1. Introduction

This guidance explains key definitions and legal tests for determining employment status, as well as reviewing relevant case law on this subject. This guidance seeks to assist Colleges understand the courts’ approach to employment status determination and thereby minimise potential pitfalls on issues relating to employment status.

Colleges may also want to assess some of their current working arrangements in light of legal trends, such as reviewing recruitment planning, contracts and conducting policy audits.
2. What does ‘employment status’ mean?

This term generally means the characterisation of a working arrangement between an employer and an individual for legal purposes.

Whilst the legal tests and case law on employment status might be helpful to Colleges, status determination needs to be assessed on a case-by-case basis. The safest position for Colleges to take is to assume that everyone is an ‘employee’ unless there is clear evidence that they have a different employment status.

Broadly speaking, there are three categories of employment status, with the category attracting the least employment rights being last in the list:

- Employees
- Workers
- Self-employed contractors

For Colleges, it is the distinction between the first two categories which is likely to be of most interest, because of the flexibility that Colleges may want in recruiting cover for academic staff during term-time, for example. Section 4.2 below provides definitions for these three categories.

1 The determination of an ‘employee’ for tax or pension purposes is addressed differently than for employment law purposes. Equally, there are different definitions concerning contracts under other areas of legislation, such as health and safety regulations and trade union law. These issues fall outside the scope of this guidance.
3. Why is employment status important for Colleges?

- To distinguish the statutory employment rights afforded to workers and employees so that Colleges are certain about their statutory and contractual entitlements.

- To calculate continuous service to determine eligibility for certain employee benefits and service based statutory rights.

- The extent of Colleges’ legal liability under certain laws, such as health and safety legislation and tax legislation as well as employer’s liability insurance, will vary depending on someone’s employment status.

- If a College is merging with another College or undergoing a TUPE transfer, certainty about an individual’s employment status is needed because only employees will be automatically transferred under the TUPE regulations.

- If a College is managing a redundancy process, clarity is needed as to whether affected individuals are classified as ‘employees’ and if deemed to be, they should be included in redundancy consultations, as well as being eligible to bring a claim for an unfair dismissal.

- Colleges can be held vicariously liable for acts carried out by an employee in the course of their employment, such as an employee being violent towards another employee or a third party, however liability is unlikely to extend to self-employed contractors.
4. Key definitions

A crux issue in determining employment status is whether an individual is a ‘worker’ or an ‘employee’ for employment law purposes. The distinctions between these seemingly simple terms sometimes become blurred due to the complexity of the legal tests developed by the courts to determine these classifications.²

The main factor in determining whether an individual is a ‘worker’ or an ‘employee’ is the existence of a ‘contract of service’. For this reason, the definitions of a ‘worker’ or an ‘employee’ are inextricably linked to the definition of a ‘contract of service’.

Where an individual is engaged under a ‘contract for services’, they will be an independent/self-employed contractor and are very unlikely to be a ‘worker’.

4.1. Definition of contract of service and contract for services

These terms cause considerable confusion due to their similarity, however the difference in their meanings is pivotal in terms of determining employment status.

**Contract of service**

A ‘contract of service’ is referred to in S.230 of the *Employment Rights Act 1996* ('ERA 1996') but is not defined. A contract of employment is a contract of service.

A contract of service can be an express or implied contract between an employer and an employee, as well as oral or in writing.

**Contract for services**

A contract for services is a contract between a client (e.g. a College) and an independent/self-employed contractor. A contractor is in business on their own account but care should be taken because someone holding themselves out to be a contractor could nonetheless be deemed to be a ‘worker’.³

There is no single objective test for identifying a contract for services but the courts use certain criteria as being indicative of the existence of such a contract, such as:

- that the contract is one for a given result and the contractor works to achieve this outcome;
- that the contractor stands to make a profit or loss on the contract and they bear the commercial risk. The contractor has the liability for any poor workmanship or injury sustained in performance of the contract;

² For the purposes of this guidance, ‘courts’ includes the employment tribunals and the Employment Appeal Tribunal.

³ In *Hospital Medical Group Ltd v Westwood [2012] EWCA Civ 1005*, the Court of Appeal ruled that even though the claimant operated as a self-employed contractor, the Employment Rights Act 1996 does not specifically exclude such an individual from having ‘worker’ status. Similarly, in *Autoclenz Ltd v Belcher & Ors [2011] UKSC 41*, the Supreme Court clarified that a written contract of employment which expressly states an individual as being a self-employed contractor and not an employee can be disregarded, if the evidence shows that the written contract does not reflect the actual reality of the working arrangement.
• the contractor maintains a high level of discretion and flexibility as to how the work is to be performed. However, the contract may contain precise terms as to materials used and methods of performance and still be a contract for services.

4.2. Definition of employee and worker

Employee

The definition of an employee stated in S.230 of the Employment Rights Act 1996 is of an individual who has entered into or works under a contract of employment. This is not a particularly helpful definition where, for example, an individual does not have a written contract of employment. Similarly, other statutory definitions of an employee given in other employment legislation are unhelpful.

Without any useful statutory definitions, Colleges are left with guidance developed by the courts to determine if an individual is an ‘employee’. The key issue is whether the courts can identify the individual as having a ‘contract of service’ and if they can, that person will have the status of an employee. Therefore, a worker claiming at court that they should be afforded the same rights as an employee will be successful, if the court finds the existence of a ‘contract of service’.

Worker

The employment status of a ‘worker’ is sometimes seen as a half-way house between an ‘employee’ and being a self-employed contractor. S.230 of the Employment Rights Act 1996 defines a worker as an individual who has entered into or works under a contract of employment or any other contract whereby the individual performs personally any work for an employer, which is not a client or customer of the worker under the contract.

If a College is certain that an individual is not a self-employed contractor on a contract for services, that person will either have the status of a worker or an employee. Workers are often employed on informal contracts, where there is no obligation placed on the employer to provide work and no obligation for the worker to accept it. In this situation it is likely that their employment status is that of a ‘worker’. However, Colleges should be aware that just because a written contract states that there is no ‘mutuality of obligation’ between an employer and an individual, a court could still decide that the individual is an employee.

Furthermore, if a worker subsequently settles into a regular work pattern they might successfully prove that there was a ‘global or umbrella’ contract, or a series of separate contracts of employment, which amounts to a contract of service. In this way, a worker can successfully prove that they have the employment status of an employee.

4 Any reference to courts in this guidance also includes judgments made by employment tribunals and the Employment Appeal Tribunal.
4.3. Extended definition of worker

To complicate matters, there is another classification of workers, who do not attract all the employment rights available under the ERA 1996. This extended definition of a worker is used for the purposes of:

i. ‘whistleblowing’ provisions in the ERA 1996, as amended by the Public Interest Disclosure Act 1998 and the Enterprise and Regulatory Reform Act 2013, and
ii. the ‘right to be accompanied at a disciplinary or grievance hearing’ provisions in s10 of the Employment Relations Act 1999.

This classification of workers would also qualify for protection under the Equality Act 2010 and can therefore bring a discrimination claim against a College. This is because the Equality Act 2010 contains a broad definition of ‘employment’ which covers employees, workers, apprentices and self-employed contractors.

4.4. Agency worker

The definition of an agency worker is given in the Agency Worker Regulations 2010 (please see the Glossary of Terms in Appendix 1).

Usually an agency worker negotiates a contract for services between themselves and their temporary work agency and there is no written contract linking the temporary work agency to a College (as the ‘hirer’). In these circumstances, the agency worker is likely to be treated by the courts as a worker and not an employee.

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5 Currently, the definition of ‘worker’ in the whistleblowing legislation covers individuals formerly and currently working for an employer, as well as applicants. The entry into force of the Enterprise and Regulatory Reform Act 2013 allows the government to widen the definition of ‘worker’ by enacting secondary legislation should it decide that this is a necessary step.

6 The Equality Act 2010 also gives former employees the right to bring a claim against a College in respect of discrimination or harassment that takes place after the end of the employment relationship.

7 If there is a dispute about whether an individual falls within the scope of the Agency Worker Regulations 2010, an employment tribunal will consider if the description of the working arrangement reflects the reality of the employment relationship.
5. Legal tests developed by the courts

These legal tests would apply in any dispute where there is uncertainty about someone’s employment status. Regardless of whether someone operates as a self-employed contractor and regardless of how their contract is labelled, the courts will always scrutinise the reality of the working arrangement between them and the employer.

An individual may not even have a written contract. In this situation, the courts would look at the reality of the working relationship between an individual and their employer to determine the employment status of that individual.

The legal test to identify a contract of service is perhaps the key legal test in the sense that once a contract of service is identified, there is certainty that the employment status of the individual concerned is that of an employee and not a worker.

5.1. Legal test for identifying if there is a contract of service

Step 1 - Is there a contract?

- Even if an individual does not have a written contract, there can still be the relevant legal requirements of a contract (intention to create legal relations; an agreement and consideration)
- ‘Mutuality of obligation’ is the key test as to the existence of a contract. If there is an obligation on the employer to provide work to the individual and an obligation on the individual to accept any work, there is mutuality of obligation in the working arrangement.
- For example, in a variable hours contract for a term-time only associate lecturer, there is a higher degree of mutuality of obligation than in with an assessor employed from a cohort of individuals whom a College engages for a day or two per year.

Step 1 in detail – Global contracts and successive assignments

Employment tribunals will often consider Step 1 in greater detail when a claimant states that they are an employee and have sufficient qualifying service to accrue a right or benefit. For example, an individual might bring a claim against a College’s determination that because they were employed on a zero hours contract for over 2 years, they were a casual worker and were not entitled to a redundancy payment. In such a case, the employment tribunal will scrutinise the working arrangement in order to:

1) Identify a global or umbrella contract which exists even during periods between assignments when the worker is not working; or
2) Identify a series of short term contracts or assignments giving rise to a contract of service.

If the court can identify a global or umbrella contract, the next step would be to determine if the global contract qualifies as a contract of service. If it does amount to a contract of
service, in the example given above, the employment tribunal would determine that the individual has the status of an employee. However, if the claimant’s argument that there was a global contract fails, they may also argue that a series of assignments gave rise to a contract of service (and thereby prove that they have the status of an employee). It is easier for a claimant to prove that there is a series of separate contracts of employment than a global or umbrella contract.

**Step 2 - If there is a contract, is it a contract of service?**

For an individual to successfully claim that they are an employee, as well as proving sufficient mutuality of obligation, they will need to show that they were obliged to undertake the work personally (rather than delegate it to someone else) and that the employer had a sufficient degree of control over them.

**Personal service**
For a contract to be a contract of service, the individual must be obliged to provide their own work and skill (although the individual concerned could have a very limited power to delegate or appoint a substitute).

**Sufficient control**
For a contract to be a contract of service, it must give the employer a sufficient level of control over the individual.

**Step 3 – balance all relevant facts**

Having applied the above steps, the courts would also look at other factors that indicate that an individual is an employee. Relevant factors include:

- receipt of wages/salary, sick pay and/or paid holiday;
- being managed by someone who is an employee of the business;
- being subject to the organisation’s rules and procedures; and
- being integrated into the business (e.g. attending meetings)

**5.2. Legal test for determining a worker from a self-employed contractor**

Under this legal test, someone would be deemed to be a worker if they satisfy the following:

1. they are an individual who has entered into or worked under a contract with another party for work or services;
2. if they undertake to perform their services personally (with a very limited scope for appointing a substitute); and
3. the working arrangement does not make the other party a client of the individual’s business.  

8 This legal test is set out in the case of *Autoclenz Limited v Benchen Ors* [2011] UKSC 41.
6. How does employment status apply to specific types of working arrangements?

In recent cases, the courts have applied the legal tests described above to situations where individuals working on zero hours contracts, or as volunteers, have claimed that they are entitled to assert statutory rights.

6.1. Zero hours contracts

The term ‘zero hours (or nil hours) contract’ is not legally defined. It is a colloquial term used to describe a contract under which the employer does not guarantee to provide any work and only pays for work actually done. Under a contract of employment/contract of service an employee is normally obliged to work and the employer is obliged to provide work and pay for it. However, this mutuality of obligation is not a characteristic of zero hours contracts.

With a zero hours contract, there is no fixed, defined number of hours per week and the individual under this contract is effectively ‘on call’. Rosters and shift rotas are a common feature of such a working arrangement and in some weeks, there may be no work (or zero hours).

These contracts raise several issues, including whether individuals working under such contracts are classed as ‘employees’ or ‘workers’ and whether employers are required to pay these individuals where there is no work but the individual is ‘on call’.

These contracts are drafted to avoid conferring the employment status of an employee upon the individual concerned. For example, such a contract might state that there is ‘no mutuality of obligation’ between the employer and the individual working under the contract. However, regardless of what is stated in the zero hours contract, the courts will look at the reality of the working arrangement. If it indicates an employer-employee relationship, the contract will be a contract of service and the individual will be deemed to be an employee.

The case law on the use of zero hours contracts has focused on the issue of ‘mutuality of obligation’. The circumstances where ‘mutuality of obligation’ can be inferred into a zero hours contract was considered in a recent case, Pulse Healthcare Limited v Care Watch Care Services Limited and six others [2012] UKEAT/0123/12/BA.
Key Case

In Pulse Healthcare Limited v Care Watch Care Services Limited and six others [2012] UKEAT/0123/12/BA a local Primary Care Trust provided a 24-hour critical care package for a lady with severe physical disabilities. Carewatch Care Services Limited were contracted to provide that package. The contract with Carewatch Care Services Limited was then terminated and was taken over by Pulse Healthcare Limited (‘the employer’).

The claimants argued before the Employment Appeal Tribunal (EAT) that they were employees and consequently were entitled to claim unfair dismissal. The employer argued that the claimants were not employees because there was no mutuality of obligation.

The claimants had signed a ‘Zero Hours Contract Agreement’ with the employer. In this document there were repeated references to ‘employment’ and there were provisions about payment, salary deductions, uniforms, annual leave, sickness, termination on notice and pension. Under ‘Hours of Work’ the document stated ‘Carewatch recognises that employees must work the hours necessary to fulfil a contract. The employee will work such hours and at such times as are agreed between him/her and Carewatch. The employer is not under an obligation to offer the employee any work and has specifically reserved the right to reduce the employee’s working hours whenever necessary’. Under ‘Hours of Employment’ appeared the words ‘zero hours’. Under ‘Mutuality of Obligation’ the document stated ‘Whilst zero hours contracts need flexibility on both sides, they do not exclude Employees from working for another employer whilst unassigned to Carewatch’.

The claimants worked an agreed number of hours each week but the agreed hours were not reflected in the written contract. The employment tribunal found that the written contract of employment did not reflect the true position and that in reality the claimants worked fixed hours on a regular basis over a number of years.

It deemed that the true terms of the contract are:

- the claimants would perform the services for the employer;
- that the claimants would be paid for that work;
- that the claimants were obliged to carry out the work offered to them and the employer undertook to offer work; and
- that the claimants must personally do the work and could not provide a substitute to do so.

The employment tribunal ruled that the claimants were employees because they were employed under global or umbrella contracts of employment. It found that there was sufficient mutuality of obligation for the claimants to be employees. Its reasoning included the facts that once the rota or work hours was prepared the claimants were required to work and the employer was required to provide that work; the claimants were subject to control and discipline; they had to provide personal services; they were provided with uniforms and equipment; they were paid on a PAYE basis; they had all worked regularly for a number of years and had only taken time off for holidays; and it was not established that there were gaps in the continuity of employment.
On appeal to the EAT, the employer argued that the claimants were not employees because they were not employed under a global or umbrella contract. The employer argued that there was no umbrella contract because there was no obligation on the employer to offer work; and if work was offered it was only when the roster was agreed by the employee that there was any obligation to work. The employer argued that such a contract required mutual obligations subsisting over the entire duration of the relevant period.

The employer also argued that the claimants were not employees because there was a succession of individual contracts covering individual shifts or individual periods of rostered work.

The EAT dismissed the employer’s appeal, concluding that the claimants were employees because they were employed under a global/umbrella contract. It ruled that the employment tribunal was entirely justified in saying that the written contracts – the ‘Zero Hours Contract Agreement’ – did not reflect the true agreement between the parties and had therefore reached the correct decision. Any other conclusion, given the circumstances of the case, would have been unrealistic.

In light of guidance from case law, the safest approach for Colleges to take is to presume that individuals engaged under zero hours could have the employment status of employees.

6.2. Variable hours contracts

Individuals employed by Colleges under variable hours contracts will have the status of employees. Variable hours employees have an ongoing contract of service/contract of employment but work to an intermittent pattern, where the hours are unpredictable, allowing for flexibility (employees under these contracts might submit timesheets and are sometimes referred to as ‘paid as claimed’ employees). Variable hours employees are entitled to all the same benefits as an employee on fixed hours, on a pro rata basis where appropriate. A variable hours contract can also either be for a fixed-term, or on a permanent basis.

Variable hours contracts are distinguishable from zero hours contracts because they guarantee a minimum number of hours work from the employer. For example, AoC’s model variable hours contract states:

Your hours of work will be during the academic terms. Your hours may vary according to the academic requirements of the college. However, the college will provide you with a minimum of [ ] hours of work per [week, term, year].

Previously, concerns have been raised by trade unions concerning whether or not variable hours contracts constitute less favourable treatment under The Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000. For example, because more women than men are employed on variable hours (or part-time) contracts, a reduction in their working hours may constitute sex discrimination.

However, the use of this type of contract does not breach any statutory legislation.

In terms of conducting contract audits, if the hours worked by an employee initially employed on a variable hours contract remain frequent but unpredictable, this type of contract does accurately
reflect the reality of the working arrangement. In this situation, it would be acceptable to continue employing the individual on a variable hours contract. However, if an employees’ working hours have stabilised into a regular pattern, best practise would be to consider changing the employee’s contract to a fixed hours contract (which could either be for a fixed-term duration or for an indefinite duration). Similarly, if no work has been undertaken by an employee on a variable hours contract for a considerable period of time (for over three months) and no further work is planned, best practice would be to consider terminating the employee’s contract.

6.3. Apprentices and apprenticeship contracts

Apprentices have the employment status of employees.

Before April 2011, apprenticeship contracts were governed by common law but any apprenticeship contracts agreed after 6 April 2011 are regulated by statute if they were created using a valid apprenticeship agreement. Apprenticeship agreements can be treated as fixed-term contracts because they are limited to the duration of the apprenticeship.

6.4. Fixed-term employees and fixed-term contracts

Individuals on fixed-term contracts have the status of employees.

The duration of a fixed-term contract does not affect employment status and fixed-term employees should be afforded the same statutory protections as employees on a contract of indefinite duration. The only distinction from employees on a contract of indefinite duration is that due to the duration of the fixed-term contract, employees on such a contract might not accrue sufficient continuity of service to qualify for certain statutory protections, such as the statutory entitlement to claim unfair dismissal or to receive a statutory redundancy payment.

Reg.8 of the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 provides that a succession of fixed-term contracts of employment extending over four years or more shall be automatically converted into a permanent contract, unless there are objective reasons justifying the continued use of fixed-term contracts. The mechanism by which this is achieved is Reg.8 (2), which provides that the clause in the fixed-term contract that restricts its duration shall no longer apply.

If Colleges need to convert fixed-term contracts into permanent contracts, they are advised to contact AoC’s Employment Team for more detailed guidance on a case-by-case basis.

6.5. Volunteers

Volunteers do not normally rank as ‘employees’ or ‘workers’ for employment law purposes because usually they only receive reasonable expenses (as opposed to being salaried), subsistence and accommodation in return for their services.

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9 The Apprenticeships, Skills, Children and Learning Act 2009 introduced apprenticeship agreements which are contracts of service.

10 In addition to the statutory limit on the use of successive fixed-term contracts under Reg.8 of the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002, Colleges may have entered into a collective agreement which provides an alternative scheme for preventing any abusive practise in respect of the use of fixed-term contracts.
Key Case:

In *X v Mid Sussex Citizens Advice Bureau and another* [2012] UKSC 59 a volunteer brought a discrimination claim against the employer. Because the Equality Act 2010 does not allow volunteers to bring a discrimination claim against their employer, the claimant relied upon European anti-discrimination legislation. The employer then argued that the claimant was not entitled to bring an employment tribunal claim because she was not an employee. The Supreme Court rejected the claim on the grounds that protection from discrimination in the workplace does not extend to volunteers.

6.6. Agency workers

In recent cases, the courts have addressed the issue of whether an agency worker is an employee. In these cases, the courts considered if an implied contract of employment had arisen between the agency worker and the ‘hirer’. The guidance that can be taken from these cases is that if the initial contract between the agency worker and their temporary work agency is genuine, the courts would only imply a contract between the worker and the ‘hirer’ (e.g. a College) if it was essential to do so. For example, if mutual obligations have arisen between the agency worker and the ‘hirer’ which are incompatible with the agency arrangements.

Colleges can be reasonably confident that even long-term agency work arrangements will not give rise to an agency worker being an employee, provided that the arrangements are genuine. For detailed analysis of the *Agency Worker Regulations 2010*, please refer to the *Agency Worker Regulations: Guidance for Colleges*.

Concerning the risk of an agency worker bringing a discrimination claim against a College, potentially an agency worker could potentially bring such a claim against its temporary work agency as well as the ‘hirer’ under the *Equality Act 2010*. However, where there is evidently a genuine contract between the agency worker and the temporary work agency which will usually be the case, it is very unlikely that the agency worker would have a cause of action against a College.
7. Statutory and contractual entitlements for workers and employees

Once employment status has been determined, Colleges can ascertain workers’ and employees’ statutory entitlements. Both workers and employees must be afforded at least the minimum statutory protections in respect of their terms and conditions of employment. Beyond this, Colleges might give both workers and employees enhanced contractual entitlements so that workers’ and employees’ entitlements derive from two different sources, namely, statute law and their contracts (or custom and practice).

Appendix 2 contains a checklist of statutory entitlements for workers and employees. Additionally, Appendix 3 contains a summary of the qualifying periods of continuous service needed before employees can assert specific statutory protections.

7.1. Workers

Statutory entitlements

For individuals falling within the ERA 1996 definition of a worker, the key statutory entitlements include the entitlement to minimum rest breaks and periods, as well as to the statutory annual leave entitlement under the Working Time Regulations 1998. Additionally, all workers (including those falling under the ‘extended’ definition of a worker) are given important statutory protections under health and safety legislation and anti-discrimination legislation, for example.

Contractual entitlements

As with employees, Colleges are not legally obliged to provide workers with more favourable terms and conditions than the minimum statutory requirements. However, Colleges have the discretion to offer workers enhanced terms and conditions of employment above the statutory minimum requirements, e.g. additional annual leave entitlement. Accordingly, if a worker is given more annual leave than the statutory requirement, this entitlement derives from the contract itself (which can include collective agreements agreed between Colleges and trade unions).

7.2. Employees

Statutory entitlements

In addition to being entitled to the same employment rights as workers, employees can benefit from the wide range of employment rights listed in Appendix 2.

Contractual entitlements

Employees can benefit from the enhanced contractual terms and conditions stipulated in their contract of employment, above the statutory minimum entitlements.

However, in the situation where an employee’s (or worker’s) contractual terms do not comply with the statutory minimum requirements, a court would always imply these statutory entitlements into their contract of employment when scrutinising the applicable terms and conditions.
8. Frequently Asked Questions

1. When does a worker become an employee?

This situation could occur where a College engages a worker as, for example, an assessor from a bank of people that a College has ‘on its books’. If in this situation, a College offers this assessor more regular work, on specified days and at specified times of the week, on the understanding that the worker will turn up, this worker is likely to be an employee because there will be sufficient mutuality of obligation. However, the specific circumstances of each case would need to be reviewed in order to determine this change in employment status.

2. If the College includes a clause in an employee’s contract of employment stating that the College has the right to vary their working hours, can their hours be varied without consulting the employee?

This is not an issue concerning employment status determination but rather, an issue of an employer’s contractual right to vary an employee’s terms and conditions of employment. A College might have a contractual right to vary their working hours if the clause allowing the College to vary the contract is drafted sufficiently broadly so that this proposed variation falls within its scope.

If there is no express clause in the employee’s contract that allows a College to vary their terms and conditions, a College will need to vary the employee’s working hours by mutual consent.

Colleges should also remember that certain statutory entitlements referred to in Appendix 2 are automatically implied into contracts of employment, so that employee’s terms and conditions of employment can also be varied by statute. Then, if the relevant statute changes, this will be implied into the relevant clause in the employee’s contract of employment. For example, if the capped amount of statutory redundancy pay changes, this change will be implied into their contact.

3. Should employees on variable or zero hours contracts be included in a redundancy process?

Yes. Employees on variable or zero hours contracts should be included in the headcount when Colleges consider which employees are affected by proposed redundancies, as well as when Colleges are planning redundancy consultations with employees.

4. Is it problematic if a worker and an employee on different types of contracts are carrying out the same job role?

No, not necessarily. A College may have a permanent employee whose job role is as a catering assistant, as well as a worker who is engaged as a catering assistant to provide assistance to permanent employees during busy periods. However, Colleges should be alert to the situation arising in Question 1 above, which may give a worker grounds to claim they are an employee and are entitled to the protections afforded to an employee.

Additionally, where Colleges engage agency workers for a period longer than 12 weeks, an agency worker will be entitled to equal treatment in respect of the basic working and employment conditions (notably pay and annual leave entitlement) that would apply if the agency worker had been recruited directly by the College.
5. **What factors should be considered when taking on an agency worker as a permanent employee?**

The situation may arise where a College offers employment to an agency worker who has been providing interim cover at a College. It is highly likely that before a College makes the offer, there was a contract of employment between the agency worker and their temporary work agency. In this case, the new starter’s previous employment as an agency worker would not count for the purposes of continuity of employment. However, if a College is uncertain as to whether there was a contract of employment between the agency worker and their temporary work agency, it would be prudent for Colleges to obtain written confirmation of this fact from the relevant temporary work agency.

6. **Does a College need to approve a request from an employee on a zero hours or variable hours contract to take time off to undertake duties as a trade union representative?**

Colleges might have employed academic staff on variable hours contracts, to cover courses which, for whatever reason, cannot be covered by the permanent academic staff. So the situation could arise where an associate lecturer on a variable hours contract is also a trade union representative. The lecturer then requests time off to undertake union duties at a time when the College requires them to cover certain lessons.

As an employee, the lecturer is entitled to request such time off in the same way as a full-time employee on a permanent contract of employment.

In the above situation, the relevant statutory provisions are contained in the *Trade Union Labour Relations (Consolidation) Act 1992*. This statute provides that trade union officials of recognised unions have a statutory right to request a reasonable amount of paid time off during working hours to carry out union duties and to undertake training. Furthermore, *S.170* of the Act provides union members of recognised trade unions with the right to request reasonable unpaid time off, during working hours, to take part in union activities.

When considering such a request, Colleges first need to ascertain whether the request fits within the requirements of the Act. If it does meet these requirements, a College can then consider whether the amount and frequency of time off requested is reasonable in all the circumstances. In so doing, Colleges should be mindful of any agreements entered into with the relevant trade union which may stipulate any agreed amounts of unpaid/paid time off. Colleges are entitled to take into account operational requirements in order to maintain an academic service when agreeing arrangements for time off with employees. Therefore, a College can explain these considerations to the lecturer and make a proposal that allows the employee the time off requested but when it is mutually convenient.

7. **What difference does it make to employment status if an individual is engaged on multiple contracts with the same College?**

A College is not precluded from entering into two separate contracts with one individual that operate concurrently. For example, one individual might be on a part-time academic contract but also be in a ‘bank’ of people that a College calls upon to work as an invigilator during examination periods.

In the above situation, Colleges should treat each employment relationship separately, so that in respect of the academic post the employee would benefit from the statutory protections afforded to an employee. However, concerning the non-academic post, the individual is likely to be a worker for employment law purposes and therefore have less statutory requirements. A College should calculate the individual’s statutory and contractual entitlements separately in accordance with the
two different working arrangements.

8. Can the College reduce the working hours of an employee on a variable hours contract and allocate them to an employee on a contract of indefinite duration?

Yes. The College should first consider what is expressly stated in the variable hours contract and then the reality of the working arrangement, to determine the best approach for reducing the hours of the employee’s working hours. If the variable hours contract expressly states that the employee’s working hours can vary above a minimum number of guaranteed working hours, this effectively gives the employer a contractual right to vary their working hours without gaining the consent of the employee. Conversely, if the variable hours contract does not expressly state that the employee is guaranteed a minimum number of working hours it would not allow a College to vary the employee’s working hours without the employee’s consent. Then, the College should consider whether there is a separate clause in the contract giving the College a contractual right to vary their working hours and if that clause is drafted sufficiently broadly so that this proposed variation falls within its scope. In the absence of these contractual clauses, the College should follow the normal procedure for varying terms and conditions of employment by consulting with and seeking the consent of the employee.

After considering the contents of the variable hours contract, the College should assess whether, in reality, the employee’s working pattern has stabilised into regular, fixed hours. If this is the case and in the absence of a separate clause in the contract giving the College a contractual right to vary their working hours, the safest approach would be to follow the normal procedure for varying terms and conditions of employment by consulting with and seeking the consent of the employee.

In terms of reallocating these hours to the employee employed on a contract of indefinite duration, this is also varying their terms and conditions of employment. Accordingly, the same consideration should be given as to whether there is a clause in the contract giving the College a contractual right to vary their working hours. In the absence of such a clause, the College should follow the normal procedure for varying this employee’s terms and conditions of employment.
This guidance document has been written to support Colleges in understanding the key legal framework around defining employment status. This document is also available in other formats, available by emailing employment@aoc.co.uk

Further guidance can be found via www.aoc.co.uk/employment

AoC Employment Helpline

Colleges can contact the AoC Employment Team for further information and advice on this or any other employment related matter by telephone on 020 7034 9900 or by email employment@aoc.co.uk
## Appendix 1 – Glossary of terms

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition of term</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agency worker</td>
<td>The definition of an agency worker in the Agency Worker Regulations 2010 is an individual who is supplied by a temporary work agency to work under the supervision and direction of a ‘hirer’ (such as a College), who has a contract of employment with the agency, or any other contract to perform work and personal services.</td>
</tr>
</tbody>
</table>
| Apprentice                    | An apprentice is an employee.  

This term is not defined in the Apprenticeships, Skills, Children and Learning Act 2009 however, since 6 April 2011 apprentices employed under a valid ‘apprenticeship agreement’ will have the employment status of an employee. |
| Apprenticeship contract      | An apprenticeship contract is included in the definition of a contract of employment in S.230 of the Employment Rights Act 1996.  

Apprenticeship contracts signed after 6 April 2011 must be in the form of a valid ‘apprenticeship agreement’ in accordance with the Apprenticeships, Skills, Children and Learning Act 2009. |
| Bank staff                    | This term refers to a pool or bank of people which an employer may have engaged as casual workers, who are ‘on call’ for when work becomes available. However, there is no obligation on such bank staff to accept any work offered by an employer. |
| Contract of employment        | The statutory definition in S.230 of the Employment Rights Act 1996 is a ‘contract of service’ or an apprenticeship contract. |
| Contract of service           | S.230 of the Employment Rights Act 1996 refers to a contract of service but there is no definition of this term because it is a common law concept.  

The courts have developed a legal test for identifying if there is a contract of service based on the reality of a working arrangement. The significance of this test is that if an individual is employed under a contract of service, the courts will determine that they have the status of an employee. |
| Contract for services         | There is no statutory definition of a contract for services. This term usually refers to the terms of engagement between an employer and a self-employed contractor. |
### Employee

The definition of an employee in S.230 of the Employment Rights Act 1996 is an individual who has entered into or works under a contract of employment.

However, there are other also other definitions given in other statutes, such as the Transfer of Undertakings (Protection of Employment) Regulations 1981 and the Trade Union and Labour Relations (Consolidation) Act 1992.

### Employment status

There is no legal definition of this term.

It is generally used to mean how a working arrangement between an individual and an employer is legally classified.

### Fixed-term employee

This term is defined in Regulation 1 of the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations.

A fixed-term contract is one which, in the normal course of events, will terminate either on the:

- Expiry of a specific term; or
- Completion of a particular act; or
- Occurrence or non-occurrence of a specific event other than reaching retirement.

### Global contract

An overarching contract of employment which links together a series of separate assignments. In this way, a casual worker can be deemed to have the employment status of a permanent employee under an overarching contract of employment.

This term is used interchangeably with the term ‘umbrella contract’.

### Mutuality of obligation or mutuality of employment

This term refers to the obligation of an employer to provide work and pay for it, together with the obligation of the employee to undertake the work. An ‘obligation’ is a legal requirement that someone will do something in the future, such as provide work.

### Part-time employee

There is no legal definition of this term and there are no legal guidelines to determine whether or not a particular employee is a part time or a full time employee.

Whether an employee is part-time is a question of fact and depends on an employer’s practice concerning the working hours of a full time employee.

Zero hours contracts and variable hours contracts are types of part-time contracts.

### Self-employed contractor

There is no legal definition of this term. The courts will approach any dispute over employment status using the legal test developed by the courts. The hallmark characteristics of a self-employed contractor are that they do not offer services personally (a self-employed contractor has the right to send and pay a substitute); they do not have control (a self-employed contractor has right to decide where/when and especially how to do their work); and there is no mutuality of obligations (a self-employed contractor has the right to refuse work offered to you).

### Temporary contract

There is no legal definition of a ‘temporary contract’. This term is commonly used generically to denote a non-permanent contract, such as an employee on a fixed-term contract.
<table>
<thead>
<tr>
<th>Employment Status</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Umbrella contract</td>
<td>See ‘Global contract’ above.</td>
</tr>
<tr>
<td>Variable hours contract</td>
<td>These contracts are not defined in employment legislation. They are the name given to a contract which guarantees a minimum number of working hours to an individual engaged under the contract.</td>
</tr>
<tr>
<td>Volunteer</td>
<td>There is no legal definition of this term. Volunteers do not ordinarily have the status of either workers or employees for employment law purposes.</td>
</tr>
<tr>
<td>Worker</td>
<td>Under S.230 of the Employment Rights Act 1996 a worker is an individual who has entered into or works under a contract whereby the individual performs the work personally and the employer is not a client or customer of the worker.</td>
</tr>
<tr>
<td>Zero hours contract</td>
<td>The term is not legally defined. It is the name given to a contract under which the employer does not guarantee to provide any work and only pays for the work actually done by the individual under the contract. With a zero hours contract, there is no fixed, defined number of hours per week and the individual under this contract is effectively ‘on call’. Rosters and shift rotas are a common feature of such working arrangements and in some weeks, there may be no work (or zero hours).</td>
</tr>
</tbody>
</table>
### Appendix 2 – Checklist of the main statutory entitlements for workers and employees

<table>
<thead>
<tr>
<th>Statutory entitlement</th>
<th>Worker (Narrow definition)</th>
<th>Employee</th>
</tr>
</thead>
<tbody>
<tr>
<td>National minimum wage</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Equal pay</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Minimum annual leave entitlement</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>As a part-time worker, not to be treated less favourably than a comparable full-time worker</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Rest breaks and rest periods</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Maximum working week (unless an opt-out agreement is signed)</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Health and safety rights</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Right to be accompanied at a disciplinary or grievance hearing</td>
<td>Also applies to workers falling under the extended definition of a worker</td>
<td>✓</td>
</tr>
<tr>
<td>Protection under the Part-time Workers (Prevention of Less Favourable Treatment)</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Unlawful deductions from wages</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Employment Status</td>
<td>Rights/Protection</td>
<td></td>
</tr>
<tr>
<td>-------------------</td>
<td>------------------</td>
<td></td>
</tr>
<tr>
<td>Not to be discriminated against on the following grounds under the Equality Act 2010:</td>
<td>Also applies to workers falling under the extended definition of a worker</td>
<td>✓</td>
</tr>
<tr>
<td>age</td>
<td></td>
<td></td>
</tr>
<tr>
<td>disability</td>
<td></td>
<td></td>
</tr>
<tr>
<td>gender reassignment</td>
<td></td>
<td></td>
</tr>
<tr>
<td>religion or belief</td>
<td></td>
<td></td>
</tr>
<tr>
<td>marriage and civil partnership</td>
<td></td>
<td></td>
</tr>
<tr>
<td>race</td>
<td></td>
<td></td>
</tr>
<tr>
<td>sex and maternity</td>
<td></td>
<td></td>
</tr>
<tr>
<td>sexual orientation</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Whistleblowing legislation</td>
<td>Also applies to workers falling under the extended definition of a worker</td>
<td>✓</td>
</tr>
<tr>
<td>Unfair dismissal rights</td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>Statutory redundancy payment</td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>Written statement of reasons for dismissal</td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>Statutory sickness, maternity, paternity and adoption pay and leave</td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>Time off for antenatal care</td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>Time off for dependants</td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>The right to request flexible working</td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>Parental leave</td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>Guarantee payment during temporary lay-off</td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>Statement of written particulars of employment</td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>Itemised pay statement</td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>Time off for public duties</td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>Paid time off to look for work in the event of redundancy</td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>Time off for trade union duties or activities</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Time off for trade union officials and activities/employee representatives</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Consultation about collective redundancies</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Fixed-term employee protection</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Protection under TUPE Regulations</td>
<td>✓</td>
<td></td>
</tr>
</tbody>
</table>
## Appendix 3 – Reference table of necessary qualifying periods of continuous employment for employees to assert statutory rights

<table>
<thead>
<tr>
<th>Type of claim or entitlement</th>
<th>Length of qualifying period</th>
</tr>
</thead>
<tbody>
<tr>
<td>Guarantee payments during lay-off</td>
<td>1 month</td>
</tr>
<tr>
<td>Statutory minimum period of notice</td>
<td></td>
</tr>
<tr>
<td>Pay during medical suspension</td>
<td></td>
</tr>
<tr>
<td>Written statement of terms and conditions</td>
<td></td>
</tr>
<tr>
<td>Adoption leave and pay</td>
<td>26 weeks</td>
</tr>
<tr>
<td>Paternity/additional paternity leave and pay</td>
<td></td>
</tr>
<tr>
<td>Maternity pay</td>
<td></td>
</tr>
<tr>
<td>Parental leave</td>
<td>1 year</td>
</tr>
<tr>
<td>Unfair dismissal for those starting employment before 6 April 2012</td>
<td></td>
</tr>
<tr>
<td>Written reasons for dismissal for those starting employment before 6 April 2012</td>
<td></td>
</tr>
<tr>
<td>Entitlement to statutory redundancy payment</td>
<td></td>
</tr>
<tr>
<td>Paid time off in working hours when under notice of redundancy</td>
<td>2 years</td>
</tr>
<tr>
<td>Unfair dismissal for those starting employment on or after 6 April 2012</td>
<td></td>
</tr>
<tr>
<td>Written reasons for dismissal for those starting employment on or after 6 April 2012</td>
<td></td>
</tr>
</tbody>
</table>
1. Background and context

Social media has evolved rapidly over the last ten years, has become easier to use and is increasingly popular with individuals and organisations. With its wide reaching scope and its unsolicited nature it presents serious risks that need to be managed.

The purpose of this guidance document is to highlight how the use of social media both in and outside of the workplace can cause employment relations issues and how these should be managed.

In this guidance 'social media' is the term used to describe the online tools, websites and interactive media that enable users to interact with each other in various ways, through sharing information, opinions, knowledge and interests. Social media involves building online communities or networks, which encourage participation, dialogue and involvement.

Colleges use social media to raise their public profile, to enhance the learning experience and engage with students, and as a useful marketing and information resource. Employees use social media in their personal lives and often professionally, either as part of their job or for professional development and networking. Colleges should make clear to employees what is and what is not acceptable when using social media. If an employee's online activity poses a risk to damage or destroy the relationship of trust and confidence between employer and employee, discipline and dismissal will be a legitimate course of action.

A glossary of terms used throughout this guide is available in Appendix 1.

2. Risks

Social media is largely informal, with limited character spaces 'posts' 'tweets' and 'updates' are usually short and give rise to a different use of language, which can sometimes be misinterpreted without the opportunity to provide appropriate context and background information. Users can often