

Freelancer Guide to Contracts and Negotiating

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INTRODUCTION

- Industry Media - Rosemary Klein, Huw Walters, Gwenda Carnie
- TV and Commercial Business Affairs Advisors
- All genres: Scripted, Unscripted, Animation, Children's Content
- Lots of industry crew engagement (BUT not employment lawyers)



CONTENT

- TV industry engagements - contract types
- Am I employed or self-employed and what's the difference anyway?
- Common contract clauses across all types of engagements and what can I negotiate?
- Negotiation tips



TV INDUSTRY ENGAGEMENTS – CONTRACT TYPES

- 3 Main types of contract commonly used in the TV Industry:
 - Contracts of employment (PAYE);
 - Freelance contracts;
 - Contracts with personal services companies



TV INDUSTRY ENGAGEMENTS – CONTRACT TYPES

Contract of Employment:

- Could be continuing/fixed term
- Paid through the payroll system of the employer
- PAYE system is used (PAYE = Pay As You Earn)
- National Insurance and income tax taken off by the employer using a tax code
- Receive a payslip



TV INDUSTRY ENGAGEMENTS – CONTRACT TYPES

Freelance Contract:

- Described by the government/HMRC as 'self-employed' or a 'sole trader'
- Typically invoices after the event, and waits to be paid (!)
- Keeps records of income and business-related expenses
- A type of business, so taxed on profit
- Submits a tax return at the end of each income tax year



TV INDUSTRY ENGAGEMENTS – CONTRACT TYPES

Limited Company/PSC:

- The individual providing services and the PSC are two separate legal entities
- Production company engages and enters into a contract with the PSC
- The individual is 'employed' by the PSC
- Individual takes money out of the limited company via a mixture of salary and dividends



EMPLOYMENT STATUS: AM I EMPLOYED OR SELF-EMPLOYED- AND WHAT'S THE DIFFERENCE ANYWAY?

- **Tax POV** – Employed/Self-Employed only
- Either PAYE is operated on your pay or it is not and you must calculate and pay your own tax
- HMRC won't care what the contract says – you need to assess the true nature of the engagement
- **Employment Law POV:** Employed/Self Employed/'Worker'
- Different rights associated with each status:
 - <https://www.gov.uk/government/publications/employment-status-and-employment-rights/employment-status-and-employment-rights-guidance-for-hr-professionals-legal-professionals-and-other-groups>
- Risks associated with getting the status wrong – pay more tax/lose out on benefits/protections.



AM I EMPLOYED OR SELF-EMPLOYED AND WHAT'S THE DIFFERENCE ANYWAY?

- How do you assess the true nature of your engagement from a tax POV?
- CEST – Check Employment Status for Tax
- Various different tests but questions often focus on 5 main concepts:
 - control - whether the production company can instruct you on how to perform tasks and which tasks to perform
 - integration - whether you are an integral part of the organisation
 - mutuality of obligations - whether you are obliged to carry out the work offered, and whether the production company is obliged to offer work to you
 - substitution - whether someone else can be sent by you to do the job
 - economic reality - whether you are in business on your own account, e.g. where you bear the financial risks of failure to deliver the service or can profit from delivering it more quickly/efficiently



AM I EMPLOYED OR SELF-EMPLOYED AND WHAT'S THE DIFFERENCE ANYWAY?

- TV Industry - HMRC Manual (ESM4118)
- Particular occupations: entertainment industry – TV workers - behind the camera workers roles normally treated as self-employed, Appendix 1.
- <https://www.gov.uk/hmrc-internal-manuals/employment-status-manual/esm4118>
- Updated in 2019
- Not an exhaustive list - if role not on the list “use the full range of employment indicators” to decide employment status



AM I EMPLOYED OR SELF-EMPLOYED AND WHAT'S THE DIFFERENCE ANYWAY?

- Who assesses your status?
- Risks to you and the production company associated with getting it wrong:
 - Prod Company:
 - Additional tax liabilities (unpaid PAYE (Income Tax and NI - can be backdated for up to 6 years)
 - Reputational risk
 - Risk to you:
 - Unplanned additional tax bill
 - Lost benefits and protections



AM I EMPLOYED OR SELF-EMPLOYED AND WHAT'S THE DIFFERENCE ANYWAY?

- **Incorrect assessment - what benefits might you lose out on?**
- **Employee rights:**
 - Not to be unfairly dismissed (after a period of 2 years)
 - Maternity, paternity, adoption leave, flexible working, redundancy
 - Statutory minimum notice periods: (at least 1 week if between 1 month and 2 years; 2 to 12 years – one week for each year employed; 12 weeks – 12 years' employment)
 - Sick pay
 - National minimum wage
 - Working Time Regs 1998 (working week, holiday, rest breaks)
 - Protection from discrimination: (e.g age, disability, race, sex, sexual orientation, religion)
 - Pension auto-enrolment



AM I EMPLOYED OR SELF-EMPLOYED AND WHAT'S THE DIFFERENCE ANYWAY?

- **Worker rights:**
 - Working Time Regs (working week, paid holiday, rest breaks)
 - Protection from discrimination
 - National Minimum Wage
 - Pension auto-enrolment
- **Self- Employed:**
 - Less legal protection - generally only contractual rights
- Note that nearly all freelancer engagements in TV are deemed to be 'workers'



PSCs

- **Quick Note on PSCs**
- Government/HMRC has been clamping down on use of limited companies to disguise what are really employment relationships and the resulting reduced tax bills.
- Provide services through a PSC – usually paid by a small salary and dividends.
- Although the gap has closed, tax rate on dividends is still lower than the income tax payable on personal income. Also, no NI is payable on dividends.
- Used to be that the risk of non-compliance sat with the PSC
- Now for medium and large companies – obligation to assess sits with the end client/production company. (Not the case yet for ‘small’ companies – still exempt).
- Seek independent financial advice on how you deliver services to make sure you are paying the right tax.



COMMON CONTRACT CLAUSES AND WHAT TO NEGOTIATE.

- Place of Work
- Start Date
- End Date
- Probationary Period
- Working Pattern and Hours (Working Time Regs)
- Notice Period (no statutory minimum for 'workers')
- Remuneration
- Holiday (employees and 'workers')
- Expenses
- Pension (employees and workers)
- Sick Pay (employees only)



COMMON CONTRACT CLAUSES AND WHAT TO NEGOTIATE

- Exclusivity (exclusive throughout? Different exclusivity at different production stages?)
- Confidentiality (NB CVs)
- IP Rights (Turnaround?)
- Credits
- Restrictive Covenants
- Pay in Lieu of Notice
- Disciplinary and Grievances
- Termination and Suspension
- Data Protection
- Diamond Notice
- Collective Agreements



NEGOTIATION TIPS

- Prepare for the negotiation – research the company and their productions, research rates for the role, likely programme budgets
- Know your worth – what sets you apart – why are you right for this role?
- Don't lower your price too quickly
- Listen, empathise and be prepared to be pragmatic and compromise



NEGOTIATION TIPS

- Look for 'win, win' solutions – avoid conflict – aim to be working together to solve a problem;
- Communicate effectively;
- Know when to walk away;
- Don't burn bridges;
- Follow up – send a thank you email summarising your understanding of the terms agreed;
- Read, correct and sign a contract.





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