

IR35

What is IR35?

IR35 (also known as the 'intermediaries legislation') is an anti-tax avoidance measure introduced by the Government in April 2000. It targets individuals who attempt to avoid paying employee income tax and national insurance contributions (NIC) by supplying their services through an 'intermediary' (see page 10 for an explanation of this term).

The IR35 regime investigates the nature of the relationship between the individual and the end user to determine whether, were it not for using a PSC, that individual would be considered as an employee or office holder (for example, a director) of the client. Where an employment contract would have existed between the individual and the client in the absence of the intermediary, IR35 ensures that the income tax and NIC liability in respect of that individual is broadly equivalent to that of an employee. Under the original IR35 rules (which currently apply in the private sector), the 'intermediary' is responsible for deciding whether the IR35 rules apply and has PAYE and NIC obligations.

In April 2017, the government introduced reforms to IR35 specifically for the public sector (known as the 'off-payroll working rules'). Under these reforms, the public sector body became responsible for determining the employment status for tax of the individual providing the services via an 'intermediary' and for operating PAYE to deduct tax and NIC, if necessary (although, if there is an agency between the public sector body and the 'intermediary', the agency has the PAYE and NIC obligations).

What is changing in April 2020?

From 6th April 2020, the government is proposing to extend the public sector IR35 reforms to medium and large businesses in the private sector. So, if the client is a public body or a medium or large private sector business, the client will be responsible for deciding whether IR35 applies whenever it receives services from a person working through an 'intermediary'. The client will have the PAYE and NIC obligations, unless it is contracting with the 'intermediary' through an agency (as explained above).

As well as public sector bodies, private sector bodies which are defined as medium or large will also be responsible for determining the employment status for tax of all individuals whom they engage via an intermediary.

This means locums providing services through 'intermediaries' to non-public sector bodies, such as corporations who provide Out-of-Hours (OOH), Urgent Care, Walk-inCentres etc., may now be affected from April 2020.

The original IR35 rules will continue to apply to clients who are small private sector businesses. So, if the client is a small private sector business, the 'intermediary' will still be responsible for deciding whether the IR35 rules apply and will have the PAYE and NIC obligations.

IR35 rules apply across the UK. They are part of a wider body of anti-tax avoidance rules which may also need to be considered where individuals are supplying their services through intermediaries or agencies.



When does IR35 apply?

IR35 broadly applies when the following three conditions are met:

1. An individual personally performs services for another person or organisation ('client') or is under an obligation to do so.
2. The individual carries out the performance of those services under arrangements involving an 'intermediary', rather than under a contract directly between the client and individual.
3. The circumstances are such that:
 - a) if the services had been provided under a contract directly between the client and individual, the individual would be regarded as an employee or office holder of the client for income tax and NIC purposes.
 - b) (for income tax purposes) the individual is an office holder under the client and the services relate to the office.

What is an 'intermediary'?

There are three types of 'intermediary', defined in the IR35 legislation as:

- A limited company in which the individual performing the services has a 'material interest' (this is often referred to as a 'personal service company' or 'PSC' – see below). Broadly speaking, a person has a 'material interest' if he and/or his associates (e.g. his spouse or certain family members) owns more than 5% of the ordinary share capital of the company, or has a right to receive more than 5% of any distributions made by the company or more than 5% of the assets of the company on a winding up.
- A partnership or LLP in which the individual is a partner and broadly, either:
 - is entitled (together with his spouse and/or certain family members) to 60% or more of the profits of the partnership/LLP; or
 - most of the profits of the partnership/LLP derive from engagements with a single client which are caught by IR35; or
 - the income of any of the partners is based on the amount of income generated by that partner from engagements that are caught by IR35.
- an individual (such as a sole trader) who provides the services of another individual, e.g. a practice contracts with John Smith, who in turn contracts with Tom Jones for Tom Jones to provide services to the practice. John Smith is acting as an 'intermediary' in this scenario.

What are the consequences of IR35?

If IR35 applies, the individual is treated as an employee for income tax and NIC purposes. An approximately equivalent amount of income tax and NIC is payable as would have been if the individual was directly employed by the client.

Until 5 April 2017, it was the intermediary's obligation to:

1. Determine whether IR35 applies.
2. If IR35 applies, deduct appropriate tax and NIC from any payments made to the individual.

From 6 April 2017, when a public sector body engages an individual through a PSC, the end client (not always has the obligation to make the status determination (even if an agency is used), but the person who pays the intermediary (which could be an agency) has to deduct tax and NICs. For these purposes, a public sector body is defined as a 'public authority' under the Freedom of Information Act 2000 (or its Scottish equivalent), which includes NHS England, clinical commissioning groups (CCGs), health boards and NHS trusts, as well as GP practices providing GMS and PMS/section 17C services (but not other types of providers who do not provide those services). In addition, the 5% allowance to be deducted for 'notional expenses' when calculating an IR35 liability is removed for PSCs operating in the public sector.

Where a public sector client or agency deems an individual inside IR35, it does not necessarily mean there is any change to their status in terms of statutory employment protection as IR35 rules only apply to tax and NIC.

As long as the individual is working under a genuine contract with the PSC, they will not be considered an employee of the client or agency by an employment tribunal.

For non-public sector engagements the old rules continue to apply and so it is still the intermediary that is responsible for applying IR35. This will no longer be the case for medium and large businesses in the private sector, assuming the changes to IR35 go ahead on 6 April 2020. The original IR35 rules (where the intermediary is responsible for determining status and deducting tax and NICs) will continue to apply to small businesses in the private sector after this date.

How does IR35 affect doctors?

The IR35 rules only apply where doctors are providing their services through 'intermediaries' whose relationship with their client is such that had they been paid directly they would be employees of the client – although it will still be up to the client to determine status where engaging the services of a sole trader.

A key factor is the right of substitution, though it is not the only factor that will be considered by HMRC. Where there is a right of substitution, the contract between the intermediary and client should provide that if a particular doctor is unavailable, then another doctor who is suitably qualified will be supplied as a 'substitute' to do the work instead, and the client cannot refuse this. If there is a right of substitution, it will be more likely that the doctor is found to be outside IR35.

The application of IR35 is assessed on a case-by-case basis so the circumstances of each engagement must be considered individually in order to determine whether it is caught by the rules (or any other applicable rules). Here are some examples of how it might affect locums and GP practices.

Example 1: A locum GP contracting directly with a client

A locum operating as a sole trader who contracts directly with a client (such as a GP practice or NHS trust) is excluded from IR35 as there is no intermediary. The end client still has a legal obligation (under general income tax rules, rather than IR35) to decide whether the locum is employed or self-employed for tax purposes and, if they deem them to be employed, to pay them through the payroll. If the client considers that the locum is self-employed for tax purposes, the locum will be responsible for accounting for tax and NICs through self-assessment. But there is still a risk that HMRC could seek to recover tax and NICs from the end client if they disagree with the decision that the locum is self-employed for tax purposes.

Example 2: A locum GP contracting via an intermediary

Where a locum is contracting with a client or recruitment agency via an intermediary (such as a PSC), IR35 may apply. Since 6 April 2017, where a public sector body (including a GMS or PMS/section 17C practice) engages a worker to personally perform services under arrangements involving an 'intermediary', the obligation to determine whether IR35 applies and, if so, account for the relevant income tax and NIC will be on the public sector body (if there is an agency, the agency is responsible for accounting for tax and NIC). For non-public sector-engagements these obligations continue to be on the PSC at present. However, the IR35 rules are set to change for medium and large businesses in the private sector from 6 April 2020 (see above). The obligations will only continue to be on the PSC where the end client is a small private sector business.

Example 3: A locum GP contracting via an agency or chambers

A locum who works for a client via an agency could contract either directly with the agency, or via an intermediary (such as a PSC). If the locum contracts with the agency through a PSC (or other 'intermediary', the IR35 rules may apply. IR35 will not apply if the locum is directly engaged by the agency either as an employee of the agency or a sole trader – in the latter case, the 'agency rules' may apply.

IR35 may also apply where a locum works via chambers. However, this will depend on how the chambers are structured, and the particular contractual arrangements.

Getting advice

The BMA can provide initial support for members with IR35. See our advice on employment status.

HMRC has published guidance on IR35 and launched a new online employment status service tool to obtain its view of whether any current and prospective workers would fall within the new off-payroll rules.

www.tax.service.gov.uk/check-employment-status-for-tax/setup

HMRC has stated that it will stand by the result its service produces unless it is based on inaccurate information. Where artificial arrangements are created in order to achieve a particular outcome from the service HMRC will treat it as evidence of deliberate noncompliance which may attract higher penalties.

If you remain unsure whether IR35 applies, you should consider seeking expert advice. BMA Law offers legal advice at discounted rates for BMA members.

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British Medical Association, BMA House,
Tavistock Square, London WC1H 9JP
bma.org.uk

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