IR35 - Top 10 traps to catch the unwary contractor

Many unwary contractors fall into easily avoidable traps that provide grounds for HMRC to investigate their IR35 status. And for those contractors without the stomach, insurance or cash to fight their cases, they can find themselves at the mercy of the taxman – having to accept swinging judgements for back taxes, interest and penalties.

The very best IR35 advice to limited company contractors is not on how to win cases against HMRC, but how to avoid an IR35 investigation in the first place. So here are the top ten IR35 traps to avoid:

1. Your client tells you to stop working on your current task and asks you to start working on another

This immediately suggests that your client controls you. The issue of control in IR35 cases has become one of the key factors pointing towards ‘disguised employment’ since the Dragonfly IR35 ruling. Stick to doing the tasks you were hired to do and that are detailed in your contract, and don’t let your client tell you what to do and how to do it.

2. Your client, or agency, won’t accept the substitution clause in your contract or won’t let you provide a substitute

Being able to provide the client with a suitably qualified substitute is a clear pointer away from you being employed by your client and keeps you outside IR35. Therefore, a right of substitution clause in your contract or, even better, actually providing a substitute during the contract, will help persuade HMRC that you are, in fact, a true contractor. Get your legal adviser to negotiate a substitution clause in the contract and make sure your client also signs a confirmation of arrangements that states you can provide a substitute. Whilst substitution is no silver bullet to keep contractors outside of IR35, it can be a considerable help!

3. Your contract stating you as a named person

Following on from the substitution issue, make sure you aren’t personally named in the contract, nor in any correspondence relating to it, as this could point to you being an employee of the client and therefore inside of IR35. If your contract and the client specifically name you as providing the services to be delivered under the contract, then the implication is that you are providing your services under an employment ‘contract of service’. The contract should be with your contractor limited company, which as proving a ‘contract for services’ as a business-to-business service provider.

4. Agreeing to complete any tasks that the client asks – being a ‘tail-end Charlie’

Taking on any work that your client offers, and not just the tasks agreed in the contract, suggests that your client is obliged to offer you work and you are obliged to take it. This is called ‘mutuality of obligation’, or ‘MOO’, and is a strong indicator of employment. Being judged a ‘tail-end Charlie’ is likely to put you inside IR35. Only complete work agreed in the contract and, if different work is offered, either refuse to do it or get a fresh contract or contract addendum issued.

5. Appraising your client’s personnel and being appraised by the client

If you are asked to appraise your client’s personnel, or submit to an appraisal of yourself by the client, this suggests that you are ‘part and parcel’ of the client’s organisation. HMRC is likely to infer that you are not in business on your own account and are, in fact, a ‘disguised employee’ and therefore inside IR35. Never conduct appraisals of your client’s personnel and don’t allow yourself to be appraised – that’s what happens to employees, not contractors.

6. Having to ask permission to take time off and/or being paid holiday and sick pay

Contractors should be careful how they manage holidays and time off. They should inform their client when they anticipate not being available to complete the tasks covered by their contract. This should be done as a professional courtesy and to ensure the client’s operations are not inconvenienced because of the contractor’s time off. However, you should never ask for permission to take holidays or time off sick, nor should you accept payment for time off, as this points towards you being controlled by the client and receiving the sort of benefits that the client’s employees receive. That is likely to put you firmly inside IR35.

7. Being named on the client’s organisation chart and having security/network log-ins and/or a client email address and business card

Although it is sometimes necessary to be branded by the client’s identity, and security or logistical reasons require you to have a client network log-in and email account, these should be avoided wherever possible as they suggest you are ‘part and parcel’ of the client’s business, and therefore inside IR35. If you do have to use client’s branding and resources, then it is essential that you can prove other tests of employment, such as control, do not apply, and that you can provide a substitute.

8. Your contract prohibits you from working for other clients
If your client insists in the contract that you cannot work for other clients at the same time, this suggests that you are not in business on your own account and are really a disguised employee, and so inside IR35. Get your legal adviser to negotiate out any clauses restricting your business in this way. The only exception is when your client insists you cannot work for any of their competitors for a given time – this is a common feature in business-to-business contracts for services.

9. The client pays for your training

If you allow your client to pay for training, this strongly suggests that you are ‘part and parcel’ of the client’s workforce and a disguised employee. As an independent contractor with a business-to-business ‘contract for services’ with your client, your contractor limited company should pay for all of your own training and development.

10. And finally... getting your yellow vest and being named as the fire warden, after organising the staff Christmas party!

A huge number of contractors fall into the trap of using employee facilities and thereby becoming ‘part and parcel’ of their client’s organisation. This can be so easily done, by taking on seemingly innocuous tasks like becoming the fire warden or organising employee events. Don’t use staff facilities like subsidised canteens or gyms, staff parking or even staff entrances. It might be inconvenient, but make sure you use the visitor’s car park, that you sign in every day, just like a visiting contractor would be expected to, and never, ever organise the Christmas party!