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Essential update for employers

This briefing provides a practical summary of selected recent developments affecting the employment of staff including where relevant related tax considerations.

Know how much holiday to give your staff

The current statutory holiday entitlement of 24 days (4.8 weeks) for a full time worker meaning generally a five-day week is increasing. From 1 April 2009, such workers are entitled to 28 days (5.6 weeks). This is a minimum entitlement, so you can choose to offer more.

For part-time workers, holiday entitlement is worked out on a pro-rata basis. The following examples will demonstrate some typical situations:

- Annabel works three days a week so she is currently entitled to 14.4 days (4.8 weeks x 3) and will be entitled to 16.8 days (5.6 x 3)
- Charles works four 12 hour shifts followed by four days off. This equates to 3.5 12 hour shifts on average (based on a standard 17 week cycle) so his current entitlement is 16.8 12 hour shifts (4.8 x 3.5) and this will rise to 19.6 12 hour shifts (5.6 x 3.5)
- Rebecca works part time during term time only. She works on average 850 hours over the whole year. This equates to 18 hours per week over the current 47.2 working weeks of the year so currently she would be entitled to 18 x 4.8 weeks = 86.4 hours holiday per year rising to 100.8 hours (18 x 5.6)

Any days off for public or bank holidays can be counted towards a worker's statutory holiday entitlement as long as it is paid leave.

Payment in lieu of the additional holiday

You are currently allowed to pay workers in lieu of them taking their full statutory holiday entitlement. However, workers must take a minimum of four weeks' holiday in each leave year.

From 1 April 2009, payment in lieu of statutory holiday entitlement will not be permitted. The carry forward of statutory holiday entitlement to the next annual leave period is also prohibited. Payment in lieu of any leave above the statutory entitlement or the facility to carry the excess forward is still allowed depending on the employment contract.

Calculating the increased holiday entitlement for different leave years

As workers are entitled to an extra 0.8 week's holiday from 1 April 2009, if their next or current leave year begins before 1 April 2009, you will have to recalculate your workers'

statutory holiday entitlement based on the number of months in the leave year falling after 1 April 2009.

For example, if their leave year runs from 1 January to 31 December 2009, your staff are entitled to nine months worth of the additional entitlement - an extra 0.6 weeks:

$$(0.8 \div 12) \times 9 = 0.6$$

Informing your staff of the changes

As the increase in holiday is a beneficial change in the terms and conditions of employment for the worker, there is no need to reissue contracts. However, you do need to let staff know about the increased entitlement in writing, eg through a staff letter.

The government website www.businesslink.gov.uk includes a template letter, example staff notice and model paragraph for an employment contract that can be edited and used to inform workers. It also includes a helpful calculator for those tricky situations!

The National Minimum Wage

The National Minimum Wage (NMW) rose to £5.73 (£5.52) an hour in October 2008.

The hourly rate for 18 to 21 year olds increased to £4.77 (£4.60) and for 16 and 17 year olds to £3.53 (£3.40) an hour.

HMRC have an ongoing programme of targeted enforcement. The sectors currently subject to special attention include hairdressers, childcare providers and the hotel industry.

Please do get in touch if you have any concerns in this area.

Changes to statutory maternity rights

Rights during maternity leave

In order to understand the changes it is necessary to have an understanding of some of the terms used and current employment rights.

Broadly speaking a woman is entitled to take up to 52 weeks maternity leave regardless of how long she has worked for her employer. This leave is currently broken down into two 26 week periods. The first of these is Ordinary Maternity Leave (OML) followed by 26 weeks Additional Maternity Leave (AML). During both periods, the employee is now entitled to the benefit of all the terms and conditions of her employment, except remuneration.



Statutory Maternity Pay entitlement

The first priority is then to establish what she must be paid. A woman with sufficient earnings who worked for her current employer before she became pregnant, is entitled to be paid Statutory Maternity Pay (SMP) for up to 39 weeks. For most women, except for those on very low salaries, the first six weeks of her leave is paid at 90% of her average earnings and then the other 33 weeks generally at £117.18 for 2008/09 (from 6 April 2009 this is expected to be £123.06). Entitlement to SMP is dependent on still being on leave from work, so apart from any occasional days at work to 'keep in touch' with her employer, once she returns to work any unused entitlement to SMP is lost.

Employers are entitled to claim the majority of SMP costs back from HMRC via the PAYE system (either 92% or 104.5% of SMP costs depending on the employer's circumstances). Where an employer has contractually agreed to pay more than the statutory entitlement, for example paying half pay throughout the leave period, then only the SMP element would be recoverable.

What are the current rules on holiday rights?

For babies due on or after 5 October 2008 a woman will be entitled to accrue her full contractual holiday entitlement throughout her AML as well as during the period of her OML.

Example

Helen is due to start her maternity leave on 1 July 2009. Her employer's annual holiday leave period runs from 1 April 2009 to 31 March 2010 and her annual contractual holiday entitlement is 30 days plus 8 statutory bank holidays. If she takes her full maternity leave entitlement of OML and AML she will accrue holiday of 38 days for the leave period.

However, following changes to the statutory holiday entitlement rules, there can be no carry forward of the 28 day statutory entitlement beyond 31 March 2010. As Helen is planning to still be on maternity leave at that point, the whole of the 28 day statutory period needs to be taken before she starts her maternity leave. The 10 days entitlement in excess of the statutory minimum can either be paid or taken on return to work depending on her employment contract.

The holiday period would need to be paid at her normal salary rate. Although SMP costs are mainly funded by HMRC, payment for holidays will need to be paid for by the employer.

The increased holiday rights is one example of the contractual benefits which now apply to both the OML and AML periods. Other benefits such as medical insurance cover must also continue through into the AML period.

If you would like any help with this complex area please do get in touch.

What about the paternity rights?

Under the Work and Families Act 2006 the government proposes to introduce additional paternity leave and pay. Under the proposals, if the mother returns to work at the end of her first six months of maternity leave the father will be entitled to take up to six months leave, three of which would be unpaid.

The government has also indicated that paid maternity leave would also be extended from 39 to 52 weeks "before the end of this parliament". This was originally planned for 2009 implementation, but has now been deferred a year and will apply to babies due from April 2010.

Salary sacrifice

Surely acquiring new skills must be tax deductible?

Employees who want to further their careers may need to develop new skills by means of some additional training. The tax treatment of these costs depends on how they are paid for and how relevant they are to the job.

Do you pay for training for your employees?

If you do then these are tax deductible for your business. Generally your employees are not taxed on the value of the training, providing it relates to their current role or to some activity they may have to perform as part of their job.

What if employees pay for the training themselves?

The same does not apply in this case. Unfortunately an employee cannot claim tax relief for training costs unless the training was actually carried out in the performance of their job, as opposed to preparing them to do the job. So it is highly unlikely that an employee who pays training costs personally will obtain any tax relief for the costs.

Salary sacrifice

An alternative would be to agree with the employee, in advance of them undertaking the training, for the employer to pay for the training and the employee to reduce their salary to compensate.

As you can see from the comparison below both the employer and employee are better off after the salary sacrifice due to the tax and National Insurance (NI) savings.

	Pre salary sacrifice £	Post salary sacrifice £
Salary	20,000	18,500
Training costs paid	1,500	1,500
Employer's NI at 12.8%	1,891	1,699
Employee's NI at 11%	1,625	1,460
Employee's tax saved	-	330
Total employer cost	21,891	21,699

It is vital that salary sacrifice arrangements are implemented correctly. Please contact us if you would like to discuss this further.

Agency workers' rights

The Agency Workers' Directive has been passed by the European Parliament. In the UK this will give agency workers equal rights to permanent staff after 12 weeks with an employer. Equal rights will mean the same entitlement to pay and basic working and employment conditions. The date has not yet been set for implementation in the UK.

Dispute resolution procedures

Acas (Advisory, Conciliation and Arbitration Service) has made available a revised Code of Practice dealing with discipline and grievance procedures. The new code will ultimately aim to encourage businesses and individuals to resolve disputes internally, saving money and time.

The Code has been approved by the Secretary of State for Business, Enterprise and Regulatory Reform.

The revised Code provides broad principles on discipline and grievance handling in the workplace. The Code will be backed up by a non-statutory Acas guide providing more detailed good practice advice.

The Code is due to come into effect in April 2009.

Redundancy

There have been many changes to employment law and regulations in the last few years. A key area is the freedom or lack of freedom to make an individual redundant.

An employee's employment can be terminated at any time but unless the redundancy is fair an Employment Tribunal may find the employer guilty of unfair dismissal.



What is Redundancy?

Under the Employment Rights Act 1996, redundancy arises when employees are dismissed because:

- the employer has ceased, or intends to cease to carry on the business for the purposes of which the employee was so employed or
- the employer has ceased, or intends to cease, to carry on the business in the place where the employee was so employed or
- the requirements of the business for employees to carry out work of a particular kind has ceased or diminished or are expected to cease or diminish or
- the requirements of the business for the employees to carry out work of a particular kind, in the place where they were so employed, has ceased or diminished or are expected to cease or diminish.

In other words, the business reasons for redundancy do not relate to an individual but to a position(s) within the business.

Consultation - Legal Requirements

Employers who propose to dismiss as redundant 20 or more employees at one establishment have a statutory duty to consult representatives of any recognised independent trade union or other elected representatives of the affected employees.

Consultation should begin in good time and must begin:

- at least 30 days before the first dismissal takes effect if 20 to 99 employees are to be made redundant at one establishment over a period of 90 days or less
- at least 90 days before the first dismissal takes effect if 100 or more employees are to be made redundant at one establishment over a period of 90 days or less.

Employers also have a statutory duty to notify the Department for Business, Enterprise and Regulatory Reform (BERR) if they propose to make 20 or more workers redundant at one establishment over a period of 90 days or less.

If an employer fails to consult, a Tribunal has discretion to make a protective award of up to 90 days pay.

It is good practice in all organisations however, regardless of size and number of employees to be dismissed, for employers to consult with employees or their elected representatives at an early enough stage to allow discussion as to whether the proposed redundancies are necessary at all. They should ensure that individuals are made aware of the contents of any agreed procedures and of the opportunities available for consultation and for making representations. It must be remembered that redundancy is a form of dismissal and therefore all employers must follow a disciplinary and dismissal procedure which satisfies the requirements of the Dispute Resolution Regulations 2004, namely to include a letter setting out the reasons for the potential redundancy, a meeting and an appeals process.

Disclosure of Information

Employers have a statutory duty to disclose in writing to the appropriate representatives the following information so they can play a constructive part in the consultation process:

- the reasons for the proposals
- the number and descriptions of employees it is proposed to dismiss as redundant

- the total number of employees of any such description employed at the location in question
- the way in which employees will be selected for redundancy
- how the dismissals will be carried out and over what timescale
- the method of calculating the amount of redundancy payments (other than statutory redundancy pay) to be made.

To ensure that employees are not unfairly selected for redundancy, the selection criteria should be objective, fair and consistent. They should be agreed with employee representatives and an appeals procedure should be established.

Examples of such criteria include attendance and live disciplinary records, experience and capability. The chosen criteria should be measurable and consistently applied. Non-compulsory selection criteria include voluntary redundancy and early retirement, although it is sensible to agree management's right to decide whether or not such an application is accepted or not.

Employers should also consider whether employees likely to be affected by redundancy could be offered suitable alternative work within the organisation or any associate company.

Employees who are under notice of redundancy and have been continuously employed for more than two years, qualify for a reasonable amount of paid time off to look for another job or to arrange training.

Unfair Selection for Redundancy

An employee will be deemed to have been unfairly selected for redundancy for the following reasons:

- participation in trade union activities
- carrying out duties as an employee representative for purposes of consultation on redundancies
- taking part in an election for an employee representative
- taking action on health and safety grounds as a designated or recognised health and safety representative
- asserting a statutory employment right
- discrimination
- maternity-related grounds.

The Right to a Redundancy Payment

Employees who have at least two years' continuous service qualify for a redundancy payment.

The entitlement is as follows:

- For each complete year of service until the age of 21 - half a week's pay
- For each complete year of service between the ages of 22 and 40 inclusive - one week's pay
- For each complete year of service over the age of 41 - one and a half weeks' pay.

A week's pay is that to which the employee is entitled under his or her terms of contract as at the date the employer gives minimum notice to the employee. The maximum statutory limit for a week's pay is £350 with effect from 1 February 2009 and the maximum service to be taken into account is 20 years. This means that the maximum statutory payment cannot exceed 30 weeks' pay or £10,500. This figure is reviewed annually and employers may, of course, pay in excess of the statutory minimum.

The employee is also entitled to a period of notice or payment in lieu of notice by statute and their contract of employment. Whether or not the payments are taxable is another matter. This is an area that HMRC regularly check on and care needs to be taken. We provide below a table setting out the main points. However, the table comes with a warning - tax is never as simple as it seems so do get in touch for clarification!

Type of payment	Tax position
A contractual payment instead of a notice period being given (known as a PILON) or gardening leave, even if the employer has an option to pay.	Generally taxable as salary.
Payments on leaving where there is an expectation or that are customary.	Good evidence of expectation has to be established from documents and interviews before these can be taxed.
Where there is no entitlement or expectation to a PILON and the employer unilaterally dismisses the employee with less notice than the employee is entitled to.	As the employer has breached the contract a PILON in such circumstances represents damages for breach of contract and the first £30,000 may be tax free.
Instead of acting unilaterally, the employer and employee may reach an agreement to terminate without proper notice. A payment of a PILON is then made.	Where this is done before termination is in prospect, it is simply a variation in the terms of employment and any subsequent payment may be contractual and hence taxable. If it is done only as part of the process of termination, the payment may not be from the employment but from the agreed terms for its destruction and is dealt with as a damages payment ie the first £30,000 may be tax free. If the agreement settles an existing contractual provision, the payment may be taxable.
A statutory redundancy payment is exempt from liability to tax unless it exceeds £30,000.	In practice there is unlikely to be tax payable because most statutory payments are covered by the £30,000 exemption. However, all payments in respect of a termination must be added together in applying that exemption.
Statement of Practice 1/1994 explains that a lump sum payment for redundancy under a non-statutory scheme is exempt up to £30,000.	HMRC are prepared to comment on the tax position of such payments before they are made.

Employing overseas workers

A number of significant changes have occurred during 2008.

The New Points Based System

From 27 November 2008 the government has introduced a merit based points system for assessing non-European Economic Area (EEA) nationals wishing to work in the UK. The system consists of five tiers, each requiring different points. Points will be awarded to reflect the migrant's ability, experience, age and when appropriate the level of need within the sector the migrant will be working.

The five points based system tiers consist of:

- tier 1 - highly skilled workers, for whom no job offer or sponsoring employer is required, for example doctors, scientists and engineers
- tier 2 - skilled individuals with proven English language ability who have a job offer, to fill gaps in the UK labour force, for example nurses, teachers and engineers

- tier 3 - low skilled workers filling specific temporary labour shortages, for example construction workers for a particular project
- tier 4 - students
- tier 5 - youth mobility and temporary workers, for example musicians coming to play in a concert.

Sponsorship

Under tier 2 the employer sponsors the individual, who makes a single application at the British Embassy in his or her home country for permission to come to the UK and take up the particular post. The individual's passport will be endorsed to show that the holder is allowed to stay in the UK (for a limited period) and is allowed to do the type of work in question.

UK based employers wishing to recruit a migrant under either tier 2 or the temporary worker category of tier 5 will have to apply for a sponsor licence. To gain and retain licences employers are required to comply with a number of duties, such as appointing individuals to certain defined positions of responsibility, having effective HR systems in place, keeping proper records and informing the UK Border Agency if a foreign national fails to turn up for work.

There is a charge of £1,000 (£300 for charities and for employers with no more than 50 employees) for a licence to sponsor tier 2 migrants. This fee buys a four-year licence.

Once an employer has obtained its sponsorship licence, it can access an online system operated by the UK Border Agency through which it can issue its own certificates of sponsorship to potential migrant workers. The UK Border Agency determines the number of certificates to be allocated to a particular employer. Each certificate of sponsorship takes the form of a unique reference number to be provided by the employer to its potential recruit, who will then be able to apply for entry clearance into the UK at the British Embassy in his or her home country.

The fee for each application for a certificate of sponsorship for a tier 2 worker is £170.

Employers that do not hold a licence cannot recruit non-EEA workers.

Identity checks

An employer must also then ensure that he checks the identity of a potential employee. These rules were revised from 28 February 2008 including the introduction of more significant penalties for non compliance.

There are two lists of acceptable documents for checking identity:

- List A contains items, such as a British passport, which have no time limits on working in the UK and which indicate that the person has an ongoing entitlement to work in the UK
- List B sets out a list of documents which carry restrictions on the amount of time individuals will be able to spend in the UK.

One significant change is that employers will have to carry out annual checks for those workers whose documents appear on List B, such as work permit holders.

After 25 November 2008, however, you might find this process easier as the government is starting to replace paper-based immigration documents, stickers and stamps with compulsory biometric identity cards.

Within three years all foreign nationals - from outside the European Economic Area and Switzerland - applying to come to the UK for more than six months or those who wish to extend their stay will need to apply for an identity card.

The cards will show the person's name, date of birth, nationality and immigration status, including whether or not they have the right to work in the UK. They will be the same size as a credit card and will have an electronic chip that will hold biometric details, such as fingerprints and a digital picture of the person's face.

If you have any questions about the rules, please see the detailed guidance at www.ukba.homeoffice.gov.uk/employers.