

Autumn 2020 Update and Newsletter

In the latest of our series of occasional Newsletters we consider the forthcoming IR35 changes, recent updates to the Job Retention Scheme, and other topical matters.

Planned IR35 changes from April 2021

The new IR35 obligations for large and medium sized private sector organisations are expected to be introduced in April 2021, similar to 2017's equivalent Public Sector rules.

However before undertaking an inordinate amount of extra work, we suggest engagers should carefully filter out any suppliers which may not be caught under IR35, i.e.:

- Is the supplier a Personal Service Company (PSC)? Recent updates to HMRC's published Employment Status Manual remind us that (assuming the intermediary is a limited company), IR35 only applies if the worker has a 'material interest' in that company. If the worker does not have a material interest then, whilst the contract is outside the scope of IR35, HMRC would alternatively expect you to be confident the worker is paid, either wholly under PAYE or by an otherwise compliant method.
- Is the worker providing (or under obligation to provide) their 'personal service'? If not, IR35 rules are again not relevant. Whilst HMRC guidance on this point is limited, as a minimum we would expect the work to be done regularly by a single or named individual, or for the worker to be under significant 'control' by their client, for the service to be deemed 'personal'.

In the meantime, we find it interesting that material case law on employment status continues to develop. In one case heard earlier this year (*HMRC v Professional Game Match Officials Ltd*, a case involving football referees), the Upper tax Tribunal decided there was an absence of Mutuality of Obligation (MOO), which contradicted HMRC's own interpretation of the point. It is understood the case will be subject of further appeal, which in turn can be expected to set important case law precedent on MOO. In the meantime, several recent IR35 decisions in relation to well-known TV and radio presenters have reinforced the importance of MOO as well as 'Control' (any absence of which would provide substantial support for any claim that a contract is outside IR35), in testing employment status.

Job Retention Scheme (JRS) update

Guidance on the 'third phase' of the JRS (covering the period 1 November 2020 to 31 March 2021) has recently launched. The key differences between this and earlier phases are as follows:

- In this third phase there is no obligation for the employee to have been included within earlier JRS claims. However as a minimum, the employee must be included within at least one of the employer's RTI returns between 20 March and 30 October 2020.
- From 1 December the employee must also not be working out their notice.
- Where the employee was not included within earlier JRS claims, nor employed at 19 March 2020, there is a more definitive method of calculating 'usual' pay and hours worked. The default would be to use the last pay period ending on or before 30/10/20, but if the pay varies significantly, the average in the period 6 April to the date before furlough should be used.
- Employer furlough pay recovery for the period 1 November to 31 January 2021 has been announced as 80% (an improvement on the percentages applying in Sept & Oct 2020).

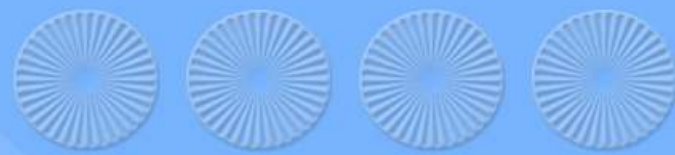
A reminder that the 2020/21 time limits for JRS and associated claims are as follows:

- JRS 'phase 1' (claims 1 March to 30 June): were to be finally submitted by 31 July 2020
- JRS overclaims: 'no penalty' corrections are needed within 90 days/20 Oct if later
- JRS 'phase 2' (claims 1 July to 31 October): to be submitted by 30 November 2020
- JRS further corrections (phase 2): now to be submitted also by 30 November 2020
- JRS 'phase 3' (from 01/11/20): submit monthly claims within 14 days of each month end

Job Support Scheme (JSS) mothballed and Job Retention Bonus (JRB) delayed

After much public debate over its terms, the JSS scheme, with its component parts 'JSS Open' and 'JSS Closed' have now been cancelled, following the extension of the JRS to 31 March.

The separate JRB, intended to provide a one-off employer payment for employees previously furloughed who had returned to and stayed in employment until 31 January 2021, has also been put on ice, though may be 'revived' once the JRS does conclude.



Employee tax deductions for Working From Home

The latest updates to published guidance confirm that employees can now claim a flat rate £6 per week tax deduction for necessary home working (£4 per week up to 2019/20). The previous HMRC insistence that employees calculate any deduction claim based on actual (i.e. marginal extra) household expenses was dropped earlier this year.

Whilst this is similar to the £6 per week payments which may be made by the employer, the rules are not identical. Where paid by the employer, the basic tax-free qualifying criteria are that the individual must work from home regularly under an arrangement (voluntary or otherwise) agreed with the employer. For the alternative employee tax relief claim to HMRC to succeed, employee home working must be *necessary* rather than voluntary, and the duties carried out at home must be 'substantive' (i.e. not merely incidental or preparatory in nature).

Whilst HMRC's latest guidance indicates that the current pandemic will be accepted as a 'necessary' cause of homeworking for the purposes of the employee tax relief claim, there is still nothing to suggest that the employee can claim relief for the costs of travel between home and their 'normal' workplace, nor may the employer reimburse such costs as allowable business travel.

The relaxation in treatment may well encourage employees to make backdated tax relief claims for the last 4 tax years. If so, as the HMRC online 'form P87' claim process is relatively straightforward, we would suggest employees are discouraged from utilising a third party adviser to submit claims on their behalf. Such advisers often charge employees on a commission basis (i.e. a percentage of any refund secured), and may encourage 'speculative' claims, which in turn may create employer queries from HMRC.

Post Employment Notice Pay (PENP) for monthly paid staff

Legislation to be introduced from 6 April 2021 will confirm that, for monthly paid staff, the 'denominator' in any PENP calculations will always be based on the average number of days in a month (30.42 days or 365/12). This should remove any previous anomalies in PENP results arising from calculating the actual number of calendar days in the previous pay period. However as before, a notice 'trigger date' still has to be identified, and any part months' unworked notice must be calculated on an exact daily basis.

International employment secondments following Brexit

By default, social security (i.e. NIC in the UK) arises in the country where the work is done. However for workers posted overseas temporarily, there are a series of international agreements which permit the employee to stay in their 'home' country's social security system.

Whilst there is no clear agreement yet (as with the rest of the Brexit negotiations) on what will happen at the end of the Brexit Transition Period on 31 December 2020, in practice we would be surprised if an extended 'run off' period is not authorised ultimately i.e. allowing the present process to prevail for existing secondees. However there is no guarantee that new postings which begin on or after 1 January 2021 will be covered, therefore it will be necessary to watch carefully for developments over the next couple of months.

One interesting result of the pandemic is that many staff are now recognising the extent to which aspects of their work are 'internationally mobile', i.e. could 'working from home' be acceptable wherever in the world you make your home? Whilst it is a nice thought, employers should be wary of not establishing unwanted payroll or equivalent withholding obligations in an overseas country, nor of establishing any sort of unwanted 'corporate presence' there.

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

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