



# Insight

December 2008

## Human Capital (Employment)

### Maternity leave – no sacrifice?

Salary sacrifice ("SS") can be a key method of saving tax, a particularly attractive option in the current economic climate. However, a recent change in law giving women extended rights to benefits during maternity leave has highlighted a common misapplication of SS rules. Women whose expected week of childbirth commenced on or after 5 October 2008 are entitled to receive the contractual non-cash benefits they were receiving prior to maternity leave not only during ordinary maternity leave (OML) (weeks 1-26) as was the case previously but also now throughout additional maternity leave (AML) (weeks 27-52).

#### How does SS work in relation to Statutory Maternity Pay (SMP)?

A SS is where an employee foregoes part of her salary, usually in exchange for the employer providing a non-cash benefit. This can produce savings for both employer and employee where the benefit can be provided free of income tax and/or National Insurance contributions.

There is a common misconception that SS operates as a deduction from the employee's salary to pay for the relevant benefit, rather than a reduction in that salary. The difference is more than technical - a salary of £40,000 from which £1,000 is deducted to pay for benefits is still a salary of £40,000. A salary of £40,000, which has been reduced by £1,000 for that purpose, is now a salary of £39,000. An existing SS arrangement will reduce a woman's higher rate SMP as it will reduce the Average Weekly Earnings upon which SMP is calculated, ie, her basic salary. However, the benefits provided under the SS arrangement are treated in the same way as any other benefits to which the employee is entitled under her employment contract, i.e. must be provided during the maternity leave period, and the employer is not entitled to make deductions from SMP to fund the benefits. In other words, employers may have to provide the extra benefits offered under a SS arrangement during maternity leave even though they cannot make any corresponding deduction from the SMP paid – the higher rate figure is reduced by being based on a lower basic salary but the lower rate is a fixed figure.

#### To deduct or not to deduct?

...that is the question and one that some employers are getting wrong during maternity leave by calculating SMP based on the pre-sacrifice salary and then deducting from the SMP the salary that has been sacrificed. This has also led them to believe that if there is insufficient SMP from which to deduct, they no longer have to provide the relevant benefit, which is an incorrect application of the law. This issue is particularly common in relation to pension contributions. Pension contributions provided under a SS arrangement are "employer's contributions" and the

employer is obliged to continue to make them during paid maternity leave without deduction from SMP. Another common example is child-care vouchers, which, if provided through a SS arrangement, must also continue to be provided during maternity leave without deduction from SMP.

#### It's no sacrifice?

For mothers receiving only SMP, it will generally be advantageous to continue on the reduced salary and receive the non-cash benefit(s) for the duration of her maternity leave rather than return to the higher salary and forfeit the benefit(s). It is after all only the first six weeks of maternity leave where SMP is affected by the lower salary as thereafter the mother is on a flat rate of SMP and the extra benefits are effectively free. Employers should also bear in mind that similar circumstances may arise in the case of employees on long-term sickness leave.

#### So are there any solutions for employers?

- Cease SS altogether for all employees. However, it would be poor logic to forego the financial benefits of SS simply to save some costs in respect of employees on maternity leave.
- End the SS arrangement for the employee prior to maternity leave with their agreement. But employers cannot end the SS arrangement unilaterally and fully informed mothers are unlikely to agree, as SS can be an attractive option during maternity.
- If employers provide at the outset that the SS will automatically cease when maternity leave begins, they should be aware that this will constitute sex discrimination. Similarly where employers instead remove the mother's opportunity to alter her SS choices during maternity leave, this again runs a risk of sex discrimination if other staff could vary them in this period. Employers may consider changing the times when employees can change their benefits (ie, only every one or two years) to avoid the risk of frontloading benefits before maternity leaves.
- Where an employer is offering contractual maternity pay (ie, over and above SMP), it should ensure that the terms of its policy clearly allow for the amount of contractual maternity pay to be based on the reduced post-SS salary and for appropriate deductions to be made from contractual maternity pay so long as this does not eat into SMP.

For further information please speak to your normal contact in the team or **Patrick Ford**, Senior Associate in Tax Strategies on 0161 830 5014.

**Forthcoming legislative proposals:** In the Queen's Speech on 3 December the Government set out its legislative plans for 2009:

- **Right to request time off for training:** Employees with more than 26 weeks' service will have the right to request time off for relevant training from 2010. The right will be modelled on the existing right to request flexible working. Broadly speaking, employers will be able to turn down a request if there is no good business reason for agreeing to it. Employers will not be obliged to pay for the training and there will be Government funding available.
- **Equality Bill:** Apart from the consolidation of all discrimination legislation into one Act, the Bill includes proposals to: extend age discrimination legislation to the provision of goods, facilities and services; ban wage "secrecy clauses" in employment contracts; enable Employment Tribunals to make recommendations that will benefit the wider workforce (rather than just the individual who brought the claim) and help prevent similar types of discrimination happening again; allow the Equality and Human Rights Commission to conduct

a series of inquiries in sectors where there is clear inequality. The financial services and construction industries will be looked at first - with the financial services inquiry looking at the alleged culture of sex discrimination including harassment and sexual exploitation, and the absence of diversity in the leadership of the sector. The proposals do not include a requirement for employers to carry out equal pay audits - which had been mooted at one point.

- **Trade union equality representatives:** There will be funding to support the development of 'trade union equality representatives' - who will work with both employees and employers to create a "fairer" workplace, for example, negotiating new flexible working patterns.

The extension of the right to request flexible working patterns to parents with children up to the age of 16 will also go ahead as planned in April 2009.

**Season's greetings from the Human Capital (Employment) Department.**

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