HRTorQue Reporter

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Should you require any further detail on any of these topics, please feel free to contact us at info@hrtorque.co.za

1) Second Revised Draft Disaster Management Bill

Author: Dave Beattie

The Second Revised Draft Disaster Management Bill was issued by Treasury on 19 May 2020. Due to the time sensitive nature of the amendments for payroll it was imperative that National Treasury and SARS assist the Payroll Authors Group of SA by issuing the amended requirements that would impact on payroll.

In the latest Bill three of the Employment Tax Incentive (ETI) requirements are deemed to be retrospectively effective from 1 April 2020. The result is that the ETI values that have already been calculated for April in terms of the 1 April Bill must be recalculated by applying the 19 May formulas to the April employee data. The value of the ETI calculated in April for April in terms of the 1 April Bill, will differ from the ETI value calculated in May for April in terms of the 19 May Bill for the following reasons:

The 1 April Bill proposed:

- An extra ETI amount of R 500
- That the ETI value for the three extended age groups must not be grossed down if there are less than 160 employed and remunerated hours in April.

The 19 May Bill proposed:

- An extra ETI amount of R 750
- That the ETI value for the three extended age groups must be grossed down if there are less than 160 employed and remunerated hours in April.
- That the '1 October 2013 employment start date' qualifying test is deleted from 1 April until 31 July.

The ETI total for April that is recalculated in May according to the 19 May Bill can be either more or less than the ETI total originally calculated for April according to the 1 April Bill.

The challenge to the administrator dealing with the submission for the monthly EMP 201 returns is the fact that there has been a change in benefits and that an adjustment would need to be made in the May payroll. The difference between the two ETI totals must be applied to the EMP 201 as follows:

- If the ETI total calculated in May for April is more than the ETI calculated in April for April, then the additional amount can be added to the normal ETI total for May in the May EMP 201
- If the ETI total calculated in May for April is less than the ETI total calculated in April for April, then the April EMP 201 must be adjusted to reflect the lesser ETI total.

PAGSA is discussing with SARS the issue of the late payment penalty and interest that would be levied if the adjustment explained in scenario 2 was made (to the April EMP 201).

Any adjustment to the ETI totals would also have an impact on the tax certificates. The recalculated ETI values for April must be allocated correctly to the monthly ETI tax certificate fields. If this is not correctly done, the tax certificate amounts will not reconcile with the EMP 201 and EMP 501 totals when tax certificates are submitted to SARS for the 2020 mid-year tax certificate submissions and reconciliations.

Finally, one additional ETI matter that has an impact on the minimum wage qualifying criteria. Section 4(1)(b) of the ETI Act requires that the employee's wage must not be less than R 2 000 per month, or the grossed-up value of the employee's wage if employed and remunerated hours are less than 160 hours must not be less than R 2000 per month.

This section has been deleted by the changes in the May 19 Bill and this change will be in effect from 1 May 2020 to 31 July 2020. After this deletion though it was not clear whether or not the employees of that employer qualified in terms of section 4 if there is no wage regulating measure and the National Minimum Wage Act does not apply. SARS after consultation with PAGSA has confirmed that an employer that is not subject to a wage regulating measure and that is exempt from the National Minimum Wage Act is not eligible to benefit from the Employment Tax Incentive.

We are working in times of unprecedented change. Traditionally legislation takes at least a year to pass through the various consultative processes before it is ready for promulgation. In this case we are looking at a compressed consultative process and legislation amendment process. The pressure on payroll companies to make programming changes has been relentless. The timing of legislative changes could not have been worse though. At this point we expect that in a lot of cases changes in ETI claims for April and May, may only happen in June. Whilst we welcome any Government concessions, one has to question why these COVID-19 concessions have had to be so technical and difficult to implement.

2) Employment Tax Incentive – Significant Risk for Employers for April and May 2020

Author: Jonathan Aitken

On the 19 May the national treasury released the second draft of the Disaster Management Tax Relief Bill. We want to highlight a critical issue for employers that may pose significant risk to them where they claim Employment Tax Incentive.

The 19 May amendment followed the first amendment published on the 1 May. While the Amendment covers a variety of relief measures our concern is with the Employment Tax Incentive (ETI) measures.

Specifically, the challenge we have is that the 19 May amendment changes some parts of the ETI calculations and backdates these to 1 April. The backdating is problematic because it means the calculations apply to April payrolls which are already closed and EMP201s have already been submitted and also to May payrolls most of which are closed (albeit EMP201s for May might have not been submitted as these are due on the 5 June).

The two specific challenges are:

1. The re-introduction of the minimum wage/wage regulatory measure/R2,000 pro rata minimum validation check. This excludes some employees from claiming depending on their pay and hours worked for the month;
2. The introduction of a new tranche in the new category (people older than 29, past their 24 month claims period, employed prior to 2013) of ETI claimants. For calculations below R2,000 these are now done on a sliding scale where previously it was a fixed amount below R4,500)

What is the problem?

The problem is that many employers will have incorrectly claimed ETI in April and May and more importantly, because of the latest changes, over claimed. We don't yet know SARS's position but there is a risk that they charge penalties and interest for these overclaims.

There is an additional risk at the end of the recon period in August that individual tax certificates don't tie up to payments made each month and fail SARS validation checks.

There is a further risk that depending on the EMP201 submitted, SARS refunds carried forward ETI, the payroll systems don't know this and then this ETI is claimed again resulting in further overclaims.

Software Developers Position

In most cases employers are unaware of this risk and reliant on payroll software providers. However, it is impossible for software developers to predict the future. There is no way they could design software to look at the 19 May changes and then back date them for periods already closed. All they can potentially do is provide guidance to clients to

correct it themselves, but this will probably not be available before the 5 June and even if available soon thereafter will not solve the problem.

What Can be Done?

We were aware of this risk in April and for our clients we ran a manual analysis (based on the rules we were aware of at the time) to make sure none of our clients over claimed as we knew the system calculations were not up to date. We intend to run a similar analysis in May and inform our clients, but of course there may also be clients who now did overclaim in April because of the changes in May. We will then do our best to rectify these and minimise the impact where possible. We will then have to do a manual final true up in June when all the rules are finalised and assuming no further changes. The net impact is to minimise but not eliminate all risk to clients. There is nothing further we can do.

For those who are not our clients we recommend doing a similar process to limit the damage. You cannot rely on your payroll software providers to solve this for you – it is not possible as they don't have all the variables.

3) TERS Update

Author: Jonathan Aitken

Temporary Employer Relief Scheme (TERS) benefit claims proved to be extremely challenging in April with the practical application of the legislation changing on a number of occasions and the UIF website crashing on occasion.

It was hoped that May applications would be better. However, the website only opened for May applications in very late May and while there are some promising signs with new questions being posed by UIF, there continue to be some practical challenges which employers need to work through. There is still a level of uncertainty and risk in making applications and employers need to be cautious.

Some points to note include:

- There was a rumour that the UIF would be only paying funds directly into employees' bank accounts even if employers had advance funded employees through the May payroll. Thankfully the system still allows you the option of selecting where the funds are paid…
- It was clear from April submissions that if you are part of a larger group with the same UIF number, or if you are part of a bargaining council but not all employees are members, then the employer needs to be careful in making one submission themselves (rather than individually for each company or separately for the bargaining council and no bargaining council employees as neither would work)
- The UIF website now asks some specific questions to employers. It is important that the employer has thought through how their TERS application ties up with their communication and practical implementation with employees:
    - Confirmation of April's submission by the employer:
        - Employee/s did not work, or any amount paid was deemed to be leave income/an advance by the employer
        - Employee/s did work and received remuneration and any excess above normal salary refunded to UIF by the employer
        - Employee/s did work and received remuneration and full amount paid by UIF paid over to employee
    - Please confirm you have the following document available to make the submission:
        - Bank Confirmation Letter
        - Signed Approval/Acceptance Letter for April
        - Proof of TERS Payment to Employees for April
        - Refunds to the UIF (if applicable)
    - For May 2020, are the salaries and remuneration during lockdown for the employees still the same as in April 2020? (Note: if you answer Yes to this be careful because the application automatically submits and you have no further ability to change anything)
- The "Leave Income" field which has caused so much confusion has been amended for May to be "Remuneration for work to be done in May 2020 (excluding leave income or payment in advance". While more helpful than April there is still no legislative guidance on what this means. Expert opinion suggests an employer should be clear with employees what is happening and should include in this column only remuneration for actual hours worked as opposed to any leave pay, taxable advances (to provide remuneration to employees in anticipation of the TERS benefit) or income where no work has been done. But be aware because there is no practical guidance there is still risk here for employers.

Overall, probably our biggest concern with TERS is the potential interpretation the UIF may take in future where employers have claimed where their business has been impacted by Covid-19, but where they struggle to show clearly that they have faced partial closure. We fear this may come back to bite employers who may have been too aggressive in their interpretation in this space.

4) Government COVID-19 tax concessions

Author: Dave Beattie

The impact of the COVID-19 pandemic has had far reaching implications on the South African economy and businesses, big or small. The true spirit of South Africans has come to the fore though and we have seen general society and Government quickly respond to deal with the hardships that have quickly become evident. Government has implemented various concessions to assist with the alleviation of the cash flow burden that tax compliant small to medium sized businesses may suffer arising as a result of the COVID-19 outbreak. The following concessions will be for a limited period of four months, beginning 1 April 2020 and ending on 31 July 2020:

- Deferral of 35% of the payment of PAYE liability, without SARS imposing administrative penalties and interest thereon.
- The deferred PAYE liability must be paid to SARS in equal instalments over a period of 6 months commencing on 01 August 2020, i.e. the first payment must be made on 07 September 2020.

Treasury has proposed the following changes to the qualifying criteria for the Employment Tax Incentive scheme during this concession period:

- The Maximum ETI claimable per qualifying employee is increased to R1 750 in the first year of employment and to R1250 in the second year of employment.
- Employers to be allowed to claim an ETI amount of R750 for employees who are between the ages of 18 and 29 years and are no longer eligible for ETI as the employer has claimed ETI in respect of those employees for 24 months (First new category).
- Employers to be allowed an ETI amount of R750 for employees who are between the ages of 30 and 65 years who earn less than R6 500 (Second new category) and
- The payment of ETI reimbursements to be made monthly instead of twice a year.

Provisional Tax has been addressed by the provision of the following concessions:

- Deferral of the portion of the first and second provisional tax payments to SARS, without SARS imposing administrative penalties and interest for late payment of the deferred amount.
- The first provisional tax payment (due from 01 April 2020 to 30 September 2020) to be based on 15% of the total estimated liability and the second provisional tax payment (due from 01 April 2020 to 31 March 2021) to be based on 65% of the total estimated liability.
- The deferred amount must be paid when making third provisional tax payment (top-up) to avoid interest being charged.

The requirements to be met for the above proposed tax relief are as follows:

- Annual turnover not exceeding R100m
- The company must be fully tax compliant (No outstanding returns, no outstanding tax debt other than a debt of less than R100 suspended debt or debt subject to the instalment payment agreement.

A Skills Development Levy (SDL) holiday was introduced in the second wave of concessions. From 1 May 2020, there will be a four-month holiday for SDL contributions (1% of total salaries) to assist all businesses with cash flow. All employers who are registered for SDL will automatically qualify for the SDL payment holiday. The zero amount SDL liability will be defaulted on the relevant EMP 201 returns.

The tax deductible limit for donations (currently 10% of taxable income) will be increased by an additional 10% for donations to the Solidarity Fund during the 2020/21 tax year. Therefore, there will be a limit of 10% for any qualifying donations (including donations to the Solidarity Fund in excess of its specific limit) and an additional 10% for donations to the Solidarity Fund.

The 20% tax-deductible limit for donations will apply only to donations made during the 2020/2021 tax year. Any donations over the limit made during the 2020/2021 tax year will be carried forward and deemed to be a donation made in the succeeding year of assessment (2021/2022) and be subject to the 10% limitation in that year.

The donations thresholds have also been increased at payroll level. Employers can traditionally factor in donations of up to 5% of an employee's monthly salary when calculating the monthly employees' tax to be withheld. An additional

percentage that can be factored in up to 33.3%, depending on the employee's circumstances - will be provided for a limited period for donations to the Solidarity Fund.

This will ensure that the employee gets the deduction that is in excess of 5% much earlier than under normal circumstances and will therefore not have to wait until final assessment to claim a potential refund, provided the donation is made to the Solidarity Fund.

However, it is important to note that a final determination must still be made upon assessment as the employee may have other income, deductions, or losses that impact the final taxable income before the deduction of donations.

If these concessions are utilised effectively the cashflow injection into companies will go a long way to assisting such entities get through these trying times. The concessions must be managed correctly though as any slip ups could cost the company in terms of penalties and interest.

5) Casual workers UIF registration

Author: Jonathan Aitken

One of the common mistakes we have seen through the TERS submission process is many employers not registering their casual workers for UIF. The legislation stipulates that any employee who works for more than 24 hours in a month must contribute to UIF. Where employers have not registered and contributed for these casual workers, the casual worker cannot claim UIF. This creates risk for the employer where the casual worker brings a claim against the employer because they are unable to receive their benefits.

6) Registration for UIF with the Department of Labour

Author: Jonathan Aitken

It has been eye opening to see how many employers had correctly registered with SARS for PAYE, UIF and SDL, but had not been registered for UIF with the Department of Labour for UIF, or had been registered, but had not been sending monthly UIF declarations.

Initially this caused huge angst because these employers' TERS applications were being rejected. Fortunately, UIF has allowed employers to show they had made payment, so they didn't lose out. However, the next step post TERS will likely be short time working UIF applications where the UIF credits built up by employees will be relevant and these UIF declarations (and history) will be critical for employees to claim.

A linked registration we also see consistently being missed by smaller employers in particular is the WCA/COID registration (required by all employers) and the filing of the annual return of earnings to the Compensation Fund. There will be some pain here particularly if an employee is infected and is then unable to claim from the Compensation Fund because the employer is not registered and/or not in good standing.

7) Potential challenge – new directive by Department of Health – vulnerable employees

Author: Jonathan Aitken

The Department of Health issued a new directive in late May to protect vulnerable employees from Covid-19 infection. While well intentioned the directive has the potential to offer some employees a way to get out of doing any work while still being paid. We have reproduced the directive and then look at this risk and how to mitigate it.

What is our concern?

In summary the directive creates quite onerous obligations for employers and requires employers to look after vulnerable employees (including the elderly, late pregnancies and severely obese employees) and provide them with an opportunity to see a doctor about their comorbidity vulnerabilities. This may end up in the doctor recommending the employee remain at home and/or take sick leave while requiring the employer to continue paying a salary while on sick leave and continue paying any medical aid benefit. Given the nature of some employees this seems to us to be an ideal opportunity for shirkers to be paid for doing nothing where the circumstances don't warrant it. We would therefore recommend employers either work through a company appointed doctor so they can control the process

or alternatively provide the employee with a detailed description of the safety precautions being taken at the workplace for presentation to the doctor (also requiring the doctor to confirm by signing that they have read the precautions). Feel free to contact us to discuss.

Note: non-compliance with the directive could be seen as non-compliance with the OHSA Act which carries some potentially quite stiff penalties for managers in their personal capacity.

In relation to the actual requirements of the directive:

What does the directive say? (source: Ministry of Health)

Who is a vulnerable employee in the context of COVID-19?

Section 5, subsection 5 (d) and (e) of the Regulations issued in terms of section 27(2) of the Disaster Management Act, 2002, specifically requires employers to adopt "special measures for employees with known or disclosed health issues or comorbidities, with any condition which or may place such employees at a higher risk of complications or death if they are infected with COVID -19; and "special measures for employees above the age of 60 who are at a higher risk of complications or death if they are infected with COVID-19."

COVID-19 is a new disease and there is limited information regarding individual risk factors for an infected person with complications and needing higher levels of medical intervention. In order to minimise the adverse consequences of COVID-19 on selected persons, employers should implement a process in identifying employees who:

- are at high-risk of developing severe illness from COVID-19; or
- reside with or care for persons that are at high-risk for severe illness from COVID-19 (including family members, aged parents etc.)

The major categories of vulnerable employees include:

1. *60 years and older*
2. One or more of the underlying commonly encountered chronic medical conditions (of any age) particularly if not well controlled:

- chronic lung disease: moderate to severe asthma, chronic obstructive pulmonary disease (COPD), bronchiectasis, idiopathic pulmonary fibrosis, active TB and post-tuberculous lung disease (PTLD)
- diabetes (poorly controlled) or with late complications
- moderate/severe hypertension (poorly controlled) or with target organ damage
- serious heart conditions: heart failure, coronary artery disease, cardiomyopathies, pulmonary hypertension; congenital heart disease
- chronic kidney disease being treated with dialysis
- chronic liver disease including cirrhosis

3. Severe obesity (body mass index [BMI] of 40 or higher)
4. Immunocompromised as a result of cancer treatment, bone marrow or organ transplantation, immune deficiencies, poorly controlled HIV or AIDS, prolonged use of corticosteroids and other immune weakening medications
5. >28 weeks pregnant (and especially with any of co-morbidities listed above)

Assessing a vulnerable employee

1. The employee should be assessed by his/her treating doctor, or, in the event that a worker cannot afford such costs, the employee should be assessed by a doctor, at the expense of the employer (noting the doctor-employee confidentiality) and preferably one who has insight into the workplace and its processes.
2. The doctor should provide a confidential note to the employer, indicating the presence of any of the above conditions, <u>without specifying the diagnosis</u>. Should the employee have a condition not listed above, which in the opinion of the doctor renders this employee vulnerable a motivation would be necessary. The treating doctor should refrain from commenting on the employee's fitness to work.
3. The doctor should ensure that the employee's health condition is fully optimized, which may include:
    - recommending flu vaccinations (and pneumococcal vaccine where appropriate)
    - INH prophylaxis for workers as stipulated in the Department of Health's guidelines
    - continuous advice on maintaining compliance with treatment plan
    - the employee has adequate supply of chronic medication for up to 6 months
    - advise the employee not to delay getting emergency care for their underlying condition
    - advise employee to maintain ongoing health consultations if they have any concerns

- ensure that the employee has access to psychosocial support for new onset or exacerbation of pre-existing mental illness

Protecting and managing vulnerable employees in the workplace:

1. Employers should have a clear and transparent policy and appropriate procedures to address the specific needs of vulnerable employees beyond the workplace risk control measures for all employees. These policies and procedures should be based on legislative provisions specific to their sector.
2. These measures need to take into account the individual circumstances of the employee in relation to their work environment and activities and would include:

2.1 Ensuring that potential exposure to the SARS-CoV-2 virus by this employee in their current job is eliminated or reduced such that the risk for infection is substantially minimised

2.2 If potential exposure cannot be eliminated or reduced, then the employer, in consultation with the relevant employee, should explore other ways of temporary workplace accommodation to prevent the risk of infection. These accommodations should be granted based on optimal utilisation of the employee's skills/competencies, without a reduction in benefits and accompanied with adequate training where appropriate:

- alternative temporary placement / redeployment to a different role and responsibility which has a negligible risk for transmission
- restriction of certain duties (not allowed to perform high risk procedures)
- protective isolation (e.g. providing a dedicated, clean office, etc.)
- provision of specific PPE appropriate to the risk of the task/activity identified in the workplace risk assessment and adherence to PPE usage protocols
- stricter physical distancing protocols (including staggering of shifts), barriers or additional hygiene measures
- limit duration of close interaction with clients, colleagues and/or the public reducing external risks (use of public transport) by providing alternative transport arrangements where feasible

2.3. If the above steps are not possible, then consideration should be given to allowing the employee to work from home if able to do so, and the necessary equipment, internet access, etc. is available

3. Leave procedures:
   - temporary incapacity, for the period of the COVID-19 epidemic, may be motivated by the treating doctor /occupational medical practitioner on the grounds that workplace accommodation is not possible
   - should this not be possible the employee should be able to utilise his/her sick leave if appropriate, as advised by the treating doctor/occupational medical practitioner
   - should sick leave be exhausted, the employee should be able to utilise his/her annual leave if an employee's working time is reduced or temporarily stopped due to operational reasons (workplace functioning at 50% of capacity), an application can be made to the Department of Employment and Labour for the TERS benefit (COVID-19 temporary relief scheme)
   - where applicable the eligibility of the employee to receive additional company benefits and/or UIF (may be topped up by TERS benefit) should be considered
   - unpaid leave is not recommended and if contemplated, should be the last resort

4. Ensure employee's existing health benefits are ensured:

   - maintain all employer-related medical aid benefits for employees already eligible for benefits until the employee is deemed eligible to return to work

Return to work (RTW) and incapacity management of the vulnerable employee post COVID-19 illness

- ensure adequate worker's compensation claim (WCA/COID) processing and rehabilitation if exposure was work-related
- ensure that any sick leave related to a workplace-acquired COVID-19 related illness is managed under COIDA procedures
- employees with mild illness (not requiring hospitalisation) should complete the mandatory 14 days isolation and return to work
- employees that have been hospitalised due to COVID-19 prolonged illness and complications should be assisted by the employer to ensure RTW integration

- a fitness to work medical evaluation should be performed in those with moderate to severe illness by an occupational medical practitioner/specialist and occupational therapist, where appropriate, to assess the presence and degree of clinical deficits (e.g. lung function impairment) and health problems related to ICU (muscle weakness, memory and concentration problems, mental ill health) since these employees may require prolonged work adjustment
- rehabilitation may be recommended by the occupational therapist and other allied health professionals as appropriate

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