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EMPLOYMENT TAXES VOICE

Issue 5 – March 2020

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Welcome from the Chair

A missing Budget in 2019 but the changes to Off-Payroll Working and the Contractor Loan Charge take centre stage

*This article was written prior to the announcement that the implementation of the Off-Payroll Working rules are being delayed to April 2021.

For the first time in a long time - reportedly 1768! – a calendar year went by in which there was no Budget. The Budget was scheduled for 6 November but this never happened as Brexit dominated debate in Parliament, the government lost its majority and a general election took place on 12 December. Nevertheless, the Employment Taxes Committee has remained very busy as you will see from the list of submissions which is included on pages 43 and 44. This is particularly so as regards the changes to Off-Payroll Working which are due to take effect from April this year. Susan Ball, Lee Knight and Steve Wade talk about these changes on pages 5 to 13. Draft legislation was published in July 2019 but there are still a number of points which remain to be addressed. This said, last year the Committee held detailed discussions with HMRC about the Check Employment Status for Tax (CEST) tool which we felt needed to be improved so as to provide businesses with better support in making the right call on the employment tax status of their contractors. Following these discussions we were pleased to see that an updated version of the CEST tool was released by HMRC last November, including an expanded set of questions together with detailed guidance and examples. Whilst it is inevitable that marginal cases will always cause problems we consider that the updated CEST represents a significant improvement on the previous version. Having said this, HMRC have lost a number of IR35 cases over the last couple of years and the points involved are often very finely balanced. Indeed, the recent case of *RALC Consulting* (*RALC Consulting Limited* v *HMRC [2019] UKFTT 0702 (TC)*), which involved an IT contractor working with Accenture and the DWP, ran to some 85 pages which underlines this point.

With this in mind, and to simplify things, why not legislate a statutory definition of employment, aligned for employment law and tax purposes, to avoid the need for an exhaustive and time-consuming exercise before arriving at a view on employed v self-employed? Lesley Fidler takes up this theme in her piece on pages 14 to 16. Surely, simplification and certainty would be a good thing for business, contractors and HMRC alike? The government began to look at this in responding to Matthew Taylor's Review of Modern Working Practice (Good Work: The Taylor Review of Modern Working Practices, July 2017) back in December 2018 and hopefully more progress will be made in the coming months. In fact Taylor went further and suggested that the ambition should be to align the taxation of the employed and self-employed so that distortions are removed, particularly as regards employer's NIC, and businesses and contractors have no tax reasons to prefer one over the other. I agree and it will be interesting to see if the government takes up this point.

A key development that took place towards the end of last year was the appointment of Sir Amyas Morse to conduct an independent review of the Contractor Loan Charge. This requires (subject to exceptions) that outstanding loans taken out from third parties since 6 April 1999 be treated as additional remuneration and taxed as such on 5 April 2019. In last year's Employment Taxes Voice I commented that the loan charge (in its then form) was arguably a '' *blunt instrument that struggles to differentiate between those that have knowingly played with fire and others who were mistaken and/or given little choice but to enter into contractor loans''* and indeed this echoed what the CIOT said when the legislation was being enacted in 2017. In my view, Sir Amyas' recommendations, all of which bar one have been accepted by the government, are sensible and fair. They include restricting the loan charge to loans taken out on or after 10 December 2010, and excluding loans taken out in subsequent (unprotected) tax years up to and including 2015/16 provided there was reasonable disclosure to HMRC at the time. Sir Amyas also highlighted that many of the concerns about the loan charge were raised by the CIOT and other representative bodies soon after Budget 2016 and he added that *''had the views of such groups been better considered in implementing the policy, it is likely that at least some of the concerns raised by taxpayers would have been addressed''*. Let's hope that in future when any similarly controversial measures are introduced then Sir Amyas' words are heeded and that feedback from consultation is effectively taken on board. Lewin Higgins-Green has more to say on the loan charge on pages 17 to 19.

Whilst the headlines have been dominated by Off-Payroll-Working and the Contractor Loan Charge, there are a number of other matters which we discuss in this edition of Employment Taxes Voice. David Chandler talks about electric cars and the dramatic reduction in the benefit-in-kind charge which will apply from 6 April 2020. The issue of climate change is fundamental and the importance of adapting our behaviour to take on board a cleaner way of doing things certainly applies in deciding what car we drive. The government clearly recognizes this and the employment tax incentive to make a cleaner choice is underlined by the fact that, in framing the anti-avoidance rules on salary sacrifice in Finance Act 2017, specific exception is made for ultra-low emission vehicles.

In other articles we cover the changes applying to short term business visitors from 2020/21, international pension plans, the construction industry scheme, salary sacrifice and pension contributions, statutory bereavement pay and leave, year-end employer reporting, payroll compliance issues for employers and I am grateful to all our authors for sharing their expertise on these topics.

I hope you will find this fifth edition of Employment Taxes Voice interesting and relevant and, as always, if you would like to know more about what the Committee does or how to become more involved please let me know.

Colin Ben-Nathan
Chair, Employment Taxes Committee

Off-payroll/IR35 rules: the basics from April 2020

Susan Ball and Lee Knight discuss the new Off-Payroll Working rules and the steps required to comply with them

*This article was written prior to the announcement that the implementation of the Off-Payroll Working rules are being delayed to April 2021.

It has always been the responsibility of any organisation engaging an individual directly to determine the employment status of that individual. Where an employment relationship is deemed to exist for tax purposes, the individual must be paid through the organisation's payroll to ensure appropriate deductions are made for tax and NIC. Employer's NIC is also then due.

Since 2000, where an organisation engaged a worker through an intermediary, sometimes the worker's own personal service company (or "PSC") directly, but this could also be via an agency, then the worker under the IR35 rules was supposed to assess whether they were in a relationship that was considered to be 'disguised' employment. If so, the worker was required to operate tax and NIC themselves on the employment income they were deemed to receive from that organisation under IR35.

It was widely accepted that the IR35 rules introduced in 2000 were not fully effective. In 2017 the rules for the public sector were therefore changed, and the amended legislation in Chapter 10 ITEPA 2003 was introduced. This legislation moved the decision for considering IR35 and assessing whether the worker was (for tax and NIC purposes) a disguised employee to the public sector end user of the worker's services, and where the worker was a disguised employee, the end user (or the fee-payer if different) became responsible for placing the worker on their payroll as a "deemed employee" so that tax and NIC could be operated on their deemed employment income via RTI.

The original IR35 rules introduced in 2000 continued to apply in the private sector. Non-compliance by workers and their intermediaries was still, however, an issue, with the cost to the Exchequer estimated to reach £1.3 billion a year by 2023-24, depriving public services of vital funds. As a result, and after consultation, at 6th April 2020, new legislation applies which extends and updates the public sector IR35 rules, primarily to include the private sector, but with changes for the rules for the public sector too.

HMRC have confirmed after extensive lobbying that they will initially take a light touch approach to penalties for non-compliance whilst these changes bed down. Organisations will not have to pay penalties for inaccuracies relating to these new IR35 rules in the 2020/21 tax year unless there is evidence of deliberate non-compliance. While this is welcome news, it is worth noting that organisations who are not compliant will, where relevant, still be held responsible for any underlying tax and NIC underpaid where the new IR35 rules are not properly applied, even where this relates to the 2020/21 tax year.

At the time of writing the final legislation is expected to be published in the Finance Bill on 19 March 2020. The broad thrust of the legislation is not expected to change but some changes to the details are expected as HMRC guidance and the current draft Finance Bill are not currently aligned.

Broadly, what are the new rules?

Under the new rules, end users of such worker's services will be required to assess whether these new IR35 rules apply to their engagements with off-payroll workers operating via an intermediary, for example their own PSC. These rules apply for both direct engagements (i.e. those where the end-user enters into a contract directly with the worker's intermediary) and those where the off-payroll worker is indirectly sourced via an agency or other third party. If engagements are caught (i.e. the relationship is a disguised employment and the engagement is "inside IR35") the fee-payer (being the party which pays the worker's intermediary/PSC) will be required to operate tax and NIC under PAYE on any deemed employment income arising under the engagement in relation to services provided by the worker from 6 April 2020.

These rules will apply to medium and large private sector organisations end-users and all public sector end users. For private sector end users who are small, that is any private sector end-user that qualifies as "small" under the definition set out in *Section 382* of the *Companies Act 2006* (*new section 60A ITEPA 2003*) the responsibility to assess the engagement will remain with the worker's intermediary/PSC under Chapter 8 ITEPA 2003. It should be noted however that small private sector organisations can still have obligations under the new rules if they are fee-payers or are otherwise involved in the labour supply chain for medium or large end users.

To be small the basic rule is that two of the following conditions must be satisfied:

- annual turnover must be not more than £10.2 million
- the balance sheet total must be not more than £5.1 million
- the average number of employees must be not more than 50.

In addition, a company is always small for its first financial year, and public companies are excluded from the small companies' regime. There are anti-avoidance provisions and rules which apply for joint ventures, groups and connected persons. Similar rules apply for LLPs, unregistered companies and overseas companies. See the HMRC guidance at ESM10006 to ESM10009.

Key terms

- End-User - the receiver of the individual's personal service who will determine the status and could also be the fee-payer if paying the intermediary or PSC directly. Sometimes referred to as the hirer, end-client, or engager.
- The Fee-Payer – often the organisation that supplied the worker and makes payment to the worker's PSC/intermediary on behalf of the client. But the fee-payer can be the end-user where the end-user engages the worker's intermediary/PSC directly.
- Intermediary - the individual's intermediary through which the individual/worker personally provides their services (for example, it could be a PSC or partnership or limited liability partnership)
- Individual/Worker - the off-payroll worker (or "OPW") who personally provides the service to the end-user.

Brief overview of the steps required for compliance

Under the new proposed rules the end-user must:

1. Determine if the contracted-out services exemption applies and, if it doesn't, whether the conditions of liability are met in respect of the intermediary. See Sections 61N, 61O and 61P Chapter 10 ITEPA 2003 and HMRC's guidance at ESM10003.
2. Undertake (taking reasonable care), and provide to the contractor and any third party with whom the end-user contracts for their service (such as an agency), with a status determination statement (an "SDS") setting out their assessment of the worker's status and the reasons for their assessment (see Steve Wade's article for further detail).
3. If the arrangement is one of "deemed employment" the fee-payer (which could be the end-user) must operate tax and NIC via payroll when paying the worker.
4. Set up a disagreement/appeal process which meets the statutory requirement so workers or the fee-payer are able to appeal the status determination if they disagree with it. End-users will need to respond to any appeals to their status determinations within 45 days of receipt. See Section 61T ITEPA 2003 and HMRC's guidance at ESM10015 (again, see Steve Wade's article for further detail).
5. Be aware of the transfer of debt provisions, which could result in a transfer of any tax and NIC liability due back up the labour chain, potentially back to the end-user, where the fee-payer or another party down the chain fails to satisfy their obligations.

The rules may also apply if working through an intermediary and the individual, intermediary, or client are:

- Overseas. However, please see below for an end-user who is wholly overseas; or
- Operate in the construction industry. These new IR35 rules take presence over the Construction Industry Scheme rules.

Step 1. Conditions of liability

The legislation will only apply where the worker's intermediary satisfies specific conditions which will vary depending on the form of the intermediary. Some end-users appear to be overlooking this step and in practice the only way in every case to determine whether the conditions of liability are met is to ask the worker, usually in writing. Section 61U of ITEPA 2003 requires the worker to notify the client whether these conditions are met within 30 days of a request. Where the worker provides a fraudulent document the end-user cannot then be held responsibility for any tax and NIC that should have been deducted (see HMRC's guidance at ESM10023).

Broadly the conditions of liability are:

Condition A: The intermediary is a company in which the worker has a material interest (broadly this is more than 5% of the shares, 5% of the votes, or entitlement to receive more than 5% of the assets).

Condition B: The intermediary is a partnership of which the worker is a member and is entitled (either alone or with members of the worker's family, which includes their spouse, civil partner or person with whom the worker lives as if they were spouses or civil partners) to at least 60% of the profits, or one in which the worker's share of the profit is linked to the payments under the contract and the majority of the partnership's income derives from the provision of services to a single client and its associates.

Condition C: The intermediary is an individual.

Step 2. How do end-users determine status?

The rules require the end-user to review the hypothetical contract with the contractor to determine the employment status. End-users can assess this in many ways, including using the HMRC Check Employment Status for Tax (or "CEST") tool. How they reach their decision needs to be communicated in the SDS. (See Steve Wade's article for further detail.)

HMRC launched an enhanced CEST service in November 2019 in response to stakeholder concerns about the previous CEST tool. Improvements have been made to the questions, language, and presentation, and guidance has also been added to help ensure that the questions are more clearly understood. See HMRC's guidance at ESM11005 to ESM11170.

HMRC have also provided a specialist hotline to support end-user organisations in making employment status determinations. End-users can contact the HMRC helpline on 0300 123 2326.

Step 3. How do you operate PAYE on a "deemed employee" who is "inside IR35"?

Responsibility for operating tax and NIC under PAYE on the deemed employment income, and reporting this to HMRC under RTI, lies with the fee-payer. In calculating the deemed employment income, the direct cost to the intermediary of materials used, or to be used, in the performance of the services can be deducted. The deduction of expenses met by the intermediary can also be deducted but this is at the discretion of the fee-payer and must only take into account those expenses that are allowable under the legislation (see HMRC's guidance at ESM10019 and ESM10028).

Off-payroll workers should be added to payroll like any other new-starter would be, although the new off-payroll worker marker must always be set. They should be issued a starter checklist so they can provide the fee-payer with the information they need to run payroll for them.

The declaration the worker chooses on the starter checklist will determine their PAYE tax code. Usually this will be declaration C as the worker will already have a primary employment with their intermediary. This would put them on tax code BR. A 0T week 1 / month 1 code would apply if the worker does not return the starter checklist. Devolved powers that affect tax codes would apply as normal, for example Scottish rates of income tax.

The fee-payer will have to pay the employer's NIC and, where due, the apprenticeship levy too. The worker will be entitled to a P45 or P60 but is not specifically entitled to a payslip. However, the worker will often request a payslip or similar as evidence of the deductions the fee payer has made.

Under RTI employers are required to tell HMRC in their Full Payment Submission about income tax and NIC deductions they make from payments to employees, when or before those payments are made. This "when or before" RTI rule applies equally to off-payroll workers meaning that the timing of payments to off-payroll workers needs to be carefully considered so that RTI requirements can be satisfied.

Step 4. What is needed in the status disagreement process?

The legislation requires end-users to have a status disagreement process in place to allow for and deal with challenges made by workers and fee payers against Status Determination Statements the end-user has issued. (See Steve Wade's article for further details.)

What about end-users who are wholly overseas?

During the recent review of these new IR35 rules concerns were raised about how the rules will apply where the end-user is overseas. The Government has listened to those concerns and will amend the legislation to exclude wholly overseas organisations with no UK presence from having to consider these rules.

Where a medium or large sized private sector client is based wholly overseas, so there is no UK connection in the form of being UK resident or having a permanent establishment, then the rules at Chapter 10, Part 2, ITEPA 2003 do not apply (see HMRC's guidance at ESM10006). The worker's intermediary should consider whether Chapter 8, Part 2, ITEPA 2003 applies for these engagements (see HMRC's examples at ESM10026).

What about the transfer of debt provisions?

Where an end-user is using an agency to source workers, the rules make the fee-payer agency liable for accounting for employment taxes and NIC to HMRC if the worker is deemed to be an employee, based on the SDS issued by the end-user. The rules provide that the liability will transfer back to the first party or agency in the chain, and potentially to the end-user, where there is a compliance failure by another party further down the chain and HMRC cannot collect the tax and NIC from that party. It is reassuring that the technical note (https://tinyurl.com/w6pa867) accompanying the draft regulations confirms that HMRC will not exercise their power to recover unpaid tax and NIC from the first agency or end-user where they cannot collect it from the party further down the chain as a result of a genuine business failure.

Does the end user need to confirm its size?

If a worker or the person an end-user contracts with is uncertain about the size of the end-user, it can formally request confirmation from the end-user. Knowing the size of the end-user will provide the certainty workers and other parties in the contractual chain need to understand whether Chapter 10, Part 2 ITEPA 2003 may apply. If the end-user confirms they are small the worker then knows they must consider Chapter 8, Part 2, ITEPA 2003.

Profile

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The Off-payrolling rules – Status Determinations and the Status Disagreement Process

Steve Wade considers the requirements for a status determination statement and the employer-led client disagreement process

*This article was written prior to the announcement that the implementation of the Off-Payroll Working rules are being delayed to April 2021.

The Government's review of the implementation of the off-payrolling rules will no doubt have disappointed those who wished the implementation to be delayed. It is, however, now clear that the Government intends to push ahead and implement the new rules in respect of payments made and worked performed after 5 April 2020.

This article specifically focuses on the requirement of the *"end client"* to issue a Status Determination Statement (SDS) and have a *"Status Disagreement Process"* in place. It based on the draft finance bill (https://tinyurl.com/yyqy486) and the draft HMRC guidance published on February 27 which clarified many points but even at this late stage a number of areas still remain unclear.

At the time of writing the next version of the legislation is expected to be published in the Finance Bill on 19 March 2020. The broad thrust of the legislation is not expected to change but changes to the details are expected because HMRC guidance and the draft Finance Bill are not currently aligned.

A worker for the purposes of this article is as defined by HMRC in their draft guidance namely: "Worker – The individual personally providing their services". It does not necessarily mean a worker for the purposes of employment rights legislation.

Importance of the SDS

When the new rules apply the responsibility to assess whether the worker providing services through a PSC falls within or outside IR35 falls on the end client. If the new rules do not apply because, for example, the end client qualifies for exemption from these rules because they are small, the responsibility to determine whether the worker falls within or outside IR 35 remains with the worker's PSC.

When the new rules apply the end client must issue an SDS to the worker (https://tinyurl.com/vf5dl2n). They must also issue an SDS to an agency if they contract indirectly with the worker's PSC through an agency.

The legislation only requires an SDS to be issued to the worker if the result of the status determination is that the worker should be subject to withholding. HMRC guidance suggests that an SDS should also be issued when withholding is not required. In discussion with HMRC they described this as "best practice". If it is "best practice" why isn't this in the legislation?

Where the end client contracts directly with the worker's PSC the responsibility to withhold PAYE, NIC and the Apprenticeship Levy, if due, will rest with the end client. The difficulties of integrating the receipts payable software which pays the PSCs fees with the payroll cycle and software is one reason why some larger organisations are ending direct contracts with PSCs.

Where the end client contracts via an agency the SDS is issued to the worker and also to the entity/agency that contracts directly with the end user. One reason why the issue of the SDS is important is that until the SDS is issued the responsibility to withhold PAYE, NIC and the Apprenticeship Levy, remains with the end client. Where there are a number of agencies in the supply chain between the end user and the worker's PSC, the responsibility to withhold moves down the supply chain as the SDS is passed down the supply chain. HMRC describe this transfer of liability as the legislation "incentivising" the agencies to meet their responsibilities.

The fact that the responsibility to withhold remains with the end user until such time as the SDS is issued has prompted a debate about what constitutes a valid SDS and representations made to HMRC during the consultation process, requested clarification on this point.

What constitutes a valid SDS?

At the time of writing, the draft guidance (which could be subject to change) states that:

"For the Status Determination Statement (SDS) to be valid the client must:

- *state in the SDS whether or not the worker would be an employee or office holder, or is an office holder, for tax and NICs purposes if they were directly engaged by the client.*
- *provide their reasons for coming to that conclusion.*
- *have taken reasonable care in coming to their conclusion."*

Reasonable care means end users should *"act in a way that would be expected of a prudent and reasonable person in the client's position".* HMRC also make the comment that "*A client with a small, straightforward workforce may only need a simple regime, provided they follow it accurately. Whereas a client with a larger and more diverse workforce may need to put in place more sophisticated systems"* and that HMRC *"would expect a higher degree of care to be taken by a large multi-national company with its own internal finance function than of a much smaller entity."*

According to the guidance *"HMRC expects each client to make a correct and complete determination, and preserve sufficient records to show how the decision was reached. Standard document retention rules apply to the SDS".*

Some examples of reasonable care include, accurately using the HMRC Check Employment Status Tool (CEST), seeking the advice of qualified professional advisors, reviewing the processes being applied and amending those processes for future determinations, where necessary. If workers are given blanket assessments without taking into consideration the specific facts for each case, then this would not be regarded as taking reasonable care.

HMRC's guidance is also clear that if an SDS does not satisfy the three criteria outlined above then the SDS is invalid and the responsibility to withhold PAYE/NIC and Apprenticeship Levy where due, would rest with the end client. HMRC's guidance also states that *"advertising a role as being either inside or outside the IR35 rules may provide clarity to workers but is not sufficient to constitute a valid SDS"*.

Client led status disagreement process

HMRC guidance at ESM10015 (https://tinyurl.com/uwmso4z) explains that *"The legislation requires clients to have a status disagreement process in place to deal with disputes of Status Determination Statements (SDS) by workers and deemed employers. An agency who is not the deemed employer (see ESM10017) within a contractual chain does not have the right to use the client-led disagreement process*.". In most cases the deemed employer will be the fee-payer. HMRC define a deemed employer in ESM10002 as: *"This is the person treated as making the deemed direct payment to the worker. It is the person responsible for the deduction of tax, NICs and apprenticeship levy, and paying these to HMRC. This may be the same person as the fee-payer, but it may be another person in the contractual chain if the fee-payer is not a qualifying person".*

A qualifying person has to be resident in or have a place of business in the UK. In broad terms the qualifying person must also not be controlled by the worker. See ESM10017 (https://tinyurl.com/qqcnx34) for more details.

Although there must be a dispute resolution process the draft legislation is not very prescriptive about what the process should be. This is to allow end-clients to set up a process that suits their situation. The HMRC guidance stating "*It is up to the client to decide the appropriate people within the organisation to deal with disagreements. The client could put in place a process to ensure the right person within the organisation receives any representations from workers. For example, by asking that representations are made to the person who issued the original SDS to the worker*".

Allowing such flexibility would seem a sensible approach but there are some concerns with the legislation as currently drafted. Firstly, the current draft legislation imposes no specific time limit on the worker to challenge the determination, although the draft guidance states that the end client "*is only required to respond to representations made during the course of the engagement and before the final chain payment is made in relation to that engagement. The end client is not obliged to respond to representations made outside of this timeframe*". We will have to wait until 19th March to see if this appeal time limit will be incorporated in the legislation or whether it will merely be in HMRC guidance.

Secondly the draft legislation doesn't specify how an appeal has to be made. It could be made verbally or in writing, however, I would recommend that end-client's appeals process requires the appeal be made in writing. End-clients will not want disputes about whether an appeal was made and whether the 45-day deadline was met. End-clients will need an audit trail, and not only for future HMRC compliance visits. It is, therefore, unfortunate that the draft legislation doesn't specifically require the appeal to be in writing particularly as status determinations, and consequently the reasons for disputing a determination, can be quite complicated.

Once the appeal has been received, the end user has 45 days from the date of receipt of the appeal to review the position. Once reviewed, the end client must:

- *"Inform the worker or deemed employer that they have considered their representations and that they have decided that their original SDS was correct and provide reasons, or*
- *Inform the worker and deemed employer they have considered representations and decided the original conclusion was wrong, provide a new SDS and state that the previous SDS is withdrawn.*
- *Take reasonable care in making any new SDS and ensuring it contains the reasons for reaching that conclusion."*

If, after completing the status disagreement process, the worker still disagrees with the outcome, then existing Self-Assessment and National Insurance processes can be followed to obtain a repayment. This isn't, however, a quick or simple process.

HMRC guidance is clear that where the end client *"does not comply with the minimum requirements of the status disagreement process, the responsibility for the deduction of tax, NICs and apprenticeship levy, and paying these to HMRC will transfer to the client for further payments".* This does not apply when the end client has received fraudulent documents during the appeals process.

Finally

It appears that the government are determined to introduce the new legislation from the 6 April 2020 despite the legislation in the Finance Bill not being available until the 19th March 2020. This leaves less than a month to resolve any differences between guidance and the legislation meaning some taxpayers will have to rely on the Chancellor's assurances that HMRC will not be *"heavy-handed"* during the first year of this new legislation.

That said end clients will need to ensure that they have processes in place to ensure that "reasonable care" is taken when making status determinations and that they have a dispute resolution process in place. All end clients should familiarise themselves with HMRC's draft guidance and any future revisions.

It is unlikely that the Finance Bill will be enacted by 6 April 2020 so It will be interesting to see how the Government introduces the law for both tax and NIC by 6 April.

Profile

Steve Wade

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Does the UK need a statutory employment test?

Lesley Fidler suggests that the UK should stop trying to manage without a statutory employment test

Much has been written on the distinctions between employment and self-employment. Countless hours of court time and even longer in preparation have been spent arguing the matter. Individuals have endured uncertainty for months or years whilst correspondence with HMRC goes backwards and forwards – or lingers. As tax advisers, we tend to see this issue from a cost perspective: to pay or not to pay secondary (employer's) Class 1 national insurance contributions? But of course there is also the employee's side: should a worker automatically enjoy the protection that employment rights bring or have to negotiate for everything?

I believe that the tax system now needs to have a statutory employment test (SET). Indeed, it is hard to see how it can operate effectively without. This is not a new idea. In 2017 the Taylor review (Good Work: The Taylor review of modern working practices: https://tinyurl.com/yaf4fk5e) suggested that '*The aim of a new legislative framework is that the legislation does more of the work and the courts less*' (Good Work: The Taylor review of modern working practices, page 32). The BEIS response (A response to the Taylor Review of Modern Working Practices https://tinyurl.com/yadyxzxp) does not reject this recommendation, but it certainly does not promote it as an urgent issue. Many commentators have rejected the idea of a SET because they believe it is not possible to create a set of tests that produce the same result as the current body of case law. This is certainly true. As the Court of Appeal repeated in 1993, *'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'* (*Hall* v *Lorimer* 66TC349).

The creators of HMRC's Check Employment Status for Tax (CEST) tool acknowledge this and so there is a rump of difficult cases where the tool holds its metaphorical hands up and admits defeat. The same limitation applied to its predecessor, the Employment Status Indicator that was created with the construction industry in mind. But the objection that a SET cannot be created assumes that a new SET would have to reflect the current position. When the statutory residence test was created much work went into mirroring the common law position, but there were far fewer cases to try and harmonise. I suggest that existing case law, both tax- and employment-related, should be considered, but not necessarily replicated, in a new, objective test.

In 2020, is it right that tax considerations should be governed by a set of common law principles that have their roots in an era of masters and servants, in times when middle-class families had servants and there was a well-developed class system that ensured that gender, birth and connections overrode ability? Working practices have changed in the past two or three decades let alone the greater part of the century since *Davies v Braithwaite* was decided in 1931. Whilst the tax profession debates the role of artificial intelligence in the tax system, it then for employment status determinations uses outmoded principles that were not designed for a world of careers such as those of IT contractors and project managers: workers whose expertise is essential to businesses but only for discrete periods. Even large employers cannot justify carrying highly specialised knowledge workers on their payrolls until they are needed: nor is this likely to be acceptable to such workers themselves. Surely it is time to look at the tripartite categorisation suggested by the Taylor review, translate (and harmonise) the proposed 'dependent contractor' status derived from the current employment law 'worker' category (Section 230, Employment Rights Act 1996) into the tax system and bring the rules into the second quintile of the twenty first century?

At Rishi Sunak's first cabinet meeting as Chancellor of the Exchequer in February 2020, he reminded his colleagues of his predecessor's challenge for every Department to identify a 5% cut in its spending. It seems unlikely that against this background, HMRC can offer one-to-one advice for large numbers of taxpayers. The current tax system is based on concepts such as self-assessment and pay now – check later. Pre-transaction rulings are only given by HMRC in a narrow range of circumstances. And yet there is requirement on a taxpayer to take reasonable care – a behaviour which is only questioned when HMRC does not agree with the result and which may not even be satisfied by engaging an adviser.

Taxpayers and their advisers therefore need an objective test of employment status so that they can proceed with certainty from the start in all cases. The recent batch of front-of-camera IR35 cases (including, in no particular order, the personal service companies used by Christa Ackroyd, Helen Fospero, Eammon Holmes, Lorraine Kelly and Kaye Adams) have all been concerned with tax years that ended several years ago (for example, in late 2019 Helen Fospero's personal service company, Canal Street, was still at odds with HMRC over 2012-13 and 2013-14 liabilities). The addition of a 3.25% interest charge which is more than six times the 0.5% rate that HMRC will pay on refunds looks more like a penalty than commercial restitution.

When the Office of Tax Simplification was set up in 2010, the tension between the simplicity of clear boundaries versus the occasional harsh results caused to those at the margins was highlighted. But currently those at the margins lack certainty. Depending on what they decide to do, they have the prospect of either paying too much in NICs or the risk of a costly and distracting dispute with HMRC at some time in the future. But only if their decision is challenged. The public sector IR35 rules of 2018 and the large employer rules in 2020 are because HMRC is not only aware that many contractors whose status is not even grey were willing to take the risk of not being identified or successfully challenged by HMRC but were succeeding in this non-compliant strategy.

There is a view that aspects of life that are only encountered as adults, such as speeding and paying tax, are where an individual's sense of right and wrong can be less developed. The contractor who says 'I must be self-employed because my agency found me three different interim roles filling-in for employees this year' would be horrified if it was suggested that she should shop lift when there was no chance of being caught. If HMRC has no prospect of having the funds to police the system adequately, then the system needs to be built without room for doubt.

Of course, even with a SET, the categorisation can be ignored or the facts mis-stated. But that is different from being left in limbo having used the CEST tool.

Taking the opportunity to adopt the Taylor review proposals and create a category of dependent contractor would avoid some of the problems of those who now fall at the margins. Such workers can need to travel long distances because their clients are scattered around the country and/or stay away from home for part of the week, so might they receive a measure of tax relief for the necessary costs incurred in the way in which they earn their taxable income? The impermanence of their engagements resulting in a lack of employment law protection as well as uncertainty as to their future income need to be factored into the position. The current IR35 rules mean that contractors whose work results in the Treasury receiving the same tax and NICs as employees are in a worse position when it comes to employment rights. The considerable premium that their services command compensates in part for this, but is it correct that the end client should effectively be able to buy its way out of employment law obligations? Are there protections that money should not be allowed to buy out?

This is a vast area that has impacts across several government departments and it will need a powerful political champion to persuade them to work together. In the meantime, both the tax system and employment law are not fit for purpose; not only in relation to off-payroll working and status determinations for those able to plan their working arrangements but also for the vulnerable worker who is told how it will be by the person who pays them.

Profile

Lesley Fidler

Lesley is both a Chartered Tax Adviser (CTA 1985) and a Chartered Member of the Institute of Personnel and Development (MCIPD 2006) and has provided advice to employers on the tax and National Insurance aspects of remuneration and reward policies and practices for more years than she cares to admit.

Now employed in-house in the financial services industry, Lesley sits on the Chartered Institute of Taxation's Employment Taxes Committee and represents the CIOT on HMRC's IR35 Forum.

The April 2019 loan charge – what now?

Lewin Higgins-Green considers the government's response to the loan charge review and what affected taxpayers should be doing

In last year's edition of Employment Taxes Voice we discussed the legislation introduced by the Finance Act (No 2) 2017 to tax the value of any pre-existing disguised remuneration loans dating back to 6 April 1999 – the "loan charge". HMRC was originally expecting up to 50,000 individuals to be impacted and that the loan charge would raise £3.2 billion in tax revenue (https://tinyurl.com/qng774b).

As we mentioned before, a House of Lords report ("The Powers of HMRC: Treating Taxpayers Fairly (https://tinyurl.com/y8qeuuye) published in December 2018 was particularly critical of the retrospective effect of the loan charge. As a result of the report, in 2019, the Government commissioned an independent review by Sir Amyas Morse and, in December 2019, published their response to that review (https://tinyurl.com/vhj26ob).

The government's response

The government accepted all but one of the independent review's proposals and have announced some key changes to the loan charge, including:

- a reduction to the retrospective effect of the legislation: it will now only apply to loans made on or after 9 December 2010 (but note that any underlying tax liability for loans made on or before 8 December 2010 will still exist – further details below);
- additional flexibility for taxpayers: affected individuals can defer the submission of their 2018-19 tax return and any required payment until 30 September 2020 without penalty or interest;
- a settlement opportunity in 2020 for any taxpayers who are now outside the scope of the April 2019 Loan Charge, but still have an underlying tax liability (for example, where a previous enquiry was opened by HMRC and HMRC has, therefore, "protected its position" to recover the underlying tax);
- the refund of voluntary payments already made by taxpayers to prevent the loan charge arising: this is for settlement agreements reached that relate to either (i) loans made before 9 December 2010 (and to which, therefore, the loan charge no longer applies); or (ii) loans made before 6 April 2016 where reasonable disclosure was made to HMRC and no enquiry was opened by HMRC in the normal statutory time limits;
- the possibility for individuals to spread the taxable amount of any loan caught by the charge evenly across the 3 tax years 2018-19 to 2020-21: this will mean that some of the loan may now be taxed at a lower rate of tax, depending on the income levels in each year.

Draft legislation to implement these changes was published on 20 January 2020 (https://tinyurl.com/tumj226). Further draft legislation was then published on 27 February to refund certain voluntary payments ('voluntary restitution') made on or after 16 March 2016 as part of a settlement with HMRC, in relation to loans made in unprotected years. This article does not consider the scheme being set up by HMRC to administer refunds.

For loans that remain caught the amount of income subject to income tax and NIC in 2018-19 (or across 2018-19 to 2020-21 if appropriate) is the outstanding amount of any caught loan. This will normally be the original amount of the loan, less any amounts actually repaid and not written off.

However, loans that are not caught by the loan charge do not escape taxation under the disguised remuneration legislation more broadly – see below.

Action for affected individuals

Individuals with loans that are potentially caught by the loan charge will first need to be clear on when any potentially affected loans were originally made – as mentioned above the loan charge will now only apply to loans made on or after 9 December 2010. HMRC have confirmed that it may be possible to apportion a total loan balance on a just and reasonable basis for an individual who received loan payments straddling the “cut off” date (e.g. where equal payments were received throughout the 2010-11 tax year and it is not possible to clarify when the loans were actually made).

Loans to individuals between 9 December 2010 and 5 April 2016 that were appropriately disclosed to HMRC at the time, and where no previous enforcement action was taken by HMRC within the normal statutory time limes (e.g. an enquiry into a tax return), will also not be in scope of the loan charge. Therefore, individuals will need to ascertain whether they made a “reasonable disclosure” to HMRC. Where individuals have provided enough information in the relevant tax return to allow HMRC to identify the loan scheme, the loan recipient and the loan arrangement, HMRC have stated they consider reasonable disclosure has been made.

Any loans which are caught by the loan charge need to be reported to HMRC. This can be done via an online form from HMRC (available in April 2020) and the revised deadline is 30 September 2020. Individuals who have already reported their loans by the original deadline of 31 January 2020 should not need to take further action (even if the tax liability has changed, or the loans are no longer within scope of the charge), unless they want to spread the loan balance over the three tax years 2018-19 to 2020-21, in which case they will need to complete the online form.

What about loans that are now out of scope of the loan charge?

Any outstanding loans that are not caught by the loan charge will not be subject to an income tax and NICs charge in 2018-19 on the outstanding amount of the loan. However, this does not mean there will be no tax consequences in the future.

The disguised remuneration legislation is still likely to catch any waiver or write-off of outstanding loan amounts, creating an employment income tax and NICs charge (together with associated employer NICs) at the time of any such waiver or write-off. Therefore individuals and their employers will still need to plan for such circumstances, ensuring that any such amounts are processed through payroll at the appropriate time.

Profile

Lewin Higgins-Green

Lewin leads the UK employment and mobility tax offering within the European tax advisory group at FTI Consulting.

Lewin is a Chartered Tax Advisor and a member of the Employment Taxes Committee of the Chartered Institute of Taxation. He can be contacted on 020 7269 9367 or lewin.higgins-green@fticonsulting.com.

Company cars – what's going on?

David Chandler looks at the changing world of company cars and whether an electric fleet could be the future

Most people entering the tax profession like the fact things change – we have an annual Budget (sometimes more than one!) and the tax playing field never sits still. However, the pace of change over the last 3 years in the company car/employment tax space has been somewhat unprecedented! We have had such a sustained period of uncertainty and change, with many signs that this will not stop.

The recent headline is that the Government have announced plans to consult on stopping the sale of all new cars with Internal Combustion Engines ("ICE") with effect from 2035, with an additional suggestion that they may bring forward that date to 2032.

To illustrate the sheer scale of the challenge – there are 33 million vehicles on the road currently. Obviously, the new rules would apply only to new vehicles sold. However, in 2019, the total number of cars sold was 2.3 million. Battery Electric Vehicles ("BEVs") accounted for just 1.6% of those sales last year – so we clearly have a long way to go in a 'relatively' short time to meet that Government aim of banning all new ICE cars.

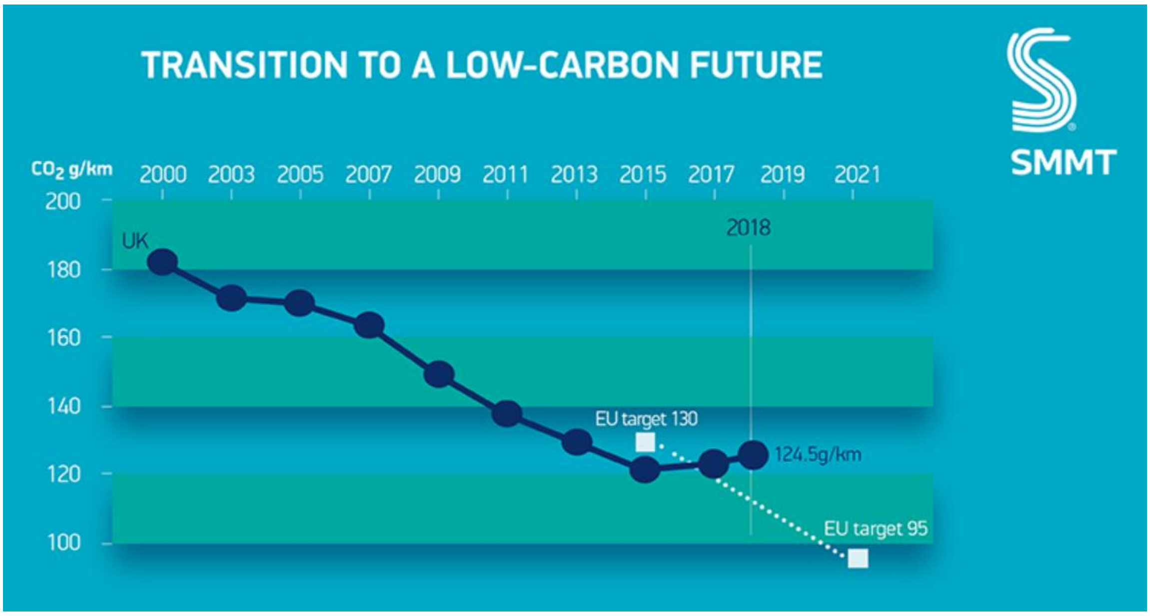
What have been the issues in the last 3 years?

There have been several aspects which have impacted the company car market.

Over the last 3 years tax rates have increased substantially, so a Diesel VW Passat (with CO_2 emissions of 106 g/km) currently has a 29% BiK (Benefit in Kind) charge (2019/20). This is a fairly typical business need company car and not in any way extravagant or considered a 'gas-guzzler'. Four years ago the scale charge on that car was 19%, which represents an increase in tax of over 50% in 4 years.

According to the latest statistics from HMRC (admittedly these are from 2017/18 tax year) there are 840,000 company cars in the UK, a number which has decreased as the scale charges on ICE company cars has increased. Given BEVs are arguably not (yet!) the solution for many business-need fleets, companies are struggling to provide cost effective vehicles under the existing company car regime. What this has meant is we have seen employees opting out of company cars, taking cash alternatives and then picking their own choice of cars outside the CO_2 restrictions of the company car tax system.

This appears to have contributed to CO_2 emissions from new cars now increasing. Over the last 3 years the CO_2 emissions on new car sales have actually increased after spending the previous 15 years declining (since 2002 and the introduction of the CO_2 based taxation system). Last year, the CO_2 increased to 127g/km according to the latest SMMT report (manufacturers have to meet a European wide average of 95g/km!). This result has been blamed by some on an increase in employees choosing petrol vehicles and larger SUV models, both of which have higher CO_2 than diesel vehicles.



In addition, due to the emissions scandal, the testing regime for cars has moved from NEDC (New European Driving Cycle) to WLTP (Worldwide harmonised Light Vehicles Testing Procedure). Essentially this means vehicles are now tested in real world conditions. Due to the way these rules have been introduced this has had the effect that the CO_2 has increased twice. The first time was in September 2018 when the concept of NEDC 'correlated' ("NEDCc") was introduced (Test results were derived under WLTP but then correlated back to an NEDC figure). Secondly, from 6 April 2020 another increase is coming as we switch to WLTP, when the new rules mean (at the time of writing) a large proportion of cars' CO_2 emissions are rising once again, some substantially.

The Government has sought to offset this 2020 increase due to WLTP and following consultation announced that for cars first registered from 6 April 2020, most company car tax rates will be reduced by 2% in 2020-21, 1% in 2021/22 before returning to planned rates in 2022-23.

What does this mean? That VW Passat above? The new WLTP figure is 134g/km, up from 106g/km. Provided that the car is RDE2 compliant, the charge, if registered after 6 April 2020, is actually 28% in 2020/21, then 29% and 30% in 2022/23 (if it isn't RDE2 compliant that Passat will be 32% going up to 34%).

What about the Electrics?

Good news! As part of the reduction announced last summer, electric cars will attract a 0% scale charge for the 2020/21 tax year. For plug-in hybrid electric vehicles ("PHEV") there will be a sliding scale based on the electric only range of the car. If a car can travel 40 miles on the electric only charge, the scale charge will be 6% of list price.

This is great news and provides a welcome incentive for the move to electric vehicles which is clearly the future aim for the Government.

In addition to the attractive tax rule changes, between 1st April 2020 and 1 April 2021, when a company **purchases** a brand new electric car outright or through a contract purchase, it will qualify for 100% first-year allowance as a result of changes made to section 45D Capital Allowances Act 2001.

What are the practicalities of an electric fleet?

Given the remit of this article is around the taxation side I won't comment too much on the other aspects of electric car provision, some of which are fiercely debated. However, some of the practical considerations arguably include:

- Cost – generally, electric vehicles remain currently more expensive than their ICE counterparts. That cost is expected to reduce as technologies improve over time.
- Supply – 1.6% of new vehicles last year were electric – this is limited by the manufacturers supply, not by demand. Manufacturers need to produce more vehicles supplied to the UK in order to meet the demand.
- Battery technology – again, this is expected to improve as manufacturers invest in electric vehicles.
- Cobalt production – one of the main components of batteries is cobalt and there are concerns how the world can produce enough ethically mined cobalt in order to produce the required amounts of batteries in sufficient quantities for electric vehicles to become more mainstream.
- Range anxiety – the majority of new electric models can travel 200 miles + which is sufficient for most journeys. However, longer journeys have to be planned around recharging and this can be troublesome (broken chargers, limited availability, and the time charging can take).
- Infrastructure – there are a huge number of charging points around the UK and this increases every month. However, as a country we still need serious investment to allow mainstream charging for electric vehicles.

Did someone say salary sacrifice?

Most readers will be aware of salary sacrifice schemes. In Finance Act 2017, the introduction of Optional Remuneration Arrangements ("OpRA") closed the tax advantage for the majority of salary sacrifice benefits except a few items, including low emission company cars.

The Government state that OpRA does not apply to cars with emissions of 75g/km or less as they are an excluded benefit under OpRA by reason of S228A ITEPA 2013. Therefore, given the low tax charge, as supply becomes available, salary sacrifice into BEVs could become an attractive benefit to encourage the take up of electric vehicles.

Summary

Clearly electric vehicles are the future and the Government policy is designed to encourage that to happen as soon as possible. However, companies, and employees, will need to balance the tax incentives alongside the practical considerations of implementing electric vehicles into fleets as we transition to a low carbon future.

One thing is for sure, the next ten years will continue to be very interesting in the world of cars, taxation and technology.

Profile

David Chandler

David has over 20 years of Employment Tax experience covering practice, industry and dealing with HMRC – helping clients to manage their compliance, planning and tax risks. The majority of his career in the big 4, he focuses on using technology to help deliver tools and services to clients in the Employment Tax and HR arena, especially around company cars, benefits and communication to employees.

Short term business visitors (STBVs) and HMRC's Appendix 8

Eleanor Meredith looks at the changes being made to the PAYE Special Agreement for short term business visitors

Little has changed in the world of reporting for short term business visitors to the UK since my article for Employment Taxes Voice last year. However, for one particular group the reporting mechanism is about to change and the scope of it will also extend. This group and the changes about to affect them are the focus of this article.

HMRC is in the process of reforming its PAYE Special Arrangement for short term business visitors, which is aimed at individuals who are taxable in the UK on their employment income from their first UK workday, but who spend very limited time working in the UK in any given tax year. Typically, these individuals either come from a non-treaty country, or are employed by branches of a UK entity. This means they can never meet the standard treaty condition for exemption from tax that requires remuneration to be paid by or on behalf of a non-UK employer, and not borne by a permanent establishment of the non-UK employer in the UK.

This reporting regime was introduced in the summer of 2015 following a recommendation by the OTS, and represented a compromise, balancing the tax that could be due on a very limited number of UK workdays (no more than 30) and the administrative burden of conventional PAYE reporting in this situation. The circumstances in which the regime could apply and its requirements were set out in a page of HMRC's PAYE Manual, at PAYE 81950.

Consultation of 2018

Following a short consultation in the summer of 2018, the government agreed to two key reforms of the regime. The first was that the total number of workdays an individual could have in the UK and remain eligible for inclusion in the regime was to be doubled to 60 days per tax year. The second was a welcome easement in the due date for filing end of year reporting from 19 April following the end of the tax year, to 31 May. This was critical, as the difficulties in gathering data to report worldwide remuneration for these individuals had made the previous deadline so tight that many UK entities felt unable to sign up to the arrangement. The same extension was applied to the deadline for the payment of any tax due under the arrangement.

What is happening now?

Both reforms were to take effect from the 2020/21 tax year, which at the time this was announced (Budget 2018) seemed an unreasonable delay for an arrangement covered only by HMRC guidance.

The reason for the delay has now become clearer, however, as it has been decided that the extension of the PAYE filing deadline in particular, has to be on a statutory footing. A related draft statutory instrument (https://tinyurl.com/qpe98pj) was released on 3 February 2020. The draft law will make an amendment to the PAYE Regulations, introducing the concept of a special arrangement and providing for a written agreement between HMRC and the employer to underpin it.

Interestingly, the statutory instrument indicates that both the due date for filing the end of year return and the due date for the payment of the tax should be specified in the agreement, while indicating that it can be no later than 31 May following the end of the tax year. One would assume that as a matter of practice HMRC would adopt this latest permitted date in all agreements issued, but this is obviously an aspect that both employers and practitioners will want to check before any agreement issued to them is signed formally.

HMRC is also moving its PAYE Manual guidance from its current page - which is only easily found if you know where to look, and far from obvious if you do not - to a new Appendix 8 in the PAYE Manual. This has a certain logic to it, as it will sit with other agreements, which have the potential to ease the strict legal PAYE reporting position, and should be easier for the uninitiated to find.

The updated version of the guidance has yet to be published, but is likely to have similar content to the previous version. The regime will continue to use an annual PAYE reporting arrangement, with all calculations and full payment submissions being undertaken at the end of the tax year. It will also have the same restrictions as the previous regime; for example, it cannot apply to anyone who has a liability to UK National Insurance, or to any directors of UK companies. Anyone covered by the arrangement will not normally be expected to complete a self-assessment tax return, unless they have other UK liabilities.

A gross up of the tax due will only normally be applied to cash remuneration if the employee is tax equalised. However, where benefits in kind are provided, HMRC also expect a tax gross up to be applied to them, unless the employee is bearing any tax due on the provision of the benefit.

There is no requirement for the agreement to be put in place before the start of the tax year, possibly because it may only become apparent later in a tax year when visitors first come to the UK that it is needed. Generally speaking, where the need for an agreement may be anticipated, employers will want to set up the arrangement as early as possible in the tax year. This is because the agreement itself serves as a confirmation that HMRC have accepted this is a case where deduction of tax under a regular PAYE scheme would be impractical.

As previously, only one PAYE scheme of this type will be permitted per employer.

What do employers need to do now?

Any employer who wishes to take advantage of the new arrangement will need to sign up to the new format Appendix 8 once this is released. HMRC announced this change with articles in the October 2019 edition of their Employer Bulletin, and in issue 74 of their Agent Update bulletin. They have also written to employers who already have a special arrangement in place for 2018/19. The communication, which could have been more clearly expressed, invited existing users to indicate whether they wished to enter into the new format arrangement or to cease the existing arrangement (although the intention was that employers should choose one alternative only, this was not made clear on the attachment that they were asked to return, although HMRC subsequently issued an email clarification via the Expatriate Tax Forum, confirming this).

Aside from having to sign up to the new arrangement, from an employer perspective, the new arrangement will operate in a very similar way to the previous one. In principle, employers can gather relevant payroll data at any time during the tax year, and this may be advisable where the population likely to be within the arrangement is clear, but may need to be more ad hoc for a more transient population. In either case, the timeframe, while a big improvement on the previous arrangement, remains tight, especially when working across numerous countries and time zones to collect payroll and benefit details.

Is there any bad news in the update?

Overall, the new format arrangement is intended to offer increased flexibility and should be welcomed. However, it should also be noted that in any instance where the employment income cannot be offset in full by a personal allowance, there will be a tax cost. Having an increased number of days permitted in the UK has the potential to increase the tax cost for the employer significantly, especially where a gross up is required because the individual is subject to tax equalisation arrangements or because of benefits in kind. Individuals who are non-resident in the UK by virtue of full time work abroad will usually want to keep UK workdays to no more than 30 to ensure they continue to meet this test; this may be less of a concern for others who would qualify as non-resident under other parts of the statutory residence test.

It was always probable that HMRC would apply penalties and interest in the event of late filing of returns and/or payment of tax. The agreement is predicated on some discretion being allowed to HMRC under the PAYE Regulations, and if they feel the agreement is not operated appropriately, they can withdraw it without notice. Having an agreement withdrawn late in the tax year, or being refused one for the following tax year, is a further possible sanction that employers will want to avoid if at all possible.

Conclusions

The Appendix 8 agreement is likely to represent a pragmatic alternative to the restrictions of RTI payroll reporting for the right sort of population, but there will continue to be potential pitfalls for employers who underestimate the scale of the reporting issue. The easements are largely welcome, but this will remain a challenging area for employers with mobile populations that fit the criteria.

Profile

Eleanor Meredith

Eleanor has been a director in Deloitte's Tax Quality Group since June 2016, specialising in Global Employer Services and providing technical support to that part of the tax practice. She continues to work in that area, working especially on the review of new and proposed law and in liaison with HMRC. Eleanor also serves on the CIOT's Employment Taxes sub-committee and represents that committee at HMRCs Expatriate Tax Forum. Eleanor can be contacted on 07920 417021 or at emeredith@deloitte.co.uk.

International pensions

Matthew Fox reviews where we are currently in the international treatment of pensions and retirement benefits.

In the last 15 years there have been many fundamental changes to the UK tax treatment of contributions to and distributions from pension schemes and it has become an increasingly complex area of taxation for both employers and employees. The UK is not alone as countries seek to reduce the tax reliefs available to high earners as well as increasing penalties for compliance failures.

For employers, understanding all costs and tax compliance risks for their pension plans has become a key focus. When sending employees on an international assignment they should assess whether relief is available for contributions paid to home country schemes as any tax due on pension contributions in the host country can add to assignment costs. Added to that is the impact of an assignment on the future treatment of distributions. There are ever increasing numbers of employees who have worked overseas for some or large parts who are now reaching retirement. It is not uncommon for such retirees to have accrued benefits in a number of jurisdictions and consequently have multiple sources of retirement income from past employment. It is critical that employers and their retired employees understand the tax treatment as the risk of significant penalties for getting it wrong have become more severe in recent years. These employees need advice on the treatment of distributions from pension plans, sometimes covering several countries.

Background

When employees go overseas on assignment, they often prefer to retain their membership of their home country plans whilst working temporarily overseas. One of the reasons for maintaining contributions to the plans is to ensure that they have continuity of pension coverage and to avoid fragmentation of their benefits. Some causes of fragmentation include:

1. Localisation – some assignees eventually settle and become local employees and join locally provided plans.
2. Acquisition – the employer may be acquired by another and, as a result, its employees join new plans
3. New employment – individuals may move cross border to take up new employment that provides benefits to employees in that country including pension

Retirement plans can take multiple forms. They range from state social security through to registered pension schemes which generally qualify for tax breaks to encourage pension savings and, lastly, to supplementary, top-up or other forms of savings plans which may be mere promises to provide additional retirement income to executives. Before providing advice to an individual client, the tax adviser first needs to identify what plans their client are a member of and how they operate, when and in what circumstances distributions occur and the type of vehicle used, e.g. a trust.

UK tax treatment of contributions and distributions – international aspects

As highlighted above there have been many changes to the tax rules over the years. The UK pensions tax regime was overhauled in 2006 to merge various tax rules and simplify the tax position. There have been many changes since then, as shown in the following table:

6 April 2006	‘A’ day – a ‘simplified’ regime for the ‘long-term’
6 April 2011	Disguised remuneration introduced with some exceptions for pension Annual allowance reduced to £50,000 Carry forward of annual allowance Flexible drawdown rules introduced

6 April 2012	Lifetime allowance reduced to £1.5M
October 2012	Auto-enrolment introduced
6 April 2014	Annual Allowance reduced to £40,000 Lifetime allowance reduced to £1.25M
6 April 2015	Pension Flexibility for Defined Contribution Schemes
6 April 2016	Annual Allowance taper introduced for high earners reducing the Annual Allowance from £40,000 to as low as £10,000
6 April 2017	Lump sums from overseas schemes paid to UK residents fully taxable, grandfathering provisions for foreign service relief Abolition of 10% abatement from income tax on foreign pensions
6 April 2020	Increase in income thresholds by £90,000 for the annual allowance taper, annual allowance restricted to £4,000 for high earners

All of the above have had an impact of the UK tax treatment of contributions and distributions and have impacted the treatment of pension contributions and distributions in the international context.

Contributions to Overseas Schemes and future distributions

There are four ways individuals can claim relief from UK tax for contributions to an Overseas Pension Scheme. The first step is to assess if the disguised remuneration rules set out in Part 7A ITEPA 2003 apply to contributions, and if so there is likely to be a tax charge on the earmarking of funds. If these rules do not apply, relief can be claimed using one of the following:

- Migrant Member Relief (FA 2004, Schedule 34)
- Transitional Corresponding Relief
- Treaty relief
- Exemption of employer pension contributions under s307 ITEPA 2003 where the scheme is an Overseas Pension Scheme (as defined in UK law).

If relief can be claimed, the relief is subject to the Annual Allowance and Lifetime Allowances limits.

The drawback of claiming the relief is that where an individual subsequently leaves the UK and, within 5 (for pre-6 April 2017 tax relieved funds) or 10 years (for tax relieved funds on 6 April 2017 or later) of ceasing to be UK tax resident, takes a distribution in a manner that would not be allowed from a UK registered scheme, there could be a member payment charge. Broadly the charge is a clawback of the tax relief claimed whilst in the UK and that part of the distribution may be subject to a 55% charge. If this applies the former assignee needs to report it on a self-assessment return. This could happen, for example, where an employee returns home and leaves the employment and then receives a lump sum from the plan as a result of leaving the job.

With the potential limited relief available for contributions and this associated future cost and compliance risk many individuals and their employers are becoming increasingly reluctant to claim any reliefs in the first place.

Employee retires in the UK, receives a pension or lump sum from an overseas plan

A pension from any non-UK pension scheme paid to an individual resident in the UK for tax purposes is fully taxable in the UK (s573 ITEPA 2003). If the pensioner is not domiciled in the UK then the pension is only taxed in the UK to the extent that it is remitted to the UK (assuming the pensioner claims to be taxed on the remittance basis).

The individual may also be taxable in the source country in respect of the pension. However, where the UK has a double taxation treaty, this often gives exemption from tax in the source country provided the pension is taxed in the UK. There can be exceptions, and the treaty must be checked in each case. Some treaties will not give exemption from source country tax if UK tax is not charged because, for example, a non-domiciled individual claims the remittance basis and does not remit the pension to the UK.

The UK tax treatment of a lump sum from an overseas plan to a UK tax resident can be more complex as a result of the FA 2017 changes. Unless the remittance basis applies, generally the starting point is to treat the lump sum as taxable and then consider reductions for amounts accrued in respect of foreign service prior to 6 April 2017. Furthermore, a lump sum from an Overseas Pension Scheme that meets certain conditions may qualify for a reduction in the taxable amount of 25% in a similar way to the payment of a lump sum from a UK registered scheme.

Employee retires overseas, received a pension or lump sum from a UK registered plan and a pension from his former UK employer's top up plan

Pensions from a UK source are taxable in the UK regardless of the residence position of the recipient. The payer of the pension will usually need to apply PAYE. If there is a double taxation treaty between the UK and the country of residence of the pensioner the treaty will often give sole taxing rights to the country where the pensioner is living, in which case a claim can be made to HMRC for authority for the pension scheme to pay the pension without deducting UK income tax. However, tax treaties vary and the exact terms of the relevant treaty need to be checked. Advice should also be taken in respect of any tax-free lump sum from a UK plan which may be liable to tax in the country of residence.

Summary

Individuals planning to retire in the UK with pension accruals for overseas service should be considering the UK tax position of their retirement benefits before they become UK tax resident again to ensure that they are fully aware of the UK tax position on their UK retirement benefits. There are many nuances and it would be unwise to rely on generic advice. Pensions remain a key topic of discussion at the Joint Expatriate Forum as there remain several areas of uncertainty where practical clarity would be helpful.

It is essential that any pension income is correctly reported in the UK. This is especially important for those with foreign pensions as there can be significant penalties associated with any 'offshore' non-compliance. With this landscape, employers may wish to help support employees in the lead up to their retirement by pro-actively encouraging them to seek tax advice.

Profile

Matthew Fox

Matthew is a senior consultant for Abbiss Cadres, a multi-disciplinary firm providing legal, tax, HR and communications consulting services. Matt is a Chartered Tax Adviser and has over 25 years' experience providing UK and US tax and social security services to employers and employees moving cross border. Matt is a member of the Employment Taxes Committee of the Chartered Institute of Taxation.

Construction Industry Scheme (CIS) – ‘Material difference’

Patrick Crookes considers the challenges facing contractors operating within the CIS, focusing on the requirements for checking the direct costs of materials incurred by subcontractors

Perhaps one of the most difficult areas of compliance for contractors operating within the CIS is ensuring the correct amount of tax is withheld from payments to subcontractors with net payment status.

Under CIS, subcontractors can claim a deduction for the direct cost of materials incurred, making it imperative that the amount deducted before tax is withheld is accurate. Consequently, this is an area of complexity in terms of what type of costs qualify as materials, as well as the steps the contractor must take to ensure they are satisfied the amount claimed as a deduction for material is reasonable. Many contractors find that there is a reliance on having a good working relationship with the subcontractor to ensure the correct documentation is provided when requested prior to payment being made.

Unfortunately, in reality it is seldom the case that all runs to plan, with subcontractors keen for payments to be made as soon as possible, or resistance to sending detailed records of materials used / plant hired to their customer, as such information would reveal the level of profit margin from the work undertaken. Given a subcontractor with gross payment status would not be required to provide such level of information, this is considered as reducing the competitive advantage with such suppliers.

As a result many contractors can find themselves in a difficult position to ensure they are compliant within the scheme on a monthly basis.

Materials – looking at the detail

The relevant legislation (FA 2004 s61) states that *‘On making a contract payment the contractor must deduct from it a sum equal to the relevant percentage of so much of the payment as is not shown to represent the direct cost to any other person of materials used or to be used in carrying out the construction operations to which the contract under which the payment is to be made relates.*’

HMRC guidance specifies at CISR15060 that the ‘Direct cost’ means what the purchaser can demonstrate they have paid for the materials. Typically, the following costs (VAT exclusive where the subcontractor is VAT registered) will be accepted by HMRC as a deduction for the direct cost of materials before any tax withholdings are applied:

- building materials and consumables
- fuel (excluding fuel for travelling)
- the actual amount spent on plant hire
- Purchase of land

Common errors in this area arise where the subcontractor incorrectly includes costs relating to travel to the site (including fuel for such purpose), accommodation near the site, waste removal, insurance and plant / tools owned or leased.

Subcontractor record review

Under regulation 4(3)(b)(iii) SI 2005/2045, it is the contractor’s responsibility to check that the subcontractor is claiming accurate material costs. In order for this to be a robust check, the contractor should request evidence from the subcontractor of the material costs (i.e. copies of invoices for the materials, fuel and plant hire).

As mentioned, obtaining this level of detail can be arduous. In the event of the subcontractor not providing any response to the contractors request for such details, the contractor would be within their rights to withhold tax on the full VAT exclusive value of the payment to be made for the construction operations.

Reasonable estimates

However, given that such a step would be deemed contentious by the subcontractor given the low profit margins typically operated within the sector, CISR15060 provides an alternative approach *'On occasions a contractor may be unable to obtain satisfactory information from the subcontractor about the cost of materials. In this case the contractor may make a reasonable estimate of the cost of materials and apply the deduction to the remainder.'*

For individuals who have the relevant expertise within the organisation to undertake a reasonable estimate (i.e. a quantity surveyor) this guidance is useful in ensuring payments can be made on a timely basis even in the event of no response from the subcontractor on request of evidence for the costs of materials incurred. However, not all contractors would have such expertise, typically deemed contractors who are brought into the scheme by virtue of their level of construction spend, will be operating in non-construction sectors, and therefore such expertise will not be available. It is important for organisations to identify key stakeholders internally and establish clear roles in the monthly return process and take on / review of subcontractors, particularly given that the impending April 2020 off payroll changes are also likely to be important to consider too (more on that later).

Given the complexities within CIS and the difficulty in obtaining accurate records from subcontractors, HMRC compliance visits typically focus on material deductions which often results in underpayments of tax to HMRC. HMRC compliance visits will typically focus on CIS returns which have reported a high level of material deductions, especially if the work would typically have a low direct cost of material. A common example is scaffolders, who may claim a deduction for scaffolding which they own outright. As such equipment has not been hired no deduction is allowed under CIS.

Underpayment of tax

Unfortunately for the contractor, as the withholding and payment of tax is their responsibility, HMRC will seek underpayments from them in the first instance. HMRC can apply concessions to offset the CIS liability under Regulation 9(5) SI2005/2045 if they believe there is a reasonable excuse under Regulation 9(3) SI2005/2045 or they are satisfied the subcontractor has included the income in their own self-assessment tax return and paid the tax due under Regulation 9(4) SI2005/2045. However, such reliefs are not automatic.

In reality, contractors often find themselves making good to HMRC an underpayment in a tax year in which the subcontractor has not yet been required to file a tax return and pay the tax due. In this situation HMRC does not pursue the subcontractor, and would leave both parties to settle the matter themselves. If the subcontractor agrees to reimburse the contractor for the amounts paid to HMRC on its behalf, which it is not obliged to do under tax legislation, the subcontractor can obtain a repayment from HMRC by providing evidence of making good the amount to the contractor and of course including the underlying income in its own self-assessment tax return. This can be administratively burdensome for all parties.

Future developments?

As mentioned above, an interesting development in this area is likely to arise following the implementation of the planned off payroll workers' legislation from 6 April 2020. Although the new legislation is set to take precedence over CIS, the same issues will be faced to ensure the deemed employer in such scenarios makes the correct deductions from payments made to the worker before PAYE and NIC is deducted. To date, guidance on what information should be obtained from the worker, and whether reasonable estimates would be allowed in certain circumstances is still unclear.

For CIS, given the number of times issues around material deductions are identified during HMRC compliance reviews, perhaps guidance should be provided to help deemed contractors without the relevant expertise a mainstream contractor would hold to be able to review levels of material deductions claimed by subcontractors / or make a reasonable estimate. A solution could be publishing typical material percentages for common construction operations a contractor can allow as part of CIS guidance, perhaps set low to incentivise subcontractors to provide evidence to contractors which will improve their in-year cash flow.

Finally, we are approaching the planned implementation of the domestic reverse charge for VAT from 1 October 2020 (following its delay from 1 October 2019). As per my article in the June 2019 edition of *Tax Adviser* there is a strong emphasis on CIS in this new legislation, given the scope of the reverse charge is based on the CIS definition of construction operations. Although deductions can be made from the payments subject to CIS tax withholding for the direct cost of material, for VAT purposes the full amount will be subject to the reverse charge where applicable.

Profile

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Salary sacrifice for pensions: still the smart option?

Rob Woodward looks at why salary sacrifice for pension contributions remains attractive to employees and employers

Please note this article was written before the Budget on 11 March 2020.

Employees reducing their salary in exchange for increased employer pension contributions has been for many years the most popular form of salary sacrifice offered by employers. There have been a number of tax and regulatory changes in the past few years that have affected both salary sacrifices and workplace pensions which has led to questions on the viability of salary sacrifice for pensions.

By way of background, employee pension contributions will attract tax relief but there is no corresponding NIC relief, whereas employer contributions to the pension plan attract relief for both tax and NIC. Salary sacrifice for pensions is essentially an NIC efficient 'wrapper' around the existing pension arrangement which does not impact the amount paid into the pension but does save both employer and employee NIC costs. Broadly it operates by an employee agreeing to reduce their salary liable to PAYE and NIC and ceasing to make pension contributions from their net pay. In exchange for this, their employer makes an additional employer pension contribution equal to the amount of the salary sacrificed.

By reducing the amount of salary payable in exchange for an additional employer pension contribution which is not liable to NIC, the employee maintains their pension contribution levels but due to the reduction in employee NIC payable, they will see a modest increase in their net pay. The employer NIC savings remain with the employer to be used in whatever way they see fit, although many do choose to share or pass the savings to their employees by way of an increased employer pension contribution.

Clearly, salary sacrifice may not be beneficial for part time employees where a reduction in their taxable salary takes them below the income tax and soon to be increased NIC starting thresholds and the impact on the earnings levels of lower paid staff must also be considered (see below). Due to the success of salary sacrifice for pensions in reducing employer costs while increasing an employee's total pay and benefits package, salary sacrifice schemes became increasingly popular and were rolled out more widely to incorporate other benefits, particularly where those benefits had a lower tax and/or NIC charge than the cash equivalent.

Extra HMRC scrutiny

Due to the proliferation of salary sacrifice arrangements, the rules governing both the salary sacrifice itself and the benefit provided were confirmed and greater scrutiny applied by HMRC. It has been, and remains the case, that the employee's salary after taking into account the sacrifice must be above the National Minimum Wage (NMW). Given the greater attention paid to NMW compliance by HMRC and the above-inflation increases in the NMW, the number of employees for whom salary sacrifice is not an option has risen.

Tax changes also impacted on the viability of salary sacrifice. To be a valid salary sacrifice, the employee must sacrifice the pay in advance of entitlement to receive it and that sacrifice must be irrevocable. These conditions flow from the key case of Heaton v Bell [1970] AC 728. The term 'irrevocable' was not defined in the case and there has been some debate over what length of time would satisfy the condition. Eventually, for certain benefits (pensions included), HMRC confirmed via the Employment Income Manual at EIM42755 that a minimum time period to agree to the salary sacrifice was not necessary and all that is needed is for the employee to sacrifice the pay in advance of entitlement to receive it.

While the position regarding the salary sacrifice was clarified by HMRC guidance, the tax and NIC treatment of the benefit provided under that mechanism changed with effect from 6 April 2017.

Concerned with the impact of such salary sacrifice arrangements on the overall receipts of income tax and NIC (as well as the consequences for employee's NIC contribution history), the Government introduced the Optional Remuneration Arrangements (OpRA) rules with effect from 6 April 2017. These rules apply where an employee gives up salary or the right to future salary in exchange for an employer provided benefit. That benefit provided in lieu of salary will be subject to tax and Class 1A NIC at the greater of the taxable value of the benefit in kind (the cost to the employer unless the benefit has a specific cash equivalent calculation such as employer provided vehicles) or the amount of salary foregone.

One of the consequences of OpRA was that many employers shied away from implementing salary sacrifice arrangements. However, it should be noted that within the OpRA legislation were specific exemptions for certain benefits. One of the exempted benefits was employer pension contributions and another was employer funded pensions advice (up to £500 per employee per year).

The Government's action of legislating against salary sacrifice generally through the OpRA legislation but specifically carving out employer pension contributions, provides more certainty to employers that the Government does not consider salary sacrifice pensions in the same light as other benefits e.g. car parking or mobile phones. Essentially it is the closest they have come to 'approving' salary sacrifice for pensions and uptake has again started to increase as employers recognise that the costs of implementation are offset against the employer NIC saving made. It should also be remembered here that if an employer pays the Apprenticeship Levy, any reduction resulting in lower Class 1 NICs will also result in a reduction of Apprenticeship Levy payable.

Potential savings

Having addressed concerns about longevity, the remaining barrier for employers to implement salary sacrifice pensions is the level of savings available.

Those employer NIC savings directly result from the number of participating employees and the amounts the employees sacrifice in favour of pension contributions. For larger employers, the number of participating employees alone drove the savings even in cases where the amounts sacrificed per employee was low. However, for smaller employers with fewer employees with low levels of amounts sacrificed per employee that was not the case. Recent developments have led employers to reappraise salary sacrifice for pensions when previously the savings were low.

Similarly, the potential increase in employee numbers due to the proposed IR35 off-payroll labour legislation due from 6 April 2020 has encouraged some employers to implement salary sacrifice for pensions and so tap into the potential savings available to mitigate their increased costs.

Overall while salary sacrifice generally is not the same proposition as it was in the past, due to the protection of pension contributions from the impact of OpRA and a number of recent developments impacting employee engagement and taxation, salary sacrifice pensions remains attractive for both employees and employers.

Profile

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Rob is an Associate Director in BDO LLP's Global Employer Services. He advises employers on matters such as employment status, HMRC enquiries and employee expenses and benefits. Rob's clients include organisations in the private, public and not for profit sectors, but with a particular focus on those operating in the recruitment sector. Rob is an ATT fellow and a CIOT member and can be contacted on robert.x.woodward@bdo.co.uk.

Statutory Parental Bereavement Pay and Leave

Matthew Brown provides an introduction to Statutory Parental Bereavement Pay and Leave

It is intended that entitlement to Statutory Parental Bereavement Pay and Leave will come into effect from 6 April 2020.

The Parental Bereavement (Leave and Pay) Act 2018 introduced a new employment right to Parental Bereavement Leave and an entitlement to Statutory Parental Bereavement Pay for any qualifying parent who loses a child (under the age of 18) or who suffers a still-birth from 24 weeks of pregnancy. The new entitlement will apply to deaths from 6 April 2020.

Statutory Parental Bereavement Leave will be a ‘day one’ employment right, whereas eligibility for Statutory Parental Bereavement Pay will be subject to certain qualifying conditions, as is the case for other parental Statutory Payments. Entitlement to receive Statutory Parental Bereavement Pay will generally follow the same administration rules as all other parental statutory payments and will be treated as earnings for tax and National Insurance Contributions purposes. It cannot be salary sacrificed.

The Parental Bereavement (Leave and Pay) Regulations were laid in Parliament on 23 January 2020. These implement entitlement to Statutory Parental Bereavement pay and leave from 6 April 2020. They include the definition of a bereaved parent, the window in which the entitlement can be taken (the ‘qualifying period’), how the leave and pay can be taken, and record keeping, along with further details of how the entitlement will work in practice.

Detailed guidance for parents and employers will be available on GOV.UK before 6 April 2020. There will also be forms available for employers/employees to use to record entitlement etc. This includes employer’s record keeping forms and the employee’s declaration form for Statutory Parental Bereavement Pay.

Entitlement to Statutory Parental Bereavement Leave

As noted above, Statutory Parental Bereavement Leave is a ‘day one’ right. There is no length of service conditions etc and leave may be taken at any time in the qualifying period. Entitlement to Statutory Parental Bereavement Leave should be considered separately from entitlement to Statutory Parental Bereavement Pay. So, an employee can take unpaid leave even if the employee is not entitled to, or does not claim, Statutory Parental Bereavement Pay.

Statutory Parental Bereavement Leave can be taken as a single block of 2 weeks, or as two separate blocks of 1 week each. It cannot be taken in days. The leave must be taken within the qualifying period of 56 weeks, starting with the date of the child’s death.

An employee will need to give notice for Statutory Parental Bereavement Leave but written notice is not required (although written notice is required for entitlement to Statutory Parental Bereavement Pay). The required length of notice for leave will vary depending on whether the employee intends to take leave within the first 8 weeks following the death, or later. For leave taken in the first 8 weeks following the child’s death, the employee will need to notify their employer before they would be due to start work on the first day of absence, and for leave taken in later periods, the employee will need to provide notice at least 1 week before the start of the leave period.

In order to qualify for Statutory Parental Bereavement Leave the employee must be a bereaved parent. The definition of a bereaved parent is discussed below.

For the purposes of entitlement to both Statutory Parental Bereavement Leave and Statutory Parental Bereavement

Pay, 'child' means any person under the age of 18, and includes any child still-born after 24 weeks of pregnancy.

In the case where an employee is eligible for Statutory Parental Bereavement Leave and Pay as a result of the deaths of more than one child, they will be entitled to 2 weeks' Statutory Parental Bereavement Leave and Pay in respect of each child.

Entitlement to Statutory Parental Bereavement Pay

Employees who meet the requisite conditions outlined below will be entitled to two weeks' Statutory Parental Bereavement Pay.

Statutory Parental Bereavement Pay can be taken as a single block of 2 weeks, or as two separate blocks of 1 week each. It cannot be taken in individual days. The entitlement must be taken within 56 weeks, starting with the date of the child's death (although an employee is not obliged to take their full entitlement if they choose not to). Statutory Parental Bereavement Pay may start on any day of the week and can be aligned with pay periods in the same manner as all other statutory payments.

The employee does not have to remain in employment with the same employer until the week before Statutory Parental Bereavement Pay is taken. They will be entitled to the payment if they meet the requisite conditions at the 'relevant week' (the 'relevant week' is the week before the one in which the child died). Where an employee is entitled to Statutory Parental Bereavement Pay and leaves employment after taking only 1 week (or before taking any), the 'former' employer remains liable for Statutory Parental Bereavement Pay (assuming the employee meets the entitlement conditions (see below) at the time of the child's death and provides the required notice etc).

If an employee works for any part of the week for which they have claimed Statutory Parental Bereavement Pay, the employer has no obligation to pay Statutory Parental Bereavement Pay for that week. The employee will still be entitled to receive payment for the second week if not already taken.

Statutory Parental Bereavement Pay cannot interrupt another statutory payment. So, for example, there will be no entitlement to Statutory Parental Bereavement Pay in respect of any week during any part of which an employee is entitled to Statutory Sick Pay. Statutory Parental Bereavement Pay can be taken at the end of the other statutory entitlement, or later. For example, this means a bereaved mother could have 39 weeks of Statutory Maternity Pay then 2 weeks of Statutory Parental Bereavement Pay and the other parent can have two weeks Statutory Parental Bereavement Pay.

Statutory Parental Bereavement Pay must, however, be taken within the qualifying period which begins with the date of death and ends 56 weeks after that date. In the case of a stillbirth, the 'date of death' should be read as the date of birth of the stillborn child.

There is no liability to pay Statutory Parental Bereavement Pay for any week following that in which the person claiming it has died.

There will be no prescribed limit to the number of people who can claim Statutory Parental Bereavement Pay in respect of one child, however every claimant's entitlement will be subject to that particular individual meeting the qualifying conditions set out below.

The start date for claims will be 6 April 2020 which means that entitlement will arise (subject to qualifying conditions being met) for any parent whose child dies, or who has a still-birth, on or after 6 April 2020.

Entitlement to Statutory Parental Bereavement Pay - Conditions

The conditions for entitlement to Statutory Parental Bereavement Pay concerns an employee's length of service and earnings, and the employee's relationship with the child.

The first condition (length of service and earnings) is:

- The employee has been continuously employed for at least 26 weeks at the *relevant week*,
- The employee has average weekly earnings of at least the lower earnings limit (LEL) (in force at the relevant week) in the *relevant period*,
- The employee has given the employer the correct notice, and
- The employee has completed the employee declaration.

The 'relevant week' is the week (ending with a Saturday) *before* the week in which the child dies.

The 'relevant period' is the period of 8 weeks ending with the relevant week.

The average weekly earnings rules and calculations are similar to those for Statutory Maternity Pay and Statutory Adoption Pay, the only difference being the relevant period, outlined above.

An employee must give their employer 'notice' for Statutory Parental Bereavement Pay in writing within 28 days of the first day of the Statutory Parental Bereavement Pay period (or where not reasonably practicable, then as soon as reasonably practicable). An employee can, however, withdraw their notice but this has to be done in writing no later than the first day of the week in which the Statutory Parental Bereavement Pay is due to start if claimed within the first 8 weeks after the child's death, or no later than one week before the start date if claimed between the start of week 9 and week 56.

The employee must provide evidence of entitlement in writing at the same time which must contain a written declaration that the person meets the qualifying conditions for Statutory Parental Bereavement Pay as well as (i) the name of the person claiming Statutory Parental Bereavement Pay, (ii) the date of the child's death (or date of birth for a stillborn child) and (iii) the period or periods in relation to which Statutory Parental Bereavement Pay is to be paid.

Note that an individual living in Northern Ireland who has a contract of employment made under the Employment Rights (Northern Ireland) Order 1996 will not qualify for Statutory Parental Bereavement Pay but if the individual is living in Northern Ireland and has a contract of employment made under the GB Employments Rights Act 1996 they will be eligible to claim Statutory Parental Bereavement Pay, subject to all eligibility criteria for SPBP being met.

The second condition (relationship with the child) means that in order to qualify for Statutory Parental Bereavement Pay (or Leave) the employee must be a bereaved parent. This requires that the person must meet, at the date of the child's death, the following conditions as to their relationship with the child who has died:

- The person must be the child's parent, including (a) adoptive parents, after a formal court adoption order has been made, and (b) parents of a child born to a surrogate, after a formal court parental order has been made. It does not include biological parents once an adoption order or parental order has been made, unless the biological parent(s) has a contact order which allows them to maintain contact with the child after the adoption;
- Adoptive parents, before a formal adoption order has been made, from the point at which the child is placed with them for adoption, so long as that placement has not been disrupted or terminated. In the case of an adoption from outside the UK, the adoptive parent will qualify before a court order is made if the child is living with them following their entry into Great Britain, and if they have received a written notification from the relevant domestic authority that it is prepared to, or has already, issued a certificate confirming that the person has been assessed and approved as a suitable adoptive parents;
- Parents of a child born to a surrogate, before a formal parental order has been made, if they have applied for a parental order or intended to apply for a parental order (and expected to get it) within 6 months of the child's birth;
- The child's 'parent in fact' (see below); and

- The partner of any of the above (whether of a different sex or the same sex), if they lived with the person above and the child in an enduring family relationship.

An employee will be the child's 'parent in fact' if they don't meet any of the above conditions, but the child has been living with them, in their own home, continuously for a period of 4 weeks ending with the date of death, and they have had day to day responsibility for the child's care during that time. Any temporary or intermittent absences are disregarded when deciding whether a period is 'continuous'. For example, a 'parent in fact' could be a grandparent who has been looking after the child in place of the child's parents. This person will have provided day to day care for the child in their own home for a continuous period of at least four weeks ending with the child's death. However, the person will not qualify as a 'parent in fact' if either (i) one of the child's parents, or anyone with parental responsibility (or in Scotland, parental responsibilities) for the child, is living in the same premises, or (ii) the person was receiving (or was entitled to receive) remuneration in respect of the care of the child. The following types of payment do not count as 'remuneration' in this situation:

a) A fee or allowance paid by a local authority to a foster parent;
b) Payments wholly or mainly intended to reimburse the person for expenses arising from the person's care of the child; or
c) Amounts received pursuant to the terms of a will, trust or similar instrument which makes provision in respect of the child's care.

The employee is required to produce a written declaration to the effect they meet the qualifying conditions. For example, that they meet the 'relationship with child' condition. An employer cannot request any additional evidence but if the employer believes there is no entitlement they can refuse.

Entitlement to Statutory Parental Bereavement Pay - Pay

If an employee meets the eligibility criteria detailed above they are entitled to receive Statutory Parental Bereavement Pay. This will be paid at the statutory flat weekly rate of £151.20 (for the year 2020/21) (or 90% of average earnings, where this is lower). The rate will be uprated each year, in line with other statutory payments. As Statutory Parental Bereavement Pay is a weekly payment that can start any day of the week, if it crosses two pay periods it can be split and aligned as is the case for other statutory payments.

If an employee works at any time in the week for which Statutory Parental Bereavement Pay is claimed they will lose entitlement for that week.

Entitlement to Statutory Parental Bereavement Pay – Record-keeping and reporting

Employers will have to keep records for 3 years after the end of the tax year in which the employer made the payments of Statutory Parental Bereavement Pay, in line with all other Statutory Payments (excluding Statutory Sick Pay). Records will include details of the Statutory Parental Bereavement Pay payments that have been made and recovered (date period began and the amount paid in each week) and the corresponding evidence including the name of employee, the date of child's death (or date of birth in case of a stillbirth), the period(s) for which it has been paid, and the employee's written declaration that qualifying conditions have been met. If the employer did not pay Statutory Parental Bereavement Pay to the employee in respect of a week that was within the employee's period of payment, the employer must record that week along with the reason no payment was made. Pro forma new declaration, record keeping and non-entitlement forms will be available on GOV.UK.

Statutory Parental Bereavement Pay will be reported and reclaimed in the same standard way for all other Statutory Payments via the PAYE Real Time Information (RTI) FPS & EPS submissions. Statutory Parental Bereavement Pay payments can be recovered by employers in the same way as other Parental Payments (generally 92% but 100% + 3% compensation for those who meet the definition of 'small' employers) via the EPS. Lastly, the P60 will include a field to record Statutory Parental Bereavement Pay.

Profile

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Compliance and the cost of mistakes!

Vaneeta Khurana discusses HMRC's compliance reviews processes and its efforts to close the tax gap

People costs are one of the largest costs for most employers. These include salary, bonus, benefits, gifts and reimbursement of expenses, all of which have tax and national insurance contribution (NIC) consequences and/or are required to be reported to HM Revenue & Customs (HMRC). With a more active and aggressive approach by HMRC to employment tax compliance and tax avoidance, many employers find it increasingly challenging to manage their employment tax risks.

This article discusses HMRC's focus on employment tax; areas of high risk and the impact of non-compliance.

HMRC's focus on employment taxes

Each year, HMRC publishes the 'tax gap' which is the difference between the amount of tax that should, in theory, be paid to HMRC, and what is actually paid. The latest tax gap published by HMRC in June 2019 (https://tinyurl.com/udz8v2o) reported a tax gap of £35bn for the 2017/18 tax year of which £12.9bn related to employment taxes (IT, NIC and CGT) (the largest tax gap). £.6.4bn of the total tax gap was in relation to the failure to take reasonable care.

As HMRC continues to close the tax gap with the introduction of new legislation to tackle non-compliance, automation to collect taxes in real time and increased compliance activity, there is greater onus on employers to ensure that appropriate and robust policies, processes and controls are in place to evidence the tax and NICs treatment applied and that reasonable care has been taken.

What does an HMRC review cover?

Those most commonly seen at present are Business Risk Reviews (BRR) for large and complex employers, National Minimum Wage (NMW) audits, PAYE compliance reviews and/or 'check of records' for mid-sized and smaller businesses.

The items which typically create the highest risk of non-compliance are those which are processed outside of the payroll. These include, but are not limited to, the following:

- short term business visitors to the UK creating a PAYE/NIC risk for the UK employer;
- payments to directors (executive, non-executive and non-UK tax resident director);
- whether tax exemptions properly apply to termination payments;
- misclassification of the employment status of contractors;
- reimbursement of expenses (including confusion over homeworkers and temporary workplaces and the difference between client entertaining, staff entertaining and subsistence); and
- the provision of benefits, rewards and incentives (including share arrangements and optional remuneration arrangements).

The responsibility for employment taxes often sits across several departments: HR, Payroll, Accounts Payable and Finance with Tax normally owning the HMRC relationship. Therefore, it is even more important to understand (and document) the end-to-end processes and data flows from one department to another.

What is the impact of non-compliance?

There is a financial impact associated with non-compliance. HMRC wants to understand whether reasonable care was taken by the employer and this influences the number of years under consideration for any unpaid taxes (mainly being four or six years). It also impacts the penalty position which is then discounted for what HMRC deem to be good behaviors. Sometimes, penalties are levied but suspended on the condition that appropriate processes and policies having been implemented to mitigate the risk of non-compliance going forward.

There is also a reputational impact which needs to be considered particularly with 'naming and shaming' penalties associated with for example NMW audits.

Conclusion

This article highlights HMRC's efforts in closing the tax gap, its compliance activity and consequently the requirement for businesses to have robust policies, processes and controls in place, particularly as employment taxes are often not the responsibility of one department alone. Given the financial and reputational consequences are potentially significant, it is important to get this right.

Profile

Vaneeta Khurana

Vaneeta is an Associate Partner at EY and helps employers to manage their employment tax risk, develop business and reward strategies, polices, processes/ controls to manage employment cost and retain/ reward its employees to support optimising profits. Vaneeta is also a member of the Employment Tax Committee of the Chartered Institute of Taxation, and sits on a number of HMRC focus groups, consulting on proposed changes to employment tax legislation, bringing to the Government's attention the views of employers and providing challenge. Vaneeta can be contacted on 07384908529.

Year-end Employment Taxes Reporting

Vaneeta Khurana considers employers tax year-end processes and returns, and discusses some common mistakes

As the end of the tax year approaches, there are a number of employer returns to be submitted to HMRC related to benefits and expenses provided to employees. It's important to ensure that employers have robust processes and controls in place to ensure that the information required to reported to HMRC is accurate and complete so that the correct amount of tax is paid to HMRC at the right time.

This article discusses some of the year end returns, the top 10 common pitfalls leading to the risk of non-compliance and how good governance can mitigate this risk.

Most common year end forms

PAYE Settlement Agreement (PSA)	This is to report minor, irregular and impracticable items where the employer settles the tax and NICs on behalf of its employees, on a grossed-up basis on expenses such as staff entertaining and gifts.	Payments are due to HMRC by 22 October.
Forms P11D and P11D (b)	This is to report benefits provided to employees including • company cars • health insurance • travel and entertainment expenses • childcare Employees pay income tax on these benefits and employers pay Class 1A NICS	P11Ds submitted by 6 July Class 1A NICs are to be paid by 22 July.
Appendix 4 Short Term Business Visitor (STBV) reporting	• Overseas employees who come to the UK on business visits from countries with a double taxation agreement with the UK and perform duties in the UK for the benefit of the UK employer, may be covered by an Appendix 4 STBV Agreement with HMRC. For employees who can be included in this agreement, no UK PAYE deductions should apply	**Report due by 31 May**

Top 10 common pitfalls when completing year end returns leading to non-compliance

1. Misclassification of client entertaining, staff entertaining, or subsistence may result in incomplete or inaccurate data being extracted to report on the PSA, particularly where expenses categories are broad, for example state 'meals'.
2. Care needs to be taken when an employee's temporary workplace becomes a permanent place of work as all travel, meals and overnight stays to a permanent workplace are taxable. For employees with fuel cards, this may mean that the full fuel scale charge can apply as travel to a permanent workplace is considered as private

commuting. HMRC would look at actual working arrangements and patterns not necessarily what is in the contract of employment.

3. The costs reported in the PSA should be VAT inclusive – many employers extract the VAT to code to a separate VAT ledger which needs to be added back.
4. Some expenses are paid directly to suppliers via accounts payable on the production of an invoice. It becomes important to have a process which considers these expenses for example deposits paid for staff entertaining events or staff accommodation costs for client conferences.
5. Remember that staff rewards are not considered as trivial benefits under the legislation and should be reported on the PSA unless they are in the form of cash or non-cash vouchers. Cash vouchers count as earnings so, PAYE and NIC would apply through the payroll; non-cash vouchers should be reported on forms P11D with Class 1 NICs paid through the payroll.
6. Many employers reimburse home broadband costs for employees who are homebased. Remember that unless there is a second phone line at the employees' home, only itemised business calls can be reimbursed tax free as broadband has a dual purpose and the business element cannot be separated. Many employers provide a homeworking allowance to cover such costs within HMRCs tax free limits.
7. Where employers have registered to payroll benefits there is still a requirement to complete the form P11D (b) for Class 1 A NICs. There could also be P11D reporting obligations for employers that payroll benefits for either benefits which cannot be 'payrolled' or where amounts have not been included in payroll (e.g. reflecting a premium increase).
8. Rules came into effect from 6 April 2017 removing the tax and NIC advantages for most benefits provided under an Optional Remuneration Arrangement (OpRA). There were some transitional rules for certain benefits such as cars and living accommodation which have now come to an end. This should be considered when preparing forms P11Ds as this places yet another reporting burden on employers.
9. Employers often make the mistake of treating the non-UK tax resident statutory directors as STBVs when they are specifically excluded from this arrangement. Consideration needs to be given to any expenses reimbursed for attending meetings in the UK as these could also be taxable.
10. Many employers are of the view that if visits to the UK total less than 30 days, then there is nothing to report. However, how do they track visits to the UK, particularly if visitors are attending meetings off site and how do they evidence that the visits are not part of a more substantial period?

Conclusion

Non-compliance is often a result of employers not taking reasonable care or misinterpreting the legislation. Having robust policies, processes and controls is important to demonstrate to HMRC that reasonable care has been taken. This has a direct impact on the number of years for which HMRC may seek to recover unpaid taxes as well as any penalties that may be imposed.

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CONSULTATIONS AND SUBMISSIONS

Employment Taxes Submissions March 2019 – February 2020

CIOT	
IR35 Forum – Mutuality of Obligation (MOO) and Check Employment Status for Tax (CEST)	08/04/2019
Off-payroll working rules from April 2020 - www.tax.org.uk/ref541	28/05/2019
April 2019 Loan Charge and ITEPA 2003, Section 222	01/07/2019
Draft legislation: Employment Allowance eligibility reforms - www.tax.org.uk/ref562	14/08/2019
Draft legislation: Taxable benefits and rules for measuring carbon dioxide emissions - www.tax.org.uk/ref568	04/09/2019
Draft legislation: Income Tax and the treatment of expenses for voluntary office holders - www.tax.org.uk/ref570	04/09/2019
Draft legislation: Off payroll working rules from April 2020 - www.tax.org.uk/ref569	05/09/2019
Health is everyone's business: proposals to reduce ill health-related job loss - www.tax.org.uk/ref596	07/10/2019
IR35 and Off-Payroll Working (OPW) rules – tax offset arrangements on status re-categorisation	13/12/2019
Draft legislation: The Social Security (Contributions)(Amendment No. X) Regulations 2020 - www.tax.org.uk/ref610	10/01/2020
The Off-payroll working (OPW) review - transfer of debt provisions	23/01/2020
Draft secondary legislation: off-payroll working rules from April 2020 - www.tax.org.uk/ref630	19/02/2020
ATT	
Off-payroll working rules from April 2020 - www.att.org.uk/ref332	28/05/2019
Draft legislation: Employment Allowance eligibility reforms - www.att.org.uk/ref339	12/08/2019
Draft legislation: Rules for off-payroll working from April 2020 - www.att.org.uk/ref340	05/09/2019

Budget representation - Off-payroll Working Rules in the Private Sector - www.att.org.uk/ref349	14/01/2020
Draft legislation: The Social Security (Contributions)(Amendment No. X) Regulations 2020 - www.att.org.uk/ref346	16/01/2020
Draft secondary legislation: off-payroll working rules from April 2020 - www.att.org.uk/ref348	13/02/2020

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Suggestions?

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