Regional Webinar Series: Recovery & Renewal: EMEA Tax Issues

Employee Tax Issues - COVID-19

9 June 2020
Agenda

1. GIG ECONOMY UPDATE - COVID-19
2. COVID-19 AND INTERNATIONALLY MOBILE EMPLOYEES
3. COVID-19 - CHANGING THE WAY EMPLOYEES ARE PAID?
4. CORPORATION TAX DEDUCTIONS- ANOTHER AREA FOR REVENUE ATTACK?
5. NEXT STEPS
Speakers

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Gig Economy Update - COVID-19
Gig Economy and COVID-19
Enhanced importance through the COVID-19 crisis and beyond

COVID-19 has highlighted the ability of workers to work remotely

Long term challenge to traditional employment models?

Economies are reliant on independent workers providing services – especially delivery services

But the taxation and legal position of workers is not altogether clear across Europe

Governments will be desperate to raise revenues
Potential areas

Labour law
- Claims from individuals for employment rights
- Relationship with workers

Tax law
- Tax authorities looking for additional revenue
- Historic liabilities
- Penalties and fines
- Could include social security contributions

Regulators
- Administrative offences, e.g., National Minimum Wage
- Labour enforcement agency
- Exclusion from public contracts

Public opinion
- Fair treatment of workers
- Damage to public image
Current uncertainty about application

Tax laws have not kept up with developing work patterns

Significant risk if companies get it wrong

Changing law

Facilitation of criminal offences

Worker / company dynamics

Views of workers may not be uniform

Shifting public opinion
UK Tax Position

HMRC...

is looking to increase revenue by tightening enforcement

is focusing on those that contract through intermediaries (personal service companies)

is introducing new rules that will apply from April 2021 that shift the compliance burden up the contractual chain.
Proposed Rules (Personal Service Companies)

Status Determination

Liability

End client

Status Determination Statement

PSC

Worker
UK Update

UK Government Updates Through COVID-19 Crisis

UK Government initially postponed reforms to personal services company rules—Query Corporate Criminal Offence if you know arrangements are wrong.

UK Government has now announced that it will press ahead with the personal service company reforms from April 2021 (despite objections from House of Lords).

Most outstanding HMRC investigations are put on hold— but expect focus on gig economy workers when HMRC reactivates investigations.

Expect general focus of UK Government on self—employed—misclassification risks for employers will increase.
France - Increased Focus on the Gig Economy Pre COVID-19

"Loi d'orientation des mobilités"
24/12/2019

Transparency, rights and social accountability

Gig workers’ rights:
- Work related accident insurance costs are borne by the platform;
- Access to training;
- Strike without being penalized;
- Access to data relating to their activity for the platform.

Platform charters:
Charter detailing social obligations of platforms towards gig workers:
- Non-exclusivity of the relationship;
- Right to refuse to accept a service
- Right to organize time schedules;
- Right to disconnect during working time without penalty;
- Right to obtain a decent price for the service;
- Right to know the quality of service expected and the monitoring methods.

The French Supreme Court censured the provision that compliance with the commitments made in the approved Charter cannot characterize a relationship of subordination.

French Supreme Court decision
20/12/2019
<table>
<thead>
<tr>
<th>Company</th>
<th>Date</th>
<th>Nature of Agreement</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Take It Easy</td>
<td>French Civil Supreme Court</td>
<td>28 Nov 2018</td>
<td>Contract was an employment agreement</td>
</tr>
<tr>
<td>Uber</td>
<td>Court of Appeal of Paris</td>
<td>10 Jan 2019</td>
<td>Contract was an employment agreement</td>
</tr>
<tr>
<td>Deliveroo</td>
<td>Labor Court of Paris</td>
<td>February 4, 2020</td>
<td>Contract was an employment agreement</td>
</tr>
</tbody>
</table>

2 criteria:
- Platform tracked the position of the rider via geolocation system
- Bonus / penalty ("malus") system used by the platform was equivalent to a power of sanction.

Driver was not free to:
- determine the conditions for providing transport service
- create own customer base
- set the price of the rides

Driver was controlled and could be disciplined.

Requalification of the relationship with Deliveroo driver as employment agreement.

Bonus / penalty ("malus") system used by the platform was equivalent to a power of sanction.

Deliveroo condemned for undeclared work (criminal sanction) and to pay indemnity of 30,000 € to the driver.
France - Next Steps

1. Group actions of Gig worker for a criminal claim for concealment of/undeclared work

2. Risk of audit of the platforms by social security and tax authorities to requalify the status into employment and ask for taxes and contributions for non-deduction at source and payment
## Gig Economy in Germany

### General overview: risks of misclassification pre and post COVID-19

<table>
<thead>
<tr>
<th>Labour law</th>
<th>Social security law</th>
<th>Tax law</th>
<th>Criminal law</th>
<th>Administrative offences law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Employment relationship with freelance service provider or his subcontractors</td>
<td>Retroactive payments of contributions for up to 4 years (30 years in case of intent)</td>
<td>Joint liability of employer and employee for wage tax</td>
<td>Failure to pay social security contributions and wage tax</td>
<td>Unlawful engagement of temporary staff</td>
</tr>
<tr>
<td>Retroactive obligation to pay salary or holiday</td>
<td>Late payment surcharge of 1% per month of the overdue amount</td>
<td>Repayment of wrongly claimed VAT (plus interest)</td>
<td>Incorrect deduction of VAT</td>
<td>Insufficient supervision</td>
</tr>
<tr>
<td>Also applies to managing directors</td>
<td></td>
<td></td>
<td>Failure to immediately correct discovered tax errors</td>
<td>Sanctions against the company</td>
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<tr>
<td></td>
<td></td>
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<td>Exclusion from public contracts</td>
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</tbody>
</table>
Gig Economy in Germany

COVID-19 relief: employees vs. contractors

- Grants due to COVID-19 up to EUR 1,500
- Grants in addition to short-time allowance, both made from 1.3.2020 until 31.12.2020

<table>
<thead>
<tr>
<th></th>
<th>Employees</th>
<th>Contractors</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tax allowance</td>
<td>✔️</td>
<td>✗</td>
</tr>
<tr>
<td>Tax deduction</td>
<td>✔️</td>
<td>✔️</td>
</tr>
</tbody>
</table>
Gig Economy in Netherlands

General overview: risks of misclassification pre and post COVID-19

- Personal obligation to perform the work
  - Contractor has to do the work himself
  - May not be replaced without consulting the principal

- Receive wages
  - Principal pays the contractor more than just a fee for costs that he incurs

- Relationship of authority
  - Principal decides how the contractor will execute the work

Or: deemed employment
(specifically designated groups, e.g., substantial shareholders, constructors of work, agents, artists, athletes etc.)

- Model agreements are provided through the Dutch tax authorities website (Wet DBA)
- OR submit the existing management agreement to the tax authorities for approval
Netherlands - Liabilities if your Company Misclassifies Workers

New Legislation & Wet DBA

- New legislation proposed (aim to go into force as of 1 January 2021);
- Measures at the bottom end of the labor market (minimum remuneration for independent contractors of EUR 16 per hour);
- Measures at the higher end of the labor market (independent contractors statements to opt-out for hourly rate of EUR 75 or more);
- Clarification of the term "relationship of authority" (gezagsverhouding); and
- A web module to assess whether the relationship qualifies as an employment relationship.

Law enforcement procedure

- Enforcement of the current rules is suspended;
- In principle, no fines will be imposed.
- Enforcement procedure is strengthened from 1 January 2020;
- Tax authorities will be able to enforce when clients do not (or insufficiently) follow instructions within a reasonable period of time;
- Fines and penalties may still be imposed in case of malicious intent and – as of 1 January 2020 – in case the withholding agent does not follow the instructions from the tax authorities.
# Netherlands – COVID-19 Relief: Importance of Difference Employee vs Contractor

<table>
<thead>
<tr>
<th><strong>Employee: NOW regulation</strong></th>
<th><strong>Contractor: Tozo regulation</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Employers who employ staff and expect a turnover loss can claim a compensation towards wages at a maximum of 90% of the wages, depending on how much turnover they lose.</td>
<td>Provides income support and / or a loan for business capital (maximally €10,157). The loan should be repaid but a delay of payment may be requested. Interest rate is 2%.</td>
</tr>
<tr>
<td>For employers who experience at least a 20% turnover loss.</td>
<td>For all self-employed professionals (independent contractors (ZZP), director-major shareholders (DGA), partners in partnerships, etc.).</td>
</tr>
<tr>
<td>Apply to Employee Insurance Agency (UWV).</td>
<td>Apply to Municipality of residence.</td>
</tr>
<tr>
<td>Additional <strong>conditions</strong> apply.</td>
<td>Additional <strong>conditions</strong> apply.</td>
</tr>
</tbody>
</table>
COVID-19 and Internationally Mobile Employees
Mobile Employees Working From Home Office

COVID-19: Impact on taxation

Permanent establishment

Withholding obligations

Allocation of taxation right

Tax residency
Mobile Employees Working From Home Office

Germany: COVID-19 relief measures

- Construction site
- Permanent establishment
- Withholding obligations
- Tax residency
- Allocation of taxation right
- Bilateral agreements with cross-border commuters
Mobile Employees Working From Home Office

Germany: Special tax arrangements during COVID-19

- Option: days at home office as days at regular place of work
- Recording obligation
- Short-time allowance: paying state

- Option: days at home office as days at regular place of work
- Recording obligation
- No impact on cross-border commuters
- Short-time allowance: state of residence

- Option: days at home office as days at regular place of work
- Recording obligation
- No impact on number of days of non-return
- Short-time allowance: paying state

- Option: days at home office as days at regular place of work
- Recording obligation
- Unactive, but paid days as regular working days
- Short-time allowance up to EUR 15k paid in Germany subject to tax in the Netherlands (tax exemption announced)

- In process of negotiations
Mobile Employees Working From Home Office
France: Special tax arrangements during COVID-19

A person shall be considered as French tax resident where this person:

- has in France his home ("foyer") or his main place of stay (this last part only applies to single taxpayers – i.e. not married, no civil union); OR
- performs in France his main professional activity, whether as employed person or not, unless it can be evidenced that this activity is of a subsidiary nature; OR
- has in France the centre of his economic interests

French tax code. article 4

March 19, 2020: Press release of the French Tax Administration

A temporary stay due to the lockdown in France or travel ban decided by the state of residence of the individual does not, by itself, meet a criteria for French tax residency under French domestic law.

Indeed, according to case law, temporary stays due to exceptional circumstances shall be disregarded for the determination of tax residency pursuant to article 4 B of the FTC (Conseil d'Etat, November 3, 1995 n° 126513)
March 19, 2020: Press release of the French Tax Administration

A temporary stay due to the lockdown in France or travel ban decided by the state of residence of the individual has no consequence on the tax regime applicable to the cross-border employee.

Effective as of March 14, 2020 and still applicable to this date.
## Netherlands

### Cross-border workers

- Working from home can impact tax and social security status of employees living in one country and working in another:

<table>
<thead>
<tr>
<th>Employees who are now required to work from home</th>
<th>salary split</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Tax consequences</strong></td>
<td><strong>Social security consequences</strong></td>
</tr>
<tr>
<td>More income now allocated for taxation to home country</td>
<td>Main rule: &gt;25% home-work leads to social security in home state</td>
</tr>
<tr>
<td>May lead to loss of Dutch qualifying taxpayer status (i.e. loss of personal deductions)</td>
<td>17 March 2020 Agreement Netherlands – Germany, and 18 March 2020 Agreement Netherlands – Belgium: 'Corona home-work' does not impact social security status</td>
</tr>
<tr>
<td>Compensation rule under Belgian and German tax treaties may mitigate disadvantages</td>
<td>Dutch unilateral rule: 'Corona home-work' does not impact social security status within EU, EER and Switzerland</td>
</tr>
<tr>
<td>10 April 2020 Agreement Netherlands – Germany and 4 May 2020 Agreement Netherlands – Belgium: 'Corona home-work days' may also be taxed in usual working country</td>
<td></td>
</tr>
</tbody>
</table>
Mobile Employees Working From Home Office

UK: COVID-19 relief measures

- Permanent establishment
- Withholding obligations
- Tax residency
- Allocation of taxation right
- Bilateral agreements
- SRT + self-isolation

COVID-19 related activities
COVID-19 - Changing the Way Employees are Paid?
Due to the COVID-19 crisis, it is now especially important for businesses keep their employees involved with their company.

As such, cash salary/bonus reductions are less than ideal from a strategic HR perspective.

An advantageous alternative for employers and employees is implementing employee equity plans:

- By reducing cash flow issues, companies may be able to reduce the need for redundancies;
- Share awards lessen the disadvantages of having a cash salary reduction.

- As awards of shares can be made at a time when the share price is historically low, there is a prospect of increased benefit to employees, if and when there is a recovery;
- Share awards foster an identity of interest between companies and their employees;
- Unlike most furlough schemes, employees can carry on working during the salary reduction plan;
- Share awards can be subject to vesting requirements, acting as a valuable retention tool;
- Certain tax planning opportunities exist in various jurisdictions, such as:
  - Awards can sometimes be structured so as to delay the tax point until e.g. vesting, thereby further reducing immediate cash flow needs caused by tax withholding requirements.
  - Certain awards of shares may not attract employer social security contributions, leading to a direct reduction in employer costs;
  - Also, it may be possible to offer employees to buy shares at a taxable discount now, and enjoy the expected future value increase under a relatively low-rate capital yield tax.
Paying Employees in Shares

Cash flow crisis

Pressing need for most companies to preserve cash

One tool that companies have at their disposal is to pay employees (especially executives) more in shares.

Plans can include:

- paying bonuses in shares
- an agreement to reduce salary in return for the award of shares
- an agreement to use salary to acquire shares
- an award of shares to employees who have had a cash reduction
Paying Employees in Shares

Areas to Consider

1. Overall strategy and programme
2. Award terms
3. Employment law implications are key
4. Sourcing of shares
5. Corporate law and securities laws
6. Tax - see below for key considerations
7. Employee communications and consent
8. Administration

Corporate law and securities laws

1. Overall strategy and programme
2. Award terms
3. Employment law implications are key
4. Sourcing of shares
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6. Tax - see below for key considerations
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Paying Employees in Shares

Tax Considerations

- Effective salary reduction needed
- Types of awards – international consequences
- Tax withholding and employer social security
- Corporate recharge/ tax deductions
Corporate Tax Deductions - Another Area for Revenue Attack?
Corporate Tax Deductions

Another area for Revenue attack?

UK - The UK has a generous automatic corporate tax deduction regime - but HMRC will challenge deductions that fall outside the regime - HMRC challenging full deductions where net settlement is used?

Germany - in principle, the local employing entity may only deduct expenses related to the awards if it has borne the factual economic burden of such expenses and the expenses relate to its business (i.e., the costs are not caused by the parent-subsidiary relationship). If awards are settled with treasury shares, it is still disputed whether the "loss" realized from transferring treasury shares to an employee at a price below market value (and acquisition cost) is tax deductible.

France - A tax deduction should be available if the Company uses treasury shares / shares purchased on open market to satisfy French qualified RSU vests / Stock-Options exercises and recharges the local entity for the cost of acquiring the shares (i.e. the purchase price).

Netherlands - in principle, it is impossible to claim a corporate tax deduction for equity-settled employee equity incentives in The Netherlands. Cash-settled equity incentives however may qualify for such deduction, provided certain conditions are met. Therefore, Dutch companies often consider implementing a so-called \textit{same-day-sale} clause in their employee option plans. Such clause typically stipulates that the shares are sold immediately at exercise of the options: consequently, the employee in principle only receives an amount in cash, thus normally qualifying for the corporate tax deduction.
## Conclusion and next steps

### Gig economy and COVID-19
- The 'new normal' often was already here: working remotely has become all too common.
- But the underlying tax system is only now being updated in many countries.
- The trend seems to be toward a qualification as a regular employee, rather than as an independent contractor.
- Keep a close eye on legal changes that are now being introduced in your jurisdiction(s).

### COVID-19 and internationally mobile employees
- The OECD has provided clarifications on how to deal with internationally mobile employees under tax treaties.
- Many countries have also concluded bilateral agreements, e.g. in case of border workers.
- But many jurisdictions also have local rules in place, e.g. for social security purposes etc.
- Again: keep a close eye on legal changes that are now being introduced in your jurisdiction(s).

### COVID-19 - changing the way employees are paid?
- Due to the COVID-19 crisis, it is now especially important for businesses to involve their employees in their company.
- Introduction of employee participation may be beneficial: both for companies to improve their cash-flow position, and for employees because of the relatively low share value ("the only way is up").
- Also, tax benefits may be available provided careful advance planning is undertaken.

### Corporation Tax Deductions - another area for Revenue attack?
- In their quest for revenue maximisation, the tax authorities may well consider reducing tax deductions for i.a. equity-settled employee incentive schemes.
- In certain jurisdictions this deduction is already repealed.