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Planning to Mitigate
Employment Law and Tax Risk

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The Government will be looking to raise as much money as possible to repay the debts it has incurred during the current pandemic. It is therefore ramping up HMRC compliance activity as this will raise desperately needed funding without breaking its manifesto promise not to raise the main tax rates. We consider below some of the areas that HMRC and other Government bodies will be targeting and how you can minimise your risks.



There are also a few changes on the horizon, which will affect employers including:

- **The end of the transition period on 31 December 2020 so that the UK will no longer be able to benefit from the EU Regulations including in relation to:**
 - **Immigration so you will need to have complied with new policies if you hire workers from other EU states and**
 - **Social security so you may be liable to pay social security in other EU countries including if employees are working from home in other countries.**
- **The changes to the Off Payroll Working rules come into effect from 6 April 2021 for medium and large private sector businesses engaging labour through third party supply chains. So, you may now be responsible for deducting tax and NIC from payments to other parties in the supply chain and be responsible for bearing the employer's NIC liability. While these rules do not give employment status, they could trigger employment tribunal claims.**

You need to understand how these rules could affect your business and what plans you need to put in place to ensure that you do not fall foul of them including careful legal drafting of contracts and policies.

We work closely with Sue Ollerenshaw of Efficient Employment Tax Solutions Limited, an employment tax expert, who has helpfully contributed to this article.

Coronavirus Job Retention Scheme (CJRS)

Companies have 90 days to notify HMRC of any errors in CJRS furlough claims. If they do not the failure is automatically treated as deliberate and concealed. This means HMRC can charge a penalty of up to 100% of the amount of the CJRS grant overclaimed in addition to the grant repayable. While these penalties can be mitigated, the maximum mitigation available if the disclosure is prompted by HMRC would be 50%. It also means that the time limit for recovery is extended to at least six years.

The most common issue is including employees who were not entitled to receive payments. This could include:

- No written evidence of initial furlough or update to take account of flexi-furlough
- No evidence that employees were furloughed specifically to the impact of Covid-19 or the selection procedure
- employees working when told not to which includes voluntary work for the employer or an associated company
- employees not furloughed for a continuous period of 21 days prior to 30 June 2020.

There are also some common issues around the calculations. These have been found in both in-house and outsourced payrolls and include:

- Payroll Software versions behind HMRC Guidance, which was updated numerous times
- Timing of payment of CJRS payment to employees and RTi reporting

- HMRC calculator dates resetting
- Calendar days not working days used and 2019/20 being a leap year
- Average for variable pay and hours rolling not fixed to 2019/20 tax year
- Pay periods spanning calendar months
- Claiming for max no. of employees after July than included in any claim up to June
- ERNIC and Pension contributions
 - Topping Up
 - Pro-rating thresholds
 - Claiming after July
- Employment allowance
- Holidays
- Redundancy
- Notice pay
- Employees on statutory leave
- National minimum wage for training
- Salary sacrifice

The records which you need to keep are:

- **The amount claimed and claim period for each employee**
- **The claim reference number for your records**
- **Initial furlough letter and any flexible furlough adjustments**
- **Your calculations in case HMRC need more information about your claim**
- **Usual hours worked, including any calculations that were required, for employees you flexibly furloughed**
- **Actual hours worked for employees you flexibly furloughed**

Now is the time to check that your calculations are correct, take account of all the rule changes and that you have all the necessary records to demonstrate this to HMRC. Otherwise you could be defending an HMRC claim when Covid-19 is just a distant memory and the employees/advisers involved in the calculations are no longer around.

HMRC National Minimum Wage (NMW) Audits

Another area where HMRC are bringing in significant amounts of additional revenue to the Exchequer is National Minimum Wage Audits. Not only are there financial penalties for getting NMW wrong but you also face the reputational risk of being "Named and Shamed". You could be liable for up to six years of underpayments calculated at today's rate not the rate in force when the error occurred. Sectors currently being targeted by HMRC include:

- **Social Care**
- **Retail**
- **Commercial Warehousing**
- **Gig Economy**

Common NMW errors include:

- **Failing to use annual increases**
- **Missed birthdays**
- **Misuse of apprentice rates**
- **Deductions for salary sacrifice, clothing and uniforms, PPE, own use or savings schemes, accommodation above the allowed rate**
- **Not paying for travel, training, downtime, security checks, changing into uniform and cashing up**
- **Including pay in calculating NMW which is specifically excluded by legislation, for example, overtime and shift premium and tips. Many software systems do not carry out this calculation correctly.**

HMRC are taking a particularly aggressive stance in certain areas, for example, when employees chose to come into work early or stay late even though they are not "required to work". It is therefore good practice to carry out your own audits and be prepared to challenge HMRC interpretation and calculations.



Redundancy and Compensation Payments

There is a common misconception that termination payments of less than £30,000 are exempt from tax. This legislation specifically brings into charge any payments in connection with the termination of an employment that are not otherwise taxable. It then provides relief in specific circumstances. This has always been a complex area of tax and the introduction of Class 1A NIC on payments of more than £30,000 and tax on “post-employment notice pay” has made it even more so. There are still planning opportunities available particularly around pension contributions. Professional advice needs to be taken at an early stage and it is important to have the correct settlement agreement in place. This is an area that HMRC have always targeted as part of employer compliance reviews but in the current climate they will be even higher on their agenda. It is also an area when expert knowledge can save expensive tribunal claims.

Construction Industry Scheme

While this scheme mainly affects construction companies, it also affects “deemed contractors” who spend more than £1 million per year on average over 3 years on construction work. There are certain exemptions for property that is used only for the purposes of the business. However, the scheme applies for construction work on any property that is:

- not used for the purposes of the business, such as where it is let for commercial purposes to a third party
- for sale or to let for example Housing Associations or
- is held as an investment.

Broadly under this scheme, the contractor or deemed contractor verifies a subcontractor's status with HMRC. The business will then either make the payment gross or deduct an amount on account of a sub-contractor's tax liability and pay it to HMRC. The contractor also provides information to HMRC monthly on what payments and deductions it has made. So, it is easy picking for HMRC to review these returns and seek additional CIS deductions from the contractor or deemed contractor. The main issues arising in this area relate to:

- failing to identify a business is caught by the rules
- failing to check whether PAYE and NIC rules apply, which take precedent over CIS
- failing to identify that a payment relates to construction operations frequently due to a disconnect between procurement and finance
- invoices not showing a labour element when there is one, for example, plant hire
- the cost of materials being inflated to reduce the tax deduction.

In a recent example, HMRC issued a letter demanding over £1 million pounds. With professional advice, this was reduced to £30,000 with penalties being suspended for two year on the basis that procedures were introduced to prevent the issue from recurring. Due to the commercial drafting of the contracts, this liability was also reduced by sums recovered from the sub-contractors.



This is only intended to give you a broad overview of these potential pitfalls it is not intended to be advice. If you need advice on any of these topics then please contact:

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