

## Prove your contract is outside IR35 by collecting key evidence

**Limited company contractors** can collect key pieces of evidence likely to halt an **IR35 investigation** before it even gets started.

Typically, contractors generate compelling evidence about their **IR35** status on a day-to-day basis. By collecting this, and making it immediately available to their professional advisers if HMRC opens an **IR35 review**, they can quickly bring IR35 investigations to a stop.

However, according to **Andy Vessey**, **Qdos Consulting's** IR35 expert, contractors may not realise the importance of some events, nor think to collect the relevant evidence. "When planning a defence for an IR35 review, a contractor is often able to verbally brief me on a key piece of evidence, but is unable to produce any evidence, particularly if the event took place several years ago," he says.

But however small each event seems, Vessey suggests creating and maintaining an electronic dossier of evidence. Here are ten pieces of evidence Vessey urges you to collect to help prove you are outside IR35:

### 1. When you are sent home, but employees have to stay

This is, according to Vessey, a classic scenario which underpinned the contractor's victory in the **Marlen** case. He suggests keeping emails, announcements or policies that show the client differentiating its treatment between contractors and employees.

"If something happens, like the IT systems go down, and you are sent home when all the employees have to stay, keep the email telling you," explains Vessey. "Some banks have a policy that contractors must not be on site during audits. Copy and file the policy. If a poster goes up on a notice board sending you home, take a photo of it."

This suggests a lack of **mutuality of obligation** (MOO), as it shows the client does not consider itself under any obligation to provide you with work or pay.

### 2. Taking time off by informing, and not asking, your client

By deciding to take time off, Vessey says you are demonstrating that you have a degree of control over your working time. However, you should be careful within the bounds of client service and courtesy, to inform the client of time off, rather than request it. Using your client's holiday forms or HR system is not a good idea: send an email informing the client that you are taking time out of the contract and make sure you keep a copy of the email.

Timesheets and invoices are also compelling evidence of having taken time off, and should also be retained. The gaps in payments and hours worked show that you did not receive any holiday pay, as well as proving you were not providing your services during that period.

### 3. When you have to rectify defective work in your own time

In Vessey's experience, this scenario rarely happens, but when it does it is powerful evidence that a contractor is not an employee. Employees do not have to rectify mistakes in their own time and at their own expense. This demonstrates **financial risk** on the part of the contractor.

"If a client expresses dissatisfaction in your work, ask them to tell you in writing, specifying exactly what needs rectifying and why," says Vessey. "Then when working on fixing the problem, make sure you record the time you spend and create a schedule of additional work that you complete."

You won't be able to bill for it, but it will set out the time spent and details of the work, which you can later show an HMRC inspector. Have it signed off by the client to confirm you fixed the problem. If the client won't sign it, send them an email notifying them, setting out what was done and how long it took.

### 4. Tendering for contracts

Tendering clearly demonstrates that you are in **business on your own account** and is evidence that you are taking financial risk. Keep records of the time you spend on the tender process, any expenses such as travel and subsistence, and the outcome. Keep copies of confirmation emails from the potential client showing you submitted the tender/attended a tender pitch.

Even if you are unsuccessful, keep copies of presentations, letters and emails, confirmation of tender applications, diary notes, names of prospects and clients who you met with. Also set out a schedule of time you spent assembling and delivering the presentation.

### 5. When you deliver speculative work for no pay

In this scenario, which Vessey sees increasingly more often, you have been asked to deliver a small speculative project or give an hour's free consultancy for a client in anticipation of winning a much larger contract.

He explains: "Speculative work featured in the [Primary Path](#) tribunal, and the judge specifically noted that it was compelling evidence that the contractor was in business on their own account."

Once again, you should note what services you delivered and the time it took you, perhaps in an email to the speculative client when delivering their 'freebie'. Note costs of attending meetings and [travel expenses](#) for completing the work if on the potential client's site.

Because there is no guarantee of you securing further work on a fee-paying basis, this also demonstrates that you are taking a financial risk.

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## 6. Publishing your own website

"Few contractors have their own website, which is surprising considering that it is an inexpensive exercise requiring little effort, but which can strongly point to you being in business," notes Vessey.

"Once created, it is important to keep the site up-to-date, perhaps by publishing a regular blog so HMRC can see your website is being used as a proactive marketing tool."

Publishing a website was an important part of the [ECR Consulting case](#). This factor, in combination with monitoring other client and other sites for work opportunities, or news that may result in work, was evidence that the contractor was in business.

## 7. Maintaining a database of potential substitutes

Vessey highlights that this evidence is particularly useful for contractors who have a [substitution clause](#) that has never been exercised, which is the case for most contractors. According to Vessey, there are two elements:

Create and maintain a list of other contractors who can act as substitutes in the event you have the opportunity to exercise the clause. Exchange emails with these contractors so you have a paper trail showing you have made each other commitments, and which can be shown to HMRC. This is particularly useful if you work in a very niche field and the candidates for substitutes are few

If another contractor working alongside you exercises their right to substitute, and they are doing similar work with a similar contract, then record it. Ask if you can have copies of the other contractor's emails with the client confirming the arrangement.

"If a contractor sends a substitute, they cannot be inside IR35, although so few contractors find themselves in that position," continues Vessey. "But being able to supply a substitute if required, and working alongside a contractor who has, are still indicators that your personal service is not required."

## 8. Completing supplementary work in addition to your main contract

In this scenario, if you identify a task that requires completion and which is beyond what you were originally contracted for, and your relationship with the client is such that you can just get on with it, then it is a strong indicator that you are not [controlled](#) by the client. It is sending a message that the client has engaged you for your expertise and has requested that you just get on with the job at hand.

Vessey acknowledges that many contractors would not have the authority without requiring sign-off first, but some do. In these circumstances, he suggests adding a schedule to your invoice for the additional work explaining what you provided, how much it cost and why it was not part of the original work specified.

## 9. Working from a home office, also known as 'business premises'

"I have asked contractors any number of times to provide me with evidence that they worked from their home office during part of their contract under investigation, and they have been unable to provide me with firm evidence."

Vessey suggests entering diary notes, emailing your client confirming you plan to work at your home office, indicating on your timesheets those days you have spent working from your own premises and recording on the invoice time spent away from the client's site.

"If the amount of time you can work from your home office is significant, say over 20%, then this is a very strong pointer towards the client having no control over where you deliver your services," adds Vessey.

## 10. Meeting clients' clients, and meetings generally

"When you meet with your clients' clients, are you introduced as part of the client's team, or as an independent contractor?" asks Vessey. "The distinction is important, because you may be considered [part and parcel](#)' by HMRC, if integrated into your client's organisation."

If possible, ensure that you are named as a contractor on any emails to the client's customer when arranging the meeting. Ideally, asked to be copied in using your own company's email with your own limited company's domain name. You may also be listed as an independent member of the project team in any presentations and, if so, keep a copy of the presentation.

Vessey admits it is a tough call because most clients don't want to admit to their customers that they lack the specialist skills in-house to deliver their services. "Make sure you have plenty of other evidence pointing away from IR35 if the client insists of branding you as one of its team."

For meetings in general, Vessey recommends keeping detailed records. It might be a nuisance, but he says that a client insisting on regular ad hoc meetings

might be considered by HMRC to be in control of you.

If you have records showing there was a specific reason, such as requiring an update or because of special circumstances, it looks less like the client is in charge.

## 11. When you refuse to carry out work not in the contract

Clients often ask contractors to do more than what is specified in the contract. On occasions, if the task is minor, commercial realities dictate that you just have to swallow it and get the job done, despite potential negative IR35 associations.

But Vessey warns against taking on any significant task that is outside of your original remit: "Decline politely and ensure your refusal has been documented. Email the client explaining what you have refused to do and why, most likely because it is not in your contract."

Equally, if you do decline a seemingly minor task, recording it could be a major piece of evidence in an IR35 review. Refusing to do work outside of your contract sends two strong messages:

That you are not controlled by your client and moved around by them from task to task, like an employee would be, and

That there is no mutuality of obligation between the parties.

Vessey says: "Adopt an evidence gathering mindset, so that collecting emails, meeting notes, making diary notes and updating timesheets and invoices becomes common practice.



**Andy Vessey**

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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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"If the worst should happen, and a tax inspector comes calling, then you will have a dossier of evidence hopefully stretching back many years that will provide compelling evidence that you are not a **disguised employee** and outside IR35."

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