

In brief, IR35, or Intermediaries Legislation, is a piece of tax legislation that first came about back in 2000, designed to combat tax avoidance from what HMRC saw as “disguised employment” by individuals supplying services through limited companies

Since April 2000, IR35 legislation has dictated whether a contractor, who is providing services through their own limited company is a disguised employee of the hirer and therefore their remuneration is taxed via PAYE as salary or, if they are self-employed and in business on their own account, their remuneration can be paid as expenses and dividends saving the contractor £000's in tax and national insurance.

Based on the existing legislation, contractors working within the Private Sector decide on their current tax status along with how much tax liability they have and the HMRC believe that 9 out of 10 of the decisions made by the contractors surrounding IR35 are incorrect thus resulting in the government losing millions of pounds in tax revenue per year.

The rules have evolved and changed in the years since their introduction, but essentially the purpose is to identify workers who would be classed as employees if you removed the fact they operate via a limited company.

In the eyes of HMRC if someone is doing the same work, in the same place, in the same way as an employee, they should be taxed as an employee.

To quote HMRC:

“The aim of the legislation is to eliminate the avoidance of tax and National Insurance Contributions (NICs) through the use of Intermediaries, such as Personal Service Companies or Partnerships, in circumstances where an individual worker would otherwise, for tax purposes, be regarded an employee of the client”.

Due to non-compliance, the Government changed the application of the IR35 rules in the public sector in April 2017, these are known as the “off payroll rules”

The Government believes the time is now right to extend the off-payroll rules into the private sector and are looking at introducing this legislation as from 6 April 2020, however we have experienced an unprecedented and turbulent 2019 within politics and Brexit, which has since seen a General Election take place on the 12th December.

Due to this it has resulted in the autumn budget which was to be held on 6 November 2019 being cancelled, which would have confirmed the introduction date of the new IR35 legislation. However, following the Conservative's election victory, the Chancellor Sajid Javid has since announced his first budget date of 11 March 2020 which will hopefully provide clarity on IR35.

What will happen in April 2020?

As from 6 April 2020 the off payroll rules may apply to the private sector. This means that a client will need to know how an agency worker is engaged e.g. PAYE by a recruitment agency, or whether paid via an intermediary such as a Personal Service Company (PCS) or an umbrella company.

The key issue is that where the off-payroll rules apply, the client will be responsible for assessing the contractor's status for tax purpose.



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A GUIDE TO IR35

Which clients will the off-payroll rules apply to and what will they need to do

Small companies will be exempt from IR35 if it meets two or more of the following criteria:

a) Has an annual turnover of not more than £10.2 million

b) A balance sheet total of not more than £5.1 million

c) No more than 50 employees

Where companies are exempt, the existing IR35 rules (where the intermediary is responsible for applying the rules) will continue to apply

Companies with a Turnover of more than £10.2 million

From 6 April 2020 the off-payroll rules apply to all public authorities, medium and large companies and organisations with a turnover of more than £10.2 million and will be down to the client to determine the workers IR35 status

How to Determine IR35 Status

Determining the IR35 status for a particular contract hinges on whether the worker would be classed as an employee if they were not working through a limited company.

If they are determined as “caught by” or “inside” IR35, they are deemed as a “disguised employee” and relevant tax implication will apply.

If they are determined as “not caught by” or “outside” IR35, they are deemed to be genuinely a business in their own right, supplying services in a business to business transaction.

The IR35 status of an assignment dictates how tax and National Insurance is handled, therefore the amount of money they take home week on week will be affected. If an assignment is classed as inside IR35, most of the income paid to the limited company **will be subject to PAYE tax and National Insurance deductions.**

It is important to stress that IR35 status applies to the Contract or Assignment, not the individual worker. This means that in the course of their contracting career they may be offered both IR35 caught and not caught contracts, with different tax treatment for each.

Inside or Outside IR35

There are two main factors which drive IR35 status - the written contract between the limited company and the agency or end client and how it reflects in actual working practices, day to day.

In the case of an IR35 investigation, HMRC will consider both elements to decide whether the relationship is one of employment or one of business to business services. They will also review the entire supply chain, which will likely mean a review of any agreement between the Agency and the Client.

The tests which determine IR35 status are complex and have evolved out of decades of case law. Among other factors, the following “tests of employment” may be applied:



Mutuality of obligation

Is the agency or client obliged to offer work and is the worker obliged to take it?



Substitution

Is the personal service of the worker required, or can they send a substitute to do the work? (Note - a replacement is not a substitution)



Control

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



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For a contract to be classified as caught by IR35, the tests must indicate an employment relationship in all 3 of the above areas. HMRC will try to establish whether the relationship is one of employment, or one of business to business services.

Making the Tax Status Decision

As mentioned previously it is the client responsibility for assessing the contractor's status for tax and determine an accurate IR35 status decision (called a Status Determination Statement (SDS))

In 2017 the HMRC developed an online tool known as **CEST - Check Employment Status for Tax**.

This tool is designed to assist workers, clients and other relevant parties to ensure that a contracts IR35 status is correctly determined. CEST uses a series of questions to determine whether the worker is employed or self-employed for tax purposes.

HMRC have said that CEST is the only IR35 decision-making tool they will stand by. However, it is worth noting that they also state that use of CEST is not compulsory, nor do they have a formal appeal process if you think an outcome has been determined incorrectly.

Passing Status Decisions through the Supply Chain

Once the client has made the tax decision, the client will have to pass that decision, together with the reasons for the decision to the recruitment agency and the off payroll worker by way of providing a Status Determination Statement (SDS).

Paying the off-payroll worker if they are deemed "Inside IR35"

If an assignment /engagement is deemed as "Inside IR35" (regardless of who makes that determination), the gross earnings will be subject to "deemed payments", in other words the Personal Service Company will be liable to PAYE and NIC from that payment just as if they were employed as a direct employee.

Clearly if the contractor is deemed inside IR35 then as from April 2020 they will suffer financially. It is estimated the impact of IR35 will cost circa £100 to £150 to per week.

Is there a solution?

There are two main options available to ensure that all parties comply with the new IR35 legislation and they are as follows:

A Temporary Agency Worker Paid PAYE

The contractors become a Temporary Agency Worker and operates on a Contract for Service, whereby they are paid weekly via PAYE eliminating any risk to all parties.

However there are increased costs to the agency to take into consideration as well as the financial loss to the contractor.

There are some benefits for the contractor to consider by operating via PAYE e.g.

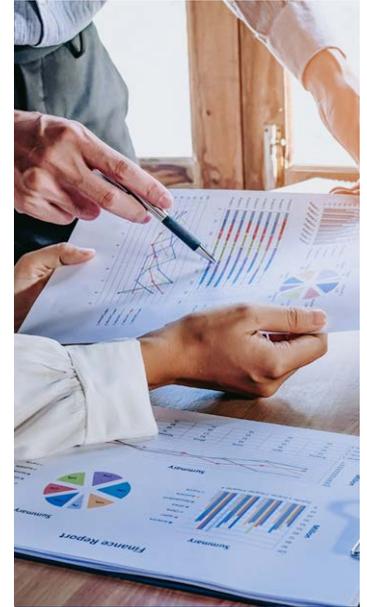
 Holiday Pay	 Sick Pay	 Taxed at source	 Save on Professional Fees associated with a Limited Company
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The Contractor Engages via an Umbrella Company

If a contractor is assessed as "Inside IR35" then a practical and compliant way to pay to get the contractor paid is via an Umbrella company, who engage flexible workers under an employment relationship. The Umbrella Company takes care of all the PAYE, NIC and all related administration and is a simple way to work.

The benefits of using an Umbrella Company are similar to those as PAYE

The disadvantage of Umbrella Companies are that contractors often find their quoted and actual pay rates confusing. This is because they are quoted a Limited Company rate by the agency but when the contractor receives there payslip from the Umbrella Company they have deducted PAYE, NIC, Apprentice levy etc.



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The Government have realised this and following the Good Work Plan they have introduced further legislation as from April 2020 whereby agencies will need to provide and issue Key Information Documents (KID) to workers which will provide pay illustrations

Paying the off-payroll worker if they are deemed “Outside IR35”

If an assignment/engagement is deemed as “Outside IR35” then the PCS will be entitled to receive their full gross payment with no deductions and the intermediary will be responsible for their own tax affairs

The Cost Impact of Inside IR35

The proposed introduction of IR35 is a fundamental change in tax rules affecting how recruitment agencies and clients engage with contractors.

We are currently undertaking due diligence on all our clients and PSC's and are working in partnership regarding the introduction of IR35 and determining how or if this legislation will have any impact on our engagement of drivers who are currently operating via PSC's along with our supply and noticeably our charge rates with our clients, as SureStaffing will not be able to simply absorb the additional costs associated with “Inside IR35” and pay contractors the same rates

Liability

We are still waiting for draft transfer liability legislation, however, at present the proposed legislation states the liability should rest with a party that has failed to fulfil its obligations until such time as it does meet its obligations at which point liability moves down the chain. However, if HMRC are unable to collect any outstanding tax liability from a party, the consultation proposes that the liability should transfer to the first party or agency in the chain, and if that fails, then HMRC will pursue the client.

At this point it is not appropriate for a client to ask an agency to indemnify them against any liability if the client does not do what it is required to do under the new IR35 legislation.

Conclusion

All of the “Inside IR35” options involve the deduction of PAYE taxes. It is clear from the government over the last few years that this is the direction of travel for all workers irrespective of how they are defined and wants its fair share of tax revenue.

The Government is assessing the impact of things like IR35, Intermediaries Reporting, The Taylor Review and will be looking to implement the way in which it, the government and HMRC consider workers employment status.

We are aware that some contractors may try to maintain their net income by using non-compliant intermediaries where there may be for example an offshore or loan scheme element which is not in the spirit of the IR35 Legislation and as such could incur potential liabilities under the criminal finances act and intermediaries legislation

With this in mind, SureStaffing are working with several of the UK's main Umbrella Companies who are FCSA Accredited Umbrella Organisations.

The FCSA is the only compliance standard operating in the sector which is endorsed by the UK's largest recruitment bodies; REC, APSCO and TEAM. Ernest & Young independently audit to a strict code of compliance and a copy of the audit report is sent to HMRC for transparency.



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We want to ensure that we as a company, along with our clients and workers are fully compliant at all times and comply with all governing legislation giving every one peace of mind.

Hopefully this summary of IR35 has been useful and if you are concerned or have any questions on how IR35 could affect your business then please do not hesitate to contact us.