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atypical workers

- freelancers
- casual/ sessional
- interns
- apprentices
- agency workers
- consultants

members' guide

experts at work



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introduction



An increasing number of Prospect members work on atypical contracts, including freelancers, consultants or members working on variable or 'zero-hours' contracts. Some members work as apprentices. Indeed, one could ask whether nowadays there is such a thing as a 'typical' worker!

In recent years, a growing number of organisations in Prospect areas have offered work to interns or volunteers. Some of these schemes are a valuable way for members to gain experience and insight into a field of work. In other cases employers use such arrangements as cheap or unpaid labour, exploiting the individual and blocking opportunities for full employment.

Often, members in such atypical working situations do not believe they have any legal rights. However, while their rights will depend on the exact circumstances of the work, all these workers may well have a range of employment protection rights and, in some cases, full employment status.

This guide gives information on the legal tests used to determine the level of employment rights. Atypical workers are not a single group with the same concerns and needs. So in individual cases members may need to seek more detailed advice from Prospect.

The guide also considers key issues for atypical workers in respect of their rights to a safe working environment, ensuring equality and developing careers. These can be provided both through formal 'training' roles such as interns and apprentices or when working as a consultant or freelance.

employment status

1

1.1 The first consideration is employment status, as this determines an individual's legal rights at work.

1.2 There are three different types of employment status and identifying which category a person falls under is often difficult.

1.3 Individuals undertaking work will be either:

- employees – with full statutory employment rights
- workers – with more limited rights, or
- self-employed or have no employment status - with no statutory rights, but they may have rights under their contract and will also have health and safety protection.

1.4 The table shows the probable employment status for different categories of atypical worker. Whether people fall in the 'most probably to include' and 'may include' columns will depend on their individual circumstances.

employment status	rights	most probably to include	may include
Employee	All statutory employment rights, including unfair dismissal, redundancy and all those below	people in typical forms of employment; apprentices	freelancers; consultants; sessional workers; zero-hours contracts; interns doing work themselves
Worker	Some rights – protection from discrimination, national minimum wage, paid holidays, representation at grievance/disciplinary (see section 3.2) and those below	freelancers; consultants; sessional workers; zero-hours contracts; interns doing work themselves	volunteers; work experience (if undertaking work rather than just shadowing)
None	Health & safety rights, contractual protection	genuinely self employed; work shadowers; volunteers	

1.5 Determining your employment status can be complicated, so if in any doubt members should seek advice from Prospect. The following sections provide detail on the relevant tests and descriptions of types of worker.

determining employment status

1.6 There is no single definitive test for determining which category an individual falls under. Courts and tribunals have held that a range of factors should be considered to determine the true status.

1.7 For instance, whether:

- there is a mutual obligation to provide and undertake the work
- tax is deducted at source by the employer
- working hours are determined by the employer
- there is a requirement for personal service
- tools or equipment are provided by the employer
- the individual is seen as part of the business
- there is an opportunity to profit financially from the way the work is done
- disciplinary or grievance procedures are applied

- there is a degree of supervision, and
- the parties understand it to be a contract of employment.

1.8 Case law makes it clear that no single factor determines employment status but that a tribunal must weigh up the range of issues in all the circumstances in order to make a determination.

1.9 Prospect has a questionnaire that members can complete when seeking advice on employment status, which is annexed to this guide. The questionnaire asks how the matters listed above apply in individual circumstances. It is particularly important to consider the reality of the situation rather than simply how it is labelled by the employer.

employee/shareholder status

1.10 In October 2012 the government announced its intention to create a new type of employment status of 'owner/employee'. This is proposed to come into effect from April 2013.

1.11 Under the proposal, employees would be given at least £2,000 of shares in exchange for giving up rights to unfair dismissal, redundancy, rights to request flexible working and time off for training, and would be required to give a longer period of notice on return from maternity or adoption leave. They would still be covered by all other statutory rights, such as protection from discrimination and the right not to have unlawful deductions from wages.

1.12 While this is labelled as a new employment status, it remains to be seen how it will be applied by the tribunals and courts.

1.13 In December 2012 the detail of this scheme was not known and was still subject to consultation, so check with Prospect for up-to-date information.

employees

2

2.1 'Employees' are employed under a contract of employment and will usually be working in a typical employment pattern. For someone to be an employee there will usually be largely positive answers in respect of the range of factors referred to at 1.6 and in the questionnaire.

2.2 Mutuality of obligation – the requirement on the employer to provide work and the employee to undertake it – is key to determining whether someone is an employee. If there is no such obligation in practice, there is unlikely to be a contract of employment. For example, if an individual is not obliged to turn up for work, and the employer has no obligation to provide work for periods of time, they are unlikely to be an employee (although they may still be a worker – see Section 3).

2.3 A range of people on atypical working arrangements may not be employees. These could include freelancers, consultants and interns. However their status will always depend on the factors at 1.6 above. Prospect often finds that members are told they are not employees when in fact they are, and are therefore entitled to full employment protection rights.

2.4 The definition of an employee under the Employment Rights Act includes those working under a contract of apprenticeship. Apprentices should therefore have the full range of employment rights (see Section 5.12 on apprentices).

2.5 Those working part time or on fixed-term contracts will usually be employees. Exactly the same tests will apply as to full-time or permanent colleagues.

employee rights

2.6 Employees are entitled to the full range of statutory employment rights including:

- unfair dismissal
- redundancy

- the right to a written statement of particulars of employment
- not to be discriminated against.

Employees also have all the rights of 'workers' (see Section 3.6).

2.7 See the Prospect factcard *Your Legal Rights at Work* for a summary of the main employment rights – <http://library.prospect.org.uk/id/2006/00702>.

workers

3

3.1 For some statutory employment rights there is a broad category of 'worker'. This applies to someone who does not necessarily meet all the usual tests for being an employee, but neither are they genuinely self-employed. Since 2000 a greater number of statutory rights have been granted to those in the worker category.

3.2 The definition of a worker under the Employment Rights Act is someone who works under a contract of employment or:

"Any other contract... 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."

3.3 Different definitions are used in the Equality Act and in respect of whistleblowing legislation, but the broad effect is the same.

3.4 The ERA definition includes people who provide work personally under a contract, where they are not genuinely operating as self-employed, even if they are not deemed to have full employee status. It also includes most freelancers, consultants, interns, sessional or casual workers, agency workers and those on zero-hours contracts. All these people may be working with a greater degree of flexibility than in the traditional employee relationship, but are still working personally for someone else and cannot be said to be in business on their own account.

workers' rights

3.5 Although workers are not entitled to the full range of employee rights, they are entitled to a number of important statutory rights. However, workers do not have the additional rights to claim unfair dismissal or redundancy and many other statutory rights that only apply to employees.

3.6 The table below summarises the main legal rights and protection applicable to workers.

legislation	brief description of right
Working Time Regulations	Minimum of 5.6 weeks paid holidays a year
	Limits on working hours and entitlement to breaks
Equality Act	Not to be discriminated against on the grounds of a protected characteristic
National Minimum Wage Act	Entitlement to a minimum rate of pay
Employment Rights Act	Not to have unlawful deductions from wages
	Protection against detriment for whistleblowing
Part-Time Workers Regulations	Equal treatment with comparable full-time workers
Employment Relations Act	Right to be accompanied to grievance and disciplinary meetings
Health & Safety at Work	To have a healthy and safe working environment

working time

3.7 Rights under the Working Time Regulations apply to all workers and not just to employees. In addition to limits on the maximum number of hours to be worked and entitlement to rest breaks and periods, this means that many freelancers, consultants and interns are entitled to a minimum of 5.6 weeks paid annual leave a year.

3.8 See the Prospect Members' Guide to *Working Time and the Law* for more detail – <http://library.prospect.org.uk/id/2011/00537>

equality rights

3.9 All the rights under the Equality Act apply to the broader category of workers. The Act specifically states that it covers those working under a contract of employment or apprenticeship, or 'a contract personally to execute any work or labour'. The Act also prohibits discrimination against contract and agency workers. It applies to employment and the provision of training, vocational guidance and qualifications.

3.10 Protected characteristics under the Equality Act are: age, disability, gender reassignment, marriage and civil partnership,

pregnancy and maternity, race, religion or belief, sex, sexual orientation.

3.11 See the Prospect Members' Guide to *Equality at Work* for more detail – <http://library.prospect.org.uk/id/2008/00092>

national minimum wage

3.12 Most workers are entitled to be paid at least the National Minimum Wage. The level of the minimum wage is very low and most freelance or consultant members of Prospect earn considerably higher rates of pay.

3.13 It is important to note that many interns and some volunteers are entitled to the minimum wage, even if they are taken on expressly as unpaid (see Section 5, types of atypical workers).

3.14 Minimum wage rates depend on age and there is a special rate for apprentices. The rates are revised each October (rates for 17-20 year olds were not increased in 2012).

age of worker	rate per hour from 1 October 2012
Aged 21 and over	£6.19
18 – 20	£4.98
16 – 17	£3.68
Apprentice rate (for apprentices under 19 or in first year of apprenticeship)	£2.65

whistleblowing

3.15 All workers are protected against being subject to detriment arising from what is called 'a protected disclosure'. For the disclosure to be protected it must relate to an actual or potential criminal offence, failure to comply with a legal obligation, miscarriage of justice, endangerment of health or safety, or environmental damage. The disclosure must have been made appropriately and in good faith for the worker to be protected from victimisation.

those with no employment status

4

4.1 The genuinely self-employed are excluded from all statutory employment rights. However they have contractual rights in respect of agreements to undertake a job. Self-employment is where the person is genuinely in business on their own account.

4.2 Some contracts will be drawn up on the basis that someone is working as self-employed, when in fact they are an employee or worker and have employment protection rights. Tribunals and courts will consider the reality of the situation, rather than simply accepting the label that the parties have given to the relationship.

4.3 Some volunteers are not covered as workers or employees and therefore have no employment protection rights (see 5.5).

types of atypical worker

5

5.1 Distinguishing whether a particular individual has employment rights can be difficult and often there will be grey areas. There is no absolute guidance to be followed and each case needs to be considered on its merits.

5.2 Below is general guidance about the likely employment status and rights of different types of atypical working.

freelancers and consultants

5.3 Where members are working on a freelance or consultancy basis they are likely to be 'workers' at the very least and therefore have the statutory rights in Section 3.6. Depending on the nature of their employment relationship they may also be 'employees' with the full range of statutory rights.

5.4 Freelancers, consultants or sessional workers usually work under contractual terms, with set obligations as to the work to be completed and specific payment terms. Typically they are seen as part of the organisation (and in some cases are indistinguishable from fully employed colleagues). They may have some flexibility about how or when they undertake the work, but often there is little else to distinguish them from employees.

interns and work experience

5.5 The terms 'intern' and 'work experience' are often used interchangeably, but generally an internship is likely to be a more structured arrangement.

5.6 Where a member is taken on as an intern (or described as being on work experience) and undertakes specific tasks themselves, they are likely to be treated as workers for employment law purposes. This will apply even if they have responded to an advert for an unpaid position or have agreed not to be paid.

5.7 The general position is that where the intern is doing elements of the work themselves they will be a worker. In some cases, depending on the detailed nature of the working arrangements, they may be an employee. The important distinction is whether or not the intern is actually performing tasks in the workplace. In the majority of internships, other than very short placements, this will be the case.

5.8 As a worker, an intern is entitled to the minimum legal rights listed above in Section 3.6, including the national minimum wage and the right to paid holidays.

5.9 There is an exception to the right to be paid the minimum wage: where the person is required to do work experience for a course of higher or further education and the placement does not exceed one year.

5.10 People doing work experience (or an internship) who are not undertaking any tasks themselves, but are only work shadowing, are very unlikely to be classified as a worker and therefore will not have employment rights or a right to the national minimum wage. Work shadowing in this sense would be where the person is simply watching and learning from someone else.

5.11 There are high quality internships which provide valuable experience. Regrettably, there are also many cases where interns are exploited. Even in cases where the intern is told that they will be unpaid, or only entitled to expenses, they may still legally be entitled to the range of workers' rights. The company or organisation must meet these rights – they cannot require the intern to opt out of statutory rights such as the minimum wage. There have been several cases in recent years where interns have succeeded in recovering arrears of pay in the courts, so it is important to take advice from Prospect in individual cases.

5.12 The TUC has produced guidance on a free 'rights for interns' smartphone app. The app will enable those workers undertaking internships to:

- establish – based on their terms, conditions and working practices – if they are legally classified as a 'worker'
- understand their employment rights
- rate the quality of their internship

- access appropriate advice and guidance in relation to employment rights and training and development.

You can download the app for free on Apple AppStore for iPhone or on Google Play for Android devices.

apprentices

5.13 An apprenticeship is a form of workplace-based training, usually in a skilled trade. It is for a fixed period or until a qualification is achieved. As mentioned above, those working on a formal apprenticeship should be treated the same as those on a contract of employment and have full employment protection rights in the same way as employees.

5.14 Apprentices must be paid at least the minimum wage and in unionised workplaces will often be covered by collective agreements providing for much higher rates of pay. There is a lower 'apprentice rate' of the minimum wage for those under 19 or in the first year of their apprenticeship. In December 2012 this was only £2.65 an hour.

5.15 A contract of apprenticeship is usually for a defined period. If the apprenticeship is terminated before completion, the apprentice may be entitled to pay and benefits for the full period and be able to claim damages for loss of the training and employment opportunity.

volunteers

5.16 Some volunteers may be 'workers' as described above. But where someone genuinely volunteers on a casual basis with no obligation to commit to fixed working patterns and no expectation of payment they will not be employees or workers and will not be covered by any statutory employment rights.

5.17 The law attempts to distinguish between those who are genuinely doing voluntary work and are therefore not covered by employment protection rights, such as hospital visiting, and those who are unpaid but in a role undertaking specific duties, often working alongside other employees doing very similar work. As with other categories of atypical working it will depend on the precise details of the arrangements (see Section 1). However, if

there is no contract or obligation on the volunteer to attend work it is unlikely that they would be classed as workers.

5.18 The National Minimum Wage Act expressly excludes genuine voluntary workers from minimum pay rates. A voluntary worker is one employed to perform work or provide services for a charity, voluntary organisation, associated fund-raising body or statutory body, who receives no money or benefits in kind except for expenses or subsistence.

zero-hours contracts & casual working

5.19 Workers employed on 'zero-hours' contracts will not have a set minimum number of hours to work, but can be called in as and when required. The same tests to establish employment status will need to be applied, but usually people working on zero-hours or casual contracts are workers and may be employees.

agency workers

5.20 Many of the above points apply in respect of agency workers, though there are specific rights to equal treatment for agency workers. These workers are not covered in this guide but see the Employment Law Update on the Agency Worker Regulations for detail – <http://library.prospect.org.uk/id/2011/00983>

health and safety

6

protection for all

6.1 All workers are entitled to work in an environment where the risks to their health and safety are properly controlled.

6.2 Volunteers, like members of the public, clients and customers, are also protected because employers (including voluntary organisations) and the self-employed are required by health and safety law to protect people affected by their work.

6.3 The genuinely self-employed also have duties to assess the risks to their own health and safety at work and are therefore responsible for providing their own first-aid arrangements, training, protective equipment and health checks, and for organising their own working time.

6.4 In 2012, the government's independent review of health and safety by Professor Löfstedt recommended the exemption of self-employed workers from health and safety laws if they 'pose no potential risk of harm to others'. Löfstedt envisaged this applying to people who work at home, entirely under their own control (he cited web-designers and some authors) and who can only harm themselves if they fail to manage their work risks. The proposals are controversial and subject to a Health and Safety Executive consultation.

rights and duties

6.5 The following health and safety rights and duties apply to employees (full or part-time, temporary or permanent), young people on work experience, apprentices, charity workers, mobile workers or homeworkers. In the case of temporary, casual or agency workers, the employment business/agency, gangmaster, contractor or hirer has a legal duty to ensure the provision of the rights set out below.

6.6 Workers have the right to:

- work in places where all the risks to their health and safety are properly controlled
- stop working and leave the area if they think they are in danger
- inform their employer about health and safety concerns
- a rest break of at least 20 minutes if they work more than six hours in one go.

6.7 Workers must:

- take care of their own health and safety and that of people who may be affected by what they do or don't do
- co-operate with others on health and safety and not interfere with or misuse anything provided for their health, safety or welfare.

6.8 Employers must tell workers:

- about risks to their health and safety from current or proposed working practices
- about things or changes that may harm or affect their health and safety
- how to do their job safely
- what is done to protect their health and safety
- how to get first-aid treatment
- what to do in an emergency (including how to summon emergency help or rescue).

6.9 Employers must provide workers, free of charge, with:

- training for them to do their job safely
- protection for them at work when necessary (such as clothing, shoes or boots, eye and ear protection, gloves, masks etc)
- health checks if there is a danger of ill health because of their work
- regular health checks for workers doing night work and a check before they start.

equality

7

equal rights at work

- 7.1** The provisions of the Equality Act apply to all workers, including all apprentices, contract and agency workers.
- 7.2** The Act prohibits discrimination because of a number of 'protected characteristics' – age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, sexual orientation.
- 7.3** Types of discrimination outlawed under the Equality Act are called 'prohibited conduct' – direct discrimination, indirect discrimination, harassment, victimisation, discrimination arising in consequence of disability, failure to make a reasonable adjustment. There is more detail on these definitions in Prospect's Members' Guide to *Equality at Work*: <http://library.prospect.org.uk/id/2008/00092>
- 7.4** Protection from discrimination applies across the employment process: from the recruitment procedures and terms upon which employment is offered, through to dismissal or leaving employment and even after employment has been terminated. Apprenticeships and any other training and development programmes are also covered.

vulnerability to discrimination

- 7.5** Most groups described as atypical workers in this guide are vulnerable to unfair or unequal treatment from the employer. Such groups are more likely to be disproportionately represented by women, disabled people, people from black or minority ethnic backgrounds, younger or older workers.
- 7.6** Research by the TUC has found that as a direct result of Government cutbacks and the recession, women's position in the labour market is changing, dramatically. The changes have resulted in a move away from full-time employment towards self-

employment, involuntary part-time and casual work. The TUC is concerned that much of this self-employment is bogus; a way for employers to save on National Insurance costs and cut back on key employee benefits such as pensions, paid holidays and sick pay.

apprenticeships checklist

7.7 Trade unions can play a crucial role in ensuring fair access to employment and training opportunities. Concerns about any of the following issues should be raised with your Prospect rep:

- negotiate best practice agreements on apprenticeships with employers which include mechanisms to encourage under-represented groups onto apprenticeship schemes
- reasonable adjustments that can be put in place to support disabled apprentices
- under-representation of women or black workers on apprenticeship schemes
- access to the same terms and conditions as other workers
- support, eg through mentoring schemes.

7.8 The TUC has produced an Apprenticeships Toolkit which is a useful source of reference at http://bit.ly/toolkit_apprenticeships

migrant workers

7.9 Migrant workers are more likely than other groups to be used by subcontractors or as casual or agency workers. There has been evidence of extreme abuse of migrant workers, particularly in low-paid sectors. But migrant workers are vulnerable to unfair and discriminatory treatment in any sector, ranging from differences in pay and conditions to denial of sick pay and leave entitlements. If you are a migrant worker and have concerns about the way you are being treated at work you should contact your local Prospect rep.

training and career development

8

atypical workers and training opportunities

8.1 Developments in the world of work have put a premium on skills, abilities and qualifications. Few individuals will progress through their working life without facing changes to their job, career or employer. There is now a greater emphasis on proven skills that can be transferred to new employment. This challenge is increased for those working as freelancers, consultants or on other atypical contracts.

8.2 Prospect aspires to enhance skills and personal development opportunities for all members. This has included seeking agreements with Government and employers on training and development that specifically focus on transferable skills and skills acquisition, continued professional development and positive support for life-long learning.

8.3 Continuing professional or career development (CPD) is vital to any type of worker, employee or the self-employed. CPD is often associated with maintaining members' professionalism and competence. It can also be about enhancing career development, business, mobility and personal satisfaction. Clearly, organisations will benefit from the contribution of professionals with up-to-date skills and knowledge.

8.4 Prospect negotiators will strive to ensure that all workers are included in the employer's training programmes and opportunities. Provision of workplace training and development should not be denied to atypical workers.

skills strategy

8.5 The Government's Skills Strategy and priorities aim to improve the skills of the workforce, the performance of the economy and engagement in learning. Given that skills are a devolved matter, each of the UK's governments is pursuing its own strategy and actions.

8.6 In September 2012 the new higher education funding regime in England came into effect. This enables potential students, including for the first time part-time students, to access finance to pay for their courses, in addition to living costs. There are conditions to access, such as age and location. Other eligibility criteria include the type of course and place of study.

8.7 For further information see: http://bit.ly/learning_choices or go to http://bit.ly/finance_students

8.8 From 2013 the Government is expected to introduce a loan scheme for those aged 24 and over and those accessing FE in England. The Government intends to encourage employer-led training initiatives, especially around professional skills and leadership and management. For the most up-to-date information see: http://bit.ly/learning_loans

8.9 In 2012-13, the Government expects to invest around £1.5 billion in apprenticeships throughout England. This will be used to support over 700,000 apprentices in training. The aim is to make NVQ level 3 the normal level to achieve for apprentices, and also to provide funding for adults under 24 to achieve a level 2 qualification.

right to request time off for training

8.10 There is a statutory right for employees over the age of 18 to request time off for learning (under-18s have rights to paid time off). This right only applies to those employed in organisations with 250 or more employees. The training must be intended to improve the employee's effectiveness at work and the performance of the employer's business. The training can either be provided internally by the employer or externally by another organisation. The employer must give the request 'serious consideration' and any refusal must be for one of the specified reasons. There are detailed

procedures to follow in making the request. There is no statutory right to be paid for the time off.

8.11 This right is only for employees. However, as identified in Section 1, some members employed on atypical contracts will have full employee status and will qualify for this right.

pensions

9

state pension

9.1 Entitlement to state pension depends on employment status, among other factors. Being classed as employed or self-employed for National Insurance Contributions purposes has a significant impact on state pension entitlement, though it does not automatically determine your employment status. There may be cases of employees paying self-employed NICs and vice versa. You should contact HMRC if you are in any doubt about the type of NICs you should be paying.

employees

9.2 If you are considered to be an employee for national insurance purposes you will pay Class 1 NICs.

9.3 Unlike income tax, NICs are payable on a 'per job' rather than an individual basis. If you pay Class 1 NICs with two or more different employers, in certain circumstances you can apply to HMRC to defer paying some contributions in order to avoid an overpayment.

9.4 You pay a lower amount if you are a member of a contracted-out pension scheme run by your employer. Class 1 employee contributions are deducted from your wages by your employer. You only pay Class 1 employee contributions between the ages of 16 and state pension age.

9.5 Regardless of whether you actually pay any Class 1 NICs, as long as you earn over £107 a week (2012-13) in any job as an employee, you build up entitlement to state pension. You get a basic state pension based on the number of qualifying years of contributions you pay or are credited as paying before state pension age.

9.6 You can earn a qualifying year if you are:

- an employee and earn over £5,564 (2012-13)
- a parent with a dependent child under 12
- an approved foster carer
- caring for one or more severely disabled people for at least 20 hours a week
- claiming certain national insurance benefits (eg Jobseekers Allowance).

9.7 If you reach state pension age on or after 6 April 2010 you need 30 qualifying years for a full basic state pension. A full basic state pension is £107.45 (2012-13). If you have fewer qualifying years you earn a proportion of the full rate.

9.8 You can make voluntary NICs if you may not otherwise qualify for a full basic state pension (these are known as Class 3 contributions). If you are likely to reach 30 qualifying years anyway then it is unlikely that Class 3 contributions would be worthwhile. However if you may not reach 30 qualifying years then Class 3 contributions might offer good value, particularly if a small number of contributions could turn a year from non-qualifying to qualifying.

9.9 If you pay full Class 1 NICs then you also qualify for a further additional state pension (currently known as state second pension). A full explanation of this benefit is beyond the scope of this guide but it can be worth up to an additional £160 a week and can therefore play a significant part in pension planning.

9.10 If you pay lower Class 1 NICs (the contracted-out rate) then your employer will pay a minimum level of occupational pension but you do not accrue state second pension.

self-employed

9.11 The state pension system for the self-employed is similar to that for employees. Many of the points made in the section on employees above are relevant to the self-employed; the main differences are outlined here.

9.12 Being treated as self-employed for national insurance purposes does not definitively mean that your job status is self-employed. If you have any doubts about the type of NICs you should be paying you should contact HMRC.

9.13 Self-employed people pay Class 4 contributions instead of Class 1 contributions. However, paying Class 4 NICs does not give any entitlement to state pension.

9.14 Entitlement to state pension for the self-employed derives from Class 2 contributions. The rate (2012-13) is £2.65 a week. There are a number of different ways of making these contributions (direct debit etc). Self-employed people with low levels of profits (£5,995 in 2012-13) can avoid paying Class 2 NICs but if this means they may not have 30 qualifying years before state pension age they should consider this option carefully.

9.15 The self-employed do not build up any entitlement to state second pension through the national insurance system.

occupational pensions

9.16 Employer-sponsored pension provision is often referred to as occupational pension provision. Where they are offered, occupational pensions are a very important part of overall remuneration. A description of the various forms of occupational pension provision is beyond the scope of this guide – this section focuses on your contractual and statutory rights.

9.17 Generally speaking, membership of an occupational pension is a contractual provision. If your contract states that you are entitled to join a pension scheme then that is usually definitive.

9.18 However, occupational pension provision is subject to a number of regulations. People aged over 75 will generally not be allowed to join a scheme. Employers are not allowed to discriminate directly or indirectly on grounds such as gender, race or sexual orientation (eg by excluding women or by excluding part-time workers who may be disproportionately women).

9.19 Regulations prohibit discrimination against fixed-term workers unless it is justified on objective grounds. However, less favourable treatment in relation to some contractual

terms is objectively justified where the fixed-term employee's overall package is no less favourable than that of a comparable permanent employee (ie fixed-term workers could be excluded from membership of an occupational pension scheme if otherwise compensated within the overall benefit package).

9.20 Regulations covering agency workers do not cover occupational pensions.

9.21 Traditionally there has been no statutory right to occupational pension provision for workers of any employment status. Employers with more than five employees have had to offer access to a pension scheme but they have not been required to contribute to it.

9.22 From October 2012 employers will gradually be required to automatically enrol employees into a pension scheme with a minimum level of employer contribution. The biggest employers are covered by these regulations first, with others being phased in over the following five years. If employees do not already have access to a qualifying occupational pension scheme and are aged between 22 and state pension age, ordinarily work in the UK and earn over £8,105 (2012-13) they will generally be covered by these regulations.

employee, worker or self-employed?



Prospect has a questionnaire to help us determine a member's employment status. A shortened version is below, but if you need advice on this please contact your Prospect representative. You can also download a copy of the questionnaire from the library on Prospect's website at <http://library.prospect.org.uk/id/2012/01076>

Complete these questions to help us consider your employment status. Give as much detail as you can and continue the explanations on a separate sheet if necessary.

Please send a copy of your contract or any other documents concerning your employment, such as a letter of appointment.

Situation	Yes	No
Are you under an obligation to work each day that you are expected or on the rota?	<input type="checkbox"/>	<input type="checkbox"/>
Detail/Examples		
Can you decide not to work on some days (other than through booking or taking annual/sick leave etc)?	<input type="checkbox"/>	<input type="checkbox"/>
Detail/Examples		
Do you think the employer/company is under an obligation to offer you work each day? Could they simply tell you there is no work one week or for a few days in the week? If so please provide details.	<input type="checkbox"/>	<input type="checkbox"/>
Detail/Examples		
Is your work supervised? For example, does someone tell you what to do, or check your work? What would happen if you did something wrong, who would tell you about it?	<input type="checkbox"/>	<input type="checkbox"/>
Detail/Examples		

Do you think colleagues or customers at the organisation/company see you as part of the organisation? or do they think you are different to the other workers there?

Detail/Examples

Are you paid a fixed rate or salary? Are you paid by an agency or the organisation you are working at? Is it a set hourly rate?

Detail/Examples

Is tax and national insurance deducted at source from your pay?

Detail/Examples

Are any other deductions made at source?

Detail/Examples

Are you paid travelling expenses?

Detail/Examples

Are there any other out-of-pocket expenses you would claim? If so who pays them?

Detail/Examples

Are you entitled to paid annual leave? If so how do you book leave, who has to approve it? Is there a form to fill in?

Detail/Examples

Are you entitled to paid sick leave? If so how much is it?

Detail/Examples

Are you able to join the company pension scheme?

Detail/Examples

Is there a disciplinary code that applies to you?
Have you been told about it? Have you ever received a warning, if so who from?

Detail/Examples

Are you able to work for other agencies or companies during your work with the current organisation?

Detail/Examples

Is equipment provided for the job?
If so who provides it?

Detail/Examples

Could you send someone else in to do your job for you, if you were not able to attend yourself?

Detail/Examples

Could you employ someone to help you get your job done?

Detail/Examples

Do you have any degree of financial risk in how you get the work done?

Detail/Examples

Do you have responsibility for investment and management?

Detail/Examples

Have you been told your employment status?
For example, have you been told you are self-employed, a contractor or an employee? Has anything about this been put to you either in writing or verbally?

Detail/Examples

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