

Clarify Your Employment Status

Protect Your Rights and Benefits



Self-employed?
Employee?



勞工處
Labour Department



Employee? Contractor / Self-employed Person?

To avoid misunderstanding or dispute, the relevant persons should understand clearly their mode of cooperation according to their intention and clarify their identities, whether they are engaged as an employee or a contractor/self-employed person, before entering into a contract. This can safeguard mutual rights and benefits.

Distinguishing an “employee” from a “contractor or self-employed person”

- ▶ There is no one single conclusive test to distinguish an “employee” from a “contractor or self-employed person”. In differentiating these two identities, all relevant factors of the case should be taken into account. Moreover, there is no hard and fast rule as to how important a particular factor should be. The common important factors include:
 - control over work procedures, working time and method
 - ownership and provision of work equipment, tools and materials
 - whether the person is carrying on business on his own account with investment and management responsibilities
 - whether the person is properly regarded as part of the employer’s organisation
 - whether the person is free to hire helpers to assist in the work
 - bearing of financial risk over business (e.g. any prospect of profit or risk of loss)
 - responsibilities in insurance and tax
 - traditional structure and practices of the trade or profession concerned
 - other factors that the court considers as relevant
- ▶ **Since the actual circumstances in each case are different, the final interpretation will rest with the court in case of a dispute.**

Employees should note

- ▶ **An employee should identify who his employer is before entering into an employment contract.** If necessary, before the commencement of employment, the employee may make a written request to the employer for written information on conditions of employment in accordance with the Employment Ordinance (EO). The employee should also keep important documents such as tax demand notes, attendance cards and wage records, etc.
- ▶ **Before an employee considers changing his status to a contractor or self-employed person, he must cautiously assess the pros and cons involved,** including the employment rights and benefits that he may lose in such a change.
- ▶ **An employer should not unilaterally change the status of his employee to a contractor or self-employed person without the consent of the employee.** Otherwise, the employee may, depending on the circumstances, lodge a claim for remedies against his employer for unreasonable variation of the terms of the employment contract under the EO. Moreover, the employee may also make a claim for termination compensation against his employer on the ground of constructive dismissal under common law.



- ▶ If an employee reasonably suspects that the employer has not taken out a valid employees' compensation insurance policy, he should notify the Labour Department as soon as possible. Moreover, employees' compensation insurance is only applicable to employees. **A contractor or self-employed person should consider taking out a personal accident insurance policy with adequate coverage on his own.**

Some differences in the rights and benefits enjoyed by an “employee” and a “contractor or self-employed person”

| Rights and benefits | Employee ^{Note 1} | Contractor or Self-employed person |
|--|----------------------------|------------------------------------|
| Entitled to basic protection under the EO. If engaged under a “continuous contract” ^{Note 2} , also entitled to employment benefits such as paid annual leave, statutory holiday pay, sickness allowance, severance payment or long service payment, etc. | ✓ | ✗ |
| Entitled to protection under the Minimum Wage Ordinance, including the statutory minimum wage | ✓ | ✗ |
| Entitled to protection under the Employees' Compensation Ordinance, including sick leave and compensation arising from work injuries | ✓ | ✗ |
| Entitled to protection under the Mandatory Provident Fund Schemes Ordinance, including employer's contribution | ✓ | ✗ ^{Note 3} |

Employers should note

- ▶ **An employer should not unilaterally change the status of his employee to a contractor or self-employed person without the consent of the employee.** Otherwise, the employee may lodge a claim for remedies against his employer under the EO and common law.
- ▶ An employer should cautiously assess the risks involved before entering into a contract to engage someone as a contractor or self-employed person. **If in essence there exists an employer-employee relationship, even though the worker is called a contractor or self-employed person or has been labelled as a self-employed person in the contract, the employer is still required to fulfil his responsibilities under the relevant legislation** by paying back statutory benefits retroactively to the worker who is falsely labelled as a self-employed person. Moreover, **the employer may be criminally liable under the relevant legislation.**



^{Note 1} As to the application of individual ordinances, please refer to relevant leaflets

^{Note 2} An employee who has been employed continuously by the same employer for four weeks or more, with at least 18 hours worked in each week is regarded as being employed under a continuous contract.

^{Note 3} A contractor or self-employed person should enrol in a Mandatory Provident Fund scheme and make contributions on his own.

Reference Court Cases

Case 1



Mr POON was an air-conditioning worker. He suffered partial loss of vision in his left eye in an accident during the installation of an air-conditioner. The contracting company considered Mr POON a self-employed person and refused to pay compensation for his injury at work. Thus Mr POON made a claim to the court. After trial of his case by the District Court and the Court of Appeal of the High Court, Mr POON appealed to the Court of Final Appeal. The Court of Final Appeal finally decided that Mr POON was an employee of the Defendant Company and the Defendant Company had to pay him compensation for his injury at work. The grounds of judgement were as follows:

1. Since the air-conditioning business belonged to the Defendant Company, Mr POON bore no financial risks. He only received daily-rated remuneration. Whenever items had to be purchased for work purposes or travel expenses were incurred in the course of the work, he was reimbursed by the Defendant Company;
2. The Defendant Company decided which jobs should be assigned to Mr POON and paid him at the agreed daily rate, plus any overtime pay. As Mr POON was a skilled air-conditioning worker, he did not require supervision over the manner of carrying out the work;
3. The Defendant Company supplied most of the equipment used;
4. Mr POON personally did the work assigned to him. He did not hire anyone to help;
5. The fact that Mr POON had worked for the Defendant Company and other companies on a casual basis at the same time did not affect his right to compensation under the law;
6. Although Mr POON labelled himself a self-employed person for the purposes of the Mandatory Provident Fund, the objective facts strongly supported that there was an employer-employee relationship between the two parties. The Defendant Company must fulfil its legal obligations.

<Case No: FACV14/2006>

Case 2



Mr LEUNG entered into an “Agreement for Sub-contracting Transportation Work” with the Defendant Company to be engaged as a Mainland and Hong Kong cross-border lorry driver. Upon termination of their relationship, Mr LEUNG lodged a claim against the Defendant Company, but the latter alleged that Mr LEUNG was not its employee.

The Labour Tribunal found that Mr LEUNG was an employee of the Defendant Company and therefore allowed the claim. The Defendant Company lodged an appeal against the finding, but the High Court dismissed the appeal and ruled that Mr LEUNG was an employee of the Defendant Company. The grounds of judgement were as follows:

1. The lorry driven by Mr LEUNG was provided by the Defendant Company;
2. Mr LEUNG was not required to make any investment or undertake any financial risk in the business. The Defendant Company was responsible for the maintenance of the lorry and paid all expenses pertaining to Mr LEUNG’s work, including parking fees and cross-border lorry driver registration fees, etc.;

3. Mr LEUNG was not allowed to hire his own helpers;
4. The Defendant Company exercised control over the work procedures. For example, Mr LEUNG had to obtain the Defendant Company's instruction before crossing the border and inform the Defendant Company for taking leave. The Defendant Company would also issue work instructions from time to time;
5. While Mr LEUNG was entitled to receive orders on his own and could use the Defendant Company's lorry with its consent under the agreement, the Judge pointed out that the work assigned by the Defendant Company had taken up the bulk of Mr LEUNG's time. In fact, Mr LEUNG had never taken up any private order;
6. Despite the fact that the Defendant Company had neither made any MPF contribution on behalf of nor given any annual leave or statutory holiday to Mr LEUNG, and described the sums paid to him as "Payments to a Non-employee" in the tax returns, the Judge pointed out that such arrangements did not alter the objective picture of an employment relationship between the two parties.

<Case No.: HCLA43/2006>

Case 3

Mr. LO worked as a hair stylist assistant in the salon owned by the three Defendants. On termination, he claimed for payment in lieu of notice, annual leave pay, etc. The Labour Tribunal found that the Defendants should pay the items. The Defendants appealed to the High Court against the finding, alleging that Mr. LO was a self-employed person and thus not entitled to the rights and benefits under the EO. Having taken all relevant factors into consideration, the High Court dismissed the appeal and ruled that Mr. LO was an employee. The grounds of judgement were as follows:




1. The Defendants had control over the work of Mr. LO. For example, every day Mr. LO had to clock-in and clock-out, and the records showed that he went to work and off work on time; Mr. LO had to notify the Defendants for his absence due to sickness;
2. Mr. LO was not allowed to hire his own helpers;
3. The Defendants provided the tools and materials used. Mr. LO did not have any cost of investment, management or operation, and did not bear any financial risk;
4. Even though Mr. LO was labelled as a self-employed person in the written agreement signed by both parties, that the Defendants had neither arranged him MPF nor filed tax return for him as an employer, the court opined that such an agreement could not rule out the employer-employee relationship should this relationship existed as indicated by the circumstantial evidence.


<Case No.: HCLA43/2015 >


This leaflet aims to highlight the differences between an "employee" and a "contractor or self-employed person". It should be noted that the relevant ordinances and court judgements remain the sole authority for the interpretation of provisions of the law and the court cases mentioned.

Enquiry and Complaint

For further enquiries about the differences between an “employee” and a “contractor or self-employed person”, you may

 Call the enquiry hotline: 2717 1771 (the hotline is handled by “1823”)

 Visit the offices of the Labour Relations Division of the Labour Department

 Visit the Labour Department website: www.labour.gov.hk

If an employer fails to fulfil his obligations under the relevant legislation, the employee may call the Labour Department complaint hotline at 2815 2200 (information will be handled in confidence), or seek assistance in person at the offices of the Labour Relations Division of the Labour Department.

Offices of the Labour Relations Division of the Labour Department

HONG KONG

Hong Kong East

12/F, 14 Taikoo Wan Road,
Taikoo Shing, Hong Kong.

Hong Kong West

3/F, Western Magistracy Building,
2A Pokfulam Road, Hong Kong.

KOWLOON

Kowloon East

UGF, Trade and Industry Tower,
3 Concorde Road, Kowloon.

Kowloon West

Room 1009, 10/F,
Cheung Sha Wan Government Offices,
303 Cheung Sha Wan Road,
Sham Shui Po, Kowloon.

Kowloon South

2/F, Mongkok Government Offices,
30 Luen Wan Street,
Mongkok, Kowloon.

Kwun Tong

6/F, Kowloon East Government Offices,
12 Lei Yue Mun Road,
Kwun Tong, Kowloon.

NEW TERRITORIES

Tsuen Wan

5/F, Tsuen Wan Government Offices,
38 Sai Lau Kok Road,
Tsuen Wan, New Territories.

Kwai Chung

6/F, Kwai Hing Government Offices,
166-174 Hing Fong Road,
Kwai Chung, New Territories.

Tuen Mun

Unit 2, East Wing, 22/F,
Tuen Mun Central Square,
22 Hoi Wing Road, Tuen Mun,
New Territories.

Shatin & Tai Po

Rooms 304 – 313, 3/F,
Sha Tin Government Offices,
1 Sheung Wo Che Road, Sha Tin,
New Territories.