ipse The Association of Independent Professionals and the Self Employed

Guide to IR35

In May 2012, HM Revenue & Customs (HMRC) issued its new guidelines on how it was going to police the Intermediaries Legislation – better known to freelancers as "IR35". This Guide will therefore seek to explain both the theory and principles behind the legislation, as well as how it might affect freelancers.

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Section 1

Introduction

In May 2012, HM Revenue & Customs (HMRC) issued its new guidelines on how it was going to police the Intermediaries Legislation – better known to freelancers as "IR35". This brought with it some significant changes in the Revenue's operational approach, but has not changed the legislation or the principles which have been laid down in case law. This guide will therefore seek to explain both the theory and principles behind the legislation, as well as how it might affect a freelancer in practice.

This document is a practical guide to:

- Working out your IR35 status.
- Drawing up an action plan to address any weaknesses in your position.
- Establishing a paper trail ready to defend against any Revenue challenge to your status.

As IR35 is complex legislation; one-size-fits-all advice inevitably has its limitations and there are times when you should definitely take expert advice tailored to your own circumstances. A further aim of this guide is to elucidate when to seek such professional help, how to access best-of-breed professional advice and how to make best use of the advice you receive.

The guide is broken into sections covering:

- A brief introduction to the main status factors: personal service, mutuality of obligation, control, and the "in business on own account" test.
- Assessing your contract status: what is important, what is not.
- Assessing your "in business on own account" status: what is important, what is not.
- Drawing up an IR35 action plan based on the above assessment.
- Maintaining an IR35 paper trail - records to keep.
- A discussion on penalties: what circumstances they can be charged in, how much they would be and how to avoid having to pay them even if you evaluate your own status and get it wrong.
- How IPSE can help you: our IR35-related services, insurances, associates and standard contracts.
- What you should do if HMRC contact you

Throughout, the aim is to provide realistic, practical steps that freelancers can take to assess and improve their own IR35 status. Angles of attack commonly seen in Revenue investigations to date are also discussed.

1.1 Case Law – what is it?

Throughout this guide, we refer to "case law". The law that applies in England and Wales is made up of "legislation" - laws passed by Parliament, which are often quite generic in nature - and the outcomes of specific cases in courts at various levels that clarify those laws. Such cases will often consider detailed practical matters. These cases – more specifically, the judgments in them – are what is termed "case law".

This system makes sense because if Parliament were ever to consider all possible practical permutations of circumstances around any given law then no law would ever be passed. Rather, they would all take a decade to get through the Committee stage. The case law system allows Parliament to set broad-brush principles and allow those practical matters that need clarification to be clarified as and when they arise.

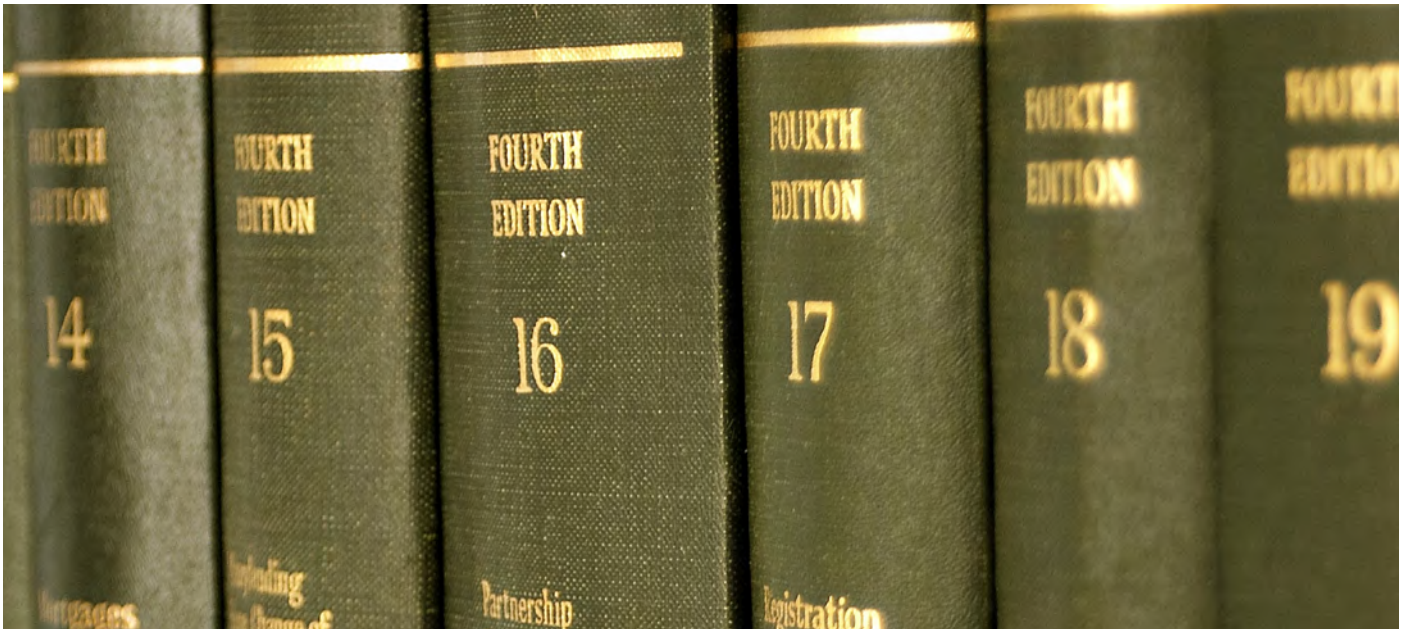
To give a trite example, Parliament might pass a law stating that all crumbly cheese must be marked as a hazard to clean carpets. For the sake of argument, suppose that the manufacturers of Wensleydale did not mark their cheese "crumbly". If a disgruntled consumer took them to court then it is likely that, whatever the outcome of the case, some clarity on what "crumbly" actually meant in this context would be provided.

For example, if the cheese did not crumble when cut with a cheese knife but did crumble when cut with a blunt table knife, does that mean it needs the label or not? Suppose the court decided that it did. This then sets a precedent and, in future, no court case would be needed for any cheese that crumbled when cut with a table knife because the Wensleydale case would already have established in law that such a cheese is "crumbly".

Of course, a further case might be required to resolve whether crumbling under suitable pressure from finger and thumb counts; conversely, if no one cares enough in practice to bring such a case, then it would have been a waste of Parliament's time to consider it in the first place. The case law system thus helps avoid "analysis paralysis" in the legislative system.

IR35 was widely criticised at the time of its introduction for its uncertain nature. Many questions of detail were simply not answered. IPSE pursued a strategy of sponsoring cases through the Commissioners and courts, in order to develop a body of case law which would provide clarity. By mid-2005 it was clear that this had largely been accomplished, and there seem to be no major points needing further clarification. Many cases are still being fought under IPSE's insurance products, with an overwhelming success rate. However, they are not generally testing new points of law; exceptions such as the well-known Dragonfly case in 2008 arise only very occasionally. IPSE will of course support any cases covering new aspects of IR35 should they emerge.

What is certain is that, as time goes on, case law will change and the angles of attack favoured by the Revenue will also change. IR35 experts will update this guide accordingly on an ongoing basis. It is always worth checking via the IPSE's website at www.ipse.co.uk that you have the latest version.



1.2 Who is the client?

Throughout this document, the term "end-user" is used to describe what many traditionally term the "client". This is because, although the law is yet to be clarified, some experts argue that following a strict legal interpretation of IR35 implies that, where there is an agency involved, it may well be the agency that is the "client". However, it seems unlikely that this was the intention when the legislation was drafted. To avoid ambiguity we will use the term "end-user" to mean the company whose personnel sign off the freelancer's work as acceptable for payment purposes.

Disclaimer

This guide does not constitute legal advice and neither IPSE nor any contributor to the guide may be held responsible for any consequences of actions taken as a result of reading it. The IPSE's advice is that freelancers should use their judgment to decide whether or not they feel competent to arrive at decisions on these matters and, if they do not, to seek professional advice on an individual basis. Details on how to seek such advice form part of this guide.

Version

This is version 2.3 of the Guide, released in December 2013

Note that in 2005 the Inland Revenue and HM Customs and Excise merged to form HM Revenue and Customs (HMRC), which now has responsibility for IR35. This document refers both to "HMRC" and "the Revenue" depending on context; "the Revenue" remains generally accepted shorthand for both of the former organisations and is often used here for convenience.

Section 2

The Main Status Factors

This guide is not an in-depth legal handbook and detailed references to case law are deliberately not included. Freelancers interested in the legal details should consult works such as:

- "Tolleys IR35 Defence Strategies: from Contracts to Commissioners" by David Smith (Tolleys: ISBN 0754524574 3rd Edn., October 2004)
- "IR35" by Anne Redston (Accountancy Books: ISBN 1841402087).

Many legal details and much discussion may also be found in IPSE's forums on our website at www.ipse.co.uk.

IR35 applies if you carry out work through an "intermediary" – typically a limited company (but it also applies to partnerships) of which you are a shareholder with a holding of more than 5% - to an end-user under circumstances in which, were there a contract direct between yourself and that end-user, that contract would be one of employment.

This guide concentrates on the "usual" case of a freelancer operating through a limited company in which s/he is a significant shareholder. The test is:

"If the limited company was not there and the contract is directly between the freelancer and end-user, would that relationship be one of employment (as opposed to self-employment)?"

This is a complex and subtle test, made more complex by the requirement to construct a "notional hypothetical contract" that does not really exist in order to evaluate it for employment status. The creation of this hypothetical contract is for tax purposes only regarding the imposition of the IR35 legislation and will have no bearing on employment rights or the reality of an independent business supplying services.

This section discusses the construction of the notional contract, and the most important employment status factors. As there is no legal definition of self employment, when considering status cases (whether for employment or tax purposes) we need to start from the opposite end of the spectrum and ask ourselves "Do we have an arrangement which represents a contract of employment?" If we don't then logically, we should have a contract for services; i.e. self employment.

There are three fundamental factors which determine a contract of employment: is the individual's personal service a requirement of the engagement, is there mutuality of obligation (at its basic level is there an obligation to offer and accept work) and can the engager/end- user exercise control?

These three key factors are often referred to as personal service/substitution (the unfettered right to substitute being the manner in which one denies personal service), control and mutuality of obligations (often abbreviated to MOO).

If these three factors are present, then we have a contract of employment and they place a freelancer within IR35, such that other factors are almost certainly of no account. If these three are inconclusive, other factors such as financial risk and the "in business on own account" test may be determinative. The factors will be discussed here in that order, with a range of minor points touched upon at the end.

2.1 Construction of the notional contract

Freelancers typically operate in one of two modes:

» through an agency

» direct to the end-user

In this latter case, it is quite clear how to construct the notional contract: simply take the terms between the freelancer's limited company and the end-user and read them as if they applied to the freelancer as a person.

However, in the case where an agency is involved, construction of the notional contract is less clear and somewhat controversial. Case law offers some good pointers on how to proceed. Often it is possible to take the contractor-agency contract (the lower contract) and agency-end-user contract (the upper contract) and compare clauses. Where clauses match – say, both require supplied personnel to wear ID in certain areas – that clause would form part of the notional contract. However where clauses do not match – say, one contract says the contractor may supply a substitute but the other does not – it is theoretically possible that the "upper contract" to which the contractor was not party could nonetheless determine the contractor's IR35 status. It is recommended that you seek confirmation from the agency that the upper and lower contracts do not have conflicting clauses that have a bearing on IR35; if the agency cannot secure an outside-IR35 upper contract from the end-client, you will have to consider whether you wish to accept the engagement.

In addition to considering the terms of the written contracts, many cases have identified the need to consider the actual working practices in the provision of the services to determine say whether there is a genuine right of substitution rather than a theoretical contractual right. For instance, a contract could provide for a suitably qualified substitute to be sent subject to the end-clients' approval but would this agreement ever be given in practice by the end client?

In general terms, IPSE's advice is not to agree to terms importing clauses from the upper contract unless you have the opportunity to review them. High Court cases have occasionally been concluded based solely on the contractor-agency contract, but only when the upper contract has not been available.

2.2 Personal service (and rights of substitution)

For IR35 to apply, there must be a requirement for "personal service". Conversely, if the requirement is not for "personal service" then IR35 cannot apply. This point must be emphasised: if it can be shown that the end-user did not require an individual's personal service, the work is instantly placed outside IR35 irrespective of other factors. The most common approach to establishing that personal service is not required is to include a "right of substitution" in the contract. Such a clause says that the services you are contracted to provide need not be provided by you personally but may be provided by someone you pay instead. Such clauses are usually "fettered" to a greater or lesser extent. In other words, the end-user has some right to refuse to accept a substitute.

Broadly, there are three situations in which this factor alone can move you out of IR35:

1. If the contract has an unfettered right of substitution. Although, on the face of it, this is commercially unlikely for many freelancers (who sell their personal expertise), in fact a number of clients have proved amenable to such a clause provided it is combined with a right of instant termination on their part (so if they do not like your substitute they can terminate the contract straight away). The clause must also be credible - no nudges or winks to suggest it will never be used - "sham" contractual arrangements are worthless and likely to attract critical Revenue attention and seriously weaken your case (please see the 2011 Supreme Court ruling in Autoclenz v Belcher & Others which made this very point). If your contract has a credible unfettered substitution clause then it is outside IR35. If a contract actually requires a substitute to be sent if you are unavailable this will remove any ambiguity and demonstrate beyond doubt

that personal service is not required. Although a few tax inspectors tried to argue that an instant termination clause negated the right of substitution, the Revenue's Personal Tax Division have since agreed that this is not the case.

2. If the contract has a right of substitution and although the end-user has a right of veto, there is a contractual clause saying that permission to substitute is dependent on the end-user's acceptance that the proposed substitute has sufficient technical and professional skill to do the work, and this acceptance will not unreasonably be withheld. Legal advice is that this is enough to move the work outside IR35, and it is much more commercially feasible than an unfettered right. This caveat within the contract must, however, still give the contractor a clear right to send a substitute, rather than just to make a suggestion that the end-user will then consider. In the Dragonfly case of 2008, the Special Commissioners did not accept that there was a genuine right of substitution after hearing evidence from the end client. Furthermore, if the end-user, for instance, will only allow a substitution with written consent and after interview, this may not be found to be a clear right to send a substitute, in line with another IR35 High Court judgment.

3. Many contracts "out there in the real world" have varying forms of substitution clauses with varying degrees of fettering. In all cases, if substitution actually happens, that is a substitute is sent and paid for by the contractor, then this is sufficient to establish that the work is outside IR35. As such, you should keep detailed records of the use of any substitutes used and payments made to provide a defence against any HMRC dispute.

In any of the three cases above, this factor alone implies that IR35 does not apply. If you do not have any of these three but are still relying wholly or partially on a right of substitution to take you outside IR35 then IPSE's advice is to obtain a professional assessment.

The above list is not exhaustive but other circumstances such as cases where the contractor is not mentioned by name in the contract are likely to rely on more subtle points of law and an expert opinion is strongly recommended.

Even if you are able to secure a reasonably straightforward substitution clause, there are a number of pitfalls to avoid. A brief guide on how to do this follows. The most likely line of Revenue attack on any substitution clause in a contested case is to try to show that the right to substitute is not genuine. A useful defence against any suggestion that a right of substitution is a sham or that a right of substitution is not strong enough to negate the requirement for personal service necessary for IR35 to apply, is to show that the end-user agreed with you a procedure by which a substitute would work on their contract. It is, of course, not necessary to have an actual substitute in mind to agree such a procedure; however, it is unlikely that an end-user who would not accept any substitute on principle would make such an agreement with you.

A "Real Arrangements" letter is an effective way to make sure that the relevant information is available to all parties without damaging your commercial interests. As the name suggests, it is a letter that your end-user signs which sets out the real arrangements. It is OK for you to write this – in fact it is recommended that you do - but it must be factually accurate as it may end up as evidence in a court of law. A poorly-drafted or inaccurate letter could end up handing the Revenue further ammunition. A deliberately misleading letter would be an even worse idea: perjury is a criminal offence which can carry a jail term for those who commit it.

The letter might cover subjects such as how they would obtain a security pass, how they would log on to the computer network, the fact that you are responsible for bringing them up to speed on the project and any particular areas that you must cover with them at your expense before using them on their site. When asking the client to agree such a set of arrangements it is worth making it clear that you are not proposing a substitute, you are merely seeking to clarify how things would work on the ground should you later decide to send one.

A selection of sample letters is included in the Appendix to this Guide.

2.3 How and why to substitute

IR35 apart, there are many good reasons why it would make sense to provide a substitute in some circumstances. These include (but are not limited to):

- You are, or someone who depends on you is, unwell or there is some other personal factor likely to require your absence from the end-user for more than a few days.
- The work requires particular expertise on a specific point that you feel someone else could usefully contribute.
- You have identified further business elsewhere which will require some or all of your time; you need someone else to ensure your current client is taken care of.

The first two of these points are often useful when negotiating a right of substitution into a contract.

When substituting, the following points are important:

a. **It is critically important that your company pays the substitute.**

b. **It is important that, where possible, the substitute not be someone already on the end-user's site in another capacity. It may be commercially preferable for a substitute to be someone already familiar with the end-user's business, so to rule out this possibility explicitly in a contract or letter could suggest to the Revenue that the arrangement is motivated by avoiding IR35 rather than being a reflection of reality; nonetheless, using a "stranger" as a substitute will put you in a much stronger position where it is possible.**

c. **It is important that you know the quality of the substitute's work. Do not throw away your professional reputation merely to safeguard your tax status (or there will be no earnings to tax!).**

d. **It is important to agree who pays to bring the substitute up to speed on the project (almost always this will be you).**

e. **It is important that you tightly control the scope of what the substitute does. You need to ensure that they do what is required within the requisite deadlines while avoiding the risk of them being so useful that the client turns to them and not you for future work!**

Some tax inspectors have in the past argued that sending a substitute for a period may only take that specific period out of IR35 and other times when a substitute was not sent would remain within IR35. IPSE considers such a position untenable – nothing in law backs it up and no case has ever been won by the Revenue on this basis (and neither, frankly, do we think it ever could).

2.4 Mutuality of Obligation

Put simply, in any contract there is an obligation on both parties to do something for the other, for example, the obligation on a freelancer to do some work and the obligation on an end-user to provide work to do and to pay for it. This is referred to as a "mutual obligation".

For an "employment" relationship to exist, the law says that there must be an "irreducible minimum of mutual obligation". This must be more than "you show, they pay" (because otherwise mutuality would be an entirely moot point – every contract would have enough mutuality for employment). Under IR35 it is necessary to consider whether or not in the context of the notional contract between the freelancer as an individual and end-user and in practical terms "on the ground", this "irreducible minimum" can be said to exist.

The problem is that no firm definition of what the "irreducible minimum" is exists in law. This is a very complex and subtle point of law and many highly expert commentators vociferously defend their own – usually somewhat idiosyncratic - interpretation of what it is and what it means. The clearest guidance from the courts sets this minimum as, "the obligation, on the one hand, to work and, on the other, to remunerate." In other words, although the minimum is not much more than "you show, they pay" you must be obliged to do rather more than turn up.

It was for some time believed that a lack of an obligation on the part of the end- user to provide work was a clear indicator of an absence of mutuality. It is now clear, however, that the Revenue concession on which this was based did not have an application beyond that particular case. One High Court case made it clear that even if a situation occurred in which a contractor was turned away one day because of, for instance, a computer crash or power cut, this does not of itself indicate an absence of mutuality and does not, therefore, automatically place the work outside IR35.

IPSE advice is that if you rely on a lack of mutuality to say you are outside IR35, but the client has to give notice (as opposed to instant termination), then professional advice should certainly be sought. Having a notice period on the part of the client (rather than allowing them to terminate with no notice) is highly likely to torpedo any claim of an absence of mutuality, as has been seen in at least one case at the Special Commissioners.

If you rely on a lack of mutuality for your IR35 status, we would strongly recommend that you include details in a "real arrangements" letter signed by the end-user, which you keep on file. The most likely angle of attack on a claim that a lack of mutuality keeps you outside IR35 would be that such a contractual arrangement was not mirrored in reality.

It has recently been noticed that agencies are increasingly trying to incorporate "IR35-friendly" terms into contracts in an effort to defuse potential employment law claims. It may in fact be easier to incorporate "express negative MoO" clauses. If incorporated into both contracts, or the lower contract and a "real arrangements" letter, it should be adequate to prove the necessary lack of mutuality.

It is also perhaps worth stating explicitly that a concept of "inter-contract" mutuality cited by some is not helpful in an IR35 context. Certainly if, at the end of a contract, the client is obliged to give another contract, that implies a relevant obligation. However, if, at the end of a contract, the client is not obliged to offer any further work then it does not help. There are plenty of employees on fixed-term contracts.

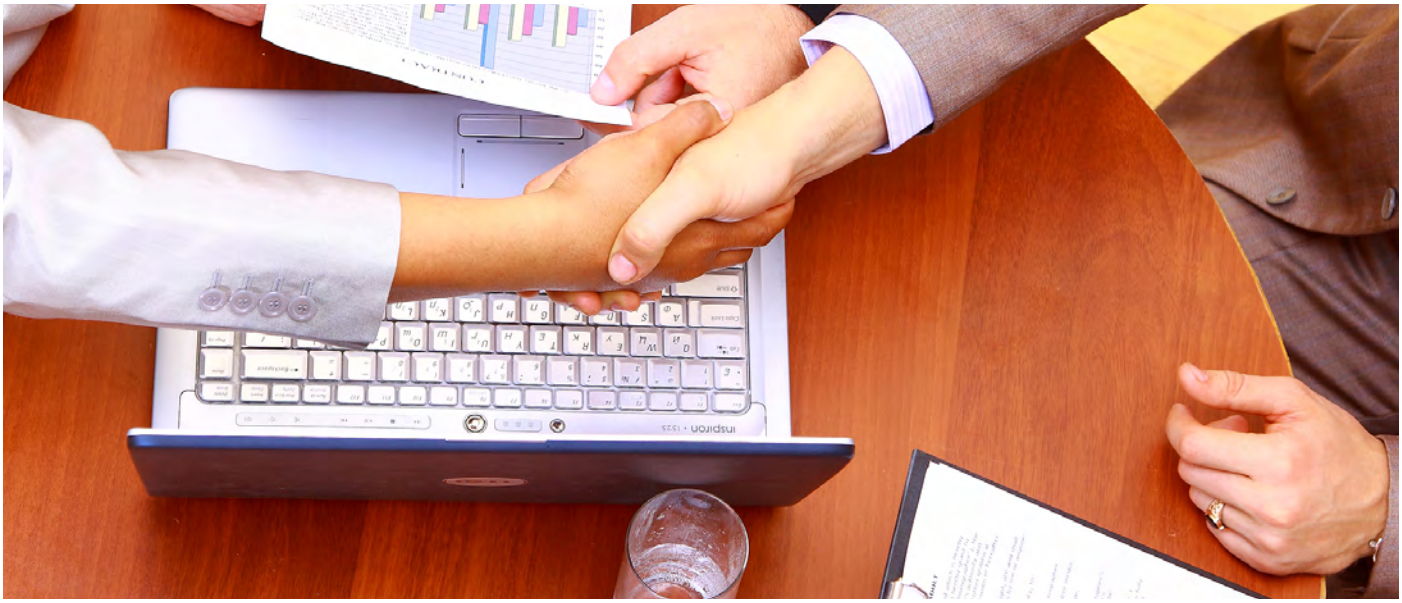
2.5 Control

For IR35 to apply, there must in the notional contract exist a relationship of "master and servant" between the end-user and freelancer.

On the face of it, what this means in practice is that the end-user has a right to dictate what you do, where you do it, how you do it and when you do it. However, among these factors, "what", "when" and "where" - sometimes termed "supervision" and "direction" - are significantly less important than "how". This factor – "control" – is still a central consideration in status determination and consideration needs to be given to whether the right of control exists rather than the exercising of control. Even if you are controlled then you are not automatically an employee but this will remove this argument as a defence against IR35.

The definition of "control" remains somewhat nebulous. The IPSE view, backed up by independent experts, is that it means actual on-the-ground control over the manner in which work is performed, although a High Court case has placed a limit on the extent to which this can be applied by comparing a contractor to a senior employee to whom such on-the-ground control might not routinely extend. Even so, every contract of employment must contain some scope for control, and the reviewer will determine whether control, even if a limited amount, is exercised within that scope.

It is clear that the right to exercise control is paramount and that even if a contractor has acquiesced to control on a daily basis, the stated lack of a right of control in the notional contract means that no contract of employment existed. Where control has been exercised and the notional contract is silent on the matter, it is of course much more difficult to disprove the existence of such a right. Less clear is the situation where a right exists in an upper contract to which the contractor is not privy, but is not exercised in reality. It seems from the case law that that this does indeed create an employment relationship. It is certainly the case that if there is no right to control then, even if the contractor does acquiesce to control in practice, there can be no contract of employment.



Of course, to some extent, in any situation where you are being paid to do work, whoever is paying you will dictate what you do and where, how and when you do it – no client will ever say "just turn up when you want and do whatever you fancy however you want to - when you feel like it"! It is also naturally true that for technical experts detailed control on how the work is done is unlikely even for employees. The more senior the employee, the more this holds true, and the more "senior-looking" a contractor's duties for an end-user, the less useful as a defence an absence of control will be.

However, a situation where a freelancer has broad contractual goals and timescales – for example "write a computer program to do X by Y" – but broad freedom within industry standard practices to decide themselves how to achieve those contractual goals, is a good one for IR35 purposes. Conversely, a freelancer who might be asked on a day-to-day ad-hoc basis to deal with any issues that arise within the end-user organisation is in a weak position with regard to this test.

It should be noted explicitly that agreements such as confidentiality agreements and agreements to follow site rules or requirements on the grounds of health and safety or security may safely be concluded between a freelancer and end-user with no impact whatever on IR35 status.

It is impossible to describe a precise boundary for this test. Most freelancers will develop a feel for it through experience, peer advice and, sometimes, professional help. In general, the following list gives a flavour of the kind of thing that is relevant. Where your own circumstances within a contract match some or all of the below, we would strongly advise that this is recorded in the contract and/or a "real arrangements" letter.

- Is the work on a specific project (as opposed to general work on anything the client tells you to do)?
- Are there specific milestones/deliverables (as opposed to "just work on it for n months")?
- Is it practical to carry out any of the work in your own offices, and if so do you decide whether and when this happens?
- In addition to industry-standard guidelines that might apply to your area, which would apply to anyone, are there particular methods that are dictated by the client or do you broadly decide how work is to be done?
- Are timescales and interim deliverables/milestones dictated by you, agreed between yourself and the end-user, or dictated by the client?

Please note that this list is not by any means exhaustive: it is intended to give a flavour, not a prescription. It should be noted also that numerous cases have been judged on whether or not arrangements contained anything inconsistent with an employer-employee relationship. An absence of definite indicators for the existence of a contract of employment will not necessarily allow a Commissioner to conclude that one did not exist, if no factors can be found which prove that it could not have been such a relationship.

2.6 Financial Risk

While the degree of financial risk taken by the freelancer is not one of the three central status pointers, it has been a strong indicator in many cases. Pretty much all freelancers take financial risks that employees do not. An example is the risk inherent in invoicing i.e. the risk of not being paid. The longer the gap between invoicing and receiving payment, the greater that risk is. Unfortunately, one recent judgment has observed that the risk of non-payment either by an end-user or an agency is no greater than the risk of non-payment faced by an employee, which is neither helpful nor strictly correct. Financial risk generally, such as the risk inherent in short or non-existent notice periods, remains an "outside IR35" pointer, therefore, but the specific risk of non-payment is probably not as useful as once thought.

A factor that is often present for freelancers but never for employees is a requirement to correct errors and bad work at the freelancer's own expense. Such a situation is a strong outside-IR35 pointer under this test. Consequently, you should ensure that you retain records detailing any costs incurred whilst correcting defective work or alternatively confirmation that the work was carried out in your own time for which payment was not received from the end client.

Other factors which indicate financial risk include the absence of "sick pay", liability for damaging property in the course of performing the contractual duties, obligation on the contractor to bear the expense of introducing a substitute (if relevant), termination without notice (if relevant) and lack of mutuality of obligation (if relevant). Contracts will often require the freelancer to carry relevant insurance cover which again is not something that an employee would be required to do. All are useful pointers to status.

A very strong situation is where the work is "fixed price", i.e. you and the end-user have agreed a definition of a piece of work and a price for it that will be paid once the work is complete to the end-user's satisfaction irrespective of how long it took to complete that piece of work. This will enable you to demonstrate that you have the ability to profit from the sound management of the contract, or conversely make a loss, and in the absence of any strong pointer to the contrary, such an arrangement will always lie outside IR35.

The Revenue have frequently attempted to argue that, where payment is by the hour or day supported by timesheets and the price of a piece of work is determined solely by how long it takes, this implies absence of financial risk (and even sometimes that it indicates control!). This point of view has no basis whatever in law and IPSE considers it entirely specious. Timesheets have been raised in the context of employment in very few cases, only one of which pertained to IR35.

They have always been found to be insignificant, and not a pointer one way or the other. It is worth remembering that most employees do not fill out timesheets; any effort to use timesheets as an indicator of employment will therefore be highly tenuous.

2.7 In Business on Own Account

This is the last of the substantial pointers. It is simply a test of "how much you look like you're in business". Issues to consider include:

a) Whether your company has its own office facilities – either at home or in dedicated offices – and the extent to which they are used for business activities. Ideally, they should be used not just for company administration purposes but also for carrying out chargeable work for clients.

b) The extent to which your company has invested in office equipment in recent years and the extent to which this has been used for both company administration and client work. In one case, the use of such equipment solely for administration, and not for work on the contract under review, was held against the taxpayer.

c) Whether your company tends to have one client at a time or multiple concurrent clients. Having concurrent contracts is a good pointer the right way for IR35 purposes. Some experts state that if you have multiple concurrent clients and the work you do for each is broadly similar then that, in itself, is a very strong pointer indeed. That said, bear in mind IR35 is assessed on a contract-by-contract basis: it is, theoretically, possible to have two concurrent contracts, one inside IR35 and the other outside, so do not assume that concurrent contracts are a "silver bullet" – they are not.

d) The steps your company has taken to market itself to potential clients, for example, using yellow pages, direct marketing, a company web site, etc.

e) Whether your company has invested in training or in research and development of new products or services in recent years. This can include paying for and reading journals to keep up with the latest developments in your field.

f) Whether your company has badges of corporate identity, such as company stationery, company phone/fax/e mail addresses and numbers, company business cards and marketing material, company web site, etc.

g) Whether your company has employer's and public liability insurance. One High Court case has, however, found this to be of little significance.

h) Whether you have professional indemnity insurance. The Revenue have sought to argue that this may be less useful for IR35 purposes because some professional employees such as hospital surgeons also carry PI insurance. High Court cases have, however, not been consistent in finding this to be a pointer to "outside IR35".

i) Whether your company has registered for VAT.

j) Whether your company has a data protection registration.

k) Whether your company has an ISO900x registration or a registration to Investors in People or any similar business related accreditation schemes.

l) Whether your company has received any Government grants or loans that are available only to businesses or sole traders and not to employees.

m) What other business activities has the company engaged in, in recent years – for example selling systems, creating web sites. Are such activities part of the company's basic trade or would they constitute a totally different trade to the main contracting activities? For example, contracting as an IT systems expert and selling systems could be all part of the same trade while a second business stream that consisted of renting out property would be a separate trade.

n) What is likely to be the nature of any future contracts? Bear in mind that the length of the contract with a client may have some bearing on the issue of being in business on your own account as a longer contract may weaken the influence of personal factors, though length of contract is not in and of itself a pointer.

Please note this is not a definitive list and it is not required to have all or even a majority of the above to be in business on your own account. Rather, the list is intended to give some ideas in terms of what is relevant and steps that freelancers can take in order to improve their position vis-à-vis this test.

It is important to realise that to be "in business on your own account" it is not necessary, as some have suggested, to be a "budding Branson". "Bog standard" freelancing businesses in and of themselves are perfectly "real" businesses. The things that one naturally does as a freelancer, either simply to exist or to enhance one's marketability, are, by and large, things that employed individuals simply do not do.

This test is all about forming an overall picture. There is no one single thing that the test will turn on, however, a freelancer with their own business cards, website, advertising material, office with equipment and manuals, VAT and DP registrations, et cetera, "looks like" a business in a way that an employee simply does not. This is the core of this test - looking at the individual circumstances and inferring a "big picture". As always, it is important to do this objectively. It is not necessary (and this is already established in case law) to have an already established business in order to secure a contract as being self employed, although it is a significant pointer in the right direction.

It is also possible to be "in business on your own account" in general terms but still within IR35 for a given engagement or series of engagements. Passing this test is not a "silver bullet" for status determination. There are certainly cases where passing this test will move a freelancer from one side of the line to the other but it is no panacea. IPSE advice is that, even when the "in business on own account" factors are strong, all relevant circumstances and facts relating to a particular engagement should be taken into consideration when evaluating status.

2.8 Minor factors

A number of other factors are pertinent to status evaluation but are minor in comparison with the factors already discussed. To list and explain them all is beyond the scope of this guide. IPSE advice remains that freelancers in the "grey area" are best served by obtaining bespoke professional advice in the first instance.

However, a few minor factors seem to recur in "pub discussions" about IR35. Although they are factors, few, if any, cases will turn on these points - they have simply obtained unwarranted currency as "urban legend", possibly because, initially, some in the Revenue cited them as major factors even though nothing in law supports this view. Three particular such factors are:

- Provision of own equipment. In some circumstances, it makes sense for a freelancer to provide equipment that an equivalent permanent employee would not. However, some permanent employees do buy equipment to help with their work and, in any event, for a freelancer in the knowledge- based sector, the relevant equipment is the knowledge stored in that freelancer's brain(!). That said, it is helpful if you do provide equipment and you should document all such equipment in your audit trail. Similarly, if you buy and read journals and trade magazines, document their purchase and the amount of time you spend working in this way to keep up with new developments, unpaid and in your own time. But if you do not provide your own equipment, it is not a pointer against you, particularly if it would be impossible or impractical, for example if working on confidential Ministry of Defence systems. Provision of your own reference manuals for use on the contract has been found in the High Court to be a pointer to "outside IR35", albeit quite a weak one.

- Hourly remuneration backed by timesheets. There is no legal basis whatever to state that this is a pointer to anything. They have not been found to be significant in any of the few employment cases in which they have been mentioned. Fixed-price working is a clear pointer to "outside IR35"; however, its absence is neutral.
- "Becoming part and parcel." The duration of a contract is, in and of itself, not a pointer either way. However, if a period of some years is spent with a single client it may be difficult to avoid de facto absorption into that client's organisation which may militate against passing on the "in business on own account" test. Care should always be taken that to ensure that you do not "look like" just another employee of your end-user. This is sometimes referred to as "becoming part and parcel" and can be a risk if, for instance, you are expected to be available to advise and assist other employees, recruit a team or otherwise work within the hierarchy of the company such as by reporting to a line-manager. Use of a company's email system has been found not to be a significant pointer to IR35 status. These issues notwithstanding, it is certainly possible to sell to the same customer for many years and not be their employee, and it should be remembered that where tribunals have found contractors to be "part and parcel" they have first considered whether they were subject to control and mutuality of obligation and required to provide personal service, and that the "big three" always take precedence over factors such as "becoming part and parcel".

Section 3

Assessing your Contract Status

IR35 is complex and most freelancers will seek professional help the first few times the question of their status arises. However, after a while many freelancers will become familiar with the legislation and its demands, and will feel confident in assessing their own status. This must be done seriously, accurately and honestly.

Because of the complexity of IR35, HMRC has said that it will not seek penalties against you where you have taken all reasonable steps to assess your status but have made a genuine mistake. The Revenue accepts that an individual can have taken reasonable steps without needing to use their review service or a professional adviser. However, if you do not take reasonable steps as described in this section to determine your status accurately then you are open to penalties. For further information on penalties, see the separate section below.

Status determination, like any legal outcome, is arrived at in the following way:

- Determination of the relevant facts.
- Determination of the applicable law.
- Application of said law to said facts.

In this context, the relevant facts fall broadly into two categories: facts about the particular engagement such as what the contract(s) say(s) and what the real relationship is "on the ground" and facts about your business.

The last section was intended to give you enough information on the relevant law to be able to apply it to your own circumstances. To recap, the main points are:

- Is the requirement one of personal service?
- Is there sufficient mutuality of obligation in the notional contract to be consistent with employment?
- Are you controlled while doing the work in the same manner as an employee?

If the answer to any of the above questions is "no" then the work cannot be caught by IR35.

If the answer to all of these questions is "yes" then the factors to consider are:

- What degree of financial risk is undertaken by the freelancer?
- Are you "in business on your own account"?

To determine your status you must make an honest assessment of where your own business stands with regard to IR35, looking at current contract(s) with regard to the self-employment tests and the overall business picture (the degree to which you are "in business on your own account"). If you are unable to decide one way or the other based on what is in this section and the previous one, then you have a borderline case and IPSE advice would be to obtain a professional assessment of your status.

When you have come to a view, you should then document it and what the key factors are that lead you to this conclusion. This could include a hardcopy print of your online contract review report. Documentation is extremely important, as it may be six years before you are asked by the Inland Revenue to explain why you think you are outside IR35. It is important to note that this "self assessment" approach must be carried out objectively. It would not be acceptable just to go through the motions without any realistic attempt to reach an objective conclusion. Mere window dressing is likely to be rapidly exposed as such in a determined HMRC investigation and would not protect against penalties.

Section 4

Office Holders

In 2013 the Government made a change to IR35 so that it now automatically captures 'office holders'. 'Office holders' are those holding specific, typically very senior, positions in an organisation. No statutory definition of 'office holder' exists though the judicial definition is "a permanent, substantive position which had an existence independent from the person who filled it, which went on and was filled in succession by successive holders."

At the time of writing, no cases involving 'office holders' and IR35 have come to light. The amendment to the legislation is therefore somewhat untested.

IPSE's understanding is that the office holder provision will affect very few contractors. It focuses on professions such as chief executives, Financial Directors and related key decision-makers on behalf of a company. These 'office holders' have always been liable for National Insurance purposes, regardless of their employment status so, in real terms, the change is not significant.

Section 5

Professional Help

6.1 Asking for help

This brief section explains when, whom and how to ask for professional help with IR35. It also briefly discusses the Revenue's contract review service.

6.2 When to ask for help

In short, professional help should always be sought whenever a freelancer is uncertain of their status or the interpretation of one or all of the tests in their own particular context. Professionals can offer a wide range of services, the most commonly used of which is a "contract review". This will typically cost a few hundred pounds and look in detail at a particular engagement in the context of the freelancer's overall business. It will provide a full professional status assessment against the various elements of the status test. Most freelancers will probably have had a number of these before taking the decision to assess the status of work themselves.

Whether or not one has used a professional to arrive at a view on status of a particular engagement, if and when the Inland Revenue tell you that your business is to be subject to an IR35 review or – more likely – a PAYE review (regularly used as a first step in trawling for subjects of IR35 status investigations), it is critical that professionals be involved straight away. IPSE members have the benefit of tax investigation insurance bundled with their membership. Additionally, the Check of Employer Records cover, bundled with IPSEPlus membership, will, as its name suggests, cover PAYE audit visits as well. The last section of this guide covers in more detail what to do if approached by the Revenue.

Whether or not one has IPSEPlus, IPSE's strong advice is always to involve professionals in any correspondence with the Revenue that has or could attain relevance to IR35. The legal maxim "those who represent themselves have fools for clients" has no more exceptions amongst freelancers than the population at large.

6.3 Whom to ask for help

For many freelancers, the gut reaction is to turn to their accountant. This can be a mistake. IR35 hinges on intricate and difficult parts of employment law – an area in which many accountants have little or no practical expertise. Some accountants, however, do offer a genuinely excellent service.

Always ensure you know what the track record of the person advising you is in dealing specifically with IR35. IPSE would strongly recommend that before paying anyone for assistance with IR35, be it a contract review or professional representation in a dispute or enquiry, a freelancer asks:

- How many contested cases the practitioner has dealt with?
- What the outcome of those cases has been – losses as well as wins? Get actual numbers.

IPSE's Accredited Accountant scheme certifies accountants as having detailed expertise on freelance tax issues, with particular emphasis in the assessment and training process on IR35. A list of IPSE Accredited Accountants is available on the IPSE website at www.ipse.co.uk/accountant.

IPSE advice is never to use an adviser who does not have demonstrable expertise in IR35, which may be shown by IPSE Accredited Accountant certification or a strong record of successfully defending freelancers specifically against IR35. IR35 has been around long enough now for an established practitioner to have built up a fair- sized (at least a hundred) portfolio of successes. Any more than the odd, occasional, failure should set the alarm bells ringing.

IPSE advice is also to involve a professional as early as possible in the process. Experience has shown that honest errors in handling a case early on can be hard (though generally not impossible) to rectify later, and almost invariably prolong the worry and expense of the enquiry.

For short questions likely to require less than 20 minutes work to answer, IPSE offers free tax and legal helplines to its members. These helplines can also help with more complex queries though these are chargeable (at a discounted rate). Details are on IPSE's website at www.ipse.co.uk.

6.4 How to ask for help

On receipt of anything that is or could become IR35-related from the Revenue (as previously stated, a notice of Check of Employer Records is the usual first step in an IR35 investigation), if a professional has reviewed one or more contracts in the period in question then that professional would be the natural first port of call. Freelancers who have evaluated their own status – and this will probably be the majority of those within IPSE who have been considering the issue for more than a year or two– IPSE's associates are normally the appropriate people.

For peer advice, support and encouragement throughout any investigation (or just for help with general questions), many freelancers turn to IPSE's online forums. As mentioned in the previous section, for short questions IPSE members can find free tax and legal helplines via IPSE's website at www.ipse.co.uk.

6.5 The Revenue's contract review service

IPSE has agreed with senior Revenue officials that the Revenue's contract review service is a public service. It is not part of the Revenue's compliance machinery although the Revenue opinion will be on file should an investigation occur later. However obtaining an opinion will not make it more or less likely that you or your company will be the subject of an enquiry. Nevertheless many contractors prefer to use alternative sources of advice.

Section 6

Maintaining an IR35 paper trail

Since the Revenue can investigate any contract(s) held at any time in the previous four – or in certain circumstances twenty – years (although the IR35 legislation can only be applied to contracts held since April 2000), it is important to have records available which establish facts to assist any such investigation, and to act as an aide-memoire when you are trying to remember the rationale behind your assessment.

This section contains a suggested documentation set to that end. It is neither prescriptive nor exhaustive - individual freelancers may prefer to keep more or less than is suggested here. The important thing is that, for each contract, you keep a record of what status you decided and why.

7.1 Keeping records for each contract

- Your contract
- What status you consider the contract to have
- Why you consider that to be the correct status (if relying on a professional assessment, just file that assessment)
- A "real arrangements" letter, if you can get one
- Any concurrent contracts/work
- On-the-ground differences between yourself and permanent employees of the end-user

For this latter point, here is a non-exhaustive, non-prioritised list of possible differences that may exist. Further, if you are unable to get a "real arrangements" letter it may be worth documenting some of the suggested points there yourself anyway, though clearly this has less force than something signed off by the end- user.

In each case, document the differences between yourself and a comparable permanent employee. If you would be comparable to a senior employee, who might work with little in the way of supervision or set hours, be especially sure to note any differences, as one recent IR35 case was lost in large part because the contractor looked like a "senior employee". Note that for a given contract, many points below will be irrelevant because either they are not applicable or there will be no difference. This does not matter.

- Security pass (is it a different style/type?)
- Pension contributions
- Eligibility for sick pay
- Procedure when you are sick (do you have to provide a doctor's sick note when employee would?)
- Eligibility for holiday pay
- Procedure for booking time away. (Is it the same as the procedure for an employee? Do you have an annual limit in terms of how many days you may not work and if so is this the same for an employee?)
- Eligibility for statutory maternity/paternity pay/leave
- Share options
- Professional development. (Does the end-user pay for formal training for you? Would you get more/any formal training were you an employee? Does your end-user play any role in assessing your personal development needs and meeting them as they would for an employee?)

- Reporting requirements to management or monitoring of work
- Staff appraisals/Personnel development regimes
- Company car
- Parking space
- Attendance at “team meetings”, company strategy presentations and the like (many end-users will invite their freelancers to these, however, some will not)
- Access to sport facilities, canteen, Christmas Party etc.
- Payment cycle
- Review/assessment. (Do you have the same annual pay review/performance assessment procedure as an employee?)
- Identification on phone/email systems as an external contractor
- Grievance procedure. (What happens if they are unhappy with something you do – is this the same as would happen to an employee?)
- Induction. (Did you get the same induction as an employee would?)
- Redundancy. (If your contract is terminated, do you get any redundancy pay?)
- Instant termination. (Some freelancers have a contractual clause stating that if the client is dissatisfied they may terminate the agreement forthwith- such a clause would be illegal in an employment arrangement.)
- Any other differences that you can think of

A natural corollary is that these are the kinds of factors that you should seek to establish and maintain, especially in cases where you are on client site routinely and for a period of many months or years. Again, no one of these will turn a case, so it is not worth digging your heels in just to get your company name on the phone list, for example. Rather, standing back and looking at the overall picture, do you look the same as or different to an employee of the end-user?

If your score is not high enough to place you in the 'low risk' category, but still consider you are "in business on your own account" then it is worth keeping a record of why you think so. Do you look like a permanent employee who moves from permanent job to permanent job? If not, why not? What do you have/do in the normal course of running your affairs that they do not have/do?

7.3 "Real Arrangements" Letters

"Real arrangements" letters have been covered in the consideration of status factors (on pages 9-10), but to recap, it is worth having one to make it absolutely clear that the right to substitute is genuine and that you are not subject to mutuality of obligation or control.

Some end-users can be reluctant to sign such a letter, for a variety of reasons. If you are dealing with a client who seems reluctant, you may like to pass on to them a IPSE document that outlines the benefits to end-users of signing a letter and is included in the Appendix at the end of this Guide. Failing this, it may be possible to clarify individual specific points by email; you should make sure you retain a copy of any such correspondence.

It is always worth repeating something that is in the contract in a "real arrangements" letter to establish definitively that it is not a sham. Below is a non-exhaustive, non-prioritised list of matters you may consider for inclusion. Many of these will not be applicable to you, many will. Just ignore the ones that do not relate to your circumstances:

- Willingness to accept a substitute.
- Ability to turn you away if no work on a given day.
- Non-exclusivity (you may have concurrent contracts).
- Anything else you consider relevant to your status.
- Any points from the second bullet list under "per-contract status records" that apply.

A selection of sample letters is available in the Appendix to this Guide.

7.4 If you do not have a written contract

If you do not have a written contract this does not mean that a contract does not exist; a contract can be written, verbal or implied. Consequently, the contract is made up of what you have agreed verbally and what has happened in practice. Recollections can vary widely after a few months let alone a few years and this will give HMRC the opportunity to interpret the position to their advantage, especially where the recollections differ. Therefore, IPSE's strong advice is not to work without a written contract and, where this is unavoidable, to obtain a detailed "real arrangements" letter as a matter of urgency.

Section 7

Penalties

Freelancers who declare their businesses outside IR35 but are subsequently found to be within it may, on the face of it, face demands for penalties as well as tax due. These penalties are tax geared and in theory could be a maximum of 100% of the outstanding tax charged, however, these penalties are mitigated and even in relatively serious or large tax investigation cases penalties are rarely above 50% but, in most cases, less than 30%. Notwithstanding, this clearly represents a considerable financial risk.

For a penalty to be charged, HMRC will have to demonstrate that there was negligence on your part in submitting an incorrect Return. Negligence does not have a Statutory definition and is takes its everyday meaning: did you carry out the tasks that you would expect the 'man in the street' to take to ensure the Return was correct?

The level of any penalty is a Revenue determination and can be disputed by appealing it to the Commissioners – the Revenue does not have the last word on penalties. It has also been said that, because a penalty is punitive in nature, the onus is for the Revenue to show the penalty is correct, not on the mere balance of probabilities but beyond a reasonable doubt. No penalty, however, need be due even if one's assessment of IR35 status is subsequently determined to be incorrect on the basis that you can demonstrate that you were not negligent. This is confirmed in the Revenue's IR35 penalty statement at www.hmrc.gov.uk/IR35/penalty.htm:

"[If] you, in your capacity as employer, act prudently by taking all reasonable steps to understand and ensure that your intermediary service company or partnership meets its obligations under the service company legislation, no penalty will be imposed"

This means that if you, as the person running the company, do not believe that IR35 applies and genuinely have taken "all reasonable steps" in coming to that view, you will not face a penalty if the Inland Revenue subsequently disagree with your view. You will, of course, still have to pay any tax, national insurance and interest that may be owed if the Inland Revenue position is upheld. This, of course, raises the important question of what constitutes "all reasonable steps".

8.1 Reasonable steps

If you are uncertain as to your status then IPSE advice would be to use an IR35 status specialist to review your contracts and your business as a whole. IPSE has a number of associates who offer such services. Alternatively, your own accountant or other advisers may offer assistance.

However, possibly after a number of professional reviews, many freelancers will feel sufficiently confident to arrive at their own informed view of their status. The question of what "all reasonable steps" are in this context is clearly most important. The following text is part of an agreed statement between IPSE and senior HMRC officials:

"It is the Inland Revenue's view that a taxpayer would not be considered to have been negligent merely because he or she failed to use either a voluntary service offered by the Inland Revenue or failed to consult with a legal or tax expert on the application of tax legislation, especially in the area of employment status case law. However, the individual would have to satisfy himself or herself that IR35 did not apply by considering his/her position in the context of the legislation and the relevant case law."

IPSE considers that a taxpayer who is seeking to take "reasonable steps" will therefore follow a process such as that described in an earlier section of this guide. One of the aims of this guide is to provide sufficient detail of what the legislation and case law say to enable freelancers to make such an assessment accurately.

Section 8

Where IPSE fits in

Although it is now a fully-fledged trade association active at senior levels within Government and industry on numerous issues, it is worth remembering that IPSE was originally founded to counter IR35. We will support you throughout this process by:

- Protecting you with our tax investigation insurance, with enhanced cover for IPSEPlus members which kicks in at an earlier stage
- Providing discounted access to other providers who have products which cover freelancers up to and including all tax, national insurance, interest and, for the rare cases where it is pertinent, penalties
- Providing this guide to assist with contract self-assessment
- Providing discounted contract reviews from professionals who take cases through the courts
- Identifying and running cases likely to clarify key points of IR35-related law, should any further opportunities to do so arise
- Providing updates if case law developments should change the boundaries
- Providing access to the best IR35 expertise in the country - those who actually run cases, not just those who watch them
- Giving best advice on how to evaluate and defend your own status
- Enabling you to participate in the online freelancer community, getting (and giving!) peer advice

Of course, IPSE does a lot more than just provide advice about IR35, but that is outside the scope of this document – if you have forgotten all the things you get when you join, please visit our website to find out!

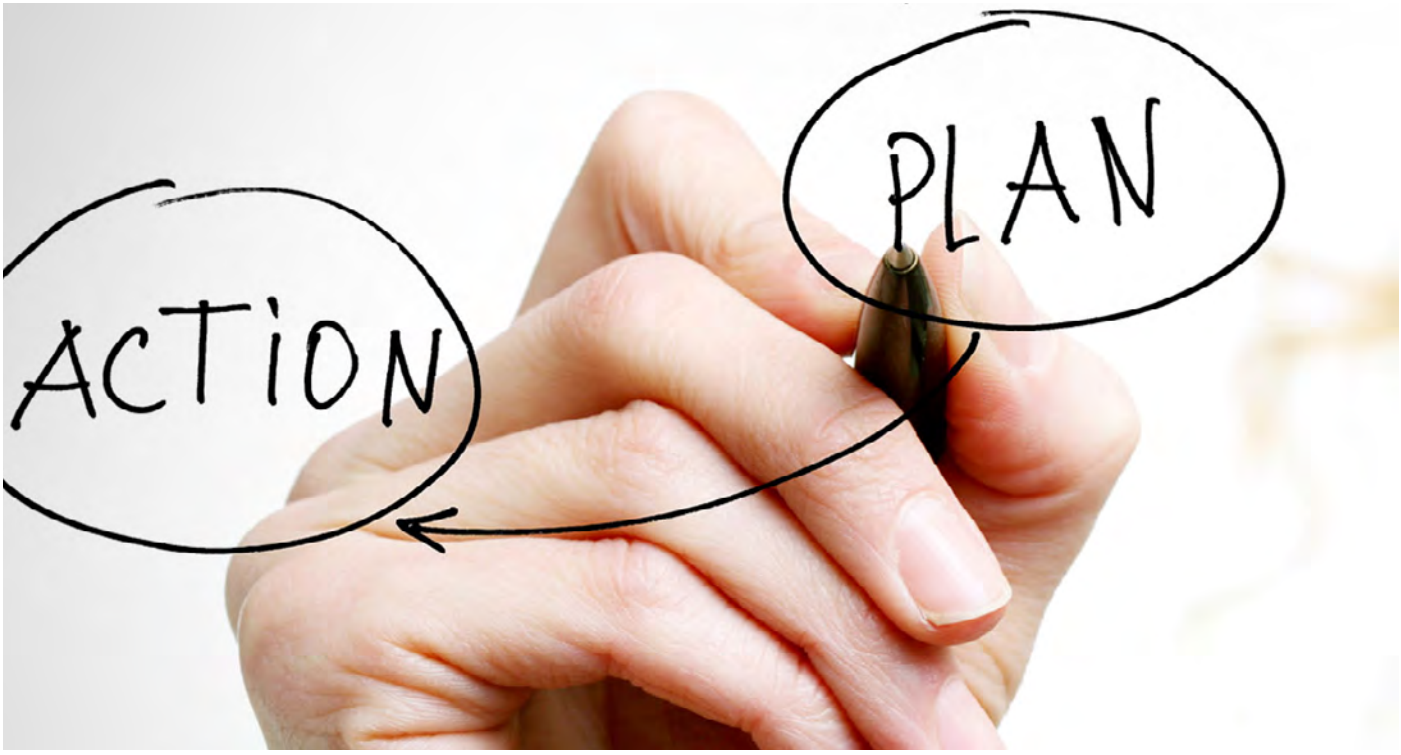
Section 9

Drawing up your own IR35 action plan

Here is a suggested outline IR35 action plan for freelancers. Many freelancers will already have completed some of the actions below; some will not have started.

- Make a list of every contract you have had since April 2000.
- For each, list all the information required for your paper trail that you do not currently have.
- Set a target date by which you will have gathered all the information you listed. This should be no more than a month or six weeks from when you make the list (or it will never get done!).
- For old contracts that have expired, where possible, ring your contact at the end-user and try to get a "real arrangements" letter. Do not just ask about IR35, ask how the client is getting on and what is happening for them - handled correctly this call could not only help establish your paper trail but also lead to new business for you!
- Evaluate your status with regard to the "in business on own account test" and make a timetable to review this position, say, twice a year.
- Draw up an action plan to strengthen your "in business on own account" position. This may range from things like getting some business cards and setting up an internet domain and website through to getting a data protection registration and considering ISO9001 or similar accreditations.
- Set a target date by which you will have executed your "in business on own account" action plan. Ideally, this will, again, be a few weeks from when you set out the plan, though here you will often be constrained by external lead times.

If you have not really done much towards your IR35 status yet, this may all seem quite daunting. However, once you get stuck in it will start to make sense – and having completed it you will know that you have given yourself the best possible defence should an investigation occur.



Section 10

What to do if the revenue contacts you

11.1 How it works

At the time of writing, the most common form of approach by the Revenue to investigate your IR35 status is through a PAYE review. Therefore, even though intuitively you might think it entirely unconnected with IR35, should you receive notice of a Check of Employer Records Letter or similar you should treat it as if it were an IR35 investigation and follow the steps listed later in this section.

If you receive any communication whatsoever from HMRC and you are not sure what it means, then call the free IPSE tax helpline on **0845 125 9252** immediately for free expert advice.

If the inspector who carries out the audit thinks you are or may be within IR35 - and sometimes this is the 'default setting' - s/he will issue a "notice of dissatisfaction". On the assumption that you do not agree with the Inspector, it is only at this stage that the enquiry becomes a "dispute" – unlike IPSE Plus membership, many insurance products do not provide cover before this point, but a large proportion of potential cases are actually resolved (in the freelancer's favour) by this stage.

Once the enquiry has become a dispute, there will usually be a large amount of varyingly pertinent correspondence. Again, we cannot overemphasise the importance of being professionally represented during this phase. Most cases that are not resolved by the Check of Employer Records get resolved at this stage.

Finally, the correspondence is referred to a specialist Status Inspector who will give a formal opinion of the IR35 status on behalf of HMRC and if you do not accept this opinion the Status inspector will issue a Regulation 80 Determination (Tax) and a "Section 8" notice (NIC). However, you may still have the right of appeal against the Determination and Notice- contact IPSE for further information.

11.2 What to do first

Do not panic. IPSE membership offers the best package of advice, insurances and access to expert representation in the marketplace so as a IPSE member you are in good hands.

If you want some (free) advice before doing anything at all, you can ring the Tax Helpline on 0845 125 9252. If you want some moral support, you can post on the IPSE's online forums on our website at www.ipse.co.uk.

Do not be intimidated by HMRC – they have to follow the law and, ultimately, whatever they would like the law to say, the courts follow what it actually does say. It can be frightening to receive a letter saying they are going to investigate you. However, through IPSE you have access to experts who have represented literally thousands of others in your situation with a single-figure number of losses. There are no guarantees but the odds are significantly in your favour.

If you have Check of Employer Records Cover under IPSEPlus membership, you will be covered by the relevant insurer, whose details are accessible from our website, for the Check of Employer Records itself. If you do not, we strongly recommend that you appoint your own professional adviser to conduct this meeting on your behalf. They are minefields for the unwary, yet a seasoned professional can usually obtain a favourable settlement of your IR35 status at this point.

Once you have decided who will represent you, send our standard "first response" letter on your company's headed paper:

Dear <inspector's name>

Re: your Check of Employer Records notification of <date>

Thank you for your letter of <date> giving notification of a Check of Employer Records. As a member of IPSE I am covered by the IPSE's <Tax Investigation Insurance / Check of Employer Records Cover> product and am currently exploring the extent of my cover.

I am appointing <name of professional adviser> to act on my behalf in this matter. Please send all correspondence to them in the first instance, at <adviser's address>. I will ensure that they are in possession of all requisite books and records in order promptly to respond to your queries.

It is proposed that the visit will be carried out at <adviser's name>'s offices at the above address.

Yours faithfully

11.3 Revenue approaches to end-users

Since IR35 was introduced contractors have increasingly been hearing reports that the Revenue has approached their end-users to request information. The Revenue's local offices appear to have been told that it is legitimate to approach end-users, agencies or even banks in this way without the taxpayer's permission.

These approaches can cause numerous difficulties. If the end-user blames the contractor for a barrage of vexatious questions from the Revenue, a valuable business relationship could be damaged. Arguably worse still, incorrect information, potentially the more dangerous for being wrong, can be gathered by the Revenue to use against the contractor. It has been common for the Revenue to get through to somebody who knows nothing of the specifics of the relevant arrangement, for instance in Human Resources, to whom they will put leading questions. Such a person will most likely not realise the significance of what they are being asked, and give inaccurate or generic answers from which the Revenue often tends to draw generic conclusions: "if that is generally the case, it must be the case for the contractor we are investigating."

Indeed, it is known that the Revenue have approached larger companies to obtain general information about how they engage contractors. They have also arranged with such companies a single point of contact for such enquiries. If you are undertaking a contract for a larger company, it will be worthwhile to ask whether they have given the Revenue such generic information and if not, to suggest to them that they do not do so in future. Similarly if a single point of contact with the Revenue has been established, it will be wise to ensure that this person is aware of your circumstances, especially where they differ from the perceived norm.

While the Revenue has no statutory authority to obtain information by such informal means, they do have the ability to demand documents under Section 20 of the Taxes Management Act 1970. Anecdotal evidence also suggests that these powers are being used incorrectly, and contractors should be aware of this potential mode of investigation. A notice under s20(3) TMA 1970 can be used to oblige third parties to hand over documents but not particulars. Such a notice is obtained from the local General Commissioner in an ex parte hearing, which the taxpayer or third party have no right to attend, but to which they may make a written submission. Such notices were historically reserved for more serious investigations, but the Revenue has come to prefer them for IR35 purposes rather than relying on 'normal' information powers which allow the taxpayer to make a personal representation to the Commissioners.

There are ways to counter these approaches to end-users. If you have a real arrangements letter, you may well be able to resist efforts to approach the end- user by providing the information in that.

If you have been unable to obtain one, you could alternatively suggest that you or your professional representative liaise with the end client to obtain the information required and thus help prevent any commercial impact of the end client being contacted by HMRC.

Ultimately, the Special Commissioners may agree that for practical reasons the end-user should be approached. The

Commissioners have observed in recent cases that information obtained from end-users can be valuable and helpful but it must relate specifically to you and not just of a general nature, so you do not necessarily want to keep it from them. Rather, it is better to manage any requests proactively and ensure that all parties have correct information.

It is worth pointing out to all end-users that they are under no obligation whatsoever to respond to such informal enquiries when they have been made without sanction under S20 or from yourself, or even to get a professional adviser to brief the end-user. Even if the Revenue does garner information in that way, if you have maintained an IR35 paper trail as recommended elsewhere in this guide, you will be able to counter any inaccurate information from such sources used by the Revenue against you.

11.4 What you are covered for

To find out what you are covered for, please check the IPSE website at www.ipse.co.uk. As a member, full details are provided in the "MyIPSE" section of the website.

Section 11

IPSE – Representing Freelancers

IPSE: background information

IPSE was formed in May 1999 in response to the Government's IR35 proposals. It has since evolved from operating as a single issue group to being a fully-fledged trade association dedicated to protecting and promoting the interests of the freelance community – irrespective of industry focus.

IPSE's aim is to work for proper recognition of independent freelancers as a genuine and valuable sector of the economy, generating wealth and employment, providing industry with a flexible workforce. IPSE is a not-for-profit organisation run by freelancers for freelancers, and is committed to promoting members commercially and supporting their development. IPSE now represents some 21,000 freelance businesses that pay an annual membership subscription.

IPSE has worked with HMRC to improve its employment status manuals (ESM), and with the then-DTI to ensure the inclusion of an opt-out clause for freelance contractors in its agency regulations. IPSE worked with the Treasury and HMRC to keep its members out of the scope of the Managed Service Company tax rules. It has sat on the IT Skills Panel for the sector skills council, eskills, and has advised about measures to counter Intra-Company Transfer (ICT) abuses, as well as clearing the IT Skills Shortage list in 2002 and keeping IT occupations off the revised shortage list in 2008.

IPSE sits on the IR35 Forum. Comprised of senior HMRC officials and external stakeholder organizations, the IR35 Forum provides advice on improvements in the administration of IR35, and in a transparent manner to assist HM Revenue & Customs in identifying specific areas for improvement in the administration of IR35.

IPSE represents freelancers at EU level, campaigning successfully against the European Commission's Green Paper on Labour Law, and in all other relevant arenas, including Westminster, Holyrood and the International Labour Organisation.

IPSE has expanded its policy work to all relevant spheres of government: it is a prolific contributor to government consultations, and has succeeded in obtaining greater clarity on security clearance processes for public sector roles.

IPSE offers the most comprehensive source of IR35 advice, guidance and tools. Its legal cover has saved members millions of pounds in professional charges and taxes since its inception. Almost 1,500 tax status cases have so been concluded, almost all of them successfully. Among the six losses, one member settled with the Revenue, and another involved a case where the member had chosen to represent himself in the first stage at the General Commissioners, with unfortunate implications for the High Court appeal.

A wealth of advice and guidance is available to members, on topics ranging from tax issues such as IR35, Section 660A and the Family Business Tax, to general guidance about being in business as a freelancer, including the provision of draft contracts. Via the forums, members and affiliates have access to an enormous store of knowledge and information about legal, accounting, taxation, marketing, technical, press and a host of other matters. The commercial forum facilitates the promotion of members' goods and services to one another. Other member benefits include discounts on insurance, accountancy, books, office support and hotel accommodation.

IPSE recognises the contribution of a wide range of stakeholders in the freelance marketplace, and invites them to join IPSE as Affiliate members, allowing them privileged marketing access to its full members, who are freelancers in IT consulting, management consulting, accounting, engineering, oil and gas, interim management, marketing communications and numerous other sectors.

APPENDIX A

Introduction

This Appendix includes sample text for the "Real Arrangements" letter mentioned in the guide. These are intended purely to illustrate the kinds of areas such a letter should deal with and the kind of arrangements you may wish to request. It also includes a degree of comfort for the Client that the engagement will be outside the scope of the Agency Workers Regulations (AWR), and that no individual providing services will fall within the definition of an 'Agency Worker'; the inclusion of this 'comfort' may help persuade the Client that it is also in the Client's own interests to accept and sign the letter (though note that the AWR and IR35 are entirely separate pieces of legislation). You may wish to write your own letter from scratch, or use this text as a model: it is intended as a starting-point, to be adapted to the circumstances of your particular engagement – it is not a formal "all or nothing" check- list of things to which you must secure agreement, although everything listed is desirable. If you do wish to adapt one of the examples provided here, be careful to ensure that it accurately reflects the engagement in question.

There are several benefits to the 'Real Arrangements letter':

1. **If HMRC are presented with a Real Arrangements letter at the outset of any enquiry, it may lead to the taxman deciding against further action. If the letter signed off by the client indicates that you have control over the work, that it's not about your personal service and mutuality of obligation is not intended, then there isn't much point in trying to interview the end client.**

2. **The client may want to make some amendments. If the client is not prepared to sign off the substitution clause for example, then you at least know that in the event of an enquiry.**

3. **If the client is not prepared to sign the letter at all, it rather puts into question the contract that you may have signed with the agency and whether the End Client sees themselves as trading with an independent contractor or taking on a temporary worker that he will control as he does his own staff. In this eventuality, you will have to decide whether or not you wish to continue with an engagement that might not withstand HMRC scrutiny.**

The samples include an "ideal scenario" letter in which the best form of each arrangement is given. In practice, you are unlikely to be able to secure such a one-sided set of arrangements, so a second version sample utilises more casual, albeit therefore less accurate, language which you or the end user may feel more comfortable with.

When you have drafted your own letter, you should forward it, along with a copy for their own reference to the end-user asking them to sign it. It may be the case that the end-user is resistant to the idea of signing such a letter for no other reason than it seems counter- intuitive to agree to such a document in addition to a legally binding contract. If you feel this might be the case, you might also wish to enclose a copy of the final document issued with the Guide (section 29), which is intended for end-users and outlines some of the benefits to them of using RA letters.

If you are still unable to obtain a letter, a second-best option is to clarify by email any specific details that really do need confirming for you to be able to do the work. You should of course retain a copy of any such correspondence.

Some freelancers tend to send end-users a statement of the arrangements to which they intend to adhere and state that they will regard the end-user as accepting these terms unless they object. This is of very limited use; it is better than nothing, but only just. IPSE advice remains that a full letter signed by the end-user is by some margin the best way of demonstrating that work is outside IR35.

Remember that this letter is not to be used as a mere ruse to side-step IR35. It MUST be an honest and accurate reflection of daily practice. Knowingly submitting an inaccurate letter as evidence in a legal hearing would constitute perjury, which is a criminal offence.

Sample Text #1 - "Ideal Scenario"

[EndUser] agrees that for the duration of the contract undertaken by [YourCo], both parties will adhere to the following arrangements and practices.

[YourCo] is a business carried on by (and substantially owned by) the individual(s) who it is envisaged will have primary responsibility for the provision of the Services, and [YourCo] regards [EndUser] as a client/customer of that business. [YourCo] enters this contract on the understanding that no individual providing Services on its behalf will work under [EndUser]'s supervision and direction. Both [YourCo] and [EndUser] understand and intend that no individual providing Services on behalf of [YourCo] will be an 'agency worker', within the meaning of the Agency Workers Regulations 2010 ('AWR'), and that AWR will not apply in respect of this contract.

It will be [YourCo]'s responsibility to provide the services using the staff which [YourCo] deems to have the necessary level of qualification and experience in order to complete the contract. If [YourCo]'s staff are ill or otherwise indisposed, or [YourCo] judges that another worker will be able to make a useful contribution, [YourCo] may substitute anyone of suitable qualifications for its staff to undertake the work.

Any such substitute will be paid by [YourCo] and instructed in the nature of the contract by [YourCo] with the costs of any handover period at [YourCo]'s expense. [YourCo] will be responsible for any necessary supervision and direction of the work carried out by any such substitute. The substitute will be directed by [YourCo] to undertake work on the contract to ensure that the services provided continue without any detriment to [EndUser]. The substitute will collect all necessary passes and documentation for working on the site from [reception / site manager's office / etc.] and will return them on departing as appropriate. The substitute will log on to [EndUser]'s computer systems by using the login/s provided for [YourCo]'s original staff. [YourCo] will give no less than 24 hours' notice of any substitution.

[YourCo] will determine where the work will be carried out, and its employee/s will make use of [YourCo]'s facilities to carry out the work should they deem it appropriate

OR

The necessity of using [EndUser]'s specialist equipment may require [YourCo]'s employee/s to work at [EndUser]'s site frequently, but they will be at liberty to use [YourCo]'s facilities in the completion of the work when practical, and will have sole responsibility for deciding when to do so.

[YourCo] will determine the means by which the contracted deliverables are accomplished and its employees will not be available for general consultation by [EndUser]'s staff or to routinely attend team meetings or similar unless directly relevant to the contracted work or necessary on, for example, health and safety grounds. [YourCo]'s employee/s will determine their hours of work and will be entitled to undertake other contracts for other clients, so long as this does not endanger the prospects of competing the contracted task by the specified time.

[EndUser] will be entitled to turn [YourCo]'s employee/s away from its site in the event of it not being possible for them to undertake work there on a particular day, for instance in the event of a power cut or computer network crash. [YourCo]'s employees will not receive remuneration for their presence in such circumstances. [YourCo] acknowledges that the contract with [EndUser] may be terminated by [EndUser] at any time and without notice, and further acknowledges that [EndUser] makes no commitment to providing work for [YourCo] subsequent to the completion of the current contract.

[YourCo]'s employee/s will not have access to company car-parking spaces and may not park on [EndUser]'s premises. [YourCo]'s employee/s will not be entitled to join [EndUser]'s social club or attend [EndUser]'s staff social functions. [YourCo]'s employee/s will not be entitled to take advantage of special offers and discounts made available to [EndUser]'s staff by certain retailers and service providers. [YourCo]'s employee/s may make use of [EndUser]'s canteen facilities but must pay in cash and may not use the staff billing facility to pay for meals. [YourCo]'s employee/s may not make use of the gym and sports facilities provided on-site for the use of [EndUser]'s staff. [YourCo]'s employee/s will not make use of the [EndUser]'s staff email system.

Should [YourCo]'s employee/s have a grievance during the course of the contract they will not make use of [EndUser]'s staff complaints procedure but report it in the first instance to either [named person / position] or [named person / position].

Sample Text #2 – more casual

Dear

Confirmation of the working arrangements between [EndUser] and [YourCo] for the period xx/xx/xx to xx/xx/xx

[EndUser] agrees that for the duration of the contract undertaken by [YourCo], both parties will adhere to the following arrangements and practices. (Alternatively, you may wish to present Appendix B, which can be printed off as an information sheet in its own right, to your client.)

[YourCo] is a business carried on by (and substantially owned by) the individual(s) who it is envisaged will have primary responsibility for the provision of the Services, and [YourCo] regards [EndUser] as a client/customer of that business. [YourCo] enters this contract on the understanding that no individual providing Services on its behalf will work under [EndUser]'s supervision and direction. Both [YourCo] and [EndUser] understand and intend that no individual providing Services on behalf of [YourCo] will be an 'agency worker', within the meaning of the Agency Workers Regulations 2010 ('AWR'), and that AWR will not apply in respect of this contract.

[YourCo] has agreed to provide a set of deliverables which are set out in the schedule to the contract/follow this letter* and which [YourCo] is expected to deliver using its own methodology. Other than the successful and timely completion of the work, [YourCo] will determine whether and when its employees are required on-site and where resources (staff or otherwise) are needed from [EndUser], it will be the responsibility of [YourCo] to identify these and liaise with relevant [EndUser] managers and staff to ensure that timetables and outcomes are met.

[YourCo] will ensure that its staff attend meetings related to the progress of the contract, but there is no expectation that the staff will attend other team meetings unless these relate to the company's health & safety, computer and security policies, which [EndUser] expects all staff and contractors to follow.

It has been made clear to all the [EndUser]'s staff that [YourCo] has been engaged for a specific project and is not required to provide general advice or further services beyond those agreed for the successful completion of the work.

[YourCo] will seek to provide continuity of service, but where it is felt that someone else can make a useful contribution, [YourCo] will arrange for the services to be provided by an additional consultant or staff member at no additional cost to [EndUser].

Similarly, where due to illness or unavailability a substitute is required, then [YourCo] will arrange for a suitably qualified and experienced replacement (who meets [EndUser]'s security clearance)* to be available, with the costs of any handover period to be borne by [YourCo]. It will be the responsibility of [YourCo] to ensure that the work undertaken by any substitute or any additional consultant or staff member meets the agreed service levels and that the agreed timetable and outcomes are delivered. [YourCo] will be responsible for any necessary supervision and direction of the work carried out by any such substitute/additional consultant/staff member.

Finally and for the avoidance of doubt, this engagement is intended to terminate upon successful completion of the deliverables, but in the event that the project is halted either temporarily or permanently prior to the anticipated conclusion, this contractual relationship will come to an end with immediate effect. There is no expectation by either party of further work ensuing after this engagement has ended.

Please note that the sports, social and canteen facilities on this site are only available to permanent staff/are available to individuals who are engaged on-site, but who will not qualify for staff discount. The car parking spaces are limited to [EndUser]'s employees members only.*

*** Amend as required**

Sample Text to explain the benefits of the RA letter to the client

End Clients need to be aware of the benefits to them of signing a real arrangements letter and so whether you wish to enclose the following as an accompanying explanation to the Real Arrangements letter, or merely use it as a 'crib sheet' is up to you.

Dear

The purpose of the enclosed letter of 'Real Arrangements' is to affirm that, both contractually and in reality, the contractor is providing services on a business-to-business basis and is not seeking / will not seek employee status, and that the engagement is intended to be outside the scope of the Agency Workers Regulations 2010. It will provide evidence that no relationship of employment exists and will create a further difficulty for any party wishing to claim subsequently that such a relationship existed.

Not only employment tribunals, but also HMRC often look beyond the terms of a written contract and assess the practical reality of a situation: if the reality on the ground does not reflect the written contract, they are entitled to disregard the contractual terms and deduce an implied contract from the practical reality.

In order to do this HMRC, in particular, will seek meetings with the Engager which takes up valuable time with a number of Engagers having been further inconvenienced by being summoned to tribunal cases. When presented with a 'Real Arrangements' letter which provides evidence that the reality and the contract do indeed match one another, it should be enough to make it clear to an investigating Inspector that there are no employment status issues in respect of tax to be pursued and one would hope that you will not be further inconvenienced.

Furthermore, as there is no direct contractual relationship between [YourCo] and [EndUser], this letter affords an opportunity for both parties to make clear their expectations of each other. It also allows for the fleshing-out of any practical details not covered by a contract and gives both parties an agreed and clear record of these.

I would be grateful if you could please read the attached letter and sign and date it where shown if it confirms your understanding of this engagement.

Yours sincerely

APPENDIX B

You may have been asked to sign a letter confirming the practical arrangements pertaining to a contract undertaken for you by a freelance contractor, who is also a member of the Professional Contractors Group. IPSE is a representative body that advises its members on legal and business matters as well as lobbying government on their behalf and assisting with legal cases.

IPSE advises all its members to obtain a Confirmation of Arrangements Letter for each of the contracts they undertake.

The purpose of this letter is to affirm that, both contractually and in reality, the contractor is providing services on a business-to-business basis and is not seeking / will not seek employee status, and that the engagement is intended to be outside the scope of the Agency Workers Regulations 2010. It will provide evidence that no relationship of employment exists and will create a further difficulty for any party wishing to claim subsequently that such a relationship existed.

This letter is not intended to be legally binding or to supersede any contract, nor can it do so. Rather, its value is that it confirms that any contracts are an accurate representation of reality by giving a full, accurate and honest description of the practical aspects of the work. HMRC and employment tribunals often look beyond the terms of a written contract and assess the practical reality of a situation: if the reality on the ground does not reflect the written contract, they are entitled to disregard the latter and deduce an implied contract from the practical reality. This letter will provide evidence that the reality and the contract do indeed match one another – such letters have been valuable evidence in many tribunal hearings.

In the event that the contractor does not have a direct contractual relationship with yourselves but has been engaged via an agency, this letter affords an opportunity for both parties to make clear their expectations of each other. It also allows for the fleshing-out of any practical details not covered by a contract and gives both parties an agreed and clear record of these.

If the letter includes arrangements, for instance, to send a substitute to carry out some of the work, these do not constitute a suggestion that a substitute be sent, but they will be utilised by the contractor in the event of a substitution.

For a brief moment's consideration, you will be able to provide clarity for all parties on all practical arrangements for the duration of the contract and create a record to which they can refer during or after the time of the contract.

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