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Engaging a consultant or contractor?

Points to consider from an HR perspective

Consultants are usually self-employed independent contractors engaged to provide specific services. Before entering into a contractual agreement with a consultant, it is important to carefully consider the pros and cons of doing so and what is the right form of contract for them, says **Gillian Mair** on behalf of Brodies LLP.



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USING CONSULTANTS: THE PROS AND CONS

What are the advantages of using consultants?

- It is a more flexible relationship than an employment relationship.
- A consultant is often used to cover a particular skills requirement for a specific project or on an 'as required' basis.
- A consultant may not benefit from the statutory protections of employment status.
- A consultant may be able to claim more favourable tax treatment.
- A consultant can usually work for a number of organisations at the same time.

What are the disadvantages of using consultants?

- Consultants, particularly those with particular skills or experience, often charge high fees.
- The consultant or HMRC may challenge the self-employed basis on which the individual has been working. The fact that an arrangement is structured and documented as a consultancy agreement (ie a contract for services) and not a contract of employment will not always be conclusive.
- If an individual succeeds in proving employee or 'worker' status for employment legislation purposes, the individual will have additional statutory protections and rights.
- If an individual succeeds in proving that they are an employee for tax purposes, organisations that engage consultants may have tax liabilities and penalties.
- By the nature of the relationship, those who engage consultants will have limited control over how, when and where the services are carried out. This can be addressed to a certain extent in the consultancy agreement but imposing too much control can risk a challenge to their employment status.
- A consultant may have protection under discrimination legislation if their contract obliges them to do the work personally, even if their status is not that of an employee or a 'worker'.
- In some circumstances, a consultant could be considered a 'worker' for pension auto-enrolment purposes.

DRAFTING A CONSULTANCY AGREEMENT

Consultancy agreements can be with either the individual consultant directly or via a service company.

Factors to consider when drafting a consultancy agreement include:

- What services is the consultant going to carry out? Make sure these are properly defined in the agreement.
- Does the consultant need to have any qualifications? If any training is needed, who is meeting the cost? Do you want to include a provision for the consultant to repay any training costs if these are being paid by you?
- Is it for a fixed term? If the agreement can be terminated by notice, how long do you want the notice period to be?
- Do you want to include a provision that the agreement will terminate if the consultant does not provide services for a certain period e.g. eight weeks?
- Is the consultant going to work from home and provide their own equipment? This is a good indicator of self-employment, but is it appropriate?
- Is there a normal working day, or minimum and maximum number of weekly hours, or does the consultant have complete control over their hours?
- The fee structure and rate. Will the consultant have to complete time sheets? What is the timescale for submission of invoices and payment? Are expenses going to be reimbursed?
- Entitlement to sick pay, benefits, holidays, and grievance procedures should be avoided as this suggests an employment relationship.
- Can the consultant appoint a substitute? At any time or in restricted circumstances? Do you need to approve a substitute?
- Which policies is the consultant going to be asked to comply with? For example, social media, data protection, health and safety, use of IT systems, workplace security.
- Is there any particular information which you need to be kept confidential during and/or post-engagement?
- What insurance cover will you need?
- Data protection: is personal data being transferred? Do you have adequate privacy notices in place? Are you protecting data that the consultant will have access to in course of providing the services?
- If the consultant carries out creative or inventive work, is there a need to protect intellectual property or decide who will own it?
- Can the consultant supply consultancy services to other organisations at the same time?
- Do you want to impose any post-contract restrictions? Bear in mind this can point towards employment status.

To discuss any aspect of this article or if you would like help with drafting a consultancy agreement, contact Gillian Mair, Associate at Brodies LLP.
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