

Are You Safe from the IR35 Regulations?

As a provider of services through your own limited company you will no doubt already be aware of the IR35 regulations. In principle, the IR35 regulations need to be considered if an individual provides services (either intellectual or manual) via their own limited company to third parties (possibly but not necessarily via an agency). The IR35 regulations, which basically prevent companies distributing profits tax efficiently via dividends, apply where the relationship between the individual director/shareholder and the ultimate recipient of that director/shareholder's services would be an employment relationship if the intermediary company and (if appropriate) agency were ignored. In other words, are you really an employee "disguised" behind your limited company.

There is no straightforward way to determine whether IR35 should apply to a worker as there is no statutory distinction between a contract of service (employment relationship) and a contract for services (self employed relationship) so we need to rely on past court judgements to establish the relevant factors.

The tests to establish a person's employment status have largely remained unchanged since the early case of Ready Mix Concrete (South East) Ltd v Minister of Pensions and National Insurance (1968), which established that three factors had to be present in order to create a contract of employment. These three factors, control, personal service and mutuality of obligations, are still considered to be the irreducible minimum in establishing employment relationships. The following issues are of only limited relevance:-

- The intention of the parties
- Provision of small items of equipment by the contractor
- Attendance of the contractor at social functions
- Training arrangements for the contractor
- Sick pay and holiday arrangements
- Payment by the contractor of minor expenses

Although these factors will be considered in any IR35 enquiry, they are incidental to the main three which are control, personal service and mutuality of obligations. If any of the main three are not present then there simply cannot be an employment relationship.

Control

We need to establish whether the end client is controlling the work, or whether you as a contractor have a reasonable degree of autonomy over the performance of the services. This will be determined by how, where, when and what is to be performed. If a contractor wants to be seen as being independent, then they will need to have a strong degree of influence over most of these. Strong levels of control exercised over a contractor would point to an employment relationship.

Personal Service

The key question here is whether the contractor is entitled to send a substitute of his/her choosing to undertake the services in question. If such a situation is genuinely the case, and indeed ideally if a substitute has been used, then it is almost impossible for an employment relationship to exist and consequently very difficult for HMRC to impose the IR35 regulations.

Mutuality of Obligations

Here the issue is whether the end Client (or the agency) is obliged to offer you more work and if it is offered whether you are obliged to accept it. If the answer to both of these is "No", then there is no mutuality of obligation. Compare this with an employment contract where your employer must continue to pay you even if there is no work, or make you redundant and compensate you.



Similarly, if you are asked to complete some work, and you are obliged to do so (if you wish to be paid and retain your employment).

Where an engagement with a particular end client is continually extended, then it becomes harder to argue that there is no mutuality, although it is impossible to define mutuality as commencing by reference to a particular passage of time.

All of these factors must be present in order to suggest a contract of service. If **any** of these elements (control, personal service, mutuality of obligations) are missing, then there would be no IR35 case to answer.

IR35 Contract Reviews

You will appreciate that each case and indeed each contract, must be considered on its own merits and some cases, contracts will certainly be borderline. Equally importantly, consideration must be given in the context of the actual circumstances rather than the theoretical terms which may be recorded in any written contracts.

As a director of a limited company, it is your duty to ensure that your company pays the correct tax, and, of course, it is your responsibility to ensure that your personal tax affairs are in order. Therefore, the onus of getting the employment status right of a particular engagement that your company is undertaking also falls to you. This clearly is not always straightforward, and it is highly unfair that the decision on a complex tax matter should be left to an individual whose expertise lies outside of tax. However, those are the rules and getting that decision wrong could prove costly – not only will HMRC seek to recover the lost tax and interest, but they will also seek to levy a penalty on the basis of taxpayer negligence.

When joining ABM's monthly contractor service, we will run through a short questionnaire which will indicate whether IR35 should be a concern to you and, for an additional fee, ABM clients can apply to Abbey Tax to have any of their contracts reviewed in greater detail. The review has two distinct parts: firstly, the contract wording is considered with particular attention paid to how it deals with the three key elements of personal service, control and mutuality of obligation; secondly, a questionnaire which you will be asked to complete will seek to address both the working practices of the assignment and the business practices of your company. Abbey tax also have an insurance scheme to cover any tax losses suffered during an IR35 enquiry.

ABM also has a [tax investigations scheme](#) which we offer to all our clients. This service is designed to cover our fees for dealing with any enquiry from HMRC and covers all the major taxes. For more information please contact Loraine Sullivan.

