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Ireland: Posted Workers Directive

Background

On July 28, 2016, Ireland transposed EU Directive 2014/67/EU (the “Directive”) into law, which enforces the EU Directive 96/71/EC concerning the posting of workers through the European Union (EU) Posting of Workers Regulations 2016 (the “Regulations”).

The aim of the Regulations is to ensure that workers posted to Ireland can avail of a greater level of employment law protections and have the ability to enforce the rights that posted workers are entitled to, if breached. A “posted worker” is an employee who is:

- Sent by his or her employer to carry out duties of his or her employment for a temporary period of time, and
- In another EU member state where they will be relevant to EU-based employers with posted workers in Ireland, as well as Irish employers with posted workers at their EU operations.

It will also be relevant for contractors and subcontractors alike.

The directive itself outlines specific situations that fall under its regulations and covers a vast range, which should be examined to determine if the service provider has an obligation.

The key measures that are being introduced in the Regulations from an Irish perspective include:

Notification to the Irish Workplace Relations Commission (WRC): On posting workers to Ireland, EU-based service providers must notify the WRC of the postings and provide certain information, such as the identity of the service provider, the anticipated number of posted workers, and some other key details related to the postings. The notification must be in English and in a prescribed format.

The service provider must also designate a location to the WRC, whereby it will hold and make available information related to the posted workers, including details of the terms and conditions of employment, pay slips, timesheets, and proof of payment of wages. The service provider should also designate a contact person to liaise with the WRC for document requests.

Changes to the posted workers' original postings must also be communicated to the WRC on a timely basis.

The WRC will issue an acknowledgment to the service provider, where it receives a declaration that it is in compliance with the regulations.

The notification to the WRC is in addition to any work permit requirements that may be applicable.

The Regulations do not specify a minimum duration for postings before the obligation to notify the WRC arises. Consequently, even though it may not be the intended target of the Regulations, strict compliance may require a declaration to be made for short-term (including same-day) business travelers whose activities fall into one of the specific situations mentioned within the directive.

Introduction of subcontracting liability: This new regulation seeks to ensure that direct employers pay posted workers in the construction industry the applicable statutory minimum rates of pay. If the subcontractor does not pay the applicable minimum statutory rates, the main contractor can be held liable for any shortfalls despite not being the direct employer of the posted workers.

However, there is an option for contractors to remove any liability where any claims for nonpayment of statutory rates of pay arise. The main contractor may claim this defense of due diligence if they can show that they have taken all reasonable steps to ensure that the subcontractors have complied with the Regulations by requesting a copy of the acknowledgement of the subcontractor's declaration to the WRC; a list of all persons employed including details, such as a Personal Public Services Number, date of birth, and details of posting; and a written assurance from the subcontractor that the worker will be paid.

Deloitte's view

The above regulations are based on EU legislation and, therefore, will have wide-ranging scope.

It is vital that EU-based employers posting workers to Ireland comply with their obligations relating to posted worker; failure to comply is a criminal offense, and a breach can result in a potential fine up to a maximum of €50,000. If a corporate body commits the breach, then its directors can be held directly liable.

Irish-based employers should also ensure that they comply with the local notification requirements if they are posting workers to other EU countries.

If you would like to find out more about this matter, please contact myself or our senior manager of Immigration Services, Roisin Fitzpatrick.

URL: <mailto:rfitzpatrick@deloitte.ie>

We offer a range of services designed to assist clients in complying with their Irish obligations in this regard.

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Global Rewards Updates: South Africa: New tax directive application form introduced for employee share plans

Highlights of the new guidance

In South Africa (SA), a tax directive must generally be obtained from the South African Revenue Service (SARS) before any tax withholding is operated against gains from share plan awards (*i.e.* remuneration).

Effective June 30, 2017, a new tax directive form should be used. The new form is called the IRP3(s) form, which is available on the SARS website and should also be available on e-filing systems. This replaces the use of the IRP3(a) directive application form, which was previously used for such applications.

Summary of what you need to know

- Going forward, the IRP3(s) form needs to be used for all tax directive applications related to employee share based compensation.
- There are a number of new fields on this form (discussed further below) which may create complexities during completion. This complexity is especially noticeable where plan participants are tax resident in SA and seek relief from taxation under the foreign services exemption, *i.e.* section 10(1)(o)(ii).
- The form does not cater for circumstances where there are either multiple vesting periods or multiple awards with a taxable event on the same day and section 10(1)(o)(ii) applies. For example, if a plan participant has multiple grants, and those grants have tranches which vest on the anniversary of grant, it is possible that at least one tranche from different grants will vest on the same day. In such cases, a separate IRP3(s) should be obtained for each tranche which is vesting, and the taxable wages realized from each tranche. However, as only one IRP3(s) form can be submitted per day, a practical work around may need to be considered.
- The entity who has the PAYE liability employer needs to declare that all information on this form is "true and correct in every respect" in order for the directive to be approved. The employer may be held responsible if the information is found to be incorrect. This requires that employers know:
 - Which section of the Income Tax Act applies to the award;
 - Whether the participant is tax resident in SA or not; and
 - The exact details of the movements of the participant to accurately apply the section 10(1)(o)(ii) exemption (if applicable).

Details of the new IRP3(s) form

The new IRP3(s) has a number of new fields that companies need to be aware of, specifically:

- An indication of the reason for the directive application needs to be given. This requires that companies understand exactly which section of the Income Tax Act is applicable to the payment. The options are as follows:
 - Revenue gain in terms of section 8A;
 - Revenue gain in terms of section 8C;
 - Dividend treated as remuneration in terms of par (dd) of the proviso to section 10(1)(k)(i);
 - Dividend treated as remuneration in terms of par (ii) of the proviso to section 10(1)(k)(i); or
 - Dividend treated as remuneration in terms of par (jj) of the proviso to section 10(1)(k)(i).
- It needs to be indicated whether the foreign service exemption in terms of section 10(1)(o)(ii) is applicable. If so, the following fields are also required:

Description	Limited space
The start and end date of the qualifying 12 month period(s) where the section 10(1)(o)(ii) exemption applies	Up to 5 periods may be indicated
The total number of work days and the number of work days spent outside SA during each of the above 12 month qualifying period(s)	Up to 5 periods may be indicated
The start and end date of the sourcing period relating to employee share plans (revenue gains in terms of section 8A and 8C)	Only 1 period may be indicated
The total number of work days and the number of work days spent outside SA during the sourcing period	Only 1 period may be indicated

- The gross value of the gain should be indicated.
- The exempt amount of the gain needs to be completed, based on the formula indicated on the form. This formula apportions the gross gain between the work days spent in and out of SA.
- The taxable portion of the gain should then be indicated.

Therefore, the new form prescribes the calculation to use in order to determine the taxable gain. This differs from the old IRP3(a) directive form, which merely required that the taxable gain be indicated, without showing the calculation used to derive this taxable gain.

Deloitte's view

- Based on the above minimum requirements indicated on the new tax directive application form, companies are expected to keep detailed and accurate information relating to the tax residency and movement of participants. This is likely to increase the administrative and compliance burden for companies in relation to employees' tax.
- This directive application form does not cater for instances where multiple sourcing periods exist or where multiple awards have a taxable event on the same day. In such cases, practical workarounds may need to be considered.
- The requirement in the new IRP3(s) form to use work days in calculating the apportionment of the gain to include in taxable income is not specified in legislation. Previously, it has been acceptable to use either calendar days or work days to determine the portion of the gain to include in taxable income.
- It would likely not be acceptable to indicate that the section 10(1)(o)(ii) exemption does not apply where it actually does as this may result in the employee being over taxed and the incorrect amount being reflected on the year end employees' tax certificate (IRP5) issued by the SA employer. In our experience, this overstatement of tax generally would not be able to be rectified on the employee's individual income tax return without the IPR5 being corrected and a new directive application form being submitted with the correct fact.

Contacts

For assistance in this matter, or any other issue related to the operation of your global rewards plans, please contact your local Deloitte Global Rewards consulting services advisor or the Deloitte Global Reward team in South Africa.

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