



Engaging developers – key considerations

Getting the right developer/s on board is key to any software development project. But engaging new employees or consultants isn't without risk, particularly in this field, so getting the legal relationship and the governing contract right is paramount in protecting your business.

Employee or consultant?

If you choose to contract with a company which employs two or more developers, you will need to ensure your contract with that company deals with issues such as confidentiality and IP ownership, but otherwise the relationship should be fairly straightforward. However, often software developers aren't employed a separate companies and instead operate as "one-man bands" and enter into contracts either in their own name or via their own Personal Service Company. Correctly determining whether your developer will be your employee or a self-employed external consultant is critical, impacting:

- the client and the contractor's tax and PAYE obligations;
- the contractor's entitlement to employee benefits and protection rights (sick pay, holiday pay etc); and
- the ownership of the intellectual property rights in the software, such as copyright.

The determination isn't always easy however, and usually involves a close look at the detailed mechanics of the relationship between the client and the developer, including:

- how much control the client has over the developer in terms of when and how he or she performs the services;
- whether the developer is obliged to provide their services themselves or whether they could send a substitute; and
- how long the engagement lasts.

Individuals who offer their services through intermediaries –like Personal Service Companies (PSCs) – are a particularly tricky area with new legislation being brought in from 6 April 2020 which will put the burden on clients to determine the employment relationship and account for PAYE taxes.

IP ownership

- **Employees** – IP created by an employee during the course of their employment will automatically belong to the employer, not the employee, but it is still important that the employment contract is explicit about how and when IP ownership arises.
- **Consultants** – the position for consultants is the opposite to that of employees, where, unless the

contract states otherwise, if the consultant develops the IP, then he or she will own it. So it is even more critical to ensure the consultancy agreement clearly states that any IP created by the consultant will be automatically assigned (transferred) from the consultant to the client.

Contractual issues

- **Confidentiality** – a key provision in any employment or consultancy agreement to ensure your ideas, trade secrets etc don't fall into the hands of your competitors;
- **Non-compete restrictions** – aim to prevent your key employees or contractors from working for your competitors for a set period of time (because of the valuable information they have obtained whilst working for you). These need to be “reasonable” in order to be enforceable, otherwise they may be seen as a 'restraint of trade', so careful drafting is needed here;
- **Non-solicitation and non-dealing restrictions** – look to stop the developer from poaching your employees and contractors or dealing with your clients once the developer has left. As with non-complete, these restrictions need to be “reasonable” in order to be enforceable;
- **Moral rights** – includes for example the right to be identified as the author of a document. Less critical perhaps than something like copyright, these should still be dealt with properly in the employment or consultancy agreement, which means the employee or consultant will need to state that they waive these rights;
- **Tax** – ensure that your contractual terms reflect the proper status of the developer as a contractor;
- **Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE)** – the implications of TUPE legislation can be substantial, so this should be an important consideration when commencing and terminating larger or longer term software development projects. The rules mean that in certain circumstances, if a software project is transferred to a new service supplier, the employment contracts of the developers associated with that contract may transfer to that new service supplier. This is most likely to be an issue with situations like outsourcing, or in-housing or change of an outsourced service supplier.

Need further information?

Read:

- Our blog on the changes to rules (from April 2020) on [engaging self-employed contractors](#);
- Government guidance on [determining employment status](#).

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