

Why use Gravitas to support you through IR35?

The experience we have gained working in collaboration with our clients in the Public Sector to mitigate potential risk from IR35, together with the specialist legal and third-party advice we have sought regarding the changes for the private sector, make Gravitas the ideal partner to support Clients through the reforms to IR35. We can help Clients to:

- Define a status determination process
- Review existing engagement models and current contractor base
- Create a status determination for their Tech contractors using the Gravitas Status Determination Tool based on case law
- Reduce client risk by providing a highly compliant process, including audits of umbrella companies in the supply chain
- Illustrate the potential impact on a contractor with a contractor fee to gross salary to net salary calculator
- Help clients understand the upcoming changes and their responsibilities through our networking events and seminars
- Identify and propose actions for IR35 compliance to help retain talent, reduce operational and delivery risk, as well as financial risk
- Provide robust, compliant, best in class, "Outside IR35" contracts
- Offer alternatives to umbrella companies for Inside IR35 contractors, e.g. the Gravitas PAYE Agency Worker model
- Provide Statement of Work ("SoW") deliverables-based solutions

What is IR35?

IR35 is legislation designed to combat tax avoidance where individuals supply their services to clients via an intermediary, such as a limited company, but who would be a worker if the intermediary was not used.

Such workers are called 'deemed employees' by HMRC. If caught by IR35 ("Inside IR35"), individuals have to pay income tax and national insurance as if they were a worker.

What are the upcoming changes to IR35 for the Private Sector?

The fundamental change is who is responsible for making a status determination and who is responsible/liable for deducting tax and making other payroll deductions – how an IR35 status is determined is not fundamentally changing. The changes bring the Private Sector IR35 requirements mostly in line with the Public Sector.

The End client is responsible for making an IR35 Status Assessment for a role, but the fee payer (probably the recruitment agency or an umbrella company) is liable in the first instance for the payment of unpaid taxes should HMRC successfully challenge an assessment.

The End client must determine the IR35 status of their off-payroll workers – whether an assignment is "inside" or "outside" IR35.

They will have to issue what is known as a Status Determination Statement (SDS) to the agency and to the contractor. If the End client issues an "inside" IR35 SDS, then they have complied with their obligations. The fee payer must then ensure that the correct tax and NI is deducted from the contractor's invoice before they are paid.

What are the risks to a client's business?

If the IR35 rules are not applied correctly, they could incur significant financial, legal, operational and reputational risks. However, the IR35 reform can provide opportunity to gain expert understanding of your workforce, attract niche talent and retain existing Limited Company Contractors.

What is a Status Determination Statement (SDS)?

An SDS is a document provided by the Client to the Agency and the Limited Company that states whether an assignment has been deemed "Inside" or "Outside" of IR35. The SDS must confirm the status of the assignment and the reasons for the decision.

What will the client's obligations be under the changes to IR35?

- Determine the status of each assignment
- Use "reasonable care" in making a determination
- Pass the determination statement to the party that it has entered into a contract with (e.g. agency or MSP) and the worker

- Include the reasons for the determination

What is “reasonable care”?

- The people making the decision should be trained, suitably qualified and understand the rules.
- They need to consider all the facts and speak to different teams internally and also to the contractor – directly or through a recruiter.
- We recommend use of the HMRC CEST tool, in addition to a third-party tool and/or lawyers or accountants. We offer the Gravitas Status Determination Tool (designed for niche IT roles) and mandate it for ‘outside’ decisions.
- Potential conflicts of interest for hiring managers may be considered.
- They must keep adequate records of the decision and communication of a decision.
- They should refresh the decision periodically, e.g. on contract renewal, a substantial change in the assignment or every few months (Gravitas recommends at least every 6 months).

What records do we need to keep?

You will need to keep a record of each determination made, the reasons for each determination and any fees paid under these engagements. If a Contractor disputes the Status Determination, you will also need to keep records of any representations made by you.

When do we need to provide the determination?

A Status Determination Statement issued before 6th April 2021 will be valid if it contains the reasons for the conclusion reached. The Client can provide a Status Determination Statement (“SDS”) at any time but must providing it before the assignment start date will reduce the risk of absorbing the ‘fee payer’ risks. The Client must include the reasons for the determination within the SDS. Clients’ must pass this both to us and the Contractor directly.

If there is any change to the working practices of a placement, or a new contract is negotiated with the Contractor the Client must re-check the rules and complete a new Status Determination assessment.

How often do we need to make the determination?

A Status Determination should be carried out at the start of each relevant assignment and thereafter (for longer assignments) after the shorter of 3 months and completion of the deliverable. Following this, Gravitas recommends carrying out assessments at least six-monthly or whenever we, the Client or the Contractor consider that the nature of the assignment has materially changed.

By when do I need to have made the status determination for current contractors?

The rules are expected to take effect for all work completed on or after 6th April 2021. For all Contractors that you currently have onsite, determinations will need to be made by the end of February 2021. This will allow, where an inside determination is received, any relevant periods of notice to be completed before the Contractor needs to switch to an alternative engagement method.

What if a contractor disputes the Status Determination?

The Contractor will have right to notify you as to why they believe the determination is incorrect. You will have 45 days to consider these reasons and provide a final outcome to the Contractor.

A Status Determination dispute is much more likely to be the case where an End Client has determined an assignment to be “Inside” IR35, but the contractor believes that the assignment is “Outside” IR35. Realistically, the onus is simply on the client to provide sufficient detail for the reason for their status determination.

What factors are considered in making a status determination?

Control: Contractor can demonstrate a certain level of autonomy on the project they are completing. Control factors include the contractor being supervised, specific start and end times and the location of work. The more the focus is on autonomously completing a deliverable, the lower the level of control.

Financial Risk: It is expected that a Contractor genuinely in business on its own account would take on a certain amount of Financial Risk such as rectifying any services the Client is not satisfied with at their own cost.

Integration: The degree of integration of a Contractor into an end client's business (e.g. do they look, feel and smell like an employee are they "Part and Parcel" of an organisation).

Others: Including right of substitution and mutuality of obligation.

Are blanket IR35 decisions allowed?

As the Client, you are required to take reasonable care in making each status determination, failure to do so will result in you becoming responsible for the Contractor's tax and NI contributions. HMRC specifically confirm that making a blanket decision is an example of not taking reasonable care.

However, some companies have adopted policies not to allow personal service companies and umbrella companies in their supply chain in order to avoid IR35 risk. This approach may bring operational risk, especially loss of talent to competitors.

Are there any exemptions available for clients from having to apply changes to IR35?

The PSC and contractor remain responsible and liable for applying IR35 if the user of the services (the client) is:

- A small business (per the Companies Act guidance), or
- The Client does not have a UK connection – a "permanent establishment" for tax in the UK in the tax year immediately prior to the one in which a service is delivered (for example, the end client is not a UK Company).

What is the small business exemption?

The new IR35 changes will affect all Public sector clients and Medium and Large private sector clients only – "small" private sector businesses are exempt.

The existing off-payroll working rules will continue to apply for assignments if the client is a "small" business, meaning the responsibility and liability for making the status determination and deducting the appropriate taxes and NICs remains with the Limited Company.

- A company qualifies as "small" if two of the following conditions apply:
- Annual turnover – no more than £10.2 million;
- Balance sheet total – no more than £5.1 million; and
- Number of employees – no more than 50 employees.

HMRC's review, published on 27 February, confirmed that the final legislation will include a legal obligation on the clients to confirm their size when asked by an agency or a worker.

Where a UK legal entity is the fee payer and pays a worker who is not a UK resident /tax payer, does IR35 apply and does the fee payer need to provide any evidence of the workers tax status? If they do need to provide evidence of the workers tax status, what would be acceptable given that the worker is not a UK resident and not a UK tax payer?

If the worker is not a UK tax resident and provides the services from outside the UK then there is a possibility that IR35 may not give rise to a tax charge in the UK but this is a complex area and each case needs to be looked at on its facts.

A UK based client would be advised to carry out a Status Determination in relation to any supply involving an off-payroll worker working through an "intermediary" - whether they reside in the UK or not. UK based Fee Payers should seek specialist legal advice on payments to non-UK intermediaries.

C19 has led to some contractors working overseas for UK companies. Where the contractors themselves have moved overseas but they are providing services to a UK company, do the IR35 rules still apply?

If the contractor is still a UK tax resident, then IR35 will apply regardless of where they work.

How can we assess the IR35 status of an assignment?

HMRC have developed a tool called CEST which is available here: <https://www.gov.uk/guidance/check-employment-status-for-tax>. However, it should be noted that checking an assignment's status is not just a mathematical

exercise, it is based on judgement. Many technology roles involve creating certain deliverables and many of these roles could be deemed to be “Outside” IR35. In these cases, it is often not what is delivered, but how it is delivered that will determine a status. Working with leading legal experts on IR35, Osborne Clark, Gravitas has built a bespoke tool for our specialist contractors that can be used to assess each worker and take into account current case law. The tool can be accessed here: <https://s.surveyanyplace.com/gravitas-ir35>

Is the Gravitas Status Determination Tool insured?

We have built a bespoke tripartite Status Determination Tool that is specific for niche IT contractors that is not insured. Our tool has been built with support from a leading external law firm and is based on case law.

With most status determination tools that have insurance coverage, the insurance only lasts for as long as the premiums are paid.

Typically, insurance will only cover a period of 4 years. In most cases, it will not provide cover a client who has not provided reasonable care in their status determination assessment process.

What are the options for an individual we are hiring once we have made a status determination?

Once a determination of an assignment has been confirmed we will need to discuss the personalised options available. These include:

Inside IR35

- APSCo and FCSA accredited umbrella companies
- PAYE – the Gravitas PAYE Solution whereby we payroll contractors
- Hiring the individual on a fixed term permanent contract (i.e. as an employee)

Outside IR35

- Continue to operate through their existing Limited Company
- Revised contractual terms will be in place that are more focused on deliverables
- Statement of Work – This solution would involve a consultancy led agreement where projects would be fully scoped and outsourced. Please note this is not a work around for IR35 but an alternative way to engage talent for specific projects. The statement of work would need to be a fully outsourced service rather than a provision of labour to fall “outside” IR35. Gravitas have a specialist team developing Statement of Work solutions – please contact Matthew Hepworth on XXX if you have any questions.

How does a Contractor know the tax implications of being “inside” IR35

- A contractor is generally worse off from a tax perspective “inside” IR35 than they are “outside” IR35, including taking the burden for employer’s as well as employee’s national insurance and with more restrictions on the expenses that may be deducted.
- The Good Work Plan effective from April 2020 means that a fee payer is required to detail in writing to workers what deductions they will suffer from their limited company rate when operating through an umbrella intermediary and provide a net pay illustration to match.
- Gravitas have a calculator that can be easily and quickly used to illustrate how a contractor fee rate converts to an “inside” IR35 salary equivalent.

How much do umbrella companies charge Contractors?

Each Umbrella Company will have their own margin but they usually range from £10 – £25 per week worked.

If a contractor is “Inside” IR35 are they an employee?

If an inside determination has been reached, the Contractor would not become an employee of the Client they may be deemed to be a “worker” and the Agency Worker Regulations may apply.

What is an umbrella company?

- The umbrella company provides payroll on behalf of the contractor and bills the agency (who in turn bills the client) for work completed by the contractor. They become the fee payer in the contractual chain.

- The umbrella generally makes money by charging the contractor and via employee benefit arrangements.
- Different arrangements are offered by umbrella companies offering flexibility
- Some clients (e.g. HSBC and their consultancies) do not allow the use of umbrella companies in the supply chain

What is a PEO model?

PEO is a Professional Employer Organisation – it is widely used in the USA and is establishing itself in the UK. With PEO, candidates are told their gross pay rate and not the limited company rate, so all employment cost deductions are already accounted for and payslips are simple to understand.

What is the Gravitas PAYE model?

Gravitas has developed an in-house compliant PAYE model for Clients or Contractors that cannot or do not want to utilise a compliant Umbrella Company for the engagement of a Contractor. Contractors would have the option to join the NEST pension scheme and holidays would be accrued and either paid when holiday is taken or at the end of the contract. Gravitas do not charge contractors for the use of this model.

It helps clients who:

- Are seeking a compliant solution and will not use umbrella companies e.g. HSBC, Capco, etc
- Are seeking to move direct contractors 'Inside IR35' and would like them to avoid the umbrella companies

It helps candidates who:

- Do not wish to use umbrella companies
- Wish to avoid the high cost of using an umbrella company

If I already have a contractor in place, can I switch them to a permanent contract as an employee?

Yes – Gravitas will help facilitate the transition of a contractor to a permanent position. There will be a temporary-permanent fee payable.

Why are certain companies refusing to allow contractors to use umbrella companies?

This may be driven by more general concerns about supply chain risks beyond IR35. Clients will want to ensure there are no risks regarding the Criminal Finances Act 2017 or other liability transfer risks they could face if a Contractor used a non-compliant Umbrella Company. There is also a risk that if IR35 deductions are not made appropriately by the fee payer and the fee payer is unable to settle its liability, the fee payer risk could potentially roll back to the client.

Can a contractor continue to use their personal service company if they are "Inside" IR35?

Yes – contractors can continue to use their personal service company, but fees paid to the personal service company will be net of tax and National Insurance and the personal service company will need to consider corporation tax and taxes payable on distributing income to its shareholders.

My company is a consultancy, is it us or our client who needs to complete the status determination assessment? / What if I have contractors working for my via a consultancy?

The client is the organisation who is or will be receiving the services of a contractor. They may also be known as the engager, hirer or end client. The client will be responsible for determining if the off-payroll working rules apply.

The key question is therefore: who is receiving the services of the contractor? If a consultancy is providing a fully outsourced service, they are likely to be deemed the end client as they are receiving the services of a contractor.

If a consultancy contract is effectively a provision of labour rather than a fully outsourced service, then the end client is likely to be the client of the consultancy.

If it is not clear, it is safer to err on the side of caution and complete a status determination statement.

Do I need to complete a status determination for a contractor that is based overseas working for a UK company via an intermediary?

This will depend on the facts.

The government simply states that:

“You may be affected by these rules if you are:

- a worker who provides their services through their intermediary
- a client who receives services from a worker through their intermediary
- an agency providing workers’ services through their intermediary

If the rules apply, tax and National Insurance contributions must be deducted from fees and paid to HMRC.”

There is therefore no automatic exemption to the IR35 rules for an individual based overseas and we recommend that an IR35 status determination is performed. The tax status of the contractor will depend on their residency and the regulations in the country in which they are working – this can be complex. By completing the assessment, the issue regarding deductions of National Insurance and tax is passed to the fee payer.

Where can I find more information?

The government has released information, including worked examples in the following link: [Understanding off-payroll working \(IR35\) - GOV.UK \(www.gov.uk\)](https://www.gov.uk/guidance/understanding-off-payroll-working-ir35)