

EMPLOYMENT

Consultancy and Contractor Agreements

Engaging contractors correctly, with attention to employment status and the off-payroll working (IR35) rules.

Contractor or employee?

Businesses often engage people on a self-employed or limited company basis, because it is flexible and avoids payroll. The label in the contract does not decide status. Courts and HMRC look at how the relationship works in practice, and a contractor who is really an employee brings employment rights, tax and National Insurance with them.

The usual factors are:

- **Control.** Who decides what is done, when and how?
- **Substitution.** Can the person send someone else in their place?
- **Mutual obligation.** Must the business offer work and the person accept it?
- **Integration.** Are they part of the business, with its email, uniform and meetings?
- **Financial risk.** Do they bear the cost of mistakes and supply their own equipment?
- **Duration and exclusivity.** Is it a series of short projects or a long-term role for one client?

No single factor decides. Employment status for employment law, and tax status, are tested separately and can give different answers.

Off-payroll working (IR35)

Where the contractor works through their own company, the off-payroll rules ask whether the contractor would be an employee if engaged directly. If so, tax and NIC must be accounted for as for an employee. Who decides depends on the size of the client. For medium and large private-sector clients, the client must assess status and issue a status determination statement, with reasons, and take reasonable care. For small clients, the contractor's own company decides.

Why status gets looked at

HMRC and the courts pay attention to how a contractor is engaged, because tax, National Insurance and employment rights follow. A business that engages the same person full time, under close instruction, for years, on a contractor basis, is likely to draw attention. Review such arrangements before they are questioned, not after.

Key points

- The contract label does not decide status. The facts do.
- Contractors through a company may fall within the off-payroll rules.
- Medium and large clients must assess status and give reasons.
- Written terms help but cannot cure a working practice that points to employment.
- Get the intellectual property position agreed in writing.
- Review long-running engagements regularly.

What the agreement should say

- **Services and deliverables.** A clear description, not a job description. Define the outcome or the project, not hours at a desk.
- **Right of substitution.** A genuine right to send a suitably skilled replacement, with a short notice requirement.
- **Control.** The contractor decides how the work is done, within agreed standards.
- **Fees and expenses.** Fixed price, day rate or milestones, how invoices are paid, and what happens on late payment.
- **Term and termination.** A fixed project or a rolling term with notice, and termination for serious breach.
- **Intellectual property.** The business needs an assignment in writing of what the contractor creates, because a contractor generally owns work they create unless it is assigned.
- **Confidentiality and data protection.** Include a data processing agreement if the contractor handles personal data. See our separate guide.
- **Insurance and liability.** Professional indemnity or public liability cover as relevant, and a sensible cap on liability.
- **Independence.** No exclusivity, no benefits, and responsibility for their own tax.

Before you start

- Does the person genuinely work on their own account?
- Can they send a substitute?
- Is the client small, medium or large for IR35?
- Who owns what is created?
- Is personal data involved?
- When will status be reviewed?

Practical steps for the client

Record the status assessment when the engagement begins and repeat it when the role changes. Make sure the way the person actually works matches the contract. Keep any status determination statement and the reasons for it. Where the engagement is long-term, full-time and under close direction, consider whether employment is the right route.

When a contractor looks like an employee

Check the facts. If status is in doubt, take advice before the first payment, as correcting it later may require back-dated tax.

Employment rights if status is wrong

If a contractor is found to be an employee or worker, the business may owe holiday pay, the minimum wage, pension contributions and notice, as well as unpaid tax and National Insurance. The contract may contain an indemnity, but an indemnity from an individual contractor is rarely worth much, so prevention is better.

How MTM can help

0161 835 2080
client@mtmlp.co.uk

We draft consultancy and contractor agreements that match how the engagement really works, and we prepare the IP assignment and data terms to go with them. The status and tax analysis, including any off-payroll determination, stays with you and your client's tax adviser.