

**THE IR35 SAGA CONTINUES**

# IR35 LEGISLATION

**HANDY GUIDE TO  
WORKING WITH IR35**

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# BACKGROUND TO IR35

*First introduced in 1999 in the UK, IR35 is a tax law. It is more formally known as the Intermediaries Legislation and came into force in April 2000 as part of the Finance Act. The income tax element of the Intermediaries Legislation has subsequently been integrated into the Income Tax (Earnings and Pensions) Act 2003 (ITEPA 2003), and the element concerning National Insurance Contributions (NICs) into the Social Security Contributions (Intermediaries) Regulations 2000.*

*IR35 was originally introduced to tackle the perceived problem of disguised employment. This is where workers are engaged through a third party, rather than on an employment contract to fulfil a role for the end client. This can save the end client money as it means that they are not responsible for paying Employers' NICs for these workers, and it also means they do not have to offer any employment rights or benefits.*

## USEFUL LINKS

Income Tax (Earnings and Pensions) Act 2003 (ITEPA 2003)  
[legislation.gov.uk/ukpga/2003/1/contents](https://legislation.gov.uk/ukpga/2003/1/contents)

Social Security Contributions (Intermediaries) Regulations 2000  
[legislation.gov.uk/uksi/2000/727/pdfs/uksi\\_20000727\\_en.pdf](https://legislation.gov.uk/uksi/2000/727/pdfs/uksi_20000727_en.pdf)



## CONTINUED...

*IR35 is intended to ensure that any individual who, but for the supply of their services through a PSC (treated, for tax purposes, as an 'intermediary') would otherwise be regarded as an employee of the end-client, is subject to tax and NI in the same way as a PAYE employee.*

*To date, the determination of whether the individual is operating inside or outside of IR35 has been the responsibility of the PSC itself against some key principles set out in case law of control, substitution and mutuality of obligation. In cases where HMRC and PSC are in disagreement about the determination the tax tribunals/courts decide the position.*

## WE'VE BEEN WAITING FOR YOU, IR35

### OVERVIEW OF THE 2021 CHANGES...

In line with the public sector changes made in April 2017, the end-user (client) will be responsible for determining the employment status of all off-payroll/contract workers for their organisation. This includes all PSC contractors.

HMRC now requires that the end-user produces evidence of their determination for each and every contractor in the form of a Status Determination Statement (SDS). The legislation prescribes that the end-user will be required to share the SDS with all parties in the contractual chain, including the PSC contractor.

In theory, this should rule out employers making blanket determinations of 'inside IR35' by end-users as the SDS will be considered to be invalid if it is later found that the end-user has failed to take reasonable care in preparing, assessing and agreeing the determination.

## IR35 APPLICATION OF PRINCIPLES

In short, IR35 involves applying three principles to determine the employment status with regards to workers being inside

or outside the legislation. These are commonly referred to as the main tests of employment.

### CONTROL

What degree of control does the client have over what, how, when and where the worker completes the work?

### SUBSTITUTION

Is personal service from the worker required or can the worker send a substitute of their choosing in their place?

### MUTUALITY OF OBLIGATION

Mutuality of obligation is a concept where the employer is obliged to offer work, and the worker is obligated to accept it.

### 2020 CASE LAW HAS ADDED THE PRINCIPLE OF "IN BUSINESS"

In Business seeks to establish whether the contractor is truly operation as a business in their own regard.

### FIND OUT MORE

[jonlee.co.uk/ir35](https://jonlee.co.uk/ir35)

**MAY THE  
WORKFORCE  
BE WITH YOU**

## KEY FACTORS IN DETERMINING IR35 STATUS

IR35 status determination will not rest on one factor, other factors can be taken into account when determining whether workers are caught by IR35, for example:

- Does the PSC have an unfettered right to substitution under which the PSC can provide a substitute to carry out the work?
- To what extent does the end client have control over the how, when and where the work is performed by the individual supplied through the PSC?
- Are the individuals supplied through the PSC under the direct supervision of your managers?
- Is the PSC under any obligation to accept work offered by the end client or is the client obliged to offer the PSC future work?
- How is payment made to the PSC?
- Does the PSC provide its own equipment or materials for the delivery of the services?

## I HAVE A CONTRACT WORKFORCE, WHAT DO I NEED TO DO NOW?

Now is the time to start planning and be ready in plenty of time before the changes come into force...

Start with a full review of your contract workforce, including the type of work or services that is/are currently performed or required under the terms of the engagement.

You will need to consider the following factors:

- Are my contractors supplied through a recruitment agency or agencies?
- Decide how you are going to determine whether the people provided through PSCs are inside or outside of IR35.
- Are the contractors operating through PSCs or umbrella companies?
- Consider whether streamlining your supply base will make IR35 determinations easier and more consistent.

### FIND OUT MORE:

Contact our IR35 expert, Grant Nisbet on 01384 446115 or email [grant.nisbet@jonlee.co.uk](mailto:grant.nisbet@jonlee.co.uk)

**ARE YOU ON THE  
INSIDE OR OUTSIDE OF THE  
IR35 WORKFORCE?**





## POTENTIAL COST IMPLICATIONS OF IR35?

A determination that an existing PSC contractor is “inside IR35” has the potential to increase costs to the client, for a few reasons. This is why we recommend engaging with your recruitment suppliers immediately so that they can help to advise on how to avoid cost pressure.

- There is a every probability that contractors will seek rate increases to offset the impact on their take home pay.
- Evidence shows that public sector payroll costs increased by more than 10% after April 2017.

- Without changing existing contract terms, it will be unlawful to deduct Employer’s National Insurance Contributions (ENIC’s) from payments made to PSC workers who are deemed to be inside IR35.
- ENIC’s must be made directly by the fee payer (recruitment agency or intermediary) and this burden is likely to be passed through to clients
- Recent cases brought to tribunal have supported contractors’ position.

## LIFE-SAVER TOOLS TO DETERMINE IR35 STATUS

### GOVERNMENT CHECK EMPLOYMENT STATUS FOR TAX (CEST)

IR35 status determination will not rest on one factor. The Government Check Employment Status for Tax tool CEST tool has been designed to help businesses make determinations on their contingent workforce.

However, the CEST tool has been subjected to heavy criticism since its introduction. Arguments have been made that it does not align with established case law, partly because of the fact that it disregards assessment around mutuality of obligation and assumes that this always applies; thereby being biased in its employment status determinations.

### IR35 COMPLETE

If you are anxious to avoid the penalties for making an incorrect determination, then ensure that you use an assessment tool that is underwritten by insurance.

**IR35 Complete** is a status determination assessment tool that provides a definitive, accurate assessment. It is also underwritten by insurance to mitigate your risk.

The tool also satisfies **Status Determination Statement (SDS)** requirements to evidence determination and share the SDS with all parties in the contractual chain.

[LEARN MORE](#)

## NEED HELP DETERMINING IR35 STATUS OR PREPARING FOR THE CHANGES?

**Book your free IR35 consultation**

**Learn more about IR35 Complete  
IR35 STATUS ASSESSMENT TOOL**

- ✓ AVOID HMRC PENALTIES
- ✓ UNDERWRITTEN BY INSURANCE
- ✓ SATISFIES STATUS DETERMINATION STATEMENT (SDS)
- ✓ QUICK AND EASY TO IMPLEMENT

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# FREQUENTLY ASKED QUESTIONS

## ARE THERE ANY EXCEPTIONS TO THESE CHANGES TO IR35?

HMRC has also confirmed that small businesses, as determined in sections 382/383 of the Companies Act 2006, will initially be exempt from the new IR35 rules where they are the end-user, provided they meet at least 2 of the 3 criteria.

*\*Small businesses must meet two of three of the following criteria to be exempt (annualised turnover less than £10.2m, balance sheet assets of less than £5.1m, average number of employees of 50 or fewer).*

## WHO WILL BE LIABLE FOR PAYING TAX CORRECTLY?

HMRC has confirmed that the first agency in the supply chain “has enough visibility of the labour supply chain to influence compliance” and also that the end-user/client can influence compliance through careful selection of the suppliers and agencies that they engage with.

The latest consultation position will therefore hold; liability can transfer up the supply chain as far as the end client if HMRC is unable to collect from the first agency. HMRC has indicated that further guidance will be provided on circumstances where unpaid liabilities are not transferable up the supply chain.

## WHAT FACTORS ARE TAKEN INTO CONSIDERATION WHEN DETERMINING IF A CONTRACTOR IS INSIDE OR OUTSIDE IR35?

In short, IR35 involves applying three principles to determine the employment status with regards to off payroll workers being inside or outside the legislation. These are commonly referred to as the main tests of employment:

- **Control:** what degree of control does the client have over what, how, when and where the worker completes the work?
- **Substitution:** is personal service by the worker required, or can the worker send a substitute in their place?
- **Mutuality of obligation:** mutuality of obligation is a concept where the employer is obliged to offer work, and the worker is obligated to accept it.

Other factors can be taken into account when determining whether workers are caught by IR35. This can include the type of contract, any financial risk associated with the assignment, being in business on your own account and whether the provision of equipment is included.

## CAN I MAKE BLANKET DETERMINATIONS ON IR35 STATUS?

The public sector changes were enforced in 2017, a number of organisations blanket-placed contractors inside IR35 to protect their own liability. This practice is not compliant with the guidelines and left many contractors paying tax at a similar rate to an employee, without receiving any employment rights in return. This was acknowledged by the Government, but they claimed the practice was not widespread. In the consultation document, it did however, make it clear that placing all contractors inside IR35 without a fair assessment is not compliant.

HMRC will require that the end-client produces evidence of their determination for each and every contractor in the form of a Status Determination Statement (SDS). The legislation prescribes that the end-user will be required to share the SDS with all parties in the contractual chain, including the PSC contractor.

In theory, this should rule out blanket determinations of ‘inside IR35’ by end-users as the SDS will be considered to be invalid if it is later found that the end-user has failed to take reasonable care in preparing, assessing and agreeing the determination.

That said, HMRC still insists that contractors with identical terms and conditions can be assessed as one.

## I HAVE A CONTRACTOR WORKFORCE, WHAT DO I NEED TO DO NOW?

We would advise that you undertake a full review of your contracting workforce as soon as possible to ensure your business is prepared in advance of the changes coming into force. Jonathan Lee Contracts is ideally placed to help you do this so if you would like to arrange a meeting or a call, please email us here.

### FIND OUT MORE:

Contact Grant Nisbet:  
[grant.nisbet@jonlee.co.uk](mailto:grant.nisbet@jonlee.co.uk)  
01384 446115  
[jonlee.co.uk/IR35](https://jonlee.co.uk/IR35)

# WHAT ARE CONTRACTORS ASKING US?

## WHO WILL DETERMINE WHETHER I AM INSIDE OR OUTSIDE IR35?

For the first time, the engager of the contractor, i.e. the end-client is responsible for determining the IR35 status.

## WILL MY AGENCY DETERMINE MY IR35 STATUS?

No – the end-client will be responsible for determining the status with regards to IR35.

## WHAT IF I WORK THROUGH AN UMBRELLA OR VIA PAYE?

The changes will not affect contractors who already work as PAYE or through an umbrella.

## CAN I STILL WORK VIA A PSC IF I FALL WITHIN IR35?

Yes, you can still work via a PSC but the correct tax and NI will be deducted at source by the agency before the funds are remitted to your PSC.

## CAN I APPEAL IF I BELIEVE THE CLIENT HAS MADE THE WRONG DETERMINATION OF IR35 STATUS?

It is not yet clear whether agencies will be able to appeal determination decisions, but, in many cases the agency will be the fee payer and therefore will need to work closely with their clients throughout the process of determining IR35 status.

However, the contractor will have the right to appeal. By allowing the contractor a voice in the determination process, it is hoped that the number of disputes will be kept to a minimum. The legislation makes statutory provision for the contractor to appeal any determination made, with the end-client being responsible to respond within 45 days of the appeal. Where an appeal is successful, a new SDS must be furnished by the end-user.

## WHAT TAX WILL BE DEDUCTED AND HOW WILL I KNOW WHAT HAS BEEN DEDUCTED?

Deductions will be clearly stated on your payslip or remittance notice.

## WILL RECRUITMENT AGENCIES MAKE HMRC REQUIRED DEDUCTIONS OR WILL CONTRACTORS BE FORCED TO USE AN UMBRELLA COMPANY?

It will ultimately be the choice of the contractor. If the client's assessment of your engagement is that you fall within IR35, you can choose to remain a limited company contractor and we will make the statutory deductions, or you may decide that the umbrella company route is more appropriate for you, in which case you could choose from our PSL of vetted umbrella providers. The terms of your engagement with the umbrella provider would be for you to agree directly with them.

## I HAVE MORE THAN ONE JOB THROUGH MY LIMITED COMPANY, DOES THIS AFFECT ME?

Each job or assignment you do will need to be assessed independently by the end-clients who received the services. It is possible to fall inside IR35 for one role and outside for another.

## IN THE CASE OF AN UMBRELLA COMPANY MODEL, IS THE PENSION PAYMENT DEDUCTED FROM THE CONTRACTORS PAY FOR BOTH EMPLOYERS AND EMPLOYEES?

The total amount paid to umbrella companies per hour always includes all statutory deductions including pension and is rarely, if ever representative of 'pay' only.

If the client determines that I am inside IR35, can I still claim mileage or travel and subsistence?

As a limited company contractor working inside IR35 (should this be the case) within the private sector, for the time-being at least, HMRC allows you to recoup 5% of your gross income to cover the costs of running your own company. For example, premise costs, accountancy fees and stationary expenses. In addition, contractors working within IR35 are able to continue claiming tax relief on pension contributions made by the PSC on the contractor's behalf.

The recent changes to the Travel and Subsistence (T&S) allowances mean that contractors working within IR35 can no longer claim on everyday expenses such as travel, mileage, hotels and meals. If HMRC believes these claims are being made and adjusted for in tax payments, the claims will be reclassified as earnings and the relevant tax and NI deductions will be made.

Any expenses that would be allowed under normal employment income can be claimed providing they meet the 'wholly, exclusively and necessarily' test. Essentially, this means that they must be absolutely necessary in performing the duties of employment. Contractors regularly do not meet HMRC's criteria for such claims.



## NOTES

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