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# HOW TO ASSESS IR35 CORRECTLY

An overview of the assessment criteria and what to avoid doing as a business.



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# Introduction

IR35 reforms were supposed to be implemented in April 2020, but were rightfully postponed until 2021 due to unpreparedness resulting from the COVID-19 pandemic, as well as flaws with government advice and the CEST tool. What quickly became apparent when we initially started talking to businesses, was that business leaders were uncertain how exactly to assess their contractor estate when given such arbitrary factors to use.

To help we hosted a roundtable with one of our strategic legal partners who specialise in IR35 to provide useful insights into what businesses need to do to prepare. As we approach the new deadline of April 2021, now is the time to prepare. In order to prepare appropriately it is fundamental you know what to do, and what not to do, when you start to assess and make decisions on the IR35 status of your employment and contractor estates.

Read on to learn more.

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# IR35 Recap

IR35 stipulates that if a contractor acts and is treated like an employee, then they should be taxed as an employee. That isn't changing. There will however be a shift in responsibility and liability. As of April 2021, the intermediary will no longer be responsible for determining their employment status. Instead, medium and large corporate end users who become responsible for ruling on employment status and correctly operating PAYE and NIC. You must:

- Demonstrate reasonable care when assessing every role and each individual contractor
- Determine IR35 statuses for the whole contractor estate
- Provide SDS reports and pass them down the supply chain
- Ensure full supply chain compliance

This includes the following:

- If a fee payer doesn't pay the tax, liability will be passed up the chain
- Mandatory provision of information to the contractor stipulating how decisions are reached
- Mandatory requirement of client to give the contractor the right to appeal a decision

Risks for not complying include fines, penalties, legal action, and reputational damage.

## The CEST Tool

In order to help businesses, the government provided the CEST tool for businesses to use. The idea behind this was that businesses could use the tool to determine the tax status of their employees and to see if they fit "inside IR35" (employee for tax purposes) or "outside IR35" (contractor for tax purposes). On paper this sounds great. But in reality, the tool was flawed:

- Decisions are made on isolated areas of the law rather than acknowledging full case law
- Mutuality of obligation (MOO), a key determiner of IR35 status is not considered
- Assessments are based on 16 questions, which oversimplifies the complexity of IR35
- It wasn't assessed under Government Digital Services (GDS) standards
- Industry stakeholders and employment status specialists have heavily criticised the tool
- Doesn't constitute reasonable care, a legislative requirement of assessing IR35 status
- NHS Digital used CEST, where found to be non-compliant, and were fined £4.3m

Despite using the CEST tool, NHS Digital were fined £4.3m for non-compliance. When in court and they used their CEST result as evidence, it was discounted and the responsibility for the non-compliance still sat with NHS Digital. Sadly, there are still fundamental flaws with the CEST tool, so although it might be useful as a starting point, it absolutely should not be the only method of determination businesses use. When determining IR35 and tax status for your contractor estate, you must use due diligence, care, and be thorough! The CEST tool is not enough!

# Assessment Criteria

When assessing IR35, there are several criteria that identify contractors as falling inside IR35 (employee for tax purposes) or outside IR35 (contractor for tax purposes). The three main areas are mutuality of obligation, control, and substitution. However, financial risk and distinction are also very important.

## Mutuality of Obligation

A feeling of continued obligations between an end-user client and contractor, where the client is obliged to provide paid work and the individual is obliged to accept and complete the work.

EXAMPLE: A contract engineer turns up to work, but all systems are down, and they are unable to do their job. Permanent employees are given another job such as cleaning or are sent home with pay. Contractors are sent home without pay.

## Control

Control in the manner of HOW work is completed. It is perfectly acceptable to have overall deliverables as long as it is operationally required.

EXAMPLE: You hire a website designer. You tell the designer what you want the end product to look like, what should be included, and the deadline, but you do not stipulate how the web designer works and where he works etc. Contractors should not sign employee policies other than those that are business critical or legally required (NDA's / Cyber Security).

## Substitution

The contractor should have an unfettered right to offer a substitute in their place. Although they don't have to act upon this, the right to do so should be there. It is also acceptable to have conditions around who the substitute can be as long as it is operationally necessary.

EXAMPLE: A contractor working in a specific programming language wants to offer up a substitute without rejection, further interview or scrutiny. As an end client, you can however specify that they must have experience working in the desired programming language.

## Financial Risk

If a contractor's work is incomplete or faulty, they will accept reduced or even no payment for their work, and will rectify it at their own cost. They may have their own insurance to cover events such as this.

## Distinction

Contractors and employees should be treated differently. A contractor should be easily identifiable. They should receive no employment benefits such as sick pay, holiday pay, car parking spaces, and pension packages.

## Other factors HMRC might consider

Whilst these are less obvious than those described above, the factors below also indicate the status of an employee/contractor:

- Those outside IR35 are more likely to carry their own insurance
- Those outside IR35 are more likely to have business premises
- Those outside IR35 are more likely to have their own website

## What to Avoid

Every employer must demonstrate reasonable care when assessing the IR35 status of their contractor estate. Failure to do so could warrant HMRC investigation. This means that every end client must:

- Avoid blanket bans and blanket assessments
- Review every role and every contractor individually
- Re-assess IR35 status every time that a role changes, a contractor is hired, or a contract is extended
- Do not rely solely on CEST
- Seek independent legal advice from a FCSA approved IR35 specialist
- Provide a thorough and detailed SDS report for every contractor and every role
- Communicate decisions clearly throughout the supply chain and give the contractor the right to appeal your decision

Now is the time to prepare, finalise processes, and make sure your house is in order for April 2021. Even if the legislation doesn't pass this year, at least you know your future-proofed for when it does happen.

Alongside our strategic legal partners, Maxwell Bond advises the following:

- Plan ahead
- Avoid blanket bans and blanket assessments
- Know your contractor estate
- Know your supply chain
- Be careful about the terminology used in your contracts
- Ensure that all contracts and policies signed by contractors are operationally required
- Avoid CEST as a sole determiner of IR35 status
- Use Maxwell Bond's tools and solutions to prepare and protect your business ahead of the reforms

Sound like a lot? Business leaders are already going through so much stress and change, do you want to avoid this extra burden?

We've created a solution alongside our legal partners who are FCSA approved and have a 100% success rate in IR35 related matters.

# Stress Free IR35 Solutions

Maxwell Bond are fully informed and prepared for IR35 contractor reforms. Alongside our strategic legal partners, we have a 100% success rate and a flawless track record. We are here to help you. With your permission we can help with:

- Complete contractor estate audit and management
- Provision of complete SDS
- Insure and indemnify each individual
- Ensure full supply chain compliance
- Complete removal of legal and financial risk
- One point of contact
- Guides, events, and market updates
- Plus, you can transfer your contractors directly to us for a 40% fee reduction

Don't spend business critical time doing all the admin for IR35 contractor reforms. Let Maxwell Bond step in and ensure full compliance, whilst taking on all the financial and legal risk.

**Contact us today to find out more.**





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# CONTACT US TODAY

Prepare and protect your business for IR35 Contractor Reform with Maxwell Bond, the consultancy of choice across contractor hire and employment in the UK.



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