



June 2019 Update

Welcome to this month's update - where we discuss the latest legislation and guidance.

In this month's edition, we report on:

- IR35 changes - contractor or employee?
 - Holiday pay and voluntary overtime
 - Parental leave
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IR35 changes – contractor or employee?

Is your contractor really an employee and how will HMRC view it?

The government is proposing new off-payroll rules (IR35) for the private sector from April 2020. These rules are aimed at individuals working through an intermediary, usually a personal service company (PSC), who most likely would be regarded as employees if engaged directly by the client.

The aim is to ensure they pay mainly the same income tax and national insurance (NICs) as if they were employed.

Under current rules, the PSC determines whether IR35 applies and pays tax and NICs if necessary. The new rules make it up to the engaging business (ie the client) to determine

whether IR35 applies and, if so, to make the deductions for tax and NICs and pay employer NICs.

The good news is the reforms will apply to medium and large businesses, but not small businesses.

To be considered 'small', a business would need to: (i) have an annual turnover that is not more than £10.2 million and (ii) have a balance sheet total of not more than £5.1 million; or (iii) have no more than 50 employees.

We suggest businesses do an audit of their contractor arrangements through a PSC. The government has created a tool for this (Check for Employment Status Test – CEST). Businesses who fill out this tool correctly and receive a response that the contractor is genuinely self-employed should be able to rely on this if HMRC questions it. However, we understand businesses may be hesitant to use this tool in case they don't get the answer that suits.

Employers: determining employment status with certainty is complex and depends on the working practices.

Contact us: we can assist with assessing contractor status.

Holiday Pay and Voluntary overtime

Should voluntary overtime be taken into account when calculating holiday pay?

Yes, if it is sufficiently regular and it could be seen as 'normal' remuneration, as found by the Court of Appeal in the case of *Flowers v East of England Ambulance Trust*.

In this case, various ambulance crew worked 'voluntary' overtime. They were free to choose whether or not to do it. The ambulance crew argued that their voluntary overtime should be included in their holiday pay payments. It was found that voluntary overtime should be taken into account when calculating holiday pay if it is sufficiently regular.

Employers: think carefully when calculating holiday pay which other payments may be seen as sufficiently regular.

Contact us: we can help with holiday pay questions

Parental leave

In the recent case of *Hextall v Chief Constable of Leicestershire Police*, the Court of Appeal decided it was not discriminatory for an employer to pay men on shared parental leave less than birth mothers on statutory maternity leave.

The special treatment women receive in relation to pregnancy and childbirth is a legal exception to the rules on discrimination. Even if it was an equal pay claim, a pregnant woman is in a special position regarding payments.

The correct comparator in a direct discrimination claim is a woman taking shared parental leave, not a woman on maternity leave.

So taking this, there was no discrimination in these cases since men and women on shared parental leave would be paid the same.

Maternity leave is designed to protect a woman's health and safety in late pregnancy as well as allow time to recover from childbirth and allow for breastfeeding. These are things which affect the birth mother exclusively, not the father. Maternity leave isn't just childcare and is not comparable to parental leave

Employers: it is helpful to get this clarity on maternity payments

Contact us: we can help on shared parental leave questions

For more information or assistance Email: enquiries@employmentlawsupport.co.uk



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