
EBT:

What leeway do trustees have to sell shares on behalf of beneficiaries and cover employers'

NICs,

and how do they achieve that?

QUICK RECAP ON EMPLOYERS' NIC ON ERS

- **NIC** applies to employees, officeholders/directors (section 2(1)(a) SSCBA 1992) and shadow directors (reg 1(2) SSCR 2001). Non-employees not considered (separate rules and probably not a beneficiary of EBT).
- **Secondary NIC:** transferrable if treated as remuneration as:
 - restricted or convertible securities
 - securities option
 - restricted covenant

(SSCBA 1992 Sch 1 para 3A(2B))

- **Health & Social Care Levy:** wef 6 April 2023 – applies to every person who is liable to pay a qualifying national insurance contribution (or would be but for age provisions) – NIC legislation applies to the levy (s3 H&SCLA 2021) – so transferrable to employees. Full guidance awaited.
- **International equivalents:** unlikely to be transferrable (worth checking) – ensure any clauses requiring a participant to transfer is limited so far as legally permissible in the relevant jurisdiction.

THE TRUSTEE'S POSITION

- **The Trust Deed:** Starting point:
 - Who are the beneficiaries?
 - Grantor or transferring under an operating agreement?
 - What is the nature of the beneficiaries' interests – fixed interest?
 - Income available – or Capital

Capital

The Trustees may pay, appropriate or apply any capital in the Trust Fund to or for the maintenance or otherwise for the benefit of all or any one of more of the Beneficiaries to the exclusion of the others and, if more than one, in such shares and proportions and in such manner generally as the Trustees think fit and the Trustees may sell any part of the Trust Fund to Beneficiaries on beneficial terms.

THE TRUSTEE'S POSITION

- **The Letter of Wishes/Operating Agreement:** Check to see if there is any guidance given to the trustee.
- **Option Agreement/NIC Election:** Confirm if it is the beneficiary's liability and so payment benefits the individual not the settlor or any other excluded person.
- **Consents:** Protector, Employee Committee, beneficiary or any other consent process before selling shares.
- **The Fiduciary Duties:** What is the proper law?
- **Formalities:** How does the trustee record the decision – minutes, deed?

THE TRUSTEE'S POSITION

‘If a Group Company directs, the Trustee shall deduct and withhold any income tax and National Insurance contributions (**NICs**) for which the Beneficiary is liable (including under contract) from any payment or any assets transferred to a Beneficiary.’

Concerns:

- Can the trustee be sure of the sums due/liability?
- Timing of liability? What if self assessment?
- What to do with the sums deducted?
- How will the Beneficiary get the tax credit?

BENEFIT TO A BENEFICIARY

- Does this benefit a beneficiary?
- Has the employee given a binding indemnity to the employer or agreed to 'make good'? If so, would it benefit the employee to be funded to reimburse the employer's NIC?
- Is there a valid election to transfer? If so the employee is directly liable for the secondary NIC – maybe a reason to do the election.
- Trust deed probably prevents any benefit passing to the employer/settlor (otherwise ceases to be an employees' share scheme s 1166 CA 2006, and the section 84 / section 95 IHTA relief).
- Is there a section 13 IHTA restriction – ie is the beneficiary a participator, is the company close?

DOCUMENTS AND PRACTICALITIES

- Trust Deed/Letter of Wishes/Operating Agreement: give the trustee comfort by ensuring they have powers. Consider refreshing the letter of wishes or amending an operating agreement to cover a share sale/gift.
- Award Agreement/Exercise notice: ensure suitable wording, particularly in the exercise notice, requesting the sale.
- Brokers selling the shares: who is the brokers' client, are there any KYC formalities ('overseas' beneficiaries)? Who bears the fees?
- Trustee minute: record decisions.
- Do not pay direct to the employer UNLESS very carefully document employee requesting the diversion of funds payable to the employee direct to the employer.

Thank you



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