

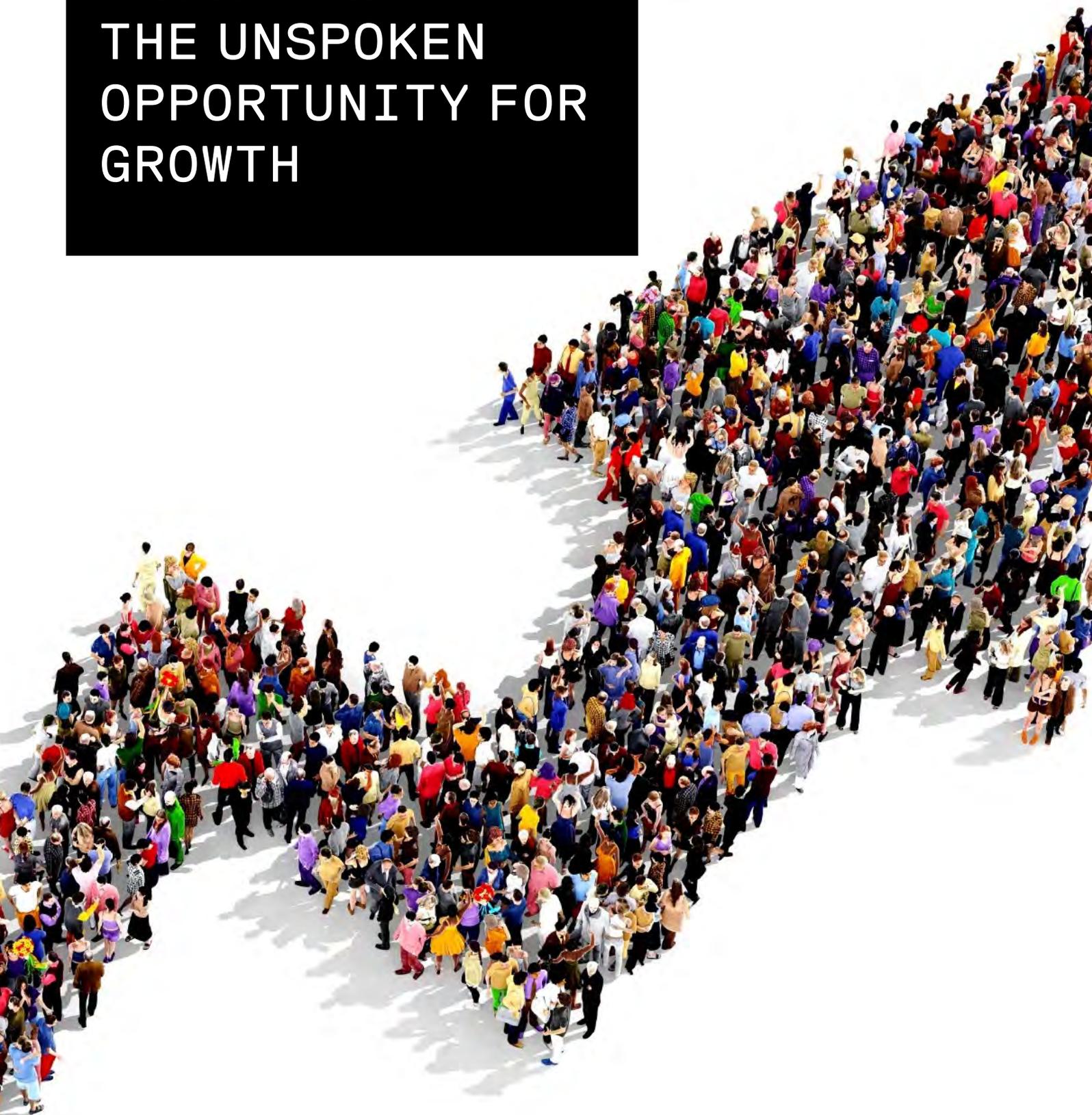
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**BROOKSON**  
**LEGAL**

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REASSESSING IR35:

**THE UNSPOKEN  
OPPORTUNITY FOR  
GROWTH**



# A FLEXIBLE WORKFORCE IS KEY TO BUSINESS GROWTH

For businesses that rely on them, the value of contractors and freelancers as a flexible and experienced resource is clear: they are vital to company success, growth and agility. It is even predicted by analysts, from the World Economic Forum<sup>1</sup> to Deloitte<sup>2</sup>, that the increased use of skilled temporary workers will be one of the defining trends in the future of work.

The Government introduced the IR35 legislation in April 2000 to ensure that businesses have access to this workforce with a more appropriate tax framework. As with any tax, however, this legislation has been largely framed in a negative light, which unhelpfully clouds the crucial issue - access to the valuable contractor resource. We believe it is now time to reevaluate how IR35 can be successfully navigated to unlock the full potential of flexible workforces to support rapid growth and rescaling in the wake of deep economic shock.

In April 2021, changes to IR35 were introduced in the private sector making it the responsibility of end-hirers to determine contractor employment status and ensure correct taxes are paid. Six months on, we wanted to know how businesses have responded, what challenges they are facing in engaging flexible talent and what role they see for contractors in the economic recovery. We turned to leading

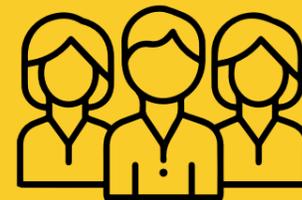
market research agency, 3GEM, to survey senior IR35 decision makers in 500 UK businesses that use contractors to build the informed perspective presented in this report. Encouragingly, 90% of these businesses plan to increase their use of contractors in the next 18 months; a pattern that matches previous downturns, when experienced resources were required to deliver projects on time. As job vacancies reach all-time highs, however, a national skills shortage presented in ONS and REC data<sup>2</sup> is clearly biting into the temporary as well as permanent workforce. Our research revealed 77% of respondents are finding hiring to be challenging (48%) or very challenging (29%). This is having a cost implication: 87% have been forced to increase contractor pay rates since April 2021.

To what degree IR35 is contributing to these challenges is explored in the following pages. However, one thing is clear; businesses that want to grow in this environment need to ensure that they are presenting the most attractive, compliant and competitive package to the flexible talent they need. Those that don't, risk being left behind. Many are now re-evaluating the IR35 solutions they put in place, in a very different environment than that prior to April 6, to ensure that they have a solution which can evolve in line with their needs as their business grows.

1. World Economic Forum: Future of Jobs Report 2020 [https://www3.weforum.org/docs/WEF\\_Future\\_of\\_Jobs\\_2020.pdf](https://www3.weforum.org/docs/WEF_Future_of_Jobs_2020.pdf)  
2. Deloitte Insights: Future of Work <https://www2.deloitte.com/us/en/insights/focus/technology-and-the-future-of-work.html>



Matt Fryer, Head of Legal Services, Brookson Legal



**90%**

of businesses plan to grow their use of contractors in the next 18 months



**77%**

of respondents are finding hiring to be challenging (48%) or very challenging (29%)



**87%**

have been forced to increase contractor rates since April 2021



Andrew Fahey, CEO, Brookson Group

# THE PRIVATE SECTOR IR35 JOURNEY

When the off-payroll working rules were first announced in the private sector, many businesses worried that they would not have time to fully manage their new responsibilities, and 57% of HR decision makers we spoke to in 2019 were considering a blanket approach to determining the status of their contractors in order to meet the deadline. In the same survey, 41% feared they would lose contractors if they were incorrectly assessed.<sup>3</sup>

These fears have their roots in the mismanagement of the changes to the public sector, introduced in 2017, which resulted in a contractor talent drain disrupting the delivery of major projects. More recently we have seen a series of high-profile tax bills that have revealed just how significant the financial penalties of getting IR35 wrong can be.

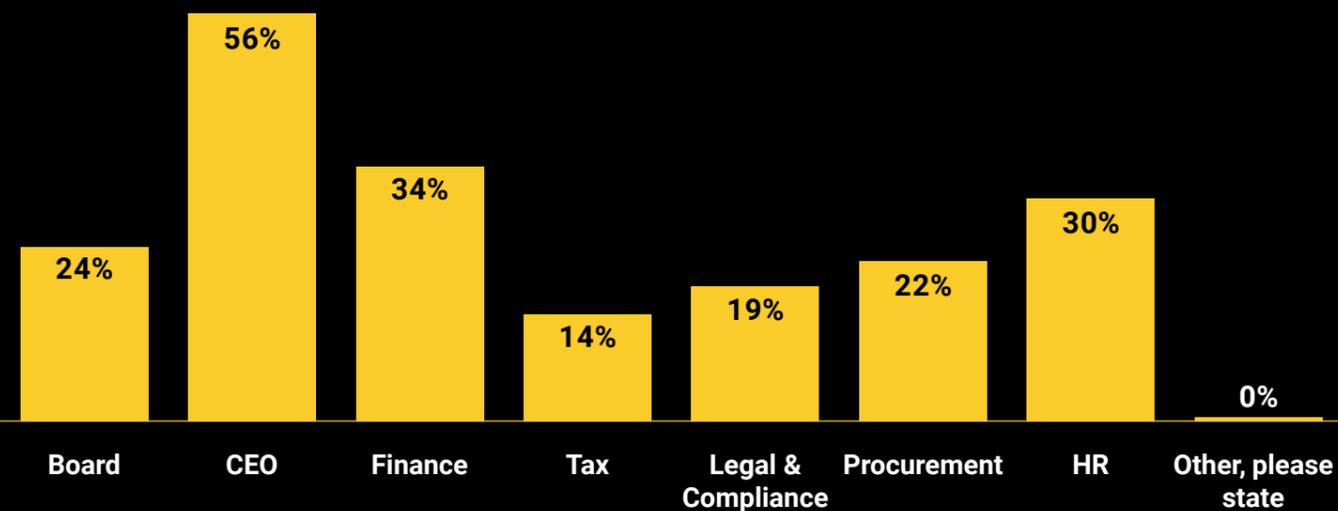
The postponement of the implementation of the IR35 changes within the private sector, until April 2021, bought more time and clearer HMRC guidance, but this was coupled with unprecedented operational and financial challenges of the pandemic.

Our latest survey shows that businesses managed to implement a wide variety of solutions in time for April 6, with responsibility for this falling between finance (34%), HR (30%), procurement (21%) and legal (18%) functions. Encouragingly, CEOs have taken ultimate responsibility for IR35 in over half (56%) of the businesses that we surveyed and the board in a quarter (24%).

For the 20% of businesses in which this is not the case, **now is the time** for senior leaders to review both the risks and lost opportunities of an inadequate solution and the value that can be found in the right one.

For businesses that implemented a quick fix, or that have avoided using contractors and freelancer off payroll since April, **now is the time** to put in place a more robust IR35 solution. A major concern that our research has revealed, however, is that decision makers are not always aware of the risks that their current solution might pose.

## WHO OWNS YOUR ORGANISATION'S IR35 STRATEGY?



Multiple choice question

<sup>3</sup> IR35: A Ticking Timebomb <https://www.brooksonlegal.co.uk/ir35-a-ticking-timebomb/>

# NEITHER THE ROCK NOR THE HARD PLACE

Following a series of high-profile government tax bills in 2021 arising from the mismanagement of the IR35 changes in the public sector, it might be expected that HMRC liabilities would be top of the list of the risks businesses identify from an inadequate IR35 solution. Of the decision makers that we surveyed, however, more saw commercial risks, including contractor costs (53%), talent attraction (42%) and project delays (42%), as potential concerns over and above unforeseen tax bills (31%). This suggests a mature understanding of the challenges presented by IR35 and an appreciation of the value provided by a flexible contractor workforce.

However, our data also reveals what could be a false sense of confidence. The vast majority of businesses we surveyed (88%) believe that they understand HMRC's guidelines as to what constitutes 'reasonable care' in making IR35 status determinations for their contractors and are confident in their chosen solution.

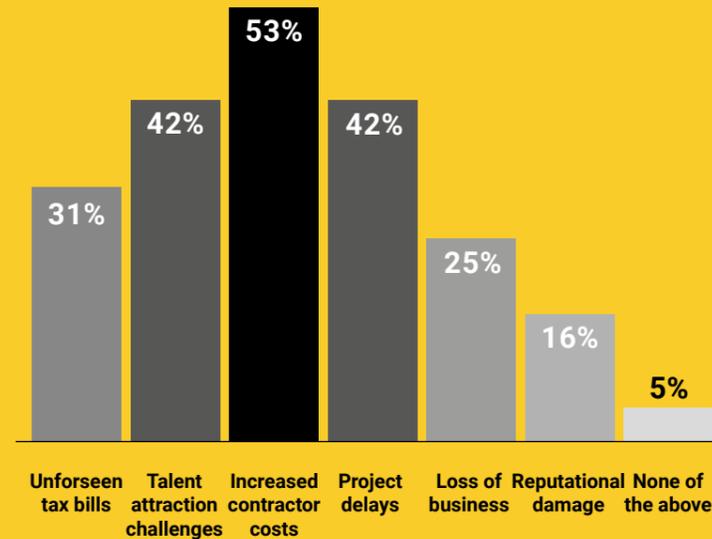
This sits in contrast, though, to many of the practices that we see evident. Of these businesses:

- **51.4%** relied on the government's CEST tool to make status determinations
- **44.3%** relied on another automated tool to make status determinations
- **36.1%** asked contractors to assess their own status, while **32.4%** delegated to agencies
- **25%** applied a blanket "inside IR35" approach to status determinations
- **47.9%** said they see their IR35 solution as a fixed solution

While not necessarily 'wrong', many of these approaches still carry either the risk of tax liabilities with HMRC or create barriers to growth which are likely to drive up the cost of resourcing. Thankfully, with a full understanding of responsibilities for 'reasonable care', there is time to review these quick-fix solutions and ensure that effective long-term processes are in place.

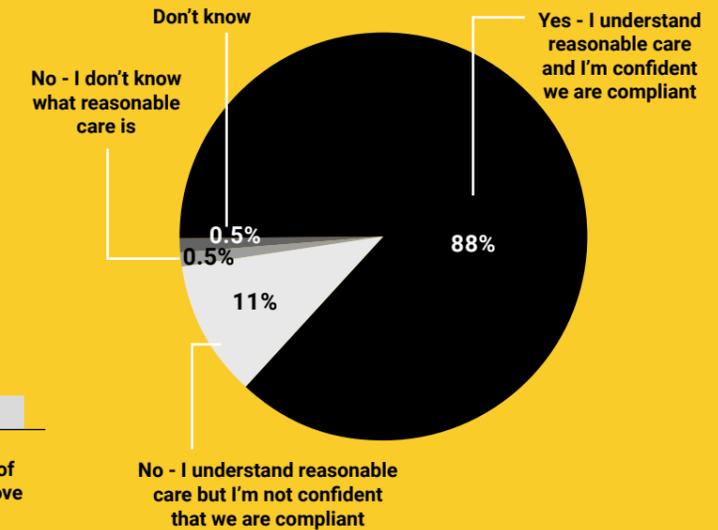
We will now explore how both commercial and financial risks can be averted and why the IR35 solutions applied in April 2021 should be reviewed and monitored on a regular basis.

## WHAT DO YOU CONSIDER THE POTENTIAL RISKS OF AN INNAPPROPRIATE IR35 SOLUTION?

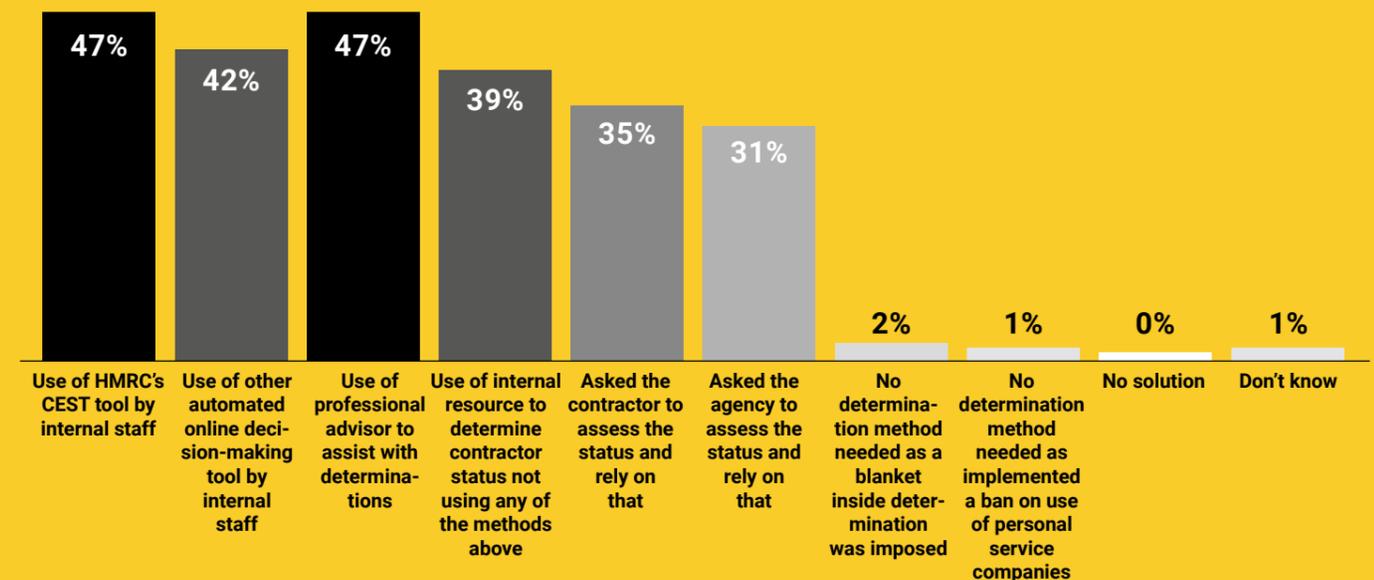


Multiple choice question

## ARE YOU CONFIDENT THAT YOUR IR35 SOLUTION AND APPROACH MEETS HMRC'S GUIDELINES FOR REASONABLE CARE?



## WHAT IR35 SOLUTION DID YOU HAVE IN PLACE IN APRIL 2021?



Multiple choice question

# CALLING TIME ON QUICK-FIX SOLUTIONS



**For many in the private sector the IR35 solution put in place in April 2021 was the right decision at the time, but the following quick fixes need to be reviewed.**



## TAX RISK: USE OF CEST OR AUTOMATED TOOLS

**47%**

Use of HMRC's CEST tool by internal staff

Automated tools alone, such as the Government's Check Employment Status for Tax tool, cannot be relied on solely to comply with HMRC's guidelines to 'demonstrate reasonable care'. Given the complexity of these rules, these tools are unable to take into account the full picture of working practices required. They are also only as accurate as the person inputting that data and are reliant on the underlying algorithm producing the right result in every possible nuanced scenario. We also know that CEST produces an inconclusive result in 20% of cases.<sup>4</sup>

**42%**

Use of other automated online decision-making tool by internal staff

While businesses may feel that they are unlikely to be fined for the use of CEST, any unpaid taxes deemed to be outstanding from incorrect assessments will be recovered by HMRC. As has been seen in the case of NHS Digital, which was asked to repay £4.3million, these liabilities can accrue to significant sums by the time of investigation.

CEST can however be a useful tool, if those using it have had appropriate training and the status determinations are regularly audited by an expert to ensure determinations are accurate.

4. GOV.UK Check Employment Status for Tax (CEST) usage data <https://www.gov.uk/government/publications/check-employment-status-for-tax-cest-2019-enhancement/check-employment-status-for-tax-cest-usage-data>



## TAX RISK: ASKING CONTRACTORS OR AGENTS TO CONDUCT ASSESSMENT

**34.6%**

of businesses asked the contractor to assess their status and rely on that

The new rules are very clear that responsibility for assessing tax status of contractors lies with the end-hirer, so a contractor should never be asked to make their own determination. The end-hirer should never rely upon a determination made by a contractor without a detailed review and consideration from the client's view of the status indicators and the underlying contracts, some of which the contractor is not party to.

Asking the recruitment agent to conduct the IR35 assessment or relying on one provided by them is also a red flag. The agent is the party least aware of the working practices and intentions of the parties but this approach can

**31.4%**

of businesses asked the agency to assess the status and rely on that

remove visibility of your flexible workforce and bury risk in the supply chain – putting both agents and end hirers at risk of IR35 fines and tax bills.

It is important to fully consider the risks associated with outsourcing the status determination process to a third party. HMRC are actively auditing private sector businesses now and are asking them for their process for deciding the employment status of off-payroll workers. If the response is to point HMRC to another party, or supply evidence provided by another party, it is likely that HMRC will dig further into the arrangements.



## COMMERCIAL RISK: BLANKET STATUS DETERMINATIONS

**25%**

applied a blanket decision across whole workforce or subsets of the workforce

For businesses anticipating continued use of contractor resource, blanket inside IR35 status determinations are not a sustainable approach to managing the IR35 changes. Even when a majority of a company's flexible workforce is expected to fall into an inside IR35 determination, a blanket approach blocks access to skilled contractors who are required for in-demand outside roles. To attract talent, pay increases are commonplace to balance out income lost to employment taxes.

This approach also carries compliance risk; to demonstrate 'reasonable care' when assessing the IR35 status of the personal service company it engages, hirers must not group together contractors into roles which have varying contracts or working practices.

**Of the 25% that used a blanket approach:**

- **89.5%** have seen an increase in contractor costs
- **30.6%** lost visibility of contractors

To do so constitutes a breach of the reasonable care requirement and automatically moves the responsibility to pay the tax and national insurance contribution (NIC) from the fee payer (typically an agency) to the end hirer. Very significant liabilities can arise in this scenario.

Businesses relying on recruitment agencies or umbrella companies in the supply chain to engage and payroll contractors inside IR35 also need to be careful that there is not a hidden compliance risk, which could resurface later. While most of these intermediaries specialise in the compliant management of contractor payroll, it remains the ultimate responsibility of the end-hirer to ensure the correct amounts are paid to manage associated debt transfer or Criminal Finance Act risk.



**59%**

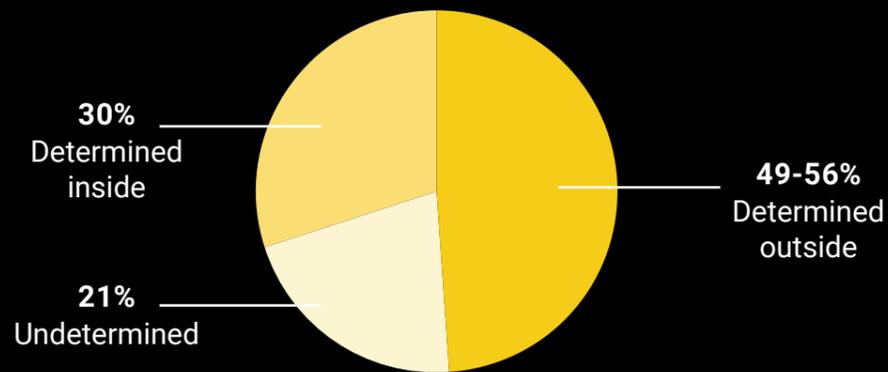
If assessed as being inside of IR35, 59% of contractors said they would seek alternative contractor work with another business, where they might be outside IR35



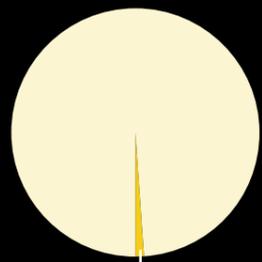
**80%**

of contractors are more likely to want to work with a company that proactively advertises roles that are outside of IR35, and has proper IR35 policies and procedures in place

CEST usage data, September 2021

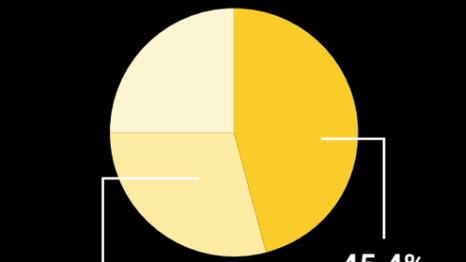


Jobfeed data:  
All contractor and freelance roles, 1 November 2021



4.33%  
Mention "IR35"

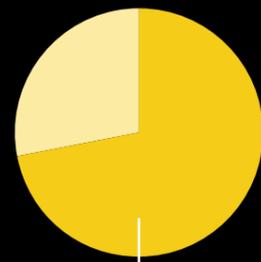
Jobfeed data: Contractor and freelance roles mentioning IR35, 1 November 2021



29.5%  
Mention  
"outside IR35"

45.4%  
Mention  
"inside IR35"

Brookson expert IR35 status determinations



72%  
Status determinations  
outside IR35

## WHAT CONTRACTORS ARE LOOKING FOR?

With 77% of businesses struggling to access a flexible workforce, it is essential that your offer is as attractive and competitive as possible. This means ensuring that roles which should genuinely sit outside IR35 are clearly advertised as such. Contractors also want to feel valued in the workforce, which can be helped by having a comprehensive IR35 solution in place.

In Brookson Legal's 2019 'Avoiding an IR35 Talent Drain' report<sup>5</sup>, we found three out of five contractors said they would jump ship and seek an alternative engagement via another business if their role was found to be inside IR35 and therefore required them to pay additional tax to HMRC. Four in five (80%) would actively seek out a business that advertised roles outside of IR35 and had a robust IR35 policy.

Looking at the latest data from job market intelligence tool Jobfeed, however, only 4.29% of contractor job adverts currently mention IR35 and of these only 29.5% are currently advertised as outside IR35 (w/c 1 Dec). That's just 1.27% of all contractor roles advertised as outside IR35.

This sits in contrast to the Government's predictions that around two thirds of the contractor workforce would be outside of IR35. The Government's own CEST data suggests that 49-56% of roles determined so far fall outside;

this does not include a further 20% of CEST 'undetermined' roles that require a more nuanced approach to determine the status, some of which will eventually end up outside too.

Meanwhile in Brookson Legal's data, based on tens of thousands of reviews undertaken for our clients in the last 12 months, a hefty 72% of roles are outside IR35.

If many businesses are not advertising roles outside of IR35, it suggests that either they are not confident in their outside IR35 determinations or that they have made more inside IR35 determinations than they need to. Either way, our latest data reveals that, since April 2021, 87% of businesses have been forced to increase pay rates to attract and retain contractors. The current skills shortage coupled with high volume of demand are likely to be contributing factors, but as the HGV driver crisis has shown, inadequate IR35 solutions are certainly a major factor.

5. Brookson, Legal Avoiding An IR35 Talent Drain <https://www.brooksonlegal.co.uk/avoiding-an-ir35-talent-drain/>

# WHO IS GETTING IT RIGHT?

The approaches by different sectors to IR35 compliance has become clear over the past months.

The two sectors with the highest blanket determinations across the whole workforce, or subsets of the workforce, were construction (40%) and information & communication services (32.6%). As previously mentioned, blanket IR35 status determinations do not demonstrate reasonable care and block access to talent and the ability to realise the true benefits of the flexible workforce.

It's also interesting to note the impact this has had on contractor rate increases. Construction businesses have seen the highest volume (32.3%) of contractor rate increases of more

than 20%, and information & communication services the highest volume (58.7%) of rate increases of 11-19%. These sectors are not struggling to recruit compared with other sectors, so it could be that to stay ahead of competition and remain attractive to contractors, having implemented blanket inside determinations, they have opted to increase rates.

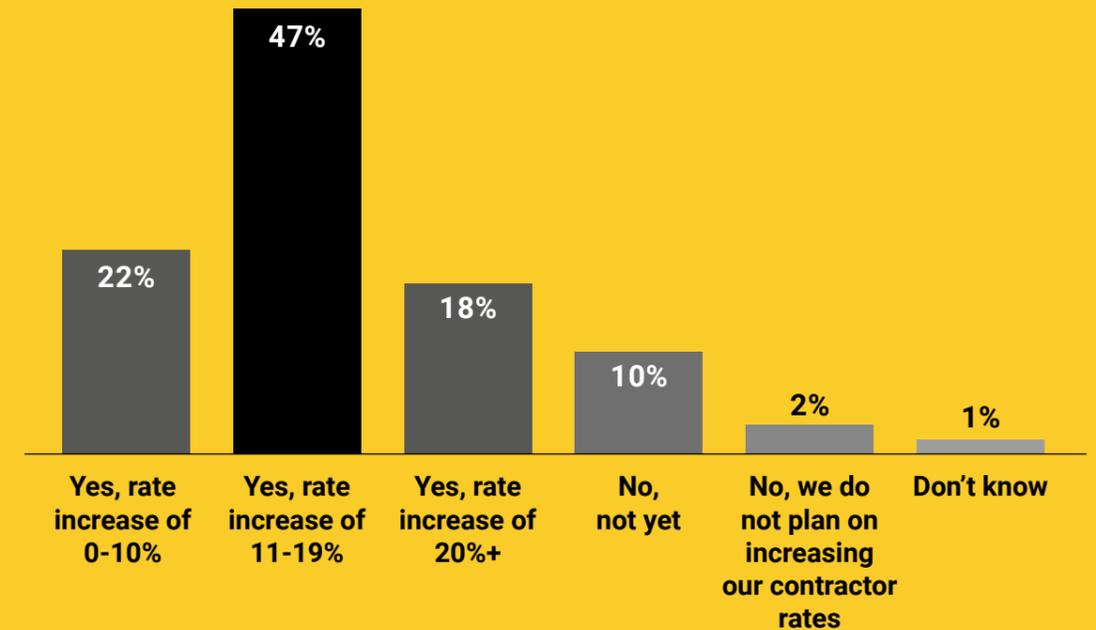
This may be an option for businesses growing in the wake of the pandemic recovery, but it is unlikely to be sustainable. For this reason, it's important for all businesses taking a blanket approach to IR35 determinations – regardless of sector – to **review their process now**, so that IR35 can support business growth rather than be a catalyst for increased contractor costs.

## IT'S NEVER TOO LATE TO IMPLEMENT BEST PRACTICE

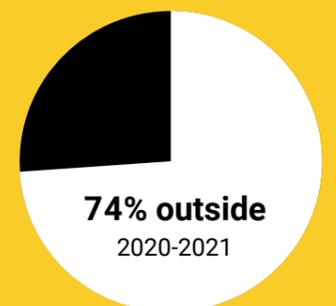
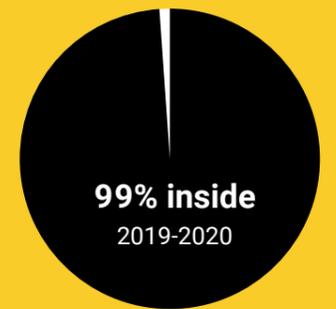
Network Rail implemented a blanket inside determination for all roles when IR35 was introduced in the public sector, but four years later it has taken the positive step to reconsider its approach. The organisation has revisited its off-payroll compliance procedures, based on the marked rise in the number of contractors it engages that are now classified as working outside IR35.

After reassessing the contractors, 74% (977) were determined as being outside IR35, which is in line with Brookson Legal's and CEST's expectation. This is a significant U-turn for Network Rail, given the accounts for the 2019-2020 financial year show that 99% of the 538 contractors it engaged at that time were working inside IR35. It shows the benefits of reassessing your approach to IR35 compliance in line with your business requirements.

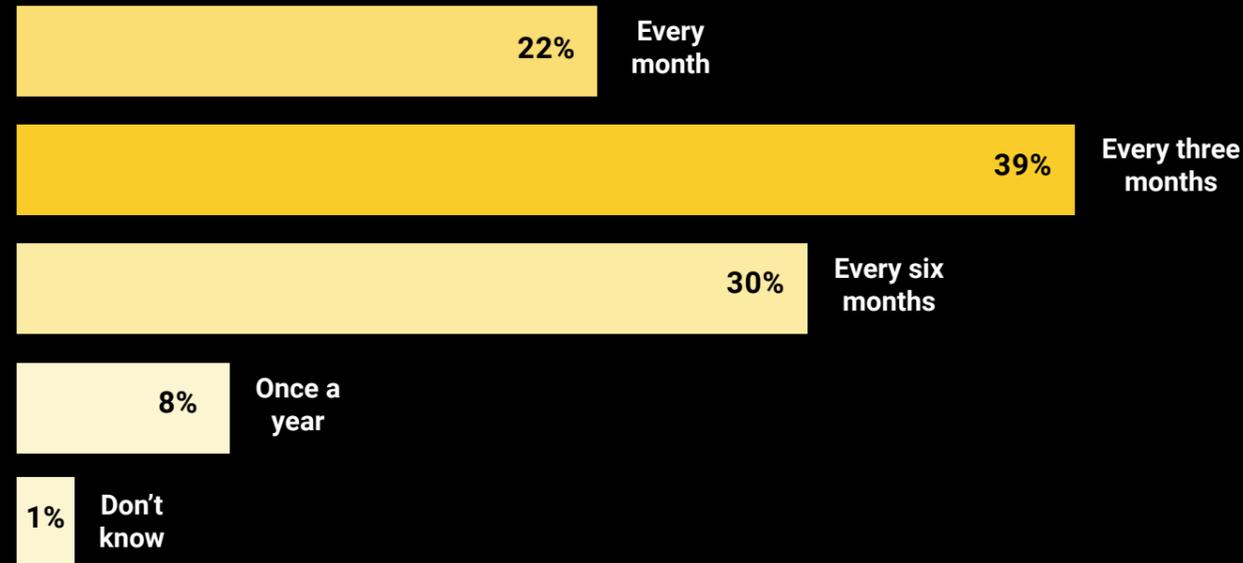
## HAVE YOU HAD TO INCREASE YOUR CONTRACTORS' RATES TO ATTRACT TALENT SINCE APRIL 2021?



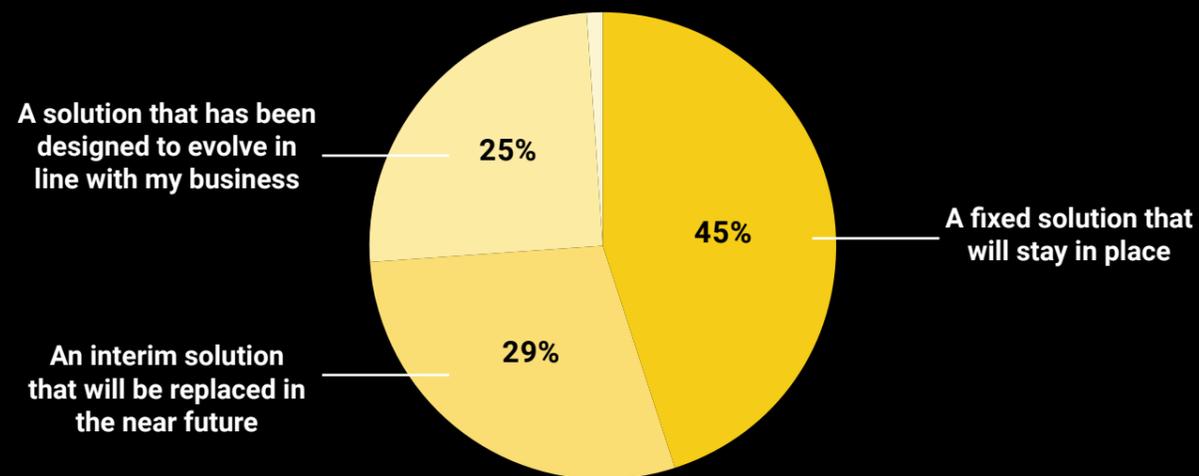
## SIGNIFICANT CHANGE IN STATUS DETERMINATIONS OF NETWORK RAIL



## WHEN DO YOU PLAN TO CONDUCT A REVIEW OF THE IR35 STATUS DETERMINATION STATEMENTS ISSUED TO YOUR CONTRACTORS?



## DO YOU VIEW YOUR IR35 SOLUTION AS BEING:



## EVOLVING TO SUPPORT YOUR BUSINESS

IR35 is an ongoing responsibility that does not end when a status determination is produced. Business needs change, as do project parameters and working practices. It is advisable to regularly revisit your IR35 solution to ensure it is working effectively and aligned with your business objectives, while ensuring compliance with HMRC's guidelines.

Of the businesses that we surveyed, it is encouraging to see that the majority (83%) intend to review their solution before April 2022, which marks the end of the one year 'soft landing' promised by HMRC to allow the private sector to adjust to its new responsibilities. A quarter have already reviewed it.

Almost half (45%) now see their current solution as a fixed solution that will remain in place, while a quarter have chosen a solution that can evolve in line with their business needs and 29% see their IR35 solution as an interim measure that will need to be replaced in the near future.

It is also reassuring that the majority of businesses (61%) intend to review their status determinations at least every three months, while fewer than 1 in 10 see this as an annual requirement. Although a regular monthly or quarterly review is likely to catch most changes, to meet requirements for reasonable care, it is also important that teams responsible for contractors are trained to recognise when working practices have changed and new status determinations need to be made.

# THE ROAD TO A TRULY FLEXIBLE WORKFORCE

Embedding IR35 into business as usual is an important first step on the road to a truly flexible workforce.

The most common and valuable outcome of the solutions that businesses have put in place since April has been improved visibility of the temporary workforce (43%). This visibility will now allow companies to better manage these vital resources and to implement new approaches and technologies that can improve communication, drive efficiencies, provide greater cost control and allow for greater workforce agility.

## Next steps might include:



Seamless payroll management which integrates tax compliance requirements



The introduction of automated technology to create more efficient processing of timesheets, invoices and payroll



Gaining full visibility and MI of utilisation and spend to identify efficiencies



Creation of a temporary workforce dashboard for easier monitoring of costs and resources

Of the companies we surveyed, 47% already seek professional advice for the management of their IR35 responsibilities. Engaging the right partner to review your flexible workforce strategy now will allow you to take the next steps towards fully unlocking the full potential of your skilled contractor resources, whilst ensuring maximum value and peace of mind.

## Of the businesses that we surveyed:



43% say their IR35 solution has improved visibility of the temporary workforce



47% already seek professional advice for the management of their IR35 responsibilities





## GET IN TOUCH...

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There is no one size fits all answer to IR35, or to the shape of a contractor workforce. Only you can determine what is right for the growth of your business. We hope, though, that this report has provided you with a fuller understanding of the requirements of the legislation and how they apply, as well as the pros and cons of different solutions. We would be delighted to sit down and discuss the best options for you.

At Brookson, our purpose is to improve how everyone can benefit from the changing world of work. We provide a range of service to users of the flexible workforce to allow them to maximise the benefit.

Brookson Legal is a team of knowledgeable and experienced lawyers who specialise in IR35 and helping hirers of flexible workers comply with the law. Our unique combination of experience and expertise means that we are the natural choice for hirers who want to assess their contractor workforce. We can ensure that you not only have the best advice and robust systems and processes in place, but that the compliance and commercial risk to your business is minimised.

For more information regarding our suite services for end hirers please contact:

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[www.brooksonlegal.co.uk](http://www.brooksonlegal.co.uk)

“**Thanks to Brookson Legal, I've now been educated around the whole reasonable care element of the legislation, it was this particular change in legislation that was causing us the most concern because we weren't confident that we would have the right evidence in the right way if our approach was challenged. We now have everything in place, we're consistent across the business and we're 100% confident in our approach and being able to evidence that if we were challenged.**”

*Martin Stubbs, Resourcing Manager, Colas*

**“Thanks to Brookson, the Co-op can continue with its goal to be a destination for talent – whether that be permanent or temporary. Its experts have given us the advice, expertise and bespoke guidance needed to navigate these complex law changes, which are made more difficult due to the nature and scale of our business. We would advise others to take the time required to do a thorough job, ensuring both your stakeholders and contractors are engaged with the process and ultimately partnering with a third party who really understands your business and the approach that’s right for you.”**

*Georgina Jones, Workforce Optimisation Lead, Co-op*