

IR35 danger: when your contract is different from the agency-client contract

In [IR35](#) cases, HMRC always obtains the contract between the agency and the client and compares it with the contract that you have with the agency.

Two Different Contracts

This presents a serious challenge to contractors, as there may well be important differences between your contract and the one the agency has with the client.

You may have done your best to show in your contract that you are outside IR35, but there may be elements in the agency-client contract which contradict those in yours. HMRC will try to show that the reality of your situation is laid out in the agency-client contract and not in your own.

"HMRC will claim that your contract does not mirror the real situation in your day-to-day work, and that the agency-client contract does," explains [Simon Sweetman](#), a tax consultant and expert on IR35 issues based in Felixstowe. "There is unfortunately very little contractors can do to protect themselves in this situation," Sweetman says.

In almost all of the IR35 cases reviewed by the Special Commissioners, the judges take the agency-client contract into consideration and quote it extensively in their final judgement. This may seem unfair, since the agency-client contract often covers a large number of contractors, and not just the one hit by an IR35 case.

Different Wording

The problem is that the language of the agency-client can be directly contradictory to that of your own. For example, we recently reviewed a contractor-agency contract in which the [right of substitution](#) was clearly stated. Unfortunately, the contractor discovered-- only after some years of working for the client-- that the agency-client contract didn't have any reference to the right of substitution! Were the contractor to be confronted with an IR35 attack from HMRC, the agency-client contract would become another string to HMRC's bow.

“ HMRC will claim that your contract does not mirror the real situation in your day to day work and that the contract between agency and client contract does ”

Simon Sweetman-Tax
Consultant

But Contracts Aren't Everything

But contracts are not the only elements under consideration in an IR35 case. As Sweetman points out, there is an increasing tendency on the part of the judges to look at what actually happens in the workplace, and to base much of their decision on testimony that reflects the day-to-day operations on the job.

Don't Be A 'Tail-End Charlie'

Are you working on a specific project, or are you just doing whatever work comes down the pipe? In a recent judgement, the judges cited a statement by the client manager calling the contractor a "tail-end charlie," meaning that whatever had to be done that others didn't complete the contractor had to do. That's powerful evidence against you in an IR35 case.

Pay attention to small details in your working life. [Don't eat at the company cafeteria](#); don't work your way into any situation where you can be considered [part and parcel](#) of a group of employees. In a recent case, a contractor arranged an ISDN connection between the contractor's office and the client-- very bad idea. [Control the work and your business](#) yourself.

“ The best you can do is to make every effort to see that not only your contract but also your performance at work show that you are outside IR35 ”

Simon Sweetman-Tax
Consultant

Can You See The Agency-Client Contract?

It would be great if you could be certain of what was in the agency-client contract. You can ask, but agencies have no legal obligation to show it to you. As we've said, it covers many contractors.

Just handle your business and your project as an independent contractor. Being right is still the best defence.

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