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What you need to know



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Calculating Strike Pay

How much pay should an employer deduct when staff lawfully strike for one day?

In the recent Supreme Court decision of *Hartley v King Edward VI College*, the Court determined that if teachers lawfully strike for one day, an employer should deduct 1/365 of annual pay.

In this case, the employer had made a deduction at 1/260 relying on the fact there were 260 working days in a year. The Supreme Court considered the evidence from the teachers that demonstrated that their work was not limited to time teaching and they regularly performed their duties during an evening, weekends and/or days of annual leave. Therefore, it was appropriate to have a deduction of 1/365.

The Supreme Court unanimously held that, unless contracts specifically state otherwise, any deduction of pay in relation to teachers taking lawful strike action must be at a rate of 1/365 of their annual pay, not 1/260 as the College had done in this case.

Taxation of termination payments

The current tax and National Insurance treatment of payments made on the termination of employment have received criticism for being too complicated.

Due to this, the Government has announced that change is on the horizon, and these changes are expected to take effect from April 2018.

What is the current position?

At the moment, employees who are paid a genuine termination payment for loss of employment, often via a settlement agreement, are entitled to receive up to £30,000 of that termination payment free from deductions of tax and National Insurance Contributions.

To qualify for the £30,000 exemption, the payment must be a genuine ex-gratia payment. In other words, not a contractual payment.

One area that often causes issues is payment in lieu of notice pay. Does payment in lieu of notice pay fall within the £30,000 exemption? The answer depends mainly on how the contract of employment is structured. If the employer reserves the right to pay in lieu of notice in the contract (what is often called a PILON), then the pay in lieu of notice will not fall within the £30,000 exemption and should be taxed. If there is no PILON clause, it will likely fall within the exemption and can be paid tax-free.

This would only not be the case if there were a custom and practice of paying in lieu. The reason for the difference is where there is a PILON, the payment is contractual. Where there is no PILON it is not contractual.

In our experience, many employers are not aware of this distinction. Some pay tax when they do not need to and others pay it tax-free when they should not.

What is staying the same?

The Government has proposed to keep the £30,000 figure as the tax-free limit for termination payments.

What is going to change?

From April 2018, HMRC is going to treat all contractual and non-contractual PILON's equally, which will take away the uncertainty.

In essence, this means that if you are paying an employee's notice period, such a payment will attract tax and National Insurance contributions irrespective of whether or not there is a PILON in the employee's contract of employment.

Currently, compensation payments in excess of £30,000 attract tax but not National Insurance contributions. From April 2018 this is proposed to change and any excess above £30,000 will also be subject to employer National Insurance contributions.

Also from April 2018, payments for injury to feelings will only be exempt from tax if they relate to a psychiatric injury or other recognised medical condition.

What do you need to do now?

The benefit that employers and employees can potentially currently receive from leaving out PILON clauses from contracts of employment will go once April 2018 rolls around, due to all PILON payments being treated the same from a tax point of view.

As a result of this, we would recommend that PILON clauses are included in all contracts of employment.

There are many benefits to including a PILON clause including the quick removal of an employee without risking a breach of contract claim. If you pay in lieu of notice without having a PILON, there is a technical breach of the employee's contract of employment as there was no contractual right to do so.

You must remember that, if an employee has restrictive covenants in their contract and you breach their contract, then they will effectively be set free from these restrictive covenants and so it is really important that you abide by their contract in this instance.

Always check termination payments

This note is only intended to be a summary of the rules in this area. When making termination payments it is always advisable to seek tax advice.

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