

Personal Service Companies and IR35

The postponed IR35 legislation implementation date for private-sector contractors came into effect from 6 April 2021. This was initially taking effect from 6 April 2020 but postponed due to the ongoing coronavirus pandemic. Businesses should reassess their position as soon as possible whether contractors or engagers.

The off-payroll working rules?

These rules can apply when an individual (contractor) provides services through their own personal service company (PSC); this is usually a limited company, however the rules may still apply when services are provided through other types of intermediaries, including a partnership, individual or recruitment agencies.

The rules make sure that contractors are taxed in the same way as employees when they engage through personal service companies, but actually would have been employees if they were providing the services directly to their clients.

Consequently, the rules also affect the recipient of the services and can also apply to agencies providing such workers' services.

Changes to responsibility

Under existing legislation, contractors are responsible for determining whether these rules apply to them. The changes coming from 6 April 2021 will move responsibility to public sector authorities and medium and large-sized businesses for deciding if the rules apply or not.

Contractors will still remain responsible for determining their position after 6 April 2021 when they engage with small businesses. The rules apply on a contract by contract basis and contractors may have some contracts which fall within IR35 and other which do not.

Determining business status

A small business is defined by Companies Act 2006 as one which meets two or more of the following criteria:

- Annual turnover of £10.2M or less
- Balance sheet value of £5.1M or less
- 50 employees or fewer

The above may be impacted when the business is part of a group and businesses not meeting the thresholds will be expected to apply the IR35 legislation from 6 April 2021. Large businesses will have a legal obligation in responding to any requests in confirming to contractors whether they are a small or medium and large entity.

Therefore, a business will first need to determine its status, if large then identify off payroll workers engaged via an intermediary and make a status determination for every off payroll contract. If the rules apply, then the business must deduct taxes and national insurance contributions and pay these to HMRC.



Evaluating IR35 factors?

Contractors can still operate through their personal service company, however determining IR35 status will become a bigger challenge, it is complex and should not simply rely on the context of the engaging contract, but to the underlying facts of the engagement and by evaluating key IR35 factors.

Some of the key IR35 factors are control & direction, substitution & integration, mutuality of obligation, financial risk and others. In addition, HMRC's Check Employment Status for Tax (CEST) tool can assist in determining the IR35 position for a contractor, and also for a hirer in determining the status of their off payroll workers.

Key determining IR35 factors explained

CONTROL & DIRECTION

One of the most important factors for IR35 status, this factor looks at the extent to which a client controls where, when and how a contractor performs his work.

In order to fall outside IR35, the contractor must demonstrate autonomy when undertaking a project, both written and working practices must show that the hirer has no influence over how the contractor performs his services.

SUBSTITUTION

The right to provide a substitute is another important factor when demonstrating that a contract falls outside IR35 status.

The right to provide substitution will strongly indicate that the contract falls outside IR35.

The right to provide a substitute must be a genuine one. When it comes to the exclusive services of an individual, it may actually be difficult to provide substitution because of the explicit nature of the services, or the necessary qualifications.

MUTUALITY OF OBLIGATION

Mutuality of obligation exists when an employer expects a worker to undertake work when asked to do so, and the worker expects to be given work on a constant basis.

This factor examines the facts after the completion of the contract. For example, if the contact is 'rolling' rather than fixed-length then this would indicate mutuality of obligation. HMRC's view of this is that 'a continuous contract of employment may be created when work is regularly offered and accepted over a period of time'.

FINANCIAL RISK

Consider the level of financial risk undertaken by the contractor/worker in their work; if all the risks are with the engager/client then it would indicate an employment relationship.

PROVISION OF EQUIPMENT

Does the worker use equipment provided by the client, or do they use their own?

INTEGRATION

To which extent has the individual become part of the client's organisation? Consider access to staff facilities, meetings and social events; organisation email address, desk and computer desktop etc.



EXCLUSIVE SERVICES

Does the contractor work for other clients or just one client; IR35 may be triggered when a contractor engages with only one client and with whom the contract is being renewed on several occasions.

Although IR35 is considered on a contract by contract basis, the fact that a contractor works on more than one client indicates itself that the contractor is unlikely to be within IR35.

There are additional factors to consider depending on each case, but all factors must be examined in their entirety when considering whether an assignment is caught by IR35.

Planning is critical

To avoid unexpected tax and National Insurance bills it is imperative that you take professional advice if you have any doubts about your IR35 status. In particular, we could help you:

- Deal with any contentious status disputes with HMRC;
- Advise you on whether your arrangements fail or pass IR35 tests;
- Improve your contracts with principals for the purposes of defeating IR35;
- Maintain the necessary records and information to support your position.

Managing and defending your rights under IR35 is not a process for the faint hearted or the uninformed, let us help you get the best result available based on your circumstances.



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