



whitepaper | 2022

IR35 Off-payroll working legislation – how has it affected hirers & their risk profile

Since April 2021 private sector hirers have been responsible for making the IR35 employment status decision on any contractors they engage via the contractor's own limited company. The hirer is responsible for the financial and reputational risk of getting the status decision wrong.

the issues

For many years limited companies had been widely promoted and used by contractors to provide their services to hirers, typically via recruitment agencies. A contractor's limited company is often referred to as a personal service company or PSC.

Since April 2000, IR35 legislation had attempted to dictate how these contractors could be paid by their personal service company. Whether an assignment is inside or outside IR35 has a dramatic effect on the contractor's tax liability and therefore their net income. Essentially IR35 helps to decide whether the contractor is a disguised employee of the hirer and therefore their remuneration is taxed as salary, or the contractor is in business on their own account, meaning their remuneration can be paid by way of expenses and dividends which saves the contractor £000's in tax and employer's national insurance each year.

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HMRC's issue was that in the private sector the contractor used to make the decision on whether their assignment was inside or outside IR35 legislation and because of this they believed that 9 out of 10 of the outside IR35 decisions made by the contractors were incorrect, losing the government millions in tax revenue each year.

public bodies

In April 2017, the Off-payroll working legislation was brought into the public sector making public body hirers responsible, and not the contractors, for making the IR35 status decision. The logic being that the hirer should know whether the contractor is working independently and not under their control or conversely, whether the contractor was working in a similar way to an employee.

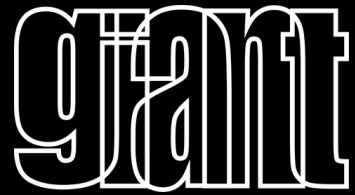
The overwhelming majority of decisions by the public body hirers were that contractors were caught by IR35 and should be taxed appropriately. As a result, HMRC deemed the new legislation a great success.

private sector

In April 2021 the Off-payroll working legislation was introduced to the private sector. Since then, hirer's must provide their IR35 decision and reasoning on a status determination statement which is passed down to the party it contracts with and also the contractor. Each hirer will have an appeals process (to be used by a contractor where an inside IR35 decision is made and appealed), but in our opinion this has had a limited effect on a hirers decision and is 'window dressing'.

Each party must pass the status determination statement on to the next party in the contract chain. Failure to do so will make that party liable for any potential tax during the period they do not pass on the statement. HMRC's CEST tool (check employment status for tax) allows hirers to check whether an assignment is inside or outside IR35. If all the answers were accurate and given in good faith at the time, then HMRC say they will standby the CEST decision and not challenge it.





There are many critics of this tool saying it is not fully based on case law, however in our opinion hirers who make an outside IR35 decision should use the tool to reduce their contingent tax risk.

why would you not use it?

IR35 assessments can be made by role. They do not have to be made individually where contractors are doing the same role. For long assignments the IR35 decision should periodically be re-reviewed.

Please note small and medium sized hirers meeting two of the following three criteria are exempt from this legislation: turnover less than £10.2m; balance- sheet total less than £5.1 million; number of employees less than 50.

risk

Under this legislation the risk, whether directly or via debt transfer, ultimately lies with the hirer. Clearly the primary risk is where the hirer decides that an assignment is outside IR35. HMRC can challenge the decision and demand repayment of lost PAYE tax and national insurance plus penalties and interest for each contractor.

A hirer's gross financial liability for lost tax, national insurance, apprenticeship levy, interest, and moderate penalties over a 3-year period for an average contractor earning £100,000 pa is well over £100,000.

Therefore, most hirers are not prepared to take the financial risk on a tax change brought in by the government. The risk is not only financial but also reputational - there are plenty of companies and individuals currently making the national news for apparently not paying the correct amount of tax.





An additional risk for the hirer is when a fee payer (if the contractor keeps their limited company the party who pays the limited company is called the fee payer) pays a limited company where the assignment is inside IR35. In these circumstances the fee payer must deduct the appropriate amount of PAYE tax and account for it correctly to HMRC. If they do not do this HMRC can transfer the debt to any party in the supply chain including the hirer. In addition to reviewing their supply chain, hirers will want to ensure that any fee payer is both compliant and financially secure.

outcomes

After understanding where the risk lies, it comes as no surprise that most hirers decided that most assignments are caught by IR35.

Whilst it would be hoped that truly independent contractors will be allowed to operate via their limited company outside IR35, the direction of travel from the government is clear - they want substantially more contractors paying PAYE taxes. Therefore, post April 2021 most contractors are working through compliant PAYE umbrella companies, agency PAYE or professional employment solutions.

Those contractors deemed crucial to a hirer who are not truly independent contractors outside IR35 were often given a rate increase to compensate for the additional tax they had to pay. In the end supply and demand always dictates rates paid. Under all eventualities the hirer will want to have control over its supply chain to ensure compliance and financial stability, thereby eliminating its own risks.





conclusion

In our opinion, these IR35 decisions have reflected the risk appetite of each hirer. In most cases hirers are risk averse and have decided that the majority if not all their contractors are caught by IR35.

about giant

Our flexible proprietary software and managed services platform, **giant precision**, can manage contractors throughout their life cycle, from candidate attraction, screening and on boarding to timesheet management, billing, employer of record, payroll and payments. In the UK and internationally.

Unlike most MSP's, our **giant precision** platform allows organisations with any number of contractors to benefit from a speedy implementation at no cost. So, if you have 5 or more contractors, we can help.

We take compliance with the complex regulations governing contractors very seriously. To underline our compliance commitment to you, we contractually indemnify you against any tax and employment risk when we manage your contractors.

And we are independent. Unlike others we do not provide agency recruiting services and we have no affiliated companies that do either. Our neutrality ensures we advise you only, on what's best for you and your contractors.

