

Employment income and pensions (Lecture P1252 – 14.21 minutes)

Off-payroll working

From 6 April 2021, the 'off-payroll' working rules (which pre-6 April 2021 only affect public sector work) are extended to the private sector, where the client is a medium or large entity (unless that client has no UK connection).

Unlike the IR35 rules, which require the worker's intermediary (normally a PSC) to potentially account for payroll taxes on its fee income if there is a deemed employment relation with the end-client, the off-payroll working rules require the end-client to decide whether there is a deemed employment relationship with the worker and, if there is, the fee-payer must account for the worker's payroll taxes.

The substantive rules were included in FA2020, but these are now amended so that they work as intended, with additional provisions introduced to tighten up the impact of the rules. All of these provisions are within Clause 21 and take effect from 6 April 2021.

Definition of intermediary

For the off-payrolling rules to apply, there has to be an intermediary, which is most commonly a company (this is the 'personal service company'). To within the provisions the personal service company has to meet certain conditions. The intermediary is caught if the worker either has a material interest in that company or is receiving income from the intermediary which represents payment for services rendered but is not taxable as employment income. This latter provision prevents avoidance by diluting shareholdings below the material interest figure to avoid the rules applying. These have been in place for IR35 since it was introduced in 2000.

The FA2020 rules updated these conditions so that the company could be caught where the worker has a non-material interest in the intermediary but receives payment for services from anyone within the supply chain (such as where they get direct payment from the end client), but the wording was such that it applied in all cases where a worker was getting a payment from elsewhere in the supply chain. The legislation is being amended so it now makes reference to situations where a worker receives payments which are not already wholly taxed as employment income.

The definition of 'non-material interest' is having:

- 5% or less of the ordinary share capital,
- Having entitlement to receive 5% or less of any distributions that may be made by the company, or
- Where the company is a close company having entitlement to receive 5% or less of the assets available for distribution on a winding up.

Information provisions

Another change relates to provision of information within the supply chain. There is current requirement for the worker to provide information to the potential deemed employer (normally the end client) regarding the application of the off-payroll working rules, which basically requires the worker to notify the deemed employer that the basic structure is such that these rules might apply (eg the worker has a material interest).

This is amended so that the intermediary (i.e. the personal service company) will have a requirement to provide the necessary confirmation where the worker does not do so. The changes will bring the intermediary into the process of confirming whether a worker is potentially caught by the off-payroll working rules. It should be noted that if no confirmation is given by the worker or intermediary, it can be assumed by the end client that the rules apply.

Fraudulent provision of information

There are specific provisions where fraudulent information is provided so that the person providing that information becomes liable for any taxes which arise by virtue of their actions. This currently only applies to the worker or anyone connected with the worker but will be extended to cover any UK-based party in the supply chain.

Targeted Anti-Avoidance Rule

There is a new Targeted Anti-Avoidance Rule. This will apply where at least one relevant person within the supply chain is involved in a 'relevant avoidance arrangement'. These are arrangements where the main purpose (or one of the main purposes) is to gain a tax advantage by circumventing the conditions of the provisions such that the IR35 rules do not apply.

If these conditions apply, the person who has entered into the arrangements will be treated as the deemed employer and will become liable for the taxes due on payments to the worker. Where more than one relevant person participates in the avoidance arrangements, HMRC will treat the higher person in the supply chain (assuming there is a realistic prospect of recovering the tax) as the deemed employer. This could be the worker or intermediary if other members of the supply chain no longer exist.

Payments on termination

In 2018 provisions were introduced which amended the termination payment provisions such that an amount of any non-contractual payment in lieu of notice (PILON) could be taxed as earnings, rather than as a termination payment. The amount which is taxable is the 'Post-Employment Notice Pay' (PENP).

FB2021 makes two amendments to these provisions. Both apply for payments made on or after 6 April 2021 in connection with termination of employment that takes place on or after that date.

Non-residents

S27 ITEPA 2003 applies to earnings for a tax year when an employee is not resident in the UK. It treats as employment income any earnings in respect of duties performed in the UK or earnings from overseas Crown employment, so they are subject to UK tax. This section is amended by Clause 22 to add a third category of earnings which can be subject to UK tax, being amounts which fall to be treated as general earnings under s402B ITEPA 2003 as PENP.

This is designed to ensure that if the earnings would have been taxable under s27 if the employment had not been terminated then the termination payment is also taxable. The percentage of the PENP which is taxable under this section is:

$$A/B \times 100$$

Where B is the total amount of general earnings that it is reasonable to assume that the employee would have received in respect of the post-employment notice period if the employment had not

been terminated and A is the amount of those earnings that would have been taxable earnings under s27.

Example

Nicos is a non-resident individual who undertakes duties in the UK, where he spends 4 days a month (out of total working days of 20 days per month). It is agreed that 20% of his employment income is subject to tax under s27 ITEPA 2003.

His employment is terminated and he receives a PILON of which £25,000 would be PENP if the whole of the amount was subject to UK tax. Based on the above formula, (20%) £5,000 of this would fall within the new s27 provisions and would be taxed as earnings in the UK.

Calculation of PENP

The new legislation includes an alternative calculation for PENP for employees who have a pay period defined in months but where either a notice period is defined in weeks or days or the post-employment notice period is not a whole number of months.

The PENP is calculated as:

$$\frac{(BP \times D) - T}{P}$$

P

Where:

- BP is the employee's basic pay in the last pay period before the trigger date (basically the date that notice is given or employment ceases)
- P is the number of days in the last pay period, and
- D is the number of days in the post-employment notice period (which is the number of days after the employment is terminated up to the end of the notice period).

This calculation can use whole months if all of the periods are in full months but this was not always possible. Clause 21(7) amends the provisions so that if the employee is on a fixed monthly salary, the calculation of the basic pay uses an average daily pay as the pay of the previous month divided by 30.42 (which is the average length of a month). This removes the variation in the calculation which would have depended on the length of the previous month.

Although this provision comes in on or after 6 April 2021, HMRC will continue to allow this mechanism to be used for payments before that date if it is advantageous.

Example

An employee is paid a salary of £30,000 by equal monthly instalments of £2,500 on the first day of each month. The employment is terminated on the 1 March and she is entitled to 2 weeks' notice but she agrees to leave immediately in consideration of a termination payment of £10,000.

Under the normal rules, the calculation of PENP would be:

$$((2,500 \times 14) / 28) - 0 = £1,250$$

If she had been terminated on 1 April, the calculation would be:

$$((2,500 \times 14)/31) - 0 = \text{£}1,129$$

Under the new rules, the average number of days would be used instead giving the PENP calculation as:

$$((2,500 \times 14)/30.42) - 0 = \text{£}1,150$$

Example 2

Salary £6,000 per month, contract specifies 3 months' notice (but no right for the employer to pay in lieu), resigned 15/3/20, worked 5 days' notice then left.

Paid £60,000 termination payment on 25/3/20.

Under the old rules:

- $BP \div P = \text{£}6,000 \div 29 \text{ days (2020 was a leap year)} = \text{£}206.90 \text{ per day}$
- $D = 86 (16 + 30 + 31 + 14 - 5)$
- $T = 0$
- Taxable PENP = $\text{£}206.90 \times 86 = \underline{\text{£}17,793}$

What if the resignation date was 15/4/20?

- $BP \div P = \text{£}6,000 \div 31 \text{ days} = \text{£}193.55 \text{ per day}$
- $D = 85 (15 + 30 + 31 + 14 - 5)$
- $T = 0$
- Taxable PENP = $\text{£}193.55 \times 85 = \underline{\text{£}16,452}$

Under the new rules:

"P" will be taken to be 30.42 days, whichever month notice is given (this is $365 \text{ days} \div 12 \text{ months}$, rounded to 2 decimals) and will remove the anomaly in the example above.

- $BP \div P = \text{£}6,000 \div 30.42 \text{ days} = \text{£}197.24 \text{ per day}$
- If the resignation date is 15 March 2020, $D = 86$ as above
- $T = 0$
- Taxable PENP = $\text{£}197.24 \times 86 = \underline{\text{£}16,962}$
- If the resignation date is 15 April 2020, taxable PENP is $\text{£}197.24 \times 85 = \text{£}16,765$.

Zero-emission vans

The cash equivalent of the benefit of a van with no CO₂ emissions is set at nil for 2021/22 and subsequent tax years so that no employment benefit arises even where there is private use. (Clause 23).

Enterprise management incentives

An employee who is provided with share options under an Enterprise Management Incentive (EMI) scheme has to meet the working time requirement which means they must spend at least 25 hours per work or if less, 75% of their working time, committed to the employer. If they cease to meet this requirement, there would be a disqualifying event and the tax advantages of holding the option may be lost, unless the option is exercised within 90 days of the disqualifying event occurring.

Clause 24 modifies the provisions so that the employee continues to meet the time requirement for EMI even if they are not required to work for the necessary hours for reasons connected with coronavirus. This could include taking unpaid leave, being furloughed or working reduced hours. The modification will apply for a period commencing on 19 March 2020 and ending on 5 April 2022.

Cycles and cyclists' safety equipment

There is a tax exemption within s244 ITEPA 2003 which removes the benefit in kind charge where there is provision of cycles and cyclists' safety equipment by an employer which meets the conditions within that legislation. This was designed as part of the Government's green agenda.

One of the conditions is that the equipment must be used mainly for qualifying journeys, being to or from work or in the course of work. For those individuals who were participating in such schemes and have received bikes or safety equipment on or before 20 December 2020, this condition will be treated as met for the period between 16 March 2020 and 5 April 2022. (Clause 25).

This has been introduced to minimise the impact of those who are working from home and so not undertaking qualifying journeys.

Exemption for coronavirus tests

Clause 26 confirms that no income tax charge arises in relation to coronavirus antigen tests (but not antibody tests) provided to employees by their employer or where the cost is reimbursed to the employee in respect of the same. This will apply for 2020/21 and 2021/22.

Optional remuneration arrangements

The Optional Remuneration Arrangements (OpRA) legislation removed the benefits of entering into salary sacrifice arrangements. Although these took effect from 6 April 2017, there were transitional provisions relating to provision of long-term benefits such as living accommodation and school fees which continue until 6 April 2021. These provisions applied only as long as there was no variation in the employee's employment contract.

There is a list of various statutory payments which are disregarded for the purposes of determining if contractual changes have been made in relation to the employee, but this list did not include Statutory Parental Bereavement Pay (SPBP) as it did not exist at the time the legislation was enacted.

The legislation is therefore changed to include SPBP as a disregarded statutory payment.

This will apply retrospectively for 2020/21 (but not earlier as SPBP was only brought in from 6 April 2020). (Clause 27).

Pensions lifetime allowance

The pensions lifetime allowance is the maximum value of tax-relieved pension savings that an individual can build up during their lifetime. If the pension fund exceeds this amount, then there is an additional tax charge on the excess at the time the pension benefits are crystallised (which is often when the beneficiary begins to take benefits from the plan).

The standard lifetime allowance for 2021/22 is £1,073,100 and this limit will remain until 5 April 2026 with the provisions allowing for normal indexation of this amount being disapplied. (Clause 28). This does not affect anyone who has a higher lifetime allowance where an election has been made previously to protect the higher value.

Collective money purchase schemes

Legislation is to be introduced so that collective money purchase pension schemes, which will be introduced by the Pension Schemes Act 2021, can operate as registered pension schemes for tax purposes.

These new schemes can be established by a single employer (or associated employers) and are designed to be less expensive for an employer to run and fund by being less administratively burdensome with overall responsibility for the scheme being shared between the scheme and its members. The aim is to give a target benefit level on retirement by pooling of risk and avoiding the need to make financial decisions at the point of retirement; a type of defined benefit scheme without the risks to an employer of having a defined benefit scheme.

The provisions are in Clause 29 and Schedule 5. The legislation is complex because these schemes will operate in different ways to other pension schemes but there have needed to be considerably alterations to make sure they can operate without creating unintended unauthorised payments charges and also so the flexible nature is reflected in the parameters within which they can operate.

Construction industry scheme

Amendments are made to the Construction Industry Scheme provisions as follows (Clause 30 and Schedule 6). All of these have effect from 6 April 2021.

Deemed contractors

S59 FA2004 designates certain persons as being contractors within the construction industry. One way in which a business can be deemed to be a contractor is if the expenditure on construction operations exceeds a legislated limit. The current limit is that in any three-year period the person has had an average annual expenditure on construction operation of more than £1,000,000 with various exceptions. A year in this context is the 12 months to 31 March each year.

The new legislation will change the test so that a person will be a deemed contractor if their expenditure on construction operations exceeds £3,000,000 in the previous year with the test being applied at any point, rather than just at 31 March. That person can elect for the condition not to be treated as met if they are not expected to make any further expenditure on construction operations.

Equally if the condition ceases to be met at any time, the person may elect for it to be treated as continuing to be met until such time as they are not expected to make any further expenditure on construction operations. The provisions also make it clear that the condition can be met subsequently even if either of those elections have been made.

The transitional provisions are such that if a person fell to be treated as a deemed contractor under the old rules but would not under the new rules, they are treated as a deemed contractor until they are not expected to make any further expenditure on construction operations.

There is also a new grace period where a person falls to be treated as a contractor under the above provisions. An officer of HMRC may exempt the contractor from the requirement to deduct tax from payments for a period including specified payments before the date the exemption is given. The period must not exceed 90 days, although this can be extended by further notices.

This enacts a provision previously operated by HMRC which gives a grace period to persons who inadvertently breach the deemed contractor threshold and it provides those persons' time to set up the necessary processes to correctly operate CIS.

Allocation of value to materials

S61(1) FA2004 specifies that a contractor deducts tax from payments to sub-contractors (where not gross payment registered) to the extent that the payment does not represent the direct cost of materials. In its current form the legislation states 'the direct cost to any other person' but this is to be amended to 'the direct cost to the sub-contractor'.

S62 FA2004 deals with how a sub-contractor, who has had tax deducted at source on payments made, can get relief for that deduction. If the person is not a company it is treated as an income tax payment on account but if the person is a company it can be treated as a payment on account of a wider range of liabilities. New sections are inserted in s62 authorising an officer of HMRC to amend deductions claimed by either:

- Correcting an error or omission relating to a set-off claim
- Removing a set-off claim
- Prohibiting a person from making a further set-off claim for a specified period, or indefinitely.

This can be done by amending returns or amending set-off claims (for example via the EPS submissions in RTI).

Penalties

There is an extension of the scope of the penalty regime where a person supplies false information including documents when applying for gross payment status either for themselves or for another person over which they have influence or control (e.g. where an owner manager provides information pertinent to the gross payment status of their company).

The maximum penalty under this provision is £3,000. This will not apply to any statement made or document furnished before 6 April 2021.