

A Month in UK Employment Law

January 2013

2013 - What's On the Horizon

2013 is set to bring with it some important changes to UK employment law and employee-related tax. To herald the New Year, here is a list of recent and pending changes that will have an impact in 2013 and beyond.

CHANGES CONFIRMED

1 February 2013

The cap on unfair dismissal compensatory award will increase from £72,300 to £74,200 and the cap on weekly pay (used to calculate the unfair dismissal basic award and statutory redundancy pay) will increase from £430 to £450. Maximum unfair dismissal awards will therefore rise to £87,700.

Before 8 March 2013

Before the deadline of 8 March 2013, the Government will implement regulations to increase the permitted period of parental leave following the birth or adoption of a child from three to four months.

April 2013

The weekly rate of statutory maternity/paternity/adoption pay will increase from £135.45 to £136.78. The weekly rate of statutory sick pay will rise from £85.85 to £86.70.

6 April 2013

The Government has announced plans to:

- Reduce the current 90 minimum period between starting consultation and the first dismissal taking effect, for 100 or more proposed redundancies, to 45 days.
- Legislate to make clear that the expiry of fixed term contracts is excluded from the obligations for collective redundancy consultation (but early termination of such contracts for redundancy will still be covered).

- Introduce new non-statutory ACAS guidance to address a number of key issues affecting collective redundancies consultation (such as the meaning of "establishment").

Draft Regulations will be issued and the changes are expected to be made by 6 April 2013.

Summer 2013

From Summer 2013 claimants will have to pay an issue fee to the Employment Tribunal when they lodge a claim or appeal followed by a hearing fee prior to a hearing.

The level of fee will be determined by the type of claim. The fee for more straightforward Level 1 claims (including claims for breach of contract, unauthorised deductions from wages, holiday pay, various statutory time off rights, and failure to pay a protective award or redundancy payment) will be £160 for issue and £230 for the hearing. All other claims will be Level 2 (covering unfair dismissal, discrimination, whistle-blowing claims) and subject to an issue fee of £250 and a hearing fee of £950.

There will also be charges for making certain applications:

- £100 for an application to set aside a default judgment;
- £60 for an application to dismiss a claim following the claim's settlement or withdrawal;
- £600 for an application for judicial mediation, payable by the employer;
- £160 to bring a breach of contract counter-claim; and
- £100 (Level 1) or £350 (Level 2) for an application for a review of a tribunal's decision or judgment.

There is a separate fee structure for multiple claims (i.e. claims submitted jointly by more than one claimant) in employment tribunals.

For Employment Appeal Tribunal, the issue fee is £400 and the hearing fee is £1,200. There is only one level of fee regardless of the type of claim or number of claimants.

Employment Tribunals will have the power to order the unsuccessful party to reimburse the fees paid by the successful party.

The current remission system that is used in the civil courts, under which fees can be waived if the party cannot afford to pay, will be extended to Employment Tribunals and the Employment Appeals Tribunal.

October 2013

The Government intends to make amendments to the Enterprise and Regulatory Reform Bill and consult on regulations that will apply to the remuneration of directors of quoted companies. These reforms are intended to make executive pay packages and the rationale for them more transparent to shareholders and to increase shareholder power to challenge payments made to executives. As currently drafted, key proposals include:

- A **"Policy Report"**: a report on a company's remuneration policy that a quoted company will be required to publish. The Policy Report must be approved by shareholder majority and any changes to it must be put to a shareholder vote. Even if there are no changes, the Policy Report must be put to shareholders every three years; and
- An **"Implementation Report"**: this is a report that a quoted company will be required to publish annually showing how its remuneration policy has been implemented in practice. Amongst other specific requirements, the Implementation Report must set out the total remuneration received by every director in a transparent format and expressed as a single figure and provide details of any termination payments made to directors. The Implementation Report must be put to shareholders and if not approved by a majority, the Policy Report must then be put to a shareholder vote.

It is anticipated legislative changes will come into force by October 2013.

CHANGES EXPECTED IN 2013 BUT NO IMPLEMENTATION DATE

New employee shareholder status

It is anticipated that the Government will implement the proposed "employee shareholder" owner status in 2013. To obtain this status, employee shareholders could receive between £2,000 and £50,000 worth of shares in their employer which would be exempt from capital gains tax. In exchange, the employee shareholder would give up certain employment rights including the right to bring a straightforward unfair dismissal claim and to receive a statutory redundancy payment.

Changes to the proposals following consultation include:

- allowing non UK registered companies to use employee owner status. It will also be possible to issue parent shares to employee owners, rather than employer shares, where the employer is a subsidiary;
- requiring employee owners to give 16 weeks' notice of return from additional paternity/maternity leave, rather than 6;
- removing the upper limit of £50,000 which would allow businesses to offer more shares under the scheme. The exemption from Capital Gains Tax, however, would remain capped at £50,000 worth of shares allowing shares to be issued by both the employing company and its parent company; and
- requiring employee owners shares to be fully paid up, and that individuals must give no consideration for them other than agreeing to be employee owners.

The Enterprise and Regulatory Reform Bill

The Enterprise and Regulatory Reform Bill will receive Royal assent in 2013 and it is anticipated that employment further changes will be introduced in 2013 and 2014.

The rules of the Employment Tribunal will continue to be overhauled and they will have the power to impose financial penalties on employers where the employer has breached employee rights to which the claim in question relates. The amount of the penalty will be subject to a minimum of £100 and a maximum of £5,000 – with a discount allowed for early payment. Proposals also include the introduction of new pre-claim conciliation procedures and compulsory re-claim references to ACAS. Smaller claims may be dealt with by means of rapid response. Compromise agreements are to be renamed as settlement agreements. The Government also plans to make changes to the composition of the Employment Appeal Tribunal so that most cases are heard by a Judge alone.

The Finance Bill 2013

On 11 December 2012 HM Revenue & Customs ("HMRC") and HM Treasury published draft clauses for proposed inclusion in the Finance Bill 2013 together with related documents. These will be the subject of consultation until 8 February 2013.

Rates & Allowances

Corporation Taxes

The main rate of corporation tax for the year commencing 1 April 2014 will be reduced to 21%. This represents a reduction of 2% in the 23% rate to be introduced from April 2013. The small profits rate applicable to annual profits of £300,000 or less will remain at 20%.

Personal Taxes

As had been announced previously, the additional rate of tax (applicable to income in excess of £150,000 per year) will be reduced to 45% from April 2013. The equivalent rate for dividends will be reduced to 37.5% which, when the relevant tax credit is taken into account, will result in an effective rate of 30.55%. The basic and higher rates of tax will remain at 20% and 40%. The higher rate threshold has been set at £41,450 for the tax year 2013/14. This will increase by 1% in 2014/15 and 2015/16 respectively. For those under 65, the personal allowance will increase to £9,440 for 2013/14.

For capital gains tax, the annual exempt amount will increase only in line with inflation from its current £10,600 for 2013/14. However, there will be 1% increases in 2014/15 and 2015/16 respectively.

No changes were announced to National Insurance Contributions or Value Added Tax rates.

General Anti-Abuse Rule ("GAAR")

It was announced earlier in the year that HMRC intended to introduce a GAAR in next year's Finance Bill. Since then, there has been initial draft legislation and consultation. The draft legislation has now been updated and HMRC has also published a response to the consultation and draft guidance on the implementation of the GAAR.

The GAAR will apply to arrangements entered into after Royal Assent to the Finance Bill 2013 is obtained (generally in July). If invoked, the party concerned is subject to a "just and reasonable" adjustment to their tax liability which counteracts the advantage of the abusive scheme. The GAAR applies to "arrangements of the entering into of which cannot reasonably be regarded as having a reasonable course of action in relation to the relevant tax provisions, having regard to all the circumstances" and applies to all taxes (including National Insurance Contributions) except stamp duty, stamp duty reserve tax and value added tax ("VAT"). The new draft guidance makes it clear that the GAAR is intended to apply only when the targeted anti abuse rules in other parts of the tax legislation fail to prevent the tax advantage from arising in relation to the arrangements concerned. The GAAR can apply to prevent treaty abuse. Although there is no specific clearance procedure in relation to the GAAR, opinions issued by HMRC are, according to the draft guidance, expected to be publicised anonymously.

It is becoming clear that HMRC intends to apply the GAAR only in limited circumstances involving contrived or abnormal steps. However, it is still unclear exactly what arrangements are more likely to be scrutinised and it thus remains unknown the extent to which typical employment or incentivisation structures will potentially be challenged under the new law.

Statutory Definition of Residence & Related Changes

The introduction of a statutory definition of residence for individuals has long been the subject of discussion in the UK. Draft legislation has now been published following a period of eighteen months' consultation. HMRC has stated that guidance will follow shortly.

The changes will apply for tax years commencing 6 April 2013. The test can be divided into three parts. There are automatic tests for residence, automatic tests for non-residence and "connection" tests for those who do not fall within one of the first two categories. The automatic tests for residence are, broadly speaking, based on day counting in conjunction with the use of a UK home or UK employment. The automatic non-resident tests are based on day counting in conjunction with employment and previous period of UK residence or absence thereof. The connection tests combine day counting with various "ties" to the UK such as work, accommodation and family. The tests are to be applied in order and on an annual basis.

In conjunction with the new changes the concept of "ordinary residence" is to be abolished. However, "overseas workday relief", where an individual can use the remittance basis of tax on income from work performed overseas for a UK or foreign employer will be retained for certain non-domiciled individuals who, broadly speaking, meet the previous requirements for being not ordinarily resident. This is to be given a statutory framework and guidance will follow in this area.

These changes will impact individuals whose residence is complicated. The abolition of ordinary residence and the placing of overseas workday relief on a statutory footing will give a degree of clarification for affected individuals and the retention of this relief is a welcome move since it tends to impact internationally mobile executives.

Entrepreneurs' Relief

Entrepreneurs' relief is a capital gains tax relief which imposes a capital gains tax rate of 10% (as opposed to the usual 28%) on eligible shares. Generally speaking shares must be acquired by an employee or officer of the business who must own at least 5% of its value and voting rights. The shares must have been held for a period of twelve months in order to benefit from the relief.

The Finance Bill 2013 extends the application of entrepreneurs' relief to those acquiring shares through enterprise management incentive ("EMI") options. EMI options are a popular means of incentivising those who work for small, growing companies. The period during which the option was held will count towards the twelve month holding period required for entrepreneurs' relief and the 5% vote and value requirement will not apply.

This is a very welcome measure and will make EMI option schemes even more attractive for companies meeting the criteria.

Tax Advantaged Employee Share Schemes

In July 2011, the government asked the Office of Tax Simplification ("OTS") to review the four UK tax advantaged share schemes – the EMI scheme, the Company Share Option Plan ("CSOP"), the Save As You Earn ("SAYE") scheme and the Share Incentive Plan ("SIP"). The OTS issued a report following this request and HMRC subsequently responded and engaged in consultation in this area.

The Finance Bill 2013 introduces changes deriving from the process described above. These will mostly take effect when the Finance Bill receives Royal Assent. Certain provisions within the schemes are to be harmonised such as retirement provisions and those relating to those leaving employment in favourable circumstances. Additionally, the rules in SIPs, SAYEs and CSOPs prohibiting the use of restricted shares will be abolished. The material interest rule, which prevents employees with certain interests in the business from participating in a scheme will be abolished for SAYEs and SIPs and the threshold for the application of this rule will be increased from 25%-30% for CSOPs. In relation to EMI options, the time limit for exercise of the options with favourable tax treatment following a "disqualifying event" has been increased from forty to ninety days. These simplification measures are generally favourable and may make certain approved schemes more attractive to employers.

"IR35"

The rules in IR35 tax as employment income any income derived from services supplied by an individual through an intermediary where, had the services been performed directly, the individual would be an employee of the recipient of the services. Earlier in the year more substantial reform in this area was proposed with the introduction of rules relating to "personal service companies". It has been announced that these measures will no longer be pursued. However, the Finance Bill does introduce draft clauses which alter IR35 slightly.

Essentially, the proposed legislation extends IR35 to situations in which the individual concerned would be regarded as an office holder (e.g. director or secretary) of the recipient of the services as opposed to an employee.

The impact of this change is unlikely to be significant but it does remove a possible argument against the application of IR35 and additional caution is thus recommended.

Other

Employer Pension Contributions

Draft legislation has been published that will restrict the exemption from tax and NICs for employer contributions to registered pension schemes. With effect from 6 April 2013 the exemptions will apply only to employer contributions to the employee's registered pension scheme. This will end the tax efficiency of remuneration arrangements that include an employer paying pension contributions into a registered pension scheme of an employee's family member.

Real Time Information

The Finance Bill 2013 includes draft amendments to the Pay As You Earn ("PAYE") penalties regime to accommodate real time information filing (RTI). Most of the amendments will apply from 6 April 2014. The penalty regime will charge penalties for late RTI returns based on the number of employees in an employer's PAYE scheme. Penalty rates will be set by regulations.

Pensions Relief

Draft legislation has been published which reduces the amounts upon which individuals can claim tax relief in relation to pension contributions. The proposals reduce the annual allowance to £40,000 and the lifetime allowance to £1.25 million. These provisions take effect from 6 April 2014. HMRC has stated that the Government will discuss "with interested parties" whether to offer personalised protection for individuals with pension pots in excess of £1.25 million on 5 April 2014. A form of personalised protection would allow individuals to continue to accrue pension, whereas fixed protection 2014 prohibits further accruals.

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