

## Test contractors for IR35 or risk litigation: IPSE's warning to public sector clients



Public sector bodies (PSBs) who fail to carry out their due diligence when assessing contractors for IR35 could be placing themselves at serious risk of litigation.

This is according to Chris Bryce, chief executive of the Association of Independent Professionals and the Self Employed (IPSE), who believes last minute changes to the legislation should prove an effective deterrent for PSBs considering imposing blanket bans on limited companies.

"I would hope that the 'reasonable care' provision proves effective in ensuring clients take the necessary measures to properly assess their contractors. A blanket decision one way or the other clearly isn't reasonable care."

### Public sector suffers as contractors choose to walk

Less than a week to go until the implementation of the [public sector IR35 reforms](#), there have been numerous reports of PSBs attempting to impose blanket bans on limited companies. Instead many PSBs have attempted to dodge their compliance requirements by insisting contractors work through umbrella companies, subjecting them to tax via Pay As You Earn (PAYE).

"This is unprofessional and shows a complete disregard not only for the spirit of the legislation but also the reasonable duty of care that clients owe to the contractors they engage," comments Bryce.

Following the proposal of the reforms, ContractorCalculator and IPSE both [warned that many public sector contractors would simply choose to vote with their feet](#). Bryce notes that these fears are being realised, to the detriment of the public sector.

"We are seeing signs that some contractors are just walking away from the public sector altogether. It's difficult to say at this stage just how many, but we are seeing a significant amount of contractors choosing to walk, certainly enough to infringe on ongoing projects within the public sector."

### Will contractors benefit from 'reasonable care' provisions?

But Bryce is optimistic that recent legislative amendments should prove effective in offering the remaining public sector contractors sufficient protection. PSBs are now required to demonstrate that they have taken 'reasonable care' in determining the IR35 status of each contractor they engage, or else risk assuming tax liability.

Bryce believes negligence on behalf of the PSB could also provide scope for legal action from contractors, and encourages contractors to be proactive if they believe their client is attempting to flaunt their responsibilities.

"The changes might leave clients exposed to litigation and it's something that we'll be taking up directly with the Cabinet Office. Contractors

whose clients have attempted to bundle them into umbrella companies should challenge them and insist that they take the necessary measures to assess them fairly.”

## **IR35 public sector reforms: What does ‘reasonable care’ mean?**

Question marks have been raised as to what exactly constitutes ‘reasonable care’. In the context of a contractor facing an IR35 inquiry, taking reasonable care means acquiring independent legal advice, which has led IR35 legal experts to suggest that the same would apply to PSBs in this instance.

Despite the fact that HMRC’s Employment Status Service (ESS) tool has been [proven to be inconsistent](#), and [has no legal bearing](#), Bryce suggests early indications from the Government suggest that it will be used as a benchmark to determine IR35 status.

“In discussions that we have held with Government, we have consistently heard that each and every position will be assessed against the ESS, and the role will be judged, not the individual. From that point of view, if clients fail to assess the positions correctly, then they are breaching Cabinet guidelines. We’re awaiting Cabinet guidance for clarity on this matter.”

## **Budget U-turn provides cause for optimism amongst contractors**

More positive news for the contract sector came in the form of the Chancellor’s recent U-turn on a proposed National Insurance Contribution (NICs) increase for the self-employed. In his Budget speech, the Chancellor announced the abolition of Class 2 NICs for the self-employed, for whom Class 4 NICs would rise to 10%, effective from 2018.

“I think it could have fundamentally changed the nature of self-employment in the UK,” notes Bryce. “It failed to recognise that the self-employed have to provide everything that an employee typically expects from an employer, and that the self-employed would have suffered unnecessarily.”

However, soon after the Chancellor reversed the proposed increase, a decision which Bryce believes was largely influenced by public criticism from relevant stakeholders, as well as pressure from Tory back benchers.

“I think the strength of opinion amongst his own back benchers was highly influential. Some of them genuinely did seem to understand the base issues. The Chancellor certainly took a very brave decision to listen to the arguments of his own back benchers as well as various industry bodies, including IPSE.”

Bryce adds: “I think that the Chancellor will probably look more closely on this and the problem as a whole in future, and I think it’s quite heartening that at last we have a Government that is prepared to admit when it has made a mistake.”

## **Self-employed tax avoidance suggestions are misled**

The Chancellor’s Budget speech alluded to the ongoing Taylor review into self-employment, in particular Matthew Taylor’s announcement in February that there is evidence suggesting that self-employment is being used as a measure to avoid tax. It sparked some unjust negative sentiment surrounding the self-employed, but Bryce is sure that this has been misdirected.

“Matthew Taylor has listened to IPSE and many other contributors to the review, and should recognise that there is a core of self-employed people who are genuinely self-employed and should be allowed to operate that way.

He concludes: “I also think that he has recognised that there is also a minority of self-employed people who have been forced into self-employment by unscrupulous employers and it’s those employers who are the tax avoiders, not the individuals.”

Published: Tuesday, April 4, 2017

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