Maternity leave and non-cash benefits

“One of my employees has gone on maternity leave, what do we need to do about their non-cash benefits? Do they stop, do they continue, do we have to pay for them?” These are some of the most commonly asked questions we get from the HR teams of our clients.

So what is a non-cash benefit?

As the name suggests, a non-cash benefit is payment to an employee in something other than cash. It forms part of their contractual agreement with the employer. Such benefits can include:

- Travel, dental & critical illness insurances
- Private Medical Cover
- Employer funded health screens
- Gym membership
- Company cars, mobile phones, living accommodation
- Salary sacrifice benefits, for example cycle to work schemes, employer pension contributions or childcare vouchers

How should non-cash benefits be treated during a maternity leave period?

As a starting point, during maternity leave, an employee is entitled to all the usual benefits of her employment, with the exception of remuneration, which is replaced by statutory maternity pay (SMP) or her employer's contractual maternity pay scheme.

This means that whilst an employee's usual 'remuneration' is not payable during a maternity leave period her contractual benefits must continue. This position is consistent with the 2008 HMRC guidance on maternity leave, salary sacrifice and non-cash benefits, which made the position quite clear – women on maternity leave with a child born after 5 October 2008 have the right to receive all non-cash benefits throughout the ordinary and additional maternity leave periods. This is regardless of whether the woman is in receipt of pay or not.

With regard to salary sacrifice arrangements (whereby the employee agrees to ‘sacrifice’ or give up part of their pay entitlement, in return for the non-cash benefit) it might be possible for an employer to claw back some/all of the sacrificed pay if the employee is in receipt of enhanced maternity pay, but not where statutory payments (e.g. SMP) are concerned. Salary sacrifice deductions cannot currently be taken from SMP.

In short, the provision of the non-cash benefit via salary sacrifice is potentially an expensive benefit for the employer, who may be faced with funding it throughout the entire 52-week maternity leave period.

So why are we telling you this? What's changed?

We’ve recently had the first Employment Appeal Tribunal (EAT) decision in relation to the treatment of childcare vouchers whilst a woman is on maternity leave; which could also have future implications for the treatment of other non-cash benefits.

In the case of Peninsula Business Services vs Donaldson, the employer offered its employees childcare vouchers through a salary sacrifice arrangement. It was a condition of this arrangement that employees were required to suspend their membership whilst they were on maternity (and other types of) leave. Employers sometimes set up their salary sacrifice schemes in this way to reduce the employer's costs in providing the vouchers whilst the employee is not in receipt of pay.

Ms. Donaldson, who was employed by Peninsula, was pregnant and wanted to join the scheme but challenged the future suspension of her membership whilst she was on maternity leave. She brought an Employment Tribunal (ET) claim for sex, pregnancy and maternity discrimination, and said the terms of the scheme were unlawful.
The Tribunal ET agreed and said that Ms. Donaldson was both entitled to join the scheme and to receive the childcare vouchers, as a non-cash benefit, throughout the maternity leave period. It would be discriminatory not to do so.

The ET decision was appealed by Peninsula and the original decision overturned by the Employment Appeal Tribunal (EAT), which criticised the 2008 HMRC guidance, stating this presented an incorrect interpretation of how salary sacrifice arrangements work.

In particular, the EAT said that there is no ‘sacrifice’ by an employee of salary when childcare vouchers are provided. Instead, it is simply a ‘diversion’ of salary, from the employee’s pay to the childcare voucher provided.

**What does this mean for employers?**

The EAT said that childcare vouchers provided to an employee during a maternity leave period under the terms of a salary sacrifice arrangement are not a non-cash benefit. Instead, they are a form of ‘remuneration’. As such, they do not need to be provided during a woman’s maternity leave period. This is a major change of direction. HMRC’s 2008 guidance on maternity leave, salary sacrifice and non-cash benefits is likely to be updated to reflect this EAT decision.

The upshot? Potentially significant cost savings for employers who will no longer have to offer salary sacrificed childcare vouchers whilst a woman is on maternity leave.

**What hasn’t changed?**

Importantly, the EAT ruling only applies to childcare vouchers offered as part of a salary sacrifice arrangement. If childcare vouchers are offered instead as a contractual benefit with no salary sacrifice element, they remain a non-cash benefit and HMRC’s guidance remains a correct summary of how they should be treated. In other words, they should continue to be provided throughout an employee’s maternity leave period.

**Should we start applying changes where salary sacrificed childcare vouchers are concerned?**

Not necessarily. Although this latest EAT ruling means it’s now possible for employers to stop salary sacrificed childcare vouchers during maternity leave, we recommend that employers exercise caution. The terms of any existing arrangement should be checked to see whether this is possible before proceeding. To simply stop offering the vouchers could result in a breach of contract claim.

And, as noted above, if your childcare vouchers are offered outside the terms of a salary sacrifice arrangement (i.e. a contractual benefit), the EAT decision does not change the legal position; the childcare vouchers should continue to be provided throughout an employee’s maternity leave period.

**Watch this space**

We recommend keeping an eye on current developments in this area. Childcare vouchers themselves are probably changing in early 2017 and moving away from employer-led arrangements towards a government-led scheme run by National Savings & Investments. We also expect that HMRC will update its 2008 guidance in light of the EAT’s decision in *Peninsula Business Services vs Donaldson*.

There is also the potential for this ruling to have a knock-on effect on other benefits provided as part of a salary sacrifice arrangement, for example, pension contributions. Arguably, such contributions might now also be considered to be “remuneration” rather than a “non-cash benefit” and, as such, there would be no obligation for employers to continue to make the salary sacrifice contributions to a pension scheme on an employee’s behalf during maternity leave.

This is subject to the interaction with section 75 of the Equality Act 2010, which writes a ‘maternity equality rule’ into occupational pension schemes. The interaction between the *Peninsula* decision and the Equality Act requirement is a distinctly grey area and one which we will continue to monitor.
The new tax-free childcare scheme
Will employees be better off with their existing childcare voucher scheme?

Employers need to be aware that not everyone will benefit from the government’s new Tax-Free Childcare (TFC) scheme. In particular, unlike childcare vouchers, households in which only one parent is working will not have access to financial support. What’s more, it is only available for children under the age of 5 initially.

Employers may want to consider keeping their existing childcare voucher scheme in place to allow those parents already signed up to determine which scheme works best for them. However, it should be borne in mind that once TFC launches, employees won’t be able to register for their company’s childcare voucher scheme.

As announced in the recent Budget, the TFC scheme, due to take effect from early 2017, will be rolled out in stages. Parents with the youngest children will enter the scheme first, with all eligible parents brought in by the end of next year.

Although the TFC involves no formal role for employers, the government expects employers to remain a source of information for their staff about the benefits of the scheme.

Who should I contact for further information?

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Issue: 60  
Date: June 2016

This issue of Foresight has been produced in association with Gowling WLG (UK) LLP

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