



SELF-EMPLOYED CONTRACTORS

Understanding the law

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Guide

Self-employed contractors: understanding the law

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1 Introduction

This guide focuses on the self-employed. Although the term ‘self-employed’ is not defined in legislation, it is generally accepted to apply to those individuals who run and manage their own business and who would, for example, have control over how, when and who carries out the work. They would also negotiate a price for the work to be carried out. Businesses and individuals should be aware that a self-employed individual may be categorised as self-employed for tax purposes but be considered an ‘employee’ (or more likely a ‘worker’) under employment law and therefore entitled to certain statutory rights and protections. Further, where an individual’s services are provided to a business client via a “personal services company”, certain tax-related obligations will be triggered under the IR35 regime.

This guide is designed to help employers ensure that they understand the relationship that they have with their self-employed contractors and highlights any legal issues that they may come into contact with.

The guide also includes information and key points for self-employed individuals to help them understand their employment status and rights.

2 Self-employment and an overview of the law

A person’s employment status is the gateway through which an individual’s legal rights and tax obligations are determined.

Although ‘self-employment’ is not defined in legislation, if a person is a business owner or contractor that provides services to other businesses, either directly or through a personal services company (PSC),¹ they will generally be considered to be self-employed. They will usually bid or provide quotes to secure work and they will also have control over how and when the work is performed while supplying the primary tools needed to carry out the work.

Example 1

Anna is a chartered accountant and the sole owner of Accountancy 123 Limited. Through Accountancy 123 Limited she provides accountancy services to other small businesses in her local area. In order to get work she has to market her services to the world at large and provide fee estimates to potential new clients. She has complete control over when, where and how the work is completed, and if she does not work, she does not get paid. Anna would therefore be considered to be self-employed.

Self-employed people are responsible for their own income tax, NICs and VAT arrangements. As a result, self-employed individuals will need to account for income tax and pay self-employed persons’ National Insurance contributions (NICs). Individuals can also be both employed and self-employed simultaneously, for example if they work for an employer during normal working hours and then run a business in their spare time.

¹ For more information on PSCs please refer to the section on ‘Tax and the self-employed’ below.

A self-employed person will have very few employment rights. Most of the rights that a self-employed individual is entitled to will be contained in the terms of the contract with the party who has engaged their services. For example, unless the contract specifically provides for it, they will not receive holiday or sick pay when they are unavailable for work.

The section in the guide on employment status, below, explains in more detail the different characteristics of each status. However, there are a few points to note. Ultimately, although a self-employed person will not be entitled to the same protections under employment law as employees or workers, they will:

- have protection for their health and safety while working on a client's premises
- be protected against discrimination in certain circumstances
- have their rights and responsibilities enshrined in their contract for services
- in limited cases, be classed as self-employed under the UK tax framework but be considered an employee (or more likely a worker) for employment law purposes. This difference is because the tax regime does not recognise 'worker' status.

The self-employed are obliged to fulfil their contractual obligations and work with due skill and diligence.

Circumstances where the self-employed will be protected from discrimination

Discrimination law protects those who are employees, workers and also anyone who is 'employed under a contract personally to do work'. Therefore, it covers some individuals who are considered self-employed under the Employment Rights Act 1996, because there is no exception for those providing services to a client or customer in the course of running a business (see section 3).

Following on from example 1, Anna provides accountancy services to a local business who is one of her clients. Under her contract she is obliged to do the work herself and cannot sub-contract or allow anyone else to do the work. She is 'employed under a contract personally to do work' for her clients so would benefit from protection from discrimination even though she is considered to be self-employed.

3 Employment status – where do the self-employed fit in?

This section sets out the legal tests for determining employment status. This includes the types of obligations that employees, workers and self-employed individuals are owed and owe.

There are three main types of employment for employment law purposes:

- **Employee**
- **Worker**
- **Self-employed**

The majority of all working individuals will fall into one of these three categories. Employment status will be dependent on what is set out in the contract and how the working arrangements operate in practice, and whether any statutory definition in relation to status is satisfied (i.e. in relation to worker status).

Although there is no definition of what constitutes self-employment, legislation does contain provisions in relation to employee and worker status (see below).

Statutory provisions under the Employment Rights Act 1996

Employee	Worker
<p>A person is an employee if they are someone who has:</p> <p><i>‘entered into or works under a contract of employment’.</i></p> <p>This means a contract of service or apprenticeship.</p> <p>Important points to note:</p> <ul style="list-style-type: none"> • The contract does not have to be written down, it could be agreed orally. • The terms of the contract could be implied rather than expressly agreed. Implied terms are those which the parties can be taken to have agreed, perhaps because they are obviously necessary or because they are customary in that business. 	<p>All employees are workers, but not all workers are employees.</p> <p>A worker must have entered into or work under a contract to perform work or services personally for another party.</p> <p>And:</p> <p>The other party to the contract must not be a client or customer of any profession or business carried on by the individual.²</p> <p>The terms of the contract may be express or implied and (if it is express) may be oral or in writing.</p>

However, employment status tests have been developed in case law and so establishing the employment status of an individual will be dependent on the facts of each case. This is illustrated by the emphasis given to the elements of personal performance and right of substitution in one of the leading employment status cases, *Autoclenz Ltd v Belcher and others [2011] IRLR 820 SC*. For more detail on the specifics of this and other cases, refer to the case summary in the [Appendix](#).

The legal tests for each type of employment status are summarised below. The terms highlighted in bold are explained in more detail below.

Employee

An individual will likely be an employee if:

- there is an obligation to provide personal service
- there is mutuality of obligation
- the employer controls the way in which the work is done
- other factors are consistent with employment; these could include:

²If the other party was a client or customer, it is likely that the individual would be found to be self-employed.

- level of integration into the business
- the label applied by all the parties
- the nature and length of the engagement
- the benefits received by the individual.

Worker

An individual will likely be a worker if:

- there is an obligation to provide personal service
- there is mutuality of obligation
- they are not carrying out a business and the other party is not a customer
- they do not otherwise meet the test for being an employee.

Self-employed

An individual will be self-employed if they are not an employee or a worker. In essence this means that:

- there is no obligation to provide personal service
- there is no mutuality of obligation
- they are carrying out a business and the other party is the customer.

Whether an individual is carrying out a business and whether the other party is a customer of that business will depend on a number of factors. These could include:

- The employer does not exert a high level of control over the individual.
- The individual is not integrated into the employer's business.
- The individual actively markets their services.
- The engagement between the individual and the other party is for a relatively short period of time.
- The individual is providing a specialist service.
- The individual invoices the other party for fees.
- The individual supplies the equipment needed to perform the service.
- There is a level of risk attached to the individual (for example, if the work is not completed, the individual does not get paid).

Self-employed individuals and the different frameworks

Importantly, there are different tests associated with whether individuals are self-employed for tax purposes or for employment status purposes.

For tax purposes, a self-employed individual should have a similar set of characteristics to those detailed below:

- The person is in business for themselves and they are responsible for the success or failure of the business. They can also make a loss or profit.
- They have autonomy over the work they do – they can decide what work they do and when, where or how to do it.
- They can hire someone else to do the work.
- They're responsible for fixing any unsatisfactory work in their own time.
- The client agrees a fixed price for their work – it is not dependent on how long the job takes to finish.
- The person uses their own money to buy business assets, cover running costs and provide tools/equipment for their work.
- They can work for more than one client.

Important points to note:

- A person could still be classed as an ‘employee’ (or more likely a ‘worker’) for employment law purposes and yet be taxed as a self-employed person.
- Individuals can also be employed and self-employed simultaneously – for example, if they work for an employer during the day and then run their own business on evenings or weekends.

Understanding specific terms

Control

An employer can decide what, how, where and when the work is done. Control is less to do with the exercising of day-to-day supervision over the individual and more on the employer’s contractual right to control. By comparison, a self-employed individual will have a greater degree of freedom in their working arrangements. For example, they commonly can determine their own working days and hours.

Mutuality of obligation

In essence this means that there is an obligation on one party to provide work and the other party, the individual, is obliged to accept the work offered in return for payment. Normally this arrangement will form part of either a written or oral contract between the employer and the individual. However, it can also mean simply that there is a written or oral contract in existence between the two parties. Therefore, even if the contract does not include an obligation on the employer to provide work or an obligation on the individual to accept work in return for pay, that individual will be an employee or worker if the contract is, in all other respects, consistent with employee or worker status.

Personal service

This means that the individual agrees to perform the work or services personally. If the individual has the ability to or can send substitutes in their place, this would be considered inconsistent with an employee or worker relationship. There are limits on this, however, so the right of substitution must be genuine and not be significantly restricted (and ideally be used in practice).

Example 3

Beth is engaged as a self-employed electrician for Electricians & Co. Her contract states that she has the right, without the need to obtain Electricians & Co.’s prior approval, to arrange for another electrician to provide the services in her place. In accordance with the terms of her contract on a day where she was scheduled to work, but has a series of personal appointments, she arranges for her colleague Craig to perform what would have been her jobs. Electricians & Co. does not have a problem with that arrangement. An employment tribunal would be likely to find that Beth’s contract did contain a genuine right of substitution clause and, on the basis of this factor alone, it is unlikely that Beth would be deemed an employee or a worker.

Following the Taylor Review,³ the Government committed to a review of employment status and conducted a consultation which closed in June 2018. A formal response from the Government is awaited. In December 2018 the Government published its policy paper, the Good Work Plan which reported on progress but no concrete proposals or reforms have yet been published (see section 4 for more information).

³Taylor, M. (2017) *Good Work: The Taylor review of modern working practices*. Available at: <https://www.gov.uk/government/publications/good-work-the-taylor-review-of-modern-working-practices>

Key points for employers:

- There are three main types of employment status:
 - **Employee**
 - **Worker**
 - **Self-employed**
- There is no definition of 'self-employed' in legislation.
- A person is likely to be self-employed where they provide services as part of their business to an entity or customer.
- The tests used to determine the employment status of an individual (either employee, worker or self-employed) have been developed through case law and will depend on what the contract says and how the arrangements operate in practice.
- Self-employed individuals will have few employment rights, with the terms of the relationship governed by the terms in the contract for services.

Key points for self-employed individuals:

- A person can be both employed and self-employed simultaneously.
- It is important that a person understands their status, as this is what determines an individual's employment rights and their tax obligations.
- A person may be classed as an employee (or more likely a worker) in relation to employment rights but self-employed for tax purposes.

4 Summary of legal rights and protections

This section sets out the legal rights which are associated with each category of employment status. Employment status is important because it determines what legal rights an individual has. An employer can grant an individual additional employment rights under the individual's contract of employment. However, the legal rights referred to below cannot be taken away.

Employees benefit from the most protection, including:

- the right not to be unfairly dismissed
- the right to statutory minimum notice and statutory redundancy pay
- family-related rights
- certain other rights to time off
- protection against discrimination and whistleblowing.

Workers have fewer rights than employees. However, they have a degree of statutory protection which recognises that they are in a subordinate position to the person they work for and so some form of basic protection is required. Consequently, workers have certain rights relating to:

- minimum rates of pay
- rights under working time and whistleblowing legislation
- protection from discrimination.

Self-employed individuals generally only have contractual rights, but they may also be protected:

- from discrimination
- under data protection legislation as 'data subjects'.

The general categories of rights and protections afforded to employees, workers and the self-employed are set out below.

Statutory provisions under the Employment Rights Act 1996

Right/protection	Employee	Worker	Self-employed
Right not to be unfairly dismissed (after two years' service)	Yes	No ⁴	No
Right to receive written statement of terms of employment	Yes	Yes	No
Itemised payslip	Yes	Yes	No
Statutory minimum notice	Yes	No	No
Statutory redundancy pay (after two years' service)	Yes	No	No
Protection from discrimination in the workplace	Yes	Yes	Possibly
National Minimum Wage/National Living Wage (if aged 23 and over)	Yes	Yes	No
Protection from unlawful deduction from wages	Yes	Yes	No
Paid annual leave	Yes	Yes	No
Right to daily and weekly rest breaks	Yes	Yes	No
Pension auto-enrolment	Yes	Yes ⁵	No
Right to be accompanied at a disciplinary or grievance hearing	Yes	Yes	No
Rights under data protection legislation	Yes	Yes	Yes
Whistleblowing protection	Yes	Yes	Possibly
Statutory Sick Pay	Yes	Possibly ⁶	No
Statutory maternity, paternity, adoption leave and pay	Yes	Possibly ⁷	No
Unpaid time off to care for dependants	Yes	No	No
Right to request flexible working	Yes	No	No
Time off for ante-natal care	Yes	No	No
Time off for trade union activities	Yes	No	No
Protection under the transfer of undertakings legislation	Yes	Possibly ⁸	No
Health and safety in the workplace	Yes	Yes	Yes

Protection from discrimination in the workplace – individuals ‘in employment’ are protected against discrimination. The Equality Act 2010 definition of ‘employment’ includes ‘employment under a contract of employment, a contract of apprenticeship or a contract personally to do work’, which could cover self-employed individuals if the contract obliges them to do the work personally.

Rights under data protection legislation – the GDPR, which came into effect in 2018, protects individuals’ information by requiring businesses to be responsible for how they process the data they collect. Self-employed individuals are protected by the GDPR, which extends to data about employees, clients and suppliers.

⁴ From 6 April 2020, workers will also be entitled to receive a written statement of particulars.

⁵ If the worker satisfies the definition of ‘eligible jobholder’.

⁶ The definition for ‘qualifying employees’ under the legislation is wider than under the normal employment status tests and include those whose earnings are liable for class 1 National Insurance contributions.

⁷ The definition of ‘employee’ for statutory maternity, paternity, adoption and shared parental pay purposes is wider than the standard definition.

⁸ The transfer of undertakings legislation defines an employee in slightly wider terms than is normally used for employment protection purposes. The term means any individual who works for another person, whether under a contract of service or apprenticeship or otherwise, although the definition does not include anyone who provides services under a contract for services.

Whistleblowing protection – some self-employed individuals will be protected under whistleblowing protection, for example doctors, dentists, ophthalmologists and pharmacists in the NHS.

Health and safety in the workplace – an employer’s duty, under health and safety legislation, is to protect the health, safety and welfare of not only their employees but also any other individual who might be affected by their business. This includes the self-employed. Employers are under a duty to assess the risks in the workplace and do whatever is practicable to mitigate these risks.

Self-employed individuals should be aware that health and safety legislation may be applicable to them. All individuals have a duty of care to look after their own health and safety in the workplace, but also that of others who may be affected by their actions at work. Self-employed individuals must assess whether the work they are carrying out could pose a risk to others or not. Self-employed individuals should also be aware that where they employ others, health and safety legislation will apply to them.

Upcoming reform

The Government’s Good Work Plan⁹ was published in 2018 in response to the Taylor Review. One of the aims of the plan is to ensure that both employers and individuals have more clarity as to the nature of their employment relationships and associated rights and obligations. Unfortunately, there remains much uncertainty over the Government’s plans for reform.

The Taylor Review proposed a clearer and more consistent definition of “worker” and that workers who are not employees be renamed “dependent contractors”. It also proposed placing less emphasis on personal service and more on control in the context of an employer/worker relationship. The Government said that it would legislate to achieve greater clarity to determine status, but so far it has given little detail about how it intends to do so. The Government has indicated that it intends to develop an online tool to determine status but cannot do this until the legislation has changed. The Government published a standalone consultation on employment status in 2018 but the response to that consultation is awaited, with no timeframe for publication. It remains to be seen whether more concrete proposals will be forthcoming.

Employment status remains a hotly contested political topic and the subject of much scrutiny and lobbying. The COVID-19 pandemic has brought a renewed focus to the issue of employment status. The House of Lords COVID-19 Select Committee report, published in April 2021, has again called on the Government to legislate to clarify employment status

Key points for employers:

- Understanding status is important because it determines an individual’s legal rights and the obligations owed to that individual, as well as how that individual should be taxed.
- Employees have the most extensive legal protection, while genuinely self-employed contractors enjoy the least (although they are entitled to certain rights and protections).
- Status is not static and can change as the working relationship develops over time.
- Be aware of upcoming reforms and developments.

Key points for self-employed individuals:

- Employment status is the key to determining the legal protections a person will benefit from while working.
- Those individuals who are unclear about their status should speak to their employer or the entity which engages them.

⁹ HM Government. (2018) *Good Work Plan*. Available at: <https://www.gov.uk/government/publications/good-work-the-taylor-review-of-modern-working-practices>

5 Employing an individual versus engaging a self-employed contractor – the advantages and disadvantages

Advantages and disadvantages of employee and self-employed status from the employer's point of view

	Advantages	Disadvantages
Employee status	<p>The employer will have a stable workforce that it can rely on to carry out its business.</p> <p>Employee relationships are likely to last for longer.</p> <p>The employer has control over when and how the employees work.</p> <p>Employees are likely to be the most productive members of staff as they can be incentivised by long-term career development prospects and rewards and benefits.</p> <p>The employer will benefit from longer notice periods, which will give it time to plan for replacements.</p> <p>The employer benefits from greater protections from enforceable post-termination restrictions (for example non-compete provisions).</p>	<p>Employees receive the fullest range of benefits, including for example:</p> <ul style="list-style-type: none"> • bonuses • enhanced sick pay • insurances <p>As a result employees are generally the most expensive type of individual to employ.</p> <p>If the employer ever wishes to reduce headcount, it will be more procedurally difficult and more expensive to dismiss employees.</p> <p>The employer will usually be expected to invest in the employee's career development and training, which can be an added expense.</p> <p>The employer will need to provide an employee with a workstation and equipment.</p>
Self-employed status	<p>Self-employed contractors are usually cheaper because the company will only need to pay for the time that they are working. The company will also not have to provide any form of additional benefits or invest in the employee's development unless there is a specific requirement in the contract for services.</p> <p>There is flexibility in the relationship so the person can be engaged during busy periods, while during the business's down time there is no continuing obligation on the employer to provide work or pay the individual.</p> <p>The employer may be able to hire individuals with the specialist skills required for specific projects that the company is undertaking.</p> <p>The employer will not be obliged to provide a space in the work environment for the individual, thereby also saving costs if the individual chooses to work from home.</p> <p>It is easier to end contractual relationships with contractors than it is end to those with employees.</p>	<p>There is no guarantee that a self-employed contractor will be available and/or willing to do the work when required.</p> <p>It is harder to develop a relationship between the company and the individual, particularly if the project is short.</p> <p>The costs of a specific project may be greater than they would be if existing employees carried out the project work alongside their existing duties.</p> <p>The employer will potentially have less stability in the workforce.</p> <p>The employer will have less ability to protect itself and its business as self-employed individuals are less likely to be subject to post-termination restrictions.</p> <p>A self-employed contractor has more control over where/when and how the work is delivered. This may be a different pattern from the one the employer is used to.</p>

Advantages and disadvantages of employee and self-employed status from the individual's point of view

	Advantages	Disadvantages
Employee status	<p>This type of status offers stability and usually a degree of permanency. This is because the individual would normally be an employee and so a part of the employer's core workforce.</p> <p>An individual will usually have greater access to development and learning as part of these will usually be offered by the employer.</p> <p>There tends to be a better sense of cohesion with other individuals employed at the organisation as employees are usually fully integrated into the employer's organisation. In practice this means that an individual will have clear reporting lines; they will also be part of a permanent team and will have access to their own workstation and equipment.</p> <p>Employees will also be subject to and benefit from the employer's policies and procedures.</p> <p>Individuals who are employees will also receive the widest range of benefits. For example, bonuses, insurances and enhanced sick pay.</p>	<p>If the individual wishes to leave the employer's employment, it is likely that the individual will have a notice period that they will have to serve. The length of a notice period can vary, but it is unlikely to be less than one month.</p> <p>When a person leaves an employer's employment they may be subject to post-termination restrictions. These can include non-compete and non-solicit provisions in order to protect the employer's business. These restrictions can be very onerous and can prevent an employee working for a competitor for up to a year.</p> <p>An individual will have less flexibility over the manner in which they work as employers usually require employees to work certain hours and have a set pattern of work.</p> <p>Employees can usually not refuse to do work required under their contract of employment.</p>
Self-employed status	<p>Individuals will have more control over what, how, where and when they do their work, so long as any deadlines are met.</p> <p>Individuals will have the ability to turn down work if they don't want to do it.</p> <p>There is the potential for individuals to receive a higher rate of income – in many cases; a person's hourly rate can be more than an employee's hourly take-home pay.</p>	<p>There is no guarantee of work being supplied and therefore no guarantee of a person being paid.</p> <p>There is the potential to earn less without the security of regular hours in employment.</p> <p>There is no access to employee benefits or a workplace pension. This could have significant impact on a person's outgoings.</p> <p>There are very few employment law rights and protections.</p>

Key points for employers:

- There are cost advantages for employers hiring self-employed contractors in that they do not have to pay the individual beyond the length of the project. Moreover, unless the contract for services provides for it, there will be no obligation on the employer to provide additional benefits such as a pension. Employers can also recruit self-employed individuals who are specialists in their field to lead or conduct one-off projects within the business. It is also easier to end relationships with self-employed contractors.
- There are advantages also in hiring an employee. The employer can ensure that it will have a stable workforce – employer–employee relationships tend to last longer than those with self-employed contractors. The employer can also be sure that it will retain control over its workforce. Employees also tend to be more engaged and can be incentivised with long-term plans and are more actively involved in the life of the business. The employer will also have the ability to protect itself through the use of post-termination restrictions in its employment contracts and longer notice periods.
- An individual's employment status is determined both by the provisions in the contract and also how the working arrangement operates in practice. Employers need to be aware that employment arrangements and an individual's employment status can change over time.

Key points for self-employed individuals:

- Self-employed individuals will retain more control over the parameters of their working lives and the working relationships that they enter into. This form of work can be more flexible and more lucrative. However, it also has the potential to be more uncertain and insecure – genuinely self-employed individuals do not benefit from many employment law protections.
- Employees benefit from stability in their working lives. Being an employee brings with it a degree of certainty as the individual will be a part of the employer's core workforce. There will also be more opportunities to develop professionally and employees receive the widest range of employer benefits. Employees will also benefit from the employer's policies and procedures (as well as being subject to them) and the widest range of employment law rights.
- An individual's employment status will depend on both their contract of employment (or contract for services) and how the working arrangement actually operates in practice.

6 Tax and contractors

This section looks at the tax position in relation to contractors and freelancers with a particular focus on the IR35 reforms that came into force in April 2021.

Keep up to date with the latest developments with the CIPD's [guide on the IR35 implications for people professionals](#)

And the Government's guide on [understanding off-payroll working \(IR35\)](#)

As stated above, for tax/NICs purposes, an individual is either an employee or self-employed. In addition, there are circumstances in which a contractor may be deemed to be an employee for tax/NICs purposes even if the contractual relationship between the parties is one of self-employment.

The tests for determining whether an individual is employed or self-employed for tax/NICs are very similar to the tests used for employment law purposes (see section 3). However, for tax/NICs purposes no one factor is dominant – it is a case of looking at the circumstances as a whole.

Individual contractors

Where a contractor provides their labour to a client directly as a self-employed individual, there is a risk that HMRC could subsequently re-categorise the contractor as an employee. If HMRC successfully re-categorised a contractor as an employee, the client would be liable for PAYE and employee and employer NICs arrears, generally for the previous six tax years (although the client would be able to offset any income tax and NICs paid by the contractor on their fees) together with interest and penalties.

Special rules apply where an individual contractor provides their labour to a client via an agency. Generally in those circumstances the contractor will be deemed to be an employee of the agency for tax/NICs purposes (resulting in an obligation on the agency to operate PAYE/NICs), unless the agency is able to show that the contractor is not subject to the right of supervision, direction or control by any person.

Contractors providing their labour via a personal services company or other intermediary

Historically, many contractors, rather than providing their labour to their clients directly, contract with their clients via a personal services company (PSC). A PSC is a company managed, controlled and owned by the individual.

Traditionally, there have been a number of advantages for the contractor of using a PSC: it may make it easier for the contractor to obtain work; it gives the contractor the benefit of limited liability; and it may enable the contractor to make tax savings by paying themselves by way of dividends in addition to salary. Traditionally there have also been benefits for clients in engaging a PSC rather than an individual contractor, as it can reduce the risk of the contractor being considered an employee of the business for employment law purposes; also, subject to some limited exceptions, it currently protects the business from the PAYE/NICs risk associated with HMRC subsequently re-categorising an individual contractor as an employee.

However, some years ago HMRC, concerned by the perceived loss of tax through the use of PSCs and as part of its clampdown on disguised employment, introduced IR35. IR35 applies where an individual personally provides labour to a client via an intermediary such as a PSC, and:

- ignoring the existence of the intermediary, the individual would be an employee or office-holder (for example a director) of the client, or
- the individual is an office-holder of the client and the services they provide through the intermediary relate to that office.

What does IR35 entail?

Before April 2021, where IR35 applied, it was the intermediary (PSC), rather than the client, who was responsible for considering whether the arrangements fall within IR35 and, if so, accounting for PAYE and NICs on deemed employment income. However, since April 2021, it is the client – rather than the PSC or intermediary – who is responsible for assessing whether IR35 applies.

The client must notify the contractor, the intermediary (PSC) and any agency with which the client is contracting of its IR35 determination, together with its reasons, by means of a status determination statement. The client must also provide a dispute resolution procedure giving the contractor the right to challenge the client's decision if they wish to do so. The client must consider any evidence provided by the contractor and notify the contractor of its decision (and the reasons for it) within 45 days of receiving the contractor's objections.

If the client determines that IR35 applies, the fee-payer – that is, the entity that has the contractual relationship with the intermediary (PSC) – will be required to deduct PAYE/ NICs from the fees it pays to the intermediary (PSC) (excluding VAT) and account for employer NICs and the apprenticeship levy. The fee-payer will be the client if there is no UK agency in the labour supply chain.

If the client determines that IR35 does not apply, the fee-payer can continue to pay the intermediary (PSC) gross.

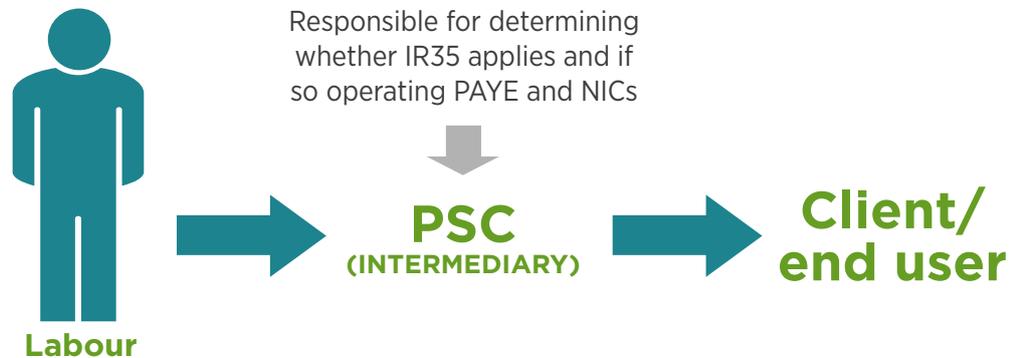
“Small” clients are exempt from these rules. There are special rules (including anti-avoidance rules) for assessing whether a client is small for these purposes, relating to financial performance and employee headcount.

Similar rules have applied in the public sector since April 2017.

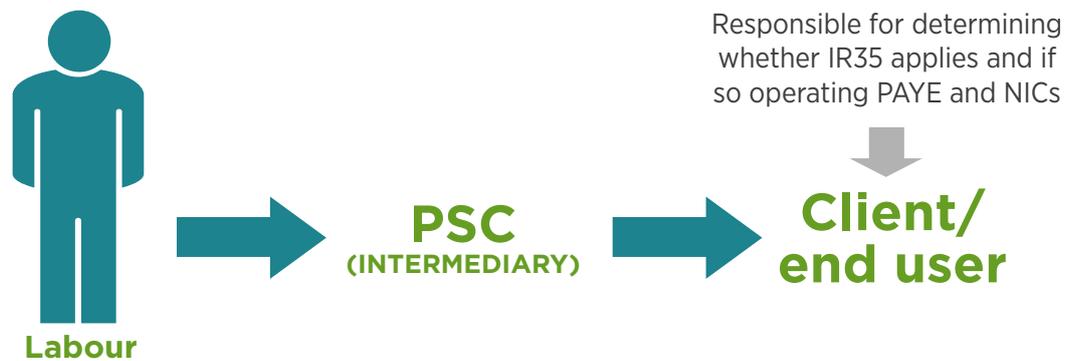
The IR35 rules only apply for tax and NICs purposes. The new rules do not affect status for employment law purposes.

Further, since April 2021, the off-payroll working rules in the Income Tax (Earnings and Pensions) Act 2003 (ITEPA 2003) now apply to medium and large private sector entities with a UK connection. These rules are relevant when engaging an individual to provide consultancy services via a PSC. They apply to payments made on or after 6 April 2021 for services supplied on after that date. In practice, the extension of these rules may result in fewer individuals being engaged to provide consultancy services via a PSC.

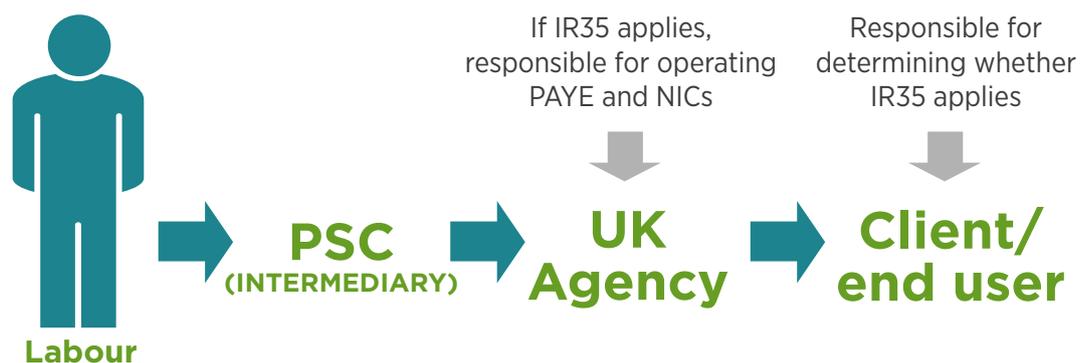
IR35 - pre-April 2021



IR35 - post-April 2021. No UK agency in the labour supply chain



IR35 - post-April 2021. UK agency in the labour supply chain



What businesses must do

Outlined below are five steps businesses must take to account for IR35. Ideally, businesses will have undertaken these steps well in advance of the implementation of IR35 in April 2021. However, if that has not happened, these steps must be followed immediately.

Step 1

Identify individual(s) in the organisation who are responsible for ensuring that the business is compliant with the new IR35 regime and ensure they are suitably trained in making IR35 determinations. These individual(s) will likely either be in HR, finance or legal.

Step 2

Identify those contractors supplying their labour through a PSC or other intermediary.

Contractors could be providing labour:

- (a) direct as PSCs (that is, the contractor is a limited company)
- (b) direct as sole traders (that is, the contractor is an individual)
- (c) via a supply agency or other employment business as well as a PSC
- (d) via a supply agency or other employment business as sole traders.

For the purposes of IR35, you need to identify those contractors who fall into categories (a) or (c).

Step 3

Audit the arrangements to assess which of the contractors fall within IR35 and which fall outside IR35. Ensure a clear and consistent methodology is used.

HMRC has a Check Employment Status Tool ('CEST') at www.gov.uk/guidance/check-employment-status-for-tax to help businesses make the IR35 determination. While businesses are not obliged to use CEST, it has the advantage that the CEST result is binding on HMRC provided that the relevant information has been correctly inputted into CEST. However, CEST has been heavily criticised. In some cases it does not provide a determination and in others the determination seems heavily biased towards a finding that IR35 is applicable. While the Government has reiterated its commitment to improving CEST and also putting in place an education and support package for businesses, businesses should have a robust system in place for assessing employment status, particularly in those circumstances where the business and/or the contractor disputes the CEST result.

Step 4

Communicate the IR35 determination and the reasons for it to the contractor, their PSC and the agency.

Step 5

Consider any documentation and systems changes that are required. For example:

- Review internal processes for obtaining approval to use contractors and on-boarding processes. This could include, for example, having an authorised list of supply agencies and ensuring that there is a signed contract with the PSC or supply agency before any work is done.
- Update template contracts for PSCs and supply agencies to incorporate IR35 changes and tax and status indemnity and warranty protections as appropriate. Ensure that your contracts reflect the status determination.
- Ensure that payroll and accounts payable systems can deal with the implications of a determination (and that VAT and PAYE/NICs can both be operated where appropriate).

Key points for engagers:

- It is notoriously difficult to determine employment status. Taking a ‘blanket approach’ of applying IR35 in all cases risks legal challenges from both the individuals and those responsible for paying them. Accordingly, ensure that you have a robust procedure in place for determining employment status.
- Clear communication with the contractor is vital. If you determine that an arrangement is within IR35 and the contractor is business-critical, budget for the additional costs.
- Making the assessment and implementing changes to procedures and documentation will take time.
- Consider whether contractors using PSCs are truly the right solution for your resourcing needs.

Key points for contractors:

- Seek independent advice on the implications for you.
- Expect to engage in negotiations about status and pay with entities that you already have an existing contractual relationship with.

7 How to decide what contract to use

This section considers, in brief, the differences between an employment contract (a contract of service between an employer and employee) and a contract for services (a contract between a business and a self-employed individual).

Employment contract

This is in effect a contract of service between an individual (employee) and a business (employer). The difference between this and a contract for services is the fact that in providing a ‘service’ a person is in effect providing themselves permanently to that business. An employment contract should include standard contractual provisions, including in relation to notice, pay, holiday, benefits, and so on.

Contract for services

A contract for services is a formal, legally binding agreement between a business and a self-employed individual which reflects a contractor–client relationship. The contract should relate solely to the specific services that the individual has been contracted to carry out. Where a person is engaged with a business under a contract for services, they are unlikely to benefit from many employment rights or other benefits, such as access and contributions to pension schemes. Nonetheless, employers should be aware of the factors that could indicate worker or employment status.

Recent and upcoming reform

Please refer to [section 6](#) above for information on IR35 and [section 4](#) above for information on the potential reforms under the Government’s Good Work Plan.

8 Summary

Key points for employers:

- There is no definition in legislation of 'self-employment'. However, it is one of the three main types of employment status. The other two are employee and worker.
- Employment status is important because it determines what rights and obligations an individual is owed and owes.
- There are two different regimes which relate to employment status: (1) the tax regime; and (2) employment rights. An individual may be considered 'self-employed' for tax purposes but may acquire certain employment rights if they are considered a worker for employment status purposes.
- An individual's employment status will be determined partly by what the contract says, but mostly by how the working relationship operates in practice and the extent to which the relationship satisfies any statutory definitions of employment status.
- The tests to establish the correct status of an individual – be that employee, worker or self-employed – have been developed by case law. It is a highly fact-specific area of law – all cases will turn on their individual circumstances.
- Employment status is not static and it can change over time.
- There are advantages and disadvantages to engaging self-employed contractors. It is usually cheaper and the employer has more flexibility over who they hire. However, there is no guarantee that a self-employed contractor will be available or willing to do the work required when required.
- There are advantages to employee status for an employer, such as maintaining a stable workforce over which an employer will retain significant control. However, disadvantages include the increased costs associated with employing individuals and ultimately ending those relationships.
- A genuinely self-employed contractor will be engaged by a business under a contract for services.
- Businesses should be aware that when engaging a contractor via a personal services company, they will need to undertake an assessment of their status to determine whether IR35 applies (and understand the tax implications that would follow).

Key points for self-employed individuals:

- There is no definition in legislation of 'self-employment'. However, it is one of the three main types of employment status. The other two are employee and worker.
- If an individual is unclear about their status, rights or obligations in the workplace, they should ask their employer or engaging entity for clarification.
- An individual may be categorised as self-employed for tax purposes but be considered a worker under employment law and so able to benefit from certain statutory employment rights.
- Whether an individual is considered to be genuinely self-employed or a worker will depend on the terms of the contract between the individual and the engaging entity and how the working arrangement operates in practice.
- If the way in which the arrangements operate in practice differ from what is set out in the contract, individuals may not be treated in law as having the status they think they do. This will then affect the legal protections available.
- Employment status is the gateway to determine what employment rights and duties are applicable.
- While being self-employed offers many advantages, including flexibility and control over their work, there are also disadvantages, including that the majority of employment law rights will not be applicable.
- IR35 impacts individuals who supply services through a PSC.

9 Appendix: case law

Employment status

Pimlico Plumbers Ltd and Mullins v Smith [2018] UKSC 29

A plumber, Mr Smith, had been engaged by Pimlico Plumbers for six years. He suffered a heart attack and requested to reduce his working days from five to three. The company refused and terminated his agreement. Following this, Mr Smith brought a number of claims, for which his employment status needed to be determined.

Mr Smith had entered into two agreements with the company which stated that he was not obliged to be offered work and was not obliged to accept work. However, the company manual imposed a number of requirements on him, including the obligation to wear a uniform, carry an ID card and use a company mobile phone and van when working. He was expected to work five days a week for 40 hours. There was no express right of substitution in his contract, although in practice he had the right to decline jobs or send another company staff member if he could not attend.

The Supreme Court focused on two of the tests: whether Mr Smith was obliged to carry out his services personally, and whether Pimlico Plumbers was a client or customer of Mr Smith's business. It found that the contract did involve an obligation of **personal performance**. Although there was a right to substitution, this was limited. It also found that Pimlico Plumbers was not a client or customer of Mr Smith. There was a degree of **control** exercised over him which was incompatible with this finding.

The Supreme Court therefore upheld that Mr Smith was a worker for the purposes of the Employment Rights Act 1996 and the Working Time Regulations 1998, as well as an employee for the purposes of the Equality Act 2010. However, as with most employment status cases, the decision was highly fact-specific and does not in itself clarify this area of the law. Despite this, it does again highlight the fact that although the contractual terms may specify one thing, it is essential to look at this in the context of the working reality of the relationship.

Uber BV and others v Aslam and others [2021] UKSC 5

In 2016, various Uber drivers brought claims for which they needed to be workers in order to succeed. Uber argued that the drivers were not workers and its terms stated that it acted as an agent for self-employed drivers, although it did impose certain requirements as to how they should provide their services. The Supreme Court unanimously decided that drivers engaged by Uber are workers rather than contractors.

The Supreme Court firstly rejected Uber's argument that it operated as a booking agent for drivers. It went on to say that, in status cases, individuals are claiming statutory employment rights protection. This general purpose of this legislation is to protect vulnerable workers. The fact that a business can usually dictate contractual terms gives rise to the need for statutory protections in the first place. This means that the task for tribunals is not to identify whether a business has agreed under its contracts to pay, for example, national minimum wage or holiday. Instead, their task is to determine whether individuals fall within the definition of a "worker", irrespective of what had been contractually agreed. The approach must be one of "statutory interpretation, not contractual interpretation". It could not be right that a business could use its contracts to determine who qualifies for protection.

The Supreme Court concluded that, although the Uber drivers had autonomy and independence in some respects, the tribunal's findings justified its conclusion that the

drivers were workers. Uber's control over their remuneration was of particular importance. The drivers' ability to charge less but not more than the fare suggested by Uber meant that their notional freedom was of no benefit to them. Overall, drivers' services were in fact defined and controlled by Uber.

The Supreme Court also decided that Uber drivers were working whenever they were logged in to the app. Particular weight was placed on Uber's practice of logging out drivers who failed to accept bookings and keeping them temporarily logged out even if they were ready to work. This pointed to there being a penalty for drivers who failed to comply with an obligation to accept a minimum amount of work when logged in. The existence of this obligation, even when drivers were not performing a booking, meant that drivers were working whenever logged in.

Like other status cases, this judgment is fact-specific. However, the judgment's emphasis on the need for "statutory interpretation, not contractual interpretation" is potentially significant. It is likely to sit alongside the decision in *Pimlico Plumbers v Smith* as the leading guide to judicial decision-making on this topic. We can also expect to see some businesses make adaptations to their models - for example, by providing greater freedom to drivers to reject orders without facing sanctions, or potentially restricting the times when individuals can log in.

Autoclenz Ltd v Belcher and others [2011] IRLR 820 SC

In one of the defining cases for employment status, the Supreme Court upheld a Court of Appeal decision that car valeters, whose contracts described them as self-employed, were in reality employees.

The valeters had been issued with contracts that included a substitution clause, allowing them to offer an alternative person to complete the work. The contract also specifically said that there was no obligation on the valeters to provide their services and no obligation on Autoclenz to engage their services, that is, no mutuality of obligation. As set out in section 3 above, these are two of the key features that can help demonstrate that an individual is genuinely self-employed.

However, despite this, the Supreme Court found that the evidence of the real relationship pointed to employment status. This was based on the findings of fact that the valeters were required to perform the services defined in the contract within a reasonable time and in a good manner; that they would be paid for this work; that they were in fact obliged to carry out the work that was offered to them by Autoclenz; they personally had to do the work; and they could not in practice provide a substitute.

The Supreme Court confirmed that, when determining an individual's employment status, employment tribunals may disregard terms included in a written agreement where they do not reflect the genuine agreement of the parties. The focus of the tribunal's enquiry should be on the 'actual legal obligations of the parties'.

Independent Workers Union of Great Britain v RooFoods Ltd (t/a Deliveroo) TUR1/985 (2016)

The Central Arbitration Committee (CAC) had to decide whether riders engaged by Deliveroo under contracts describing them as self-employed were actually workers, for the purpose of the right to compulsory trade union recognition. The CAC determined that they were genuinely self-employed.

The decision centred around the question of whether there was an obligation of personal service. The contract between Deliveroo and the riders allowed the riders to provide a substitute, engaged and paid directly by them, to perform a delivery. Substitution was rare and mostly unnecessary, given their flexibility to decline jobs without penalty. It also

carried regulatory and reputational risks for Deliveroo, since the substitutes would not have gone through their selection and training process. However, the CAC found that these factors did not mean that the substitution provisions were not genuine. Neither did it matter if Deliveroo's reason for including the substitution clause was to defeat arguments as to worker status, provided the right was genuine. The CAC heard evidence of substitution being used in practice. The "almost unfettered right of substitution", which the CAC found was genuine, was fatal to the union's argument that the contract was one of personal service.

Consistent with such cases being highly fact-specific, the CAC commented that the circumstances of this case were different to those in other gig economy cases (including the Uber case). Nonetheless, it is a decision that bucked the trend in gig economy cases, which tended to find worker status.

The IWGB lost its judicial review challenge in the High Court.

IR35 and tax status

Albatel Limited v HMRC [2019] UKFTT 195 (TC)

The First-tier Tribunal (Tax Chamber) held that IR35 did not apply to an intermediary company that supplied the services of the TV presenter Lorraine Kelly to her client, ITV. This was on the basis that a hypothetical contract between Ms Kelly and ITV would not have constituted a contract of employment.

The tribunal concluded that the services supplied were the 'brand and personality' of Ms Kelly, and therefore the terms of an arrangement between her and ITV would have amounted to a contract for services, not an employment relationship. In particular, the tribunal focused on the fact that Ms Kelly carried out a range of work for other clients during the relevant periods and that the intermediary company she used to provide those services was clearly in business on its own account.

Another factor that the tribunal considered was that ITV did not have control over Ms Kelly's work. She had significant control over the programmes made and was involved in a number of key decisions. The tribunal said that *'in looking at the overall picture we were wholly satisfied from the evidence that contrary to being part of a jigsaw, Ms Kelly was the jigsaw.'*

MDCM Ltd v Revenue and Customs Commissioners [2018] UKFTT 147 (TC)

Mark Daniels provided management services to construction companies through his personal services company, MDCM Ltd. If a construction company needed these services, it would contract with a recruitment company that would then enter into a contract with MDCM Ltd. The construction company would also enter into a separate contract with the recruitment company for the services.

In 2016 HMRC determined that the contractual arrangements in place were caught by IR35 and that Mr Daniels should be treated as an employee of the construction company he provided services to. It issued determinations to MDCM Ltd setting out its liability to pay PAYE and National Insurance contributions.

Mr Daniels appealed to the First-tier Tribunal (Tax Chamber). The tribunal found that various factors were all indications of employment status – Mr Daniels did not have to supply his own equipment, there was a requirement for personal service, and he took on no other financial risks. However, it concluded that other factors were all inconsistent with employment – the nature of the payment arrangements (there being a flat rate per day), the fact that there was no requirement for either party to give notice to terminate, and the fact that Mr Daniels had no entitlement to employee benefits. This meant that Mr Daniels would not be an employee under the hypothetical contract required by IR35.



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