

SALARY SACRIFICE AND WORKPLACE NURSERIES - UPDATED

September 2024

With reference to the initial briefing on the general rules regarding Salary Sacrifice, which can be found [here](#), this briefing gives some specific guidance on Workplace Nurseries. This briefing is an update as HMRC has recently issued clarification of the rules.

All Workplace Nurseries, in order to be eligible for tax free status, must comply with the registration requirements of the appropriate registering body, such as Ofsted. Each devolved nation has its own registration requirements.

There are two main nursery offerings:

1) **An Employer Onsite Nursery**

An employer can provide an onsite nursery, with the childcare being available to children of all employees (although these can be based at a particular site if the employer operates from different locations) and this is tax free. There are various conditions attached to this exemption, including definitions of:

- the child (Condition A) – up to the last day of the week in which falls the 1 September following their 15th birthday, or 16th birthday if the child is disabled;
- the premises (Condition B) – this cannot be a private house;
- the person making the premises available (Condition C) – the employer; and
- the care being open to all employees (Condition D) – this can be limited to one location if the employer has premises in more than one location.

All of the definitions are very detailed, but are generally in line with what one would anticipate. In respect of Condition A, care must be taken that the nursery's registration is not limited to looking after children from birth to 31 August after their 5th birthday, which would apply under the Ofsted Early Age Register.

Employers can offer such childcare either free of charge or charge a fee (which can be financed by way of a salary sacrifice arrangement). Assuming the necessary documentation is in place, the provision of this type of childcare is readily accepted by HMRC as being tax free.

2) A Joint Childcare Facility

Small employers, who may not be able to individually set up a workplace nursery, can join together with other similar employers to finance and manage a childcare facility, thereby forming a “partnership”. This is the area on which HMRC has issued further guidance as, in its opinion, there are a few nurseries that are operating where the partnership requirements, as detailed below, are not being met. Where this is that case, the salary sacrifice benefit will not work and the benefit will become chargeable to tax. Additionally, some workplace nursery scheme operators have been advertising that their services are HMRC approved - this is incorrect, as HMRC have stated that it “will never give approval for a business to advertise that a scheme is tax compliant”.

In order for this type of childcare to be tax exempt, Conditions A, B and D, as above, need to be satisfied plus:

- The care must be provided under arrangements made by persons who include the scheme employer, meaning the employer operating the scheme under which the care is provided. This is normally the actual employer, but could be a different employer in a group situation, for example.
- The premises on which care is provided are made available by one or more of those persons ie various employers (and again this cannot be a private house).
- Under the arrangements, the scheme employer must be wholly or partly responsible for financing and managing the provision of the care.

It is possible for the employer to enter into an agreement with a commercial nursery providing childcare; however, it is essential that the partnership requirements are met and the childcare is on the premises of one of the employers. The key partnership requirements are that the employer is “wholly or partly responsible for financing and managing the provision of care”.

To ensure that the childcare provision is accepted as tax free, it is critical that the employer is able to demonstrate that they are involved in both the financing and managing of the provision of care and that these conditions actually do occur and can be demonstrated to occur. These are detailed as follows:

Financing

HMRC require that the employer provides capital to the nursery provider and/or some real or substantial commitment to funding the facility. It is not enough for the employer to simply buy places from the nursery. HMRC will accept that this finance condition is met assuming there is an agreement in place to meet a set proportion of the overall cost of providing the care and where the employer provides a guarantee to indemnify the primary care provider against losses.

Previously, HMRC accepted the employer making a fixed contribution towards the cost of running a nursery, e.g. £100 per month per child as financing - this is no longer accepted where there is a commercially run nursery. In its latest guidance, and probably the most illustrative of the expectations, HMRC has stated “employers must accept the financial risk associated with running a childcare facility, which is likely to take the form of contributing to overall costs and is such that there is also joint responsibility for any losses”. A further illustration of the financial commitment required by HMRC is its statement “in the case of a facility which was newly established or of doubtful financial viability the commitment may take the form of a long term undertaking to pay a fixed periodical contribution (possibly expressed as the price of a given number of places) where that contribution is calculated to ensure overall financial viability.”

Management

The employer is required to input and influence in both management decisions and the way in which childcare is provided. This must be on a more frequent basis than occasionally. Whilst there is not a requirement to be involved in the day to day running of the nursery, the employer must, in a real sense, play a part in management and be involved in:

- Appointing and monitoring the performance of those engaged to look after the children
- The extent of the care provided
- The conditions under which that care is provided
- The allocation of places

If an employee is appointed to the management board, they must have the necessary authority to make decisions on behalf of the employer (and there should be evidence to this effect).

There are a number of providers who facilitate this type of partnership and each one has their own terms and conditions, including the level of financial support required, the minimum contract period for each child and notice period.

It is essential that the conditions under the headings of finance and management are met. The exemption was not originally intended to cover commercially run nurseries and will not comply if, in essence, the employer is merely buying places in such a nursery.

Conclusions

Salary sacrifice and the provision of workplace nurseries can provide a valuable cost saving to employees, in terms of both tax and NIC savings, and provide the wider benefit of attracting and retaining staff with children needing childcare. For the employer, there will be the cost of running a nursery or assisting with the running of the nursery, if in a partnership, but this is partially offset by the employer's NIC savings.

There are nursery groups who offer this type of partnership and, as long as care is taken to ensure that they do meet HMRC guidelines, the tax and NIC exemption will apply. This can be an effective offering for the savings to employees via salary sacrifice, plus a valuable attraction to potential employees. However, it is critical that the conditions of financing and management are real, and that the employer is not paying lip service to these conditions by simply buying places at a commercially run nursery. If this were to be the case, HMRC would deem there to be a benefit in kind.

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