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Employment, Freelancer Contracts and IR35 implications for Independent Songwriters



Introduction

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- Employment status including employees, workers and the genuinely self-employed
- Personal service company contractors and IR35
- Public and private sector off payroll provisions
- Essential terms for ‘employers’ to insist on.

Introduction

- **What is your ‘employment status’?**
- Employee
 - contract of employment
 - i.e. contract of service
- Director shareholder of a limited liability company
- Member of a limited liability partnership
- Partnership
- Sole trader principal

What is your people's 'employment status'? (1)

- Employees
- Self- employed sole trader 'independent contractors'
- Self-employed PSC 'independent contractors'
- Self –employed general partnership independent contractors
- Agency workers.

What is your people's 'employment status'? (2)

- Co-Director / shareholders
- Fellow full share LLP members
- Fellow part or fixed share LLP members
 - Tax status?
 - Employment status?
- Salaried partners: employees?
 - Tax status?
 - Employment status: employee or partner?

What is your people's 'employment status'? (3)

- PSC's – Off payroll working rules
- General Partnership – OPWR
 - Public sector April 2017
 - Private sector April 2020
- Client determination of status
- Fee payer makes deductions
- Small business exemption.

Key contractual terms – ‘staff’ (1)

- The parties
- Distinction between ‘service’ and ‘services’
- Conflicts of interest and freedom to contract
- Statutory requirement for PII
- Registration with VRS / HCPC.

Key contractual terms – ‘staff’ (2)

- Term and termination – notice
- Duties
- Independent contractor – substitution?
- Salaries
- Fees, expenses and invoicing?

Key contractual terms – ‘staff’ (3)

- Other activities
- Confidentiality and competition
- Data protection
- PII insurance and liability
- Tax and employment status.

Key contractual terms of business (1)

- The parties
- Preamble – purpose of agreement
- Services to be provided
- Term and termination
- Fees, expenses and invoicing.

Key contractual terms of business (2)

- Tax and employment status
- Confidentiality and competition
- PII insurance and liability.

Management of IR 35

- Are you as client or contractor or intermediary caught by IR 35?
- Off-payroll working rules
 - Small businesses exemption
 - £10.2 million turnover
 - Assets of £5.1 million
 - No more than 50 employees
 - Wholly overseas client exemption
 - Fully outsourced service exemption.

Management of IR 35

- OPWR only catches contractors who contract through an intermediary
- Client decides on employment status for tax
- Client decides on each engagement undertaken by contractor
- Client informs individual and PSC or other party in the supply chain of the outcome and reasons (status determination statement)
- SDS passed down the supply chain to fee payer.

What are the key considerations for making an employment status determination?

- No definitive list
- Strict legal factor A – mutuality of obligation
- Strict legal factor B – how much control each party has over the engagement
- Strict legal factor C – is there a right of substitution (but note ready mixed tests – below).
- What about CEST (check employment status for tax)? guidance only.

How to challenge IR35 status?

- Write to the client outlining why their determination is wrong
- 45 day client review procedure deadline
- IR35 rule continues to apply during 45 day period
- If client misses it, the contractors tax and NI becomes client responsibility.

IR 35 reform – offsets of tax and NIC

- Where worker incorrectly treated as self employed, the deemed employer must pay the income tax and NIC due had the worker been treated as an employee.
- Until 6th April 2024 tax and NIC actually paid by the worker and their PSC intermediary could not be offset against the deemed employer's liability.
- HMRC now has the power to deduct tax paid by the worker from the tax and NIC due from the deemed employer.
- The cost of the deemed liability is shared more fairly between the deemed employer and the worker
- Retrospectively to 2017 (Public authority clients) 2021 (medium and large sized private).

IR35 reform – non compliant umbrella companies

- The OPWR has caused hirers to be more cautious
- Risk of incorrect categorisation of a contractor's tax status and consequent failure to pay the right amount of tax has caused an increase in use of umbrella companies as intermediaries to manage PAYE deductions
- It has created a new layer of supply chain compliance challenges caused by non-compliant umbrella companies
- New initiative to transfer tax debt to other entities in the chain including the end hirer with penal rate of 35% of the assignment rate as opposed to a IR35 compliant rate of 14% of the assignment rate.

Practical tips for staying outside IR35

- Have a number of clients
- Avoid MOO – reserve the right to refuse work and exclusivity
- Have the right to send a substitute
- Have the power to determine the place where the services are performed
- Insist on a clear set of deliverables outlined in a statement of work.

Practical tips for staying outside IR35

- Ensure working practices differentiate between contractors and permanent employees: contractor specific work place policies
- Avoid replacing an existing employee
- Equipment and expenses
- Keep a diary of your day-to-day work
- Obtain a professional assessment of the proposed contract
- Submit professionally prepared tax returns on time
- Comply with the 24 month rule and the 40% rule.

The tax tribunals (FTT and UT) & Court of Appeal approach – the cases

01

Lorraine Kelly ITV presenter

Sufficient control over presenting activities to be self employed. It was a matter for her if she acted in a way which breached OFCOM rules. Despite obligation to comply statutory regulations in her contract.

02

Eamon Holmes ITV presenter

Same or similar contractual provision but Judge ruled that ITV had sufficient control.

03

Gary Lineker GLM -v- HMRC March 2023

Lineker operated through a general partnership (not a PSC) – the GLM Partnership. Signed contracts with BBC and BT Sport personally. Because each partner – Gary and his wife – acted as both principal and agent – the contracts were found to be direct between Gary Lineker and BBC and therefore IR35 did not apply. Therefore, contractors working through a partnership should establish a “general partnership” to guarantee that they are outside the scope of IR35.

The tax tribunals (FTT and UT) & Court of Appeal approach – the cases

04

Stuart Barnes (S&L Barnes Ltd -v- HMRC

Personal services company had been wrongly assessed by HMRC as falling within IR35. On the facts not a contract of employment Applying *Ready Mixed Concrete 1968* although mutuality of obligation and control the 'other factors' in the third stage of the test such as IP rights, no financial dependency on Sky and latitude in stating his availability and price show self employed,.

05

Kay Adams (Atholl House Limited -v- HMRC)

CoA remitted back to FTT December 2023: Was self employed because: BBC precedent for treating presenters like Ms Adams as self employed; the power of her 'brand'; and the absence of holiday pay, sick pay or pension entitlement. Confirmed "third stage" of *Ready Mixed Concrete* test is an overall evaluation of facts consistent or inconsistent with the conclusion of employment status and the first stage – mutuality of obligation and the second stage – control – may be part of that assessment.

06

Kickabout Productions Limited -v- HMRC 2022

TalksSport presenter was employed because existence of suspension and notice provisions inexplicable unless some obligation to provide work.

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Thank you

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