



# Unlocking IR35

Helping you navigate off-payroll legislation  
in the private sector

By Rullion | November 2019

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Sam Thorne, Practice Manager, London

# Are you IR35 ready?

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**From April 2020, legislation around you how engage contingent workers is changing. If you fail to comply, you could be liable to extra costs and exposed to risk.**

IR35, or off-payroll working legislation, was introduced in 2000 to ensure all contingent workers were paying the correct amount of tax and NIC.

Previously, a worker was responsible for determining their own IR35 status. However, from April 2020, this responsibility will shift to the end user (the organisation that engages the contingent worker). This means the end user will have to assess their contingent workforce to determine whether the individual is inside or outside IR35 legislation. If a worker is deemed to be inside IR35, they'll be subject to tax and NIC deductions – which will reduce their take home pay.

As the end user, you'll be obliged to share the IR35 determination with the worker and other entities in the supply chain i.e. your recruitment partner. You'll need to demonstrate you've taken "reasonable care" when carrying out the IR35 assessment.

With over 40 years' experience in the recruitment sector, we've guided businesses both large and small through various legislative changes. Our expert team provides a complete solution that protects your organisation and ensures that you have a compliant workforce.

# How to gather data on your contractor population

Lorena Calimanescu,  
Recruitment Resourcer,  
London



**Before you undertake any IR35 assessments, you should begin by mapping out your contingent landscape, gathering insight on your current contingent workforce and identifying any hidden contractors.**

You should gather insight on your current contingent workforce and identify any hidden contractors. Failure to do so could result in significant financial penalties from HMRC as you may miss contingent workers in your IR35 process.

**You'll need to complete an audit, capturing data and gathering insights into your current contingent workers, identifying:**

1. Who exactly are your current contingent workers?
2. What is their pay rate?
3. How long have they been on assignment for?
4. What is the end date of their assignment?
5. What is their current employment status?
6. Are there other intermediaries in the supply chain?

**We've created a template which will help you quickly and easily enter your contingent workforce data, which includes sections on:**

- Requirement title
- Agency name
- Start and end date
- Department and location
- Contractual status
- Pay rate and unit
- Agency mark-up and charge rate

[Download template >](#)

# How to determine an individual's employment status

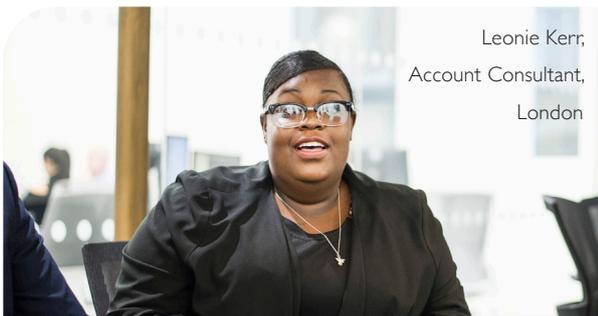
**Once you have a complete overview of your contingent workforce, you'll need to start assessing whether individuals are inside or outside IR35.**

As the end user, you'll be responsible for providing a Status Determination Statement for each contingent worker and demonstrate you've taken "reasonable care". HMRC use various factors to establish the employment status of a contingent worker, including control, substitution and mutuality of obligation.

## Control

One of the most important factors when determining a contingent workers' status is around the level of control. Do you control where, when and how an individual undertakes tasks on their assignment?

It's important that a worker can demonstrate a level of autonomy when undertaking an assignment, as opposed to being under direct supervision by the end client. A self-employed worker should have more influence over how they complete tasks, being provided with milestones to hit, rather than a list of directions.



Leonie Kerr,  
Account Consultant,  
London

### Key signs to watch out for:

- Line manager supervision
- Defining when a contingent worker works
- Provisions for holidays and sick pay

## Substitution

One of the biggest factors when determining whether a contingent worker is inside or outside of IR35 is the right to provide a substitute. If a worker misses work for whatever reason, do they have the right to provide a substitute?

An employee provides a personal service to their employer – if they can't attend for whatever reason, there's no obligation to provide a substitute. However, a business provides a service to the end user, and therefore are able to provide a substitute.

Whilst other factors will come into play, if a worker doesn't have the right to provide a substitute, they are more likely to be inside IR35.

## Mutuality of obligation

A mutuality of obligation exists when the end user is obliged to provide paid work and the contingent worker is obliged to accept and complete the work. This situation is typical of an employer-employee relationship. However, if a worker is genuinely operating via limited company, they'd expect the end user to hire them to undertake a specific task, with no expectation of further work.

The question of mutuality of obligation arises not during the course of the initial contract, but when this contract expires. For example, if a contingent worker has a rolling contract opposed to a fixed-length contract, this could indicate a mutuality of obligation exists.



## Other factors include:



### Financial risk

Is there a high level of risk involved in the individual's work? If most of the risk lies with the end user, this indicates employment. To be deemed self-employed, any errors made during the contract must be rectified in the worker's own time.



### Provision of equipment

Unless there is a sound reason, the worker should supply their own equipment.



### Employee benefits

A true self-employed worker doesn't receive employee benefits. This includes holiday, sick pay, pensions.



### Intention of parties

HMRC wants to determine the true relationship between worker and end user. Therefore, the contract must clearly state the intentions to be supplier and customer, not employee and employer.



### Exclusivity

A self-employed worker should be able to work in more than one organisation at a time. If a worker is obliged to work exclusively with one client at a time, they're probably an employee, not a self-employed worker.



### Part and parcel

It's important that a contingent worker isn't seen as part of the organisation. For example, if they have staff (employed by the end user) reporting into them or attend staff social events then they're behaving like an employee.

**Whilst HMRC has introduced the CEST tool to help businesses and individuals undertake IR35 assessments, it has been widely criticised regarding its accuracy. We've partnered with a number of specialist providers to deliver market leading assessment services, that offer determinations based on up-to-date case law and services underpinned by professional indemnity.**



Nora Morris, on-site Account Manager, Warrington

# Trends affecting resource demand

**In the face of uncertainty, the UK labour market has evolved in a clear, consistent direction. In August 2019, an analysis of permanent placements revealed its sharpest decline in three years.<sup>1</sup>**

As a counterbalance, self-employment figures have risen from 3.3 million people just after the turn of the millennium, to 4.8 million in 2017 – representing an additional 3.1% of the country's total labour force that is no longer directly employed.<sup>2</sup>

Of these, the majority (4 million people) work either alone or with a single partner, and have no other employees.<sup>3</sup> These are predominantly skilled people who are choosing, or being chosen by their clients, to provide their services on a contract basis. They work as sole traders, through umbrella companies and agencies, or in the main, through single-director limited entities called Personal Service Companies (PSCs).

For the last decade, and even longer, private sector organisations have seen contracting as a low-risk way to benefit from specialist skills without the overheads of permanent recruitment, or as a workaround for a shortage of full-time talent.

A recent survey of employers with contingent workers shows that two thirds still consider contingent workers as a main avenue for gaining access to key skills for the short term.<sup>4</sup>

<sup>1</sup> <https://www.rec.uk.com/news-and-policy/press-releases/permanent-staff-appointments-decline-at-quickest-rate-for-over-three-years>

<sup>2</sup> <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/articles/trendsinselfemploymentintheuk/2018-02-07>

<sup>3</sup> <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/articles/trendsinselfemploymentintheuk/2018-02-07>

<sup>4</sup> <https://www.rec.uk.com/news-and-policy/press-releases/record-low-business-confidence-denting-ambitious-hiring-plans>

## But that risk profile is changing

**In a policy paper published in October 2019, HMRC set out its case that only 1 in 10 contingent workers in the private sector have properly assessed their IR35 status.<sup>5</sup>**

Even if only half of the total PSC labour force is active in the private sector (the percentage is likely much higher), this means that 1.8 million people may not have paid the right amount of tax on their contract earnings.

For the government, this equates to a lot of money left on the table. When the IR35 legislation comes into effect for private companies, HMRC expects an additional £3 billion in tax revenue to be generated over a four-year period and then used to fund “essential public services”.<sup>6</sup>

For the workers themselves, the figures are equally significant. In a letter to Members of Parliament in late 2019, publication and advisory service *ContractorUK* explained that HMRC’s own predictions show at least 153,000 UK contingent workers losing a fifth of their take-home pay after April 2020.<sup>7</sup>

While the upcoming election might affect the timing of the private sector legislation, there is little doubt that IR35 will soon have a marked impact on the supply and demand of skilled and even more commonplace resources.



We can predict the form this disruption will take by looking back at how the public sector has managed its own transition in the two years since IR35 legislation came into force. In the five months immediately following the introduction of IR35 legislation, public bodies cut an average of 12 contingent workers from their books,<sup>8</sup> and several Ministry of Defence bodies instituted a new policy that threatens the future of the widely-used Contingent Labour One contracts.<sup>9</sup>

In fact, early indications are that the private sector is responding more comprehensively and aggressively to the looming IR35 legislation. Banking giant HSBC began to enforce a blanket ban on working with limited company workers in September 2019,<sup>10</sup> followed by other financial institutions, including Barclays, Lloyds, Morgan Stanley, and RBS.<sup>11</sup>

5 <https://www.gov.uk/government/publications/hmrc-issue-briefing-reform-of-off-payroll-working-rules/hmrc-issue-briefing-reform-of-off-payroll-working-rules>  
 6 <https://www.gov.uk/government/publications/hmrc-issue-briefing-reform-of-off-payroll-working-rules/hmrc-issue-briefing-reform-of-off-payroll-working-rules>  
 7 [https://www.contractoruk.com/news/0014312contractoruk\\_writes\\_mps\\_stop\\_ir35\\_changes\\_april\\_2020.html](https://www.contractoruk.com/news/0014312contractoruk_writes_mps_stop_ir35_changes_april_2020.html)  
 8 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/704931/Off-Payroll\\_Reform\\_in\\_the\\_Public\\_Sector.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/704931/Off-Payroll_Reform_in_the_Public_Sector.pdf)  
 9 [https://www.contractoruk.com/news/0012891second\\_mod\\_body\\_threatens\\_axe\\_pscs\\_ahead\\_ir35\\_change.html](https://www.contractoruk.com/news/0012891second_mod_body_threatens_axe_pscs_ahead_ir35_change.html)  
 10 [https://www.contractoruk.com/news/0014079hsbc\\_stop\\_hiring\\_limited\\_company\\_contractors\\_2019\\_due\\_ir35\\_changes\\_2020.html](https://www.contractoruk.com/news/0014079hsbc_stop_hiring_limited_company_contractors_2019_due_ir35_changes_2020.html)  
 11 [https://www.contractoruk.com/news/0014312contractoruk\\_writes\\_mps\\_stop\\_ir35\\_changes\\_april\\_2020.html](https://www.contractoruk.com/news/0014312contractoruk_writes_mps_stop_ir35_changes_april_2020.html)

# How do we expect organisations to respond?

**Organisations who've introduced blanket bans have attempted to soften the blow, giving existing contingent workers a grace period to choose between transitioning into employment or having their contracts terminated. Time will tell how sustainable this strategy will be for talent attraction and retention, but the initial evidence is not encouraging:**

- A third of private sector businesses are worried that IR35 will soon see them lose valuable resources.<sup>12</sup>
- An analysis of public sector departments suggested that 76% had already lost these kinds of highly-skilled workers – leading to the delay or cancellation of 71% of general projects, and 79% of IT projects.<sup>13</sup>
- A survey of public and private sector workers found that if their contracts were found to be within IR35, close to 60% would consider finding work elsewhere and a further 30% would consider abandoning contract work altogether.<sup>14</sup>
- Government-sponsored research shows that between 30% and 40% of public bodies have found it harder to attract new workers since April 2017 – either due to a lack of available skills, or an unwillingness to work under IR35 regulations.<sup>15</sup>
- Independent research paints an even murkier picture, with 78% of public sector employers finding it harder to attract skilled contingent workers since the IR35 legislation came into effect.<sup>16</sup>

Whilst private enterprise is not guaranteed to mirror the public sector, they both share the same reliance on skilled contingent workers to deliver of a wide spectrum of projects and initiatives. This is especially true in areas like IT, oil and gas, renewable energy, and rail – where engineers, developers, and technology experts are sought after to bring short-term but business critical projects over the line.<sup>17</sup>

All of this is destined to – sooner rather than later – create a situation where the demand for skilled resources outstrips the supply of workers who are able or willing to work within the confines of IR35.

The obvious side effect will be a shift in the dynamic between contingent workers and end user, allowing workers to demand higher rates as businesses struggle to find an alternative.

By getting ahead of these changes, and formulating a clear, considered approach to contract hiring, you can turn IR35 from an obstacle into an opportunity.

[Visit Xplor for details >](#)

<sup>12</sup> <https://www.brooksonlegal.co.uk/news/avoiding-an-ir35-talent-drain/>

<sup>13</sup> [https://www.contractorcalculator.co.uk/public\\_sector\\_ir35\\_reforms\\_survey\\_projects\\_536410\\_news.aspx](https://www.contractorcalculator.co.uk/public_sector_ir35_reforms_survey_projects_536410_news.aspx)

<sup>14</sup> <https://www.brooksonlegal.co.uk/news/3-in-5-contractors-could-leave-hiring-businesses-if-found-to-be-inside-ir35/>

<sup>15</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/704931/Off-Payroll\\_Reform\\_in\\_the\\_Public\\_Sector.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/704931/Off-Payroll_Reform_in_the_Public_Sector.pdf)

<sup>16</sup> <https://www.hays.co.uk/documents/34684/1181815/IR35+Whitepaper.pdf>

<sup>17</sup> <https://www.itcontractorsuk.com/top-contracting-facts-figures-2018.php>



# Gaining a competitive advantage by navigating IR35

**The roll-out of IR35 changes in the private sector will soon become impossible to ignore. Although research published in November 2019 shows that a third of private sector businesses who regularly engage contingent workers do not yet realise the reforms are coming, high-profile cases are now making headlines.<sup>18</sup>**

In August 2019, around 1,500 workers who had been engaged by GlaxoSmithKline through PSCs were simultaneously told their work in the previous tax year had fallen under IR35 and that unpaid tax would be recovered.<sup>19</sup>

The government is not taking a “wait and see” approach with enforcing IR35 – even where the results appear to be exacerbating skills shortages in its own services. Since April 2017, the NHS has discovered that just under 80% of its contingent workforce will fall under IR35 – after a quarter of its departments lost at least half their flexible workers.<sup>20</sup>

The bad news is out there, and if you, as an end user do not openly talk about and explore a way forward, the important contingent workers you engage with may consider taking drastic action such as changing careers (like more than 60% of NHS contingent workers) or giving up contract work entirely.<sup>21</sup>

The government provides a CEST (Check of Employment Status Tool) to end users and contingent workers with the proviso that it cannot provide a definitive answer in 15% of cases.<sup>22</sup> In practice that margin of error may be much larger; in late October 2019, the NHS revealed that, despite using the CEST tool to determine the IR35 status of each of its specialist resources in the previous tax year, it is being pursued by HMRC for £4.3 million in unpaid taxes.<sup>23</sup>

There is no shortcut to understanding how IR35 will affect you and your contingent workforce. The key is an exhaustive audit and consultation period, working with workers to re-assess the suitability of your contingent working practices and whether or not your current relationship is sustainable.

Depending on how many key contingent workers you use, this could be a time-consuming exercise; evidence from the public sector suggests that the majority of public bodies are dedicating more staff time to administration since April 2017.<sup>24</sup>

18 <https://www2.staffingindustry.com/eng/Editorial/Daily-News/UK-A-third-of-companies-who-engage-non-permanent-contractors-are-unaware-of-upcoming-IR35-reforms-51757>  
19 <https://www.itpro.co.uk/government-it-strategy/28305/ir35-news>  
20 [https://www.contractorcalculator.co.uk/public\\_sector\\_ir35\\_reforms\\_survey\\_projects\\_536410\\_news.aspx](https://www.contractorcalculator.co.uk/public_sector_ir35_reforms_survey_projects_536410_news.aspx)  
21 [https://www.contractorcalculator.co.uk/public\\_sector\\_ir35\\_reforms\\_survey\\_projects\\_536410\\_news.aspx](https://www.contractorcalculator.co.uk/public_sector_ir35_reforms_survey_projects_536410_news.aspx)  
22 <https://www.gov.uk/guidance/check-employment-status-for-tax>  
23 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/815360/NHS\\_Digital\\_annual\\_accounts\\_and\\_report\\_2018-19.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/815360/NHS_Digital_annual_accounts_and_report_2018-19.pdf)  
24 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/704931/Off-Payroll\\_Reform\\_in\\_the\\_Public\\_Sector.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/704931/Off-Payroll_Reform_in_the_Public_Sector.pdf)



## So how do we recommend you turn that extra work into value, or use it to gain an edge on your competition?

One way is to use your understanding of IR35 to reposition your organisation as a stable, desirable place to work – a safe harbour in a storm that is already eliciting extreme reactions from others. As tempting as it might seem to follow the banking sector's broad-brush approach and ban the use of PSC workers, this could be counter-productive in both the medium and long term.

This may become the fallback position for organisations that do not allocate the resources to understand their contingent worker landscape. Research indicates that as many as 62% of large and medium-sized businesses will be effectively forced into implementing some kind of blanket ban, because they will not have the time to properly audit and assess their contingent workforce.<sup>25</sup>

IR35 analysts like Brookson Legal, believe that outright banning limited company contract work may open your business up to legal challenges – as well as contributing to increased overall costs and a sector-wide exodus of talent.<sup>26</sup>

A quick-fix alternative might be to insert an intermediary between your organisation and your contingent workforce as a way of reducing risk. This could be an umbrella company, or a larger consultancy with multiple employees, rather than a single-personal limited company.

## Look to stand out from the crowd (and secure your business against risk) by exploring two contrasting staffing options on a case-by-case basis.

1. Consider moving contingent workers from PSC working to permanent employment where the resource demand justifies it. Although this trend is rising (up 7% year on year from 2017 to 2018) less than a quarter of contingent employers will offer this kind of pathway to a full-time position, making your business an attractive prospect for talent that has been denied this opportunity elsewhere.<sup>27</sup> This approach has the added benefit of ensuring that critical knowledge stays within your business, while also giving you an opportunity to renegotiate existing contracts to make sure neither party will fall foul of IR35 in a historical audit.<sup>28</sup> Find out more about how Rullion can support you migrate contingent workers to permanent employment with **RPO on Demand** here.
2. Where a permanent position does not make sense – such as in industries with cyclical programmes of work with downtime in between - work closely with contingent workers to ensure that your working practices are clearly defined and will meet the criteria for control, substitution, and mutuality of obligation we identified earlier. By carefully defining these parameters, you increase your chances of retaining existing workers and attracting new talent ahead of the competition; 80% of workers say they are more likely to work with companies with clear IR35 policies and procedures, and that actively promote roles that will fall outside of IR35.<sup>29</sup>



**Building on these pillars, it's now time to put your IR35 strategy into practice. For more information, get in touch with our expert team who can help you unlock IR35 in your organisation.**

<sup>25</sup> <https://www.brooksonlegal.co.uk/ir35-a-ticking-timebomb/>

<sup>26</sup> <https://www.itpro.co.uk/government-it-strategy/28305/ir35-news>

<sup>27</sup> <https://www.rec.uk.com/news-and-policy/press-releases/employers-defy-economic-uncertainty-to-continue-to-hire-despite-low-business-confidence>

<sup>28</sup> <https://www.rec.uk.com/news-and-policy/corporate-blog/ir35-7-top-tips-for-recruitment-businesses->

<sup>29</sup> <https://www.brooksonlegal.co.uk/news/3-in-5-contractors-could-leave-hiring-businesses-if-found-to-be-inside-ir35/>

# FAQs

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## What is IR35?

IR35 is a legislative instrument used by HMRC to identify disguised employment status and counter tax avoidance by identifying and targeting contingent workers who operate like an employee.

## What is going to change?

From April 2020, when a contingent worker is considered to be inside IR35:

- The 'fee payer' (agency) must pay employer's National Insurance on top of the agreed rate
- The fee payer must deduct income tax and National Insurance from the worker's pay rate via PAYE
- The end user is now responsible for assessing the IR35 status of their contingent workforce and providing a status determination to the worker and known entities within the supply chain
- The end user and agency can be liable for unpaid tax, penalties and interest if they haven't demonstrated "reasonable care" during the assessment

## Who's responsible for determining IR35 status? The end client, the agency or the contingent worker?

Prior to the legislation coming into effect, the contingent worker would determine their own IR35 status. However, from April 2020, this responsibility will shift to the end user. If you engage contingent workers via a fee payer (agency), it'll be the fee payer who'll be liable for an incorrect status determination. That being said, the end user is still responsible for assessing and determining the status of their contingent workforce.

## What happens if the end client gets the assessment wrong?

If the end client determines a contingent worker's IR35 status incorrectly, it will be extremely costly to the organisation.

If a worker is wrongly deemed as outside IR35, HMRC may launch an investigation. This could lead to back taxes, penalties and interest. If a worker is wrongly deemed as inside IR35, as demonstrated with the public sector reforms, workers are likely to increase their rates or abandon projects when they don't feel the assessment was fair. The end user must set up a process that allows contingent workers to challenge decisions.

With both decisions, the end user needs to demonstrate "reasonable care" when making status determinations. If the end user is found to have not demonstrated reasonable care, they could find themselves liable to penalties from HMRC.

### **Is there a tool to help determine IR35 status?**

HMRC has developed a basic online tool, CEST, to help the end user assess whether an individual is inside or outside IR35. While it can deliver a result within minutes, it has been heavily criticised as it's provided incorrect IR35 decisions in existing IR35 court cases.

To guarantee a compliant process, we've partnered with several legal experts to undertake all IR35 assessments. Not only will this ensure all contingent workers have the correct IR35 status, it also leaves an audit trail of the outcome and supporting documents. They'll also be on hand to provide legal advice and best practice moving forwards.

### **What is a blanket assessment?**

A blanket assessment is where the end user predetermines an IR35 status decision without conducting an individual assessment and instead basing the decision solely on job description or role. Not only is this failure to take reasonable care, it also assumes the set of circumstances identified are applicable to anyone in that role, leading to wrong, unlawful IR35 determinations. Failure to demonstrate reasonable care could result in a huge tax burden for the end user.

### **What is a blanket ban?**

To try and counterbalance risk, many organisations are applying blanket bans on all contracts. Organisations that adopt this approach will only engage workers on a "on-payroll" basis. While mitigating potential risk, organisations who adopt a blanket ban should be prepared for rising costs and recruitment challenges as workers increase their rates to offset the rise in tax or gravitate towards organisations that are prepared to engage workers outside IR35.

### **How should a contingent worker be treated in comparison to employees?**

Every worker must be treated with respect regardless of whether they are a contingent worker or permanent employee. However, it is important to remember that contingent workers aren't employees, and therefore shouldn't be seen to be or treated as 'part' of the organisation. For example, it's important that they don't have staff reporting into them, attend any social events or receive any employee perks.

### **Where do I start?**

Get in touch! With over 40 years' experience in the recruitment industry, we've guided businesses both large and small through various legislative change. Our expert team at Rullion provides a complete solution that protects your organisation and ensures you have a compliant workforce.



**We remove the hassle of recruitment, priding ourselves on helping our clients, candidates and employees succeed and grow.**



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