

New Irish Revenue tax guidance on determining employment status

What you Need to Know

- In May 2024, the Irish Revenue Commissioners ("Revenue") published guidance on determining employment status for taxation purposes. The guidance was issued subsequent to the Irish Supreme Court's judgment in *The Revenue Commissioners v Karshan (Midlands) Ltd. t/a Domino's Pizza [2023] IESC 24* (Karshan).
- The guidance considers the five-step decision-making framework from that case and provides several worked examples. Although the guidance is tax-focused, in our view it will guide tax and employment law analysis in the future.
- Businesses should review their contractual and day to day working arrangements with workers who are not employees – if by applying the five-step test, there is a risk of misclassification, then employers need to consider how best to address historic tax and employment law liabilities and mitigate future tax and employment law risks. Equally, there may be cases where a prospective change in status may be appropriate given the new legal principles set out in the Karshan case.

Background to the Karshan Case

- The Karshan case was decided in 2023. The case concerned pizza delivery drivers who were engaged by a Domino's Pizza franchise in Ireland. The court determined that they were employees for

tax purposes and therefore the employer company was liable to account for them under the PAYE system (see our previous Industry Updates on this – [Is the gig finally up? – The Domino's Case](#) and [The Domino Effect – What this Supreme Court Decision means for Employers in Ireland](#)) and our podcast [Tax & Coffee series](#).

- The case was notable because it specifically addressed workers status in the "gig economy". The court concluded that single instances of work, provided once or on an ongoing basis, could still lead to an employment relationship where that work is paid.
- The Court set out a five-step decision-making process for determining employment status and this is considered in more detail below. The guidance illustrates how Revenue will apply this process.

New Revenue Guidance – What it Says

The guidance provides specific commentary on several industries including construction and part-time workers. It notes that it is expected that part-time, casual and seasonal workers will generally be considered employees.

The guidance provides many examples in this regard. For example, it notes that "*an individual serving at a bar at one concert for a set fee*" may be regarded as an employee.

Revenue notes that the guidance does not impact personal service companies. Revenue does not look through corporate structures

except in limited circumstances. Therefore, where a worker has been engaged through a company, (which may be owned by the worker), they should not generally be classified as an employee.

The guidance encourages reviews of the classifications applying to workers, particularly where there is a historic arrangement in place. They cite the example of couriers who have historically been treated as self-employed, but on application of the framework should generally be reclassified as employees. The Chair of the Revenue Commissioners has publicly stated that there will be "an increased focus" on this area. Significant liabilities for employers may arise due to an incorrect classification. If there is a risk, businesses could consider whether tax insurance offers a solution to mitigate the potential costs. Some businesses will consider making voluntary disclosures to reduce Revenue penalties.

The guidance recognises that there are several Irish State bodies with responsibility over employment matters. This guidance does not apply to social insurance law, which remains under the remit of the Department of Social Welfare (DSW), or employment rights which is overseen by the Workplace Relations Commission (WRC). However this guidance is of material relevance to employers in Ireland or businesses with contractors located in Ireland because the tests for determining the correct worker status will likely be relied on by individual workers who claim employment misclassification and associated employee rights. Revenue has indicated that work is ongoing on an update for determining employment status, in conjunction with the DSW and the WRC.

Five-Step Decision-Making Framework

The decision-making framework from the Karshan case and the Revenue guidance consists of two stages. Firstly, there are three "gateway" questions which operate as a filter. Only if they are answered affirmatively, will the last two questions be of relevance.

If any of the first three questions are answered negatively, there cannot be a contract of employment.

1. Does the contract involve the exchange of a wage or other remuneration for work?
2. If so, is the agreement one pursuant to which the worker is agreeing to provide their own services, and not those of a third party, to the employer?
3. If so, does the employer exercise sufficient control over the worker to render the agreement one that is capable of being an employment agreement?
4. Are the terms of the contract, interpreted in the light of the facts and working arrangements, consistent with a contract of employment, or with some other form of contract?
5. Is there anything in the legislative regime under consideration that adjusts or supplements any finding?

1. Exchange of wage/remuneration

The first question is easy to answer. In almost all circumstances where an individual is providing services, there will be some remuneration in exchange for those services. The Revenue guidance reflects a very lenient interpretation of this limb of the tests. It provides that where there is a payment by a business to a worker for a service then there is a contract which is capable of being an employment contract. This applies whether there is a written contract or not, and whether the work is carried out on a one-off basis or continuous basis. This test materially eliminates the confusion associated with the old "mutuality of obligation" test.

2. Personal Service

The issue of personal service considers whether the worker has agreed to provide their services to the business personally or whether they can send a substitute to perform the work for which they are engaged. It can be quite rare

in practice unless the worker is truly an independent contractor, to be able to send in a substitute on little or no notice to the client.

An unfettered right to substitute is inconsistent with an employment contract.

3. Control

Control has been a long-established feature of Irish case law on this topic and refers to the ability, authority or right of a business to exercise control over a worker concerning what work should be done, and how, when and where it should be done. The right to exercise control is more important than whether the business actually exercises it.

The guidance notes that skilled work requires less direction than unskilled work but if the business retains some residual authority over the worker, then it can still be a contract of employment. The Court in Karshan considered that the integration test can be viewed within the context of control, namely the extent to which a worker and their work form a coherent part of the business.

Additional matters to consider when examining control include elements such as notice of termination provisions and what is required from either party, the extent to which the business controls the method and amount of payment, and the working hours of the worker. A fixed reporting line, employee like supervision of method as well as output and participation in performance reviews are more characteristic of an employment relationship.

4. All of the circumstances of the employment

If the first three questions are answered affirmatively, then the contract must be interpreted in light of the factual matrix in which it was concluded. This involves consideration of the real arrangement on a day-to-day basis as opposed to merely the wording of the contract. This is a wide-ranging enquiry and the guidance notes that there are no "static

characteristics" indicative of an employment contract. The extent to which the worker is truly in business on their own account and taking enterprise risk is a key part of the analysis. The more limited the contractor is to influence the profit from the enterprise, the less likely it is that the worker is a contractor.

5. The legislative context

Consideration should be given to any legislation that requires modification to the approach adopted to the relationship between the written contract and the real arrangement between the parties. The practical application of this limb of the test is not yet clear. This is likely to involve an analysis of any legislation or regulatory framework, typically non-tax legislation, which could dictate a particular contractual structure or operational requirements and which may inform a conclusion on whether a person is an employee.

Further Information

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