



The small print for BIG IDEAS

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Client Reference Number: Clio [Confidential]

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By email to: [Confidential]

Dear [Confidential],

Re: Your appointment with qLegal on 24 October 2023.

How we work

Thank you for attending your appointment with us and for using the services of qLegal at Queen Mary University of London. Although we cannot provide you with representation in any proceedings and do not hold ourselves out to be a firm of solicitors or patent attorneys, our advice is free, and we aim to provide the same high standard of service expected in the practice of law. Please note that the legal advice provided is in relation to the Laws of England and Wales only. If you require advice outside of this jurisdiction, please contact us.

Summary of the facts and documents you have provided:

Summary of background facts

- [Confidential] (the “**Business**”) is a design and manufacturing business in [Confidential] run as a partnership between [Confidential] and [Confidential]. The Business produces workwear and sells it via three streams – direct to customer, direct to industry and wholesale to retailers.
- The Business produces garments in-house, engaging individuals as seamstresses on a freelance basis.

- The individuals engaged by the Business are required to provide the services themselves and are not permitted to provide a suitably qualified and experienced substitute to provide services in their place.
- The individuals invoice the Business for payment based on the number of hours they have worked.
- The Business is currently working on commercially sensitive designs for a third-party fashion house and has signed a non-disclosure agreement (the “**NDA**”) with the third-party brand, agreeing to keep the brand’s design and logos confidential.
- The Business currently has three seamstresses working on a part time basis. One of the seamstresses may also be appointed to the role of a supervisor in the future. The Business has also collaborated with the [Confidential] and engaged a student as an intern working with the Business part time. The Business has agreed to certain terms and conditions with the [Confidential] in respect of this student’s engagement.
- The nature of relationship between the seamstresses and the Business is largely informal due to the lack of written contracts in place. The seamstresses are instructed on their responsibilities and specifications both in person and in writing, mostly via WhatsApp. [Confidential] assumes overall oversight of the work performed and exercises managerial control over the studio's operations. The seamstresses work from the studio two to three days a week from 9:30 a.m. to 6:00 p.m. However, if they wish to stay longer to complete work or in times of increased workload, they are paid their hourly rate for this work. The Business does not intend to extend employee/worker benefits to the seamstresses over the next year or so.

The Business’ planned expansion:

- The partners are considering incorporating the Business into a private limited company.
- The Business will consider engaging additional self-employed independent contractors to accommodate increasing workloads.
- Once the Business is incorporated into a private limited company, consideration will be given to engaging the seamstresses as employees and enrolling in the ‘Pay as You Earn’ scheme.
- In the future, the intention is for the appointed supervisor to assume responsibility for office management and contribute to the Business’ expansion endeavours. There is also the prospect of transitioning this into a full-time role and engaging the supervisor as an employee in the foreseeable future.

We have been provided with the following documents:

- A copy of an invoice from a machine assistant addressed to the Business dated 31 August 2023; and
- A copy of the email collaborating with [Confidential].

Scope of our advice

Issue 1: What are the different ways to engage individuals?

Detail the differences between the three types of employment status: employee, worker, and self-employed independent contractor, and the differing obligations and rights afforded to each.

Issue 2: How should the Business engage individuals?

Assess the basis that the Business has engaged the seamstresses and consider whether the seamstresses should be engaged as employees, workers or self-employed independent contractors moving forward.

Issue 3: What are the key clauses to be included in a contract?

Establish the types of clauses that should ideally be included in the written contracts for the seamstresses. Consider whether the intern has sufficient confidentiality obligations and ensure individuals engaged by the Business are working in compliance with any third-party NDAs.

Summary of advice

When determining employment status, individuals can be sorted into three categories: employees, workers and self-employed independent contractors. The terms 'freelancers' and 'self-employed independent contractors' are often used interchangeably. The Business can opt to engage individuals as employees through a contract of employment or as self-employed independent contractors through a contract for services. These contracts should reflect the reality of the working arrangement; for example, it would be inappropriate to engage an individual as a self-employed contractor when, for all intents and purposes, they are carrying out work in a manner that is more consistent with employee status. As we will detail below, workers are engaged on very similar contracts to employees. Based on the Business' current commercial needs, intentions and future goals, engaging the seamstresses under contract for services as self-employed independent contractors is likely the most appropriate option for the Business at this time. When contracting

with individuals on this basis, the key clauses to incorporate into their agreements are: (i) intellectual property, (ii) confidentiality, (iii) non-competes, and (iv) conflicts of interest.

Explanation

What are the different ways to engage an individual?

In the UK, businesses can structure their relationship with individuals working with them by way of a: (1) contract of employment; or (2) contract for services. It is important to note that the courts will not only consider the terms of the contract but also consider the reality of the relationship when determining status.

To classify an individual as an employee, there must be a contract in place. This contract can be written or oral. An employee-employer relationship is made up of several key elements:

- The employee has an obligation to perform the work personally;
- There must be mutual obligations between the employer and the employee, meaning both parties have commitments and responsibilities; and
- The employer must exercise a certain level of control over the employee's work.

The reality of the working relationship is also important in determining employment status. Some key factors which suggest an employee-employer relationship are:

- The individual is told how the work they are required to do must be completed (i.e., the individual is subject to a high degree of control over their working practices);
- The business must offer work and the individual is required to accept said work;
- The individual is being paid a fixed wage or salary;
- The individual has undergone an induction process or been provided with training; and
- The individual is being paid when they are absent due to sickness or holiday.

The above is by no means an exhaustive list and there are a variety of factors that are considered when determining whether an individual holds the status of employee. Equally, just because some of these factors are present in the way an individual carries out their work does not necessarily mean that the individual is an employee, as these factors are considered in the round.

A worker is a broader term that encompasses various types of individuals engaged to perform services. Workers can be engaged under a contract of employment (like an employee and thus an employee is also classified as a worker), or another type of contract where an individual agrees to perform work for another party. Workers are not considered full blown employees but are nevertheless not fully independent in carrying out their work. Workers must also have a contract in place, whether written or oral. The essential elements are:

- The individual must have an obligation to perform the work personally; and
- The other party to the contract is not considered a client or customer.

In contrast to the contract of employment, the contract for services is a contract that is used for engaging a genuinely self-employed individual, such as a consultant, to carry out services for another party where the relationship between the parties is not that of employer and employee or worker.

Each employment status provides varying benefits. Some of the key differences between the three statuses are set out below:

Description	Employee	Worker	Self-employed Independent Contractor
Legal rights	Some examples of what an employee is entitled to: (i) protection against discrimination related certain protected characteristics, (ii) national minimum wage, (iii) holiday pay, (iv) statutory sick pay, (v) statutory maternity, paternity, adoption, parental, shared parental and bereavement leave and pay, (vi) auto-enrollment into a compliant pension scheme, (vii) duties of health and safety, (viii) protection under the Transfer of Undertakings (protection of Employment) Regulations 2006,	Some examples of what a worker is entitled to: (i) protection against discrimination related to certain protected characteristics, (ii) national minimum wage, (iii) holiday pay, (iv) statutory sick pay, (v) statutory maternity, paternity, adoption, parental, shared parental and bereavement leave and pay if certain conditions are met, (vi) pension benefits, if they satisfy the definition of eligible job holder, (vii) duties of health and safety, and (viii) protection under the Transfer of Undertakings (protection of Employment) Regulations 2006.	Self-employed independent contractors are entitled to: (i) protection for their health and safety on a client's premises and (ii) be protected against discrimination related certain protected characteristics.

Description	Employee	Worker	Self-employed Independent Contractor
	(ix) unfair dismissal rights; (x) a minimum notice period and (xi) statutory redundancy pay.		
Tax and national insurance	Employers are responsible for paying the employee's income tax and national insurance.	Tax law does not recognise worker status, and thus a worker will be taxed in the same way as an employee.	Self-employed independent contractors are responsible for paying their own taxes and national insurance.
Pay	Employees typically receive a salary though they can be paid for their work by the hour, week or month.	Workers are also expected to be paid for their timed work. They will be paid in accordance with their contract and how frequently they worked.	Self-employed independent contractors are paid only for the work they have completed for a price that has been agreed to in advance of doing the job.
Competitors	Employees have restrictions around working for other people, particularly competitors, whilst employed. There is an implied	Worker contracts may or may not have an exclusivity clause which details whether they can work for other employers. Post-termination	A self-employed independent contractor is free to work for others, unless otherwise agreed in writing. Any limitations are generally

Description	Employee	Worker	Self-employed Independent Contractor
	<p>term in their contract that the employees will serve in good faith and not work in competition with their employer or solicit their employer's customers whilst employed by the employer. Post-termination non-competes are also often included in employment contracts.</p>	<p>non-competes are sometimes included in their contracts.</p>	<p>restricted to a business' competitors only.</p>
<p>Ownership of Intellectual Property ('IP')</p>	<p>The rights in any creation made by the employee during the course of employment would be owned by the employer.</p>	<p>The rights in any creation made by the worker during the course of the engagement may be retained by the worker, subject to the terms of their contract.</p>	<p>The rights in any creation made by the self-employed independent contractor remains with the independent contractor, unless specifically stated in the contract that the IP ownership will vest with the employer.</p>

How should the Business engage individuals?

Based on the information provided on how the three seamstresses are currently working, it is likely that they are self-employed contractors. This assessment is formed on the basis that they are not obliged to accept work from the Business, they provide invoices for their hourly work, they carry out their work with a sufficient degree of independence, they have not been providing the services for a long period of time, they do not receive payment during any holiday and they work for other clients (or on their own business) when not providing services for the Business without restriction.

However, there may be some risk that the seamstresses hold the status of worker as they are not permitted to appoint a substitute to carry out their work, are provided with equipment to carry out their services and have no written agreement in place confirming their status; engaging the seamstresses under a written contract for services which confirms their independent contractor status would therefore be helpful to mitigate this risk.

Moving forward, while deciding which is the best option for how the Business should engage individuals, the Business should keep in mind the rights, obligations and duties set out in the table above. If the Business is looking for a more permanent option and wishes to retain full control over the individual, then employing the individual as an employee under a contract of employment would be a suitable option. The employee would primarily work for the Business and would be obligated to carry out any requests to work from the Business, creating loyalty that could be desired from the Business.

However, it is important to keep in mind that an employee is entitled to statutory employment rights. Some of these include – national minimum wage, statutory sick pay, statutory holiday pay, protection against unfair dismissal, protection for reporting wrongdoing in the workplace etc. For further information regarding statutory employment rights, please refer to: <https://www.gov.uk/employment-status/employee>.

It is important to also remember that engaging an individual as an employee gives the employer less flexibility when compared to engaging them as a self-employed independent contractor. Additionally, often

the overall cost of hiring a self-employed independent contractor is lower than hiring an employee as the employer does not need to pay their national insurance contributions, pension contributions and so forth, though a self-employed contractor may ask for a higher rate of pay.

If the Business is looking to engage individuals for a short-term or to undertake specific tasks required for the Business, then engaging the individual as a contractor under a contract for services would be a suitable option. In this type of option, the individual does not afford an 'employee' status and is therefore not entitled to the same statutory rights, obligations and payments that are given to an employee under contract of employment. Although this is an advantage for the Business, there are several disadvantages as well. The Business would have a lack of control over the independent contractor's work, there is no obligation for them to work and they can work as and when they want should they so choose. For further information regarding self-employed contractors, please refer to: <https://www.gov.uk/employment-status/selfemployed-contractor>.

While the Business remains a partnership, we recommend continuing to engage individuals as self-employed independent contractors. As set out above, we recommend formalising this relationship between the contractors and the Business by entering into a written contract for services.

As a side note, in the current relationship between the seamstresses and the Business, the Business is making payments even when the individual has been sent home for being sick without work being completed for that particular day. This is more in line with the practice of an employer – employee relationship rather than that of an employer – independent contractor relationship. Although these payments are a kind and thoughtful gesture, in terms of best practice, it is recommended that the Business cease making these payments to best protect its' interests. In the unlikely event that any of the seamstresses challenged their status as independent contractors, these payments could be used as evidence to support an argument that the seamstresses were, in reality, working as workers/employees rather than self-employed contractors.

What are the key clauses to be included in a contract?

There are several key clauses that the Business should cover in their contract for services to protect its' interests. These are as follows:

1. **Confidentiality** – this clause is one of the more important clauses as it helps provide increased certainty that the contractors will keep any confidential matters, such as designs used by the Business

as well as by third party collaborations, confidential. The clause should be drafted broadly enough that it would likely cover any additional obligations that the Business agrees or has agreed to with a third-party brand.

2. **Non-compete clause** – this clause will prevent a self-employed independent contractor from competing with the Business and working with a competitor for the specified period. However, this clause should set parameters for what types of business are defined as competitors. The clause should also set out a defined period of time for which the non-compete clause is applicable. The most common time frame for this clause is a period of six months after the self-employed independent contractor has stopped working for the Business, though a shorter period may be more appropriate in these circumstances given the nature of the business.
3. **Conflicts of interest** – it is important to include this clause as it will require the independent contractor to disclose any potential conflicts of interest that may affect their ability to work with the Business. For example, if they are carrying out work or intend to carry out work for a competitor. The Business may then choose not to engage the individual, or cease to engage them, based on this information.
4. **IP** – this clause will ensure that any IP created by the self-employed independent contractor whilst carrying out work for the Business vests in the Business. The Business should also consider whether a formal agreement which addresses intellectual property is required in respect of its collaboration with the London College of Fashion.

Please note that the above list is not an exhaustive list of clauses to be included in the contract for services.

What are the next steps?

The Business should seek further legal services in respect of getting a written contract for services in place between it and the seamstresses. As a minimum, these contracts should include the clauses mentioned above and confirm that the independent contractor is indeed engaged as an independent contractor and not a worker or employee.

As and when the Business decides to change from a partnership to a private limited company, it is advisable that the Business seeks legal services to assist with this process.

We hope that the advice provides you with a comprehensive understanding of the legal questions you asked us to address. Should you require any assistance in any future matters, please do not hesitate to contact us.

We would be extremely grateful if you could take a few moments to complete this short form <https://qlegal.eu.cliogrow.com/intake/96a0a71c35ef40cdda77d55a571f8a72>, as your feedback is important to our educational development and the development of our services.

Yours sincerely,

[Confidential]

Student Adviser

[Confidential]

Student Adviser

On behalf of qLegal