



Employment. Or not? **CHECKLIST**

An employment contract or not an employment contract: one of the most important questions in labour law or employment contract law. And therefore, a very important question to be addressed when you start working with staff or hiring people or cooperating with people on some sort of contractual arrangement. In this video, I'll try to explain some of the background to the problems in defining the employment contract and the consequences of it.

And I'll elaborate on the downloadable checklist, which can be used to minimize, not to completely solve, but minimize problems when faced with employment contract questions. But before I go into that, I'll introduce myself first. My name is Barend and I'm working as a labour law professor at Leiden University. And my career has been mainly in academia. And I have some experience in labour law in action, in practice, mainly as a judge, but this video, this checklist will hopefully lead to me learning something as well of the practice of having to deal with, having to work with difficulties in defining the employment (or not employment) relationship. So I'm very curious to know whether the tools we have developed are helpful. And I certainly hope that the checklist will prove useful for you and for your work. And then I'll go into the substance of this video.

You can hire people on the basis of a contract of employment. And it's, of course, dependent on the particular country and the particular system you're working in and under, but in very broad strokes, you can say that an employment contract contains three elements. One of the parties, the worker, is performing work in exchange for wages, for payment. That's the second element. Work and wages, the first two elements. And the work is performed in subordination to the other party, the employer.

And because the establishment of the contract of employment, when you come to the conclusion that there is a contract of employment, that has huge consequences. Because employees are in most systems considered as people who have to be protected and they are protected by all kinds of mandatory law.

So when there is a contract of employment that leads to the conclusion that there is a right to paid annual leave. That there is a minimum wage, in most countries. That there a maximum to the working hours to be performed per week. And it may also lead to social insurance and tax obligations on the part of the employer.



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Not all contracts under which one party performs work for another can be deemed to be contracts of employment. The main exception being the freelancer or the self-employed worker, interns and volunteers.

The difficulty being that in defining the contract of employment in nearly all systems substance, the substance of contract, prevails over the form of the contract. So even though you write down in a contract that someone is a freelancer or a volunteer, if in actual fact that said freelancer, that said intern, is working in subordination in exchange for payment for another, usually the conclusion will be that there is a contract of employment, irrespective of what's written down by the parties concerned and therefore mandatory law is applicable even though the worker involved and the work provider involved do not have the wish to have that mandatory law applicable.

So the contract of employment, it's an entrance ticket, a ticket of admission, to employment law protection. And that makes it so important that you know, whether or not there is a contract of employment.

In most systems, the defining element of the contract of employment is the subordination element. One of the parties, the worker, the employee, is working under the legal authority of another party, the employer. That's in most systems the distinctive characteristic of the employment contract versus, for instance, the freelance agreement. And subordination can be seen in two or perhaps three forms. It's of course feasible that the employer gives substantive directions on how to perform the job involved or says every day or every week or every month, what specific tasks the worker has to perform. But sometimes there is no need for substantive directions. And also the subordination can be seen more in giving organizational directions; that you have to be present at certain times that you have to adhere to administrative rules set by the other parties.

For instance, a procedure for calling in sick or a procedure for taking leave or not. And in a way sometimes, and in some systems, there is an element of economic dependency of the worker involved towards the work provider, the employer. But subordination, it has an ancient ring to it, but it's more than just having to listen to directions and directives of the employer.



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It can also be seen in a more organizational way, and can also be shown in being economically dependent on the other party. But it is a difficult criterion.

I'm coming to the checklist in order to make it more easy. But in theory, there are three criteria, namely subordination, performing work in exchange for a wage. But in actual fact in actual practice, it's sometimes difficult to establish whether or not those criteria and especially the subordination criterion has been met. There is the difficulty of distinguishing the employer's authority from a contractor who merely gives instructions to the contracted party on how to perform the job. For instance, if you hire someone to paint your house, that painter has to listen to your instructions as to the color of your front door. (S)He is not free to make it purple, when you love a yellow door. That's a mere instruction. It doesn't establish an authority. But it's sometimes difficult to distinguish between authority and having to listen to instructions of someone who has hired you.

And because of the rule that what's written down is not always decisive, it's sometimes difficult to know beforehand what the character of your contract with someone else is.

And perhaps the most difficult thing is that in theory, an employee is completely different from an entrepreneurial freelancer and a volunteer, but in actual daily practice, it might be that they are performing more or less the same work in the same building or on the same website. The theoretical differences may dissolve in the light of actual practice. So there are some difficulties establishing whether or not someone is an employee or self-employed or another figure all together.

And therefore we have developed a checklist in order to make it possible to narrow the gap between certainty and uncertainty. It's not the 100% you're completely sure answer. But if you go through the steps of this checklist, you have a good chance of defining in a right way whether or not you have hired someone on a employment contract basis or another basis, or if you're looking at it from the perspective of a worker, whether or not you have been hired as an employee, or have been hired as a freelancer. I'll go through the checklist, which can be downloaded. And it's important to note that you cannot follow this checklist in a way: "I'm at step one. Step one leads to the conclusion this might be an employment contract. Ready."



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You have to take all the factors, all the steps, into account. And it may be that step one points in the direction of an employment contract, whereas step three points in another direction. You have to add all those ingredients, you have to add them to the soup and then taste it as a whole. What does it really mean?

I'll go through the steps. One of the first steps is: What does the contract say? Does it say that's an employment contract or not. Usually when a contract says that it is an employment contract, there's not so much doubt anymore. If it says something else, or if it says nothing, you can go through steps two, three, four, and so forth.

And you may note that all those steps in this checklist do not really focus on the criteria: wages, authority and work. It's another way of approaching the definition and it's derived from what's happening in some countries where they have developed websites with those kinds of steps in order to establish whether someone is an employee or not for fiscal or social insurance purposes.

But what does the contract say is an important starting step. Therefore, we've named that step one. Step two: Is someone active in the core business of the organization or providing an auxiliary service. It's more likely that someone active in the core business of an organization is an employee than someone who is hired in to provide some auxiliary services to the organization. And by extension, it leads to some similarity to it, one could say, what is core business and auxiliary? That differs from one organization to another, of course. In some organizations, the accountant is auxiliary and sometimes it's not. And then one of the tests you may want to take is, is the position of that specific worker similar or different compared to employees of the organization.

And you can then focus on the tasks required from that particular worker, his or her duties and the benefits he or she receives. Are there more similarities to other employees of that organization or is there a dissimilarity. That may overlap with the core business - auxiliary service test. And again, is someone integrated into the organization or just a passer-by? Does that person have his or her own office space?



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Is he or she mentioned on the website? Are you part of the assessment cycle of an organization or are you just hired to perform one specific job, once specific task, that's of importance. And the checklist continues. What are the level and calculation of fees and wages? Again, if that's comparable to, similar to, what happens with other employees, then the conclusion might be that he or she is an employee as well.

But if the level and the calculation of fees and wages is very much different, for instance, a lot of self-employed are remunerated on the basis of completing a task or are paid for the hours they have provided. They're not working on a weekly or monthly stable wage. The number of working hours might also be relevant. And that relates to the number of clients the worker is working for.

If someone is hired full time for a longer period of time, it's more likely that he or she is an employee than when someone is providing a few hours per week or per month. Again, someone doing the books, an accountant providing some services two or three hours a month, will be deemed auxiliary and not performing the core business of the organization. So the criteria are interrelated as well.

So the number of working hours is relevant. And it's not said that someone who works for 40 hours a week for an organization always is an employee. But it is more likely that he or she is. And another relevant factor as to the position of the worker is for how many other organizations that worker is active. Does this worker provide work, services, to a lot of contractors and not to one sole contractor?

It is more likely that he or she is an independent worker and is self-employed. And the last hint to the characterization of the contract is: Who pays, who invests, if the worker brings his own equipment and finances his own education and courses in order to be able to perform the work involved, it is more likely that that person is an independent contractor, is self-employed, is a freelancer and not an employee. Whereas if the office space, the computers, the software and tools are all provided by and paid for by the employer, then it's more likely that the other party is indeed an employee. Certainly so, if that organization also provides for the education of that person involved.



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What I wanted to say was that it's sometimes difficult to reach a hundred, 100% certain definition in practice, or a hundred percent certain answer to the question: Employment contract or not. Since what's put on paper is not always decisive. And a lot of factors have to be taken into account. But I hope this video and working with the checklist will help you narrow the gap between complete uncertainty and certainty.

And for now my compliments to you. Well done you for following this instructive, I hope, video.