The Intermediaries Legislation aka IR35

The Intermediaries Legislation aka IR35 came into effect in April 2000. Its primary aim was to target ‘disguised employment’ i.e. sub-contractors whose relationship with the businesses who engaged them looked more like employment than self-employment thus side-stepping PAYE and NICs through payroll by operating through a personal service company (PSC). IR35 considers the underlying yet hypothetical contract between the business needing the work to be completed (client) and the person who is actually completing it (worker); and looks to establish what are the real contractual terms of the engagement.

This view was expressed by Lord Clarke in Autoclenz Ltd v Belcher {2001} UKSC 41 when he stated “”the relative bargaining power of the parties must be taken into account when deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only part.’

HMRC describe this as painting a picture:

"In order to decide whether a person carries on business on his own account it is necessary to consider many different aspects of that person's work activity. This is not a mechanical exercise of running through items on a checklist to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another. The process involves painting a picture in each individual case."

This requires looking closely at contracts and matching these terms to actual working practices. It is important to understand however that IR35 has been targeting off-payroll practices for many years and it is only with the change in who is now responsible for the determination of status that has caused such flurries of activity by the large private companies with which hospital doctors engage or use the services.

Many, if not all doctors operating private practices, will have been contacted by the hospital providers or medical groups with whom or through whom they provide their patients with their services. The letters being sent are generic and are accompanied by a form to complete which is based closely on HMRC’s CEST tool. These forms have the look of being a requirement and ask each doctor to sign them as individuals with limited options for explanation as many of the questions are closed: Yes or No. It is important to consider your response carefully before committing a signature. This activity is because with effect from April 2021 the onus of compliance has shifted from the PSC to the client, or to any “agency” making arrangements and payments to doctors through PSCs.

Doctors may recall that on 6 April 2017 the tax rules for off-payroll working in the public sector changed and that many workers providing their services through agencies direct to NHS hospitals found their contracts and payments altered significantly. This is because where work is undertaken for a public authority, the public authority, rather than the worker's PSC, is responsible for determining the tax status of the contract, i.e. if arrangements look more like disguised employment, the engager (NHS trust) must ensure all payments made under contracts to PSCs are assessed to PAYE with the worker (director/shareholder usually) named as the deemed employee.

This responsibility for determination of status of a worker, has been extended into the private sector for large and medium sized businesses (see below for qualification of size for LMs). Where work is undertaken for a small private sector engager the existing rules (IR35) remain unchanged. The worker must assess each contract undertaken to determine the tax status of that contract to ensure their PSC applies IR35 rules if the work is deemed employment, (Part 2 Chapter 8 ITEPA 2003).

A company is small for its first financial year unless two of the following apply:

Annual turnover: more than £10.2m

Balance sheet total: more than £5.1m

Average number of employees: more than 50

Now LMs in addition to all public sector engagers must review each contract to determine any implied employment tax status and issue a Status Determination Statement (SDS) accordingly. The SDS as defined in new legislation s61NA is an important practical document informing all entities along the labour supply chain whether or not payments for the work will need to be made under deduction of PAYE and NICs. Although there is no requirement to provide a determination if the result is that IR35 does not apply, it is usually best practice for LMs to do so.

The SDS must include reasons for the decision to treat the engagement under IR35 and the engager must demonstrate they have taken reasonable care in arriving at their determination. If they fail to meet these obligations to the worker, the SDS is not valid. This is because there is a right of appeal against the SDS.

Whilst many businesses will use the HMRC Check Employment Status for Tax (CEST) tool to make the determination, some will use their own method, such as that produced by CHG, for example. There is no legal pre-requisite form although HMRC [confirms](https://www.gov.uk/guidance/check-employment-status-for-tax) on its website:

'HMRC will stand by the result given unless a compliance check finds the information provided isn’t accurate’.

HMRC will not uphold their determination however if the result was achieved through contrived arrangements designed to arrive at a particular outcome from the service rather than answering with how an arrangement works in practice. In such circumstances, this would be treated as evidence of deliberate non- compliance with associated higher penalties. Presumably this is why businesses such as CHG are requesting individuals to sign their forms stating they have answered accurately.

The CEST tool has been criticised for being a ‘blunt instrument’ as it fails to ask intelligent questions about the nature of the relationship, but relies on closed questions (because it is clearly subject to Artificial Intelligence, not human – although no doubt, some doctors might say that would not be much of an improvement!).

When considering how to respond each doctor as the worker should examine the circumstances under which they operate, particularly if they are paid on a sessional basis to be available regardless of clinic lists, are a member of a consortium of some kind, or a Limited Liability Partnership (LLP). An LLP which shares profits based on the many different sources of income available to the LLP, and is after common costs for billing, secretarial support, professional indemnity, etc. should consider its membership agreements for how members share in profits and provide their services.

There is no legal definition of employment or self-employment so it is necessary to establish all of the facts including the reality of the day-to-day working practices and the contractual terms in order to apply case law precedent to the evidence. This process includes case law encompassing tax, NICs, in addition to employment law wherever the status of an individual has been explored and decided. Of course HMRC is required to consider these same facts although HMRC’s interpretation of case law may not match yours – that is why we have the tribunals and court process.

When examining the nature of a relationship there are usually two aspects: the written contract – this should always be in place for truly commercial delivery of a service; and working practices – what actually happens. Within the relationship there are many elements to be considered, but as a result of the status case Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance (1968) there are three main ones which provide the trump card:

Personal service or the right of substitution - is the working arrangement personal to the individual or does the individual have the right to use or engage another person to perform the services? If there is a clause demonstrating that any reasonable person (qualified and with admitting rights usually should suffice for hospital doctors), then this is the best indicator that there is no employment deemed or otherwise. This right needs to be reasonably fettered in order to be able to send a substitute. A ‘reasonable’ fetter means the engager would need only to be satisfied that the substitute was suitably skilled and qualified to undertake the work. In these circumstances it may be important to demonstrate that the original contractor remains responsible for the work and for paying the substitute.

In the case of corporate members of an LLP, this would be considered in the picture painted. Clearly operating through an LLP which is the sub-contractor tendering and taking on the work offered and organising and allocating work between group members and associates, there is no stipulation that any one particular person is obliged to perform the service. What is less clear-cut is if the corporate member is a PSC and they have only one director who can perform the service. There are a few ways of considering this circumstance, the primary ones are:

The LLP has its own costs to meet in order to provide the service and as such is demonstrating the badges of trade. The LLP does not stipulate who carries out the work, merely offers it to its members, or associates in the knowledge that someone will be available. There is no obligation on any member to perform set services or to be controlled by the LLP. Thus there is an absolute right of substitution as usually all members or associates are interchangeable. It would be perfectly possible that any member could arrange for another suitably qualified individual to complete their work (there are many from whom to choose), and whilst it does not happen often, it would also be possible to allocate the profit of that work to the original member and the substitute be paid from that corporate member’s profit share.

Each member of an LLP receives a profit share after costs allocated and distributed according to a written partnership agreement. This profit is after the costs of operating the business and often is a true mix of income from many different sources such as private patients (self-pay and insurance backed); NHS tendered work either direct or indirect via hospital groups; medico-legal reporting; lecturing, etc. All of this income is earned concurrently and goes into the pot to be paid out based on the profit-sharing arrangements (PSA) within the agreement. There is no distinction between income sources and who provides the service and there is no direct link between what an individual earns and what they are paid.

Mutuality of Obligation (MoO) means that as a minimum there is a continuing and reciprocal obligation on the worker to provide his own work, and on the engager to provide work, or if there is no work an obligation to make payment. Much of the case law looking at MoO has risen out of employment law where it has been necessary to prove MoO in order to qualify for certain benefits as employees are entitled usually to sickness and holiday pay for example. This lack of MoO has to be present during the delivery of a contract and can be tied up with control. As an independent provider of services to private patients, there is never any MoO to anyone other than the patient however under a contract for delivering say, 5,000 scans, it may be necessary to consider some of the other factors. Having any form of notice period can show some MoO, although in partnerships, there is usually no obligation by the partnership to provide work even if the notice period to leave is stipulated within the agreement and most certainly it is unlikely that any profit would accrue if not work was performed.

Interestingly HMRC’s opinion differs from that of the courts when considering MoO as they believe it exists in all contracts: if you perform the service, you will be paid.

Control is extremely important for medical services. The question posed: is the individual subject to the control of his engager as to how, why, what, when and where he performs the work or is he free to determine his own method? Of course doctors are highly skilled professionals and make their own judgements, that is the nature of their service, but is the individual subject to abide by the end client’s rules and regulations, site rules, policies and procedures similar to the end-client’s employees. For example, a radiologist may be required to log into an end-client system to obtain the source data for diagnosing a scan, but if he can do this from his home office, at a time convenient to him and he does not have to offer the service unless he chooses to do so, then this is unlikely to be subject to strong controls pointing to employment.

This becomes more complex a relationship if that same person performs exactly the same tasks in the NHS as he may be doing in the private sector. For example, the Uber drivers logged onto the Uber app and at this moment Lord Leggatt stated by ‘entering into a contract …to perform driving services for Uber…’ the driver became a worker. Worker however, for these drivers was about the control to which they succumbed including being on an agreed shift, having to state when they took breaks, being monitored and sometimes penalised for refusing fares, what the type of cars were driven, no contact between drivers and travellers, whether or not refunds were provided. This situation contrasts with CRC v Professional Game Match Officials Ltd [2020] UKUT 147 (TCC) which found that the ability to refuse work by the match officials was sufficient to demonstrate there was no MoO and no underlying contract of employment.

It is essential therefore to consider how relationships really work and that individuals remain autonomous. It would need to be demonstrated quite clearly that the person providing the service was not indirectly engaged by the NHS. This would mean looking at elements of the externalisation of any contract to perform the service.

An interesting observation came from the Uber BV v Aslam case when the Supreme Court approached its decision by considering the statutory rights principles that employment legislation exists to protect those in a subordinate position compared to contract law which presumes the parties knowingly enter into terms because they are equal. All the elements of control, MoO and personal service will need to be considered to paint the picture because the NHS has the right of control, MoO and personal service whilst the doctor is employed, but if the work has been tendered and offered to a larger company who has no control over each provider, pays per scan and does not know who will perform the diagnosis until it has been completed, then it seems unlikely that the end-client would have a deemed employment contract.

Every contract is and should be unique and therefore different. Whilst Substitution, MoO and Control are the primary tests against which performance is assessed there are several other pertinent factors which may need to be considered, the most common of which are as follows:

Defective work: Whose responsibility is it to correct defective work? If that of the individual in their own time without further charge, this is indicative of self-employment outside of IR35.

Hiring others: This can be a deciding indicator of self-employment but to carry weight it must happen in reality. Within the LLP we can engage with other providers if necessary to fulfil our obligations under any contract provided that the person supplying the service, is suitably qualified, registered and has admitting rights. The LLP would then pay such an associated party from income before profits were calculated for other members. It is also possible for one of the members to engage a doctor direct and pay them from their own profit share if the circumstances arose.

In business on your own account: To have a proper business organisation indicates self-employment. For IR35 many will not have the usual trappings of being in business like stock, premises or staff but they can still show the structure of a genuine business. This may take the form of an office at home, a website, being VAT registered, having business stationery, advertising, invoicing, taking out insurances. Having other clients particularly concurrently, is most helpful.

Financial risk: The easiest way to demonstrate financial risk is having a fixed price paid at the end of the contract. Many of the factors illustrating being in business give support to financial risk, as costs and risks are not associated with an employment contract. This is also true of the risk of bad debts or lack of work. HMRC agrees that invoicing demonstrates financial risk.

Intention of the parties: The intention of the parties (including the end client in agency cases) to have an independent relationship should always be stated in a contract to ensure that all parties understand the relationship.

Freedom to offer services to others: Contractors should have the freedom to undertake services for others and exploit their skills in the market-place, as they deem fit. Having other business streams running concurrently demonstrates the intention of being in business, thus having a clause setting out this freedom is important.

Provision of equipment: of course not many doctors need to provide but if you can show this is paid for separately, for example, room hire or secretarial cover charged at the market rate, or access to software, etc.

Benefits of employment: Status indicators such as holiday pay, sick pay and pensions, etc. would never be paid to someone delivering services under a commercial contract because it is never the responsibility of the engager to pay for or control the individuals performing the service. Even such simple things as being invited to the annual event or being able to use a staff canteen could indicate employment – the provision of a cup of tea, probably does not!

Basis of payment: It is HMRC’s contention that hourly or daily rates indicate employment but case law does not support this view because both employees and the self-employed can be paid by specific measurements of time.

Integration into the organisation: becoming part and parcel of an organisation such that it is difficult for others to notice the difference between sub-contractors and employees is important. Doctors are often part of a team which includes employees providing medical care for a patient, but it is important that the process identifies the sub-contractor as separate, for example a different set of disclaimers being used, or separate billing, or appointment services. Sub-contractors introducing themselves as a representative of the engager (as opposed to their own business) is never a good idea, so something simple like wearing your own name badge, or using your own stationery should be considered for anything contracting with the end-user. If for example an anaesthetist or radiologist from a group is used directly by a surgeon but paid for by the hospital provider, then it must be clear that these services are offered and paid for separately to the hospital fee. A written agreement is always best practice to show a service is being offered by a separate business, not specific individuals. An engager should never be allowed the right to move the sub-contractor onto a different project or task, there should always be reference back to the contracting entity to re-engage. Such control demonstrates integration by affording the same rights an engager has over its own employees (see again the case of the match officials).

This is a very complex area which has financial consequences for both engager and sub-contractor. If there is a proven deemed employment then it is highly likely that the costs of that employment will be dropped firmly on the shoulders of the sub-contractor. There is no right of the employer to pass on the costs of the employment, which is basically 13.8% of the contract fee as employers’ National Insurance, but what they can do is to end the original contract and renegotiate the terms. Thus the newly deemed employee will find they could lose, PAYE (say 40%) and employee’s NICs (mostly 2% for doctors in full time NHS employment) and employers’ NICs (13.8%) which would make the net fee greatly reduced on what may be paid under current arrangements. Many engagers will no longer engage direct with the worker and imposes the use of an umbrella organisation which operates the payroll on behalf of you both for which it charges a fee plus vat.

If a doctor receives a status determination of deemed employment, they can make an appeal to the engaging company before the end of the contract (usually after the first payment is received net!) who must then respond giving a full explanation of the elements considered and why the determination was confirmed within 45 days of the appeal. It must be remembered however that the appeal will no doubt be looked at by the same department who made the assessment. Many firms are taking a blanket approach to this as the time and effort involved in assessing every contract may be prohibitive. This does not mean that this is in fact the appropriate decision and often workers will just refuse to take on the contract and work will halt. This has already happened in the public sector with large projects grinding to a halt and deadlines being missed.

It should be possible if the doctor or the group through whom business is conducted, have sufficient clout over work being completed, that they are able to negotiate appropriate terms in order to work in the way they wish to work but it should mean that there are many more written contracts mirroring working practices created instead of many of the informal arrangements which exist currently.