



ActifHR

Where people matter...

January 2020 Update

Welcome to this month's update - where we discuss the latest guidance and legislation.

In this Edition we report on:

- Are they contractors?
 - Worker Status: Substitution Clause
 - Does contributory conduct in an unfair dismissal case have to be gross misconduct?
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Are they contractors?

From April 2020 the government is proposing new off payroll working rules for the private sector.

IR35 (the off payroll rules) were introduced in 2000 and aims to ensure individuals currently working through an intermediary, in most cases a personal service company (PSC), who if engaged directly by the client would be regarded as employees, pay the same National Insurance contributions (NICs) an income tax as if they were employed.

Under the current rules, a contractor or the PSC decides whether IR35 applies and pays NICs and tax if necessary. Therefore, tax risk does not lie with the client rather the employer.

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It will be for the business that takes on a contractor to make the decision whether IR35 applies, under the new off payroll working rules, and if so to make the appropriate deductions for NICs and tax and pay employers NICs.

The reforms do not apply to a small business but do apply to medium and large businesses. To be considered 'small', in the Companies Act 2006 a business would have to satisfy two or more of the criteria:

- (i) have an annual turnover that is not more than £10.2 million;
- (ii) have a balance sheet total of not more than £5.1 million; or
- (iii) have no more than 50 employees.

For unincorporated entities, the government is currently consulting in suitable thresholds which are most likely to be based on the employee number and turnover

Employers: even if you are exempt, the IR35 checklist still applies regarding the position of contractors.

Contact us: we can help with advising on IR35 and contractors

Worker Status: Substitution Clause

One of the points on the IR35 checklist is that if the worker or contractor is not available for some reason, they can substitute their services.

So, does this mean a substitution clause in a person's service contract (contractor agreement) mean they are automatically denied 'worker' status?

No, as shown by the evidence provided by the EAT in Stuart Delivery Ltd v Augustine.

Mr Augustine was a delivery courier, employed by Stuart Delivery Limited (SDL) undertaking fixed hours 'slots'.

During these slots SDL was controlling Mr Augustine, so he was unable to leave the area he operated in, and in order to guarantee him an hourly wage he had to do the deliveries offered to him.

Therefore, he was not available to other delivery companies during this slot, which were typically three hours.

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A tribunal investigated an arrangement where if Augustine was not available, so he could release his slot back into the pool of approved couriers via SDL's app. As he had no control, this was not a proper substitution clause which could deny him 'worker' status.

Employers: Make sure you have the right contractor agreement in place

Contact us: We can assist with contractor agreements

Does contributory conduct in an unfair dismissal case have to be gross misconduct?

No, held the EAT in *Jagex v McCambridge*

After discovering a document on a communal printer with a senior employee's pay on it, the employee was dismissed.

After pointing out the document to a colleague, someone else began guessing what the pay for the senior employee was. Although the employee was not directly involved, they were still dismissed for gross misconduct for disclosing pay details.

The tribunal came to the conclusion that the disclosure was not gross misconduct, so there should not be a reduction for contributory fault.

The EAT stated that the tribunal misdirected itself that only discovery of gross misconduct can therefore end up in a percentage reduction of an award to an employee for their personal contributory fault.

The employee's conduct needs to be considered, to whether they are culpable or blameworthy and if this the case a decision is to be made on whether a reduction to their award happen.

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Employers: take all circumstances into account with a disciplinary

Contact us: we can assist with investigations and disciplinarys



Caroline has a wealth of experience supporting business clients with practical hands on HR and Employment Law advice. Caroline's pragmatic approach helps businesses of all sizes deal with complex HR situations. She qualified as a Solicitor in 1999 and now acts as a specialist Human Resource / employment Law Consultant to business.

Caroline Robertson, CEO



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