

## Contractor Doctor: My agent is refusing to amend my contract - what are my options?

Dear Contractor Doctor,

I am renewing my contract between my [contractor limited company](#) and agent. My legal adviser has suggested I make changes to the contract to make it more [IR35](#) friendly.

However, my agency refuses to make any changes to their standard contract, as they see this as an unnecessary cost.

What are my options? Can I contract directly with the client? Can I buy myself out of the [restrictive covenant](#)? Or do I have to sign a contract that might put me within IR35?

Thanks

Liam

Contractor Doctor says:

Firstly, the contractor should be congratulated not only for getting their contract renewal with the agency [checked by a legal expert](#) specialising in contractors' contracts, but also for acting on the advice the lawyer has given.

Contractors should always [have their contracts checked](#) before they sign them, as a small investment in specialist legal advice at an early stage could save thousands further down the line when something goes wrong.

It is very common for agents to show reluctance to change their standard contracts, as they are quite right to identify contractual changes as a potentially unnecessary legal expense. There are a number of options for contractors to consider in this circumstance.

### Call the agent's bluff

The easiest, although potentially highest risk, option is for the contractor to say to the agent that if the changes are not made to the contract, the contractor won't sign it.

However, the contractor must be very sure of their negotiating strength before adopting this position, and must also be confident that they have a strong relationship with the end-user client.

The contractor should also be aware that their actions might result in the agent being in breach of contract with the client, if the agent has promised to provide the contractor's services, which are then withheld. Clearly, this can be a double-edged sword.

### Upper and lower level contracts

And contractors should remember that if they do succeed in getting changes made to their contract with the agency, known as the 'lower level contract', these changes may well not be made to the contract between the agent and the client, known as the 'upper level contract'.

In an [investigation by HMRC](#), HMRC and/or a judge will examine both contracts, and if they do not match, will often place greater weight on the upper level contract between the client and the agent, dismissing the contractor's contract with the agency.

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### Buying-out the contract

Some agents may be receptive to the contractor 'buying-out' the contract, so that the contractor can contract direct with the end-user client. The terms of the buy-out would make it clear that the agent could not enforce any restrictive covenant in the contract.

But this is likely to be an expensive exercise. The agent will calculate the buy-out price based on their margin times the length of the contract, but all in one lump sum to be paid in one go by the contractor. It may well be cheaper for the contractor to work inside [IR35](#)!

The contractor may also go to all the trouble of freeing themselves from their contract with the agency, only to find that the client adopts exactly the same attitude and refuses to change their standard contract. Clients are often significantly more inflexible than agents in this respect.

The 'notional contract' can work for contractors

If the contractor has to bite the bullet and go with the contract that has unfavourable clauses that put the contractor in danger of working within IR35, there are still yet more options the contractor can try.

When establishing whether a contractor is in fact a disguised employee and therefore liable to pay income tax and National Insurance Contributions as if they were employed, a tax tribunal or appeals court judge will consider the 'notional contract', rather than what is in the contracts.

The 'notional contract' is the contract in force based on the real relationship between the contractor and their end-user client, which will be established by using evidence from the client, contractor, agent and other witnesses and sources.

If the paper contracts put the contractor in IR35, yet their working relationship with the client, or notional contract, clearly puts them outside IR35, then a tax tribunal or court could find the contractor outside of IR35.

### 'Confirmation of arrangements'

A powerful piece of evidence that can support a contractor's real working relationship with their client is the '[confirmation of arrangements](#)', which is a document signed by the client, or acknowledged by email, that clearly lays out how the contractor works.

For example, the contract may not specifically allow a [right of substitution](#) or may require the contractor to be present at the client's site at specific times. However, the confirmation of arrangements may say that the client is in fact happy for the contractor to use a substitute and that the contractor can work at their home office when work allows it.

Ideally, though, the contractor should have an IR35-friendly contract and working arrangements that clearly keep them outside IR35. But if it is not possible negotiate changes to the contract, the real working relationship will have great weight in a tribunal or court.

Good luck with your contracting!

Contractor Doctor

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