

UK: EMPLOYMENT UPDATE

In this Briefing we digest the consultations on proposed new 'Off payroll'/IR35 rules and restrictions on the use and misuse of confidentiality clauses in termination agreements and employment contracts. We also consider whether restrictive covenants may require updating in light of Brexit.

Non-disclosure/confidentiality agreements: consultation on prevention of misuse

The Government is consulting on what further limitations might be put on confidentiality clauses in both employment contracts and settlement agreements to ensure they cannot be misused and to clarify what they can and cannot cover.

In summary, the Government is proposing:

- to legislate that no confidentiality clause can prevent a person making any disclosure to the police. This will make it clear that, regardless of what a confidentiality clause says, a victim can discuss a matter with the police or report a crime without fear of reprisal under a confidentiality clause;
- a requirement that confidentiality provisions and the limitations on them are summarised in the written statement of particulars of employment ('Section 1 statements') that employers are currently obliged to provide employees whose employment is to continue for more than one month. Note that from 6 April 2020, there will be no minimum service requirement and the obligation to provide a S1 statement will be extended to workers as well as employees;
- a requirement that confidentiality clauses in settlement agreements also clearly highlight the disclosures that the clause cannot prevent the worker from making; for example, a protected 'whistleblowing' disclosure, reporting a criminal offence (or discussing any matter with the police), disclosing information to a court;
- that a confidentiality clause in a settlement agreement that does not meet the new wording requirements is made void in its entirety. In practice this would mean that an employee who breaches the confidentiality provisions of a settlement agreement could not be sued for doing so if the confidentiality provision was not drafted appropriately;
- if the confidentiality clause in a Section 1 statement does not meet any new wording requirements, there would be an enforcement mechanism via the employment tribunal. At present an employee may seek a declaration from the employment tribunal on the contents of their Section 1 statement to confirm, amend or substitute the written particulars. The tribunal is only able to award compensation for a missing or defective Section 1 statement if the employee has brought another specified statutory employment claim (e.g. unfair dismissal). In such cases the compensation is two or four weeks' pay subject to the statutory cap (currently £508 but rising to £525 from 6 April). Note the entire confidentiality clause in the employment contract will not be rendered void;
- a requirement that workers receive independent legal advice on the nature and limitations of any confidentiality clause in a settlement agreement, and the disclosures that a worker is still able to make, in order for the settlement agreement to be valid.

Key issues

- Non-disclosure agreements/confidentiality agreements: consultation on prevention of misuse
- New IR35/Off payroll working regime: consultation
- New tax year/New rates
- Brexit: restrictive covenants - do you need to update them?

Other ideas under consideration include:

- legislating to provide that confidentiality clauses cannot prevent disclosures to other (as yet unspecified) people or organisations – the consultation seeks views on who this would encompass;
- whether the Government should provide a specific form of wording to be used in settlement agreements and Section 1 statements; note this is not the Government's preferred approach.

At this stage it is unclear whether there will be any transitional provisions that will exempt employers from having to amend Section 1 statements for the existing workforce. If the Government mirrors its approach to the extended Section 1 statement regime coming into effect in April 2020 then employers will not have to 'repaper' the existing workforce; however, should an existing employee request an updated Section 1 statement, or the employee's terms change, the employer will have to produce one conforming with the new requirements within one month.

Also slightly unclear is whether the entire settlement agreement is rendered void if independent legal advice is not obtained on the confidentiality clause or whether it is only the clause itself that is void and unenforceable in such circumstances?

Employer action points

The consultation closes on 29 April, it is highly likely that new legislative provisions will be in place before the close of the year, and in all probability earlier. Employers should give thought to the following:

- what revisions will need to be made to settlement agreement language?
- what provisions need to be made to take into account the higher legal fees that employees will incur (and expect reimbursement for) in the termination context;
- what revisions will need to be made to confidentiality clauses in employment contracts and/or Section 1 statements?
- whether it is desirable and /or pragmatic to re-issue Section 1 statements to the entire workforce.

The Confidentiality Clauses Consultation closes on 29 April 2019. It can be found [here](#)

New IR35/Off payroll working regime: consultation

Following the May 2018 HM Treasury consultation on extending the IR35 legislation governing off-payroll working (IR35 Rules) to the private sector HMRC has launched a policy paper and consultation providing more detail on amendments that will be made to the existing IR35 Rules and how they will apply in the private sector.

The new IR35 Rules will come into effect on 6 April 2020 and will apply to medium and large organisations if an individual's services are supplied to them via an intermediary (e.g. a personal services company (PSC)).

The end user client will be under a new obligation to assess whether the IR35 Rules apply (i.e. whether the individual would be its employee for tax purposes (not statutory employment law purposes) but for the intermediary) and if they conclude that the rules apply the fee payer (usually the organisation paying the worker's PSC) must then deduct tax and employee NIC's from the fee (less permissible expenses) and pay employer NIC's.

Who is in scope?

The new off-payroll regime will not apply to small corporate and unincorporated entities. A company qualifies as "small" if it satisfies two or more of the following requirements:

- its annual turnover is not more than £10.2 million;
- its balance sheet total is not more than £5.1 million;
- it has no more than 50 employees.

The consultation is considering two alternative options for determining whether unincorporated entities are in scope: either (i) unincorporated entities with 50 or more employees, and, entities with turnover exceeding £10.2 million; or (ii) unincorporated entities that have *both* 50 or more employees *and* turnover in excess of £10.2 million.

Information obligations and dispute resolution

End user clients will be required to provide the off-payroll worker directly (as well as the party they contract with (for example, an agency or PSC)) with the employment status determination for each engagement, and where requested the reasons for the determination. This must be supplied by the time the contract starts or before the off-payroll worker starts to provide their services.

Clients will also be required to have a status disagreement process to resolve an off-payroll worker or feepayer's disagreements on its status determination based on a set of statutory requirements.

As a minimum the process will require consideration of evidence put forward by the off-payroll worker and/or fee-payer, advising the party of the outcome of that consideration and the reasons for that outcome; aside from these requirements however client organisations will be able to tailor the process to fit in with their wider business processes.

Miscellaneous implications for the fee payer

Where the IR35 Rules apply, the fee-payer will be treated as an employer for income tax, NICs and Apprenticeship Levy purposes and the worker will be treated as having an employment with the fee-payer.

Impact on employment status for other purposes

The consultation is quite clear that the IR35 Rules employment status determination will be for tax purposes only. It emphasises that there is currently no link between tax and employment rights and that it is not intended to consider the interaction between employment rights and being taxed like an employee. However, it concedes that the Government has consulted on aligning the employment status definitions across the tax and employment rights regimes and that detailed proposals will be published in due course. Accordingly it cannot be ruled out that further changes will have to be made to the new IR35 Rules in light of these developments.

Timeframe

The consultation closes on 28 May 2019; the new legislative regime will then be included in the draft Finance Bill to be published in the Summer with a view to implementation on 6 April 2020.

Practical issues

Organisations should give thought to:

- assessing whether they are medium or large companies/unincorporated entities falling within the new IR35 regime;
- auditing their current/future staffing arrangements to identify what use is/will be made of engagements with intermediaries, including PSCs and agencies that supply labour to them;
- assessing whether internal arrangements in relation to procurement, HR, tax and line management will need to be revised to ensure that comprehensive, joined-up processes will be in place to ensure consistency of approach in relation to employment status decisions, provision of status information and reasons and how status decision appeals are dealt with;
- current payroll software, process maps, HR and onboarding policies to assess if any changes need to be made;
- what amendments need to be made to consultancy and other contractual arrangements where the individual service provider is supplied by a service or other intermediary company where the arrangement will be in place on/after 6 April 2020; addressing for example:
 - whether a reference to the new regime should be included;
 - an explicit right to deduct and withhold tax;
 - a requirement for the PSC to provide sufficient information to enable service recipient to make the status decision;
 - an obligation to provide the off-payroll worker's National Insurance Number, tax code and relevant details to enable the right tax to be deducted; even though there is strictly speaking a legal obligation to provide this information in any event.

The HMRC Policy Paper and Consultation HMRC Policy paper and consultation: Off Payroll working rules can be found [here](#).

New tax year/new rates

2019/20 Statutory maternity, paternity, shared parental leave and sick pay rates

	2018	2019
Standard rate maternity/adoption/paternity/shared parental leave pay	£145.18	£148.68
Statutory sick pay	£92.05	£94.25

	April 2018	April 2019
Maximum amount of a week's pay*	£508	£525
Maximum statutory redundancy/basic unfair dismissal award	£15,240	£15,750
Maximum unfair dismissal compensation	£83,682 (or 12 months' salary if lower)	£86,444 (or 12 months' salary if lower)
Maximum combined compensation for unfair dismissal	£98,922	£102,194

* For the purposes of calculating a statutory redundancy award or unfair dismissal basic award.

These new rates will apply to dismissals that take effect on or after 6 April 2019.

Brexit: restrictive covenants - do you need to update them?

Whatever form Brexit ultimately takes employers may wish to consider the restrictive covenants in existing contracts of employment to assess whether they need to be updated. If for example non-compete covenants have a geographical application that includes the EU or the EEA and Great Britain is not separately identified as a restricted area in the covenant there is a risk that the non-compete clause will not apply to restrict competing activity in Great Britain.

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