

Contracting termination clauses that avoid IR35 risk

Contractors should pay greater attention to the existence and wording of their **termination** clauses as these could have a part to play in keeping contractors outside **IR35**. So says IR35 expert **Andy Vessey** of **Qdos Consulting**.

Termination clauses and notice periods vary considerably from contract to contract. Most are designed to protect the client from the sudden departure of a contractor mid-contract, as well as to provide a safety net for the contractor to find alternative work.

However, as Vessey explains, when a contractor is facing a borderline IR35 ruling in a tax tribunal or court and the decision is borderline, the wording of the contract termination clause could push the verdict in either direction.

"Termination clauses can provide a tax tribunal or court with insights into the level of **mutuality of obligation** between contractor and client and therefore IR35 status," says Vessey. "So, although unlikely to be a key factor in **determining whether a contractor is inside or outside IR35**, the termination clause could be a clincher in a borderline case."

Not having a termination clause would be best

Vessey recommends that wherever possible termination clauses should only be included to cover the most serious breaches, such as where a contractor makes a serious and costly error or is giving away trade secrets.

He says that, from an IR35 point of view, the best kind of termination clause is one that doesn't exist, so that there is no notice period either way. But he acknowledges that is an unrealistic scenario, particularly as most clients will insist on a termination clause to protect their projects and deadlines, and contractors will want to protect their income streams against budget cut-backs and project cancellations.

Notice periods in termination clauses can indicate mutuality

So why should termination clauses be left out of contracts? Vessey explains: "If a project ends naturally ahead of schedule and a contractor stays on because the termination clause says there are four weeks left to run, it is likely the client will be finding the contractor new things to do, and that points strongly towards mutuality of obligation, which is an important factor placing contractors inside IR35."

"The absence of a notice period is not conclusive," adds Vessey. "But if there is no notice period it is indicative of self-employment and, when viewed with the rest of the evidence, not having that notice period could tip the decision in the contractor's favour, especially if the contractor had the right to terminate mid-contract."

"The converse is also true," he continues. "When the contractor takes on any work simply to work out the notice period, despite the original project having been completed, this could place the contractor inside IR35 when viewed alongside other evidence."

Case law is weak and HMRC unresponsive

In Vessey's experience, HMRC has been "unresponsive and not paid heed when presented with a defence based on a lack of mutuality". He says the case law is not strong and a good 'mutuality of obligation' test case is long overdue.

"Mutuality of obligation is still one of the **key factors in IR35 cases**. But court and tribunal judges have tended to agree with HMRC's simplistic view that mutuality is assumed where contractors accept work offered to them and are paid for it. Notice periods and termination clauses then serve to enhance that view."



Andy Vessey

Client Services Manager

Qdos Consulting Limited

Andy is a Senior Tax professional at Qdos and has a wealth of experience in IR35 and status matters which he guides the firm on.

“
Termination clauses can provide a tax tribunal or court with insights into the level of mutuality of obligation between contractor and client and therefore IR35 status
”

Andy Vessey, Qdos Consulting

Qdos Consulting is a leading expert in status and IR35. The company also consults in taxation and employment law and provides low cost business insurance for contractors. [Read Full Profile...](#)

[View all our experts](#)

To avoid finding themselves unwittingly trapped in a contract that includes heavily slanted termination clauses and notice periods that set them up to be inside of IR35, contractors should always ensure they [check and review new contracts with an IR35 specialist](#).

Published: Saturday, May 22, 2010

© 2016 All rights reserved. Reproduction in whole or in part without permission is prohibited. Please see our [copyright notice](#).



ABCe verified website - last audit confirmed 134,482 monthly unique visitors

© Copyright 2016 Byte-Vision Limited UK. All rights reserved [Copyright notice](#)