

## Keeping control keeps IR35 away from contractors

Contractors who are found by HMRC to be under the supervision, direction and control of their clients may also be likely to be found to be inside **IR35**. Control is one of the **key tests of employment** used by HMRC to determine whether a contractor is a **disguised employee**.

"Until the First Tier Tax Tribunal cases involving **Marlen** and **Primary Path** in 2011, clients have needed only the right of control over contractors, which may never actually be exercised, for the contractor to be caught by IR35," explains **Qdos Consulting's** IR35 expert **Andy Vessey**.

"Since these cases and, in particular Primary Path, it is possible to demonstrate that there are degrees of control that may not be sufficient to put a contractor inside IR35. However, an understanding of the components of control – how, what, where and when – can underpin a contractor's IR35 defence."

The judge in Primary Path introduced a concept of control whereby the level of control and supervision exercised did not go beyond that which one would expect in the hiring of an independent contractor.

### What are supervision and direction?

According to Vessey, although the phrase 'supervision, direction and control' is usually said in a single breath, each word has its own meaning in the context of employment law and IR35.

He explains: "Supervision is understood to mean that a contractor's work is closely supervised. In practice, this could mean that the work is rigorously checked by a client employee and it must be authorised and signed off before the contractor can continue to the next task. A contractor subject to this level of supervision is clearly controlled, and inside IR35.

"Direction is as it suggests: the client delivers detailed instructions to the contractor directing them on how they should perform the task, saying 'we don't like how you do it, this is how you will do it'. The key point is that the contractor has no choice: they must perform the task exactly as ordered. The client is encroaching on the contractor's skill set and ability to perform the task independently."

### Control: where how, what, and when

Both supervision and direction as described above are examples of control that Vessey explains is commonly broken down into four elements:

**Where:** does the client control the location of where the work is completed?

**When:** can the client dictate to the contractor specifically when the tasks must be completed?

**What:** this refers to the scope of the work, and works both ways. Can the client treat the contractor like a 'tail-end Charlie', allocating tasks at whim? This places control in the hands of the client. Alternatively, can the contractor decide to press on when a variation occurs without seeking approval from the client? This places control in the hands of the contractor.

**How:** is the client providing detailed instructions to the contractor about how they should complete the work?

"HMRC may only need to show than one of these four aspects of control is present, depending on the strength of the evidence, for there to be a strong case that the contractor is controlled and therefore inside IR35," highlights Vessey.

### 'Where' is often a neutral factor

"The location, or 'where' factor, is often considered to be a neutral factor when determining control," continues Vessey. "This is because in most mainstream contracts the contractor is required to work on the client's site to be able to perform the tasks."

Vessey says that the example often used is that of a tradesperson such as a central heating engineer working at their client's house: "The engineer can only fix your boiler if they come to your house. This doesn't mean the householder controls or employs the engineer.

"IT contractors tend to have to work on their clients' IT systems from their clients' offices. Engineering or oil and gas contractors may only be able to perform the tasks specified in their contracts at their clients' facilities, sites or plants. As a result, 'where' is often acknowledged to be a neutral factor."

### Working from home is a good indicator of not being controlled

Although relatively unusual, Vessey notes that 'where' can be a factor when a contractor works mostly from their home

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Andy Vessey, Qdos

office: "If, for example, an IT contractor is working for a client in the USA, works from home and only has deadlines to meet, then it is difficult to see how they can be controlled.

"There is no-one checking the work on an ongoing basis, no set hours, and nobody standing over the contractor checking they are working at a specific time. Unless the client laid down strict guidelines and rigid reporting requirements, the presumption of control is a bit tenuous.

"It would be difficult for HMRC to argue that there are any of the elements of control in this scenario."

### **Control over 'when' can be more subtle**

Vessey notes that controlling when a contractor must perform their tasks can be more subtle: "If you have an example where an IT contractor's banking client specifies that the contractor must be present between the hours of 08:30 and 17:30 Monday to Friday, then control is being exercised by the end client.

"Alternatively, if the contractor's client says 'you can access our systems on site between 08:30 and 17:30 Monday to Friday but we don't mind what hours you work within those times', this gives control to the contractor because they have some discretion over when they can work."

The above are two examples of when a contractor is controlled versus when the contractor retains control, but Vessey acknowledges that there are many shades of grey when applying the 'when' factor.

### **'What' is a factor of key importance to HMRC**

"The 'what' of control is clearly a factor of key importance to HMRC, because it appears in so many of HMRC's examples in its guidance and proposed legislation," says Vessey. "'What' applies to the scope of the work that the contractor has agreed with the client."

It is best exemplified when a contractor comes across something that is unscheduled, or something additional that requires doing, which was outside of the original contract. There are two aspects to the 'what' factor:

Does the contractor have sufficient control that they can press on with performing the additional task without consulting the client, so that the project can continue? This demonstrates a lack of control by the client

Does the client have the power to change the contractor's role and workflow without consulting the contractor or renegotiating the contract; ie the contractor is being used as a 'tail-end Charlie'. This demonstrates control by the client.

According to Vessey, the reality is that in case 1 the vast majority of contractors would be required to seek permission from the client to complete any additional tasks arising after the contract has started, that were not in the original contract. However, this independence, if it exists, is important to acknowledge.

"Where the contractor may have some license is in saying to the client, 'I have come across a glitch that I intend to fix and that will take some extra time; are you OK with that?'. This suggests that an element of control rests with the contractor."

### **The right of control does not have to be exercised for IR35 to apply**

In case 2, if the client has the right to allocate the contractor to any task, then control clearly rests with the client, and the contractor maybe inside IR35 as a consequence. Control exists even when the client has the right to tell the contractor what projects to work on, but may never actually do so.

Vessey says this highlights a very important point, which is that the client needs only to have the right to control, and not actually exercise it, for the contractor to be deemed to be controlled and inside IR35.

"HMRC has used several examples in its guidance and consultation documents of where the ability of the client to allocate tasks without negotiation clearly demonstrates control.

### **Knowing 'how' can mean control rests with the contractor**

What clearly sets contractors apart from many other types of flexible workers is that, if they are genuine independent professionals, they do not need to be told how to perform their tasks.

Vessey explains: "If a client provides a detailed specification, then that is not considered to be control because the contractor – or service provider – needs to understand what actually needs to be done.

"But a genuine contractor should not need to be told how to complete the work, and should have discretion over how they actually perform the tasks required. Once they have been given the specification, the contractor should be able to get on with it in the manner that they choose."

Vessey identifies another key point, which is that adhering to specific industry practice, standards or guidelines in how tasks are completed does not mean a contractor is controlled.

### **Contracts and what clients say**

In Vessey's experience, most contracts are either 'silent' on control or contractor-friendly. However, as is the case with all IR35 issues, it is what actually

happens and the working relationship that HMRC will use as evidence that a contractor is inside IR35.

"It only needs a client to say 'of course we expect our contractors to be on site between 08:30 and 17:30 Monday to Friday', or 'if priorities change, I would not hesitate to move a contractor into a different project' for HMRC to have a case for control, and IR35.

"HMRC will aim to demonstrate control in as many of the four sub-factors as possible. Prior to the first tier tax tribunal Marlen case, it was a straightforward exercise for both sides to prove or disprove control in each of these areas."

Although first tier [tax tribunals](#) do not set legal precedents, Vessey highlights that it is still possible to use them in defence of a contractor: "In Marlen, HMRC felt it had a good case for control until the tribunal judge introduced a different conceptual level of control that resulted in a victory for the contractor."



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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 concludes: "There are many aspects to control, and control itself is only one element of the tests of employment that HMRC will apply in an IR53 case. Contractors should not try and tackle an IR35 review without expert assistance, because with professional support there's every chance the investigation can be halted before it gets off the ground."

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