Contractual clauses and the Agency Workers Regulations (AWR)

Contractors may find unexpected clauses regarding the **Agency Workers Regulations (AWR)** being inserted into contracts by their agencies, but many such clauses should not give rise to any cause for concern. In fact, they could even help, albeit marginally, to strengthen a contractor's case for being seen as **in business on their own account** by HMRC.

Roger Sinclair, of contractor legal specialist **Egos**, explains: "Some agencies' approach to risk is such that they will fill a contract with clauses to try and ensure that any conceivable risk is anyone's problem but their own. And that's how many are approaching AWR."

But when contractors see a clause asking them to warrant that their **limited company** works on a business-to-business basis, or to indemnify the agency against claims made under AWR, there may be no real cause for alarm.

Common AWR contract clauses

Since AWR came into force on 1 October 2011, contractors have begun to see fresh clauses appear in new and renewal contracts. The clauses vary from agency to agency, but typically say:

"the contractor warrants that it operates on a business-to-business basis"

"the contractor is operating a business undertaking"

"services are performed by an independent consultant"

"the contractor is not directed or supervised by the client"

"the services are provided to [the agency] and the client as customers of the contractor's business"

"the contractor shall indemnify [the agency] against any losses arising…from any claim that the contractor is entitled to rights according to AWR".

All of these clauses relate to specific elements of the AWR legislation and are designed to give the agency, and possibly the client, comfort in establishing that the contractor is not inside AWR, and that if they are subsequently found to be inside, any risk is passed from the agency to the contractor's limited company.

Limited company contractors are business undertakings with clients

However, despite the ominous nature of the wording, asking a limited company contractor to warrant that they operate on a business-to-business basis and that their client is their own businesses' customer are not necessarily bad things.

"AWR does not apply where there is a contract, under which the client has the status of a customer of a profession or business undertaking carried on by the individual" explains Sinclair. "The regulations simply don't apply.

"However," he continues, "There may be some debate over exactly what 'business undertaking carried on by the individual' means.

"In the case of a contractor working through a limited company, which the individual him/herself owns and manages, perhaps in conjunction with other family members, it seems to me to be pretty inescapable that the individual is in fact carrying on a business undertaking, the company itself, and is using that business undertaking to provide the individual's services to its clients and customers. It is therefore difficult to see how AWR might apply to an individual using their own limited company to provide services to a client."

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>
> Roger Sinclair, Egos

From the agency's perspective, if AWR does not apply, it is a positive. So contractual provisions requiring the contractor to warrant the facts that support 'outside AWR' status are simply trying to lock an individual into certainty as to what their status is. And, if the contractor is in fact engaged in a business undertaking, it is not unreasonable for the agency to ask for such an acknowledgement.

AWR indemnity clauses

"Contractors faced with an indemnity clause have the choice to negotiate its removal," says Sinclair. "But if the clause is indemnifying against something that is never going to happen because that would be under the individual's sole control, it is hard to see how the contractor might be assuming risk by agreeing to the clause."

Conversely, Sinclair warns that under normal circumstances, signing a contract with an indemnity clause causes the party giving the indemnity to assume additional risk.

But liabilities under AWR may not be viewed as normal circumstances. Sinclair explains: "The legislation makes express provision for how AWR tribunals should deal with liabilities. So it is possible that any indemnity provision may fail on grounds of illegality because it could be viewed as usurping the jurisdiction of the tribunals."

AWR clauses are not directly relevant to IR35

Sinclair says that the inclusion of AWR clauses has no relevance to a contractor's **IR35** status: "AWR and IR35 are separate and distinct pieces of legislation, and each should be considered in isolation. Either a contractor is inside IR35, or they are not, and the same goes for AWR.

"A contractor might be (a) inside IR35 and within AWR, (b) outside IR35 and outside AWR, (c) inside IR35 and outside AWR – and even (at least in theory) (d) outside IR35 but inside AWR."

Despite their treatment in parallel and in isolation, the evidence used to determine IR35 and AWR status will be drawn from the same basic pool of facts. That means genuine own company contractors are unlikely to come to any harm by warranting they are a business undertaking and indemnifying the agency against AWR.

"Agreeing to many of the new clauses appearing in agency contracts may contribute positively to the general picture that will be created when **determining a contractor's IR35 status**," says Sinclair. "So leaving these kinds of AWR provisions in a contract might be helpful, if a limited company contractor later becomes the subject of an **HMRC IR35 investigation**.

NB the above is not intended to apply, in the case of (a) contractors working through umbrellas, or (b) contractors who engage and provide substitutes.

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