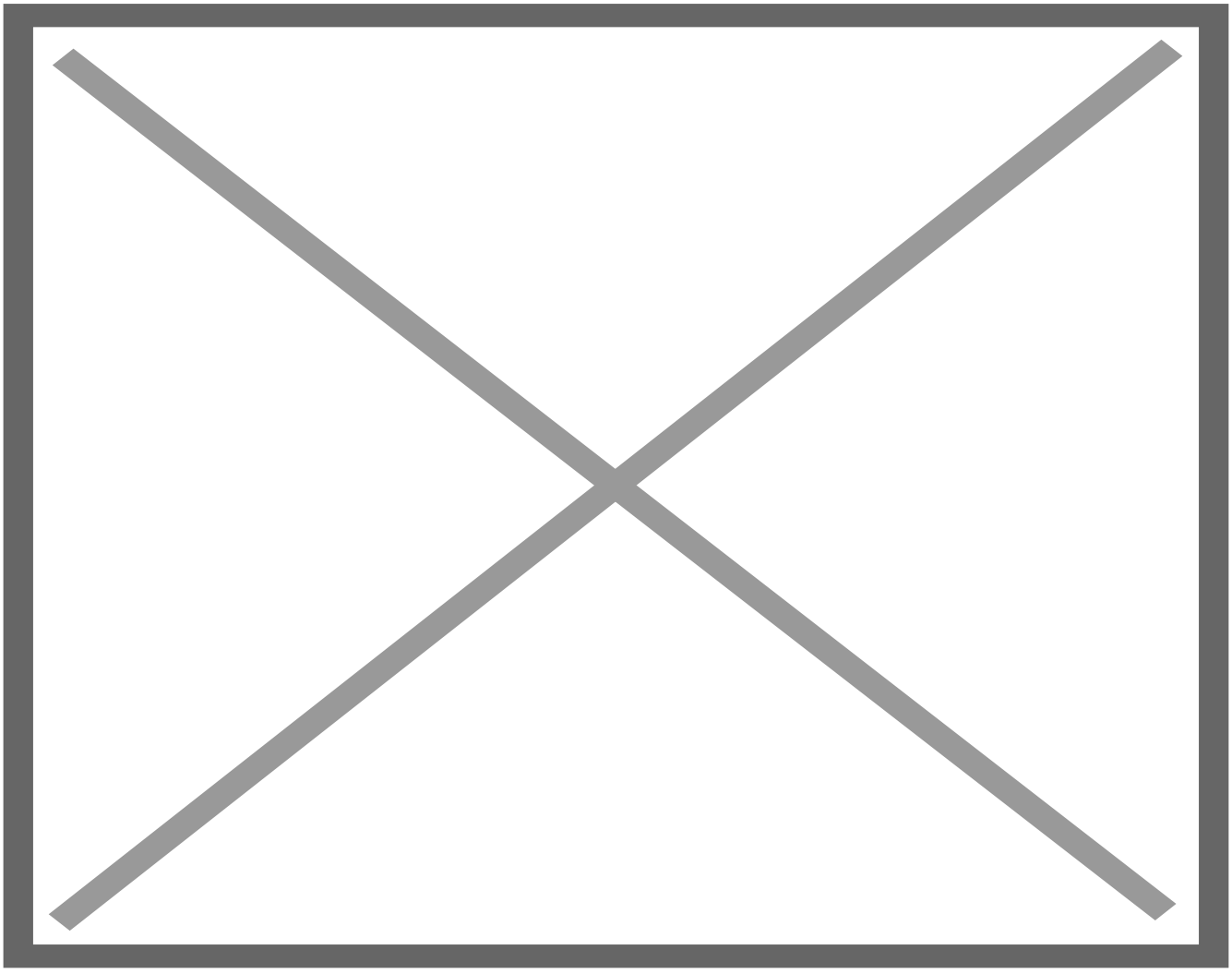
Relaxed workers

Employment Tax



01 March 2016

Stephanie Symonds-Dye considers a welcome update on short term business visitors

Key Points

What is the issue?

Short term business visitors from overseas branches of a UK company or from non double-taxation treaty countries are not eligible for the PAYE relaxation provided for under the Appendix 4 (STBV) agreement

What does it mean to me?

Employers must withhold PAYE on a real-time basis for employees performing substantive work in the UK who are not covered under an Appendix 4 agreement. HMRC has released a new special PAYE arrangement, which relates specifically to individuals unable to meet the conditions of the Appendix 4 agreement

What can I take away?

Employers with short term business visitors meeting the special arrangement criteria should apply for the new arrangement with HMRC as soon as possible. Although calculations and returns need not be submitted until 19 April after the end of the tax year to which the agreement relates, the signed agreement needs to be in place by 5 April 2016 for any employer wishing to use the arrangement for the 2015/16 tax year. Employers would be well advised to allow a reasonable time for HMRC to process any application

For many years UK employers have been using HMRC's Appendix 4 agreement on short term business visitors (STBV). It allows a relaxation of the PAYE withholding requirements associated with particular short term business visitors working in this country for UK entities. For host employers, it is a more pragmatic solution when making Real Time Information (RTI) submissions to HMRC.

As Steph Carr explained in 'Just visiting', *Tax Adviser*, September 2015, the Appendix 4 agreement is strict in its application. The conditions state that the employee in question must be present in the UK for no more than 183 days in any 12-month period, must come from a country with which the UK holds a double taxation agreement (DTA) and also that the employment income article of that DTA is expected to apply to the employee's remuneration. The agreement therefore does not cover employees visiting the UK from countries with which the UK does not have a DTA. Nor does it normally apply to those who are engaged by an overseas branch of a UK company because they are employed ultimately by a UK entity, legally and usually economically too.

As a result, for individuals who are not covered by an Appendix 4 agreement, HMRC expects employers to withhold PAYE on a real-time basis for any remuneration on any workdays performed in the UK. The only exception is if the individuals are employed by non-UK entities but, despite working in this country, they are not 'working for' any UK host employer. In practice, most UK entities that are aware of business visitors to the UK from companies in the same group will not attempt to distinguish employees in this category in case HMRC later disagrees.

Practical considerations

Employers are faced with a deluge of practical issues when managing their short term business visitor populations.

First, simply identifying visitors working in the UK on a real-time basis is in itself a challenge. I have seldom seen this done successfully without the support of business traveller technology; often, companies will identify these individuals by accident or, at tax year end when general travel and expense data is reviewed. Many of these visitors will not enter the UK on a formal assignment so will not typically even be visible to the employer's global mobility function. Consequently, employers often have to formally disclose them to HMRC after the tax year has ended. This approach can invite significant payroll penalties and can damage the employer's risk profile and relationship with HMRC.

Second, when a business traveller is identified, the employer must quickly determine their taxable income. The difficulties in this process should not be underestimated, and employers can find it difficult to collate global payroll data at tax year end, not to mention on a real-time basis. Dealing with different payroll systems, languages and time zones can turn this task into a significant project. It can also be especially problematic when dealing with countries for which the concept of ‘personal’ income tax is unfamiliar, as will be the case for many non-DTA jurisdictions such as UAE and Brazil.

Finally, employers must then set up these visitors on their payrolls and complete the forms and submissions for each of them. Often the HR data required for this is not readily available because they are not UK employees with UK HR records, delaying matters further. Employers can bypass this issue to an extent by using an Appendix 6 Modified Payroll agreement. This is available only if the business visitor is ‘tax equalised’ which in itself requires careful consideration because the associated gross-ups are likely to increase the tax costs.

The new special arrangement

In October 2015 HMRC released a new special PAYE arrangement, which relates specifically to individuals unable to meet the conditions of the Appendix 4 agreement. It is a welcome addition to the suite of ‘relaxations’ HMRC offers employers for short term business visitors and expats more generally.

The rules

The special arrangement specifically covers business visitors from non-DTA countries and those working for overseas branches of UK companies. Since the expectation is that remuneration from UK workdays will be taxable, interestingly the new arrangement focuses on workdays rather than days of presence as would be required under the Appendix 4 agreement, which is considering a DTA-based test. The special arrangement can be used for visitors who spend 30 workdays or fewer in the UK each tax year. As with the Appendix 4 agreement, non-resident directors of a UK entity are excluded from the arrangement, and would therefore be subject to the normal PAYE withholding requirements.

Workdays

Employees who visit the UK from a non-DTA country must perform ‘substantive’ rather than ‘incidental’ work for the benefit of the UK company to attract a UK PAYE withholding requirement. We saw in Carr’s article that ‘incidental work’ would not attract a PAYE withholding requirement. Employers should bear in mind that the definition of incidental duties in case law is extremely narrow, and is interpreted and applied equally narrowly by HMRC in practice. Proving after the event that the duties undertaken were preparatory in nature, of lesser importance than day-to-day duties and served no independent purpose is enough of a challenge to provide a powerful disincentive.

HMRC appears to be taking a stricter approach in relation to incidental duties and it may request business calendars, email records and conference materials to test the exact nature of the work performed. With mobile phones and tablets allowing employees to work remotely and flexibly, it is becoming easier for employees to perform substantive work away from their home office and almost without appreciating they are actively working.

For employees who visit the UK from branches of a UK company, employers do not need to establish whether the work is for the benefit of the UK enterprise, given the ultimate employer is based here. However, the same

considerations for incidental versus substantive work would still apply.

The benefits

The new arrangement relaxes the employer's requirement to withhold PAYE on a monthly basis and submit RTI returns. Instead, it allows them to defer the reporting and withholding required for the business visitor until the tax year end. This removes much of the administrative burden and offers a more generous window in most cases for employers to calculate the final tax liability for the tax year in question.

It also gives the employer time to prepare payroll and HR personnel for such a time-consuming process. Finally, it allows employers more time to manage and accrue for the costs associated with any tax liabilities ahead of these being incurred, which is often an area of internal friction and can affect profitability.

Unless the employee is tax equalised, I understand HMRC does not seek a tax gross-up on withholdings under the special arrangement (other than on benefits in kind), even if these are not recovered from the individual business visitor. This again reduces complexity and provides employers with more scope to manage this process correctly without excessive costs.

Self-assessment compliance obligations

HMRC has indicated that tax return filings will not typically be required for these business visitors, assuming the amounts paid at year end are accurate. Although this lifts a layer of self-assessment administration, it may pose additional challenges for the taxpayer when considering potential foreign tax credit claims in their home country. This is because some countries may request sight of a UK tax return as evidence of the UK tax payment rather than accept payroll withholding records. If the UK tax involved is more significant, employers may wish to support their employees to undertake a cost benefit analysis to determine the best course of action in terms of any additional reporting needed.

Summary

Short term business visitors continue to be a significant area of interest to HMRC. With employee movement fundamental to any successful multinational, the monitoring and administration required to ensure compliance for short term business travellers is ever-increasing. HMRC's new special PAYE arrangement is welcome. It offers a practical solution to non-DTA business visitors and it provides employers with a realistic solution to ensure compliance.

The special arrangement can be agreed with HMRC for the 2015/16 tax year onwards, so employers should seek approval from HMRC before 5 April 2016.

Further information

Read Steph Carr's article '*Just visiting*'.