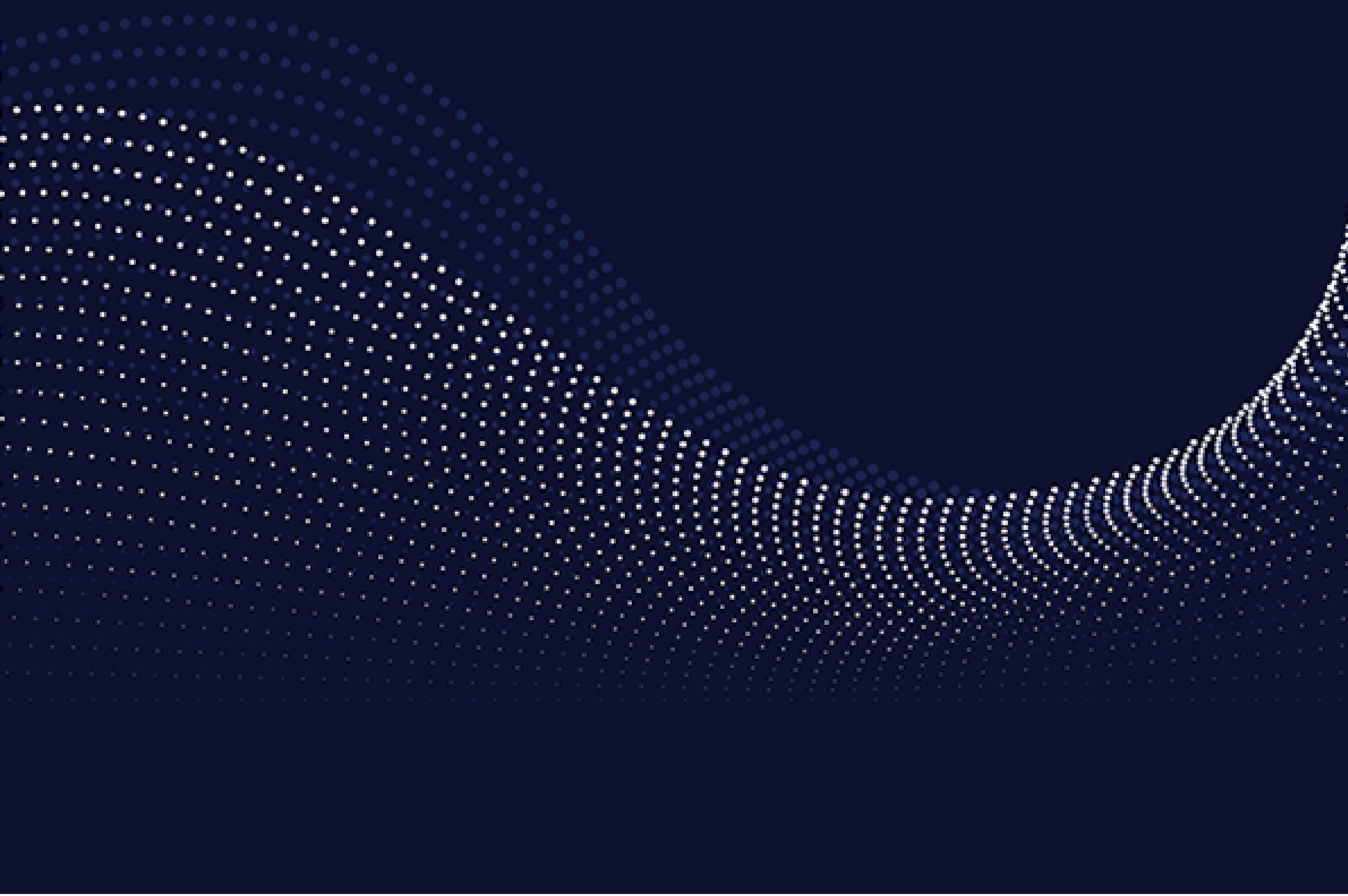
LEXOLOGY
Getting The Deal Through

EXECUTIVE COMPENSATION & EMPLOYEE BENEFITS 2023

Contributing Editors

Ryan J. Liebl and **Stephanie B. Vasconcellos**

Mayer Brown



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Quick reference guide enabling side-by-side comparison of local insights, including local law, regulation, practice, and enforcement agencies; governance; disclosure; common provisions of employment agreements; incentive compensation; equity-based compensation; employee benefits; termination of employment; post-employment restrictive covenants; pensions and other retirement benefits; indemnification; change in control issues; multi-jurisdictional considerations; and recent trends.

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LEXOLOGY
Getting The Deal Through

Explore on **Lexology**

United Kingdom

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SOURCES OF RULES AND PRACTICE

Overview

1 Provide an overview of the primary sources of law, regulation and practice that govern or affect executive compensation arrangements or employee benefits.

The primary sources of legislation affecting compensation arrangements are:

- the National Minimum Wage Act 1998 – requires employers to pay the prescribed minimum wage;
- the Pensions Act 2008 – requires employers to automatically enrol qualifying workers into a qualifying pension scheme and pay minimum contributions;
- the Working Time Regulations 1998 – requires that all workers have a right to 5.6 weeks' paid annual leave;
- the Equality Act 2010 – requires workers be paid the same for doing the same work, irrespective of gender; and
- the Companies Act 2006 – primary source of UK company law and provides some regulation around executive compensation.

The tax treatment of executive compensation arrangements and employee benefits is primarily governed by:

- the Income Tax (Earnings and Pensions) Act 2003; and
- the Social Security Contributions and Benefits Act 1992.

The UK taxation authority also publishes guidance.

Most legislation is the same throughout the United Kingdom; however, devolved legislation may slightly vary the position (and tax rates) in the nations of Scotland, Northern Ireland and, to a lesser extent, Wales.

The Financial Services and Markets Act 2000 provides a regulatory framework covering certain financial services and activities, such as those relating to options and securities.

Companies listed on a stock exchange will be subject to the rules of such stock exchange and may be subject to additional investor guidance and requirements, which can regulate compensation (eg, the UK Corporate Governance Code).

Companies in certain financial services sectors may be subject to additional regulation in relation to remuneration.

Enforcers

2 What are the primary government agencies or other entities responsible for enforcing these rules?

HM Revenue and Customs enforces the rules relating to tax, social security contributions and the National Minimum Wage. Regulatory bodies such as the Financial Conduct Authority and Prudential Regulation Authority also play a role, particularly in the financial services sector.

The Equality and Human Rights Commission enforces the Equality Act 2010.

The Pensions Regulator regulates workplace pensions.

GOVERNANCE

Governance requirements and shareholder approval

3 Are any types of compensation or benefits generally subject to specific corporate governance requirements or approval by shareholders or government agencies? What is the general process for obtaining approval?

Directors' remuneration in private companies is usually set by the board of directors, subject to the articles of association, a shareholders' or investment agreement.

UK companies with shares admitted to trading on certain markets are required to prepare a directors' remuneration report, which must be approved by the board and signed by a director or company secretary. The report comprises two major segments: an annual remuneration report (subject to a non-binding shareholder vote) and a directors' remuneration policy (approved by a shareholder vote at least every three years). Payments and benefits (including the provision of shares) provided to directors outside of an approved policy will be of no effect.

UK companies cannot generally issue shares (or grant equity-based awards to be settled by new issue shares) without shareholder authority and a shareholders' resolution to disapply the shareholders' rights to be offered the shares. There are exceptions to this rule, including in relation to an employees' share scheme, but this type of scheme only permits participation by employees and former employees of the group (and certain relatives), and not non-employees including non-executive directors. Any approval would generally be obtained either at a shareholders' meeting (most common for listed companies) or by way of written resolution (more common for private companies).

Certain financial activities relating to options and other equity awards are also regulated in the United Kingdom and require the approval of the Financial Conduct Authority unless an exemption applies. Most companies rely on a similar 'employee share scheme' exemption, although, where this is not available, other exemptions may apply.

Listed companies are subject to certain guidelines and investor requirements and recommendations in relation to executive compensation. As a consequence, most listed companies usually need to set up a remuneration committee.

In addition, UK companies with a premium listing on the London Stock Exchange generally require shareholder approval to:

- operate an employees' share scheme that uses newly issued or treasury shares;
-

operate a long-term incentive scheme in which one or more directors is eligible to participate; or

- grant an option with an exercise price lower than market value to be satisfied by newly issued shares, subject to certain exceptions.

Listed companies (on any market) may be subject to further shareholder approval constraints set out in applicable listing rules and investor guidance.

Certain companies in the financial services sector may be required to obtain shareholder approval to introduce or change certain elements of remuneration and may need to be report this to the relevant regulator.

Consultation

4 Under what circumstances does the establishment or change of an executive compensation or benefit arrangement generally require consultation with a union, works council or similar body?

Changes to any terms and conditions relating to pay and benefits set by collective bargaining must be negotiated with the union. If an employer is contemplating dismissing and re-engaging staff who do not agree to the changes and 20 or more employees are affected at one establishment within a period of 90 days or less, the employer must consult with appropriate representatives of the employees about the dismissal. If an employer is proposing to dismiss as redundant fewer than 20 employees at one establishment within a period of 90 days or less, the employer must undertake individual consultation with employees who are in the pool.

Prohibited arrangements

5 Are any types of compensation or benefit arrangements prohibited either generally or with respect to senior management?

Certain types of arrangements between UK companies and their directors (or connected persons) are prohibited unless shareholder approval is obtained – in particular, arrangements involving long-term guaranteed employment, the purchase or sale between the parties of a substantial non-cash asset (eg, a house), director loans and certain types of loss of office payments.

The restrictions are more onerous for public companies, including a prohibition on providing financial assistance in relation to the acquisition of shares in such UK public companies unless an exemption applies. There is a conditional exemption for employees' share schemes.

Certain companies in the financial services sector are subject to additional regulatory restrictions in relation to remuneration.

Rules for non-executives

6 | What rules apply to compensation and benefits of non-executive directors?

The rules and restrictions for a non-executive director's remuneration are generally similar to those for an executive director.

However, non-executive directors are unable to receive tax-advantaged share options or awards (such as SAYE (Save As You Earn) options) as those awards can only be made to employees (and, in some cases, full-time directors, which non-executive directors tend not to be). They are similarly often unable to participate in listed company share plans due to investor requirements often restricting the grant of variable remuneration to non-executive directors, including the UK Corporate Governance Code which recommends not awarding share options or performance-related remuneration to non-executive directors, as well as certain exemptions that require the use of an employees' share scheme.

DISCLOSURE

Mandatory disclosure of executive compensation

7 | Must any aspects of an executive's compensation be publicly disclosed or disclosed to the government? How?

UK companies are generally required to disclose aspects of directors' remuneration in their publicly available annual accounts. The extent of disclosure depends on the size of the company.

UK companies with shares admitted to trading on certain markets must prepare a remuneration report in relation to the directors every financial year. Although shareholders will vote on the report, their vote is only advisory and a negative vote cannot retrospectively void any payment. The report must be filed at Companies House and published on the company's website. Such companies are also required to make available on their website details of any remuneration payments and payments for loss of office to departing directors.

Listed companies may be required to publicly disclose any related party transactions if required by the rules of the relevant stock exchange. Disclosure of senior management remuneration may be required on listing or where certain types of prospectus or circulars are required to be published. UK listed companies with over 250 employees must disclose annually the ratio of their CEO's pay to the median, lower quartile and upper quartile pay of their UK employees.

Companies in the financial services sector may be subject to additional disclosure requirements.

All companies are required to report activity relating to equity awards and shares issued in relation to employees and directors to HMRC as part of annual reporting requirements. The grant of enterprise management incentive options must also be notified to HMRC.

EMPLOYMENT AGREEMENTS

Common provisions

8 | Are employment agreements required or prevalent? If so, what provisions are common? Are any terms prohibited or unenforceable?

While there is no legal requirement to provide a written contract of employment, employers have a duty to provide employees with a written statement of particulars on day one of employment. The statement must include details of remuneration, holiday entitlement and pay, terms relating to pensions and pension schemes and any other benefits or paid leave provided by the employer.

Many senior executives and directors will also have provisions in their service agreements relating to remuneration in the form of bonuses and post-employment restrictive covenants.

Equity incentives are typically treated as being separate from an employee's terms of employment and accordingly dealt within under separate documentation.

INCENTIVE COMPENSATION

Typical structures

9 | What are the prevalent types and structures of incentive compensation? Do they vary by level or type of organisation?

The most prevalent type of incentive compensation is the right to be paid a cash bonus, which is often expressed as a contractual entitlement to participate in a discretionary bonus scheme if specific criteria are met. Bonuses do vary based on sector and the seniority of the employee.

Equity incentive arrangements are also common, particularly for start-ups, private equity and listed companies. These take the form of share option and direct equity holding arrangements, including both tax-favoured and non tax-favoured arrangements.

Restrictions

10 | Are there limits generally on the amount or structure of incentive compensation? Are there limits that adversely affect the tax treatment of the compensation relative to the employer or the executive?

Case law has established limits on the exercise of the employer's discretion to pay a bonus and on exercising discretion under equity incentive schemes. The duties overlap and can be summarised as a duty to:

- exercise discretion honestly and in good faith;
- not exercise discretion in an arbitrary, capricious or irrational way; and

- not breach the implied term of trust and confidence.

Many tax-favoured equity incentive arrangements are subject to statutory limits, as well as regulatory considerations. However, there are no overarching limits applicable to equity incentives. Regulations and governance guidelines may apply to the structure and quantum of awards.

Deferral

11 | Is deferral and vesting of incentive awards permissible? Are there limits on the length or type of vesting and deferral provisions?

It is possible to defer bonus awards. However, this is not particularly common for unlisted companies and otherwise mandatory deferral is more commonly seen in the financial services sector, where the deferral may be regulated. Vesting and payment is typically based on certain performance and employment criteria. Listed companies (and particularly premium listed companies) often do require deferral of at least part of a bonus into shares to meet investor requirements.

Vesting is common in equity incentive arrangements, which can include time-based vesting or performance-based conditions. No limits apply, but most equity incentives subsist for a maximum of 10 years. This is mandated for tax-favoured schemes and under certain regulatory codes.

12 | Are there limitations on the individuals or groups eligible to receive the compensation? Are there aspects of the arrangement that can only be extended to certain groups of employees?

Listed companies often require deferral of incentives for executive directors and other members of senior management, to meet investor requirements. Share plan participation may be restricted to employees for tax and regulatory reasons, with tax-favoured plans generally restricted to group employees or full-time directors (or both).

Recurrent discretionary incentives

13 | Can it be held that recurrent discretionary incentive compensation has become a mandatory contractual entitlement? Is this rebuttable?

Company bonus schemes often give employers full or partial discretion to determine the bonus amount. Courts have implied terms, such as the duty of mutual trust and confidence, to regulate employers' discretion. As a consequence, ostensibly discretionary compensation schemes can generate contractual or quasi-contractual entitlement. To minimise risk, employers should signpost in written bonus schemes that pre-contractual negotiations and oral representations are not binding.

With the exception of certain all-employee equity incentive schemes, most equity incentives are offered on a discretionary basis. Equity incentives are typically treated as separate to an employee's contract of employment.

Effect on other employees

14 Does the type or amount of incentive compensation awarded to an executive potentially affect the compensation that must be awarded to other executives or employees?

Discrepancies among levels of cash bonus can give rise to equal pay claims or discrimination claims if the reason is due to gender or another protected characteristic. If the discrepancy is due to fixed term or part time worker status this can also give rise to claims of less favourable treatment.

Otherwise, the type or amount of incentive compensation awarded to an executive typically does not have a direct impact on the compensation that must be awarded to other executives or employees. These decisions are usually discretionary and made on a case-by-case basis, taking into account individual performance, responsibilities and other relevant factors.

Mandatory payment

15 Is it permissible to require repayment of incentive compensation under certain circumstances? Are there circumstances under which such repayment is mandatory?

It is possible to require repayment of cash bonuses in certain circumstances, for example employee misconduct or corporate failure.

Clawback provisions are a requirement for certain employees in the financial services sector and are commonly adopted in other sectors.

Moreover, the UK Corporate Governance Code and various institutional investor bodies recommend that listed companies introduce mandatory repayment or clawback provisions in incentive schemes.

Many companies offer sign-on bonuses and it is not uncommon for firms to provide that the bonus be repaid if the new joiner leaves before a given period elapses.

16 Can an arrangement provide that payment is conditioned on continuing employment until the payment date? Are there exceptions?

Employers typically provide that a bonus or other incentive is conditional upon the employee remaining in employment (and not under notice) until the date of payment or vesting or delivery of the shares.

EQUITY-BASED COMPENSATION

Typical forms

17 What are the prevalent forms of equity compensation awards in your jurisdiction? What is a typical vesting period? Must the arrangements be offered to a broad group of employees, or can the employer select the participants?

Prevalent forms of equity compensation awards include options, share schemes and cash-based schemes, such as phantom arrangements. The arrangements are generally discretionary enabling the company to select which participants may receive awards, but larger and listed companies are more likely to operate all-employee plans, such as UK tax-favoured Share Incentive Plans (SIP) and Save As You Earn (SAYE).

The typical vesting period can vary but is often structured as three to four years, with some plans incorporating a one-year cliff followed by monthly vesting. Some tax-favoured plans such as Company Share Option Plans (CSOP) include a minimum three-year holding period for tax favourable treatment. Companies may also introduce performance-based vesting criteria or conditions, which could be linked to financial metrics like earnings before interest, taxes, depreciation and amortisation or other Key Performance Indicators.

18 Must equity-based compensation be granted by the company's board of directors (or its committee) or can the authority be delegated to officers or employees of the company? Are there limitations or requirements that apply to delegation?

Generally, board consent is required, however the board can usually delegate specific authorities to particular officers or employees. In private companies, certain shareholder or investor consents may also be required alongside the board consent.

Tax treatment

19 Are there forms of equity compensation that are tax-advantageous or disadvantageous to employees or employers?

There are four main tax-advantaged schemes: enterprise management incentives, CSOP, SIP and SAYE. These schemes provide tax advantages to the employee (and often the employer). Each of these schemes is subject to specific conditions, including qualifying requirements related to the company and participants as well as the nature and terms of the awards.

Where these tax-advantaged schemes are not available, alternative structures may achieve tax favourable treatment (for example, for a privately held company, restricted and growth share arrangements).

Registration

20 | Does equity-based compensation require registration or notice? Are exemptions, or simplified or expedited procedures available?

Equity-based compensation typically requires registration and reporting to HMRC where awards are made to employees or officers (including non-executive directors) who are UK resident (or who have UK duties). Tax-advantaged arrangements have separate reporting regimes and returns. Ongoing reporting applies to certain events during the lifetime of equity-based compensation arrangements, including the exercise or lapse of an option and any other material changes which might give rise to a tax liability.

A prospectus may be required for certain offers of transferable securities, under the UK Prospectus Regulation, however there is an exemption for offers to directors and employees, conditional on limited information being provided and other exemptions may also apply.

Withholding tax

21 | Are there tax withholding requirements for equity-based awards?

There are potential tax withholding requirements for equity-based awards depending on the circumstances at the time the tax liability arises. If the equity award constitutes a readily convertible asset (RCA), the PAYE payroll tax withholding system applies, and National Insurance Contributions may also potentially apply. However, if the award is not classified as an RCA, the tax liabilities are generally a self-assessment matter for the participant.

Inter-company chargeback

22 | Are inter-company chargeback agreements between a non-local parent company and local affiliate common? What issues arise?

Corporation tax deductions may be available for the costs incurred in setting up and operating an employee share scheme.

A statutory regime exists providing, where applicable, employer company corporation tax deductions for share option gains and certain other gains made or value received by employees relating to share awards. Where the statutory regime applies, a company does not need to incur any financial cost to obtain the relief, so no inter-company chargeback may be necessary. However, inter-company chargeback agreements may still be required, either to comply with a group's broader global transfer pricing arrangements or where the conditions for the statutory regime are not met.

Relief may also be available for certain costs incurred in relation to specific employee share schemes such as SIP, SAYE, CSOP and employee benefit trusts.

Where the statutory regime does not apply, corporation tax relief may be available under the general UK tax principles that apply to corporate expenditure. The company is required to incur actual costs to qualify, and chargeback agreements may be required. The expenditure

must also be incurred wholly and exclusively for the purposes of a company's trade and must be revenue rather than capital in nature.

Stock purchase plans

23 | Are employee stock purchase plans prevalent or available? If so, are there any frequently encountered issues with such arrangements?

Employee stock purchase plans are relatively common, but less prevalent than option plans due to the administrative burdens. These are typically offered by large, listed companies who wish to take advantage of the availability of certain tax-advantaged schemes such as all-employee SAYE plans (where employees are granted a discounted option and save for three or five years to exercise the option or withdraw the savings with a bonus) or SIPs (where employees acquire or receive shares which are held for five years for full tax relief). Such schemes often require the involvement of a third-party bank, trustee or administrator however and must generally be offered to all employees.

EMPLOYEE BENEFITS

Mandatory and voluntary employee benefits

24 | Are there any mandatory benefits? Are there limits on changing or discontinuing voluntary benefits that have been provided?

Workers have a right to a minimum of 5.6 weeks' paid holiday at full salary rates. There is no legal obligation for employers to pay unwell workers full salary. Eligible employees who are absent from work due to incapacity and who meet three qualifying conditions are entitled to receive statutory sick pay, at a reduced rate of pay set by the government. There are also various mandatory payments for those absent from work taking maternity, paternity and adoption leave. Again, the rate of pay is set by the government. Some employers choose to pay enhanced rates of sick pay and to compensate employees who are taking leave for family reasons.

Typical employee benefits and incentives

25 | What types of employee benefits are prevalent for executives? Are there tax or other financial incentives or disincentives for such employee benefit arrangements?

Executives often receive private medical insurance for themselves and their family, life assurance and permanent health insurance. These benefits are taxed as a benefit to the employee.

TERMINATION OF EMPLOYMENT

Rules for termination

26 | Are there prohibitions on terminating executives? Are there required notice periods? May executives be dismissed without cause?

There is a required statutory notice period for people employed continuously for one month or more: not less than one week if the period of employment is less than two years and an additional week for every year of continuous employment up to 12 years. The maximum statutory notice period is 12 weeks, but the parties can agree a longer period.

Either party can elect to treat the contract as terminable without notice by reason of the conduct of the other party. This applies if the executive has committed a repudiatory breach of contract or gross misconduct and if an employer has committed a repudiatory breach of contract.

There is often a contractual term allowing employers to make a payment in lieu of notice.

Any employee with more than two years' service can claim ordinary unfair dismissal and in certain circumstances an employee can claim that a dismissal is automatically unfair if they have less than two years' service. Dismissal of an executive with more than two years' service must be for a legally fair reason to avoid a claim.

Mandatory severance pay

27 | Are there statutory or mandatory minimum severance requirements? Are there any other mandatory, post-employment benefits?

Employees with a minimum of two years' service must be paid statutory redundancy pay, which is calculated based on age, length of service and the weekly rate of pay.

The maximum length of service for statutory redundancy pay is 20 years. Weekly pay is based on average earnings over the 12 weeks to the day when they received notice (subject to a cap). Employees receive between half a week and one and a half week's pay for each year of service, depending on age.

Statutory redundancy pay cannot be waived and employees can bring a claim if this is not paid.

Typical severance pay

28 | What executive severance payment level is typical?

As well as statutory redundancy pay, severance packages for executives typically include termination payments. 'Golden parachute' clauses are not uncommon in unlisted companies, whereby a senior employee will be supplied with an enhanced severance package on the termination of their employment contract, specifically where termination

takes place upon a given event. Where there is a change of control clause in the contract, it is not uncommon for redundancy and notice payment to be enhanced.

Reasons for dismissal

29 Are there limits on dismissal for 'cause'? Are there any statutory limits on 'constructive dismissal' or 'good reason'? How are 'cause' or 'constructive dismissal' defined? Are there legal or customary rules relating to effecting a termination for 'cause' or 'constructive dismissal'?

There are five statutory fair reasons for terminating someone's employment: capability, conduct, redundancy, breach of a statutory duty or restriction and the catch-all provision 'some other substantial reason'.

In addition to relying on fair reasons, employers must be able to satisfy Employment Tribunals that they acted reasonably in relying upon that reason to dismiss the employee and followed a fair process.

There is no statutory definition of constructive dismissal, but employees are justified in treating themselves as being constructively dismissed if their employer commits a repudiatory breach of contract, treated by the employee as bringing the contract to an end. Under common law, if an employer has committed a repudiatory breach, the employee can accept it by resigning, typically without notice. To avoid accidentally affirming the contract, employees must do this without undue delay. The employee will then be entitled to common law damages and will be free from obligations such as restrictive covenants or garden leave clauses (though confidentiality obligations will endure).

Gardening leave

30 Are 'gardening leave' provisions typically used in employment terminations? Do they have any special effect on benefits?

Garden leave is commonly used when dismissing senior employees in the UK. It can only be imposed if there is an express term in the employee's contract allowing their duties to be suspended during their period of notice. If not, imposing garden leave is a breach of contract.

During garden leave the employment contract continues, so the employer must continue to offer and pay for all benefits.

Waiver of claims

31 Is a general waiver or release of claims on termination of an executive's employment normally permitted? Are there any restrictions or requirements for the waiver or release to be enforceable?

It is not permitted to waive statutory claims without satisfying various legal requirements. These claims can be waived using a settlement agreement. The employee must take legal advice for the settlement agreement to be valid.

If an employee and employer enter into an agreement that ostensibly waives contractual and statutory claims but does not comply with the statutory requirements for a settlement agreement, it will only be enforceable with regard to contractual claims.

POST-EMPLOYMENT RESTRICTIVE COVENANTS

Typical covenants

32 | What post-employment restrictive covenants are prevalent? What are the typical restricted periods?

Post-employment restrictive covenants will often vary in scope and duration but typically include the following:

- non-solicitation of clients, customers and employees – typically for a period of six to 12 months depending on level of seniority;
- non-dealing restrictions with certain clients, customers or employees – usually for a duration of six to 12 months; and
- a non-competition clause – typically covering a period of three to six months.

Enforceability

33 | Are there limits on, or requirements for, post-employment restrictive covenants to be enforceable? Will a court typically modify a covenant to make it enforceable?

Enforceability will depend on the scope and duration of the restrictions as well as whether the restrictions are genuinely designed to protect legitimate business interests. Types of interest that will typically be protected include the protection of business connections, goodwill, the stability of the employer's workforce and the protection of trade secrets and other confidential information.

Although the courts will in some cases omit words from a covenant to make it enforceable, they will never rewrite it. Therefore, if the period or scope of the covenant is too broad it will likely fail.

Remedies for breach

34 | What remedies can the employer seek for breach of post-employment restrictive covenants?

If an employee breaches a post-employment restrictive covenant, the usual remedy is to bring an action for damages for breach of contract. Alternatively, they may decide to seek an injunction depending on the severity of the breach.

PENSION AND OTHER RETIREMENT BENEFITS

Required retirement benefits and incentives

35 Are there any required pension or other retirement benefits? Are there limits on discontinuing or modifying voluntary benefits that have been provided?

Employers are required to automatically enrol certain workers into a qualifying pension scheme and make minimum contributions. Other workers have a right to opt into a pension arrangement in certain circumstances. There are rights to opt out and a system of re-enrolment every three years.

There may be limits on discontinuing or modifying any benefits over and above the auto enrolment minimum depending on how those benefits have been put in place. For example, any variation of contractual terms will require employee consent. If the benefit has been provided under trust, any discontinuance or modification will depend on the terms of the trust, and, in some circumstances, satisfying certain statutory requirements.

Typical retirement benefits and incentives

36 What types of pension or other retirement benefits are prevalent for executives? Are there tax or other financial incentives or disincentives for such employee benefit arrangements?

Most executives are entitled to minimum auto-enrolment employer contributions, but employers may provide a higher level based on seniority or market practice (or both). For registered pension schemes, both the executive and the employer obtain tax relief on their contributions, up to an annual allowance after which a tax charge is applied. For 'high earners' with earnings above certain prescribed thresholds, that annual allowance may be reduced so any pension contributions made in excess of that limit would not be tax favourable.

Most pension contributions are paid to defined contribution pension arrangements. In some cases, the executive may participate in a defined benefit pension arrangement (in which the benefit payable on retirement is typically calculated as a fraction of salary for each year of service) but this is now relatively rare because a large proportion of such schemes are frozen, so that no further benefits can accrue, or closed to new joiners. This is because the cost of providing a defined benefit scheme is typically very high compared to that of providing a defined contribution arrangement.

Supplemental retirement benefits

37 May executives receive supplemental retirement benefits?

There are no limits on the retirement benefits that any executive (or other employee) may receive other than, in the case of a registered pension scheme, having to keep within the terms of the Finance Act 2004 to avoid tax charges.

INDEMNIFICATION

Directors and officers

38 | May an executive be indemnified or insured for claims related to actions taken as an executive, officer or director?

Directors and Officers liability insurance protects directors and officers regarding claims made against them in connection with the discharge of their duties. This may cover liability in connection with any negligence, default, breach of duty or breach of trust.

Whilst a company is allowed to indemnify its directors and officers for any financial loss arising from a claim made against them while acting in this capacity, the company is generally not permitted to indemnify them against liability in connection with any negligence, default, breach of duty or breach of trust by them in relation to the company.

CHANGE IN CONTROL

Transfer of benefits

39 | Under what circumstances will an asset sale in your jurisdiction result in an automatic transfer of benefit obligations to the acquirer?

If there is an asset sale, provided this constitutes a relevant transfer, all rights, powers, duties and liabilities under or in connection with a contract of employment will transfer to the acquirer, including the obligation to provide substantially equivalent benefits.

Executive retention

40 | Is it customary to provide for executive retention or related arrangements in connection with a change in control?

All employees are transferred automatically on an asset sale, where this constitutes a relevant transfer. Following the transfer, the employment contracts have effect as if originally made between them and the new employer. On a share sale, the employees will remain in place despite the change in ownership.

Share plans will typically contain provisions dealing with a change of control – usually either providing for the exercise of options and delivery of shares which are then purchased in the acquisition or providing for rollover of awards. Any retention tends to take the form either of rollover built into the equity awards from the outset or, if catered for later, transaction bonuses or new equity awards to be offered by the buyer. Care needs to be taken with

earn outs for officers and employees as, depending on the structure, these may be taxed as employment income rather than sale consideration.

Listed companies may be less likely to provide for additional retention arrangements for executive directors due to investor requirements and, if relevant, the restrictions of their remuneration policy.

Expedited vesting of compensation

41 Are there limits or prohibitions on the acceleration of vesting or exercisability of compensation in a change in control? Are there restrictions on 'cashing-out' equity awards?

For private companies, the only limits are the terms of the relevant compensation itself and any applicable shareholders' agreement. For companies listed on certain markets, there may be additional restrictions in the company's remuneration policy and investors do not generally support automatic acceleration of a director's equity award on a change of control.

For companies in the financial services sector, any acceleration must be in line with applicable regulatory rules.

UK equity plans typically do not provide for 'cashing-out' as a matter of course due to the tax consequences. Listed companies are more likely to have such provisions but will typically only use them for UK individuals if they cannot easily source shares to satisfy the awards.

42 Are there adverse tax consequences for the employer or the executive relating to benefits or payments provided pursuant to a change in control?

Not for someone resident in the United Kingdom, provided that, where the employee has a tax-advantaged award, if they are permitted to exercise it or accelerate it outside the terms of the award or the scope of the tax exemption, tax-advantaged treatment may not be available.

MULTI-JURISDICTIONAL MATTERS

Exchange controls

43 Do foreign exchange controls rules apply to the remittance of funds, or the transfer of employer equity or equity-based awards to executives?

There are generally no UK foreign exchange rules restricting such remittance or transfer. However, if there are sanctions affecting the other country, it would be advisable to confirm that these do not affect the ability to remit funds or transfer equity.

Local language requirement

44 | Must employment agreements, employee compensation or benefit plans, or award agreements be translated into the local language?

Employment agreements, employee compensation or benefit plans or award agreements are not generally required to be translated into the local language of the employee. If a contract is not written in English, if there is any dispute about its terms, translation into English would be required to enable judicial determination.

Net salary arrangements

45 | Are there prohibitions on tax gross-up, tax indemnity or tax equalisation payments?

There are no statutory or regulatory prohibitions on tax gross-up, tax indemnity or tax equalisation agreements.

Tax indemnities are common and are typically included in employment agreements and incentive documentation. They will typically be coupled with a right to withhold and deduct from any fees, salary, or other amounts due to the individual.

Indemnities covering employer's National Insurance Contributions are generally unlawful, subject to a broad exception for share option arrangements where the employee agrees to the transfer of such liabilities.

Tax equalisation agreements are relatively uncommon, except for internationally mobile senior executives. In such cases, HMRC has a process to utilise modified versions of the PAYE payroll withholding schemes and employers will often assist their employee in preparing their self-assessment tax returns to ensure compliance with the necessary tax obligations.

Choice of law

46 | Are choice-of-law provisions in executive employment contracts generally respected?

Choice of law provisions in employment contracts are generally respected. If an employee is working in the United Kingdom, they will be subject to mandatory UK employment rules that cannot be disapplied if the contract is expressed to be subject to the laws of a different jurisdiction.

UPDATE AND TRENDS

Key developments of the past year

47 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

In November 2022, the proposed Health and Social Care Levy was abolished and the 1.25 per cent increase to National Insurance contributions was removed.

Also in November 2022, the Investment Association published updated principles of remuneration. These included:

- factoring in contextual sensitivity around the cost-of-living crisis when determining executive pay;
- an increased focus on environmental, social and corporate governance (both risks and opportunities);
- aligning executive directors' pension contributions to the rate afforded to the bulk of the company workforce; and
- supporting increases in non-executive director pay where role complexity merits it.

2023 has seen changes to personal income tax rates, as well as the simplification of the operation of or eligibility of companies for certain tax-advantaged options. In particular, enterprise management incentive (EMI) options no longer require a summary of restrictions on shares to be provided to optionholders nor the signature of a working time declaration. It is also expected that, in 2024, the 92-day period in which EMI options must be notified to HMRC will be lengthened to 6 July following the tax year in which the option was granted. Restrictions on eligibility for Company Share Option Plan options have been loosened by removing the ‘worth having’ test for the shares under option, and the financial limits for individuals have doubled to £60,000. Save As You Earn (SAYE) options now have bonuses payable at the end of the savings contract following the decision to introduce a bonus rate above zero.

The government is reviewing the two all-employee tax advantaged plan (SAYE and Share Incentive Plans) and has confirmed plans to limit the duration of non-compete clauses in employment agreements to three months. The government has also proposed removing the cap on bankers' bonuses, which currently places a financial limit on the amount of bonus payable to twice an employee's salary.

In September 2023, a framework was introduced to extend the pensions auto-enrolment regime to younger workers and for contributions to be based on the first pound of earnings in certain circumstances.

The pensions lifetime allowance (the total amount of pension savings you can build up before having to pay a tax charge) is to be formally abolished from 6 April 2024. This will have a significant impact on those with considerable pension savings who are often executives and may encourage them to continue working where they might otherwise have retired due to tax concerns.

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