

## Contractors assessed 'inside IR35' could claim rights under AWR, says lawyer



Contractors subject to blanket 'inside IR35' assessments by clients in response to the Off-Payroll legislation have a potential means of recourse courtesy of the [Agency Workers Regulations \(AWR\) 2010](#).

According to employment lawyer Martyn Valentine of [The Law Place](#), an 'inside IR35' assessment could warrant a legitimate claim for various rights as an agency worker [under the AWR](#). This, he notes, could force a client's hand where a dubious IR35 status determination is concerned.

"Where a client has placed a contractor 'inside IR35' as a result of a blanket policy decision, it has effectively boxed itself into a corner. At this point, the client will either have to admit liability under the AWR by acknowledging that its status determination has rendered the contractor an agency worker, or it will have to admit that it has failed to take reasonable care in reaching its determination, contrary to the Off-Payroll legislation."

### Inside IR35 assessments leave clients vulnerable to AWR claims

Valentine references regulation 3(2)(b) of the AWR, which sets out criteria defining the arrangement whereby the worker is not considered an agency worker, stating:

*'An individual is not an agency worker if there is a contract, by virtue of which the individual is available to work for the hirer, having the effect that the status of the hirer is that of a client or customer of a profession or business undertaking carried on by the individual.'*

"The latter part is crucial," says Valentine. "An 'outside IR35' engagement is a business-to-business contract between two companies on a buyer and supplier basis, whereby the hirer meets the status described above, protecting them from action on AWR grounds.

"However, by rendering the contractor a 'deemed employee', the client no longer fulfils this criterion, in which case I fail to see how one might argue that the AWR do not apply if challenged at an employment tribunal (ET)."

According to Roger Sinclair of contractor legal specialist [Egos](#), the issue of rights under the AWR is even more straightforward: "A contractor in any kind of marginal position is likely to qualify for rights under the AWR," he says.

Sinclair alludes to the 'agency worker' qualifying criteria set out in regulation 3(1), which notes that they work '*under the supervision and direction of a hirer*', and either '*has a contract of employment with the agency*' or has '*any other contract to perform work and services personally*'.

"Any contractor who isn't firmly outside of IR35 is likely to stand a good chance with an AWR claim," he adds. "It just so happens that an

'inside IR35' renders a client's case against an AWR claim by a contractor pretty much indefensible."

## Why might a contractor make an AWR claim?

There's little doubt that a contractor deemed within scope of IR35 would succeed with a claim under the AWR, although some might consider it a means of recourse intended to help achieve fair tax treatment and the client's compliance with the Off-Payroll legislation.

"It's no secret that the tax risk imposed upon clients and agencies encourages many to adopt blanket approaches to Off-Payroll compliance, which is of course unfair on the contractors. Now, the client is placed in an unenviable position whereby it doesn't want to operate contractors outside of IR35 for fear of tax risk but would instead find itself liable for worker's rights under the AWR if it refuses to do so."

Valentine believes that the prospect of litigation for rights under the AWR could prove an effective deterrent against blanket assessments for many clients, adding: "Any litigation against the client and/or agency could result in a precedent which, although only considered persuasive from a legal perspective, could certainly be relied upon by other contractors hoping to bring similar action against other parties."

However, Sinclair takes a differing view, suggesting that clients would far sooner accept liability under the AWR: "Compared with the potential liabilities having been found to have failed to comply with the Off-Payroll legislation, the cost of the provision of rights under the AWR would be negligible. Hiring firms are likely to find the bogeyman of AWR far less scary than that of HMRC."

## Rights claims could provide contractor compensation

Nonetheless, where a successful challenge is made, an AWR claim could at least present a source of compensation for some contractors unable to secure a fair IR35 assessment. Valentine notes that the AWR do not prevent retrospective action, meaning affected contractors could feasibly wait until the end of an engagement to make claims for the requisite rights that have been withheld.

"'Inside IR35' contractors claiming under the AWR would be advised to do so retrospectively, as not to jeopardise their engagement. The client would have to concede in an ET that the AWR applied, in which case the contractor would be awarded damages for loss of rights."

"Or, the client would have to admit that they didn't take reasonable care when assessing the contractor's status, providing the grounds for a successful challenge against the 'inside IR35' determination."

Regulation 14 of the AWR renders the agency and hirer jointly liable for breach of the regulations. However, the apportionment of liability is a matter for the tribunal. As such, Valentine notes that, in practice, a claimant would issue proceedings against both.

"This is far from ideal for the client and agency," he adds. "Ultimately, the remedy from their perspective is for the client to consider engagements on a case-by-case basis instead of carrying out blanket assessments."

However, before taking action, Sinclair advises contractors to weigh up the risk and reward: "Many contractors are typically paid significantly more than their permanent employee counterpart, and so establishing rights under the AWR may do little to supplement their earnings. Contractors considering taking action should think carefully about the reward, against the time and expense of making a claim through the ET."

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