Safeguarding share schemes

JD Ghosh of Winslows Tax explains updates to the rules around employee share schemes

The Covid-19 pandemic has caused many uncertainties in relation to the operation of tax advantaged employee share schemes (which are very important for retention of talent by companies). The Government has made changes in legislation (in the Finance Act 2020) and published guidelines (Employment Related Securities Bulletin 35 ('Bulletin') published by HMRC on 8 June 2020) to tackle some of such uncertainties caused by Covid-19. Set out below is a summary of the changes.

Enterprise Management Incentives (EMIs)
A new clause has been added to the Finance Act 2020 which provides a time limited exception for EMI option holders who are unable to meet the necessary 'working time' requirements (see below) as a result of Covid-19. This exception will take effect from 19 March 2020 and come to an end on 5 April 2021 (which can be extended to 5 April 2022, if required).

The legislation requires that to qualify for the tax advantages associated with an EMI option, an employee must work at least 25 hours per week or if less, at least 75% of the employee's working time for the company (or the group) granting the EMI option. This is the 'working time' requirement. If the option holder is unable to meet the 'working time' requirement at any time during the period in which the option holder holds the EMI option, a 'disqualifying event' occurs. In that case, the option holder will lose the EMI tax advantages unless the option is exercised within 90 days of the 'disqualifying event'.

This is a welcome relief to existing holders of EMI options. They will not suffer a 'disqualifying event' and, therefore, will not lose the tax advantages as a result of taking unpaid leave, being furloughed or working reduced hours because of Covid-19.

The Government has also announced that legislation will be introduced in the Finance Bill 2021 so that the limited exception in respect of the EMI 'working time' requirement, as described above, will also apply to the grant of EMI options.

Accordingly, employers can issue new EMI share options between 19 March 2020 and 5 April 2021 to individuals who do not meet the 'working time' requirement as a result of taking unpaid leave, being furloughed or working reduced hours because of Covid-19.

With regard to agreed EMI valuations, HMRC acknowledges that Covid-19 may lead to situations where EMI options may not be granted within the 90-day normal validity period. Accordingly, HMRC have confirmed in the Bulletin that, provided there have been no circumstances which would impact the valuation, then:

- where the 90 days expired on or after 1 March 2020, the valuation letter can be automatically treated as being extended by a period of 30 days; and
- any new EMI valuation agreement letter issued on or after 1 March 2020 will be valid for 120 days.

Save As You Earn (SAYE)
Under the existing rules, participants may miss contributions for up to a maximum of 12 months without the option lapsing or the cancellation of the savings contract. HMRC have confirmed in the Bulletin that they will allow contributions to be postponed for a period exceeding the 12-month payment holiday where the monthly contributions are missed because of employees being furloughed or being on unpaid leave due to Covid-19.

HMRC will update its specimen SAYE Prospectus from 10 June 2020 and its Employee Tax Advantaged Share Scheme User Manual to reflect the extension to the payment holiday, where the contributions are missed due to Covid-19. SAYE contracts do not need to be re-issued to take advantage of the extension.

The Bulletin also states (with an illustration) that the maturity date of an option will be postponed by the total number of months missed, including those missed as a result of Covid-19.

The Bulletin also confirms that, payments to furloughed employees pursuant to the Coronavirus Job Retention Scheme (CJRS) can constitute salary and SAYE contributions can continue to be deducted from such payments.

HMRC will also permit payments to be made via standing order for participants who are unable to make their monthly contributions from salary due to having to take unpaid leave as a result of Covid-19 but the deductions from salary would recommence at the earliest opportunity.

Share Incentive Plans (SIP)
The Bulletin states that, like SAYE, payments to furloughed employees pursuant to CJRS can constitute salary and SIP contributions can continue to be deducted from these payments.

The Bulletin confirms that participants will not be allowed to make-up missed deductions if they stop them due to Covid-19.

Company Share Option Plans (CSOP)
HMRC have confirmed that CSOP options granted to full time directors and/or qualifying employees at the time of grant before Covid-19 will continue to be qualifying CSOP options where such director or employee is furloughed because of Covid-19.

The Bulletin states that employers and agents should try to meet the 6 July 2020 deadline for registering new schemes and filing ERS annual returns.

However, if it is not possible to meet the 6 July deadline due to Covid-19, HMRC will consider Covid-19 as a reasonable excuse, provided employers and agents can demonstrate how they were affected by Covid-19 when making their appeal.

Our view
The Government have helpfully addressed some of the issues that have impacted the operation of tax-advantaged employee share schemes due to Covid-19, in particular, with regard to EMI, SAYE and SIP. The proposed changes to the EMI legislation through the Finance Act should also alleviate some of the major concerns that Covid-19 has presented to EMI option holders.

However, further HMRC guidance would be needed, for example, how the retrospective modification to the 'working time' requirement would work given that Finance Bill 2021 will become law only when it receives Royal Assent.

It is also conceivable that further issues will, and are likely to, emerge on the impact of the unprecedented pandemic on employee share schemes. For example, the performance conditions attaching to certain EMI and CSOP options granted prior to Covid-19 may need to be substantially altered to give business efficacy post-Covid-19. Would HMRC view major alteration to the performance conditions a fundamental change to the option (and therefore, the grant of a new option)?

For advice on all Share Scheme matters contact Winslows to arrange a free consultation. Contact info@winslows.co.uk – www.winslows.co.uk

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