

#118 HR Newsletter

April 2018

Holiday Pay Calculations

If monthly or weekly pay has regularly occurring additional payments (e.g. overtime, commission, shift pay, car allowance, bonus, attendance bonus etc.), they **must** be included into the calculation of a week's holiday pay if they occur regularly. **"Regularly"** means "happening more often than not", so if you look back over the previous 12 weeks – if the payment occurs in 7 or more times in the 12-week reference period, then it is "regular" for purposes of regulatory compliance.

IR35 Recent Developments

In 2 new developments regarding the IR35 (self-employed or employee debate) there has been 2 unusual revelations:

The first is at the BBC – where it appears that the Senior management "mandated and bullied" staff that they must use a Personal Service Company (PCS - a small limited company to offer their service to allow for future work with the BBC). Hundreds of BBC presenters and staff were 'coerced' into forming personal service companies to gain work at the corporation so that it could treat them as freelancers for tax purposes, a parliamentary commons select committee heard on Tuesday 20th March.

The Department for Digital, Culture, Media and Sport (DCMS) session examined witnesses who had given written evidence on the "very serious issue". Those who spoke included Money Box presenter Paul Lewis and Radio 4 Front Row broadcaster Kirsty Lang, who alleged that the BBC historically "pressured" them into forming PSCs to be offered work as contractors, rather than as employees.

This follows the HMRC investigation that concluded Christina Ackroyd, a BBC Look North presenter, had avoided tax by using this arrangement for the last 7 years and was fined her outstanding tax bill (reportedly £419,000).

The second is a construction worker deemed to have been self-employed by Courts (and not an employee). Quantity Surveyor, Mark Daniels, set up a PCS offering Quantity Surveying Services and was engaged through an introducing company (Solutions recruitment). He worked full time on night shift for an "end-user client" for 9 months.

In a tax tribunal, when Mark has appealed against a HMRC ruling that he was an employee, it was determined that the degree of control that the client actually had over Mark's work was too low for it to be actually classed as an employee and he only received a flat day rate, had no notice period, no holidays, or sick pay and no employee benefits... and hence was self-employed.

So the debate rumbles on - but the 10 key test questions appear still to be a very good test of establishing the relationship:

Test Questions

Main

	Self employed	Employed
1 "Mutuality of Obligation" - Is the company providing continuous work and the employee obliged to attend work and deliver it. This includes the right to refuse work if the person is too busy or does not wish to take on the work.	Right to refuse work	Obligated to do all the work
2 Does the person perform duties for other companies? The more other clients or companies the more they are classed as self-employed	Works for many other clients	Works for one company
Does the person carry financial risk in the undertaking as if they are running their own business?	Carries financial risk	Has no financial risk
3 Can the person supply a replacement to cover their work if they are ill, on holiday or are seeing another client? Is the relationship in reality with the person rather than buying a service	Yes, can supply a replacement	No - company will supply replacement
4 Does the company <i>control</i> how the work is done?	No	Yes

Supplementary

5 Is the person VAT registered for the service that they are offering?	Yes	No
6 Does the person pay their own income tax and NI (or is it deducted at source)?	Pay themselves	Deducted at source
7 Does the Company provide all the tools and material to complete the work?	No	Yes
8 Does the person hire their own helper to complete the tasks?	Yes	No
9 Is the work a finite task or project or ongoing requirement?	Finite	Ongoing
10 What is the nature of the written contract?	Contract for services	Contract of employment (Contract of Service)

NMW

The Government has named and shamed 179 employers for underpaying 9,200 minimum wage workers by £1.1 million. The employers were also fined a total of £1.3 million in penalties. The most prolific offending sectors this time were retailers, hospitality businesses and hairdressers.

Some Companies believe that they have been paying NMW correctly but fall into some traps and end up getting fined. The common traps are:

- **Care Sector.** If a care worker sleeps overnight in a residence – they must now be paid full NMW for that time (even if they are asleep for all of it).
- **Accommodation Offset.** If you provide accommodation for employees – there are statutory limits governing maximum deductions, and you cannot deduct more <https://www.gov.uk/national-minimum-wage-accommodation>
- **Annualised Hours.** If you pay staff a set monthly (fixed salary) - but they work variable hours based on the fluctuations of the business – you need to ensure that in any pay-month you have paid them at least their NMW for those hours - (the referencing period cannot be longer than a month and no longer 1 year).
- **Annualisation.** John Lewis were caught out when they used rounding factors of 52 weeks per year rather than the more accurate number of 52.14
- **Clothing #1.** If you require staff to purchase their own clothing (e.g. black shoes /black trousers) this needs to be “accounted for via a reduction in their hourly rate” and you must ensure that this reduction does not take them below the NMW. Many hospitality and retail chains have recently been caught by this issue.
- **Clothing #2.** If staff are required to wear a fashion houses own brands that they can buy (usually at a discount) this money also needs to be deducted from their reckoning to establish if they have been paid at least the NMW
- **Late Night Taxi.** If 'late night taxi' costs are deducted from wages – staff may fall under the NMW threshold – they need to be above this threshold AFTER these deductions.
- **Buying Football Tickets.** Football clubs who allow staff to buy tickets direct from their wages have also been caught falling foul of the NMW regulations.

These last 2 examples show that staff cannot use their net pay in payslip to buy Company goods – as this results in them being given less than the NMW – the way to avoid it is to allow them to pay for them in a separate manner (cash or cheque) but not via payroll.

Companies who are caught by these strict rules, must repay 200% of the underpayment back to the staff.