



# IR35 Update

February 2021



## What is IR35?

---

The term IR35 has been bandied around for several years now since it first came in during 2000. Finally it looks as though this April it will become the law for not just public sector bodies but most private sector companies to comply with, so what is it? IR35 is the anti-tax avoidance legislation that was introduced by the Government that targets disguised employment.

Disguised employees are employees who falsely position themselves as limited company contractors and do this to attract less tax, which HMRC see as tax avoidance. It is being widened so that HMRC can more clearly identify whether contractors are working through their limited companies correctly and paying the tax they should be for those services.

It has also been referred to as 'off payroll working rules' and is designed to prevent workers from avoiding tax by operating as contractors, when effectively they are employees all but in name.

From April 2021 the responsibility for checking the status transfers from contractors to large and medium companies to do the assessments for IR35 themselves.

## Who does IR35 affect?

---

The legislation tends to cover freelancers and contractors who provide their services through a Personal Service Company (PSC). A PSC is a company through which a contractor operates to do their freelance work (because most businesses will not hire a sole trader). The term isn't defined in law – HMRC simply uses this label to describe companies that may be used as 'cover' by contractors who are really employees in all but name.

If you are a private sector employer engaging the services of a contractor from April 2021, you need to be aware of the rules on IR35 and establish if the work they are providing for your company could fall inside or outside of the IR35 rules.

The legislation changes are being introduced because of the way employees are treated differently from contractors when providing similar services.

You as an employer or those who contract with you are affected by the changes to 'off payroll working rules' if

- **You are a contractor who works through an intermediary, e.g., your own limited company, often known as a personal service company (PSC), and**
- **You provide your services to public sector organisations or medium or large-sized organisations out side of the public sector.**

A medium or large-sized organisation will have a turnover of more than £10.2million, a balance sheet total of £5.1m and/or more than 50 employees.

## Inside or Outside IR35?

---

If, when assessed using the HMRC criteria, the contractor or the PSC's earnings are considered to be a 'salary', this means they are within or 'inside' IR35. If the assessment criteria show the earnings cannot be classed as salary because of how they operate, the contractor or PSC would be deemed to be 'outside' of IR35.

## What will private sector employees be required to do come April?

---

Once the legislation comes into force, private sector employers will be held responsible for determining whether IR35 applies to any contractor they hire, if they are inside the IR35 rules they will be required to treat the contractor as an employee for tax purposes. This is a double-edged sword for affected businesses as there will be hefty fines for companies that choose not to apply or fall foul of the rules. Whereas, if they assess the contractor as an employee the costs will increase as they will be required to pay the relevant on-costs that would be in place if they were an employee, i.e., pension, holiday pay, sick pay etc.

Currently, contractors themselves are responsible for making this decision. The changes being brought in will mean the responsibility for checking status transfers to the company or end user of the services and brings the private sector into line with the public sector, where these arrangements have been in place since April 2017.

## Checking IR35 employment status

---

HMRC offers an online tool, Check Employment Status for Tax (*CEST*) that both contractors and companies can use to give a general guide to the contractual status. This system comes with a health warning from professionals, that it may not cover everything when making decisions, so bear this in mind when assessing for your own purposes. And don't rely on it wholly when determining IR35 status.

If the company or the contractor are investigated by HMRC and found to be inside IR35 when you have stated that IR35 does not apply to you, then both the contractor and the end user client will be held responsible and ordered to pay any unpaid tax from up to six years prior to the investigation taking place.

HMRC uses the following factors to test IR35 eligibility.

### 1. Substitution

If the contractor or the end business can send a substitute to complete works in the contractors' place, this suggests the contractor isn't providing a personal service, and the worker isn't a disguised employee.

### 2. Control

If an end business controls the workload of the contractor or how the work is carried out, it suggests the person is inside IR35 as they are not providing a specialist service as a contractor.

### 3. Mutuality of obligation (*MoO*)

If both parties pass the above tests, it is unlikely that MoO applies as it will be deemed outside IR35 anyway. MoO can be present in both contracts of service and contract for service.

### 4. Risk

If a contractor can make a profit or a loss i.e., financial risk this would suggest that the contractor is outside IR35.

## Is there a template for the Status Determination Statement (SDS), and is there a cross over between this and the CEST results? Can we just share the CEST results as our SDS?

---

HMRC have recently updated guidelines in that they will now accept a printed, dated copy of the response and reason from the CEST tool as a valid SDS. They are also clear that there needs to be evidence that the contractor's contractual working arrangements are mirrored in practice and therefore completing the CEST tool is only part of it. Employees should therefore ensure they regularly check the working arrangements and re-assess if anything changes.

## Does IR35 apply to workers who live overseas?

---

If the client or hirer is based in the UK and has a UK entity, then the worker would be subject to the IR35 reforms.

### How do we apply IR35 to European-based contractors?

- If the overseas personal service company (PSC) is providing services in the UK then yes, you will need to consider status and send a Status Determination Statement (SDS). If you conclude that IR35 applies and there is no UK entity in the supply chain to operate PAYE, the responsibility for doing so would lie with you.

### Are overseas consultants excluded from the regulations?

- No. It will depend on the circumstances, but broadly speaking, if the overseas PSC is providing services in the UK you will need to consider status.

## When working with an agency, do you just have to ask them whether any individuals have personal service companies? Does the agency have to do the check?

---

We would advise employees to carry out an indicative assessment of the role before the contractor is placed, this would then give clarity to the recruiting agency as to whether they are looking for candidates inside IR35 (*PAYE or Umbrella*) or outside IR35 (*limited company / personal service company contractors*).

## When advising an agency that the position we want to fill is inside IR35, is it right to assume they would advertise the position as such, and ensure the relevant taxes are being paid? What checks do we need to do after confirming the position is inside?

---

If the company (*end client*) has determined that the role is inside IR35 then it is up to the agency to ensure they are deducting the relevant taxes of that worker. Although it is the responsibility of the end client to determine the status, if reasonable care has been exercised, it is the responsibility of the agency (*and the liability falls to them*) to deduct the relevant taxes. Company's should communicate the status to the agency and update this if anything changes. HMRC expect the company to keep records to demonstrate that they have told the agency. Do not forget that the company needs to let the worker's PSC know the status decision.

## What do I need to do now?

---

It is key to start the process of preparing for IR35 as early as possible. If you haven't already – make a start. The best way to do this is to analyze the risks through auditing the company's current position. In addition to this, learn from what others have done. Businesses in the private sector are at an advantage as the public sector has already been through the changes.

## Make sure you keep people informed

---

Communication is key to ensure key stakeholders/recruiters/Line Managers in the company are all aware of and understand the implications about IR35 and engaging with contractors. This means having conversations with your contractors, discussing status determinations and options moving forward, together. It is also key that any intermediaries such as the company's external recruiters are kept in the loop about the decisions you are making. They can also be pivotal in helping identify the status of your assignments.

## Do you need help with IR35?

---

If your company is struggling to understand their current position, we can help. Give us a call and we can chat through your concerns and provide you with a quote for our services to help you understand and provide you with up-to-date literature and documents to manage this process. We're here to help you get through and avoid risks of non-compliance or errors with IR35.



Centric HR Limited  
Hawkesyard Estate  
Hawkesyard Hall  
Armitage Lane  
Armitage  
Staffordshire  
WS15 1PU

 03333 660567

 [enquiries@centrichr.co.uk](mailto:enquiries@centrichr.co.uk)

 [www.centrichr.co.uk](http://www.centrichr.co.uk)

Follow us

