

Extension of IR35 to Private Sector, Part 2 - keeping the right company

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The proposed extension of IR35 in April 2020 will make private sector businesses liable to deduct tax on payments to individual contractors operating through personal service companies if the individual would be deemed their employee if it were not for the PSC.

[Short but potentially important diversion – the test here is employee for tax purposes, not employment rights purposes. The distinction is important for so long as it lasts (there are moves to harmonise them) because it is the difference between showing that the relationship could be one of employment (tax) and that it could only be so (employment rights). This means that even where that hypothetical contract between individual and end-user is found to be one of employment for IR35 purposes, that does not actually make that person your employee.]

A key way to show a person not to be an employee for either purpose is to demonstrate them to be in business on their own account, i.e. to be carrying on some trade or profession of which the end user is simply a client. Contracts entered into with a PSC in such circumstances will, at least initially, be much less likely to be caught by the IR35 extension.

So if you are thinking about appointing someone through their PSC, what indicators should you be looking for? What are the signs of someone in business on their own account? No rocket science here – all the obvious stuff is relevant. Keep an eye open in particular for:

- Does the PSC have its own terms of business? An employee tends to sign the contract he is given by the employer, while a business tends to have its own terms to be agreed by the client, even after some negotiation. It will make the PSC look more distant and less integrated if your contract with it starts with its terms, and is not just the same template you used last time (especially if that template was itself clearly derived from your standard terms and conditions of employment).
- Does it have a logo and corporate letterhead, i.e. a “presence” beyond its mere existence as a legal entity deep in the crypts at Companies House?
- Does it advertise that presence to the wider world? Any appearances in the trade press, published articles in its name, entries in Google and other online Yellow Pages equivalents? Any online reviews or social media entries in its own name? Any marketing materials or brochures showing particular expertise in the area you are looking to use it in? Does it have its own phone number or website?
- Does it have any other staff besides the individual who will be supplying their services to you (excluding the almost inevitable silent spouse as “company secretary”)? If it contracts with you, will it have any other clients on the go at the same time?
- Check its filing history at Companies House – is there evidence of proper accounts, other directors and staff? How long has it been operating in its current form (the longer the better) and do look out for evidence that you might be its first and only customer, since that says either that the individual is not very good or that they have only just gone into the contracting business and so won't have any record of operating a trade or profession.

Earlier in this post I said that showing your new contractor's PSC to have been a genuine business would provide



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protection “at least initially”. Even if all these prior pointers are present and correct for the PSC you contract with, that protection is not indefinite. If you then treat the individual over an extended period as if they were an employee (in terms of control, integration, exclusivity of service, etc.), then the fact that they were at one point in the past clearly operating as a proper business will not prevent HMRC from determining that circumstances have changed.

Stay tuned for Part 3 – shaping your contractor’s role.

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