

NATIONAL INSURANCE CONTRIBUTIONS ACT 2011

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 2: Regional secondary contributions holiday for new businesses

Section 4: “Holiday” for new businesses

28. This section introduces Part 2 of the Act, which provides for the regional secondary contributions holiday for new businesses.
29. *Subsection (1)* sets three conditions, all of which must be met if the section is to apply.
30. The first condition, in *subsection (1)(a)*, provides that a person, or a number of persons in partnership, (“P”) must have started a new business during the relevant period. Section 5 defines what is meant by “starting a new business”.
31. *Subsection (4)* defines “the relevant period”. It begins on 22 June 2010, when the Chancellor announced the Holiday in the Emergency Budget. It ends on 5 September 2013, three years after the implementation date.
32. The second condition, in *subsection (1)(b)*, provides that the principal place at which the new business is carried on at the time it starts must not be in any of the excluded regions.
33. *Subsection (5)* provides that “the excluded regions” for the purposes of the Holiday are Greater London, the South East Region and the Eastern Region. Section 11 defines “the South East Region” and “the Eastern Region”.
34. The third condition, in *subsection (1)(c)*, provides that P’s new business will not qualify for the holiday unless there are “qualifying employees” in relation to it. Section 6 specifies when a person is a qualifying employee.
35. *Subsection (2)* sets out how the benefit of the Holiday will be provided. It gives two alternative means by which P can benefit.
36. First, *subsection (2)(a)* provides that P may deduct the appropriate amount in respect of each qualifying employee from Class 1 contributions payments that P is liable to make. “Class 1 contributions payments” is defined in section 11 and section 7 specifies what is the “appropriate amount”.
37. Secondly, *subsection (2)(b)* provides that if P is not able to deduct this amount, it may be refunded to P. Section 8 explains how a deduction or refund is made.

Example

- Brandon starts a new business on 27 September 2010 and takes on two employees on 1 November 2010. Brandon is eligible for the Holiday but does not claim. After the end of the 2010/11 tax year he is advised by his accountant that he could have claimed the Holiday.

Brandon decides to claim and calculates what his NICs Holiday entitlement was for the period from 1 November 2010 to 5 April 2011 and makes an application for a refund to HMRC. Provided the information is complete, Brandon would be entitled to a refund of the secondary Class 1 contributions payable in respect of the two employees for the 2010/11 tax year. He will continue to enjoy the Holiday for his two employees up to 31 October 2011 by making deductions from the payments he is due to make to HMRC during the 2011/12 tax year.

Section 5: Starting a new business

38. This section defines what is meant by “starting a new business”.
39. *Subsection (1)* provides that P starts a new business when P begins to carry on a new business.
40. *Subsection (2)* defines when a business is not to be regarded as a “new business”. In the vast majority of cases there will be no question about whether a new business has started as no business will have existed before and so this test will be satisfied.
41. The definition of a new business provides that a business will not be a new business if the person applying for the Holiday has at any time in the six months before the start of the business carried on another business consisting of most of the activities of which the most recent business consists. This is to prevent a business ceasing and then restarting or restructuring itself in order to take advantage of the Holiday in circumstances where it is not actually a new business.

Example

- Roy carries on a business as a carpenter with two employees. He is offered a job working for a larger business and accepts, closing his own business and releasing his employees. He doesn't enjoy his new job and leaves after 3 months. He begins to carry on his old business as a carpenter, and re-hires his former employees. This is not a new business as, within the six months prior to it starting, Roy carried on another business consisting of the activities of which the business consists.
42. *Subsections (2)(b)* and *(3)* provide that a business is not a “new” business if P carries it on as a result of a transfer. That happens when P begins to carry on the business on another person ceasing to carry on the activities of which it consists or mostly consists in consequence of arrangements involving P and the other person. So where:
 - a) there is a transfer of activities of an existing business from one person to another,
 - b) those activities constitute all or most of the activities of the business to which the transfer is made, and
 - c) there is an arrangement for the transfer between the parties,this will not count as a new business.

Examples

- Sam is a publican, running a pub in a small village. He wishes to retire and sells the pub as a going concern to Tom, who takes over the trade and continues to employ the pub's staff. Tom is not carrying on a new business, as the whole of the trade he is now carrying on was previously carried on by Sam.
 - Jim is a sole trader, a plumber. The business incorporates and Jim's wife Rosie is named as the sole director. Jim is then taken on by the company as an employee. This is not a new business, as the whole of the trade carried on by the company was previously carried on by Jim.
43. *Subsection (4)(a)* provides that P is to be taken, for the purposes of *subsection (3)*, to begin to carry on a business on another person ceasing to carry on such activities if the

business begins to be carried on by P otherwise than in partnership on such activities ceasing to be carried on by persons in partnership.

Example

- John and Paul are dentists, practising in partnership. They fall out and dissolve their partnership, dividing their practice and its patients between themselves and both now carry on their professions alone. Neither Paul nor John is carrying on a new business, as each is carrying on a profession whose activities were previously carried on by them in partnership.
44. *Subsection (4)(b)* provides that P is to be taken, for the purposes of *subsection (3)*, to begin to carry on a business on another person ceasing to carry on such activities if P is a partnership which begins to carry on the business on such activities ceasing to be carried on –
- (i) by a person or persons otherwise than in partnership,
 - (ii) by a partnership not consisting only of all the persons constituting P, or
 - (iii) partly as mentioned in sub-paragraph (i) and partly as mentioned in sub-paragraph (ii).

Example

- Alan, Ben, Charles and David are partners in an accountancy firm. Ben wishes to retire. The firm is expanding, and the remaining partners decide to admit 2 new partners, Ellen and Frances. The partnership also buys the business of another accountant, George, who also wishes to retire. The new business carried on in partnership by Alan, Charles, David, Ellen and Frances is not a new business. The activities of the business were previously carried on by a combination of (1) a partnership of different constitution than the current partnership (being the one carried on by Alan, Ben, Charles and David), and (2) a person otherwise than in partnership (the business carried on by George).
45. *Subsection (5)* provides that P will not be starting a new business if (a) before beginning to carry on a business, P enters into arrangements under which P may at any time during the relevant period carry on as part of the business activities carried on by another person, and (b) the business would have been prevented by *subsection (2)(b)* from being a new business if P had been undertaking the activities at the time he started his business, and the other person at that time had ceased to carry them on.
46. The intended effect of this provision is that a person will be prevented from enjoying a holiday if, before beginning to carry on a business, the person enters into arrangements that mean that at some point after the person’s business has started he may undertake activities carried on by another business and, had the person been undertaking those activities at the time the business was started, a holiday would not have been allowed.

Example

- A partner in a firm of solicitors handles all the divorce work. He breaks away from the firm and makes an arrangement with the firm that, if his new firm does not prosper, he will be entitled to buy the divorce business of the old firm. His new firm advertises for new divorce work but is only moderately successful. So, he exercises his option to buy the divorce business from the old firm. By virtue of the “arrangements” rule, the partner’s new firm will not count as a “new” business.
47. *Subsection (6)* defines the meaning of “business” for the purposes of section 5. A business means something which is –
- (i) a trade, profession or vocation for the purposes of the Income Tax Acts or the Corporation Tax Acts,
 - (ii) a property business, as defined in section 263(6) of the Income Tax (Trading and Other Income) Act 2005, or

- (iii) an investment business, which means a business consisting wholly or partly of making investments.
48. A charity which starts to trade will also fall within the definition whether or not it is carrying out trading activities with a view to profit.

Section 6: Qualifying employees

49. This section specifies when a person is a qualifying employee in relation to a new business.
50. *Subsection (1)* sets out two conditions, both of which must be met if a person is to be a qualifying employee in relation to a new business.
51. The first condition, in *subsection (1)(a)*, is, broadly speaking, that the person must have been taken on as a new employee of the new business within the business's first year of operation. It requires that the person first becomes employed as an employed earner for the purposes of the new business before the end of the initial period. "Employed earner" has the meaning given by section 2(1)(a) of the Social Security Contributions and Benefits Act 1992 and its Northern Ireland equivalent. It thus includes employees and office-holders (such as company directors).
52. Under *subsection (1)(a)*, the person must become employed before the end of the "initial period". *Subsection (3)* defines the "initial period".
53. The "initial period" means the period of one year beginning with the date on which P starts the new business or, if earlier, the first date on which an employee is first employed for the purposes of the new business. If a new business starts up on or after 22 June 2010, but the first date on which an employee is first employed by the new business is before 22 June 2010, the employee is treated, for the purposes of paragraph (b), as first employed on 22 June 2010. The effect of *subsection (3)* is that no new business can have an initial period that begins before 22 June 2010.

Example

- ABC Restaurants Ltd was first registered on 1 May 2010 and two directors were appointed. Preparatory work was undertaken and the new restaurant started to trade on 1 October 2010. The two directors appointed on 1 May 2010 qualify for the Holiday but they are treated as having been engaged for the purposes of the new business on 22 June 2010. Each director will have a Holiday period from 6 September 2010 to 5 September 2011. ABC Ltd can have a Holiday for up to eight further employees it engages before 22 June 2011.
54. The second condition, in *subsection (1)(b)*, is that P must be the secondary contributor in relation to any payment of earnings to or for the benefit of the employee at any time during the employee's holiday period. This means, broadly speaking, that P must be the person liable to pay employer NICs in relation to any payment of the new employee's earnings during the holiday period that relates to that employment.
55. *Subsection (1)(b)* refers to payments of earnings during the period that is the "holiday period" in relation to the person. *Subsection (4)* defines the "holiday period".
56. The holiday period in relation to a person begins on the day on which the person is first employed for the purposes of the new business or, if the person is first employed before 6 September 2010, with that date. It ends one year from the date it begins, or at the end of the relevant period, whichever of those dates is the earlier. If a qualifying employee leaves and is re-employed the employee will not be eligible for a new Holiday period. Instead, the new business will be able to enjoy whatever period remains of the employee's original Holiday period.

Example

*These notes refer to the National Insurance Contributions Act
2011 (c.3) which received Royal Assent on 22 March 2011*

- A new business (sole trader) commenced trading on 6 August 2010 which falls within the relevant period. The principal place at which the new business is carried out when it starts up is not in an excluded region. The first ten employees engaged between 6 August 2010 and 5 August 2011 (the initial period) will qualify for the Holiday.
 - The first employee is engaged on 28 August 2010. Earnings paid to that employee between 6 September 2010 and 5 September 2011 (the Holiday period) will be eligible for the Holiday.
 - The second employee is engaged on 30 September 2010. Earnings paid to that employee between 30 September 2010 and 29 September 2011 (the Holiday period) will be eligible for the Holiday.
 - The third employee is engaged on 10 September 2011. As the employee's start date is outside the first year of business (the initial period) the new business is not eligible to claim the Holiday for this employee.
 - The second employee leaves the new business in January 2011 and rejoins it in July 2011. The new business can resume the Holiday for this qualifying employee until the end of his original Holiday period which ends on 29 September 2011.
57. *Subsection (2)* limits the Holiday to the first 10 qualifying employees.
58. Under certain circumstances, the NICs anti-avoidance legislation concerning personal service companies (commonly known as "IR35") and managed service companies imposes a NIC liability on deemed payments of employment income. *Subsection (5)* provides that the Holiday will not apply to employer NICs liable to be paid on those deemed payments.

Section 7: The appropriate amount

59. This section specifies what the appropriate amount is in respect of a qualifying employee.
60. *Subsection (1)* provides that this amount is "the relevant amount of secondary Class 1 contributions".
61. That phrase is then defined in *subsection (2)* as the amount of secondary Class 1 contributions which P is liable to pay in respect of relevant earnings.
62. *Subsection (3)* defines "relevant earnings". A qualifying employee's earnings will not automatically attract the Holiday. To attract the Holiday:
- the earnings need to be paid in respect of employment as an employee for the purposes of the new business;
 - they need to be paid during the holiday period; and
 - they need to be paid when the principal place at which the business is carried on is not in any of the excluded regions.
63. So *subsection (3)* provides that the requirement for the business not to be in any of the excluded regions must be satisfied at any time when it is paying earnings to a qualifying employee as well as at the time when the business starts.
64. *Subsection (4)* provides that the appropriate amount is capped at the first £5,000 of employer NICs. This limit is applied in relation to each qualifying employee separately.
65. *Subsection (5)* ensures that this section is consistent with the special NICs timing rules which apply to earnings paid to mariners. The calculation of primary and secondary Class 1 contributions in respect of earnings paid to mariners proceeds largely in the same manner as other employed earners except that there are special rules where a mariner's earnings are paid at the end of his voyage. *Subsection (5)* is intended to ensure that earnings paid in respect of that part of the voyage that falls during the holiday

period count for the purposes of the Holiday, despite the fact that they may not be paid until after the holiday period has ended.

66. *Subsection (6)* is concerned with contracted-out NICs. If the qualifying employee is contracted out of the State Earnings Related Pension Scheme, P will pay secondary NICs at a rebated (i.e. reduced) rate. Some contracted-out scheme rules require the employer to pay the rebate into an occupational pension scheme or other pension provider. Accordingly, *subsection (6)* gives employers of contracted-out qualifying employees the benefit of deducting employer NICs at the full, non-contracted-out rate, so that they can pay the rebate to the pension provider.

Section 8: Making of deductions or refunds

67. This section explains how a deduction or refund is made.
68. *Subsection (1)* lays down the primary means of obtaining the benefit of the Holiday. The appropriate amount (see section 7) may be deducted from any one or more Class 1 contributions payments made by P in respect of the same tax year as the one in which the earnings giving rise to the appropriate amount were paid. Section 11(1) defines “Class 1 contributions payments” as monthly or quarterly payments of Class 1 NICs.
69. *Subsection (2)* lays down the secondary means of obtaining the benefit of the Holiday. To the extent that the appropriate amount cannot be deducted under this section, P is entitled to a refund from HMRC if P requests a refund.
70. *Subsection (3)* provides that no deductions or refund may be made until an application is made to HMRC and HMRC grants the application.
71. As the Holiday is a scheme to help new businesses in targeted areas of the UK it is considered under EU rules as a state aid. The details of the Holiday are such that in connection with Articles 107 and 108 of the Treaty on the Functioning of the European Union (TFEU) the “de minimis” Regulations apply so that the state aid is lawful aid granted by the UK. The ceiling for the aid covered by the de minimis rule is in general €200,000 (cash grant equivalent) over any three fiscal year period. Lower ceilings apply for some sectors. Road transport has a ceiling of €100,000, agriculture has a ceiling of €7,500, and fisheries and aquaculture has a ceiling of €30,000. HMRC’s mandatory application process for new businesses is in place to ensure compliance with these limits.
72. The applicable legislation (which refers to the Treaty provisions in place before TFEU came into force) comprises:
- Commission Regulation [\(EC\) No 1998/2006](#) of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to de minimis aid;
 - Commission Regulation [\(EC\) No 1535/2007](#) of 20 December 2007 on the application of Articles 87 and 88 of the EC Treaty to de minimis aid in the sector of agricultural production; and
 - Commission Regulation [\(EC\) No 875/2007](#) of 24 July 2007 on the application of Articles 87 and 88 of the EC Treaty to de minimis aid in the fisheries sector and amending Regulation [\(EC\) No 1860/2004](#).
73. *Subsection (4)* provides that HMRC can specify what information the application is to contain, the form in which it is to be made, and the manner in which it is to be made. The information requested in the application form includes:
- PAYE and Accounts Office references;
 - business name;
 - the date the business started;

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- the business address and post code; and
 - the region or country in which the principal business address falls.
74. Businesses that have not received any state aid are required to apply online. Businesses that fall within the agriculture or fisheries and aquaculture sectors which have had any form of de minimis state aid, or any other aid towards the costs of hiring new employees, during the current and two previous financial years will not qualify for the Holiday. Other businesses that are in receipt of state aid are required to submit a paper application.
75. *Subsection (5)* provides that the deadline for making an application for a refund in respect of a qualifying employee is four years from the day on which the last deduction could be made in respect of the qualifying employee.
76. *Subsection (6)* provides for a right of appeal. The standard NICs appeal procedures which apply in relation to decisions about (for example) the categorisation of earners as employed or self-employed will also apply to decisions about deductions or refunds under section 8. Paragraphs (a) and (b) apply, respectively, the Great Britain legislation and the Northern Ireland legislation relating to NICs appeals to the decisions to which this subsection applies.
77. *Subsection (7)* specifies the decisions to which *subsection (6)* applies, and which can therefore be appealed. They are decisions about entitlement to deductions, and the amount of a deduction, if entitled, and decisions about refunds and the amount of a refund, if entitled.

Section 9: Retention of records

78. This section introduces a record-keeping obligation on P relating to records concerning the Holiday.
79. *Subsection (2)* sets out the details of the record-keeping requirement. The documents or records which P must keep and preserve are those relating to two matters:
- whether P was entitled to make a deduction in respect of the employee, and, if so,
 - how P calculated any amount that has been, or could have been, deducted.
80. P must keep and preserve the relevant documents or records for at least 3 years beginning with the date on which the last deduction under section 8 is, or could be, made in respect of each qualifying employee. The period provided - 3 years - is consistent with the period for which employers are required to retain other NICs-related records.
81. There is already a general NICs record-keeping requirement imposed on employers: so, in order to prevent there being overlapping duties, *subsection (3)* ensures that the general requirement does not apply in relation to records relating specifically to the Holiday.
82. *Subsection (4)* explains that the duty under this section may be discharged by preserving the relevant documents or records in any form or by any means.
83. *Subsection (5)* applies to this section the information and inspection powers contained in Schedule 36 to the Finance Act 2008. These powers make provision that enable HMRC to check compliance with the law. They include the power for officers of HMRC to issue notices requiring persons to provide information or to produce documents if the information or document is reasonably required by the officer for the purpose of checking the taxpayer's tax position. They also include the power to inspect business documents that are on the business premises. *Subsection (5)* will extend the powers in Schedule 36 to ensure that HMRC officers can check compliance with the Holiday legislation.

Section 10: Anti-avoidance

84. This section sets out an anti-avoidance rule.
85. *Subsection (1)* provides that the Holiday is not available if P starts the new business pursuant to avoidance arrangements.
86. *Subsection (2)* defines “avoidance arrangements” by reference to the purpose for which the arrangements were made. The Holiday will not be available to P if the main purpose, or one of the main purposes, of P in being party to such arrangements is that they result in P carrying on activities as part of the new business which might otherwise have been carried on as part of another business (whether by P or any other person), but which P carries on as part of the new business in order to obtain Holiday deductions or refunds (or increased deductions or refunds).
87. “Arrangements” are then defined at section 11(1) in a non-exhaustive manner to include “any agreement, understanding, scheme, transaction or series of transactions (whether or not legally enforceable)”.

Section 11: Interpretation of Part 2

88. *Subsection (1)* defines, or gives signposts to the definitions of, words and phrases which have been used in Part 2.
89. The principal enactments relating to NICs are SSCBA 1992 and, in relation to employment in Northern Ireland, SSCB(NI)A 1992. *Subsection (2)* provides that expressions used both in this Part and in Part 1 of SSCBA 1992 or, if appropriate, Part 1 of SSCB(NI)A 1992 have the same meaning in this Part as they do for the purposes of that Part.