



IR35

A brief guide to IR35

Overview

IR35 - also known as 'intermediaries legislation' or 'off-payroll working legislation' is a regulation which seeks to ensure that no tax advantage is gained by an individual appearing to be working for themselves via an intermediary (for instance a personal service company or a limited company), but in reality acts like an employee of the client and should pay tax as such.

If IR35 applies (inside IR35) then the Consultant, as the intermediary, has to operate PAYE and National Insurance contributions on any revenue generated during the tax year and the Client and/or Recruiter would have to deduct PAYE and NI contributions as per any employed member of staff.

IR35 in Operation

IR35 regulations are based on precedence or case law. This means the collection of past legal decisions written by the courts or similar tribunals in the course of deciding IR35 cases. Any existing disputes are therefore resolved based upon the way in which the law was evaluated, and decisions made in previous cases.

Determining IR35 Status

It is fair to say that there is not a defined answer to this. It is complicated, as case law can often be as it can be difficult to work out what the applicable precedent is from any given case, and how generally the principle from the case can be stated. As a general rule of thumb, consider whether the assignment 'looks and feels' like employment. Are you managed and treated in the same way as permanent employees? Do you work the same hours from the same location? Are you obliged and contracted to work in the same way as an employee? A risk averse business may even determine that at all contract assignments are inside IR35, it reduces their risk portfolio with the determination not having a defined line. It may also mean they miss out on the most experience consultants on the market who would not wish to work in such a manner. Ultimately, your IR35 status will be determined by a number of factors, not all of which you necessarily have to satisfy. So, what are these? The most commonly referred to factors are 'Supervision, Direction & Control', 'Mutuality of Obligation or MOO' and the 'Right to Substitution'.

- **Supervision, Direction and Control** - As an employer exercises all of these elements over an employee, if an assignment falls under the same remit then it will be inside IR35. Consultants looking to illustrate that an assignment is outside of IR35 will look to define themselves as a specialist consultant whose skills and experience will define how their work is undertaken and they are working a transient assignment that would not necessarily be part of the 'business as usual' organisation.
- **Mutuality of Obligation [MOO]** – If you were offered any further work after your existing assignment, would you be obliged to accept the offer? Conversely, is your client obliged to offer you any further work? If the answer to either of these questions is yes, then that implies that you both have mutual obligations and IR35 would apply.
- **Right to Substitution** – If you are required to offer a personal service throughout the contract then this would point to IR35 applying. If you have the right to substitute and another consultant can take on your duties, then this would mean that IR35 does not apply. (This best example of this would be to think about an Application Consultant working for a software house, the same client would not get the same consultancy regularly over time).

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Generally speaking, you would need to ensure that at least one of these factors to do apply to your assignment (or work habits in general) in order to be confident of operating outside of IR35. The one exception being the right to substitute, if you can demonstrate your freedom to substitute yourself for another consultant then IR35 would not be relevant. Supporting factors to your decision could also include.

- **Payment & Services** – Are you paid on a ‘time’ basis which may indicate that IR35 could apply, or are you paid on completion of a ‘Schedule of Works’ based on successfully completing project milestones. The latter indicating IR35 need not apply.
- **Risk** – Were you to personally make a mistake that could have been avoided, would you be paid to correct it or rectify the problem in your own time? Are their ramifications for not meeting standards of work, deadlines, etc? Do you have a selection of your own business insurance? If the answer is yes, then it would point to IR35 not applying.
- **Equipment** – It sounds trivial, but an employee would be expected to use their own equipment at work. The business would provide their tools. Specialist contractors however may very well use their own equipment. This may be the shakiest measure as there may be a number of reasons why a contractor may use a client’s tools, not least security or health & safety. It is still considered, nonetheless.
- **Exclusivity** – Are you working exclusively with one customer? Do you or can you provide services to multiple entities? If you can or, more clearly, you do then it would support a decision of outside IR35.
- **‘Part & Parcel’** – Whilst this is not a key test, it still features in IR35 documentation. Are you part & parcel of an organisation? Are you engrained in the company a member of staff that would cause problems if they left? Are you featured on their website? Are you on employee lists? Do you attend all the same social functions? Do you have office keys? If so, it may support an inside IR35 decision.

Complying with IR35

Whilst there is no hard and fast rule, apply the information to the categories outlined above. When you have done so, does the assignment ‘look & fee’ like employment? Can you put a clear gap between yourself and the company’s employees? Make it clear to all parties that you are not an employee and put in place documentation to prove that that is the case. If you are ever asked to justify the decision to your customer, your recruiter or the HMRC, then you will be very glad that you did.

Checklist

Criteria	Answer
Supervision, Direction & Control	
Is the assignment flexible, transient & transformation/project related?	Yes / No
Can the contractor identify themselves as a specialist Consultant?	Yes / No
Will the expertise of the Consultant help direct how the work is carried out?	Yes / No
Are the hours of work and deliverables agreed mutually between all parties?	Yes / No
Mutuality of Obligation	
Is the Consultant obliged to accept amendments or extensions to their assignment?	Yes / No
Right to Substitute	
Does the Consultant have the right to substitute their personal services? (Please refer to your Services Agreement).	Yes / No
Supporting Factors	
Is the Consultant able to carry out consultancy in locations other than the main office?	Yes / No
Where applicable can the Consultant utilise their own tools and equipment to provide services?	Yes / No
Are there consequences if the Consultant does not meet deadlines or produces unsatisfactory work?	Yes / No
Is the Consultant free to provide concurrent consultancy with other customers?	Yes / No

If IR35 Applies

If IR35 applies there will be an increased tax liability, alongside interest. HMRC would be looking to recoup the tax that would have been paid, had the engagement been deemed employment in the first place.

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Online Assessment

Check Employment Status for Tax ([CEST](#)) is an online Government tool which seeks to help people determine the IR35 status of an engagement.