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money matters

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UP TO DATE DEVELOPMENTS IN TAX AND BUSINESS PLANNING

In this issue:

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Employment law makes waves

Some overtime pay now has to be included in most holiday pay, following an Employment Appeal Tribunal decision in November 2014. Under the previous rules, it was only necessary to take basic pay into account when calculating holiday pay.

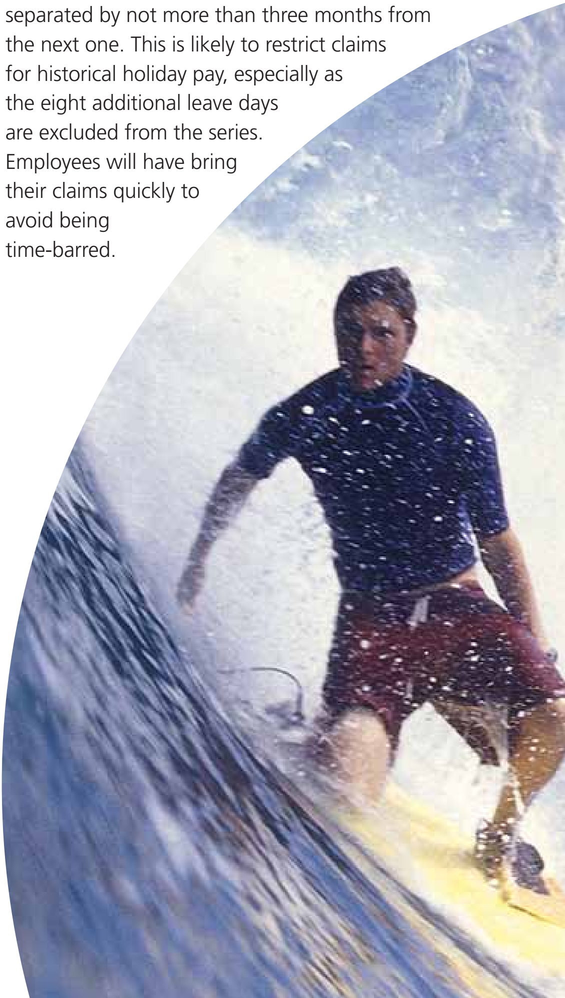
This follows an earlier ruling by the Court of Justice of the European Union (CJEU) that holiday pay should include commission and other elements of contractual variable pay such as shift allowances. That case involved a salesman who received a basic salary plus variable commission, which made up about 60% of his total remuneration. He therefore suffered financial hardship as a result of taking a holiday because he could not earn any commission while he was away from work. The CJEU said that the purpose of holiday pay is to put workers in the position they would have been if they had been at work.

The tribunal ruled that holiday pay should include pay for non-guaranteed overtime; this is overtime that an employee must work if asked, but which the employer does not have to offer them. It is not clear whether the ruling covers voluntary overtime – which the employee can refuse.

There is a complication because the decision only applies to the four weeks (20 days) of paid annual leave that employers have to provide under the Working Time Directive. Employers are still allowed to make payments at the lower, basic pay rate for the eight days of additional leave required under the Working Time Regulations 1998. This overturned an earlier decision that employees could choose which days would be covered by the Working Time Directive.

Backdated claims

Employees must make their claims for the extra holiday pay that they may be owed within three months of the underpayment of holiday pay, and there may be limits on the amounts of their claims for back pay. The tribunal ruled that a claim may include a series of earlier underpayments but each period must be separated by not more than three months from the next one. This is likely to restrict claims for historical holiday pay, especially as the eight additional leave days are excluded from the series. Employees will have bring their claims quickly to avoid being time-barred.



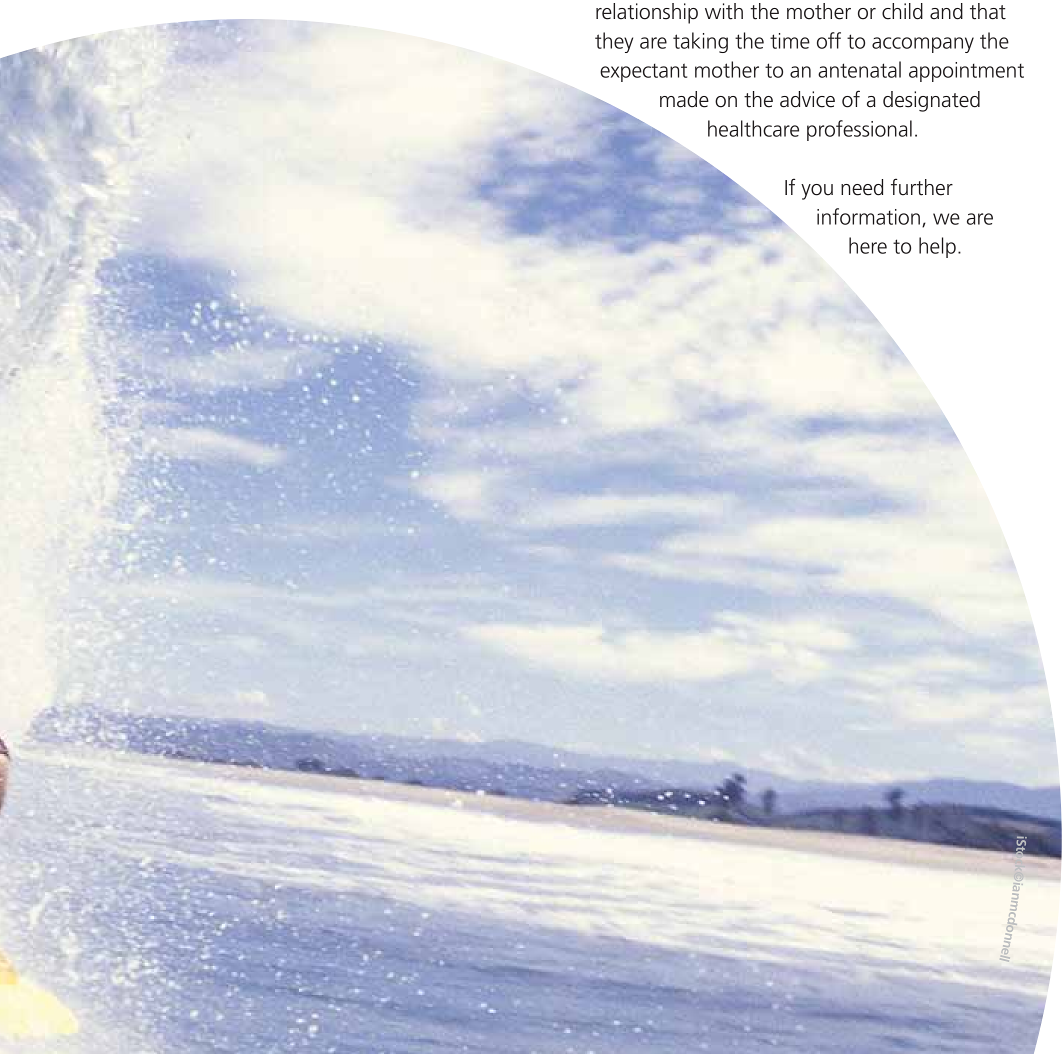
Future holiday pay arrangements

Employers should consider how they should calculate employees' holiday pay in future. Although there would be some cost saving, it may be awkward and inconvenient to pay a higher rate for the first four weeks of holidays than for subsequent days. One way to reduce the increased cost of holiday pay in the future might be to reduce the amount of overtime that they require employees to work.

Unpaid leave for expectant fathers

Expectant fathers or partners of pregnant women now have the right to unpaid time off during working hours to accompany their wife or partner to two ante-natal appointments, of up to six and a half hours each. The employer is not allowed to ask to see the appointment card, but is entitled to ask the employee to make a declaration stating the date and time of the appointment. Employees can also be asked to state in writing that they qualify through a relationship with the mother or child and that they are taking the time off to accompany the expectant mother to an antenatal appointment made on the advice of a designated healthcare professional.

If you need further information, we are here to help.



The Autumn Statement tax announcements

The 2014 Autumn Statement contained several tax surprises and turned out to have some of the characteristics of a mini-Budget.

Residential stamp duty land tax (SDLT) was restructured with effect from midnight on 3 December 2014.

Property buyers now have to pay a rate of duty on the portion of the purchase amount that falls within each band in much the same way as income tax.

The rates and thresholds have been adjusted. There is no tax on the first £125,000 of any residential property transaction and the rates then rise to 12% on the slice of value above £1.5 million. The net effect will be to reduce SDLT for 98% of homebuyers.

ISAs An unexpected announcement was that spouses and civil partners will be able to inherit their deceased spouses' or partners' ISA balances for deaths on or after 3 December 2014.

The balances will continue to earn tax-free returns. The details of how this will operate should be announced in due course.

Peer to peer (P2P) lending A new relief will be introduced allowing individuals who lend through P2P platforms to offset any losses from loans that go bad against other P2P income.

It will be effective from April 2016 and individual investors will be able to make a claim for relief on losses incurred with effect from April 2015.

Non-UK domiciled individuals who wish to use the remittance basis of taxation will have to pay higher charges if they have been UK residents in 12 out of the last 14 years or 17 of the last 20 years.

The government will also consult on making the election for the remittance basis apply for a minimum of three years.

Inheritance tax The government no longer plans to introduce a single settlement nil-rate band as it originally proposed. However, there will be new rules to target avoidance through the use of multiple trusts and simplify the calculation of trust taxation.

We are here to help so please get in touch with us if you need advice.

Restrictive covenants on employment contracts

Following a recent case, employers who require employees to sign a contract that restricts their activities after termination must make sure its terms are accurately drafted and well thought through.

Employers use restrictive covenants to stop former employees from engaging in activities that might compete with their business. Such clauses are usually unenforceable because they are a restraint of trade and are contrary to public policy, unless the employer can show that it has a legitimate interest to protect and has reasonable grounds for having this protection.

In a case that went to the Court of Appeal, a non-competition clause had been poorly drafted and, if it were read literally, it provided the former employer with no protection. An employee whose contract included a restrictive covenant had left his job and joined another company in a similar line of business. The company he had left tried to take out an injunction in accordance with the restriction to prevent the employee from joining the new company for one year after termination of his employment.

The clause in question prevented the employee from dealing with the former employer's products, rather than similar products. However the High Court decided to give effect to what were obviously the parties' intentions by correcting what it viewed as a drafting error. The Court of Appeal concluded that it would be correct to interpret an ambiguous clause in such a way as to give it a commercially sensible effect. However in this case, the meaning of the clause was clear and it was poor drafting that gave it no practical effect. The employment with the competitor therefore did not breach the clause.

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Restrictive covenants provide employers with a valuable way to protect their commercial interests but they can also have a potentially major impact on the freedom of former employees and can therefore be hard to enforce. In particular, the courts will reject blanket and excessive restrictions.

Legitimate restrictive covenants may prevent a former employee from competing with the former employer, dealing with or soliciting the former employer's customers or suppliers, or enticing away other employees. A restriction lasting more than a year is unlikely to be justifiable.

An employer taking on an employee subject to a restrictive covenant should take care not to induce the employee to breach the clause, because that would leave the new employer open to being sued.

All BETs are off

HMRC introduced its voluntary business entity tests (BETs) just two years ago with the aim of giving freelancers an idea of where they stand in relation to IR35. However, the tests have been heavily criticised and HMRC has decided to withdraw them from 6 April 2015. There are no plans for any type of replacement.

The BETs consist of 12 weighted questions and scores, with a low score indicating a high risk of being subject to an IR35 compliance check.

The problem is that many of the BETs are not particularly realistic. Some self-employed professionals class as medium risk despite clearly being outside the scope of IR35.

For example, the highest score is given for having employees responsible for bringing in at least 25% of turnover. Although many professionals obviously employ staff, these will often be secretarial or administrative.

It makes sense for small businesses to keep overheads to a minimum by working from a home office, rather than having separate business premises – so no score for that. And although many businesses suffer bad debts, these are unlikely to be more than 10% of turnover – so again no score.
From 6 April 2015, HMRC will not take the BETs into account if they open a compliance check. Should you be unlucky enough to be subject to an enquiry before then, HMRC will close this immediately if you have used the BETs and are in the somewhat unlikely position of achieving a low risk score.

They will then not open another enquiry for three years provided your circumstances do not change. This three-year period also applies where an enquiry has already been completed. Results and evidence relied on should be retained for at least the three-year period.

Of course the withdrawal of the BETs does not change the basic fact that the way to avoid IR35 is to show that you are working on a self-employed basis. Having an IR35-friendly contract is a good starting point, but it is essential that your actual day-to-day working practices match the contract.

For example, there is little point in having a substitution clause if it is never made use of. If you are working through an agency then the agency/client contract should be the same as your company/agency contract.

Unfortunately, in some cases it may simply be impossible to keep a contract outside the scope of IR35.

In this case, please contact us as soon as possible so that we can advice you on the tax implications.

The mansion tax debate continues…

The top end of the residential property market has been depressed by high rates of stamp duty land tax and may yet suffer from the annual 'mansion tax' proposed by both Labour and the Liberal Democrats if they were to come to power after the May election.

Leading Labour politicians have provided details of their current proposals, which seem to be popular with much of the electorate, although probably not those directly affected. The proposed tax would target high-value properties, more than 95% of which are situated in London and the south east of England. The suggested starting threshold of £2 million would affect around 100,000 homes. In contrast, Scotland and Wales combined currently have fewer than 1,000 homes worth more than £2 million.

The current suggested structure is a simple banded system possibly based around the annual tax on enveloped dwellings (ATED) which was introduced in 2013. ATED currently applies where property valued at over £2 million is owned within a corporate 'wrapper' or 'envelope', with higher annual charges applying for property values exceeding £5 million, £10 million and £20 million.

Details are lacking, but Labour has said that the annual mansion tax charge would be £3,000 for properties valued between £2 million and £3 million, with higher bands possibly set at £5 million and £10 million. The £2 million band would rise broadly in line with property values. Overseas owners of second homes in the UK might be required to pay proportionally more. Homeowners would be expected to make an assessment of their property's value for submission to HMRC. This would save the cost of an independent valuation, but it could lead to penalties being charged if HMRC were to dispute a valuation.

Labour is proposing a facility to help home-owners on a relatively low income – i.e. probably basic rate taxpayers. They may be able to defer paying the tax charge until the sale of their properties or earlier death. It is too early to speculate about what tax planning, if any, might be effective. One approach might be to avoid the purchase of a single expensive main residence, and instead buy a less costly property and use the spare cash for a holiday home.

Where there's a will there's a way

The intestacy rules in England and Wales have been changed. The changes do not apply to Scottish intestacy rules.

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Where there are no children, the rules now say that the surviving spouse or partner should receive all of the deceased person's estate outright. Previously, they would have received the first £450,000 plus half the remainder – and the other half would have been divided between the deceased person's other relatives.

If there are children, the surviving spouse or partner will receive the first £250,000 of the estate, plus half of the rest of the estate absolutely – and the other half will go to the children. Previously, the surviving spouse or partner was only entitled to the income for their lifetime from their half of the estate. After the surviving spouse's or partner's death, the children would have eventually received the capital.

The other main intestacy rules remain broadly unchanged; so, for example, if a person dies with no surviving spouse or partner, the children will receive all their estate. Where there are no children, the estate will pass to the deceased's parents. However, step-children and step-parents do not qualify as children and parents for the purposes of these intestacy rules.

The update does virtually nothing to address the situation of cohabiting couples. Unmarried couples have no automatic inheritance right to their partner's estate, even if they have children. Legislation to give rights to unmarried couples has been drafted, but it will not be enacted during the current parliament.

Many people might think that their estate is too small to worry about making a will, but with recent increases in property values this may have changed – especially as a much greater share now goes to a spouse or partner rather than to children. Inheritance tax is also an important issue.

Making a will can help with tax planning and we are here to help.

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