

IR35 applies to office holders unless there is no personal service

Contractors fulfilling the duties of an office for their client must operate [IR35](#). That is unless they can prove that the role does not require their personal service. Only the personal service/substitution test applies in the case of office holders: control and [mutuality of obligation](#) are not relevant.

And [Qdos Consulting's](#) IR35 expert [Andy Vessey](#) believes that proving no personal service is a condition of the contract will be difficult to achieve for the vast majority of contractors in such roles.

"Legislation was introduced in April 2013 that took the previously exempt role of office holder into IR35," explains Vessey. "National Insurance Contributions (NICs) had always applied to office holders so the legislation had to be amended to align tax as well.

"Contractors in senior roles within their client's organisation such as chairman, directors, non-executive directors and nominee directors will always be office holders. It is unlikely that a client having appointed a contractor into senior roles like these will then allow the contractor to substitute."

What is an 'office holder'?

Although there is no statutory definition and the taxman's guidance is not clear, HMRC's status manual section [ESM2503](#) provides some examples of the kinds of roles that would be treated as an 'office', and would have corresponding 'duties'.

"Office holders can include company directors and company secretaries, chairpersons, coroners, the clergy, sub-postmasters and veterinary inspectors," continues Vessey. "It is also highly likely, and of greater relevance to contractors and interims, that the chief executive or director of a public sector body would be considered to be an office holder."

There is a judicial definition of the word 'office', which HMRC's status manual chapter [ESM2502](#) gives as a:

"...permanent, substantive position which had an existence independent from the person who filled it, which went on and was filled in succession by successive holders."

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Andy Vessey, Qdos Consulting

Offices can be created by convention within an organisation

So, Vessey highlights that another example could be the Finance Director of a business: "A contractor could be appointed into an FD role that was previously held by a succession of employees, has been a long standing role in the business and will be for years to come.

"That suggests the contractor becomes an office holder, and must operate IR35 if they cannot prove that their personal service is not required."

However, Vessey adds that just because a role might sound like it ought to be an office does not necessarily mean it should: "Just because someone might be given a title that sounds like an office holding is not sufficient in itself.

"The role should be investigated further, looking in detail at what the contractor is doing and the duties they are fulfilling."

The traditional tests of employment do not apply

A crucial difference between the tests used to determine the IR35 status of a regular contractor and one in an office is that only the personal service test is applied to office holders.

Vessey explains: "Normally, to determine their IR35 status a contractor would be subject to the conventional [tests of employment](#) as laid down by employment case law. These are control, substitution and mutuality of obligation alongside other factors such as in [business on your own account](#), taking financial risk and [part and parcel](#).

"However, in the case of an office holder the only test that is relevant is whether their personal service is required, or do they have an unfettered [right of substitution](#).

"In my experience, contractors are appointed to office holding roles specifically for the individual skills and experience they bring. It is highly unusual for the client to accept and confirm to HMRC that the contractor's personal service is not required."



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.

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...](#)

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Vessey confirms: "Contractors appointed to a role that they believe could be an office should seek professional advice from an IR35 expert. Failing to operate IR35 when they should could result in a contractor receiving hefty tax bills if HMRC decides to investigate."

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