

IR35's replacement isn't a simple legislative game - it's Guess Who? with 1.4m people

Flexible workers come in all shapes and sizes and are variously called locums, contractors, freelancers, consultants, temps, supply workers, agency workers and so on. Some of these terms are better understood and defined in certain sectors, such as supply teachers or locum medical staff, but there are no standards and the various names for flexible workers can mean very different things.

This is but one of the [challenges facing the Office of Tax Simplification as it considers a replacement for IR35](#). OTS Tax Director John Whiting's warning that [IR35 is likely to remain in force for some time](#) demonstrates that OTS understands the magnitude of the challenge it faces and does not intend to rush the process. This is also a warning to contractors to remain on their guard against falling into [IR35 traps](#).

It is possible to define some groups of the flexible workforce according to how they work. For example, temps tend to work short-term under the control of clients on the agency payroll. Contractors bring specialist skills to specific client projects, typically working for a single client at a time. Freelancers usually have multiple clients and perform multiple tasks. Consultants have multiple clients, but tend to advise clients on how to do something rather than performing the task themselves. Temps get taxed like employees. And most other groupings work through limited companies, partnerships and sole-traderships, because they are genuinely in business and get taxed accordingly.

IR35 uses the term 'disguised employee' to define workers who should be taxed as employees, but it could be better to identify them as 'disguised temps'. So, the question those discussing an IR35 replacement might be better asking is 'when is a temp not a temp?' But then, of course, there have to be questions that determine the answer?

There are a host of factors in existing employment and case law, the main ones being [substitution](#) and [control](#), followed by [mutuality of obligation](#), [part and parcel](#), [financial risk](#) and the rest. In fact, the recently developed [IR35 Online Test](#) asks contractors 53 relevant questions to [determine IR35 status](#).

When applying the currently battery of employment tests, some workers are easily identified as '100% temps' and others as '100% not temps', but what about all those in between? That's a huge grey area.

I'm often reminded of the game 'Guess Who?', where the object is to identify a specific person selected randomly from 32 character picture cards by your opponent. To do so, you must ask a whole series of questions about their appearance. You go through different characteristics, like hair colour, facial hair, eye colour, do they wear hats, smiling, frowning and so on to identify your opponent's character by a process of elimination.

To put this into context, IR35 is like trying to play Guess Who with 1.4m people, the flexible workforce. And these 1.4m workers have a hundred 'characteristics' to be guessed, namely the tests of employment from legislation and case law. This is the scale of the challenge facing the OTS when finding a successor to IR35, and despite the worthy objective of simplification, the dream of a simple set of rules to separate the temps from the not-temps is likely result in frowns all round.



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