

ContractorCalculator – Written evidence (OPR0014)

Declaration of interest

I've been in this market for 23 years, first being a contractor myself. My background is mathematics, computer programming, and algorithm design. 10 years ago we built an online status test to try and help people ascertain their IR35 status. Today it's wrapped up in something called "IR35 Shield" which is a commercial operation. My website ContractorCalculator.co.uk is also commercial, and has been running for over 20 years. It's in my interests for contractors to be given fair tax treatment.

Summary

- Contractors left the firms they were working for as blanket bans came in, resulting in short and long term damage to firms.
- Contractors are forced into the unregulated umbrella market, despite not wanting to use an umbrella. And the vast majority cannot tell if it is a tax avoidance scheme. They are not given much choice – just a list to choose from.
- Disputes are non-existent – as firms decide status before it is advertised, and only hand out an SDS if it is outside IR35. Disputes are not taking place. Contractors are told "take it or leave it".
- The underlying issue is that the flaws in the legislation have created a behavioural effect leading to many firms deciding not to hire PSC based contractors anymore.

Our Surveys:

We have completed three surveys on IR35, which could be summed up as "We told you it would be bad, we told you again it would be bad. See, it was bad."

Date	Respondents (Contractors)	Title	Context
Mar-20	12,347	The BIG IR35 Survey	Private sector roll out - prior to one year delay
Jan-21	3,320	IR35 Road Ahead	Private sector roll out - prior to final roll out
Nov-21	3,708	The IR35 Impact Survey	Private sector roll out - after final roll out

The BIG IR35 Survey:

<https://www.contractorcalculator.co.uk/docs/20200305%20-%20ContractorCalculator%20-%20Big%20IR35%20Survey%20Report.pdf>

IR35 Road Ahead:

https://www.ir35shield.co.uk/Files/IR35Shield_Contractor_Survey_2021.pdf

The IR35 Impact Survey: Not yet published.

These surveys are conducted by inviting tens of thousands of contractors on our databases to complete, together with some marketing on LinkedIn. The software used is SurveyMonkey, and should you desire we can meet with you and show you the forensic detail and slice and dice.

Note: For the IR35 Impact survey, we asked contractors what happened around April 2021, and what is happening now – 6 months on.

It is these statistics we are referring to in this submission.

Answers to specific questions

Q) Has the recent extension of the off-payroll working rules to the private sector made it more difficult for engagers (the business the contractor ultimately works for) to hire people with the right skills and expertise? To what extent has its introduction contributed to job vacancies?

1. Stats from our recent survey:

- 47% introduced a blanket ban on PSC contractors
- 65% of firms lost at least half their contractors – who left.
- 58% said firms moved “most” or “some” of their work out of the UK.
- 35% cancelled projects.
- 50% said the firm they worked for would have long term damage. 38% said short term damage. Firms were damaged.
- 46% said contractors needed to be paid more to be retained.

2. HMRC figured they would create behavioural change to put everyone on payroll. Instead, firms offshored work.

Q) For those engagers (and their advisers) who use the CEST (Check Employment for Tax Status) tool to assess employment status, how effective do you consider it to be? Do you have confidence in its results? If not, what further improvements need to be made to it?

3. I help defend cases at tax tribunal, and have an intimate knowledge of the relevant case law. CEST does not align with it – I know, because I’ve pulled it apart and read the source code – I’m a software engineer and the code is in the public domain.

4. A recent Court of Appeal case, for Professional referees contains decisions that prove that CEST is flawed because it does not fully consider mutuality of obligation. HMRCs long standing, entrenched view, has been shown to be wrong.

5. If status was about height, and someone needed to be 5 foot 6 to be considered self-employed, CEST sets the bar at 6 foot 10.

6. We provided a CEST assessment with full evidence to HMRC as part of a tax enquiry, along with all evidence supporting the answers chosen. They dismissed it without valid reasons in a couple of sentences. We used all the evidence at First-tier and won the appeal. The case was RALC Consulting.

7. Stats from our survey:

- 91% have heard of CEST
- Only 5% say they think it is accurate. 77% say it is not, and 17% don’t know.

- 79% said it does not reflect the law around status.
- 84% do not trust HMRC to stand by the results.
- 56% of contractors said they were assessed by CEST.
- 57% said they did not think the assessment process was fair.

8. The testing of CEST is still shrouded in secrecy. We spent a long time seeking to get copies of all the test scripts. The Public Accounts Committee (PAC) asked for copies of them. HMRC told them they did not keep them. This is absurd, and is in the “dog ate my homework” zone. [We wrote about it.](#)
9. CEST is not law, and not in statute. Firms cannot rely on it, and many large firms know not to use it.

Q) What changes have engagers had to make to apply the off-payroll rules to contractors, in terms of systems, personnel and training? By reference to your own experience, to what extent (if any) do you consider that compliance costs have increased because of the changes?

10. We work with firms to help them put in processes. It's has been a very large undertaking for many of them.
11. Aside from the initial cost of putting processes in place, the ongoing cost to manage it ranges from £50 to £200 extra for each contractor hired, just to do the assessments.
12. There is however the hidden costs to firms due to them not being able to source the talent they need at the price they are prepared to pay, if they have introduced blanket bans. If budgets have not increased, then the amount of work / projects will need to shrink, or they seek alternatives offshore.

Q) How well has HMRC supported engagers, contractors, and their advisers with the implementation of the new rules and is any further or different type of assistance needed

13. There is considerable guidance published online, which is much better than it used to be.
14. The legislation is very complex, and there are flaws in it, and HMRC has not explained some parts of it very well, particularly in it's webinars, where many of us spotted some serious errors. David Kirk wrote about 25 of them: <https://david-kirk.co.uk/?p=577>. He's a very well respected tax expert who has written books on employment status, and represented to ICAEW on the IR35 Forum for many years.
15. HMRC have struggled with the detail. They were asked to explain a very complex piece of legislation to 60,000 firms and 20,000 agencies – many of whom would struggle to understand the complexities. The dumbed down versions didn't help at all.
16. The fact that a large portion of engagers implemented blanket bans says it all really.

Q) To what extent has the introduction of the new rules generated disputes between engagers and contractors concerning the status of contractors vis à vis the rules and how successfully or otherwise have these been resolved?

17. The overwhelming evidence from our experience is that the vast majority of engagers make the decision without consulting the contractor, and do not allow disputes. If they do, they are rarely overturned. The whole of section 61T – disputes, was a waste of time.
18. Any disputes are resolved with the 5 words: "Take it or leave it."
19. It's only when firms discover that they cannot get the skills they need for the amount they are prepared to pay that they then decide to either pay more or seek to implement IR35 properly.
20. Firms are still advertising for positions on an "inside IR35" basis with contract rates that they call "assignment rates" – no basis in law – and which wrap in the employers NI contributions they should be making, not the contractor. Contractors are pushed into using unregulated umbrella companies, contrary to the law.
21. Stats from our survey:
 - Around April 2021, only 3% of contractors who disputed the status had the answer changed.
 - 17% stayed working with the client, outside IR35.
 - 23% stayed working "inside IR35"
 - 28% of contractors terminated the contract.
 - 13% were terminated by the client.
 - 88% of contractors told us the extra employers NI due by the client, was taken out of their rate – unlawful deductions are rife.

Q) What behavioural effects have resulted from the introduction of the new rules in the private sector in terms of the arrangements adopted in hiring contractors?

22. Contractors pushed into using unregulated umbrella companies, who then scam them via various skimming techniques.
23. Contractors are also being asked to sign contracts with overly onerous indemnification clauses, whereby they become liable simply if HMRC forms an opinion the status was wrong – rather than a judge having to say so.

Q) The Government is proposing a new employment body with powers to enforce employment rights, including for those engaged by agencies and umbrella companies. How effective do you think such a body will be in ensuring workers, particularly the lower paid, are treated fairly?

24. Enforcement has been non-existent for years. Criminals do not read the rule book.
25. This is likely to be a tick box exercise that will not help.
26. A simple way to help the lower paid (who have no bargaining power) is to have a rule that says anyone on a pay rate less than £X per hour, must be on agency payroll as a Temporary Agency Worker – which then comes with all the rights they need.
27. It seems absurd that in the UK we allow recruitment agencies to funnel hundreds of millions of pounds via unregulated umbrella companies, who then pay them for introducing them. Better legislation and regulation is

needed – and the second simple option is to make it law that the pay rate agreed is a PAYE based rate, and that's what the contractor must get paid by the umbrella. The "assignment rate" wheeze is the open door to skimming/scamming pay from the low paid.

28. Stats from our survey:

- 15% of contractors were only given one choice of umbrella to use.
- 69% told they could only work, if via an umbrella. That was April 2021. Now that figure is 88%.
- Only 6% of contractors say they are happy to use an umbrella. Yet 88% are being forced to use one if they cannot work outside IR35.
- 71% told us they regularly or occasionally get marketing material from tax avoidance schemes promising 85% returns.
- 78% said they would not be able to detect if an umbrella was a tax avoidance scheme (yet HMRC holds these people liable).

Q) How successful will the draft Finance Bill proposals for earlier publication of information about promoters and avoidance schemes be in protecting individuals from being drawn into such schemes?

29. Unlikely. These schemes are like trying to win a game of wac-a-mole.

30. The only way the supply chain can be enforced is via real-time auditing of payslips and money transfers.

31. Real-time checking of monies is the only way to stop the dodgy schemes. Did HMRC get the money they were supposed to get, or not? It's that simple.

32. Why spend all that money creating an enforcement body, when all you need to do is simply make agency workers go on payroll? What are the benefits of umbrella companies? Do we really need them? Firms already offer outsourced payroll bureaus. Just use those. The existing umbrella companies can just regear and become specialist payroll bureaus.

Other Survey stats

33. Other stats:

- 345 told us they were currently out of work. 69% told us this was because of the IR35 reforms. 41% had been out of work for over 6 months. 87% of them told us it was unusual for them to be out of work this long.
- 41 told us they retired because of IR35.
- 85 left the country.
- Only 26% told us they were given a Key Information Document (KID) by the recruitment agency, despite this being a legal requirement.
- 41% of firms are still blanket banning PSC contractors.

Legislative Flaws

34. If the client adheres to reasonable care when making an assessment, but gets it wrong, and passes the SDS to the worker, then the recruitment agency is liable for the tax, not the client. This is grossly unfair.

35. The extra tax being sought is primarily employers NI. But, the nature of the legislation means the client doesn't just pay the difference in taxes paid (by taking into account offsets), they have to pay the entire tax bill, including employers NI, PAYE, and employees NI – even if the contractor has paid

corporation tax and dividend taxes. This liability can be around half of the cost of hiring the contractor – they do not want that risk on the balance sheet.

36. Firms looking to increase value, for a later sale, will not want risk on their balance sheets. Already buyers due diligence asks about PSC contractors being used and seeks to ascertain future risk. But, there is no certainty, because any assessment is just an opinion, until HMRC or a judge says otherwise.
37. HMRC have the power to issue an Opinion on status, and in my experience they often get this wrong. But firms do not want to take the risk of this happening, and then having to appeal to tax tribunal – which for these cases is very expensive to do.
38. The legislation has introduced considerable uncertainty and tax risk for firms, which is why firms are choosing instead to move projects out of the UK.
39. We have the silly situation now where UK contractors seek remote work for non-UK companies, to avoid the new Chapter 10. And we have firms seeking to use non-UK workers to also avoid Chapter 10.
40. The actual truth is that if firms get a good process in place and get things right, then it will be very hard for HMRC to convince a judge otherwise. But, the fear and uncertainty factors, driven by firms who profit from “inside IR35” decisions has meant we are where we are.

12 November 2021