

IR35 STATUS ASSESSMENT ROADMAP

ORACLE CONTRACTORS

IR35 RECAP

NOVEMBER 2019

WHAT IS IR35?

- IR35 is the common term for the ‘intermediaries legislation’, which came into force in 2000.
- It is a piece of tax legislation which aims to level the playing field between those working through their own limited company and those effectively working as a permanent employee.
- Key terms to remember:
 - *Disguised employee* – a limited company contractor using their limited company for tax benefits they are not entitled to (inside IR35).
 - *Genuine contractor* – a limited company contractor operating as a business (outside IR35).

HOW DOES IR35 WORK?

- IR35 is based on historic case law, meaning that the tests used have been derived from past court rulings.
- There are a number of tests which are used to determine whether an individual is operating as a genuine business or not, including whether they take financial risk or are considered part and parcel of an end client's organisation.

THE PRIMARY IR35 TESTS

- The three main tests which are often discussed:
 - *Personal service / right of substitution.*
 - *Control.*
 - *Mutuality of obligation.*

- Please consider the other tests:
 - *Written contract.*
 - *Working practices.*
 - *Right of dismissal.*
 - *Financial risk.*
 - *Part & parcel of the organisation.*
 - *Exclusive services.*
 - *Intention of the parties.*

IR35 DETERMINATION

- Up until 5th April 2017, the responsibility for determining the IR35 status of an engagement was that of the contractor.
- As of 6th April 2017 within the public sector, the responsibility for determining the IR35 status of an engagement shifted from the contractor to the public sector body, applying to payments made on or after 6th April, so included any prior work delivered but not paid.
- As of 6th April 2020 this rule will be applied also to the private sector, wherein end clients will be responsible for determining the engagement status of their contractors under the IR35 rules.

INSIDE OR OUTSIDE IR35?

- To be 'inside IR35' means that a contractor is determined, for tax purposes, an employee of the end client and therefore subject to PAYE and NI.
 - *If operating 'inside IR35', the appropriate taxes will need to be paid, which usually involves a 'deemed payment' of income tax being made at the end of the tax year.*
 - *This means the monies received by contractors inside IR35 will be net.*
- To be 'outside IR35' means that a contractor is determined as a genuine business, and therefore operating outside of the IR35 rules.
 - *If a contractor is operating 'outside IR35', they are able to pay themselves a salary, draw the remainder of income as dividends, and remain responsible for their taxes.*
 - *This means the monies received by contractors outside IR35 will be gross.*

IR35 CHANGES FROM APRIL 2020

NOVEMBER 2019

KEY HIGHLIGHTS

- Contractors are no longer responsible for determining their engagement status under the IR35 rules.
- End clients (hiring organisations) will be responsible for determining the engagement status of their contractors under the IR35 rules.
- Where a contractor is deemed to be 'inside IR35' (i.e. employed for tax purposes), the fee-payer will also be required to deduct PAYE as well as pay employers NI and the apprenticeship levy.
 - *Where a contractor is engaged directly by the end client – the end client will be the fee payer.*
 - *Where a contractor is engaged via a recruitment agency – the recruitment agency will be the fee payer.*

OBLIGATIONS OF HIRING ORGANISATIONS

- Take 'reasonable care' in determining a contractors IR35 status.
 - *HMRC have yet to define reasonable care but it is broadly understood to mean that consideration should be taken to each individual's position, avoiding any blanket policy rulings.*
 - *This is why in our view the end clients should opt for insurance backed assessments for peace of mind at a cost of less than £90 per engagement.*

OBLIGATIONS OF HIRING ORGANISATIONS

- Must issue a 'status determination statement' to both the contractor and the next party in the supply chain:
 - *They will be responsible to pass this on in the supply chain until it reaches the fee-payer.*
 - *The statement must include both the status decision made and the reasons behind the decision.*
 - *Until the client provides a statement to the relevant parties, the client will be deemed as the fee-payer and thus liable for any failure to deduct the appropriate taxes.*

OBLIGATIONS OF HIRING ORGANISATIONS

- Must implement a 'client-led disagreement process' to handle any disputes in status decisions.
 - *Clients must respond within 45 days providing the result of this consideration as well as the reasoning.*
 - *Failure to comply with these obligations will once again result in the client being deemed as the fee-payer and therefore liable for any taxes due.*

OBLIGATIONS OF RECRUITMENT AGENCIES

- Upon receipt of a 'status determination statement' from the client, they will be required to either pass the statement along the supply chain to the fee-payer, or where the recruitment agency is the fee-payer, deduct the appropriate tax and NICs from the contractors fee before making payment
- Responsible for paying the relevant employer's NI and apprenticeship levy to HMRC.
- The liability will sit with the fee-payer which will in most cases be the recruitment agency, unless the client fails to adhere to their obligations.

IR35 ISSUES TO AVOID

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BLANKET DETERMINATIONS

- A blanket determination is the broad application of an IR35 status to a large group of off-payroll workers without due consideration or assessment.
- Whilst role-based assessments are considered compliant in the eyes of HMRC, the blanket application of a determination is not compliant with the rules.
- Applying blanket determinations or banning the use of contractors altogether can lead to recruitment difficulties.
 - *Stephen Barclay, Minister of State for the Department of Health and Social Care, stated that “58% of central public bodies have not experienced problems with filling off-payroll worker vacancies and 63% have not experienced an increase in contractor rates payable as a result of the new legislation.”*
 - *Although 58% may have not experienced problems, that means 42% are experiencing difficulty in filling vacancies, which is almost half of the central public bodies.*

EMPLOYMENT RIGHTS

- Whilst operating outside IR35, contractors are not taxed the same as employees, and therefore do not need to seek employment rights such as paid holidays; however, if operating within IR35, they are taxed the same as any other employee would be, but are currently not entitled to the same rights.
- There have been several successful claim for employments rights by contractors in inside IR35 roles.
- This gives a warning to any organisation looking to apply IR35 as a risk-averse strategy to attempt to curb any liability, that a risk will still remain for defending against employment disputes.

CONTRIVED ARRANGEMENTS

- In a reaction to IR35 reforms, many organisations have been purporting the use of a clear ‘statement of work’ as a way of circumventing the changes, as HMRC’s guidance states that clients who are receiving ‘outsourced’ services will be exempt.
- If services are genuinely outsourced, the supplier of the services (i.e. the consultancy or agency) is considered the client for the purposes of IR35 and therefore carries the responsibility for determining the status of its contingent workers.
- However, when organisations are looking to change existing arrangements from a provision of labour to outsourced services it may be that the supplier in question is not set up to manage projects themselves and simply replacing the existing written agreements with a ‘statement of work’ contract is not enough.
- As is the case with IR35 in general, it is imperative that the structure of any written contract is borne out in reality, as the true facts will always take precedence.

CEST RELIANCE

- HMRC developed an online IR35 status determination tool – ‘check Employment status for tax’ (CEST). It is regularly criticised for its lack of relevance to specific roles and industries – a flaw which ‘recruitment and employment confederation’ (REC) believes extends to the changes overall – and ignores key status tests due to HMRC’s simplistic interpretation of case law.
- The tool also puts an over-reliance on the right of substitution test, and contains discrepancies in wordings which are crucial, as it not only changes the situations considered to be acceptable, but also demonstrates the lack of care and understanding in generating the questions.
- The solely digital nature of the tool means that context is not provided, and the supporting notes are not always sufficient to omit the misunderstanding of questions. CEST’s digital logic also does not enable it to make a determination on borderline cases, leaving 15% of users without a determination to base their decisions.

IN OR OUT – PROS & CONS

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INSIDE OR OUTSIDE IR35?

- Look for insurance policy backed, platform based detailed assessments provided by experts.
- Be truthful and transparent with the determinations and insist on a full audit trail.
- Consider changes of working practices and relationships between clients & contractors.
- Beware of yet known market forces e.g. supply & demand, gross rate increases and net rate decreases.
- Consider risks of both inside or outside IR35 and mitigate against those risks.
- HMRC state that 30% should be inside. Our partner QDOS has had 1,600 enquiries and only 3 were found to be inside!

INSIDE IR35 - CLIENTS

PROS

- Ability to treat contractors as an employee.

CONS

- Reduced talent pool as contractors look to seek outside IR35 engagements and avoid inside IR35 engagements.
- Potential future employment rights to be provided to contractors e.g. holiday pay.
- Higher gross rates (25%+) as contractors seek to preserve their retained incomes.
- Switching 'carte blanche' to inside from outside IR35 could result in being party to potential retrospective investigation.

OUTSIDE IR35 - CLIENTS

PROS

- Increased talent pool as contractors look to seek outside IR35 engagements and avoid inside IR35 engagements.
- Likely lower gross rates.
- No potential employment rights claims e.g. unpaid holiday.
- Further protects previous outside IR35 engagements.

CONS

- Potential risk of tax liabilities for incorrect status determination IF clients engage a contractor directly.
 - *This is removed completely if you engage a contractor via a recruitment agency.*

INSIDE IR35 - CONTRACTORS

PROS

- Less competition for inside IR35 roles.
- Potential employment rights to be provided to contractors e.g. holiday pay.
- Less business administration.

CONS

- Lower retained rates due to PAYE / employers & employees NI.
- Not able to offset business expenses e.g. pension contributions.
- Switching 'carte blanche' to inside from outside could result in potential retrospective investigation.

OUTSIDE IR35 - CONTRACTORS

PROS

- No longer liable for incorrect status determinations.
 - *Still liable for retrospective determinations.*
- Higher retained rates.
- Able to offset business expenses e.g. pension contributions.
- Further protects previous outside IR35 engagements.

CONS

- More competition for outside IR35 roles.
- Greater business administration.

ORACLE CONTRACTORS & QDOS

OUR PARTNERSHIP

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ABOUT QDOS

- QDOS has 30 years' experience providing tax and insurance services to the UK's self-employed workforce, and the businesses which engage and service them.
- Wholly owned subsidiary of HCC International Insurance Company plc, a member of the Tokio Marine Group of Companies, with 2,500 employees globally and revenues of \$2.3bn
- Leading authority on IR35 legislation to provide solutions for clients, contractors & recruitment agencies.
- Provision of opinion on IR35 status for their contracted workforce, for clients including the Home Office, and Transport for London.
- 25,000+ IR35 assessments provided annually.

QDOS SERVICES WE PROMOTE

- IR35 status assessments.
- IR35 insurance.

STATUS ASSESSMENTS

- Platform built ahead of 2017 off-payroll reform in public sector with 40,000+ assessments.
- Bespoke proprietary software specifically for IR35 status assessments.
- Used by over 50 public sector agencies and clients, including Hays, TfL and the Home Office.
- Leveraged by 100's of private sector clients and recruitment agencies.
- UK's most experienced authority on status assessments yet flexible to changing requirements.
- Allows for complete management of determination process and supply chain communication.

QDOS STATUS ASSESSMENT METHODOLOGY

- All assessments carried out by an IR35 specialist.
- No automation in results; the specifics of each role/contractor reviewed individually.
- Client, contractor and recruitment agency involved in process to ensure audit trail is comprehensive and to reduce risk of subsequent disputes.
- Technology reduces administration and provides full oversight.

QDOS WORKFLOWS – INDIVIDUAL: AGENCY INITIATING

1. OC completes 'invite ltd company' (i.e. contractor) form on QDOS platform, which also includes end client contact details and 'sends invitation'.
2. QDOS sends an email to the contractor inviting them to complete a 42 question IR35 status assessment.
3. Contractor follows link to QDOS platform to verify.
4. Contractor pays assessment and insurance fee of £89 plus VAT on QDOS platform.
5. Contractors then answers 42 questions on QDOS platform.

QDOS WORKFLOWS – INDIVIDUAL: AGENCY INITIATING

6. Answers submitted via QDOS platform to QDOS IR35 specialist for determination.
7. Determination sent to end client for agreement / non agreement / comments.
8. This agreement ensures each party takes the necessary steps to determine the engagements ongoing IR35 status, ensuring compliance with IR35 legislation for all parties.
9. Once agreed the 'status determination statement' is sent to client, contractor and agency stating the agreement to the determination by the end client - this has the following:
 - *Date.*
 - *Contractor ltd company.*
 - *Completed by name.*

QDOS WORKFLOWS – INDIVIDUAL: AGENCY INITIATING

- *The opinion including key decisions in bullet point form.*
- *Client representative name, job title, end client name, approved on date with time stamp.*
- *Full list of questions and answers with applicable QDOS comments as appropriate.*

10. Insurance covering all parties in place.

11. Contract process can start.

12. Audit trail documented and stored.

WORKFLOWS – ROLE BASED: AGENCY / CLIENT INITIATING

1. QDOS provides a client account on the QDOS platform for agency or end clients to login and administer the IR35 status determination for its current & future contractor engagements.
2. End client or agency creates a 'role for assessment' on the QDOS platform.
3. The agency or end clients completes a 12 question IR35 assessment (the number of questions are different for clients to contractors).
4. Answers submitted to QDOS IR35 specialist for determination.
5. Determination sent to end client for agreement / non agreement / comments.

WORKFLOWS – ROLE BASED: AGENCY / END CLIENT INITIATING

6. The end client agrees the supply of a contractor for the role with recruitment agency.
7. End client or agency completes 'invite ltd company' (i.e. contractor) form on QDOS platform, which also includes recruitment agency details and 'sends invitation'.
8. QDOS platform sends an email to the contractor inviting them to complete a 42 question IR35 status assessment.
9. Contractor follows link to QDOS platform to verify & login.
10. Contractor pays assessment and insurance fee of £89 plus VAT on QDOS platform.

WORKFLOWS – ROLE BASED: AGENCY / CLIENT INITIATING

11. Contractors then answers 42 questions on QDOS platform.
12. Answers submitted to QDOS IR35 specialist for determination.
13. Determination sent to end client for agreement / non agreement / comments.
14. This agreement ensures each party takes the necessary steps to determine the engagement's ongoing IR35 status, ensuring compliance with IR35 legislation for all parties.

WORKFLOWS – ROLE BASED: AGENCY / CLIENT INITIATING

15. Once agreed the 'status determination statement' is sent to client, contractor and agency stating the agreement to the determination by the end client - this has the following:
 - *Date.*
 - *Contractor ltd company.*
 - *Completed by name.*
 - *The opinion including key decisions in bullet point form.*
 - *Client representative name, job title, end client name, approved on date with time stamp.*
 - *Full list of questions and answers with applicable QDOS comments as appropriate.*

16. Insurance covering all parties in place.

17. Contract process can start & audit trail documented and stored.

QDOS IR35 INSURANCE

- All 'outside IR35' assessments directly indemnified.
- Policy covers both legal defence costs plus tax liabilities, interest and penalties.
- Cover for liabilities on a 'per engagement' basis.
- Status assessment account holder is policyholder, but extension to cover all in the supply chain.
- Underwritten by parent company Tokio Marine HCC (rated 'very strong' by Standard & Poor's).

BENEFITS OF QDOS - CONTRACTOR, CLIENT & AGENCY

- Meets your legal obligations.
- Removes the onus of administration and decision making.
- Provided by experts with 40,000+ assessments.
- Documented audit trail.
- All legal defence costs plus any determined tax liabilities, interest and penalties.
- Contractor, client and agency all 'on the same page'.

ORACLE CONTRACTORS SUMMARY

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SUMMARY

- IR35 Legislation has not changed – just who determines status!

- Clients should hire the appropriate contractor, working in the appropriate way, working within the appropriate determination; whether inside or outside IR35.
 - *Don't try and put a square peg through a round hole.*
 - *Don't fear the unknown as the legislation is decades old.*
 - *Don't work with perceptions – work with reality.*
 - *Don't narrow your choices by making blanket decisions.*
 - *Don't work with partners that don't understand the legislation.*

- Imperative to use insurance backed engagement status assessments provided by experts.

- Always have a full status determination audit trail of all engagements.

SUMMARY

- Clients are not held liable for incorrect determinations if they engage a contractor via a recruitment agency as long as:
 - *They follow appropriate processes – whether an engagement with a contractor is inside or outside IR35. NB: If they engage a contractor directly they will be held liable for incorrect determinations.*

- Contractors as of April 2020 are no longer held responsible for incorrect determinations unless they provide fraudulent information.

- Recruitment agencies are liable for incorrect determinations – so use an agency that:
 - *Understands the legislation completely.*
 - *Partners with appropriate experts to mitigate risk i.e. insurers, specialist service providers and law firms.*
 - *Acts as a true partner in the supply chain by offering expertise in the sourcing of contractors, party to the process of status determination, appropriate use of ‘fit for purpose’ contracts and mitigates risk via all of the above.*

SUMMARY

Ironically it is us the Recruitment Agency that is mostly at financial risk in a traditional supply chain of:

Contractors → Recruitment Agency → End Clients

We trust in our preparation, processes and partnerships to remove these risks as well as the potential risks for contractors and clients.

We see this as an opportunity to further elevate our standing in our market place by being the recruitment agency partner of choice for contractors and clients that desire a compliant solution for their engagements...