

Alert

HMRC Limited Liability Partnerships Review — Treatment of Salaried Members

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HM Revenue & Customs (“HMRC”) has published draft legislation and guidance¹ in relation to “disguised employment” in UK limited liability partnerships (“LLPs”). This draft legislation and guidance is intended to implement the proposals set out in HMRC’s consultation document² published on 20 May 2013. The new legislation is scheduled to be effective from 6 April 2014 and will tax as employees certain individual LLP members who are in substance employees of the LLP despite being admitted as members of the LLP (“Salaried Members”).

HMRC appears to have taken a much more restrictive approach in the draft legislation and guidance than was anticipated based on the provisions of the consultation document.

Broadly, a member of an LLP will be a Salaried Member (and taxed as an employee) if all of the following three conditions are satisfied:

1. The member performs services for the LLP and the reward for the performance of those services is fixed or, if variable, is variable without reference to or is in practice unaffected by the overall amount of the profits or losses of the LLP. HMRC’s draft guidance clarifies that, in order to avoid this condition being met, amounts payable to a member must be determined by reference to the overall profitability of the firm — amounts calculated by reference to a member’s personal performance or by reference to objective performance criteria of the individual member (for example, the performance of their own “book”) will not be sufficient to avoid this condition being met.
2. The member does not have significant influence over the affairs of the LLP. This is required to be significant influence over the business as a whole — influence over specific matters, such as voting for the LLP’s management committee or to approve the accounts, will not be sufficient to avoid this condition being met. The draft guidance also makes clear that where an LLP has a management committee which effectively runs the LLP, only those members who are on the management committee will be regarded as having significant influence and non-management committee members are potentially Salaried Members (if they also meet the other two conditions).
3. The member’s capital contribution to the LLP is less than 25 percent of the compensation which the member receives from the LLP in the relevant year by way of fixed or variable income from the LLP for the tax year as described in Condition 1. The intention is that members will not be able to avoid

¹ See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/264620/4_Partnerships.pdf.

² Partnerships: A review of two aspects of the tax rules: <https://www.gov.uk/government/consultations/a-review-of-two-aspects-of-the-tax-rules-on-partnerships>.

Salaried Member status under this condition unless they have made a significant investment in the business (at least 25 percent of their income from the LLP for that tax year) so that they have a real risk resting on the success or failure of the business.

On the basis of this published draft legislation and guidance, it would appear that many UK LLPs with “junior members” who receive profit shares based upon their own personal performance or who do not have significant influence over the affairs of the LLP would be at risk of Salaried Member categorisation. In this case, the amounts received by the Salaried Member would be treated as employment income subject to the applicable employment income tax rules, including deduction of income tax and employee’s national insurance contributions under the Pay As You Earn (PAYE) system and the requirement for the LLP, as the deemed employer, to account for the 13.8 percent employer’s national insurance contributions based on the deemed employment income of the Salaried Member.

The Salaried Member rules will be applicable only to UK limited liability partnerships and not to general partnerships or to limited liability partnerships formed under the laws of jurisdictions outside the UK, even if they are operating in the UK. However, where a US investment manager has structured its UK-affiliated entity as a UK LLP, the new rules will be applicable to amounts received from that UK LLP by the members of the UK LLP, if those members are deemed to be Salaried Members.

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