

IR35 and the right of substitution: convincing clients to accept the clause

Introduction

To avoid being caught by IR35 a Right of Substitution clause can be a key factor.

One important factor is ensuring that the clause is worded correctly. Some lawyers argue that if a correct clause is in the contract then you will always pass IR35.

However, when [negotiating your contract for IR35 compliance](#) it is a very difficult task to convince the client to have it in the contract. So, how do you convince the client or agency to include one?

This article lists the elements of a proper clause and offers some arguments which you, as a contractor, can use to 'sell' the clause to your clients.

Right of Substitution - a proper clause

Not all clauses are written the same, and some will not pass IR35.

Before discussing how to sell the clause to the client, let's examine what a proper clause should consist of.

The elements of correct Right of Substitution are:

- o You must have an unfettered right to substitute yourself for someone else.
- o You should pay for the substitute (not the client), since you are effectively subcontracting the work.
- o You should pay for the handover period (training period etc) for the substitute to replace you.
- o The client must not have the right to refuse a substitute without reason. Bear in mind that if the substitute does not have the necessary skills and cannot fulfil the contractual requirements then the client reserves the right to terminate the contract.

Worried Clients

Some clients have not investigated the law in sufficient detail and form worrying, often emotional, conclusions from the right of substitution clause.

For example, they infer conclusions like:

- o "I don't want that, they could bring someone in less skilled."
- o "I don't want that, if they arrange a substitute it could cost us a lot of time and expense in handover costs."
- o "I don't want that, if they arrange a substitute close to a deadline, the time taken to handover and train could jeopardise it."
- o "I don't want that, if they cannot do the job anymore I'll simply find someone else who can."

Although these arguments are contrary to what could be exercised legally based on a proper substitution clause, they are nevertheless real and need to be dealt with if you are going to have a chance of getting the clause into your contract.

From a sales perspective, these are simply objections that need to be countered.

To counter them we first need to understand where they have come from.

Managing risk

The objections raised by the client are perfectly natural reactions and simply indicate that they see a threat to their business or career by allowing such 'flexibility'. If you read between the lines they spell out three words: **I SEE RISK.**

Good managers are obsessed with risk, and will sniff it out and destroy it at every available opportunity.

Other managers have a set way of doing things and don't like change. Change means potential lack of control, and thus risk.

So, now we know what the objections are based on, let's have a look at how they can be countered.

Countering the Right of Substitution objections

Again, from a basic sales perspective we need to counter each objection, and then offer an extra benefit they will receive by accepting the clause.

So the objections are based on 'more risk' and we want any benefit to be 'less risk'.

With this in mind, let's attack each of the objections above:

Objection 1: "I don't want that, you could bring someone in less skilled."

Answer:

I legally cannot do that, because you have hired me to perform a specific function. If I bring in someone less skilled you can terminate the contract immediately and also sue me for damages for not fulfilling the contract.

Not only that, but as my skills inevitable increase on the project and my value on the market, you can be assured that if I do exercise the clause that you will only have to continue paying the original rate for my increased skills. This is better than me exercising a termination clause because it will cost you money to find and retrain someone, and you will have to pay more to hire them in the first place.

Objection 2: "I don't want that, if you arrange a substitute it could cost us a lot of time and expense in handover costs."

Answer:

The contract legally states that I must fund the entire handover and cover all training costs. This is better than me exercising a termination clause whereby you would have to incur this cost. Whilst I personally intend to fulfil the services myself throughout the contract, unforeseen circumstances could arise where this is not possible.

Having the clause in the contract protects you throughout the contract should something like this happen. Think of it like car insurance. You don't intend to crash, but if someone crashes into you, you are covered.

Objection 3: "I don't want that, if you arrange a substitute close to a deadline, the time taken to handover and train them could jeopardise it."

Answer:

I am equally committed to meeting deadlines and do whatever is required to meet them. The handover and training of a substitute will never be allowed to jeopardise a project deadline.

In the event that I exercise the substitution clause we will both be able to plan accordingly to ensure that the project continues to run smoothly. There won't be any surprises.

Depending on the level required a handover period would normally last one month, and a vast majority of the handover training is done outside of normal working hours.

Not only that, whilst they are training, they will also be able to provide extra input into the project which you will be getting for free, which I shall be funding.

Objection 4: "I don't want that, if you cannot do the job anymore I'll simply find someone else who can."

Answer:

I have ever intention of fulfilling the contract personally until the end. However, there could be unforeseen circumstances which mean that I will no longer be able to do so.

If you allow me to terminate the contract you would then have to fund the recruitment and training of someone to take over from me.

Without the ability to terminate early together with a Right of Substitution clause the onus will be on me to find a replacement and train them, all at my expense.

This will reduce the exposure for you.

And finally, the last statement for closing, "Assuming you are happy with what I've said, can we arrange to have the contract updated and I'll start next week?"

Other considerations

Whilst objection countering is a useful way of attempting to get the client to change their mind, there are cases where this will be fruitless.

Some clients have contracts with the agencies that will never pass IR35 and contractually insist that the contracts between agency and contractor reflect those terms. In these cases there might be very little you can do about it, depending on your bargaining position.

In most cases you will be speaking to the agent who has already secured the deal, since you are now talking contract terms. The agent will want minimum hassle to close the deal closed which means not hassling the client.

You would then have to convince them to speak to the client to get things changed. Having a 'messenger salesman' who has no interest in selling the product is not good for business. Remember, they get the same commission whether you are inside or outside IR35.

If you cannot get access to the client directly to discuss it, which is unlikely, the best bet would be to start on a short term contract so you can then try and renegotiate. This is discussed more in ['negotiating your contract for IR35 compliance'](#).

Conclusion

In this article we covered the topic of how to counter objections when attempting to get a correct Right of Substitution clause in your contract to help you pass IR35.

Good luck with your negotiations!

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