

THE NATIONAL LAW REVIEW

Extension of IR35 to the Private Sector, Part 12 - the Benefits of not Following your Own Procedures (UK)

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We have cautioned earlier in this series about allowing your PSC contractors to become integrated into your business so far as their outward projection to clients is concerned – describing them as part of “our team”, giving them business cards, company phones or invitations to the client party, and so on. Integration is something you actively aim for in respect of your employees (expect significant morale problems if you do not) and so is absolutely not something you want where you are trying to side-step “new” IR35’s hypothetical employment status from next April.

But integration has inward-facing aspects too and these will be just as telling if HMRC comes calling. Application to PSC contractors of the same policies and procedures as you use for your employees is clearly to be avoided so far as you reasonably can. Some examples:

- Induction and Training – Remember that you are notionally hiring your PSC contractor as an external resource on the basis of his specialist skills. The amount of training/induction you do should therefore be limited to the essentials of functioning safely in your building – locating the coffee machine, the loos and the fire escape, say. You can probably just about get away with training on any particular equipment which you use which the contractor could reasonably not have seen before, even as a specialist, but not with sessions on the company’s values, mission-and-vision stuff or the technical aspects of his role. As a contractor he should know about the latter already and he will care about the former probably even less than your employees.
- Administrative Policies – Try not to apply expressly to your contractors your procedures around expenses claims, holiday booking, sickness reporting, IT/email access, etc.
- Contractor Grievances and Complaints – These should be directed via the Legal, Commercial or Procurement teams and nowhere near HR unless they include allegations of discrimination or other misconduct by your employees. There should be no suggestion that the normal grievance procedure applies in any way. That is particularly the case in relation to any possible appeal since that is not a usual component of B2B dispute resolution methods but rather an industrial relations construct for employees only.
- Performance and Conduct Management – Genuine contractors have no general right to be warned about possible adverse consequences (including the termination of their contract) if their performance or behaviour is substandard. That again is the product of case law arising out of the unfair dismissal regime, which obviously applies to employees only. Your contract is with the PSC and can be terminated at any time by the notice provisions which it will inevitably contain. But what if you are unhappy about a particular aspect of your PSC contractor’s work but not so much that you want the cost and disruption of terminating and retendering all the services in question? Does delivering an unmistakable carpeting to the contractor mean that you have inadvertently used a disciplinary procedure and so brought deemed employee status a little closer? Not if dealt with carefully, so:

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- if there is a complaints process within the PSC contract, use that;
- address your complaint to Joe Soap Limited, not Joe himself;
- ensure that any deficiencies are required to be corrected in Joe's time (i.e. unpaid) and not on your ticket as would be the case for an employee;
- don't offer any right of appeal; and
- don't let force of habit lead you to use any employee-type template or words like disciplinary, warning, PIP and so on. As with grievances, it is also better that any such improvement notice comes from Legal, Commercial or Procurement, not HR.

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