HRTorQue Reporter

November 2020

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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) Abuse of the Employment Tax Incentive Scheme

Author: Jonathan Aitken

In conjunction with SAICA, the South African Institute of Tax (SAIT) urges its members to be cautious of structures created to take advantage of the Employment Tax Incentive (ETI) Scheme where the nature of the relationship between the employer and employee is not a real one.

The article and further detail can be found at this link.

The article draw attention to one structure which roundtrips cash to enable a party to take advantage of ETI and also claim skills development points for BEE.

These structures have now come to the attention of Treasury so please beware as these "ghost employee" structures will be investigated. Ultimately it will be the employer who feels the pain rather than any advisor who facilitates it.

Abuse of the incentive will also likely lead to its closure which will impact those employers who do need it to support employment. It will also discourage government from introducing similar incentives.

2) Employer's ability to recoup training costs

Author: Douw van der Walt

Employers will in the course of employment spend money and time on the development of their employees. This development can range from new employees being assigned work buddies or the employee being enrolled on specialised courses or further tertiary education. The actual cost to the employer can be expensive.

This often places employers in a difficult situation when the employee decides to leave their employ, as the employee has acquired skills at great expense to the current employer and then leaves to ply their trade elsewhere.

The question is now: what do we do? We have spent all this money, time, and considerable effort, and on the face of it, the employee simply walks away with the skills acquired at the current company with seemingly no recourse?

In the case of the National Health Laboratory Service v Janse van Vuuren, the employer employed the employee on the basis that the employee would work for them and study. One of the terms of the contract of employment was that if the employee did not remain in employment for a period of two years after the completion of the training and qualification as a specialist, she would reimburse the plaintiff for her training costs. When the employee resigned in 2010, the employer successfully sued her to recover such costs - the employer valued the amount to be paid at R2 million. The court had to decide on the damages the employer suffered.

The employer did not sue based on contractual breach, but based on penalty, and the court had to rule on the fairness of the amount claimed. The company used the provisions of the Conventional Penalties Act 15 of 1962.

The court found that it was fair, just, and equitable that the penalty stipulation be moderated and reduced, to correspond with the actual training costs incurred by the employer. The penalty was then calculated as being R1,630,445 (R1,63m). The employer was entitled to be paid that amount as well as accumulated interest.

The critical element for employers is the importance of having the training stipulated in a contract with the employee and preferably for the employer to include a fair repayment term.

It is also important to recognise that the actual training cost is not only the direct cost of the course itself and could include:

- time-off
- long study leave
- sabbaticals
- specialised mentoring and coaching and / or management support
- travel
- research projects

Should you require any assistance with the drafting of such clauses or training agreements, please contact us on info@hrtorque.co.za.

3) What is the tax payable on tips or other gratuities from clients to waitrons?

Author: Douw van der Walt

Restaurants are often confronted with the moral dilemma of whether their staff who serve clients are liable for paying tax on the tips or gratuities they receive from clients.

The tax treatment of tips paid by patrons to waitrons has been clarified by SARS in an Interpretation Note. The establishment/employer is merely holding the funds for the waitron/employee and performing a distribution role for the customer/patron.

Accordingly, under these conditions, the employer would not constitute an 'employer' as defined for the purposes of Employees Tax in relation to the tip or gratuity. PAYE would therefore not be deducted from the tip or gratuity by the establishment/employer.

It is important that waitrons understand that the income they received "directly" from a patron or from the establishment/employer where they are acting as a conduit for the distribution of the tips, that these tips must be included in the recipient's (the waitron) 'gross income'.

This means that the onus is on waitrons and other restaurant employees to declare the total amount of tips or gratuities received to SARS when completing their annual tax returns.

It is our recommendation that restaurants must have a policy and an acknowledgement by their waitrons that they understand this obligation and act responsibly when submitting their personal Income Tax returns.

4) ETI – extra COVID claims lost if not made before the 31 August 2020 recon cycle

Author: Jonathan Aitken

Editor's note: We ran a number of articles in the past few months about the challenges with the Disaster Management Tax Relief Bill, the calculation of ETI and how payroll systems had struggled to keep up. We also warned about the perils of getting this wrong. In practice, it looks like many of our fears have been realised. For help with ETI, please feel free to contact us.

The various releases of the Disaster Management Tax Relief Bill (DMTR Bill) put the enhanced ETI relief measures into effect for April, May, June, and July 2020. The first DMTR Bill was published on 1 April 2020 and was deemed to be effective from the same date, followed by the DMTR Bills published on 1 May and 19 May. As far as the ETI changes are concerned, the provisions were made effective in part retrospectively to 1 April, and the balance of the changes to 1 May.

This very short timeframe, the complexity of the changes, and particularly the changes made in May that were implemented retrospectively to 1 April, put huge pressure on the shoulders of payroll suppliers and employers. This was drawn to the attention of the authorities by the PAGSA at the time.

Employers have asked whether concessions will be granted by SARS to prevent the loss of claims where either their systems or internal processes mean the employers haven't claimed them in time for the August 2020 EMP501 filing season.

Unfortunately, as expected, there will be no ability to claim this ETI as the legislation doesn't allow for SARS to make a concession in this regard.

Legislation:

Section 9 of the Employment Tax Incentive Act provides for the roll-over of ETI totals from month to month where this was either more than the PAYE liability for the month or that were not claimed in an earlier month when the ETI was available to be claimed.

Section 9(2) allows any excess or unclaimed ETI to be rolled forward in months during which an employer is not tax-compliant (i.e. the employer has not submitted returns required by any tax Act administered by SARS, or has not paid the taxes due as required by any tax Act).

Section 9(4) states that ETI totals can only be rolled forward during the 6-month tax certificate submission cycle (March to August, and September to February). Any ETI that has not been claimed at the end of the last month of each 6-month cycle (31 August and 28/29 February) is forfeited ("deemed to be nil").

No changes were made by the DMTR Bill to sections 9(2) and 9(4) of the ETI Act.

SARS Feedback

SARS have confirmed that the above summary of ETI Act sections 9(2) and (4) is correct - all excess ETI claims that were not made via the EMP201 process by 31 August, are forfeited.

Further, the ETI Act does not allow the SARS Commissioner to consider requests to allow increased ETI claims to be made after the 6-month tax certificate submission cycle has ended (31 August and 28/29 February), even under the difficult circumstances of the ETI relief period of April, May, June, and July 2020.

The SARS eFiling and e@syFile systems are aligned with section 9 and will not allow the ETI totals on the EMP501 to be increased.

However, the ETI totals on the EMP501 can be reduced, thereby increasing the PAYE liability retrospectively from the amounts declared on the EMP201 in the previous 6 months. Penalties and interest will then be calculated on the increased PAYE liability and shown on the employer's statement of account.

If the employer so wishes, a 'Request for Remission' process can be made by the employer to motivate a concession on the penalties in terms of section 218 of the Tax Administration Act. If the employer follows this route, it is best to make use of the services of a competent tax practitioner who has experience of the SARS dispute processes.

5) COVID Regulations – Requirements to submit data to National Institute of Occupational Health (NIOH)

Author: Nicky Hardwick

The Department of Health has published directives which requires companies who **employ more than 50 employees** to submit information on **a weekly basis via a special portal**.

The information that is required on a weekly basis is the following, and is quoted directly from the directive issued which can be accessed here Government Gazette.

1. **Vulnerable Worker Data:**
   All employers are legally required to identify those employees who are vulnerable for the more severe outcomes of the COVID-19 infection. Since this is a key component of the screening of workers, this data must be submitted by employers.

   The vulnerability status of each worker that is submitted is not dependent on the availability of detailed medical information being available to the employer. ***This once off submission is submitted when collected by the***

workplace, and any subsequent occasion when new appointments are made, or an employee's status requires updating.

2. **Daily Symptom Screening Data:**
   All employers are legally required to screen all employees entering their work premises daily. This screening must be based on the prescribed set of symptoms as has been defined by the National Institute of Communicable Diseases to determine those persons likely to be presenting with a COVID-19 infection, and therefore should be referred for further assessment.

   This daily collected data must be submitted by employers, for those employees that are symptomatic**. *The data must be submitted on a weekly basis should there be symptomatic workers recorded during the calendar week. The submissions should occur before Tuesday for the previous calendar week commencing on Sunday.***

3. **COVID-19 Testing Data:**
   Based on their daily symptom screening, or on their employees' presentation to their health provider, employees are referred to health providers / health laboratories for testing for the presence of the COVID-19 virus.

   In terms of managing the pandemic in the workplace, the employer is expected to be notified of the results of the tests. The results of the laboratory tests of all employees who test positive must be submitted by employers, upon receiving the results of such tests.

   This **submission occurs only when an employee tests positive for COVID-19** and should be submitted on a weekly basis should there be positive workers identified during the calendar week.

4. **High exposure risk Workplace Contact - tracing:**
   When an employee tests positive within the workplace, all those in contact must, as per the Department of Employment and Labour Direction, be assessed for a high risk or low risk of exposure.

   A high risk of exposure is defined as being in proximity (<1.5m) for a prolonged period of time (>15 minutes) without the use of personal protective equipment and/or a face mask. Those employees with such a high risk of exposure are expected to be placed in quarantine.

5. **The total numbers of employees placed in quarantine:**
   Details on high exposure workers *should be submitted on a weekly basis should there be positive worker/s identified during the calendar week*.

6. **Post infection outcome and Return to Work Data:**
   Recovery from the infection will vary based on vulnerability and other risk factors. Understanding the outcomes of the infection among employees provides critical information.

   All employers who indicate employees have tested positive must submit information about the outcome of the infection, and the return-to-work decision. No confidential clinical information is required. ***This data must be submitted once only when the employee returns to work.***

Submission process?

Employers must access this link: https://www.nioh.ac.za/home/national-resources-directives-guidelines

Important: In collecting this information from their employees, employers are obliged to inform employees about the submission of this data to the Department.

The National Institute of Occupational Health (NIOH), is the statutory entity designated by the Department of Health for the collection, analyses and reporting of the data from workplaces.

This clause does not remove the legal obligations by employers to report COVID 19 related information to specific government Departments (Department of Employment and Labour, Department of Public Service and Administration and Department of Mineral Resources and Energy, Department of Trade, Industry and Competition etc.).

It is recommended that all the data be submitted in electronic format. In instances where employers are already using electronic applications, they can submit data to the NIOH data either through CSV data files and/or secure API transfer.

6) Constitutional Court Ruling – Domestic workers should get COID

Author: Jonathan Aitken

The Constitutional Court have now ruled that it is unfair for domestic workers to be excluded from the Compensation Fund for occupational injuries and disease. This is not unexpected and will be welcomed by employees in this sector.

The biggest challenges will be working out how this will operate in practice given how dysfunctional the Compensation Fund is already (It struggles to cope with existing employers let alone another 5 million employers); and how the increased compliance risk and cost might impact employment in this space.

The case that sparked the ruling involved a domestic worker who was partially blind and while cleaning windows, fell off a ladder into a swimming pool and drowned. This unfortunate incident highlighted areas of potential risk for injury in a home and the consequences of an informal domestic arrangement which left the survivors of this domestic worker with no funds or recourse as a result of dangerous or undesirable workplace practice.

The next step will be for the legislation changes to be promulgated. A big concern will then be that without any guidance form the Compensation Fund (very unlikely this will be forthcoming), this will require all domestic employers to get registered which is time consuming and expensive and it is unclear what category they should be registered in. It will then require domestic employers to submit an annual return of earnings. Together these steps will cost a couple of thousand Rand so we expect many employers to be non-compliant in the short term which will raise civil claim risks for them.

HRTorQue offers a domestic payroll option to make sure employers are compliant in this space. Contact us for more information.

7) Malawi/Zambia/Mauritius – recent legislation changes

(Source: crs.co.za)

Malawi PAYE changes

With reference to the Provisional Budget Statement for Malawi 2020/2021 and an announcement made by the Finance Minister on 11 September 2020, the Malawi Government has proposed an increase in the PAYE tax-free bracket.

Conflicting information has been published regarding the increase. Upon enquiry, the Malawi Revenue Authority confirmed the increase of the tax-free bracket from MK45,000 to MK100,000 per month, effective 1 October 2020.

Kindly note that a government gazette confirming the changes is not yet available and the changes are subject to approval.

The Minister also announced that the middle tax bracket of 15% has been removed. He is quoted as stating: "Government is aware that this adjustment is huge and to minimise its impact on the base for Personal Income Tax, the 15% middle bracket under the Pay As You Earn regime has been removed."

This was not mentioned in the Provisional Budget Statement or the Budget Statement, therefore it cannot be confirmed.

Mauritius Training Levy

The Finance (Miscellaneous Provisions) Act 2020 (Act 7 of 2020) was published in a Legal Supplement in August 2020. The Legal Supplement includes amendments to various Acts, such as the Income Tax Act and the National Pensions Act. Amendments to the Income Tax Act describes the changes to the Solidarity Levy, while the National Pensions Act was amended to include the new Contribution Sociale Généralisée (CSG).

In addition, the Human Resource Development Act was amended to announce changes to the National Training Fund levies.

Previously, every employer was required to pay a training levy at the rate of 1.5% of the total basic wage or salary of its employees. For the period July 2019 to June 2020, an employer was required to pay the levy at the rate of 1% for employees whose total basic wage or salary did not exceed Rs 10,000.

As from 1 July 2020 to 30 June 2021, every employer must pay a training levy of 1% in respect of every employee.

Mauritius Portable Retirement Gratuity Fund (PRGF)

On 3 September 2020 the Ministry of Labour, Human Resource Development and Training circulated communication regarding the further postponement of the PRGF.

The obligation to submit monthly PRGF returns and make payment of contribution has been postponed to January 2022. Employers may opt to file the monthly PRGF return and make payment of PRGF.

However, as a result of the negative impact of COVID-19, employers may, during the period 1 January 2020 to 31 December 2021, in the event of justified dismissal or resignation of an employee, pay directly to the employee, with his consent, the PRGF amount due to the MRA.

Employers have a legal obligation to submit an exit statement to MRA in respect of that employee. The Ministry of Social Security will thereafter notify the employer of the amount of PRGF to be paid in respect of past services of that employee.

Mauritius CSG, NSF and Training Levy

The Mauritius Revenue Authority (MRA) has published a notice to inform employers that, following the introduction of the Contribution Sociale Généralisée (CSG), the deadline for the submission of the monthly contribution return and payment of contributions for the month of September 2020 is Monday, 30 November 2020.

The monthly contribution return includes contributions in respect of the following:

- Contribution Sociale Généralisée (CSG);
- National Savings Funds (NSF); and
- Training Levy.

The deadline for the submission of the monthly contribution return for any subsequent month is the end of the following month.

The facility for the submission of the monthly contribution return and payment of the contributions is available on MRA's website, www.mra.mu and through the Mauritius Network Services (MNS).

Employers are informed that the facility to file the joint PAYE/Contribution Return for the month of September 2020 and onwards will continue to be available on MRA's website.

No penalty and interest will be applicable for late payment of PAYE for the month of September 2020 where the return is submitted and payment is made on or before Monday, 30 November 2020.

Zambia 2020/2021 Budget Speech

On 25 September 2020 the Zambian Minister of Finance delivered the 2021 budget to the National Assembly with the theme "Stimulate Economic Recovery and Build Resilience to Safeguard Livelihoods and Protect the Vulnerable".

Proposals made affecting employers/employees are:

- An increase in the annual tax exemption threshold for PAYE was proposed from K36,000 to K48,000 and the adjustment of tax bands.

The proposed measure is aimed at increasing taxpayers' disposable income.

- Reference interest rate applicable on employee loan interest benefit.

The Minister proposes to adjust the reference interest rate to be used in the determination of tax applicable on employee loan interest benefits to be the Bank of Zambia policy rate plus a margin of 2.0%.

This will allow for uniformity of interest rates used for assessment of the loan benefit.

To read the full text of the Budget Speech, follow the link.

8) Egypt – Temporary Solidarity Payment

(Source: crs.co.za)

New law approved to introduce a temporary solidarity contribution.

A new law, Law No. 170 of 2020, was approved and issued in the official gazette on 13 August 2020. It took effect on 14 August and will be applicable for a period of 12 months. This law provides for the deduction of a monetary amount from employees to support the country in dealing with the impact of pandemics and natural disasters.

The law applies to all employees in the private and the public sectors, as well as chairpersons and board members of all public and private entities, whether the relevant employee or person occupies a permanent or temporary position, or acts as an expert, consultant or in any other capacity.

The contribution rates are as follows:
- 1% from the net income of active employees
- 0.5% from the net pension of retired employees

The contribution will be based on both fixed and variable salary elements (including allowances, commissions, incentives, bonuses, overtime payments) after payment of payroll taxes and social insurance contributions.

Active employees with a monthly net income of EGP 2,000 or less and retired employees with a monthly net pension of EGP 2,000 or less are excluded from contributing.

The contributions must be paid into a bank account set up by the Ministry of Finance.:

9) Mauritius – Contribution Sociale Généralisée replacing National Pension Fund

(Source: crs.co.za)

The Contribution Sociale Généralisée (CSG) Regulations 2020:

Regulations made by the Minister under section 30F of the National Pensions Act were published in Government Notice No. 214 of 2020. As from 1 September 2020, the National Pension Fund is being abolished and replaced by a new system, the Contribution Sociale Généralisée (CSG), a progressive contribution system.

Under the CSG, employers are required to deduct, where applicable, the employee's contribution from his/her wage or salary and pay that contribution, together with the employer's contribution, to the Mauritius Revenue Authority (MRA). The rate of contribution applicable to the private sector is shown below.

Category of employee	Employee Contribution	Employer Contribution
An employee earning a basic wage or salary **not** exceeding Rs 50,000 per month	1.5%	3%
An employee earning a basic wage or salary exceeding Rs 50,000 per month	3%	6%

Basic wage or salary means:

- *Where the terms and conditions of employment of the employee are governed by Remuneration Regulations or Wages Regulations, an arbitral award or an agreement, the basic wage or salary prescribed, or where the employer pays a higher wage or salary, the higher wage or salary paid, excluding any allowance by any name and whether paid in cash or in kind.*
- *In any other case, all the emoluments received by the employee, excluding any bonus or overtime.*

The monthly return and payment of CSG with respect to a month is required to be made electronically on or before the end of the following month.

An exception was made by the MRA for the month of September 2020. The last date for submission of the return and payment of CSG to the MRA is 30 November 2020.

Facilities for the electronic submission of CSG returns are available on the MRA website. Employers must use the same employer registration number (ERN) and password applicable for the submission of NPF return.

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