

IR35 legal dangers of the standard agency contract

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Introduction

In the past many contractors signed contracts with agencies without being too concerned whether or not the detailed clauses reflected the way in which they provided their services to the end client.

With the introduction of **IR35** it is important that contractors which provide services as independent contractors (rather than simply supplying workers to work under the control of clients as if they were employees) ensure that their contracts accurately reflect the way they work. Otherwise they may find themselves caught by IR35.

Uphill struggle

Contractors [negotiating changes for IR35 compliance](#) in their agency's standard contract often face an uphill struggle. Sometimes this is due to the agency being unwilling to spend time looking at clauses and gambling on the contractor giving in and signing the standard contract.

Often the agency will say that the client will not agree to changes and sometimes this so. However many contractors will find themselves in the situation where they and the client are in agreement but the agency will not change the contract to reflect the realities of the situation.

Why is this and why, in particular, do agencies try to insist on there being a clause in the contract which says that the contractor's worker will work under the control of the client?

The answer lies in the particular way that agencies structure their contracts.

The agency contract

Instead of simply charging a finders' fee to the client, agencies generally insist on having a contract with the client under which the agent undertakes to provide the services to the client at a certain fee rate, and another contract with the contractor under which the contractor agrees to provide the service to the client on behalf of the agent for the fee rate minus, say, 20%.

Contractually this is a standard contractor/sub-contractor arrangement under which if anything goes wrong, the agency is directly liable to pay compensation to the client. The agency must then try to recover its loss from the contractor.

Agencies like to reduce their potential liability and one way of doing this is to put a clause into the contract with the client saying that the contractor's worker will be under the client's control, obey any reasonable instruction, and that the client must supervise the worker. If anything goes wrong it is more difficult for the client to sue the agency because the contract says that the client has control of the worker.

Thus although the client may agree that the services being provided by the worker are consultancy services where the worker is providing his judgement and expertise rather than being a servant obeying his master's orders, often the agency will still try to insist on a control clause.

Direct contracts

It is not surprising that many contractors are looking with renewed interest at the possibility of direct contracts between contractor and client.

In doing so they are not necessarily seeking to dispense with the services of the agencies who may still be needed to put those who provide a particular service and those who need it, together.

They are seeking a reasonable arrangement with agencies which allows contractor and client to negotiate a direct contract which reflects the realities of the situation and which is not coloured by the desire of agencies to dress up the relationship as something akin to employment in order to reduce their own potential liabilities.

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