

If you employ people – Do you have an IR35 problem?

HMRC want all people you “employ” to be on your payroll and for taxes to be deducted from them at source and paid over each month. The reality is more complicated. More and more people are demanding flexible working and do not necessarily want to be tied into a traditional employee role.

IR35 is Tax avoidance legislation designed to Tax ‘disguised employment’ at a similar rate to employment.

‘Disguised’ employment is where people are employed, and Tax is not deducted at source, such as employing people through their own Limited Companies or as self-employed.

IR35 has been around for years but has been widely ignored – changes are on the horizon that HMRC hope will alter this.

What IR35 is not!

IR35 is only concerned where you employ someone, and that person uses some sort of intermediary such as their own Limited Company or an agency.

IR35 does not apply when you employ subcontractors in the construction industry or someone on a self-employed basis.

The latter has its own set of indicators to determine if someone is self-employed or not, separate from IR35.

Someone is probably self-employed and should not be paid through PAYE if most of the following are true:

- They are in business for themselves, and are responsible for the success or failure of their business and can make a loss or a profit
- They can decide what work they do and when, where or how to do it
- They can hire someone else to do the work
- They are responsible for fixing any unsatisfactory work in their own time
- Their employer agrees a fixed price for their work - it does not depend on how long the job takes to finish
- They use their own money to buy business assets, cover running costs, and provide tools and equipment for their work
- They can work for more than one client.



So, what are the changes to IR35?

IR35 is concerned with those trading through their own personal service company or intermediary. These people are often referred to as contractors.

IR35 is designed to ensure that contractors pay the same Tax and National Insurance as employees, and that they do not benefit from trading through a Limited Company if they are doing a job or role that would otherwise be completed by an employee.

The changes being rolled out are all about who determines if someone falls within the IR35 regime. Until recently the onus was on the contractor, and in the future this onus will be on the employer. The employer would then need to collect the Tax and NIC and pay this over to HMRC.

This is an important distinction because IR35 has been widely ignored and is difficult to enforce. The hope here is that employers will take this much more seriously, and if the rollout of this in the Public sector is anything to go by, it seems to be the case.

Exemptions

There are important exemptions, though – the requirement to determine the employment status will only apply to medium and large companies. This means if you are a small company, with a turnover of less than £10.2m, a balance sheet of no more than £5.1m or employ 50 employees or less, then you are exempt.

However, it should be noted that even if you are exempt from the new rules, the old rules are still in existence for individuals working through an intermediary (usually a personal service company) who must still assess their employment status and apply IR35 if necessary.

In addition, although you may be exempt because of the size of your company, you may be in a supply chain whereby you supply services to a medium / large company. If you are, and you employ someone through a personal service company or umbrella company, you will be contacted by your customer and will have to apply the rules to your supplier.

For those not exempt - how do I determine if my contractors fall under IR35?

From April 2021, it will be your responsibility to determine whether a worker is an employee or a contractor for Tax purposes. You will have to issue a Status Determination Statement to your contractors, which states their IR35 status and explains why.

Your contractors may operate via a personal service company, or they may use subcontractors themselves that operate in this way.

If you support your decision with sufficient evidence and file the appropriate Tax documents, you should avoid any penalties.

There is no set checklist or criteria to decide if someone is an employee however, the following are normally assessed:

- Whether there is any obligation to provide work
- Who provides the equipment for the work?
- Who has control over the work – is there autonomy over the work?
- The ability to hire someone else to do the work instead
- The financial risk involved for the contractor – who pays if things go wrong?
- Has the contract become “part and parcel” of the organisation?



You can refer to the HMRC guidance and use their employment status for Tax (CEST) tool.

Although the CEST tool receives mixed reviews, it does give you a good steer of the approach taken by HMRC and the indicators that they are looking for. It will also be accepted by HMRC when considering whether an employer acted reasonably when applying the IR35 rules.

<https://www.gov.uk/guidance/check-employment-status-for-tax>

IR35 actions you should take:

1. Review all your relationships with contractors and/or consultants
2. Make sure your terms of engagement are clear and accurate
3. Provide contractors with their Status Determination Statement
4. Consider changing some contractors into employees if they fall within IR35 and if this is a more practical solution for you both.