



CREATIVE CAREERS

Inspiring the next generation



DIVERSITY AND INCLUSION, WHY ARE WE STILL TALKING ABOUT IT?

BEST PRACTICE RECRUITMENT GUIDE
FOR CREATIVE LEADERS

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INTRODUCTION

There have been many initiatives over the years that have focused on encouraging employers to diversify their workforce. Despite this, diversity across the Creative Industries ⁽¹⁾ remains largely unchanged, still failing to be representative of the wider working population or the communities that it works to serve and engage. It is this that defines diversity in the workforce for best practice purposes and as such stretches beyond the nine protected characteristics that are outlined in the 2010 Equality Act, shared on page 4.

Historic recruitment patterns such as the use of unpaid internships, an over-reliance on volunteers, rigid pre-requisites for entry along with a ‘who you know, not what you know’ culture, may all be jeopardising our sector’s ability to be truly inclusive. This could also be compounded by some of the hierarchical structures of inequality found in our organisations, with our leaders typically being drawn from a narrow demographic.

Whilst there have been many successful programmes that have supported underrepresented talent into our workforce, it has been the case that some job-creation activity has been treated as an ‘add-on’ rather than core to an organisation’s operating culture. We’ve also learnt that organisations, regardless of profile or scale, sometimes lack understanding about different entry routes into the workplace, the different types of roles and employment routes that exist or rather more an accurate definition of each, and which one/s might be the best choice for the opportunities they have.

We are grateful to the legal team at Counterculture Partnership LLP, a professional services firm specialising in advice to the creative and cultural sector, for their assistance with this guide. However, this is a tool to encourage objective assessment of an organisation’s current approach. It is not a substitute for legal advice, and you must not rely on it as such. Always obtain professional or specialist advice based on your organisation’s specific circumstances before taking, or refraining from taking, any action on the basis of the information in this guide.

We hope this guide will provide some helpful food for thought, encouraging organisations to think about their current approach and whether recruitment processes could be changed or built on for the better. We know change can be hard, but working together will make it easier.

This Best Practice Recruitment Guide has been created by Creative & Cultural Skills as part of the DCMS-funded Creative Careers Programme (CCP), an integrated industry-led programme of activity across England that is working to ensure there is a larger and more diverse intake of talent and a broader range of routes into the creative industries, a commitment of the Creative Industries Sector Deal. The Creative Careers Programme is being delivered by Creative & Cultural Skills, ScreenSkills and the Creative Industries Federation in partnership with the Careers and Enterprise Company and Speakers for Schools.

1. Advertising and marketing; Architecture; Crafts; Design (product, graphic, fashion); Film, TV, video, radio and photography; IT, software and computer services; Publishing; Museums, galleries and libraries; Music, performing and visual arts; Animation and VFX (visual effects); Video games; Heritage





DIVERSITY AND INCLUSION IN THE WORKPLACE

What does diversity and inclusion in the workplace mean?

The terms 'diversity' and 'inclusion' are frequently used in our sector, but this doesn't necessarily mean these terms are fully understood.

Whilst most employers will (or should) have awareness of the 2010 Equality Act and the nine characteristics that are protected by law: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex (gender), and sexual orientation. Being a truly inclusive employer should go beyond simply fulfilling obligations to avoid discrimination against these characteristics.

Typically, **diversity** in the workplace concentrates on staff recognising difference. Valuing different view-points and approaches, as well as the workforce being representative of the communities that it seeks to serve and/or engage.

Inclusion focuses on how an organisation ensures its workers can fulfil their potential regardless of their background, identity or situation. An inclusive workforce sees the benefit of a diverse range of people working together, and makes individuals feel equally valued and able to contribute.

An organisation that has an inclusive approach to recruitment welcomes applications from a diverse range of candidates without prejudice and deploys recruitment methods that actively encourage and facilitate this.

What feeds inequality in the workplace?

There are many factors that lead to an organisation failing to be truly diverse and inclusive, these can include:

- Prejudice and bias, which can be conscious or unconscious.
- Lack of confidence or skill in managers and/or decision makers who consider it easier to manage those with a more uniform set of experiences and perspectives.

- Conforming to type. It can be assumed to be a more straightforward option to recruit someone in the image of oneself or the previous postholder who may have been popular with others.
- Unwillingness to change because this isn't deemed important or necessary.
- Lack of representation in the business, sector or individual occupation to date.

Why should my workforce be diverse and inclusive?

From a business perspective, diversity can directly impact upon effectiveness. For example, in a marketing and communications team, where the brief is to attract a larger and more diverse audience into a venue, staff with different perspectives, backgrounds and circumstances will aid the delivery of that work. It's also true that employers have a legal duty to protect the health, safety and welfare of their staff, and working in a diverse and inclusive way may help in meeting those obligations.

But beyond those considerations, organisations that invest in the development and wellbeing of their staff see everyone in the organisation as an individual. This means the background, identity and/or circumstances of individuals bears no relationship to their ability to meet their potential, and staff feel valued and respected. These organisations are safer, more positive and frankly nicer places to work, often resulting in greater staff loyalty, improved performance and increased wellbeing.

Key reasons why an organisation should want to be diverse and inclusive:

Moral – people deserve to be treated equally regardless of their background, identity or personal circumstances. Failure to do this means you risk treating one person less favourably than another, which isn't fair. We all have the right to develop and grow, be rewarded, equally supported and be given a voice on things that matter to us.

Social – everyone should have equal access to employment and development based on merit, not because they have had the fortune to access training, experiences or networks that others haven't - these aren't indicators of someone's ability. We must learn to recognise and utilise someone's skills, even if they are presented to us in ways that we're not used to. It could be bad for a business's productivity if we don't do this!

Legal – in addition to the serious health and safety obligations mentioned above, there are many Acts of Parliament which protect employee and other workers' rights. For example, the National Minimum Wage Act 1998 sets minimum requirements for pay and the Employment Rights Act 1996 sets out many familiar rights including

the right to maternity leave and the right (after two years' continuous service) not to be unfairly dismissed. Discrimination, harassment and victimisation on the grounds of a 'protected characteristic' are prohibited by the Equality Act 2010 – and the conduct of an organisation or individual staff member can be held to account both outside of working hours and outside of the workplace.

Diverse workforces aren't just about improving the way in which tasks or areas of work are undertaken, there are wider benefits, such as:

- Mirror imaging - much anecdotal evidence suggests that where a business's workforce reflects its local community, it improves the diversity of audiences/ customers and helps to extend reach.
- Increasing acceptance and kindness between staff. The more we're exposed to difference, the more we can understand it and value it.
- Business sustainability – embracing a diversity of thoughts, ideas and ways of working from different backgrounds, identities and circumstances, improves planning, decision making and engagement.

Ultimately, workplace disputes can be costly and time consuming for an organisation. They can also result in financial penalty, reputational damage and in some situations, criminal proceedings. Promoting and embedding diversity and inclusion in the workplace protects your organisation and supports your people: why shouldn't your workforce be diverse and inclusive?



ROUTES INTO THE WORKFORCE: UNDERSTANDING THE DIFFERENCE BETWEEN EACH

We know the creative industries uses a range of routes to support and develop talent into and through the sector. However, we still come across employers that misunderstand different types of training and employment routes, which may be feeding our failure to be inclusive as well as putting our sector’s resilience at risk. The most common issue we see relates to pay and understanding when this should apply and when it may not need to.

The title you give to a role or an individual isn’t what determines their right to pay. The conditions within which an organisation requires someone to operate is what determines whether an individual should be paid or not, so just calling someone a ‘volunteer’ doesn’t mean the law would treat them as one.

Work experience and industry placements

The term **‘work experience’** is used to describe a range of placement opportunities across the creative industries. We would like to help employers understand best practice here to avoid mis-labelling an opportunity that would be better referred to as something else. This may help reduce concerns about offering work experience opportunities and bust some common myths.

Work experience is generally aimed at young people aged 14 upwards. A work experience placement typically lasts for between one day and two weeks in total and should provide the candidate with an opportunity to gain some insight into an industry or company. This means a candidate undertaking work experience with you may be exposed to more than one department, role or function during their placement.

Candidates undertaking work experience should be encouraged to take on basic duties and/or shadow existing staff, but should not be given direct responsibility for tasks that are business critical i.e. a task that the company needs fulfilled in order to operate.

Organisations providing work experience should have an up-to-date safeguarding policy and set of procedures in place. It is also advisable for a company to have a work

experience policy, which outlines in which departments and/or situations the company offers work experience and why. See the 'Introducing a Workforce Development Policy' section on page 30 of this guide.

You may wish to identify a work experience coordinator in your organisation either as a standalone role or as part of an existing role, who can help set and maintain oversight of all work experience opportunities you wish to offer. Each work experience placement should be risk assessed prior to commencement and evaluated at the end.

Work experience placements are unpaid but all learning objectives and expenses to be covered as part of the work experience opportunity should be agreed at the start.

Industry placements are more involved. This is a work-based learning opportunity that allows a candidate to gain real experience of an individual role or occupation. Industry placements are part of accredited training programmes and should help a candidate fulfil the requirements of the course they are undertaking. For this reason, those undertaking an industry placement do not need to be paid under National Minimum Wage regulations, but are expected to turn up just as they would for taught sessions with their training provider.

The course itself will determine the overall length of an industry placement and the expected number of hours to be worked. Industry placements should last for no more than 12 months in total. Candidates may need to undertake more than one placement to make up the total number of placement hours that is required by their course.

Candidates should be aged 16 years and over and must be supported and managed to undertake real tasks during their placement. They should be set clear objectives at the start and be given clear and constructive feedback throughout. Candidates undertaking an industry placement should have a dedicated line manager or supervisor, who along with all staff, must recognise that the candidate is there to learn.

The manager/supervisor or a nominated HR lead in your organisation must ensure the candidate gets all the necessary training and support needed to fulfil their placement. This includes helping the candidate understand company policies and procedures, the importance of complying with these and where they can get further information if needed.

Candidates should be treated as members of the team for the duration but may need to be excluded from accessing business sensitive information and/or discussions. In such instances, the reason for exclusion should be clearly and openly explained.

The host organisation should be provided with details of a key contact at the training provider and should be in regular contact with them about the candidate's progress during the placement. If a candidate fails to turn up without notice this should be reported to the training provider on the same day.

Personal and Protective Equipment (PPE), uniform and relevant work-related equipment needed to fulfil the placement should be provided by the host organisation (employer). Each industry placement should be risk assessed prior to commencement and evaluated at the end.

Apprenticeships

Today an apprenticeship is simply defined as a job with training, but is only recognised as being a formal apprenticeship if aligned to an apprenticeship standard (England) or framework (Scotland, Wales or Northern Ireland).

An apprenticeship consists of three core elements:

- a paid job – provided by an employer.
- off the job training - this must make up a minimum of 20% of the apprenticeship and be provided by a registered training provider.
- English and maths - this applies only to those who don't hold recognised qualifications in these subjects at an agreed level.

In England, apprenticeships can only be delivered through a tripartite agreement between an employer, apprenticeship training provider (who in some instances may also be the employer) and an End Point Assessment Organisation. They offer a genuine alternative to academic study and help individuals gain the skills, knowledge and behaviours they need to become **competent** in an occupation.

There is a long history and culture of creating unpaid work opportunities in the creative industries. This culture has contributed to some misconceptions about what an apprenticeship is and what an employer's obligations are. We hope the following will help:

By law all employees, including apprentices, need to be paid at least National Minimum Wage (NMW). There is a NMW rate specifically for apprentices, which applies to all apprentices aged 16-18 and those aged 19 and over who are in the first year of their apprenticeship. After this point, apprentices must be paid the appropriate minimum wage for their age. Employers may choose to pay their apprentice more than the minimum wage from the start, something we'd encourage where it's possible to do so.

An apprentice must be aged 16 or over and have completed their final GCSE year at school before starting an apprenticeship. There is no maximum age limit. In England all training for apprentices is funded regardless of a candidate's age and prior qualifications. The only time this doesn't apply is where a candidate's prior qualifications are in the same subject as their chosen apprenticeship or where a candidate already has related prior occupational experience i.e. they already have experience of doing the job. In these instances, a candidate is still free to undertake the apprenticeship but they, or you the employer, may need to pay the full training costs from your own funds. The training

provider will assess whether an individual is eligible for funding and if so for what proportion at the start of the apprenticeship.

The recommended duration of an apprenticeship is now determined by the individual apprenticeship standard your apprentice is working to. This can vary from 12 months to 6 years, or sometimes longer! However, no apprenticeship in England is allowed to last for less than 12 months. All apprentices must have a contract of employment in place, and be paid for at least 30 hours a week, and be formally engaged with the off-the-job training for the duration. The paid contractual hours must include the minimum 20% off-the-job training.

Where an apprenticeship is undertaken on a part-time basis, the employer must extend the length of the employment contract and pro-rata the 30 hours a week, so the apprentice is contracted and paid for the equivalent number of minimum hours overall. For example, to make the required minimum of 30 hours a week for 12 months part-time, the employer may issue a contract to the apprentice for 15 hours a week for 2 years (so the same overall hours are contracted and paid for).

It's important for an employer to recognise that an apprentice is, first and foremost, an employee and must be treated as such. There are some specific things that should be noted:

- All apprentices should have a dedicated line manager.
- If under 18 years of age an apprentice must always be given a 12-hour break between one shift ending and another starting.
- young workers (under 18) must not exceed the 8 hour a day or 40 hours per week working rule, as part of the working time regulations. They are entitled to rest breaks of at least 30 minutes if their shift lasts more than four and half hours.
- An apprenticeship may be the first step into the workplace for some, so whilst you have employed them to do a job for you it's important to remember that they are also learning how to do this. We advise managers to apply patience and understanding here.
- All apprentices are entitled to holiday and any other benefits your company offers to staff such as childcare vouchers or paid sick leave in line with your policies.

For more detailed guidance and best practice recommendations on apprenticeships please go to [Creative & Cultural Skills' A Manager's Guide to Apprenticeships](#).

Internships

In recent years there have been myriad initiatives designed to support interns into the sector and much publicity about the use of unpaid internships. Internships are one of the most misunderstood role-types in the sector with some defining them as a route only for graduates, others thinking of them as a prolonged work experience opportunity, some referring to them as a training opportunity in the workplace (sometimes called a traineeship) and some, sadly, view them as free labour. In all instances where they are misunderstood, we tend to find employers simply lack awareness of some key factors that could help them better define and position internships.

In truth, there is no legal definition of an intern, only the definition of a worker, which we outline later in this guide. At the start of this section we highlighted that it's not what you call someone that defines their role, it's the conditions within which they are expected to operate. This is why in practice many unpaid internships are at risk of contravening NMW regulations. We explore this later in the guide.

Unlike an apprentice, interns do not need to undertake formal training alongside their internship or work towards achieving a certificate of competence.

Sometimes, training providers such as Universities refer to 'internships' when they are describing conditional work elements of a particular study programme. What they are really describing is an 'industry placement' as defined earlier in this guide, and as such the 'internship' is not subject to NMW. This also applies to all placements where a candidate is merely shadowing another worker and not undertaking duties themselves.

Taking account of HMRC guidelines and the need to give an intern a meaningful experience, we suggest a best practice definition of an internship is:

A paid, entry-level position for someone of working age, who is seeking to develop their CV or change career. An internship lasts for no more than six months, and the individual has a defined role and is paid at least NMW for their age.

Volunteers

Volunteering is any activity that involves spending time, unpaid, doing something that aims to benefit an individual or group other than, or in addition to, close relatives.

Volunteering must be a choice freely made by the volunteer. This can include formal activity undertaken through public, private and voluntary organisations as well as informal community participation.

There are many reasons that people choose to volunteer, including:

- wanting to give time or expertise back to a cause or community.
- to make new friends and increase social contact.

- gaining new knowledge or learning new skills.
- for the sheer love of the location e.g. an avid theatre goer who just loves to spend time in a theatre atmosphere.
- as a step towards paid employment.

Volunteers should be free to volunteer for a reasonable and mutually agreed period that suits them. Organisations should recognise that volunteers hoping the opportunity will help them progress into paid employment may volunteer for less time than someone who is volunteering simply to give 'something back'. We encourage employers to value and support both.

Somebody **is not** a volunteer if:

- they are given money other than expenses (which ideally should be reimbursed against actual receipts);
- there is a contract to do work between the individual and the organisations.

A contract creates legally binding obligations on those who enter into it and requires that something of value (the legal term is 'consideration') is exchanged in return for the work.

A genuine volunteer will not be considered an employee or worker, entitled to those protections and rights, if they do not have a contract with the organisation.

Many organisations use volunteer agreements. These are useful for setting out mutual expectations on one or two sides of A4. However, they should not be referred to as 'contracts', nor be very formal, nor use language or imply conditions that appear to intend to create binding obligations. Remember, a contract can be made verbally as well as in writing.

Whilst genuine volunteers are not covered by employment law, because they do not have a contract, organisations should still take care to ensure that they treat volunteers fairly and equally. No organisation will retain volunteers for long if they feel they are being poorly treated.

All volunteers should be:

- able to volunteer an amount of time over any period that suits their needs. This is highly unlikely to be fulltime i.e. Monday to Friday, 9am-5pm;
- offered any training (and protective clothing) that is appropriate to assist them in carrying out their voluntary duties;
- assigned a mentor or supervisor, to monitor progress;
- reimbursed genuine, necessary, documented and agreed expenses;
- offered a volunteer agreement to clarify the expectations for both the volunteer and organisation.

No volunteer should be asked to undertake business-critical duties because ultimately they can choose whether or not to attend, and you are unable to hold them to account in the same way you would a worker or employee. If you treat volunteers just as if they were your paid workers or employees, then you risk HMRC or an employment tribunal deciding that they are in fact a worker or employee – which could have significant consequences, like granting them entitlement to the NMW.

Best practice when working with volunteers would include:

- An induction where the volunteer is told about the organisation and its policies. This would generally cover health and safety, what to do if you have a problem and an introduction to other staff and volunteers.
- A volunteer should be told who their supervisor or leader is and how to contact them. It is important that they have a named person who they can go to with any problems or queries.
- Adequate training to be able to carry out their role.
- Ongoing support and supervision, to make sure the volunteer is happy in the role.
- Support and training for your staff who supervise or lead volunteers, so they understand how volunteer management is different from managing employees.
- Considering extending your equal opportunities policy to include volunteers if appropriate
- Ensuring that the organisation stays abreast of good practice in volunteer management.

Voluntary workers

There is a category of worker called a voluntary worker, who can only work for a charity, a voluntary organisation, an associated fundraising body or a statutory body. They cannot work for commercial organisations.

Voluntary workers can have a contract of work in place, expected to attend at specific times to perform specific tasks, without the organisation having to pay them or grant them all the same benefits and rights as paid workers or employees. However, they can be reimbursed for expenses actually incurred (or reasonably estimated as likely to be or to have been incurred) in the performance of their duties, for example the purchase of required uniform, or to enable the voluntary worker to perform their duties and that are not accommodation expenses, for example home to work transport costs or increased childcare costs.

Voluntary workers have a more complex legal status, crossing both volunteer and worker definitions, rights, and exemptions. This status may also have wider

considerations – for example, Right to Work checks may apply. You should take specific advice if you think your organisation uses voluntary workers.

It's important to note that voluntary workers must still be free to come and go as they please. i.e. if they don't want to turn up for work, they don't have to. If a voluntary worker is undertaking a role that's identical to a paid worker, you may be required to pay the voluntary worker a wage, and as such their Voluntary Worker status would no longer apply.

Employees, Workers and the Self-Employed

These routes into the workforce are those that most organisations will be familiar with, and aware that they require payment.

Which category an individual sits in can be surprisingly difficult to identify. As we've said before, it is the working conditions within which an individual is required to operate that determines their status as employee, worker or self-employed person. Approaches to determining employment status are addressed later in this guide.

Employees receive the highest level of protection in law and have the broadest range of rights, with workers entitled to some, but not all, of those protections and rights. The self-employed, who are effectively running their own business, receive the least protection from legislation: i.e. they are not entitled to holiday pay or sick pay from the organisations they work with.

Employees

There are different definitions of 'employee' and 'employment' used in different legal contexts. The most significant legislation on the rights of employees is currently the Employment Rights Act 1996, and that defines an employee as an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment. It then defines a 'contract of employment' as a contract of service, which can be express or implied, and agreed verbally or in writing (a contract does not have to be in writing for it to exist!).

There's no statutory definition of a 'contract of service', but in very simple, general terms, it requires an individual to personally do the amount and type of work in the contract. They cannot send someone else to do their job and they must follow the lawful and reasonable instructions of their employer in order to remain employed. In return for their service, the employer makes payment of the agreed amounts and benefits.

Those who qualify as employees have significant protections and rights. The table on pages 22 - 23 sets out some key rights for comparison, but as examples, maternity leave is only guaranteed to employees, and (after a minimum period of service) only employees are protected in law from unfair dismissal and eligible for redundancy

payments. The law also implies certain terms into all contracts of employment, for example, the duty of mutual trust and confidence.

Having an employee comes with additional costs, and administration, for a business: for example you will have to pay Employers NIC and pension contributions, and use the PAYE reporting system. But it also gives you certainty, and may give you a level of commitment from and retention of key individuals that other arrangements may not.

If you are considering recruiting employees, pages 24 - 29 of this guide have suggestions for best practice approaches.

Self-employed

At the other end of the employment rights scale are self-employed contractors (also commonly called freelancers), who work under contracts for services.

Again, there's no statutory definition of a 'contract for services' but in very simple, general terms it is when someone in business for themselves agrees to provide particular services to another person or company. The key requirement is that the services are delivered: it does not necessarily have to be the specific individual delivering them.

Self-employed contractors usually offer their services to more than one organisation at once, determine how and when they will work, can send someone else to deliver the work if they feel it appropriate, manage their own tax and National Insurance obligations and charge fees that they determine for the services.

Engaging self-employed contractors is a common way of working in the sector: they are often specialists in their field and engaging them allows organisations to access specialist, short term, flexible services without the additional statutory obligations and costs of hiring another employee such as employers National Insurance contributions.

The use of personal service companies and the 'off payroll working' rules (commonly referred to as IR35 rules) are outside the scope of this guide. However, organisations should be aware that there are changes coming into force in April 2020 and if you engage self-employed contractors in this way you should take specialist advice.

Self-employment gives far fewer rights and protections to the individual, which is not always fully appreciated by either side. In some circumstances health and safety legislation and equality legislation may extend to cover the self-employed, but, for example, they have no entitlement to be paid National Minimum Wage, nor to receive paid holiday, nor to receive sick pay and there is no protection from unfair dismissal.

Also, even if both sides agree at the outset that the relationship is one of self-employment, a court or tribunal can disagree - remember, it's the conditions within which someone is expected to operate that determines what they are! If an employment tribunal decides that in reality someone is actually an employee with statutory rights, then they will apply those rights when making their judgement (see the rights table on pages 22 - 23).

HMRC also pays close attention to questions of employment status when inspecting tax records, and if it rules an individual is an employee it can, and does, impose penalties and collects employers NIC.

Best practice to consider when engaging a self-employed contractor would include:

- Is it genuinely a situation of self-employment? Consider what the reality of the working relationship will be (this is explored in more detail on pages 19 - 21). Even if self-employment is appropriate, have you considered other options (like fixed-term employment contracts) which may encourage a more diverse range of applicants?
- Issue a contract for services before work starts, including the agreed fees, timescales for delivery, a payment schedule and acceptable expenses. Consider and include what will happen if there is a problem and the services cannot be delivered/are sub-standard.
- Issue any appropriate and relevant company policies – but be mindful that this may move you closer to having the same level of control you would have over an employee or worker. (See pages 14 - 21).
- Consider which legal obligations will apply to each self-employed contractor you engage (for example, are there specific Health and Safety or employers' liability insurance requirements) and whether there are steps you need to take in relation to those.
- Ensure there is a designated point of contact in your organisation for the self-employed contractor, and where appropriate offer feedback.
- Pay on time (where there are no issues with the service delivery). A self-employed contractor may charge interest on late payments, and disputes over debts are time consuming and costly. There's also a reputational risk.
- Charities may be subject to additional regulatory requirements when engaging self-employed fundraisers, and specialist advice should be sought in this situation.

Workers

Worker status sits between that of an employee and a self-employed contractor. The Employment Rights Act 1996 sets out two tests for determining 'worker' status:

- Someone who works under a contract of employment is a worker: so when other legislation (like the National Minimum Wage Act 1998) refers to 'workers', employees are also included.
- or
- Someone who has a contract to do work personally – but is not carrying on a business or profession – is also a worker.

The second test allows those people who do not qualify for employee status, but who have some form of contract which requires them to undertake the work personally, without the freedom of a self-employed contractor, to gain some protections in law.

In simple terms, a 'worker' has a contract to do work or services personally for a reward – they cannot send someone else – and while they will be obliged to do work once they have committed to it – they may not have to accept whatever work they are offered by an employer.

A worker has some rights and protections: for example, the Equality Act protects workers, they are entitled to the National Minimum Wage and are protected by the Working Time Regulations, which includes the entitlement to take paid holiday. Other legislation (for example, entitlement to statutory sick pay) uses slightly different definitions which may mean some workers qualify and some don't.

But where a right is specifically reserved to an employee, for example the requirement to give at least the statutory minimum notice to terminate a contract, or protection from unfair dismissal after two years of service, a worker is not protected.

There are many circumstances where the flexibility and rights offered by worker status suits both parties. However, it is a less secure position for the individual, and from a diversity and inclusion perspective, organisations may want to consider whether these more casual working arrangements are the best option.

Agency Workers

'Agency Worker' is a term used to describe an individual engaged by an employment business (a temporary work agency) sent to perform work for one of the agency's clients (the hirer) on a temporary basis. This is not the same as using a recruitment agency to find you a permanent employee, which is outside the scope of this guide.

Agency workers are often used to provide cover in unforeseen circumstances or to meet fluctuating demands or specific needs, for example, stewards at events.

There are regulations (for example, the Agency Workers Regulations 2010) which govern this type of relationship between an individual, a temporary work agency and a hirer. They give the individual a number of protections and after a qualifying period, certain rights.

If your organisation will hire agency workers, you should take specific advice because it is possible – depending on the conditions within which an organisation asks them to operate – that an individual can be treated as an employee or worker of the hirer, whether that was intended or not.

Best practice considerations when using agency workers would include: thinking about the nature of the work that the agency workers will be asked to do; reviewing the use of agency staff and how they are managed and instructed; and keeping abreast of the relevant regulations and the documentation they require.



WHAT'S THE DIFFERENCE? DETERMINING EMPLOYMENT STATUS

The question of employment status is often both a question of fact and a question of law. Whatever the contractual documentation states, if the status of a person engaged by an organisation is challenged by either the person or by an outside agency such as HMRC, the court will look at the reality of the relationship – not what either party calls it. As stated previously in this guide, it's not the title you give someone that determines their status, it's the conditions within which you're expecting them operate that determines this.

The test to determine an individual's employment status has been developed in the courts over many years. The court or tribunal will look at the facts of a case and apply the following tests during its deliberations:

1. Whether there is a **mutual obligation** between the individual and the organisation. Does the individual have the right to a minimum amount of work or pay? Are they required to attend, or could they lawfully refuse to do the work offered? The more obligation there is upon an individual to accept work when offered, the more likely they are to be an employee.
2. Whether the individual is under the **control** of the organisation. How integrated into the organisation is the individual? If the business could not function without that person doing that role, the relationship is more likely to be one of employment.

Does the organisation dictate the manner in which the individual undertakes the work, or can the individual decide what to do, and how and when to do it? Are they subject to the organisation's rules such as appraisal and disciplinary procedures? Do they require training and supervision to provide the services? The more directions the organisation can enforce on the individual, the more likely they are to be an employee.

Can the individual work for other organisations at the same time as working for the organisation in question? If they do not have other clients, or they are restricted by the organisation in the engagements they can undertake now or in future, they are more likely to be considered an employee.

3. Whether the individual is obliged to **personally** undertake the work required by the organisation.

Can the individual send someone else to deliver the services on their behalf? If there is a right of substitution, is it ever actually used? If the reality of the situation is that an alternative person could not be sent or would not be accepted in place of the individual, then the more likely the individual is to be considered an employee.

These three factors are the most important considerations, but courts and tribunals must also consider the overall picture of the relationship between the individual and the organisation and so they consider other terms of the agreement such as:

- Does the agreement between the parties explicitly state that the relationship is not intended to be one of employer-employee? The court can disregard such a statement if they think it is a 'sham' designed to conceal the true nature of the relationship but including it can still add to the evidence in favour of self-employment.
- Does the agreement require the individual to assume any financial risk themselves – are they required to have their own insurance, provide their own tools/equipment, or are expected to put right any defects in their work at their own expense? If an individual is genuinely running their own business, and incurring financial costs, that would add to the evidence in favour of self-employment.
- How is the individual paid - a set sum each month or do the amounts and dates of payment vary based on an agreed schedule or record of time spent? Do they receive other benefits which are given to employees (share options, training costs, benefits in kind)? A regular fixed sum suggests an employee's salary. Varying amounts paid on receipt of an invoice may add to the evidence in favour of self-employment.
- Has the individual incorporated a service organisation through which they deliver their services? Taking steps to limit their financial liability would suggest an independent business and add to the evidence in favour of self-employment.
- Does the individual market and promote their business, and cultivate relationships with their own clients to generate future work? Independently identifying and choosing who to provide services to would add to the evidence in favour of self-employment.

Remember, you cannot determine someone's employment status by running through a checklist: it is always dependant on the particular facts and circumstances of each individual case. The factors above will not all have the same level of importance in every

situation, so an overall assessment has to be made based on all the evidence and legal tests taken together.

Each time an individual is engaged, these questions should be asked, and where self-employed contractors are working in an organisation, regular reviews of their status should be undertaken.

HMRC has an [employment status tool](#) which companies can use to assist them in deciding the status of their staff. It is important to note that although the tests for employment status are applied in both tax law and employment law, one is not determinative of the other, and it is possible for a person to be considered employed by HMRC and yet self-employed for the purposes of employment law.



KEY RIGHTS OVERVIEW

This is not an exhaustive list of an individual’s statutory rights at work, only a selection, and only applies to employees, workers and the self-employed. The rights of other groups, like voluntary workers, are not included and you should seek specific advice.

This table was prepared in November 2019, prior to Brexit. There may be changes to these rights when the UK leaves the European Union.

Only statutory minimum entitlements are covered here. An individual’s contract may be more generous and if so, those provisions must be followed.

You should always take specific advice on the rights an individual may have, based on the facts of each particular case.

Right	Employee	Worker	Self Employed
To receive written particulars of terms: Details of pay, hours, holiday entitlement, pension arrangements and several other key terms must be set out by particular deadlines and in particular documents.	✓	✓ From April 2020	✗
Statutory Sick Pay	✓	May qualify if relevant NI rules are met	✗
Itemised pay slip	✓	✓	✗
National Minimum Wage	✓	✓	✗
Workplace Pension enrolment (if eligible)	✓	✓	✗
Paid Holiday	✓	✓	✗
Family related rights:			
• Maternity/paternity/adoption shared parental leave	✓	✗	✗
• Statutory Maternity/ Paternity/Adoption/ Shared Parental Pay	✓	May qualify if relevant NI rules are met	✗

Right	Employee	Worker	Self Employed
Right to request flexible working	✓	✗	✗
Protections from discrimination because of or in relation to a protected characteristic (age, disability, gender reassignment, marriage or civil partnership, pregnancy or maternity, race, religion or belief, sex, sexual orientation)	✓ (Note that applicants for jobs are also protected)	✓	There may be some protection for some contractors, dependant on the particular facts.
Protections from harassment or victimisation	✓	✓	There may be some protection for some contractors, dependant on the particular facts.
Right not to be treated less favourably as a part time worker	✓	✓	✗
Right not to be treated less favourably if a fixed term employee	✓	✗	✗
Minimum statutory notice period (note that a contract may provide for periods of notice whatever the employment status)	✓	✗	✗
Protection from unfair dismissal	✓	✗	✗
Right to a redundancy payment	✓	✗	✗



BROADENING YOUR APPROACH TO RECRUITMENT: HOW TO REACH THE WIDEST POOL OF TALENT

Unconscious bias

It's probably fair to assume that many people are shaped by the world around them. Their beliefs, values, assumptions and instinctive responses are built on their own experience of the world. As the name suggests, to be unconsciously biased is automatic and unintentional - there is no malice intended when a university educated manager shortlisting for a position selects only candidates who have degree level qualifications, but it may be that, unconsciously, they place more value on that type of experience because it is what they are most familiar with.

The difficulty for the recruitment process is that these unconscious decisions can result in a workplace closing its doors to diverse talent, instead hiring people who look like us or with whom we share a common experience. In failing to identify the most talented person for the role, we risk damaging our business.

It's important to remember that there is a difference between conscious and reasoned choices or actions and unconscious stereotypes and prejudices that we are not aware of when we make decisions. The human brain tries to make decisions as quickly and effectively as possible, using its previous experience as a guide. Stress and tiredness exacerbate this default. It's perfectly normal and natural and in dangerous situations, serves us well. But when recruiting, if we always do as we've always done, the creative sector and its workplaces will remain largely white, male-dominated, and middle class.

Tackling unconscious bias

Consciously preventing yourself from acting unconsciously verges on the impossible. Instead, accept that unconscious bias exists and design systems to mitigate it.

The following examples may help you think about this:

- If you have identified an issue within your organisation you want to address, for example, a lack of diversity, first research the problem you are trying to solve. Are you receiving a good breadth of applications, but not shortlisting diverse or disabled candidates? Or are you not receiving suitable applications in the first place? If not, can you find out why? Try and understand what sits at the heart of the issue and then create a response based on facts, not more assumptions.

- When recruiting, make sure you allow enough time for decision-making based on clear criteria set in advance, don't rely on a CV or letter 'jumping out at you'. Record the evidence and the reasoning behind the decisions you make.
- Consider anonymising applications, so a candidate's name, gender and age is not revealed to the shortlisting panel.
- Consider advertising your role without stating who the company is, just where you're based and the type of organisation you are. Sometimes candidates may have preconceived ideas about your company/brand that prevent them from thinking you're for them.
- Unconscious bias exists in your audience too, and if they cannot see themselves reflected or welcomed in your organisation, they may discount you without consciously knowing why. Make sure that the people making the decision, or having the conversation, or promoting the event reflect the organisation you want to be.

Job descriptions

We see lots of job descriptions in the sector that inadvertently close the door to diverse talent and could reasonably put people off from applying for a job. This is counterproductive for an organisation, because it means you end up recruiting from a small and potentially homogenised pool. In other words, you don't know the extent of the talent available to you until you make your jobs open to all. Plus, the protections of the Equality Act also cover job applicants, so consider the requirements you place on a role in this context too.

There are of course some jobs that can only recruit individuals with recognised qualifications, skills and prior experience. None of us would want to be treated by a Doctor who isn't certified or sufficiently experienced to do so. However, we can be quick to default to asking applicants to have specific prior qualifications and experience that may not be a true measure of whether they're the most appropriate candidate for a role.

When writing job descriptions, it might be worth just sense-checking your JD against the following:

- Is the job description based on what you need someone to do for you, or learn to do for you, or is it based on what the previous candidate did? Sometimes what we need now differs from what has been done in the role before. Review this objectively.
- Simplify the language you use in your JD. Don't assume knowledge that only those who conform to type would recognise, avoid acronyms that are specific to your organisation or field of work, and don't assume that everyone knows what your company does even if you're well-known. Remember, lots of people have transferable skills which could be valuable to you, rather than simply sticking with a familiar skill set articulated by someone that you identify with more readily.

- Only set necessary and valid pre-requisites for entry. Ask yourself if it's essential for a candidate to have a degree or 10 years prior work experience in a similar role. These aren't necessarily true measures of one's ability.
- GDPR places restrictions on the use of 'automated decision making'. If you use a recruitment tool that automatically discounts people on the basis of set requirements, without a human being reviewing those decisions (like a website which only allows applications with a certain level of experience to proceed), take advice on your privacy policy and obligations.
- Don't forget to look for potential and a willingness to learn, regardless of the position's seniority. Sometimes these candidates have more to offer in the long run, as they'll grow and develop with the organisation rather than coming in with pre-conceived ideas about the way things should be done.
- Take a leap of faith. You might think it's easier if you just go with what you know, but it may just pay to let go!

Remember, where you advertise your positions can have just as much impact on who you attract as the content of the job advert itself. Look at where you currently advertise your positions and think about where else you could go. As a sector we can be guilty of posting our positions in places that appeal to certain demographics. Have you considered the Job Centre, local newspapers, and other non-sector specific platforms?

Approaches to interview

It's probably rare to find a candidate that really likes going to a job interview, but sensible employers will recognise that this is a candidate's opportunity to shine and you must create the conditions that help them to do this. Failing to create open, thoughtful and encouraging conditions for interview means you risk not getting the best from someone and in turn potentially losing out on the best talent for your business.

Remember, recruitment is a two-way process, you aren't doing someone a favour by giving them a job, the right talent will benefit your business, so you need to make sure you're selling yourself too.

Don't be afraid to enjoy the recruitment process either, it shouldn't be a chore that you have to squeeze around other responsibilities. Try and see it as an exciting opportunity to find someone that's going to be a positive addition to your team and company.

When designing your interview process ask yourself if the set up helps sell your organisation's culture (or the culture you hope to achieve) and if the method/s you're using aid this. And remember the Equality Act applies to the recruitment process too: be sure that the arrangements you make for deciding who gets the job are not

discriminatory. 'Arrangements' would include the application form or process, interview times, locations and facilities, any tests or assessments and the shortlisting and decision-making process.

Here are some options for you to consider:

Panel interview: keep it light and remember this set up can be intimidating, particularly if the candidate is asked to sit at one end of the boardroom table with the panel at the other. Make it friendly and try sitting around the table (or in a circle if there is no table) so it feels more like a conversation is going to take place rather than a hard Q and A! Plan your questions, and be mindful of potentially discriminatory questions that you cannot ask at all, and those that you cannot ask in advance of a job offer.

Presentation: remember this is a skill in itself, so it may only be worth building this into the interview process if the candidate is required to present as part of the role they're applying for. If you do choose this method, make it clear upfront what style of presentation they may wish to consider: a brief PowerPoint, a short talk, a pre-recorded video presentation. Do what you can to empower the candidate and make them feel comfortable.

Task and assessment: whilst this method is great way to get a candidate to demonstrate core skills and attitudes it can also feel overwhelming for some. For anyone that's been to an assessment centre, sometimes just not knowing what the tasks are going to be can fill people with dread. If you choose this method, please make sure the tasks being assessed are relevant to the core of the role you're recruiting for e.g. don't set a task that asks a candidate to organise an inbox if the core of the role is focused on managing clients or customers, choose something that helps them demonstrate the way they interact and communicate with real people!

Consider if you should ask applicants about any reasonable adjustments required under Equality Act requirements.

Group interview with team tasks: this only works if you have lots of applicants and team work is an essential part of the role.

A light touch combination of two or more of the above may also be an option, it can help break up the interview process.

There are also some simple things you can do during the interview process to help (which seem obvious but are easily forgotten):

- Welcome the candidate, show them around (if appropriate), offer them a drink (and not just water from the jug on the table but a cup of tea or coffee), let them get a feel for your company and the environment within which you work.
- Make conversation and show interest in the candidate, don't just launch straight into questions or tasks. The more relaxed a candidate is the more likely you are to see their true potential.

- Make sure any questions you ask are succinct, don't ask three questions in one!
- Don't be afraid of a silence, let a candidate think and let them know it's ok for them to take their time (it can sometimes be hard to recall an example when we're nervous).
- Make sure they are given the opportunity to ask you questions.
- Thank the candidate for showing interest in the role.

Induction

All organisations should make it their duty to put in place a thorough induction for new starters. We see too many organisations assume that a new starter is fine if they've signed their contract of employment and know their working hours.

If we're honest, the first few days in a new job can be tough for anyone, even the most experienced of individuals. Getting to know colleagues takes time, as does getting to know how an organisation operates. Whilst it wouldn't be realistic for an induction to go on for months, it would be realistic for an induction to last for a few weeks.

Here are some things to consider:

- Make sure the candidate is introduced to all staff (where practical), help them understand where they fit within your organisation. If it's a micro-company then schedule a one to one between each team member and the new candidate in the first few weeks, so they can get a feel for what each member of the team covers. In larger organisations consider doing this with the staff that the new candidate is likely to work most closely with, even if they're not in their immediate team.
- Take the candidate through key policies and procedures, don't just ask them to sit and read them. Ask them questions to check their understanding. Remember, if a staff member doesn't fully understand their obligations, it could put your business at risk.
- If it's a job role that requires travel, show them the process for booking travel and how to claim back work-related expenses and what constitutes a legitimate expense (this should be outlined in your expenses policy).
- Make sure they understand their working hours and any flexibilities you permit here.
- Assess the need for reasonable adjustments at the start. Help create the environment that's most conducive to a candidate's success (and therefore yours).

- Explain at the start expectations regarding conduct. Even the most experienced candidates can get this wrong! You must help them understand your culture and standards early on.
- Create time for the team to spend together so the new candidate can get to know everyone properly. This can also help existing staff be more inclusive.
- Most importantly, make time for the new candidate at the start. Don't start them and then go into back to back meetings for the next two weeks. Schedule time in your diary just for them.

There are some candidates who may need just a little bit more support at the start such as those who are new to the world of work. In this instance don't forget the small things like explaining when and where they can take lunch and breaks, what is considered appropriate attire, where the toilets are (and let them know they don't need permission to go to the toilet, this is something that a school-leaver may need to be made aware of!).



INTRODUCING A WORKFORCE DEVELOPMENT POLICY

Organisations that wish to follow best practice approaches to recruitment may find it useful to put in place a workforce development policy. Organisations of all sizes can introduce one of these to help set clear boundaries for a company and its staff. Doing so can help nurture the organisation's desired recruitment culture going forwards.

When introducing a workforce development policy, try and consider the following:

- What your company wants to offer and what it doesn't. It's much easier for staff if they know when an organisation does offer work experience and paid internship positions, or not. This way, when asks are made to the company, all staff can respond in line with the company's policy.
- Set out what you want to achieve through the workforce development policy, such as training individuals in specific roles where you have skills needs or wish to diversify a team. This will also ensure that the opportunities you offer are meaningful.
- If work experience or industry placements feature in your policy, you may want to specify when in the year you'll make opportunities available and why, for example you may run a seasonal programme and want to help someone learn during times when the organisation has more work.
- Who do you want to prioritise creating development and employment opportunities for? For example, if 80% of your organisation is made up of graduates, could you look at ways to increase non-graduate employment? Although employers cannot discriminate with regards the 9 protected characteristics in the Equality Act, there are situations where there may be an objective justification for what might otherwise be an indirectly discriminatory policy or practice. However, you should always take specific professional advice before rolling out a policy that might place those with a protected characteristic at a disadvantage, and be sure that the policy is proportionate in its impact and has legitimate intent.

- Think about whether your workforce development policy is solely about your business or is designed to do some greater good and make this clear.

Workforce development policies don't need to be complex, they can be constructed as follows:

The introduction – say why the company has this policy and what it hopes to achieve through it.

Types of opportunities offered – in this section specify what types of opportunities the company will offer such as Industry Placements for T-Levels, Apprenticeships, Paid Internships, or Volunteering opportunities. Define in what areas each of these roles will be created and state how many opportunities a year you hope to create (if the answer here is on a project by project basis then it's fine to state this). Where existing roles are to be recruited to, outline in the policy the steps the organisation will take to ensure a role is fit for purpose. Think about objectively reviewing the role in relation to the organisation's current needs and update the JD before advertising the position.

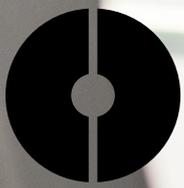
Spell out the recruitment process – outline the steps the company will take when recruiting to new opportunities, whether it's work experience or the next CEO. Think about the advice set out earlier in this guide and see if there are things you could introduce that would make recruitment more accessible, inclusive and fair. Set a standard for your company and then encourage all staff to work to it.

Key personnel – identify who in the organisation is responsible for the policy and for creating different types of opportunities. It might be the same person for each of these, or it may be different personnel depending on the type of opportunity or the area of the business it aims to support.

Support during an opportunity – state in your policy the level of support, guidance and supervision each type of opportunity will receive as standard. This is also a helpful way to clarify for existing personnel what their obligations might be here.

Progression – be clear with candidates from the start. Don't guarantee future work for someone if you can't do this but be clear from the beginning about what the organisation's position is. Don't leave it until the last week of their placement or employment to let them know! Do try and support candidates to progress following their time with you, give them advice about places they can look for relevant work or further experience and help them identify the skills and knowledge they have gained whilst with you.

Most importantly, make sure the workforce development policy is real and true, don't just write one and let it sit in the background, make sure it is an active policy that helps drive your organisation's culture and ways of working.



CREATIVE CAREERS



For further information about the Creative Careers Programme, visit [DiscoverCreative.Careers](https://www.discovercreativecareers.com) and follow us on Twitter at [@CreativeCareers5](https://twitter.com/CreativeCareers5).



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