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LLP MEMBERS ENHANCED PROTECTION FOLLOWING SUPREME COURT "WORKER" STATUS DECISION

EMPLOYMENT

LLP clients will be aware of the Supreme Court's decision in the well-publicised case of *Clyde & Co v Bates van Winkelhof*[1]. This note examines the practical implications of the judgment for LLPs.

WHAT DID THE SUPREME COURT DETERMINE?

- The focus of the case were the whistleblowing provisions of the Employment Rights Act, under which "workers" are entitled to protection from detrimental treatment as a result of having made protected disclosures. "Workers" are defined not only as employees working under a contract of service, but also as those working under a contract which provides for the individual to provide their services personally, although not where the entity receiving the services is the individual's client or customer.

- On the face of it, LLP members fall into that second category and so are workers, as they are obliged to render services to the LLP (and cannot send a replacement along instead), and because it stretches language to breaking point to describe the LLP as the member's client or customer. That simple solution eventually formed the basis for the Supreme Court's decision, the water having been muddied at the Court of Appeal stage by the complex interaction between the Employment Rights Act and the LLP Act. The LLP Act confirms that LLP members are not employees of the LLP, unless they would also have been employees had the LLP been structured as a general partnership. The Court of Appeal felt the LLP Act's distinction between members and employees indicated that the same distinction ought to be made between members and workers. The Supreme Court rejected that view, focusing simply on the Employment Rights Act definition. No doubt this decision was influenced by the overriding public policy behind the whistleblowing legislation, which aims to promote the raising of concerns free from retaliation.

- The complexity comes because the definition of a "worker" in the Employment Rights Act does not apply only to whistleblowing, and is repeated in identical terms in a number of other pieces of legislation.

WORKING TIME

- Workers are subject to the controls on their working time set out in the Working Time Regulations. These deal with daily rest breaks and night time work, alongside the better known rules on the 48-hour maximum working week and the minimum 5.6 weeks' paid annual leave.

- Most LLPs will have sensible working patterns for members, but the *van Winkelhof* decision makes it important that LLPs ensure:
  - opt-outs from the maximum working week are in place where necessary;
  - consideration is given to the complex case-law on the accrual and calculation of holiday pay; and
  - proper records are kept.

NATIONAL MINIMUM WAGE

- Workers are also subject to the national minimum wage. Depending on the remuneration structure, it is possible that an LLP member (even with substantial profit-share or drawings) might also be entitled to the hourly minimum wage. Specific advice should be sought in each case.

OTHER WORKERS' STATUTORY RIGHTS

- The worker definition may also impact LLPs' treatment of any part-time members, and may also affect firms' ability to recover remuneration by way of clawback arrangements. These might, in some cases, be incompatible with the restriction on making deductions from workers' wages, and remuneration structures should therefore be examined closely.

AUTO-ENROLMENT

- All "eligible jobholders" are required to be auto-enrolled in a qualifying pension scheme, although they may then opt-out. In almost every case, LLP members, as workers, will also be eligible jobholders.

- However, only those with "qualifying earnings" above £5,772 are eligible jobholders who need to be auto-enrolled. The Pensions Act gives a list of the sources for qualifying earnings, which includes the obvious items such as salary, wages, commission, bonuses and overtime payments. Profit share, or drawings against profits, do not appear to be covered so, depending on each firm's remuneration structure, it is likely that many LLP members will, in fact, not fall within the auto-enrolment category.

[1] [2014] UKSC 32

- Those firms whose staging date for auto-enrolment has passed, or is near, should analyse their remuneration and pension arrangements as a matter of urgency, seeking specific advice as appropriate.

- It is worth noting that the Pensions Act does not contain the same degree of anti-avoidance as HMRC's new regime for the tax treatment of LLP members whose profit share is recharacterised as employment income. Those rules are expressly intended to have effect for tax and national insurance purposes only, so firms should feel relatively comfortable that changes to tax arrangements will not wash across into the pensions area.

WHISTLEBLOWING

- To end by coming full circle to the actual focus of the Supreme Court's judgment, on the specific issue of whistleblowing, LLPs should review their members' agreements and whistleblowing policies and ensure that appropriate carve-outs from confidentiality provisions are drafted to permit members to make protected disclosures without suffering detriment in the same way as employees.

- It may be that aggrieved LLP members will seek to assert whistleblowing claims to enhance their negotiating position on exit, and firms should be alert to this, and ensure that any concerns raised are dealt with properly, both as part of good risk management generally, and also to reduce the availability of such claims.

CONTACT DETAILS
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