

Spring 2017 Newsletter

In our (early) Spring 2017 Newsletter we consider some of the potential pitfalls of the new salary sacrifice rules, changes to IR35 obligations (which are aimed at Public Authorities currently), along with other topical employee taxation and payment issues.

Optional Remuneration Arrangements (aka flexible benefits or salary sacrifice)

From April 2017 non-cash benefits provided to employees on an 'Optional' basis (i.e. where the employee has a choice whether or not to receive the benefit) will be taxed on the higher of the amount of salary the employee gives up or the value of the benefit they actually receive. Given that the most common salary sacrifices (pensions, employer provided childcare, and Cycle to Work schemes) will be excluded from the new rules, this seems unlikely to swell the Exchequer's coffers as much as expected. In short, it is a highly complex and significant change (i.e. taxing what the employee *might* have received rather than what they actually receive), for what might be expensive to administer and police, and of course a resultant loss of flexibility for the employer/employee.

We think the new arrangements will most commonly affect in-house benefits, accommodation benefits, and 'company car or cash' schemes (if provided optionally). For example, if the employee elects for an efficient and clean company car (as opposed to taking a cash allowance so they can buy their own gas guzzler), they will be caught within the new rules unless the car's CO₂ rating is 75g/km or less!

Following the 2016 Autumn Statement it was announced that some of the changes are to be phased in; there will be no alteration to the treatment of existing employee agreements on company cars, living accommodation and school fees benefits until April 2021, and for other existing benefits, until April 2018.

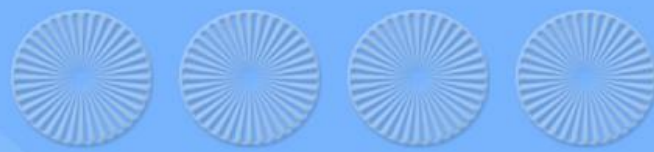
Whilst there may be a temptation to think that 'nothing needs to be done' until these later dates are reached, this is *certainly not* the case. This transitional 'grandfathering' will only apply if arrangements have been definitively entered into with each employee, by 5 April 2017. Also HMRC has said that *subsequent contractual changes, renewal (including auto-renewal) or modification* (i.e. made after 5 April) will have the effect of cancelling any such transitional exceptions. Given there are many ways in which a contract can be updated or amended (some involving specific employee elections or employer confirmations, others being undertaken on a one-off basis and some periodically), it will be vital that any new contracts or contractual changes, both before and after 5 April, are considered and implemented effectively.

Off-payroll payment obligations for Public Authorities (and elsewhere)

There will be new 'IR35' rules to consider from 6 April 2017, where individuals provide their personal services to a Public Authority client via their own Personal Service Company (PSC). The new obligations may be summarised as follows:

- Firstly it is essential to decide whether the contract falls within the new rules, i.e. is the contractor supplying their services to a Public Authority client, as opposed to someone else (not always easy to tell, especially if there is a chain of contracts), and in doing so this a personal service.
- If so, then the Public Authority client must make a decision whether or not 'IR35' applies i.e. would the worker be their own employee if none of the other 'intermediary' structures existed in the engagement chain?
- If IR35 applies, the Public Authority must either withhold PAYE/NIC in full (accounting for this under RTI) or inform anyone else paying the PSC, in order that the payer may itself observe that obligation (the latter may apply if payments are routed through an employment business or agency to the PSC).

In making decisions on IR35 matters, HMRC expects the Public Authority to be able to rely on its new online digital status tool (which seems highly optimistic given that the tool has only very recently been made public, and there have been many signs in the 'beta testing' phase that the tool lacks robustness). Whilst this digital tool may ultimately prove to be a useful guide, the



distinction between employed and self-employed status remains a non-statutory test, so an effective working knowledge of employment case law is likely to be required.

This in itself assumes that the Public Authority will know enough about how the contract operates in order to make these decisions. Whilst HMRC insists that the IR35 rules are not being tightened fundamentally, all those in the contractual chain will need to have an operational understanding on these new procedures, as well as effective exchanges of information, to avoid PAYE/NIC simply having to be operated 'by default'. This would inevitably cause upward pressures on the costs of the contract, if only for the fact that employer's NIC would be due from the payer.

The most recent HMRC guidance also says that if the worker does not provide their services via a PSC, then the new rules don't apply. Perhaps misleadingly, this guidance omits to say that more onerous obligations apply if the payer is a non-compliant Managed Service Company (MSC). In practice it may be very difficult to distinguish between a PSC, a compliant 'umbrella' payroll, and a non-compliant MSC, so specialist advice may be needed in cases of doubt.

2016/17 P11D obligations

P11D obligations for 2016/17 must be met on the basis of the employer deciding whether statutory exemptions apply to allowable expenses. The main criteria are that employers should operate a checking system for ensuring that the expenses have actually been incurred, and must ensure that the expenses paid or reimbursed are not taxable. On the one hand this seems like a useful relaxation of the earlier rules (the employer no longer needs to apply for a formal dispensation), but placing the onus on the employer to decide if expenses are allowable is of course an additional responsibility, requiring practical experience and technical knowledge.

Particular issues can arise if ad hoc scale rate expenses, or benefits with a mixed business/private motive are provided, and the tax treatment of such items may still have to be discussed and clarified with HMRC in advance, to avoid incurring unnecessary obligations.

In-year changes to employee tax codes

We are told that, from May 2017 HMRC will be using all relevant information at its disposal, e.g. including contemporaneous RTI returns, to ensure that employee's tax codes are brought up to date. Whilst this begs the obvious question of why HMRC has failed to do so in the past, in general the department's desire to implement more accurate tax codes 'in-year' should be welcomed. However we assume payroll departments can, in turn, expect more queries!

Apprenticeship Levy

The new levy from 6 April 2017 will be raised on 0.5% of an employer's annual pay bill, insofar as the pay bill exceeds £3m per annum. Also the levy must be reported via RTI on an Employer Payment Summary (EPS) within 14 days after the end of each tax month (so the first payment for 2017/18 is due no later than 19 May 2017). The ringfenced funds must then be accessed by the employer (to provide training via an approved provider) within 2 years, on a 'use it or lose it' basis.

National Living Wage (NLW) and National Minimum Wage (NMW)

The NLW rate for the 'over 25s' increases from £7.20 to £7.50 per hour, from 1 April 2017. In any review of NLW/NMW, HMRC will focus typically on ensuring the correct rate is paid for each age band, counting (or discounting) pay or deduction items incorrectly, and any failure to identify all 'working time' properly. We do have recent evidence of NLW/NMW reviews becoming more prevalent though, in many cases, incorrect claims of arrears (which are not uncommon) can be resisted successfully.

If you would like our further assistance on any of these matters, please contact us.

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