

GUIDANCE ON THE EMPLOYMENT STATUS OF AGRICULTURAL WORKERS IN WALES

Introduction

This guidance is intended to assist farmers (as employers) and agricultural workers to understand their employment status and their associated rights. This guidance is an overview of the law in relation to the employment status of agricultural workers only, professional legal advice should be taken in relation to any specific matter.

An individual's employment status is important to determine what rights they have in relation to their employment, and the responsibilities of their employer.

In general terms there are three main types of employment status.

- Employee;
- Worker; and
- Self-employed

Employees have more employment rights than workers. What constitutes an employee and what constitutes a worker is defined by law. It is not always easy to determine the difference between an employee and a worker, for further information about these legal definitions and on the distinction between employees and workers see **Appendix 1**.

Employment Status in the Agricultural Sector in Wales

The position in relation to employment status is slightly different in the agricultural sector in Wales from the general position as outlined above. In the agricultural sector in Wales for the majority of employment rights, there are two main types of employment status:

- Agricultural worker (which covers employees and workers); or
- Self-employed

There are also others who work in the agricultural sector in Wales such as agency workers, volunteers and individuals on work experience who may not fall within the definitions of worker or self-employed individual. These types of workers are also considered in this guidance.

“Agriculture” includes dairy farming, the production of any consumable produce for the purposes of a trade or business or any other undertaking (whether carried on for profit or not), the use of land as grazing, meadow or pasture land, the use of land for orchards, osier land or woodland, the use of land for market gardens or nursery grounds.

Agricultural Workers

An agricultural worker in Wales is entitled to the rights set out under the Agricultural Wages Order

(http://www.legislation.gov.uk/wsi/2019/511/pdfs/wsi_20190511_mi.pdf) which includes rights to:

- The agricultural minimum wage;
- Holiday and holiday pay; and
- Agricultural sick pay.

Whether agricultural workers are entitled to other rights in addition to those included in the Wages Order, e.g. maternity, paternity or shared parental leave, will depend upon whether they are an employee or a worker (see Appendix 1 for further information).

Self Employed

The other category of employment status is that of a self-employed individual. A self-employed person will generally run their own business and take responsibility for the success of that business. Self-employed people will be contracted to provide a service for a farm or farmer as a client rather than as an employer.

They do not have the same employment rights as agricultural workers.

Deciding on Employment Status

It is not always easy to determine the employment status of an individual. There have been a number of recent cases where individuals who have been described as self-employed have been found by the courts to be workers. In the context of agricultural workers, as we have outlined above, this would mean the individual would be entitled to the rights as set out in the Agricultural Wages Order. It is important therefore to make the correct distinction between an agricultural worker and a self-employed individual.

The employment status that applies to an individual will depend upon the specific arrangements made between the farmer and the individual and the relationship in question. However, the following factors will likely indicate that an individual is genuinely self-employed:

- The farm/farmer 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;
- The individual is able to determine when and how they work and is not under the direct supervision of the farmer/farm manager;
- The individual does not have to carry out the services personally and is able to appoint someone as their substitute;

- The individual is free to provide their services to whomever they choose without operating exclusively for one farm or farmer;
- The individual is engaged for a finite period to carry out a specific task or project;
- The individual is paid on completion of a specific task or project and will not normally be paid overtime;
- The individual provides their own equipment and materials in order to perform the services;
- The individual 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;
- 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.

Conversely, an absence of the factors above may indicate that an individual is not genuinely self-employed and is more likely to be an agricultural worker.

Example 1:

An individual is engaged by a farmer to repair fencing. The farmer sets out the service wanted (i.e. repairing the fence) but the individual determines when and how that service is delivered. They use their own equipment and can either undertake the work personally or appoint someone to do the work on their behalf. The individual is free to manage their time and work elsewhere provided the work is completed in an agreed time-frame. The individual is paid for the specific task of repairing the fencing and the individual is then responsible for their own income tax and National Insurance Contributions and for registering for VAT if relevant.

- The individual is likely to be acting as a self-employed independent sub-contractor and not an agricultural worker.

Example 2:

An individual is offered work periodically e.g. during lambing season. For the lambing period, they are required to work exclusively for that farmer for the hours agreed/needed. The individual works under the supervision of the farmer and must undertake the work personally (i.e. they cannot send someone else). The individual may be paid overtime.

- The individual is likely to be an agricultural worker for the period they are engaged by the farmer. As such, the provisions of the Agricultural Wages Order will apply to them for the period of their engagement.

Other Types of Individuals Working in Agriculture in Wales

There will be other types of individuals working in the agricultural sector who do not fall within the definitions of agricultural worker or self-employed individual.

Volunteers

Volunteers are unlikely to have a contract in place. They will **not** be considered to be an agricultural worker for the purposes of the Agricultural Wages Order if the following apply:

- The volunteer is only paid reasonable out-of-pocket expenses in relation to their volunteering role (ideally in relation to receipts as opposed to estimated);
- The volunteer is not undertaking work in return for regular gifts or rewards (one-off gifts of a small value or free entry to events are unlikely to change a volunteer's status and make them an agricultural worker)

Payments to volunteers that could be construed as wages, for example regular payments that do not relate to actual expenses incurred, requiring volunteers to work regularly at specific times for specific periods and providing volunteers with holiday, may all indicate that the volunteer is in fact an agricultural worker.

Work Experience

The nature of work experience can vary greatly. The term 'work experience' generally refers to a specified period of time that a person spends working on a farm, during which they have an opportunity to learn directly about working life and the working environment.

It is possible for an individual doing work experience to be considered an agricultural worker depending upon the nature of the relationship and the length of the work experience provided. It is unlikely that individuals who are merely shadowing i.e. watching and learning whilst undertaking some hands-on involvement for a short period would be considered agricultural workers. However, individuals working for longer periods in a more hands-on role with specific tasks and responsibilities are more likely to be agricultural workers and therefore subject to the Agricultural Wages Order.

The following categories of individuals however are exempt from the National Minimum Wage and therefore the agricultural minimum wage provisions set out in the Agricultural Wages Order:

- Individuals of compulsory school age;
- Students undertaking work experience placements not exceeding one year as part of a UK based higher education or further education course.

Agency Workers

An agency worker is supplied by a temporary work agency to a farm/farmer to carry out work for the farm/farmer. The work is normally for a temporary period.

The Agency Workers Regulations give agency workers the right to the same basic working and employment conditions they would receive if directly engaged by the farm/farmer to do the same job.

Contractual Documentation

Having a written contract in place, which sets out the nature of the relationship between the farm/farmer and the individual, can provide clarification as to whether the individual is intended by the parties to be an agricultural worker, self-employed contractor, or volunteer.

For example, a contract with an individual which stipulates hours and place of work, supervision, pay, term of employment and which prevents the individual from working elsewhere, will indicate a relationship of employer/agricultural worker. On the other hand, a contract for a specific period or task, which allows a substitute or sub-contractor to be appointed, where payment is at the end of the task or period, paid according to invoice and which makes the individual liable for any losses arising from failure to complete the work will indicate a relationship of client/self-employed sub-contractor.

It is important to note however that courts, when determining the employment status of individuals, will look beyond what the contractual documents state (i.e. to see what actually happens in practice) in order to establish the reality of the relationship. So merely stating that an individual is intended to be self-employed in a contract will not necessarily be determinative of their employment status - this will depend on what actually happens in practice.

Obligations Under Auto-Enrolment for Pension

All UK employers are obliged to auto-enrol eligible workers in a pension scheme and make mandatory minimum contributions. An eligible worker will be an individual who:

- Works under a contract. This covers permanent and temporary agricultural workers, agency workers and apprentices;
- Is aged at least 22 but has not reached state pension age; and
- Who earns more than the earnings trigger of £10,000 a year (in 2018/19)

Employment Status Checklist

Set out below are the key characteristics of:

- An employer/agricultural worker relationship (**left hand column**); and
- An arrangement between a farm/farmer and a self-employed sub-contractor (**right hand column**).

You can use the checklist to help determine whether an individual is an agricultural worker (and therefore subject to the provisions of the Agricultural Wages Order) or a self-employed individual who is not.

No single characteristic is determinative of the employment status of the individual; you will need to look at the relationship as a whole. For example, you may be able to tick boxes in both the agricultural worker column and the self-employed column. If, however, you tick the majority of the boxes in the agricultural worker column it is likely that the individual is an agricultural worker and therefore subject to the Agricultural Wages Order.

The checklist is intended as a guide only, professional legal advice should be taken in relation to any specific issue or if the employment status of an individual is unclear.

Agricultural Worker	Tick	Self-Employed	Tick
The farm/farmer has offered the individual work and the individual has accepted that offer (i.e. there is a contract or agreement whether express or implied, oral or in writing that the individual will work for the farm/farmer).		The individual is engaged for a finite period to carry out a specific task or project.	
The individual is required to provide their services personally (i.e. they cannot send someone in their place)		The individual is not required to carry out the services personally and can send someone else in their place without approval in advance by the farm/farmer.	
The individual can send someone in their place but this must be approved in advance by the farm/farmer and can only be done in certain situations e.g. the individual is unable to work due to illness.			

<p>The farm/farmer controls what the individual does, how they do it and when they do it.</p>		<p>The individual has the ability to determine when and how they work and is not under the direct supervision of the farm/farmer.</p>	
<p>The individual cannot work for anyone else without the approval of the farm/farmer.</p>		<p>The individual is free to provide their services to whomever they choose without operating exclusively for one farm/farmer.</p>	
<p>The individual is paid a fixed amount on a regular payment date (i.e. weekly/monthly) and payment is not necessarily linked to the completion of a specific task.</p>		<p>The individual is paid on completion of a specific task. They do not receive and are not entitled to additional benefits (e.g. paid holiday and sick pay) and will not normally be paid overtime.</p>	
		<p>The individual will be 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.</p>	
<p>The farm/farmer provides the individual with the facilities and/or equipment required by them to carry out their job.</p>		<p>The individual provides their own equipment and materials in order to perform the services.</p>	
<p>The individual is not responsible for the payment of income tax and National Insurance contributions on their earnings, the farm/farmer assumes this responsibility.</p>		<p>The individual is responsible for payment of their own income tax and National Insurance contributions on their earnings and is responsible for registering for VAT if the level of their supplies exceeds the relevant registration limit.</p>	

Appendix 1

Employee

The Employment Rights Act 1996 defines an employee as:

"an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment"¹.

A contract of employment means:

"a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing"².

An employee therefore will work to the terms of their contract of employment (e.g. in relation to the hours and days of work). Under that contract they will have to carry out the work personally. An employee is entitled to have a written statement of their employment³ setting out the basic details of their employment e.g. salary, place of work, hours of work and notice.

Employees are entitled to a wide range of employment rights, including all those to which a worker is entitled.

Examples of employee rights include:

- written statement of employment
- itemised pay slip
- the National Minimum Wage
- holiday pay, maternity and paternity pay etc.
- the right to request flexible working hours
- the right not to be discriminated against.

Worker

The Employment Rights Act 1996 defines a worker as:

"an individual who has entered into or works under (or, where the employment has ceased, worked under):

(a) a contract of employment, or

¹ section 230(1)

² section 230(2)

³ Section 1 of the Employment Rights Act 1996

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, 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"⁴.

A worker will also therefore work to the terms of their contract of employment/contract for services although these terms may not be as prescribed as those in an employee's contract of employment (for example hours and days of work may not be fixed).

Generally, a worker will have to carry out the work personally, however some workers may have a limited right to send someone else to carry out the work instead, such as a substitute or sub-contractor.

Workers could include:

- casual work
- agency workers
- freelance work
- seasonal work
- zero hours work

Workers are entitled to some employment rights including:

- the National Minimum Wage
- holiday pay
- protection against unlawful discrimination
- the right not to be treated less favourably if they work part-time

⁴ section 230(3)