

Contractors should use right of substitution in contracts

Contractors should include a right of substitution clause in their contracts to try to ensure remaining outside of IR35. If you are providing a service, and not employment, then another contractor like yourself who is able to provide the same service should be able to take your place. "It's an important step toward assuring that you remain outside IR35," says Barry Roback, a principal at the Watford-based accounting firm [JSA Group](#) which specialises in contractors.

A Very Significant IR35 Factor

"If you don't have such a clause, the reverse may be argued; you cannot be substituted for, therefore you are an employee," Roback points out.

But, as James May, who heads up the freelancer, SME and umbrella advice division at the Hove-based legal consultancy [Lawspeed](#), suggests caution:

"A genuine right of substitution is a very important factor in determining self-employment status. However it is only one part of the picture that the court will draw when making its determination. The court will look at all the aspects of your relationship with the client, not just substitution."

How To Word It?

First of all, can someone else really substitute for you? If you are a famous television personality, a world-renowned expert on a recondite subject, or the last-surviving programmer in a software language that no one uses anymore, the court is likely to rule that you have no possibility of substitution.

On the other hand, if you have the right to replace yourself with another worker who has much the same skills that you do, then you are obviously not providing the services 'yourself,' as an employee would, and so you have a good chance of succeeding in proving that you are outside IR35—at least, in that case, the clause would be an important factor in such an argument, says David Royden, a solicitor specialising in contractor affairs with firm [Layton's](#) in Manchester.

Says Royden: "The clause should be 'fettered,' that is, the type of substitute should be limited by certain restrictions." But the wording of these restrictions is most important. If the restrictions are so specific as to make the possibility of substitution nearly impossible—that is, if the person has to have been born on a Tuesday and have red hair, the court will not be amused."

The Issue of Control

"But equally important is the issue of control," May adds. "Does the client decide who the substitute is, or do you? Does the client have the power to refuse the substitute? If the client has too much control over the substitution process, the court may claim that the client is simply looking for another employee like yourself. So do retain the right to find and furnish the substitute yourself in the contract."

Another clause to avoid would be one involving client approval or satisfaction, usually worded: 'the right to substitute another representative of the Company to provide the Services provided that the Client is satisfied that the proposed substitute possesses the necessary skills, expertise and resources to perform the Services'

"This isn't necessary," Royden continues, 'because if the client isn't satisfied with the substitute's services, then your company is responsible no matter what. There is the possibility of breach of contract.' You should at no time suggest that the client has control over the provision of services that you make.

A more relevant term would be to say 'any costs incurred in providing a substitute will be at the expense of the Company.' That nullifies the risk of sending in the substitute who cannot do the job.

With pressure from the Treasury and the Revenue increasing on contractors, this is a very good point to be mindful of.

Published: Monday, February 26, 2007

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