Accountax Members Newsletter

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April 2016

Salary Sacrifice and Travel and Subsistence

From 6 April 2016 changes to legislation removed the right of employees who are engaged through third parties and are subject to supervision, direction or control to claim travel and subsistence expenses. There is also an additional risk where they are not subject to supervision, direction or control from Section 289 FA 2015 which created new legislation restricting the use of salary sacrifice in respect of travel and subsistence expenses. Such an arrangement is defined in the legislation as:

"Relevant salary sacrifice arrangements", in relation to an employee to whom an amount is paid or reimbursed in respect of expenses, means arrangements (whenever made, whether before or after the employment began) under which—

(a) the employee gives up the right to receive an amount of general earnings or specific employment income in return for the payment or reimbursement, or

(b) the amount of other general earnings or specific employment income received by the employee depends on the amount of the payment or reimbursement".

It is clear therefore that where an employee gives up a right to part of their salary in exchange for reimbursement of tax free expenses then this arrangement would be caught by the legislation. This is not new as a principle, HMRC have always challenged improper salary sacrifice arrangements, and it is widely accepted that a salary sacrifice arrangement such that an employee is giving up part of their salary in exchange for expenses is not a genuine and true salary sacrifice agreement (as the employee is not receiving any kind of tangible benefit in exchange for the salary he has given up – in fact expenses are not a "benefit" in true tax terms if they are eligible to be reimbursed tax free).

There may be certain situations where practices and provision of information to employees may create or imply an arrangement which would fall within the legislative provisions. The most common two circumstances where this could occur are:

Agency practices

Agencies should be careful as to how they provide information to individuals where those individuals will become employees of an umbrella company. Where, for example, an agency consultant provides information to the work seeker along the lines of "your rate of pay is £15 per hour but we pay you through Umbrella Company limited". The Agency has stepped through the contract between the umbrella company and the agency and impliedly established an entitlement to the whole £15 per hour by the work seeker.

Where this happens and an individual can establish an entitlement to the whole amount of the monies paid by the agency, then the individual is entitled, under worker/ employee rights, to gross pay of £15 per hour for every hour worked – therefore if any monies are deducted from this £15, or any part of this £15 is paid as anything other than taxable pay, the agency has automatically entered into a

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Salary Sacrifice and Travel and Subsistence (continued)

pseudo salary sacrifice arrangement which falls foul of the legislation (any contracts entered into subsequent to this would be challengeable as the entitlement was created prior to employment or commencement of services).

It is therefore fundamentally important that agencies fully understand how the contractual chain must operate, and honour these contracts. Care must be taken when agencies are dealing with individuals and should present information along the lines of "we subcontract the provision of construction services to Umbrella Company limited. The job rate we agree with Umbrella Company limited is £15 per hour, but you would need to discuss your pay with Umbrella Company limited as this £15 is not the agreed rate of pay for you".

Pay slip information

The other common pitfall involves the way in which umbrella companies present information to their employees on their payslip. An umbrella employee payslip should contain no more and no less than any other payslip for any other employee. Typically in an umbrella company scenario umbrella companies like to provide the employees with additional information such as the rate agreed with the agency, employers NI and company profit margin – there is no issue in providing this information per se, however how the information is provided can prove problematic.

The only information which should be on a "payslip" should be the employee's taxable pay, expenses and employee tax and NI. If any other information is to be provided it must be provided separate to the "payslip" element. The reason being that if employers NI, agency rate, margin etc is provided on one combined page under the heading of "payslip", then by virtue of providing all the information on an employee payslip it has impliedly established that all the monies identified flow from the individuals employment.

As such the employee could reasonably construe that the agency rate is his employee entitlement and all monies subtracted from this are unlawful deductions/unlawful salary sacrifice – which would bring it squarely within the legislation.

It must be made clear to the employees that the information such as Agency rate, Employers NI etc are provided for information purposes only and are not provided as part of their employee entitlement (as their employee entitlements are contained solely and completely within their employment contract)

As part of the employment contract it should specifically provide the employee is entitled, and guaranteed, at least National Minimum Wage (NMW) for every hour worked by the employee.

Where that contract is properly drafted and observed in practice, as a matter of law, the employee's entitlement to salary is contained wholly and solely within the contract of employment between the umbrella company and the employee. This contract, and this contract alone, provides the employee with their entitlement to salary (and all other employee benefits). As such the employee always has a guaranteed set salary, and as a matter of law their only entitlement to pay is NMW plus Holiday Pay (HP) for every hour worked – they have no entitlement, in law, to any other monies from the umbrella company whatsoever.

With these contracts in place there is no question of an employee entering into an agreement to give up any part of their salary (as the umbrella company is never going to pay less than the guaranteed payment of NMW plus HP). Effectively the umbrella company operates individual profit centre for each employee, which operates in exactly the same way as any company with fee generating consultants who receive bonuses.

It is our opinion that an umbrella company operating under the correct contracts, and adopting the correct practices does not automatically fall within the scope of the legislation. As highlighted above there may be certain addition practices outside of the contracts which could damage, or bring into question the validity of, the contractual chain and care must be taken by both the umbrella company and Agency to ensure contracts are upheld and vigorously followed.

If you require any further information on this please contact David Harmer at d.harmer@accountaxconsulting.com.

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The TYCO Case—Working Time Directive and National Minimum Wage

The Court of Justice of the European Union (CJEU) decision in the TYCO case (September 2015) has caused concerns for some UK employers. The case concerns the application of the Working Time Directive to workers who do not have a fixed or habitual place of work. Some employers have also been worried that there may be associated issues with the calculation of hours for National Minimum Wage purposes.

The background to the case

Tyco employed technicians across most of Spain to install and repair security equipment in homes and on industrial and commercial premises. They assigned them a large geographical area to cover, so they had no fixed place of work. In 2011 Tyco closed its regional offices and assigned all its employees to the central office in Madrid (Spain).

Under the new arrangements Tyco calculated the employee's daily working hours from arrival at the premises of the first customer the time they left the premises of the last customer. Their workers had to travel each day from their homes to the customer's premises which could involve up to 6 hours driving a day. The workers were provided with a mobile phone and a company vehicle. Each evening they would receive a list of appointments from the central office.

Before the closure of the regional offices Tyco used to count the daily working time of its employees as starting when they arrived at the regional office (the employees then picking up the vehicle they were to use and receiving the list of customers to be visited and the task list) and ending when they returned to the office in the evening (to leave the vehicle there). In UK terms the employees had changed from being "depot based" to "home based". This change dramatically reduced the number of working hours each day, as time spent driving to and from the first and last appointments of the day were not regarded as working hours for purposes of the WTD.

The Decision

The Working Time Directive (WTD) defines working time as any period during which the worker is working, at the employer's disposal and carrying out his or her activities or duties, in accordance with national laws and/or practice.

The CJEU held that where workers without a fixed place of work use a company vehicle to go from their homes to the premises of a customer or to return to their homes from a customer's premises then they are working because they are at the employer's disposal and carrying out their activities or duties. This is because the employer can change the arrangements for the day while they are travelling. For workers who do not have a fixed or habitual place of work, the time spent by those workers travelling each day between their homes and the premises of the first and last customers designated by their employer constitutes working time within the meaning of the directive.

What does this decision mean for UK employers?

The judgment applies to any situation where the employee is travelling in the performance of their duties. Normal commuting from home to a fixed place of work is not affected. Where a worker doesn't have fixed place of work and cannot be given new instructions by their employer while travelling then this decision may not apply. However, to give certainty it would be wise to consider the use of a WTD opt out.

As far as compliance with the National Minimum Wage is concerned, national law applies. The NMW regulations 2015 state that for 'time work' and 'salaried hours' work (two of the four types of work under the regulations) the hours spent travelling during normal working hours count towards the NMW, but this does not include travel between a worker's home and a place of work or a place where an assignment is carried out. The NMW regulations 2015 clearly show that

"The hours when a worker is travelling for the purposes of time work, where the worker would otherwise be working, are treated as hours of time work unless the travelling is between—

(a)the worker's home, or a place where the worker is temporarily residing other than for the purposes of working, and

(b)a place of work or a place where an assignment is carried out."

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IR35 and the Public Sector

From April 2017, where the public sector engages an off-payroll worker through their own limited company, that body (or the recruiting agency if the public sector body engages through one) will become responsible for determining whether the rules should apply, and for paying the right tax. It appears that the preferred route for determining the correct treatment will be means of gaining HMRC's opinion upon the arrangements. In turn it seems likely that this opinion will be provided through the new Employment Status Indicator (ESI) tool

The IR35 Forum minutes from December record that HMRC have plans to have an IR35-specific Employment Status Indicator (ESI) online tool ready for testing this spring. It will be interesting to see how this is operated because the way in which the questions are phrased and answered will be the key to determining whether or not it is a useful tool.

Assuming that the ESI tool is fair and accurate, the real value for HMRC will be that when using the ESI tool the contractor has to enter a code which identifies them as the user. If the result under the ESI tool is 'caught by IR35', then HMRC will expect to see the contractor completing the deemed payment calculation. If the deemed calculation is not made, then presumably this will trigger an IR35 enquiry; but does that mean the individual contractor was actually caught? Could an error have been made? Could new information have come to light that means that the engagement isn't actually caught?

We are already seeing a much less flexible interpretation of the 'off payroll guidance' which requires the Public Sector to have assurances from the contractors it engages that they are paying the 'right amount of tax'. More and more, this seems to be interpreted as meaning that the contractor should be taking their income as PAYE or applying the deemed calculation; that is to say treating the engagement as caught by IR35.

HMRC wishes to consult on proposed changes which will make organisations in the Public Sector responsible for deciding whether IR35 applies with effect from April 2017. The consultation document is expected to be released in the summer. Accountax will be responding to that consultation and would be interested in hearing the thoughts of contractors currently operating in the public sector via a personal service company on the proposed changes.

Trivial benefits in kind

For many years a concessionary treatment has applied to trivial benefits in kind such as Christmas Hampers provided to employees. Where these benefits didn't confer any lasting benefit (that is to say they were often perishable or consumable items) and were of limited value (usually accepted by HMRC as being under £50 in value) they could be ignored for tax and NI purposes with agreement from the taxman.

This concessionary treatment is being brought within the legislation from the 2016/17 tax year. This is a mixed blessing as the legislation includes rules to cap the use of trivial benefits as well as rules which in effect extend the nature of the benefits which can be deemed as trivial.

The cost of an individual benefit cannot exceed £50 or where the cost applies to several employees it must not exceed £50 per head on average. The benefit cannot be provided under salary sacrifice arrangements or be a reward for services.

For directors or other office holders of close companies the total cost in any tax year cannot exceed £300. This includes any trivial benefits made available to their families.

The new rules largely mirror the old concession. However there is no requirement that the benefit consist of a perishable or consumable item. The cap for directors and office holders of close companies limits the value of these new rules for those individuals and their families. However, for everyone else bringing the trivial benefits rules within the legislation creates a slight relaxation. It represents a nice way for employers to take the doubt out of making these gifts when they are clearly for staff welfare purposes.