

Functions of Scope Section

1.1 Functions of Scope Section

The functions of Scope Section are to give decisions and information on the insurability of employment in accordance with the law.

Scope Section deals with employers and employees, or their representatives, who may apply to have an employment investigated to make sure that the correct class of PRSI is applied. Social Welfare Inspectors (SWIs) may also identify cases during the course of their inspection work which warrant investigation by Scope Section. Insurability cases may also arise during the course of claims processing. The Department of Enterprise, Trade and Employment, whose Redundancy and Insolvency legislation is tied into insurability under the Social Welfare Acts, may also request confirmation of insurability. Where there is a doubt, the case will be formally decided by a Deciding Officer (DO) in Scope Section.

1.2 Legislation

The main legislation is contained in:

Social Welfare Consolidation Act, 2005:

Chapter 2 of Part 2 (Employed Contributors)

Chapter 3 of Part 2 (Self-Employed Contributors)

Schedule 1 (Employments, Excepted Employments and Excepted Self-Employed Contributors).

Social Welfare (Consolidated Contributions and Insurability) Regulations, S.I. No. 312 of 1996: Part IV (Insurability)

Schedule C (Subsidiary Employments)

Schedule D (Employments in respect of which persons are treated as employers).

1.3 Administration / Information

Scope Section is based at:

Gandon House,

Amiens Street,

Dublin 1

Phone: 01 6732585

Fax: 01 6732460

E-Mail: scope@welfare.ie

1.4 General enquiries

DOs make statutory decisions on questions concerning the insurability of an employment as provided for under Section 300(2) of the Social Welfare Consolidation Act, 2005 including:-

whether an employment is or was an insurable employment, insurable self-employment or insurable (occupational injuries) employment,

whether a person is or was employed in an insurable employment, insurable self-employment or insurable (occupational injuries) employment,

what rate of employment contribution is or was payable by an employer in respect of an employed contributor,

what rate of self-employment contribution is or was payable by a self-employed contributor,

who is or was the employer of an employed contributor,

any other matters which may be prescribed.

1.5 Investigation of insurability

As part of the process of making a decision on insurability, a SWI may interview the worker and a representative of the employer separately about the nature of the employment and a statement (Form INS 1) is completed by each party. These investigations may be made through the representative of either party, e.g. their solicitor or accountant. Where a limited company is involved, the statement is taken from and signed by someone authorised to act for and sign on behalf of the company. [Part 5 of this document details the Guidelines issued to Inspectors to be considered when investigating insurability cases].

Support documentation may be sought by the Inspector such as:

written contracts

Memoranda of Association

Accounts and wages books

List of duties and instructions

Entries into minute books

Annual returns.

When the investigation is completed the Inspector submits the completed INS 1 forms, a detailed report including any supplementary information on any vital facts, and a comment on any contradictory information, to a DO in Scope Section for a formal decision.

Records of Directorships and Shareholdings registered for Limited Companies in the Companies Registration Office (CRO) are also available to the DO to aid the processing of insurability cases.

1.6 **Decisions**

Each of the parties whose insurability is being investigated, and where appropriate, their representatives, are notified of a decision on the insurability of an individual. The reasons for that decision are also included in the notification.

Decisions are based on all the available evidence and also on legal principles handed down in various court judgements over the years. They are based on established facts. Each case is assessed on its own merits in accordance with the general precedents of Irish law concerning contract of service. Operations which seem to be the same may differ in the actual terms and conditions in any given case.

A DO is obliged to follow the binding precedents of Irish law where appropriate. The findings of an administrative tribunal concerning the contracts of services are arrived at within its own statutory context. A DO will have regard to these findings but is not bound to follow them. A DO must also take account of the criteria set out in the Code of Practice for determining Employment or Self-employment status which were drawn up by the Employment Status Working Group set up under the Programme for Prosperity and Fairness. (A copy of this Code of practice is shown at Appendix A).

1.7 **Effect of a decision**

Where necessary, the workers contribution record is amended in accordance with the Scope decision. However, where the contributions previously paid were deducted at the incorrect rate with the consent or connivance of the worker, the contribution record will not be amended until the contributions properly due are paid. Entitlement to a social insurance payment will be awarded or withdrawn in accordance with the amended contribution record.

Arising from a Scope decision the employer and the employee may each be entitled to a refund of PRSI arising from the decision. See Section on PRSI Refunds.

1.8 **Revised decisions**

Decisions may be revised in certain circumstances. See Section on Revised Decisions.

1.9 Appeals

All DOs decisions can be appealed by either party within 21 days of the date of the decision to:

The Chief Appeals Officer

Article II. Social Welfare Appeals Office

DOlier House

DOlier Street

Dublin 2

Telephone: Dublin (01) 6732800. LoCall: 1890 747 434

Note:

The rates charged for using 1890 (LoCall) numbers may vary among different service providers.

1.10 Revenue liaison

Scope Section liaises with the Office of the Chief Inspector of Taxes to ensure, as far as possible, consistency in decision making in both organisations in relation to the classification of employments.

PART 2: CONTRACTS OF SERVICE/CONTRACTS FOR SERVICES

Insurability under the Social Welfare Acts generally hinges on three types of employment contracts, with some exceptions:

a contract of service - where a person works as an employee.

a contract of apprenticeship - where the first aim of the contract is to train and the work is secondary; the employer covenants to teach the apprentice a trade or profession and the apprentice covenants to learn and to serve the employer during the continuance of the apprenticeship.

a contract for services - where the contractual relationship does not amount to a contract of service or apprenticeship.

2.1 Contracts

A contract is an agreement between two named parties which defines the rights and obligations of both parties, is legally binding and must benefit each party. A contract may be written, oral, expressed or implied. It may be casual, temporary, part-time or of short duration and still be a contract. Each case is viewed on its merits, in the light of the particular facts and in accordance with the general principles of law.

2.2 Written contracts

A written contract may cover only part of the relationship between the worker and the business. If there is a difference between what is stated in the written contract and the manner in which the operations are being carried out by the worker, the contract will be understood to have been altered or amended by the day-to-day operation of that contract. If there is a conflict, therefore, between what is written in the contract and the actuality of the circumstances on the ground, DOs will decide the case on the basis of the actual circumstances of the employment.

2.3 Proposed contracts

A DO will not give a decision on the insurability of a worker under a proposed contract.

2.4 Contracts not enforceable in law

Where a non-EU national is employed without a work permit neither the employer nor the employed person is free to enter into a contract of employment. Such employment is not legal and therefore the employment will be ruled by a DO to be not insurable. Similarly, arrangements made between parties which are of a domestic, friendly, casual or charitable nature, which are entered into without the intention of setting up a contract, are not enforceable in law.

2.5 Contract of Service and Contract for Services

As described above, insurability under the Social Welfare Acts is generally conditional upon the existence of a contract of service, contract of apprenticeship, or contract for services between the parties.

The term contract of service has not been statutorily defined. It is in effect a concept of common law, based on principles formulated in court decisions. The DO applies these principles when looking at the operational arrangement in place in any given circumstance (each case is decided on its own merits) and decides whether the employment is insurable under the Social Welfare Acts or not.

2.6 Exceptions

Persons excepted from the payment of employment contributions and self-employed contributions are outlined in Parts 2 (Excepted Employments) and 3 (Excepted Self-employed Contributors) of Schedule 1 of the Social Welfare Consolidation Act, 2005 and are listed in paragraphs 3.18 - 3.24 (employees) and 3.30 - 3.36 (self-employed) of these guidelines.

2.7 Factors to be considered

There are a number of factors which are considered when deciding whether a contract of service exists or not. None of these tests are exhaustive, nor can they be used as a checklist of tests to decide whether a person is an employee or not. Each of the terms and conditions of the contract must be weighed up individually and then balanced against the other conditions which exist.

Control Test

The right of control over a worker is a significant indicator of a contract of service. A worker who has to comply with instructions as to where, what, when and how work is carried out, is ordinarily an employee. It will not always be necessary for the employer to instruct the worker, particularly where workers have developed particular skills. The employer is merely required to retain that right. Control of an employer over an employee can be perceived through forms of verbal or written instructions, through manuals provided or procedures in place. Where control is not a factor this could either be an indication of the employees level of skill or that the worker is self-employed.

Provision of training

Training being provided to the worker by the business indicates an employer/employee relationship where the employer is concerned with the work being performed and also the standard of work.

Regular reporting

Regular reporting arrangements in place indicate that the worker is an employee and obliged to account for the work s/he is performing.

Personal service test

The obligation to provide personal service points to a finding that the employer is not only interested in the results but also that it is the specified worker who achieves these results. Where personal service is not required, it is a pointer towards a contract for services. In some contracts for services, however, there may be a requirement that the self-employed worker has a particular skill which s/he personally has been contracted to supply.

Freedom to send substitutes

The freedom to send substitutes or hire helpers at the workers own cost is indicative of a contract for services. However, if a worker hires, supervises and pays other workers at the direction of the employer or the worker is operating by way of delegated duty from the business, it is likely the worker is an employee. A worker who is free to send a substitute, with the prior approval of the business, and the substitute is paid by the business, is likely to be an employee.

Exclusivity

Exclusive rights to service indicate the worker is an employee, whereas a self-employed contractor may work for a number of different contractors at the same time. It is important to differentiate between the independent contractor and the employee who works in a number of part-time jobs. The right to personal service is not proof of a contract of service but a contract of service cannot exist where there is no such right.

Integration

Where a worker is integrated into the business process and the operations of a worker are an essential part of the businesses functions and supports, it generally signifies that the worker is an employee.

Provision of equipment

The furnishing of tools, equipment and protective clothing to the worker by the employer supports a finding of a contract of service. In some occupations, however, it is customary for the worker to supply particular tools and equipment at no cost to the employer. For example, carpenters generally provide their own hand tools. Significant investment by the worker in the provision of equipment necessary for the job is more indicative of a contract for services.

Location

Working on the employers premises and use of all the necessary facilities are the norm for employees. In some cases, however, employees may work away from the employers premises because of the nature of the work. Also, self-employed workers may work on a contractors premises and use some of their facilities and remain under a contract for services.

Level of risk

A high level of financial risk, in capital or assets, undertaken by a worker, or being exposed to financial risk by having to bear the cost of making good faulty or substandard work, indicates that the worker is self-employed.

Having the opportunity to profit from sound management in the scheduling and performance of engagements and tasks, to employ resources or investment, and to have the freedom to make decisions accordingly indicates a contract for services. However, this does not apply where performance related pay is a feature of the employment.

Correcting unsatisfactory work at the workers own expense and on the workers own time is a pointer of a contract for services.

Remuneration

The method of remuneration for employees is generally a fixed rate periodical payment. The fact that remuneration is by time, by piece, on commission, on invoice, by fee or some other method that has been mutually agreed does not automatically point to the worker being self-employed.

The payment of tax and its collection is determined in accordance with the appropriate legislation and is not determinative of employment status.

Miscellaneous

Mileage, subsistence and expenses paid by the business to a worker are generally indicative of a contract of service.

Company sick pay, holiday pay and membership of a superannuation scheme are benefits generally provided by employers in respect of their employees. However, the absence of these benefits does not automatically point to self-employment status.

The label attached to a contract, i.e. that the parties describe the worker as being an employee or self-employed, is not determinative.

PART 3: MAIN LEGISLATIVE PROVISIONS

3.1 Provision to make regulations

Section 12 (3) of the Social Welfare Consolidation Act 2005 provides that the Minister for Social Protection may make regulations whereby particular employments can be excluded from or added to the insurable employments specified in Part 1 of Schedule 1 of the Act.

3.2 Modification of insurance

The Minister may make regulations to change the provisions relating to the insurability of certain types of employees. Employees who worked in these employments before 6 April 1995 and continue to do so, are insured at a modified class of insurance and they and their employers pay a reduced rate of PRSI. This modified rate gives entitlement to a limited number of social welfare benefits, depending on the category of employment and Class of PRSI payable.

Persons employed in any employment for whom the modified rate of PRSI applies and who are subsequently employed without a break in service in any other employments described below, for which various modified rates apply, will continue to be insurable at the modified rate appropriate to the new employment.

Persons who are employed in an employment where a modified rate of PRSI applies, who immediately become employed as a Garda Trainee or an Army Cadet and on ceasing training, are immediately appointed as a member of the Garda Sochna or as a Commissioned Officer of the Defence Forces, will pay PRSI at the appropriate modified rate from the date of appointment to the new permanent position.

3.3 **Insurable employments**

Insurable employments are employments set out in Part 1 of Schedule 1 of the Social Welfare Consolidation Act, 2005, whereby every person aged 16 or over and under 66 are compulsorily insured as employees. These workers are referred to in the Act as employed contributors.

3.3.1 **Employment under a contract of service**

Employment in the State under a contract of service or apprenticeship, written or oral, whether expressed or implied, and whether the employed person is paid by the employer or some other person, and whether under one or more employers, and whether paid by time or by the piece or partly by time and partly by the piece, or otherwise or without any money payment, is insurable.

3.3.2 **Employment on a ship or aircraft**

A person is an insurably employed contributor under a contract of service as:

(a) the master or a member of the crew of:

- (i) any ship registered in the State, or
- (ii) any other ship or vessel of which the owner, or, where there is more than one owner, the managing owner or manager, resides or has his/her principal place of business in the State.

(b) the captain or a member of the crew of:

- (i) any aircraft registered in the State, or
- (ii) any other aircraft of which the owner, or, if there is more than one owner, the managing owner or manager resides or has his/her principal place of business in the State.

3.3.3 Insurable employments at sea

Where a person works in a designated area on or about a drillship, rig, platform, or similar installation, in the exploration of the seabed, subsoil, in the exploitation of their natural resources, in the operation of a pipeline or cable for the transport or transmission of energy or energy products and the employment would ordinarily be insurable for the purposes of the Social Welfare Act, the employment will be treated as insurable. The term designated area is defined in Section 1 of the Continental Shelf Act, 1968.

3.3.4 Employment as a civil servant

Civil servants of the Government or the State are insurable at PRSI Class B provided they were in such employment before 6 April 1995 and continue to be so employed. Civil servants employed before 6 April 1995 in a post where a superannuation allowance was not granted, who are appointed to a position where a superannuation allowance is granted, without breaking their service, are also covered for PRSI Class B from the date of the new appointment.

3.3.5 Employment as a member of the Garda Sochna

Garda who commenced employment before 6 April 1995 and continue to be so employed without a break in service are insurable at PRSI Class B. Trainee Garda employed before 6 April 1995, who immediately on finishing training became a member of the Garda Sochna, are insurable at PRSI Class B.

3.3.6 Employment in the Defence Forces

Commissioned Officers of the Defence Forces and members of the Army Nursing Service who commenced employment before 6 April 1995 and continued thereafter without a break in service are insurable at PRSI Class C. Other members of the Defence Forces who were employed before 6 April 1995 and who are subsequently appointed as commissioned officers without a break in employment are insurable at PRSI Class C from the date of appointment.

3.3.7 Employment under any local or other public authority

Persons employed in a local or public authority in a permanent and pensionable position before 6 April 1995 and who continue to be so employed are insurable at PRSI Class D, provided their payments during illness are considered adequate by the Minister. Those employees who were not employed in a permanent capacity before 6 April 1995 and who are subsequently employed in a permanent and pensionable capacity without a break in employment are insurable at PRSI Class D, provided their payments during illness are considered adequate by the Minister. Definition of a Public Authority is at paragraph 4.4.

3.3.8 Employment in a statutory transport undertaking

Persons employed in a statutory transport undertaking in permanent and pensionable positions before 6 April 1995, who continued to be so employed without a break, are insurable at PRSI Class D, provided their payments during illness are considered adequate by the Minister. Those persons who were not employed in a permanent and pensionable capacity before 6 April 1995 and who are subsequently so appointed without a break in employment are insurable at PRSI Class D, provided their payments during illness are considered adequate by the Minister.

3.3.9 Employment as a Teacher

Teachers employed in a pensionable capacity before 6 April 1995 and who continue to be so employed without a break in service are insurable at PRSI Class D in the following employments:

- (a) in a national school.
- (b) in a comprehensive school established by the Minister for Education and Science.
- (c) in a secondary school where they receive an incremental salary in accordance with the rules made by the Minister for Education and Science for the payment of such salary to secondary teachers.
- (d) in a domestic science training college recognised by the Minister for Education and Science.
- (e) in a training college recognised by the Minister for Education and Science for teachers in national schools.

Teachers who before 6 April 1995 were employed in non/pensionable employment in any of the above scenarios and who subsequently become employed in a pensionable capacity as above without a break in service are insurable at PRSI Class D from the date they are formally appointed to the pensionable position.

3.3.10 Employment as a Medical Practitioner

Registered medical practitioners as defined by the Medical Practitioners Act, 1978, who were employed in a permanent position before 6 April 1995, are covered by public sector superannuation schemes and are provided with adequate payments for illness, are insurable at PRSI Class D.

Registered medical practitioners employed in a voluntary hospital before 6 April 1995 in a post which was not permanent and pensionable who are subsequently appointed to a permanent and pensionable post are covered by public sector superannuation schemes and who are provided with adequate payments for illness, are insurable at PRSI Class D.

Registered medical practitioners who were not employed before 6 April 1995 in a pensionable capacity under a public sector superannuation scheme and who subsequently become employed in a permanent and pensionable capacity without a break in employment are insurable at PRSI Class D.

3.3.11 Employment by Bord Telecom

Persons employed by Bord Telecom in a permanent and pensionable capacity before 6 April 1995, who are provided with adequate payments during illness and continue to be so employed, are insurable at PRSI Class D. Those persons who were not in permanent and pensionable employment before 6 April 1995 and who subsequently become so employed without a break are insurable at PRSI Class D, providing the payments during illness are considered adequate by the Minister.

3.3.12 Employment as a Court Messenger

Employment as a court messenger under section 4 of the Enforcement of Court Orders Act, 1926 is an insurable employment.

3.3.13 Employment in nursing professions

Employment as a trainee midwife, student midwife, pupil midwife, probationary midwife, trainee nurse, student nurse, pupil nurse or probationary nurse is insurable. The term nurse includes a nursery or childrens nurse.

3.3.14 Employment as a manager of a Social Welfare Branch Office

Employment by the Minister as a manager of a Social Welfare Branch Office is an insurable employment.

3.3.15 Religious

Employment where the employed person is a person in Holy Orders or other minister of religion or a person living in a religious community as a member of that community is insurable.

3.3.16 Sub-postmaster

Employment by An Post as a sub-postmaster remunerated by scale payment is insurable.

3.3.17 Community Employment

Employment under a scheme administered by An Foras Iseanna Saothair (FS) and known as Community Employment where that employment begins after 6 April 1996, or in any other case, where, subject to the conditions and in the circumstances that may be prescribed, the person elects to be an employed contributor.

3.3.18 Part-Time Job Opportunities Programme

Employment under a programme known as the Part-Time Job Opportunities Programme administered by or on behalf of the Conference of Religious of Ireland where that employment begins after 6 April 1996, or in any other case, where, subject to the conditions and in the circumstances that may be prescribed, the person elects to be an employed contributor.

3.3.19 Persons recruited by Employment Agencies

Employment whereby an individual agrees with another person who is carrying on the business of an Employment Agency (within the meaning of the Employment Agency Act, 1971) and is acting in the course of that business to do or perform personally any work or service for a third party (whether or not the third person is a party to the contract and whether or not the third person pays the wages or salary of the individual in respect of the work or service) is deemed to be an insurable employment by paragraph 13 of Part 1 of Schedule 1 of the Social Welfare Consolidation Act, 2005. The person who is liable to pay the wages or salary of the individual concerned is deemed by section 12(4) of the same Act to be the individual's employer.

3.4 Insurable self-employment

Persons aged over 16 and under 66 are compulsorily insured as self-employed contributors if:

they work under a contract for services, and

have reckonable income (where tax is payable at Schedule D), or

have reckonable emoluments (where tax is payable at Schedule E) which is at least 3,174 per annum, up to 31 December 2010 and €5,000 from 1 January 2011.

3.5 Excepted Employments

Some employments are excepted from Social Insurance contributions and are listed in Part 2 of Schedule 1 of the Social Welfare Consolidation Act, 2005.

3.5.1 Employment by a spouse

Employment in the service of the husband or wife of the employed person is not insurable. However, where one member of a married couple is employed under a contract of service by a partnership consisting of the spouse and another person or persons, s/he will ordinarily be regarded as employed by the partnership and not by the spouse. This will also apply in the case of a limited company in which either member of the couple is a director. In each of these cases the spouse is not employed directly by the other spouse but through the partnership or limited company. The employment will be insurable if it is under a contract of service.

3.5.2 **Casual employment**

Employment of a casual nature otherwise than for the purposes of the employers trade or business and otherwise than for the purposes of any gain or recreation where the persons employed are engaged or paid through a club is not insurable. The question of whether work is casual is determined by reference to the particular circumstances of each case. The phrase for the purposes of the employers trade or business includes work which is incidental or ancillary to the business carried out by the employer.

3.5.3 **Employment by a prescribed relative**

Employment by a prescribed relative of the employed person, being either employment in the common home of the employer and the employed person or employment specified by regulations as corresponding to employment in the common home of the employer and the employed person is not insurable.

Where a person is employed by a parent, grandparent, step-parent, child, grandchild, step-child, brother, sister, half-brother or half-sister, the employment is not insurable provided:

- (a) there is no written contract of service or apprenticeship,
- (b) the person is a member of the employers household, and
- (c) the employment is related to a private dwelling house or farm in or on which both the person and the employer reside.

If any of these conditions are not fulfilled the employment will be insurable if it is under a contract of service. Where the employer is a ward of court the exception does not apply.

3.5.4 **Subsidiary Employment**

Employment specified in regulations as being of such a nature that it is ordinarily adopted as subsidiary employment only and not as the principal means of livelihood is not insurable. This is where the person is ordinarily and mainly dependent for his/her livelihood on an employment which is:

excepted by virtue of paragraphs 3.18.1 or 3.18.3 above (paragraphs 1 and 3 of Part 2 of Schedule 1 of the main Act),

in the public or civil service and the person pays the modified rate of PRSI,

as an attendant at or in connection with examinations held by the Department of Education and Science,

as a presiding officer or poll clerk at Presidential elections, elections to the European Parliament, general elections, bye-elections, local elections or at referenda involving occasional service only, or as a member of the Defence Forces involving service in either the Army Reserve or the Naval Service Reserve for any period not in excess of 21 consecutive days.

3.5.5 Employment of inconsiderable extent

Employment specified in regulations as being of inconsiderable extent is not insurable. The phrase inconsiderable extent applies to any contribution week where a person works in one or more employments (other than systematic short-time employment - see paragraph 3.5.6 below) which would otherwise be an insurable employment, where the total amount of reckonable earnings payable to or in respect of an employee from such employment or employments is less than 38 in respect of that contribution week.

Where an employee is employed by more than one employer in any contribution week and where his/her reckonable earnings, derived from any one of such employments, is less than 38, the employee shall inform each of his/her employers of the amount of reckonable earnings in respect of his/her other employment or employments, for the purposes of determining whether the inconsiderable extent regulations should apply to him/her.

3.5.6 Systematic short-time work

Systematic short-time work applies where the employees of the business had been working full time but whose weekly hours of work were reduced by the business and there is an expectation that full-time working will resume within a reasonable period. In these cases the employment is insured at the class of PRSI which normally applies to that employment.

3.6 Excepted self-employed contributors

3.6.1 Some self-employed persons are excepted from paying PRSI Class S as they are excepted self-employed contributors. These are set out in Part 3 of Schedule 1 of the Social Welfare Consolidation Act, 2005.

3.6.2 Prescribed relatives of self-employed contributors

A prescribed relative of a self-employed contributor not being a partner, where s/he participates in the business of the self-employed contributor and performs the same tasks or ancillary tasks is not insurable. The prescribed relative is defined as a parent, grandparent, step-parent, child, grandchild, step-child, brother, sister, half-brother, half-sister or spouse of the self-employed contributor. Details of partnerships are given in paragraphs 4.2 and 4.3 below.

3.6.3 Self-employed and in receipt of Unemployment Assistance or Pre-retirement Allowance

A self-employed contributor who is in receipt of unemployment assistance or in receipt of pre-retirement allowance is not insurable.

3.6.4 Income below a prescribed amount

A person whose total income, reckonable emoluments or reckonable earnings (if any) from self-employment and employment is less than 3,174 per annum before deducting any superannuation contributions or any allowances which are allowable for income tax purposes is not insurable. Reckonable emoluments, reckonable earnings and reckonable income are defined in Article 2 (1) of Part 1 of the Social Welfare Consolidation Act, 2005.

3.6.5 Persons with only unearned income or pensions

An employed contributor or a person who is in receipt of a pension arising from his/her previous employment or the previous employment of his/her spouse, in the case of either of whom the income for the contribution year does not include reckonable emoluments or in the case of reckonable income, income to which Chapter 3 of Part IV of the Income tax Act, 1997 applies, is not insurable.

Employees and those in receipt of a pension from their own or their spouses previous employment, whose only other source of income is unearned income such as dividend income or rental income are not insurable.

3.6.6 Self-employed Public Servants

A person employed in any one or more of the employments specified in regulations under section 14 of the Social Welfare Consolidation Act, 2005, being employments in respect of which the contribution payable under the said regulations are reckoned only in relation to the grant of widows (contributory) pension, deserted wives benefit or guardians payment (contributory) and are not reckoned in relation to the grant of any other benefit is not insurable. (Public or Civil Servants who are paying PRSI at Class B, C or D who are also self-employed)

3.6.7 Persons with unearned income normally living abroad

A person who is regarded as not resident or not ordinarily resident in the State in accordance with the provisions of the Income Tax Acts and whose reckonable income for the year does not include income to which Chapter III of Part IV of the Income Act, 1997, applies or whose only income is unearned income is not insurable.

3.7 Persons treated as employers

For the purposes of the Social Welfare Acts, certain persons are specified as being employers of an employed contributor:

The Minister for Education and Science, where a teacher in a national school is paid a salary by the Minister for Education and Science,

The Church Representative Body of a Minister of Religion of the Church of Ireland,

The person from whom a vehicle, vessel, aircraft, machine or animal is hired on a contract of bailment (other than a hire purchase agreement) is to be treated as the employer of a person plying for any of the above for hire, in consideration of the payment of a fixed sum or a share in earnings or otherwise,

The Minister for Education and Science, where a teacher works in a comprehensive school established by the Minister for Education and Science.

3.8 Persons normally resident in this State who are employed abroad (outside the EU)

An insured person ordinarily resident in this State who is temporarily employed abroad in employment which would normally be insurable under the Social Welfare Acts by an employer who is resident or has a place of business in this State, is insurable for the first 52 weeks. Where the employment continues beyond 52 weeks the above provisions may, with the consent of the Minister, be extended beyond 52 weeks.

3.9 Persons not normally resident in this State or any other Member State of the EU who are employed in this State

Where an employer is not ordinarily resident in or has his/her principal place of business in the State, in Northern Ireland, or in Great Britain or in the Isle of Man, temporarily employs a person who is not ordinarily resident in the State, PRSI contributions ordinarily due may be waived for the first 52 contribution weeks.

Part 4: **MISCELLANEOUS**

4.1 **Directors**

A director of a registered limited liability company who performs duties solely in his/her capacity as a director and receives payment of fees or emoluments is liable to self-employment contributions at PRSI Class S, providing s/he has reckonable income of at least 3,174 per annum.

However, it is not unusual for a director to perform executive duties also in that company and receive remuneration which is independent of any fees or emoluments received for the directorship. In such cases the company's Memorandum and Articles of Association, required by the Companies Act, set out, inter alia, its objects, membership and regulations under which the business is carried out. Table A of the First Schedule of the [Companies] Act sets out the prototype Articles of Association, which are deemed to be adopted by every company except insofar as they are amended or excluded. Regulation 85 of the Table provides that a director may hold an office of profit in the company other than that of auditor and Regulation 89 provides that the directors shall cause records to be kept of all appointments made by the directors. If, therefore, these two Regulations are not specifically amended by or excluded from the Articles of Association they are deemed to be included and they provide legal cover for the employment of a director under a contract of service.

Once these provisions are in place, the existence of a contract of service, or not, is decided by reference to Factors to be Considered at paragraph 2.7. Where a contract of service exists, PRSI is due at Class A or Class J as appropriate. Where a contract for services exists, Class S applies.

4.2 **Partnerships**

Business partners are insurable as self-employed contributors. A partnership is defined under the Partnership Act, 1890 as the relationship subsisting between persons carrying on a business in common with a view to profit, where persons can include a company and business includes every trade or occupation. Each partner contributes in one or more ways with money, property, labour, or skill and shares in the profits and risks of loss in accordance with the partnership agreement or understanding.

In determining whether a partnership exists, it is necessary to determine whether the parties intended to join together to carry on a trade or business and share in the profits or losses. Intention of the parties is determined not merely from their statements, but to a large degree, from their conduct in carrying on the business, not only in regard to each other, but also in regard to third parties. Further light is cast on the true intent of the parties by such matters as the abilities and contributions of each and the control which each has over the operation of the business.

While all of the following factors may not apply, a partnership normally exists if:

there is a written Partnership Agreement (Note: There is no legal obligation/requirement to have a written agreement),

The business stationery reflects the existence of a partnership,

There is a joint business bank account,

Each partner writes cheques on the business accounts in his/her own right,

It is apparent to those doing business with the partnership that one exists,

Business accounts/activities are in joint names (e.g. Mart, Creamery, Cash & Carry, Brewery, Herd Number etc.),

There is evidence that each partner made a significant contribution to the running of the business,

The business is jointly owned by the partnership,

The partnership is recognised by the Revenue Commissioners for all relevant taxes and the tax affairs of each partner should reflect this,

Each partner contributes capital or services to the business,

Each partner has the right to participate in management decisions and other responsibilities (no partner should be an employee of the other),

Profits are paid and losses made good in accordance with their agreement. In the absence of a written partnership agreement the shares of profits should be equally divided between the partners.

4.3 Married or closely related parties and partnerships

A husband and wife may enter into a valid partnership agreement with each other, as may close relatives. In these instances, while it is not a requirement, the terms of the partnership are normally set out in a written partnership agreement as the Courts are reluctant to assume that spouses or close relatives living together intend to enter into legal relationships.

4.4 **Public Authorities**

For an employer to be considered a Public Authority for the purpose of the Social Welfare Acts, the following criteria must be met;

it must have a statutory origin,

it must perform public or statutory duties,

its business must be for public benefit and not for private profit,

it must be an autonomous body exercising powers directly affecting the general public,

it must have a satisfactory superannuation scheme and a provision for adequate payments during illness to its employees.

4.5 **Share Fishermen/women**

In the fishing industry, one of the traditional methods of payment to crew members working on board fishing vessels is by share of the value of the catch. The class of PRSI payable depends on whether an individual is employed or self-employed.

In a High Court judgement dated 2 October 2001, it was determined that Share Fishermen/women, paid solely by a share of the catch, were not employed under a contract of service. The main factors which determined that crew members were not employees of the boat owner but partners in a joint adventure were:

That each weekly voyage was a separate venture and no crew member had a contract that entitled him/her to take part in any subsequent voyages,

Crew members did not receive payment of wages for participating in a fishing expedition but became entitled to a share of the net profits (if any), and

Most importantly, although the boatowner/skipper engaged each crew member s/he did not decide what the rate of remuneration would be; this was determined partly by custom (50% of the profits being allotted to the boat) and partly by agreement between the parties.

It follows from this judgement that Share Fishermen/women, working in circumstances where the three factors mentioned above apply and are paid solely by share of the value of the catch, are likely to be self-employed and insurable at Class S rate of contribution provided that they have reckonable income of 3,174 or more p.a.

It is important to note that the High Court judgement only applies to Share Fishermen/women who are paid solely by share of the value of the catch. A Fisherman/woman who is paid by fixed basic wage or salary is more likely to be an employee of the boat-owner or skipper (Class A rate of PRSI).

Full details of the Departments PRSI position on Share Fishermen/women is contained in the Department of Social Protection Fact Sheet No. 2 of 2002, A Guide to PRSI for Share Fishermen/women.

Code of Practice for determining Employment or Self-Employment status of Individuals

This leaflet was prepared by the Employment Status Group set up under the Programme for Prosperity and Fairness. The group was set up because of a growing concern that there may be increasing numbers of individuals categorised as self employed when the indicators may be that employee status would be more appropriate. The leaflet has been updated in 2007 by the Hidden Economy Monitoring Group under Towards 2016 Social Partnership Agreement. The purpose of the document is to eliminate misconceptions and provide clarity. It is not meant to bring individuals who are genuinely self-employed into employment status.

In most cases it will be clear whether an individual is employed or self-employed. However, it may not always be so obvious, which in turn can lead to misconceptions in relation to the employment status of individuals.

The criteria below should help in reaching a conclusion. It is important that the job as a whole is looked at including working conditions and the reality of the relationship, when considering the guidelines. The overriding consideration or test will always be whether the person performing the work does so as a person in business on their own account. Is the person a free agent with an economic independence of the person engaging the service? This economic test is paramount.

The Safety, Health and Welfare at Work Act, 2005 is the cornerstone of health and safety regulation in Ireland. Employers and Employees all have duties under the Act. The legislation treats self-employed persons in a similar manner to employers. It places on them an onus to manage, plan and conduct all work activities to ensure the health and safety of all persons at a workplace. Generally speaking self-employed persons and contractors have a greater responsibility to manage health and safety issues than employees. However, regardless of a persons status, health and safety management and practice is essential in all work operations. More information is available from 'www.hsa.ie'

Criteria on whether an individual is an employee

While all of the following factors may not apply, an individual would normally be an employee if he or she:

Is under the control of another person who directs as to how, when and where the work is to be carried out.

Supplies labour only.

Receives a fixed hourly/weekly/monthly wage.

Cannot sub-contract the work. If the work can be subcontracted and paid on by the person subcontracting the work, the employer/employee relationship may simply be transferred on.

Does not supply materials for the job.

Does not provide equipment other than the small tools of the trade. The provision of tools or equipment might not have a significant bearing on coming to a conclusion that employment status may be appropriate having regard to all the circumstances of a particular case.

Is not exposed to personal financial risk in carrying out the work.

Does not assume any responsibility for investment and management in the business.

Does not have the opportunity to profit from sound management in the scheduling of engagements or in the performance of tasks arising from the engagements.

Works set hours or a given number of hours per week or month.

Works for one person or for one business.

Receives expense payments to cover subsistence and/or travel expenses.

Is entitled to extra pay or time off for overtime.

Additional factors to be considered:

An individual could have considerable freedom and independence in carrying out work and still remain an employee.

An employee with specialist knowledge may not be directed as to how the work is carried out.

An individual who is paid by commission, by share, or by piecework, or in some other atypical fashion may still be regarded as an employee.

Some employees work for more than one employer at the same time. Some employees do not work on the employers premises.

There are special PRSI rules for the employment of family members.

Statements in contracts considered by the Supreme Court in the Denny case, such as You are deemed to be an independent contractor, It shall be your duty to pay and discharge such taxes and charges as may be payable out of such fees to the Revenue Commissioners or otherwise, It is agreed that the provisions of the Unfair Dismissals Act 1977 shall not apply etc, You will not be an employee of this company, You will be responsible for your own tax affairs are not contractual terms and have little or no contractual validity. While they may express an opinion of the contacting parties they are of minimal value in coming to a conclusion as to the work status of the person engaged.

Criteria on whether an individual is self-employed

While all of the following factors may not apply to the job, an individual would normally be self-employed if he or she:

Owns his or her own business.

Is exposed to financial risk, by having to bear the cost of making good faulty or substandard work carried out under the contract.

Assumes responsibility for investment and management in the enterprise.

Has the opportunity to profit from sound management in the scheduling and performance of engagements and tasks.

Has control over what is done, how it is done, when and where it is done and whether he or she does it personally.

Is free to hire other people, on his or her terms, to do the work which has been agreed to be undertaken.

Can provide the same services to more than one person or business at the same time.

Provides the materials for the job.

Provides equipment and machinery necessary for the job, other than the small tools of the trade or equipment which in an overall context would not be an indicator of a person in business on their own account.

Has a fixed place of business where materials, equipment, etc., can be stored.

Costs and agrees a price for the job.

Provides his or her own insurance cover e.g. public liability cover, etc.

Controls the hours of work in fulfilling the job obligations.

Additional factors to be considered:

Generally an individual should satisfy the self-employed guidelines above, otherwise he or she will normally be an employee.

The fact that an individual has registered for self-assessment or VAT under the principles of self-assessment does not automatically mean that he or she is self-employed.

An office holder, such as a company director, will be taxed under the PAYE system. However, the terms and conditions may have to be examined by the Scope Section of the Department of Social Protection to decide on the appropriate PRSI Class.

It should be noted that a person who is a self-employed contractor in one job is not necessarily self-employed in the next job. It is also possible to be employed and self-employed at the same time in different jobs.

In the construction sector, for health and safety reasons, all individuals are under the direction of the site foreman/overseer. The self-employed individual controls the method to be employed in carrying out the work.

Consequences arising from the determination of an individuals status

The status as an employee or self-employed person will affect:

The way in which tax and PRSI is payable to the Collector-General. An employee will have tax and PRSI deducted from his or her income.

A self-employed person is obliged to pay preliminary tax and file income tax returns whether or not he or she is asked for them.

Entitlement to a number of social welfare benefits, such as jobseekers and illness benefits. An employee will be entitled to jobseekers, illness and invalidity benefits, whereas a self-employed person will not have these entitlements.

Other rights and entitlements, for example, under Employment Legislation An employee will have rights in respect of working time, holidays, maternity / parental leave, protection from unfair dismissal, etc.

A self-employed person will not have these rights and protection.

Public liability in respect of the work done.

Deciding Status - Getting Assistance

Where there are difficulties in deciding the appropriate status of an individual or groups of individuals, the following organisations can provide assistance.

Tax and PRSI

The Local Revenue Office or the Local Social Welfare Office

Scope Section in the Department of Employment Affairs and Social Protection.

If there is still doubt as to whether a person is employed or self-employed the Local Revenue Office or Scope Section of the Department of Social Protection should be contacted for assistance. Having established all of the relevant facts, a written decision as to status will be issued. A decision by one Department will generally be accepted by the other, provided all relevant facts were given at the time and the circumstances remain the same and it is accepted that the correct legal principles have been applied to the facts established. However, because of the varied nature of circumstances that arise and the different statutory provisions, such a consensus may not be possible in every case.

The National Employment Rights Authority

The National Employment Rights Authority (NERA) was established on an interim basis in February 2007 in accordance with the commitment under Towards 2016, the Social Partnership Agreement for 2006 2015. Three units dealing with employment rights, which were formerly part of the Department of Enterprise, Trade and Employment have been subsumed into NERA: the Employment Rights Information Unit, the Labour Inspectorate and the Prosecution and Enforcement Unit. NERAs key objective is to achieve compliance with employment rights legislation. This will be achieved through provision of information, carrying out inspections and enforcement and prosecutions when necessary.

Relevant Contracts Tax Form RCT 1

Relevant Contracts Tax (RCT) applies where a Subcontractor enters into a contract with a Principal Contractor (Principal) to carry out relevant operations (construction, forestry or meat processing operations). The Principal and Subcontractor must jointly complete Form RCT 1, declaring that the contract is a Relevant Contract (and is not a contract of employment). Form RCT 1 has been revised to require further information from both Principal and Subcontractor as to why a proposed contract is considered to be a Relevant Contract. An incorrect designation of the contract as a Relevant Contract will have consequences for both the Principal and the Subcontractor. Further information is available from 'www.revenue.ie'

Employment which is not insurable

The 2003 and 2006 Employment Permits Acts provide for a large number of employer obligations and offences which include specifically the employment of non-EEA (non-European Economic Area) nationals except in accordance with an employment permit, where required. In this regard, a contract of employment between such a migrant worker and an employer which is not covered by a valid employment permit is an illegal contract and that employment is not consequently insurable under the Social Welfare Consolidation Act, 2005. Further information regarding Employment Permits legislation is available at 'www.entemp.ie'

A Guide to PRSI for Share Fishermen/women - Fact Sheet No. 2 of 2002

What is Share fishing?

In the fishing industry, one of the traditional methods of payment to crewmen/women working on board fishing vessels is by share of the value of the catch. If you work in the fishing industry and are paid solely by share of the catch you are a Share Fisherman/woman and should note the contents of this Fact Sheet.

Employed or self-employed? - High Court Judgement (2 October 2001)

The Class of PRSI you pay depends on whether you are employed or self-employed. Employed contributors are generally insurable at the PRSI Class A rate which provides cover for all benefits and pensions while self-employed contributors are insurable at PRSI Class S rate which provides cover for limited entitlements.

In a judgement dated 2 October 2001 the High Court ruled that two named Share Fishermen were not employed under contracts of service (i.e. as employees) by the boat-owners/Skippers (William Deasy -V- Minister for Social, Community and Family Affairs and Francis Griffin -v- Minister for Social, Community and Family Affairs).

The judge relied on the previous High Court case of DPP -V- McLoughlin (1986) in coming to her decision. The main factors in that case which determined that a crew were not employees of the boat owner but partners in a joint adventure were: -

1. That each weekly voyage was a separate venture and no crewmember had a contract that entitled him to take part in any subsequent voyages.
2. Crewmembers did not receive payment of wages for participating in a fishing expedition but became entitled to a share in the net profits (if any), and

3. Most importantly, although the boat-owner / skipper engaged each crewmember he did not decide what the rate of remuneration would be; this was determined partly by custom (50% of the profits being allotted to the boat) and partly by agreement between the parties.

It follows from this judgement that Share Fishermen/women working in circumstances where the three factors mentioned above apply and are paid solely by share of the value of the catch are likely to be self employed and insurable at PRSI Class S rate of contribution provided that they have reckonable income of Euro 3,174 (IR2,500) or more p.a.

[It is important to note that the High Court judgement only applies to Share Fishermen/women who are paid solely by share of the value of the catch. A Fisherman/woman who is paid a fixed basic wage or salary is more likely to be an employee of the boat-owner or Skipper (Class A rate of PRSI). If in doubt about the Class of PRSI payable contact Scope Section, Department of Employment Affairs and Social Protection, Gandon House, Amiens Street, Dublin 1. Telephone (01) 6732585, Fax 6732460, Email scope@welfare.ie].