or supervision on a regular basis of a person providing this activity which would be regulated if unsupervised.
- (c) Advice or guidance provided wholly or mainly for children relating to their physical, emotional or educational well-being if carried out by the same person frequently (once a week or more often), or on 4 or more days in a 30-day period or overnight.
- (d) Former category (d), treatment or therapy, is now replaced by "health care" provisions.
- (e) Moderating a public electronic interactive communication service likely to be used wholly or mainly by children, carried out by the same person frequently (once a week or more often), or on 4 or more days in a 30-day period.
- (f) Driving a vehicle being used only for conveying children and carers or supervisors under arrangements as prescribed*, carried out by the same person frequently (once a week or more often), or on 4 or more days in a 30-day period.

An explanation of how the two-tier system would work in practice

Those who will be working in Regulated Activity will be eligible for enhanced checked with a barred list check as those posts will be the ones offering unsupervised regular close contact with vulnerable groups including children. Those working in an activity which is being removed from Regulated Activity, for example in a supervised capacity with children, will still be able to obtain enhanced checks, but without a barred list check.

Regulated Activity in relation to cleaners, caretakers etc.

All staff on schools/academies payrolls will remain in Regulated Activity.

FREQUENTLY ASKED QUESTIONS ABOUT EMPLOYMENT STATUS EMPLOYED OR SELF-EMPLOYED – A SCHOOLS/ACADEMIES GUIDE

It is easier for me to take on contractor or workers as self-employed. If we agree, why can't we choose?

Engaging contractors or workers on a self-employed basis can have a number of attractive features for both parties, but whether someone is your employee or is self-employed depends on the particular working arrangements and not upon the preferences of the people involved. The tax rules for self-employed people are designed to reflect the financial risks taken by people genuinely in business on their own account and should only be applied to those people.

If there is no written contract between me and the person I take on, does that mean he or she is self-employed?

No. Contractors or workers sometimes claim that they are self-employed because they do not have a contract with the person for whom they work. What this usually means is that they do not have a written contract, but if they have agreed to work in return for payment, a contract must exist – either a contract of service (employment) or a contract for services (self-employment). It can be written, spoken, implied or a combination of all three. The contract is an important factor in considering employment status and is particularly valuable to the worker because it determines their rights and obligations.

If workers I engage have subcontractor's tax certificates (CIS6) or registration cards (CIS4), does that mean they are self-employed?

Not necessarily. Just because they hold a certificate or card does not mean that every job they take on is as a self-employed person. It is the actual terms, conditions and facts that apply to each job that determine whether they will be employed or self-employed in that particular case. Certificates and cards show the way that a school/academy should treat payments made to the holder if the terms of the engagement are a contract for services (self-employment). If the relationship is a contract of service (employment), then the school/academy must deduct PAYE and NICs in all circumstances, even if the worker has a certificate or card.

If the terms of the engagement change part way through the contract, what should I do?

If the change results in a contractor or worker becoming employed, you should tell us and begin to deduct tax and NICs from his or her earnings. If you fail to do so, you could be held liable for the deductions which should have been made, and you may also be liable for interest and a penalty. If the change results in a worker becoming self-employed, he or she will be responsible for their own tax and NICs.

An employee who took his apprenticeship with us now wants to do the same work for us but on a self-employed basis. Can we agree to this?

It is not the worker's choice. The terms, conditions and facts under which he or she is engaged should determine the employment status of the worker.

I took on a worker on a casual basis whom I genuinely regarded as self-employed, but I have subsequently made this a permanent arrangement on terms and conditions that suggest they are an employee. What should I do?

You must start to operate PAYE when you next make a payment. If the worker has been paid for past periods of engagements on terms and conditions amounting to employment you could be liable for the PAYE tax and NICs you should have deducted, so it is important that you make regular reviews of the status of your individual workers to avoid this happening.

Are there categories of worker where specific rules apply?

The same tests apply to all workers. It is important that you consider the status of your entire workforce, including managers, estimators, site supervisors and professional staff, as well as manual workers. However, if a worker is supplied by an agency and it is not solely on an introductory basis, special rules might apply with the result that the agency has an obligation to operate PAYE and account for NICs.

Does working for one employer for a long period point towards employment?

This is certainly a factor to consider in the overall picture (just as a series of short-term engagements with many different contractors may point towards self-employment), but it is only one factor. It is important to pay close attention to the status of long-term workers because of the PAYE and NICs liability which may accumulate if you do not operate PAYE when you should.

What happens if an employment tribunal finds that a subcontractor, who had been treated as self-employed, was in fact an employee?

Employment tribunal decisions are not binding on HM Revenue & Customs, but they usually take into account similar factors. So the decision is likely to be the same when considering an employee for tax purposes. If this was to occur, unpaid tax and NICs would be collected.

**TAXATION AND NATIONAL INSURANCE CONTRIBUTIONS
DECLARATION FORM – SELF EMPLOYED INDIVIDUALS**

Part 1) Declaration by individual providing service to the academy

I declare that I am self-employed and will invoice the Academy, as per contract, and that I am responsible for Taxation and National Insurance contributions in connection with the following work:

| Description of work | |
|---------------------|--|
| | |

| Duration of work | |
|------------------|--|
| Date from | |
| Date to | |

| Details of costs | |
|------------------|--|
| | |

| | |
|--------------------------------|--|
| Company Name | |
| Name | |
| Signature of Individual | |
| Date | |

Part 2) Declaration on behalf of the academy

I declare that the person shown in part 1 of this form has confirmed that they are self-employed and has provided written assurance that they will be responsible to the Inland Revenue for any taxation and national insurance contributions with the work detailed above:

| | |
|--------------------------------|--|
| Name | |
| Signature of Individual | |
| Job Title | |
| Date | |

