

Extension of IR35 to private sector, Part 3 – just a question of self-control (UK)

Article By:

David Whincup

So you have identified your individual contractor and you want to agree terms of engagement with his personal services company which give you the best possible chance of avoiding direct liability under IR35 when it changes in 2020. Here are some preliminary tips:

- Ideally, ask the contractor (care of his PSC) to provide his own terms as a starting point for your agreement. Even if you then negotiate these almost out of existence, it still shows an arms-length relationship akin to a proper commercial agreement, and not an employment contract. If the contractor does not have any terms of business then this will obviously create a question over whether he is genuinely in business on his own account (see Part 2 of this series [here](#)). If he does have terms, be prepared to be flexible in those you agree – you may be more comfortable with your own confidentiality wording, for example, but though the PSC's is different, is it necessarily worse? If you can agree the PSC's wording in any respect, then you should.
- If you do use your own terms, consider writing these from scratch as a commercial agreement rather than amending your template employment agreement. There are two main reasons for this – first, large parts of most employment contracts are in there to mitigate prospective unfair dismissal liability on termination, which is obviously irrelevant for people who are not employees and so do not have that protection. Second, somebody in Admin is bound to miss one of the references to “employment”, “salary”, or “benefits” in the amendment process and so leave you with a glaring cosmetic own-goal from the start. How can you say that the contractor could not even hypothetically be your employee if you have engaged him on what was clearly once a contract of employment?
- What we are trying to avoid here is the contractual imposition of unnecessary supervision, direction or control. These are the factors to which HMRC will attach great weight in the question of whether your contractor could be your employee if it were not for the PSC in the middle. HMRC guidance defines “supervision” as overseeing someone to ensure that they are doing the work they are required to do and to the correct standard. “Direction” is making a person do the work in a certain way by instructing or advising them on how it is done, and “control” involves someone having the authority to move your contractor from one job to another.
- In practice, this means that your consultancy contract can and should go into very considerable detail about the task to be performed (the “what” and the “when” of it), but you

should limit so far as possible any terms about the “how”. That is a matter for the consultant to determine in the exercise of his professional judgement.

- Remember that you do not need a lot of contractual obligations around the “how” and broader behaviours because if the work or conduct is objectively substandard, you can (i) terminate the engagement without unfair dismissal risk; and (ii) if necessary, sue the contractor company under the Supply of Goods and Services Act 1982, Sections 13 or 14. These provisions imply terms into B2B contracts for the supply of services that those services will be provided with reasonable care and skill and (where no time is stated) within a reasonable period.
- That means also the end of any suggestion that the contractor can be put on to different work without his agreement. Therefore there should be none of that “...and anything else we tell you” flexibility wording you often see at the end of employees’ job descriptions. The tighter and more specific the remit (the “what”) of the contractor’s appointment, the better. By all means propose and agree new assignments with your contractor after he has started, but do so formally and via the PSC. In other words, produce an amended consultancy agreement or variation letter as you would with any other arms-length commercial arrangement when changing the task specification.
- Last, remember that what the contract says is only the starting point for HMRC’s investigations. If in practice the consultant *is* actually directed, supervised and controlled (especially if backed up by any sort of threat or other form of compulsion outside the bare terms of the contract), then all your careful drafting can still come unravelled. If it is at all practicable, consider having your relationship with your consultant visibly handled by the Legal, Procurement or Commercial departments rather than HR and ordinary line management.

Next week, Part 4 – defining contractor roles.

© Copyright 2024 Squire Patton Boggs (US) LLP

National Law Review, Volumess IX, Number 51

Source URL: <https://www.natlawreview.com/article/extension-ir35-to-private-sector-part-3-just-question-self-control-uk>