Weight Watchers – Employment Status

The Upper Tribunal has upheld the decision of the First Tier Tribunal that ‘leaders’ who hosted Weight Watchers meetings were employees for PAYE and National Insurance contributions purposes.

The decision follows other recent significant employment status decisions in the courts and at tribunals, including a recent Employment Tribunal case involving an independent financial advisor.

The cases should be examined carefully, particularly by any organisations who engage significant numbers of individuals on a ‘self-employed’ basis.

Details

The most recent case (Weight Watchers (UK) Ltd and Others v HMRC) is a tax case which considers the employment status of leaders who host Weight Watchers classes in the UK. The Upper Tribunal fully upheld the views of the First Tier Tribunal that the leaders were employees.

Some of the key points made by the Upper Tribunal are:

▶ In considering substitution clauses, the real question is whether the clause is so wide as to permit, without breach of contract, the individual to decide never personally to turn up for work at all. This was not the case with the leaders.

▶ There was a sufficient degree of control to evidence an employment relationship, despite a clause in the documentation that the leader had ‘absolute discretion’ as to how classes were conducted. The Tribunal judge commented that this “was a label probably designed by lawyers...which did not reflect the practical reality of the relationship”

▶ Although there was some risk of financial loss to the leaders, this was insufficient to disturb the overall conclusions based on the mutual obligations and level of control.

This decision comes after a recent Employment Tribunal case (Johnson-Caswell v MJB (Partnership) Ltd) which, at a Pre-Hearing Review, determined that an independent financial advisor (IFA) was an employee (and could, therefore, pursue claims including unfair dismissal). This case is not a tax case and at this stage does not create any binding precedent. Nonetheless it will be interesting to see if the case progresses and whether the tax tribunals will pick up on any of the concepts that were considered in the case.
The decision is relatively light on detail, but indicates that the key factors of mutual obligation, control and personal service pointed towards employment, although the contractual terms appear similar to those on which many IFAs are engaged on a self-employed basis. One point which may well be challenged on appeal is that the judge maintained that the fact that the individual was ‘controlled’ as a result of higher FSA obligations did not detract from that fact that the individual was controlled by the company concerned.

It should be noted that both of these cases may be appealed.

**Ernst & Young’s perspective**

In line with the recent case of Autoclenz Ltd v Belcher and Others, Weight Watchers indicates a subtle shift towards a more purposive interpretation of employment contracts in the tax arena as well as for employment law purposes.

Engagers will need to consider the terms of their own agreements with individuals treated as self-employed, and assess whether HMRC and the courts could ‘look through’ these to determine that they do not reflect the reality of the working arrangements.

Employment status is a notoriously difficult area which can prove very costly for businesses where individuals are retrospectively recategorised as employees.

**How Ernst & Young can help**

We can advise your business on the level of risk attached to individuals who are engaged on a self-employed basis. We can help to structure such arrangements to minimise the risk.

We can also help to develop a robust process to evaluate employment status when engaging individuals to help ensure that your business is protected from exposure to unexpected costs.

Our Global Employment Tax Services team advises on PAYE, NIC and International Social Security issues to facilitate compliance with relevant legislation and the design of policies which deliver benefits for the employee and manage the cost to the employer. Using our cross discipline expertise, we can, for example:

▸ Assist with UK PAYE audits undertaken by HMRC
▸ Advise on the tax and policy issues of employees leaving their employment
▸ Manage NIC costs and avoid PAYE pitfalls in relation to stock options
▸ Design and implement new flexible schemes around company car issues
▸ Develop policies on travel and subsistence
▸ Undertake cross-border reviews to assess employment tax risks for global organisations