

## IR35 – ‘Off Payroll Working Legislation’ – 2021 Private & Public Sector

This document provides insight on the ‘Off Payroll Working Legislation’ (IR35) now in force (for larger companies) in the private sector and the public sector.

Included are details on:

- **What the legislation is.**
- The options available to organisations to **mitigate the impacts this new regulation** may have on their critical ‘contractor’ workforce - in regards to current projects, future projects, and organisational operations.
- **A short overview on how Digital Works Group may help you solve these issues** - via its inherently IR35 compliant structure and ways of working – meaning you don’t need to declare activities undertaken with us as ‘inside’ IR35. Both new initiatives and existing projects.

### 1. OFF PAYROLL WORKING LEGISLATION / RULES

- **IR35 is a suite of legislation/court rulings designed to stop ‘shadow employment’** – i.e. when the person providing the services to an organisation is in reality an ‘employee’ – and not self-employed/‘a contractor’ -- and therefore their income should be liable for Income Tax and NIC.
- The case for ‘shadow employment’ is often made when there is a single person Ltd business involved, whose director and owner is also the sole service provider (‘single provider’ or ‘contractor’) of services in that business.
  - Through the above set-up, the provider may elect to pay themselves from income in a more tax-efficient distributable profit-share dividend approach.
  - This payment extraction method is perfectly legal, **as long as the provider can prove they aren’t a shadow employee** and therefore subject to IR35 legislation. This is often done by the ‘single provider’ by using appropriate wording within the service contract, proof that the organisation has multiple clients, or most critically that the organisation has inherent substitutability of resources who are able to perform the services.
  - Failure to have the above increases the risk of any engagement being deemed ‘shadow employment’ and subject to IR35 rules (and income tax and NICs).

The broad suite of factors HMRC typically uses to determine employment or ‘self-employment’ (i.e. contractor) can be found in **Section 7 (appendix)** at the end of this document.

- **April 2021 saw a change to IR35 legislation.**
  - From now it is **no longer just the provider** (or others in the channel helping the supply of services – such as personal services companies) to determine if they are subject to IR35 legislation.
  - **From this date it will also be the responsibility of the organisation** ('employment business') which receives an 'individual providers' services to determine whether or not they fall within the scope of IR35 rules. Determining if a 'role' is inside or outside of IR35 – 'inside' defined as subject to income tax and NIC, 'outside' defined as not subject to income tax and NICs under the IR35 rules.

## 2. THE IMPACTS

- For many organisations this can have material significance, not least of which is the risk of liability for additional 'income tax and NIC' fees if they declare a 'role' as outside IR35 incorrectly. But this isn't the only impact.
- For many organisations 'contractors' form a vital part of the development and operation of their business, often critical to the economic performance of the company, while providing ongoing flexibility.
- Without careful handling, and taking into account the needs of the organisation as well as the 'single provider', the changes may lead to negative impacts to the organisation with regard to progressing critical projects, operations, skills and more. This will simply increase risks and potentially economic costs, in turn impacting existing mission critical activities and how organisations may go about resourcing new projects for the future.

## 3. SOLUTIONS – BEING IR35 'COMPLIANT'

- The options for companies to approach the new legislation are quite clear:
  1. Operate as is and take the risk.
  2. No longer employ 'single person' providers, but resource needs via 'permanent staff' on the company payroll.
  3. Put a blank approach in place with 'single person providers' where all roles are determined to be within IR35.
  4. Employ 'single person' providers, but have clear measures in place to determine if a 'role' is inside IR35 or not. If the activity is, continue to pay the 'provider' the same rate as before, placing the economic burden of the additional taxes on the provider.

5. Employ 'single person' providers, but have clear measures in place to determine if a 'role' is inside IR35 or not. If the activity is, enhance the pay to the 'provider' to assist with covering the economic burden of the additional taxes on the provider. This would need to be a circa 20% upswing.
6. Choose to work with 'multi-team' providers who are inherently 'IR35 compliant' due to substitutability, and who can provide 'outcome-based' solutions to a given business need or problem, by deploying small teams or an individual. These providers delivering activities or solutions, do not need to be declared 'within IR35'.

Or, if the organisation does declare a need as a role, work with 'multi-team' providers whose structure and operating approaches make it much more likely that such a role would be classed as 'Outside'.

Or, if the organisation does declare a need as a role, and one within IR35, work with such 'multi-team' businesses who have the payment and operational processes that are able to adhere to this.

For the organisation the ideal situation is to find solutions which mitigate the risks, while continuing to provide flexibly for their needs, and allow for similar economic conditions to prevail (i.e. no costlier than before)

- If we look at the options above, we can identify the pluses and minuses of each approach:

OPTION	IR35 Safe	Maintains/ Easy to acquire critical skills	Maintains Flexibility	Cost is the same	Overall Risk – critical project impact   fines + reputation
1	No	Yes	Yes	Yes	High
2	Yes	No - not in the short-term	No	No – probably costlier in the long-term	Medium
3	Yes	No – makes hiring harder	No	Yes	Medium
4	Yes	No – increased risk of critical contractors leaving	Yes	Yes	Medium
5	Yes	Yes	Yes	No – costlier. Typically, an upswing of 20%.	Low

6	Yes	Yes – new projects Potentially – existing projects	Yes	Potentially – depends on the provider	Low

- The option(s) chosen will undoubtedly be influenced by the situation/scenario and the degree of risk a company is willing to tolerate. For example, how a company resources a new project may require a different choice than how the company deals with ‘critical contractors’ working on an existing projects.
- However, what we believe is certain, is **choosing to do nothing (option 1) is not a wise option as the potential punitive economic and reputational risk is obviously high.**

#### 4. DWG & IR35

- Digital Works Consulting Ltd (t/as Digital Works Group) is a business transformation and innovation consultancy, with a major in digital. We have successfully provided solutions and skills for many leading businesses – such as eBay, PayPal, MasterCard, Virgin Media, and more.
- Providing solution-based outcomes to:
  - a given broad requirement - i.e. digital transformation, turnaround or innovation;
  - a given need - i.e. re-engineering an old technical platform, mapping a compelling end-to-end customer experience, or creating a clear vision and strategy;
  - or providing specific skilled resources to solve something - i.e. an experienced project manager, BA, product owner or digital marketing expert.
- Today we are a multi-team business of over 50 people. **We are inherently IR35 compliant** – meaning activities with us that are declared as an outcome rather than as role - don’t need to be declared inside IR35 rules -- because of our inherent substitutability, multiple clients, and the right regulatory compliant corporate structure.
- But even when needs are declared as a ‘role’ and determined to be within IR35, we have the right operational processes and business model to work with this scenario. Directly or via an intermediary partner you may be operating with. **However, because of our structure as a supplier, often those roles don’t need to be determined as within IR35** – as proven by the numerous evaluations we positively passed during the preparation stages of the targeted roll-out of the legislation in April 2021.

And we are different from others because of our deep ‘digital change’ experience within the business, a think and do (outcome) approach, the end-to-end service provision suitable for most transformation or innovation needs, and our market-leading rates/value.

**We are a strong partner – for the ideal ‘Option 6 approach’.**

## 5. DWG & IR35 SOLUTIONS FOR ORGANISATIONS

### For New Projects:

- DWG offers a simple and compelling option to resource/deliver activities which you may need – in line with our proposition and skill sets.
- Engaging with us will ensure activities are:
  - IR35 compliant – not having to declare them within IR35 rules
  - The delivery of the right skills and experience
  - Flexibility
  - And through our market leading rates, a similar economic basis as before.
  - Usually by moving from a 'role' based definition or need, to one which is more 'solution outcome' – often better for the business.
- But as described in the previous section, if the need is declared as a role and determined to be inside IR35, we also have the operational processes to be able to adhere to this – direct or via an intermediary; allowing you to remain IR35 safe and compliant.
- Finally, our corporate structure and business model also allows us to work well and through 'intermediaries' (recruitment businesses). Which includes ensuring compliance to their requirements coming from the '2011 transfer of debt/management service company' legislation.
- **Meaning DWG is a good partner for your skills requirements ongoing. As well as compliance to the various IR35 scenarios moving forward.**

### For Existing Projects:

- We can also, at times, offer compelling solutions for how companies tackle scenarios where they need to be IR35 compliant, while continuing to engage with critical and existing 'single provider/contractor' relationships to deliver a need/project, without adversely affecting the economics/costs.
- Solutions which work for the organisation, channel providers and the end contractor.

## 6. CONTACT

The new regulations are certain to provide challenges for many businesses, so if you are interested in discussing any of this further, we would be delighted to help.

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## 7. APPENDIX – Factors used by HMRC to determine ‘Employment or Self Employment’:

The distinction between employment and self-employment (‘contractor’) can be a fine one. Factors HMRC may use and may be of importance in deciding this are as follows:

- a) **Contract**
  - if there is a ‘contract **of** services’ this tends to suggest employment;
  - whereas a ‘contract **for** services’ this suggests self-employment.
  
- b) **Integral position** – if the individual holds an integral position within the organisation, for example a chairman, he/she must be employed.
  
- c) **Risk**
  - Employees usually receive a regular wage or salary; they are paid whether or not their employer is making a profit and do not risk their own capital in the business.
  - Self-employed people are normally paid a separate fee for each job they do; they may make losses as well as profits and may lose their capital if the business fails.
  
- d) **Control**
  - can the individual choose the place of work, hours of work and method? If so he/she is likely to be self-employed.
  - Is he/she subject to direction of another person? Does a master/servant relationship exist? If so he/she is likely to be employed.
  
- e) **Legal rights** – Does the individual have the right to receive regular remuneration, holiday pay, redundancy pay and benefits? This can indicate employment rather than self-employment.
  
- f) **Equipment** – In general, employees do not provide their own equipment but self-employed people do.
  
- g) **Exclusivity**
  - In general, an employee is employed by just one employer and is an integral part of that employer’s business. Where a person works almost entirely for one organisation, there is a very strong argument for treating this person as employed.
  
  - Self-employed people normally have a number of clients and are not integral to any of their clients’ businesses.

#### **h) Substitute**

- An employed person cannot provide a substitute worker to do the job.

**NOTE:** HMRC will consider a number of these factors in assessing whether an individual is employed or self-employed - but ones like legal rights, control, exclusivity and substitute - are arguably of higher weighting.