

ADVICE ON LOCUM CONTRACTS

BACKGROUND

The PDA is no longer advising the use of the locum contract. The reason for this is that with the development of the cases on employment status such as Uber, Pimlico Plumbers etc, although parties can agree the terms of the contract, these terms, however carefully crafted, may not represent the reality of the relationship between the parties.

The actual contract will in most cases arise from an analysis of the true relationship between the parties and so what is called the “multifactorial test” is looked at by the Employment Tribunals to establish whether the relationship is locum (self-employed or a business), worker or employee. In the latter two you will to acquire certain levels of protection under employment legislation (see Appendix below).

The rigorous control over the work of pharmacy locums militates towards any self-employed locum working exclusively for one pharmacy or several over a period in the same capacity and these can in effect be part-time or full-time contracts that can attract was is effectively worker or employee status.

Even if you set yourself up as a company, this does not always prevent you from claiming worker status if the reality shows a different relationship.

The substitution clause (see below) is something that will depend on how it is applied. A lot of the time the pharmacy will have their own substitutes and will engage them when you are on leave, even though you have the clause in your contract. On analysis some of the clauses have no real meaning and so you would need to look at the actual role to determine the real contractual relationship.

If you have been working on what would realistically be a contract of employment or as a worker for some time and believe that you qualify as such under the test below, then you may want to contract the PDA for advice as to the real relationship you have developed. Ultimately, it will depend on the type of relationship you wish to establish and so you will need to consider carefully the information provided below, so that you achieve your desired contractual status.

SELF-EMPLOYED (LOCUM), WORKER OR EMPLOYED?

The test for both self-employed and employment status are set out below. This will guide you as to what the true relationship is between you and the pharmacy.

A. Factors indicating employment status

Mutual obligations

The company is under an obligation to provide the individual with regular work and the individual is under an obligation to make themselves available to do the work.

Personal service

The individual is required to provide their services personally. Either there is no right to appoint a substitute or any right of appointment is subject to the company's approval and may only be used in certain situations (usually where the individual is unable, rather than unwilling, to work).

Control

The individual is under the control of the company to such a degree as to make the company their "master". In other words, the company controls what the individual does, how they do it and when they do it. However, those holding senior, professional or skilled positions may retain significant control over how they carry out their work but still be employees. The individual is also expected to conform to standards of, for example, behaviour or dress expected of others within the same working environment.

Exclusivity

The individual is not normally free to work for other organisations without the express permission of the company. The individual may be subject to restrictive covenants in their contract.

Nature and length of the engagement

The length of the engagement is not determined (with the exception of fixed-term contracts) and does not relate to the performance of a specific task.

Pay and benefits

The individual is paid a fixed amount on a regular payment date irrespective of performance targets or completion of a specific task (however, note that shift workers or commission workers may be employees). They may receive a pension, bonus, private medical insurance, company car or other benefit and be entitled to company sick pay.

Integration

The individual is integrated into the company. For example, they perform services which are similar to or substantially the same as those performed by an employee, their name appears on the internal telephone directory, they have a company e-mail address, they wear a uniform and they have a company business card.

Facilities and equipment

The company provides the individual with the facilities and equipment required by them to carry out their job.

Financial risk

The individual is paid even if there is not sufficient work to keep them fully occupied. The individual assumes no financial risk in working for the company.

Taxation

The individual is not responsible for payment of income tax and national insurance contributions (NICs) on their earnings.

B. Factors indicating self-employed status

Mutual obligations

The company is not obliged to offer work on a regular or frequent basis and the individual has no obligation to accept any work that is offered.

Control

The individual has the ability to determine when and how they work and is not under the direct supervision of the company.

Personal service

The individual is not required to carry out the services personally and has an unqualified right to appoint a substitute.

Exclusivity

The individual is free to provide their services to whomever they choose without operating exclusively for one organisation.

Nature and length of the engagement

The individual is engaged for a finite period to carry out a specific task or project.

Pay and benefits

The individual is paid on completion of a specific task or project or on a commission-only basis. They are not entitled to participate in any benefit schemes and will not normally be paid overtime.

Integration

The individual is not sufficiently integrated within the company to have a defined role and does not perform services similar to or substantially the same as those performed by an employee.

Facilities and equipment

The individual provides their own equipment and materials in order to perform the services.

Financial risk

The individual risks their own capital in the business and will be personally responsible for any losses arising from their work. They may be required to correct any unsatisfactory work in their own time and at their own expense. Conversely, they may have the opportunity to profit from the success of the project.

Taxation

The individual is responsible for payment of their own income tax and NICs on their earnings and is responsible for registering for VAT if the level of their supplies exceeds the relevant registration limit.

HMRC AND TAX IMPLICATIONS

The HMRC has been keen on assisting people with their employment status. Whilst you have every intention of being self-employed, you may be an employee by virtue of the relationship, as stated above. The HMRC will analyse how the working relationship is conducted on a day-to-day basis.

There is a ‘Check Employment Status for Tax’ (CEST) tool available on the government website: <https://www.gov.uk/guidance/check-employment-status-for-tax>

You will need to check this for your own peace of mind in relation to any tax liabilities you may have.

HOLIDAY PAY

As a result a case in the CJEU in 2017, self-employed worker may be able to claim back pay unpaid annual leave going back to the time the Working Regulations came into force.

The court stated that “an employer that does not allow a worker to exercise his right to paid annual leave must bear the consequences”, since this decision it has been decided

that a worker who does not request leave does not automatically lose right to pay in lieu.

Any claim must be made within 3 months less one day from the date the worker leaves the organisation, or if the relationship continuing it will be a series of unlawful deductions unless or until the arrangement ends and the limitation will apply from that date.

EMPLOYMENT TRIBUNAL MATTERS

If you believe that you have been working under scenario “A” above for some time and would like to discuss whether to you have a claim for worker or employment status, you may wish to call and discuss this with a view to establishing the true status of your employment.

If any of the above applies to you, please call the enquiries on 0121 694 7000 or email enquiries@the-pda.org and one of the employment team will discuss this with you.

APPENDIX

STATUTORY RIGHTS

Employee section 230 (1) ERA 1996	Worker Section 230 (3) ERA 1996	Self-Employed
Dismissal		
Redundancy		
Notice		
Maternity		
Parental leave		
Fixed Term Employment		
Dismissal, disciplinary and grievance process		
National Minimum Wage	National Minimum Wage	
Protected Disclosure	Protected Disclosure	
Working Time	Working Time	
Part-time Worker	Part-time Worker	
Right to be accompanied	Right to be accompanied	
Unlawful Deduction of Wages	Unlawful Deduction of Wages	
Discrimination	Discrimination	Discrimination
Health and Safety	Health and Safety	Health and Safety