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Essential Employer Update 2022

Error and fraud in Covid-19 support schemes: HMRC's approach

'From the beginning it was clear the schemes would be targets for fraud and that customers would make mistakes.'

Given estimates suggesting £5.8 billion lost to error and fraud, it's not surprising HMRC is investing heavily in compliance. A Taxpayer Protection Taskforce of 1,265 staff is involved in post-payment enquiries, lasting at least until 2023.

The aim ultimately is to identify and recover amounts overpaid under support measures like the Coronavirus Job Retention (furlough) and Eat Out to Help Out schemes. HMRC intends to produce updated error and fraud estimates for furlough claims by summer 2022, using a random enquiry programme, and analysing data from completed compliance activity.

Showcasing its detective work, HMRC cites the example of a business claiming to have furloughed all its workforce. But when HMRC examined debit and credit card sales for the period, it looked like business as usual: the figures didn't suggest trade had been shut down and HMRC duly recovered £53,000 in furlough payments.

The Taskforce's main focus is fraud, not innocent error. But where there is genuine error, HMRC wants to support businesses to put things right. To this end, it is issuing nudge letters to some businesses, asking them to revisit their claims.

Risk areas range from problems stemming from payroll software, to errors calculating pensions, salary sacrifice and National Insurance contributions. The position can be particularly complex where employees weren't paid enough under furlough rules. Here employers must either top up wages or repay furlough monies within a 'reasonable period' as set out in HMRC guidance. High level professional body discussions are ongoing with HMRC on a number of points, such as how to top up underpayments to employees, given tax and benefit implications, and whether there are any de minimis limits applying to errors found. We strongly recommend looking back over claims now, and should be pleased to advise further.

Stay compliant on minimum wage

New minimum wage rates apply from 1 April 2022:

	Hourly rate from 1 April 2022
National Living Wage (age 23 and over)	£9.50
21-22 year old rate	£9.18
18-20 year old rate	£6.83
16-17 year old rate	£4.81
Apprentice rate	£4.81
Accommodation offset	£8.70

National Minimum Wage is the minimum pay per hour that nearly all workers are entitled to. The National Living Wage is more than this, being the entitlement of workers aged 23 and over.

The new rates represent a significant increase, and as rates rise, so more employees come within scope of minimum wage legislation. With the complexity of the rules, it can be only too easy for employers to make errors unintentionally. This can happen, for example, after birthdays, when younger employees pass from one age band to another. Salary sacrifice arrangements are another area where mistakes are often made. Regularly monitoring payroll procedures for minimum wage compliance is always prudent in view of the penalties and reputational damage that can attach to errors.

Right to work checks: are you up to date?

Right to work checks have changed during the pandemic. Though it's still necessary to carry out such checks, and remains an offence knowingly

to employ anyone without the right to work in the UK, employers have been able to perform checks remotely. This has involved a video call with the worker, and the use of scanned documents or photos of documents, rather than originals. But this temporary concession is due to end on 5 April 2022 (inclusive).

So what comes next? Firstly, there is no need to carry out retrospective checks on those who had a Covid-19 adjusted check between 30 March 2020 and 5 April 2022 (inclusive). Employers will have a defence against a civil penalty if the check undertaken during this period followed the appropriate guidance. Secondly, the Home Office is expected to release further guidance nearer April; and a new digital solution is in the pipeline enabling checks to continue to be conducted remotely, but with enhanced security. This should include many who are unable to use the Home Office online checking service, including UK and Irish citizens. And thirdly, from 6 April 2022, employers will again need either to check the original documents, rather than scans or photographs – or to use the Home Office online right to work tool. Checks will be done with the individual physically present, or via live video link while the employer has the original document in their possession. In passing, note that 6 April 2022 also brings change to checks for biometric card holders.

Off-payroll working. What to consider now

The off-payroll working (OPW) rules continue a policy which started with the so-called IR35 regime. The aim in each case is that those who would be employees, if it wasn't for the presence of an intermediary (usually a personal service company), pay broadly the same income tax and national insurance as employees.

The scope of the OPW rules was extended to cover both public and private sector workers from 6 April 2021. The change means responsibility for deciding the employment status of workers providing services through an intermediary moves from the worker to the client. This applies where the client is classed as medium or large according to criteria in the small companies' regime. Where an engagement is within the OPW rules, the fee-payer must deduct income tax and national insurance, paying these to HMRC.

A glance at the many employment status cases coming to court is enough to show the difficulties of making an accurate status determination. The right of substitution is often thought of as key in determining status. Can a worker send someone else to do the work for them (the right of substitution), or must they carry it out themselves? An unfettered right of substitution may indicate that someone is not an employee. On the other hand, the requirement to perform work in person – personal service – can point towards an employment relationship.

This was an area examined in a recent case at the Court of Appeal. The case involved a moped delivery courier who worked for Stuart Delivery Ltd. The question was whether he was a worker, as defined under the Employment Rights Act, with the employment rights such status brings. Stuart Delivery argued the courier was not a worker, because of his right of substitution. The Court, however, decided that he had only a conditional right of substitution, and that the requirement for personal service predominated. Though couriers were allowed to turn shifts down, they could only release them to Stuart Delivery's other drivers. The organisation's business model was based on couriers being obliged to perform work personally, with guaranteed minimum hourly payments and delivery awards that hinged on their taking up delivery slots.

The verdict is a reminder of the need to look at all aspects of a working arrangement when making a status determination. A single factor such as the right to provide a substitute, may be insufficient to keep a worker outside the rules. Checking whether the contractor is in business on their own account, and how, practically, they mesh with your business, make good starting points. We can help you get a clear picture of your responsibilities in this area.

Employer disability responsibilities: reasonable adjustments

Equality law places obligations on employers to create a more level playing field for people with disabilities, and physical and mental health issues. One is the duty to make reasonable workplace adjustments. This extends not just to existing workers, but to the recruitment process as well. What is considered reasonable for an employer to do will vary, depending on the business. Expectations of a multi-national employer will be different from what's expected of the owner of a local shop. Similarly, staff needs may differ, even among those with the same health condition.

The essence of the idea of reasonable adjustment is that disabled people shouldn't be put at a 'substantial disadvantage' as against those who aren't disabled. If such a disadvantage exists, the employer must practically try to remove, reduce or prevent it.

The responsibility to make reasonable adjustments only comes into play where an employer is aware, or should reasonably be aware, that someone has a disability. This means employers should take steps to inform themselves of needs within their workforce, though with an eye also to staff privacy and confidentiality.

There are three main areas involved: change to policies and procedures; change to the physical layout of the workplace; and change by providing extra equipment or services. Where hot desking is normal policy, for example, someone with autism may need their own desk and a quiet place to work. Where the height of light switches or shelves causes problems for a wheelchair user, these may need repositioning. Provision of extra equipment could entail something like additional software for someone with visual impairment, allowing them to use a computer with speech output.

Reasonable adjustments are made at the employer's cost, and we are on hand to discuss your plans for expenditure, and areas where tax relief may be available.

And finally: scanning the horizon

New watchdog, new teeth? Plans for a new one-stop shop, single labour market enforcement body are a step closer. Combining responsibilities currently in the remit of the Gangmasters and Labour Abuse Authority, the Employment Agency Standards Inspectorate and HMRC's National Minimum Wage Enforcement, the new body will also have additional powers. These include enforcement of holiday pay for vulnerable workers, for example. The new body will be established through primary legislation when parliamentary time allows.

New Employment Bill. Anticipated since 2019, the Bill, when published, will introduce a raft of new measures. These include:

- a new right to carer's leave: being up to one week of unpaid leave as a day one right
- ending employers' ability to retain part of any tips, service charges or gratuities for their own use, rather than passing them to workers
- introducing neonatal leave and pay
- extending redundancy protection for pregnant women and new parents.

Sexual harassment in the workplace. Also on the government's agenda is a new requirement for employers to prevent sexual harassment, and potentially an extension to the time limit for bringing cases under the Equality Act 2010 to the employment tribunal. New rules will be introduced when parliamentary time allows.

Working with you

We are always available to advise on employer obligations around tax and the workforce.