



**Regional employer National Insurance contributions Holiday
for New Businesses**

Technical Note, Draft Legislation and Explanatory Notes

27 August 2010

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Introduction

This Technical Note explains the Regional Employer National Insurance contributions Holiday for New Businesses ('the Holiday') announced in the Emergency Budget on 22 June 2010. Before making enquiries about the Holiday, new businesses should read the web based guidance which will be available before 6 September 2010. The guidance will also include the necessary application form.

If further information about the Holiday in general is required, new businesses and their advisers should contact HM Revenue & Customs (HMRC) at: - employernics.holidayfornewbusinesses@hmrc.gsi.gov.uk (telephone number: 0207 147 3838).

Chapter 1 – Technical Note

The Government believes that sustainable and balanced growth must be based on private sector enterprise and investment. The creation of new enterprises in areas most dependent on public sector employment will support transition to a new, sustainable model of economic growth. The Government is therefore helping new businesses in these areas to create jobs, by reducing the costs of employing staff.

Overview

On the 22 June 2010 the Chancellor announced the Regional Employer National Insurance contributions Holiday for New Businesses (the Holiday). It will last from the date of the Emergency Budget on 22 June 2010 until 5 September 2013. The Holiday will target help on certain 'new businesses' who are also employers and who start up outside Greater London, the South East and the Eastern regions of the UK.

New businesses will be able to make National Insurance contributions (NICs) savings under the Holiday from earnings paid to employees on or after 6 September 2010. The Holiday will operate by allowing a deduction against the amount of Class 1 NICs that an employer is required to pay to HMRC each month or each quarter. With two main modifications, new businesses that were started between 22 June 2010 (the date of the Chancellor's Emergency Budget) and the 5 September 2010 will benefit to the same extent as a new businesses started on or after 6 September 2010 provided they satisfy the eligibility tests.

For the first ten qualifying employees that a new business employs in its first year of business, following start up, it will be entitled to an individual Holiday for each of those employees. The Holiday period for each employee will last for the shorter of the employee's first year of employment or the time left until the Holiday scheme ends on 5 September 2013.

The Holiday will apply to all relevant earnings paid to a qualifying employee during the first year of the employee's employment but there will be a maximum saving of £5,000 in employer NICs in respect of each employee.

The Holiday will be administered as a de minimis State Aid. New businesses wishing to enjoy a Holiday will need to make an application to HMRC when they engage their first employee. Full guidance will be available on the Business Link website for those interested in applying.

The draft legislation includes anti-avoidance measures to prevent existing businesses making arrangements to exploit the Holiday.

The Holiday will be entirely voluntary and will enable qualifying new businesses that choose to participate to reduce the amount of secondary (employer) NICs liability that they would otherwise have to pay over to HMRC. If a new business does not wish to participate

in the Holiday scheme it will be required to meet its employer NICs liabilities in full in the same way as any other employer.

Detailed rules about the Holiday

Royal Assent of draft legislation

The Holiday will be introduced in a National Insurance Bill in the Autumn and is expected to receive Royal Assent in early 2011, when it will become law. Until that time, businesses eligible for the Holiday will, as a result of the exercise of HMRC Commissioners' collection and management powers, be able to receive the benefit of the Holiday from 6 September 2010.

New businesses which choose to participate in the scheme in advance of it becoming law should note that if the draft legislation that is published in this Technical Note is not enacted in substantially the same form they will be required to pay over to HMRC by 19 April 2011 any contributions that they have withheld which remain due.

Eligibility

The Holiday will apply where:

- a person, or a partnership (P) starts a new business in the period 22 June 2010 to 5 September 2013 (the relevant period),
- the principal place at which the new business is carried on when it is started is not in an excluded region, and
- qualifying employees are engaged for the purposes of the new business

The Holiday will be available to new businesses in the form of incorporated businesses, sole traders and partnerships. It includes new trades, professions or vocations and also new charities that are trading as well as property and investment businesses.

Starting a new business

The start date of a new business fixes the period within which qualifying employees can be employed (the initial period). The Holiday can apply where a person starts a new business outside of the excluded regions between 22 June 2010 and 5 September 2013, the principal place at which the business is carried on when it starts is not in an excluded region and one or more persons are qualifying employees.

The new business requirement forms a key part of the policy underlying the Holiday. Only new businesses (including charities that start to carry out a trade) will qualify for the Holiday. 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.

The definition of a new business provides that a business will not be a new business if the person (P) 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 restarting or restructuring itself in order to take advantage of the Holiday in circumstances where it is not actually a new business. Similarly where there is a transfer of activities of an existing business from one person to another, those activities constitute all or most of the activities of the business to which the transfer is made and there is an arrangement for the transfer between the parties, this will not count as a new business.

Examples

- Jim is a sole trader, a carpenter. 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.
- 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.

Nor is a business a new business if P begins to carry on the business on another person ceasing to carry on the activities of which the new business mostly consists because of arrangements involving P and the other person.

A person (P) will be taken 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)

A person will also 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 could 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.

Examples

- 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 the whole of which was previously carried on by them in partnership.

- 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.

A business is defined as being something which is a trade, profession or vocation, a property business or an investment business. A charity which starts to trade will also fall within the definition whether or not they are carrying out trading activities with a view to profit.

Qualifying employees

In order for the new business to gain the benefits of the Holiday it must have qualifying employees. They must have been first employed for the purposes of the new business before the end of the 'initial period' which lasts a year and P must be the employer in relation to any payment of earnings at any time during the employees holiday period.

The initial period

The initial period begins on the date on which the new business starts, or if earlier, the first date on which a person is first employed for the purposes of the new business. The start of the initial period cannot be before 22 June 2010 but for those new businesses that start up on or after 22 June 2010 but who first employed employees prior to the start up, those employees will be treated as being first employed on 22 June 2010.

The maximum number of qualifying employees

All employees (including directors) count as qualifying employees up to a maximum of 10, irrespective of the level of their earnings. Employees who earn below the secondary threshold (currently £110 per week) or who are part-time or casual employees count towards the quota of ten even if they leave the employment before 6 September 2010. Once the new business has employed the first ten employees it cannot qualify for a Holiday for any other employees taken on even if one or more of the first ten employees have subsequently left.

Principal place of business

As a prior condition, in order for any qualifying employees to be able to benefit from the Holiday the principal place at which the new business carries on when it starts up must not be in an excluded region (see below). If the principal place of business moves into an excluded region during the initial period or during a holiday period in relation to a qualifying employee, the benefit of the Holiday ceases immediately.

To enjoy the Holiday the principal place at which the new business starts to be carried on must not be in any of the excluded regions. For most new businesses there will be little

doubt about whether the test is satisfied – the location of the new shop, restaurant or business premises will be clear to see.

In a few cases, there may be no obvious place of business (for example, a plumber with employees whose work takes him from one job to the next). In these cases, the new business will need to demonstrate that the principal place where, for example, the business records are kept and from which the business is administered is not in any of the excluded regions. Where a new business cannot demonstrate that the principal place at which the business is carried on when it starts is outside of the excluded regions, a Holiday will not be available.

If the new business is based in two locations, the Holiday will only be available if the greater part of the business is not carried on in an excluded region when it is started. If the greater part of the new business is not carried on in the excluded regions then the Holiday will be available to all of the employees including those working for the business located in the excluded regions. If the greater part of the business is carried on in the excluded regions the new business will not be eligible for the Holiday. The onus is on the new business to demonstrate that the principal place at which its business is carried on when it is started is not in any of the excluded regions. Cases of doubt will need to be determined on the facts of the particular case.

Excluded regions

The Holiday is not available to new businesses where the principal place at which the new business is carried on when it starts is in the excluded regions. The three excluded regions are:

Greater London

The Eastern Region comprising:

- (a) The counties of Bedford, Cambridgeshire, Central Bedfordshire, Essex, Hertfordshire, Norfolk and Suffolk.
- (b) The non-metropolitan districts of Luton, Peterborough, Southend-on-Sea and Thurrock.

The South East Region comprising:

- (a) The counties of Buckinghamshire, East Sussex, Hampshire, the Isle of Wight, Kent, Oxfordshire, Surrey and West Sussex.
- (b) The non-metropolitan districts of Bracknell Forest, Brighton and Hove, Medway, Milton Keynes, Portsmouth, Reading, Slough, Southampton, West Berkshire, Windsor and Maidenhead and Wokingham.

Holiday period

There is an individual Holiday period of one year for each qualifying employee during which the earnings that they are paid as a result of employment by the new business qualify for the Holiday. The Holiday period begins on the first day that the qualifying employee is employed for the purposes of the new business or 6 September 2010 if the employment, commenced before that date. 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

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.

The amount of the Holiday (appropriate amount)

For qualifying employees the amount of the Holiday is calculated by establishing the amount of secondary (employer) Class 1 contributions liable to be paid in respect of earnings paid to or for the benefit of the qualifying employee in respect of employment for the new business in the 'holiday period' provided that the principal place at which the business is carried on when the earnings are paid is not in an excluded region.

There is a maximum Holiday value in respect of each qualifying employee which is set at the first £5,000 of the secondary Class 1 contributions due in respect of earnings paid to that employee in the Holiday period. The cap for each employee applies to the whole of the employee's Holiday period whether or not its duration crosses a tax year. Any unused amount up to the cap of £5,000 is not transferable to another qualifying employee. Once the £5,000 cap is reached the Holiday will end for that employee. New businesses will need to keep a cumulative total of the deductions made against each qualifying employee in order to ensure that the £5,000 cap is not breached. A separate cumulative

total will be needed for those new businesses that are subject to the lower State Aid thresholds described below.

Where the employee leaves before the cap is exhausted and then returns, the new business will be entitled to make Holiday deductions on earnings paid in the remainder of the employee's Holiday period up to what is left of the £5,000 cap.

Making a deduction

Provided that the new business has submitted an application for the Holiday, in such form and manner as is specified by HMRC (see the section on State Aid below) and that application has been approved by HMRC a new business will be able to deduct, from the monthly or quarterly NICs payments that it is required to make to HMRC, the appropriate amount. As set out above, the appropriate amount is the amount of secondary Class 1 contributions which the new business is liable to pay in respect of the earnings paid to or for the benefit of qualifying employees during the Holiday period. The deduction can only be made if, when the earnings were paid, the principal place at which the new business is carried on is not in an excluded region.

The appropriate amount for each tax year can only be deducted from monthly or quarterly contribution payments due to be paid by a new business in respect of that tax year. If the amount of the Holiday deduction that a new business is entitled to deduct exceeds the amount of the payments from which the deduction can be made, HMRC will on receipt of a request refund the excess to the new business. An application for a refund cannot be made more than four years after the date on which the new business could have made the last deduction in respect of the qualifying employee.

State Aid considerations

The EC treaty generally prohibits Member States from giving support to businesses that would give them an unfair advantage over their competitors: this is known as State Aid. However, where aid below a certain value is granted it is considered that it will not affect trade nor distort competition between Member States. In order to offer this lawful State Aid there are certain procedures that must be followed as provided for under Commission Regulation (EC) No. 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the EC Treaty – (the de minimis Regulations)¹.

State Aid may not be given to certain business sectors (such as the coal sector). New businesses in these sectors will not, therefore, be eligible for the Holiday. Full details will be available on the Business Link website.

Most business sectors can receive total de minimis aid of up to €200,000 over a continuous period of three years. New businesses will be entitled to the maximum deduction under the Holiday (of £50,000) where they:

- have not previously received any de minimis State aid; or

¹ O.J. L 379, 28.12.2006, p.5.

- have received a previous de minimis aid which when combined with the maximum deduction of £50,000 under the Holiday will not exceed this €200,000 limit

A lower limit of de minimis aid applies to certain sectors: These are:

- Agriculture where the limit is €7,500 (excluding activities which are not connected to the production, processing and marketing of agricultural products falling within the scope of Annex I of the Treaty Functioning of the European Union (TFEU), such as agro-tourism, the development of craft industries or aquaculture).
- Fisheries and aquaculture where the limit is €30,000 (excluding the objectives of serving to increase fishing capacity and aid granted for the construction or purchase of fishing vessels).
- Road transport where the limit is €100,000.

For the agriculture, and fisheries and aquaculture, sectors the limits of the de minimis aid also limit the amount of Holiday deductions that may be claimed. So, for example, a fisheries business can claim maximum relief of €30,000.

No State Aid is allowed if the amount of the aid when combined with any aid given towards the costs of hiring new employees which have been given under another block exemption or notified scheme if that would mean that the aid permitted under the block exemption or notified scheme is exceeded.

Other issues

Earnings of workers supplied by personal service companies (IR 35)

The personal service company legislation is aimed at engagements where an individual undertaking work for an end client would have been employed by the end client had they been engaged directly rather than through an intermediary. The intermediary is treated as the secondary contributor. Employees who are treated as employed earners by virtue of the Social Security Contributions (Intermediaries) Regulations 2000 are not qualifying employees but only to the extent that earnings in an employed earner's employment arise by virtue of those Regulations. However, intermediaries often pay the individual operating through the intermediary a regular salary and subject to fulfilling the other qualifying criteria, the employer would be eligible for the Holiday.

Managed service companies

The Managed Service Company legislation is aimed at managed intermediaries marketed to disparate individuals to enable the individuals to avoid being classed as employees of the end clients for whom they work. Since the primary purpose of such intermediaries is avoidance, employees who are treated as employed earners by virtue of the Social Security Contributions (Managed Service Companies) Regulations 2007 are not qualifying employees.

Business take-overs

Where a business that is eligible for the NICs holiday is taken over or sold the Holiday ends.

Contracted-out rates

New businesses that pay reduced rates of contributions because the employee is in an occupational pension will be able to withhold the full amount of secondary NICs (12.8 per cent of earnings above the secondary threshold) even though this may be higher than the reduced rate they are required to pay.

Excluded secondary contributors

This measure only applies to new businesses that undertake a trade, profession or vocation or are either property or investment businesses. Other secondary contributors who are not businesses as defined will still have to pay secondary Class 1 NICs on earnings paid to employed earners. For example, public sector employers that do not trade for the purposes of either the Income Tax Acts or the Corporation Tax Acts or employers of personal or domestic employees such as nannies, gardeners, cooks and carers. The Holiday does not cover these secondary contributors.

Benefit entitlement

As the Holiday affects only secondary Class 1 contributions and an employee's contributory benefit entitlements are derived from the payment of primary Class 1 contributions, the Holiday raises no contributory benefit implications.

Class 1A and 1B contributions

Class 1A contributions which are payable on taxable benefits and Class 1B contributions payable where there is PAYE Settlement Agreement between the HMRC and an employer are not included within the Holiday.

Further interaction of the Holiday with EC legislation

The social security treatment of certain persons moving within the European Union and European Economic Area is governed by EC Regulations 883/2004 and 987/2009, and EC Regulations 1408/71 and 574/72.

In broad terms, the EC Regulations allow those workers within the personal scope of the legislation to move freely within the Community and enjoy continuous social security cover, by ensuring that the legislation of a single Member State applies to the exclusion of others, and that when it does so, the individual is not directly or indirectly discriminated against on grounds of nationality (or residence). In order to make them effective the EC Regulations are also binding on employers and employees, as well as the social security administrations of Member States.

Where a new business in another Member State has employees who fall within the UK National Insurance scheme, HMRC will construe the relevant EC Regulations so as to allow the new business to avail itself of the Holiday. This will ensure that workers who are sent to the UK and who come within UK legislation are not more expensive than comparable UK workers with a UK employer and also that the Holiday is not a barrier to freedom of establishment of a new business in other Member States.

What new businesses need to do?

The Holiday does not make any changes to the existing legislation for the calculation, recording and the reporting of Class 1 NICs. This will allow for the early take up of the Holiday so that new businesses can benefit from it as soon as possible.

From 6 September 2010 new businesses will be issued with a PAYE scheme Starter Pack. It will include information about the Holiday and direct the new employer to the Business Link website which will contain information about the Holiday and full details of the State Aid rules.

New businesses that choose to take advantage of the Holiday have to notify HMRC by completing an application form which contains information needed for State Aid purposes. There will be an online application process for businesses:

- within the sectors that have a €200,000 de minimis State Aid limit (which will be the vast majority of businesses); and
- which have had no previous de minimis State Aid

The online application form requires confirmation that no State Aid has been received by the new business (as the Holiday targets only new businesses we do not expect many to have already received State Aid). HMRC will advise the business that the Holiday is a de minimis State Aid and that the correspondence needs to be kept for three years.

For other businesses there will be a separate paper application. HMRC will require the business to specify to which sector they belong and provide details of de minimis aid received in the current or two previous fiscal years.

Calculation of the Holiday

New employers have to calculate tax and NICs liability on earnings paid to their employees and make payments to HMRC monthly or quarterly. The calculation of liability is undertaken either manually or more commonly using payroll software. The Holiday will not disturb this process and those eligible will still have to calculate their NICs liability in the same way as a non-eligible employer. However, those enjoying a Holiday will then be able to reduce the monthly/quarterly payment that they are required to make to HMRC by the amount of their Holiday deduction (the appropriate amount).

In year record keeping

The employer must keep and preserve any documents or records relating to its entitlement to make a deduction in respect of a qualifying employee and the calculation of any amount that has been, or could be made in respect of the employee. Keeping and preserving the following information should ensure that the requirement is met:

- (a) name of qualifying employee (including directors)
- (b) the National Insurance number of the qualifying employee
- (c) date employee commences employment
- (d) date Holiday period for employee/director ended (this may be less than one year after (c) above)
- (e) amount of Holiday claimed in this tax year for each employee
- (f) amount (if any) of the Holiday claimed in previous tax year
- (g) date on which business started

NB: the total of (e) and (f) should not exceed £5,000 for each qualifying employee up to a maximum of £50,000.

The employer will need to keep the records for not less than three years from the date on which the final Holiday deduction is or can be made in respect of each qualifying employee.

End of tax year - Holiday return

At the end of the tax year the new business should make the normal end of year returns showing the total amount of NICs that was due in respect of employees. The amount shown **should not include** any reduction due as a result of the Holiday. In addition the employer should send in a separate Holiday return showing the amount of the Holiday deductions made.

Although not a statutory requirement, submission of an end of year return in respect of the Holiday is necessary to avoid HMRC taking action to recover what, in the absence of a Holiday return, would indicate an underpayment on the P35. To ensure the Holiday is properly accounted for the Holiday return will need to be sent to HMRC at the same time as the end of year tax return.

HMRC will provide a form on its website with the other information and guidance relating to the Holiday. HMRC's form will ensure that all relevant information is captured but in all cases an end of year return in respect of the Holiday should include the following information.

- a. name of company/business
- b. trading Address/Address of principal place of business at start
- c. PAYE reference
- d. company's Registration Number (CRN)

For each employee (including directors) where the employer has claimed the Holiday:

- e. name of qualifying employee (including director) for which Holiday operated

- f. National Insurance number.
- g. date employee engaged
- h. end of the employee's (director's) Holiday period
- i. amount of employer NICs relief claimed in tax year
- j. amount of employer NICs relief claimed in the previous tax year
- k. total amount of employer NICs relief claimed for the tax year (the sum of the figures at item (i) for all qualifying employees)

NB: the sum of the figures in (i) and (j) for each employee should not exceed £5,000 and the overall Holiday amount should not exceed £50,000.

Appeals

Officers of HMRC will be able to decide certain issues arising under the legislation enacted in relation to the Holiday for new businesses including:

- (i) whether an employer is or was entitled to make a deduction from his contributions payments in accordance with the Holiday legislation and if so the amount the employer is or was entitled to deduct;
- (ii) whether an employer is entitled to a refund in accordance with the Holiday legislation and if so, the amount

Further information

Web based guidance will be available before 6 September 2010.

Chapter 2 – Draft clauses

PART 1

REGIONAL SECONDARY CONTRIBUTIONS HOLIDAY FOR NEW BUSINESSES

1 “Holiday” for new businesses

- (1) This section applies where—
 - (a) a person, or a number of persons in partnership, (“P”) starts a new business during the relevant period,
 - (b) the principal place at which the new business is carried on when it is started is not in any of the excluded regions, and
 - (c) one or more persons are qualifying employees in relation to the new business.
- (2) The appropriate amount in respect of each qualifying employee may be—
 - (a) deducted from Class 1 contributions payments which P is liable to make, or
 - (b) refunded to P.
- (3) Section 2 defines what is meant by “starting a new business”.
- (4) “The relevant period” is the period—
 - (a) beginning with 22 June 2010, and
 - (b) ending with 5 September 2013.
- (5) “The excluded regions” are Greater London, the South East Region and the Eastern Region.
- (6) Section 3 specifies when a person is a qualifying employee in relation to a new business.
- (7) Section 4 specifies what is the appropriate amount in respect of a qualifying employee.
- (8) Section 5 explains how a deduction or refund is made.
- (9) Section 6 makes provision requiring the retention of records.
- (10) Section 7 contains an anti-avoidance rule.
- (11) Section 8 makes provision for the interpretation of this Part.

2 Starting a new business

- (1) P “starts” a new business when P begins to carry on a new business.
- (2) A business is not a “new” business” if—

(a) P has, at any time during the period of 6 months ending with the time when P begins to carry it on, carried on another business consisting of the activities of which the business consists (or most of them), or

(b) P carries it on as a result of a transfer (within the meaning of subsection (3)).

(3) P carries on a business as a result of a transfer if P begins to carry on the business on another person ceasing to carry on the activities of which it consists (or most of them) in consequence of arrangements involving P and the other person.

(4) For the purposes of subsection (3) P is to be taken to begin to carry on a business on another person ceasing to carry on such activities if—

(a) 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, or

(b) P is a number of persons in partnership who begin to carry on the business on such activities ceasing to be carried on—

(i) by a person, or a number of different persons, otherwise than in partnership,

(ii) by persons in 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).

(5) If, before P begins to carry on a business, P is a party to arrangements under which P may (at any time during the relevant period) carry on as part of the business activities carried on by any other person, P is not to be regarded as starting a new business by beginning to carry on the business if the business would have been prevented by subsection (2)(b) from being a new business if—

(a) P had begun to carry them on when beginning to carry on the business, and

(b) the other person had at that time ceased to carry them on.

(6) In this section “business” means something which is—

(a) a trade, profession or vocation for the purposes of the Income Tax Acts or the Corporation Tax Acts,

(b) a property business (within the meaning of section 263(6) of the Income Tax (Trading and Other Income) Act 2005), or

(c) an investment business (that is, a business consisting wholly or partly of making investments).

3 Qualifying employees

(1) A person is a “qualifying employee” in relation to a new business if—

(a) the person first becomes employed as an employed earner for the purposes of the new business before the end of the initial period, and

(b) P is the secondary contributor in relation to any payment of earnings to or for the benefit of the person in respect of the employment at any time during the period that is the holiday period in relation to the person.

(2) Where (apart from this subsection) there would be more than 10 qualifying employees, only the first 10 persons who become qualifying employees are qualifying employees.

(3) The “initial period” means the period of one year beginning with—

(a) the date on which P starts the new business, or

(b) if earlier, the first date on which a person first becomes employed as an employed earner for the purposes of the new business,

but if the first date on which a person first becomes employed as an employed earner for the purposes of the new business is before 22 June 2010, the person is to be taken for the purposes of paragraph (b) as first so employed on that date.

(4) The “holiday period”, in relation to a person, is the period—

(a) beginning with the day on which the person first becomes employed as an employed earner for the purposes of the new business or, if the person first becomes so employed before 6 September 2010, with that date, and

(b) ending with the earlier of—

(i) the end of the period of one year beginning with the day on which it begins, and

(ii) the end of the relevant period.

(5) None of the following—

(a) the Social Security Contributions (Intermediaries) Regulations 2000 and the Social Security Contributions (Intermediaries) (Northern Ireland)

Regulations 2000 (which provide in certain cases for an intermediary to be treated as the secondary contributor in relation to the payment of earnings), and

(b) the Social Security Contributions (Managed Service Companies) Regulations 2007 (which provide in certain cases for a managed service company to be treated as the secondary contributor in relation to the payment of earnings),

have effect for the purposes of this Part.

4 The appropriate amount

(1) The appropriate amount in respect of a qualifying employee is the relevant amount of secondary Class 1 contributions.

(2) “The relevant amount of secondary Class 1 contributions” is the amount of secondary Class 1 contributions which P is liable to pay in respect of relevant earnings.

(3) “Relevant earnings” are earnings paid to or for the benefit of the qualifying employee, in respect of employment as an employed earner for the purposes of the new business, at any time during the holiday period when the principal place at which the business is carried on is not in any of the excluded regions.

(4) But if (apart from this subsection) the relevant amount of secondary Class 1 contributions would exceed £5,000, it is the first £5,000 which becomes liable to be paid.

(5) In the case of a qualifying employee who is a mariner, the reference in subsection (3) to earnings paid at any time during the holiday period includes, in relation to earnings paid for a voyage beginning in the holiday period but ending after it, earnings earned in the part of the voyage period falling within the holiday period.

“Mariner” and “voyage period” have the meaning given by regulation 115 of the 2001 Regulations;

(6) If P is liable to pay secondary Class 1 contributions at the contracted-out rate P is to be treated for the purposes of subsection (2) as liable to pay them at the non-contracted-out rate; and for this purpose “contracted-out rate” and “noncontracted-out rate” have the same meaning as in the 2001 Regulations.

5 Making of deductions or refunds

(1) To the extent that the appropriate amount is attributable to secondary Class 1 contributions payable in respect of earnings paid in a tax year it may be deducted from any one or more Class 1 contributions payments made by P in respect of that tax year.

(2) If the amount which P would be entitled to deduct under this section exceeds the amount of the payments from which it can be deducted, HMRC must instead refund the excess to P if P requests them to do so.

(3) No deduction or refund may be made under this section until an application has been submitted to, and granted by, HMRC.

(4) An application must contain such information, and must be made in such form and manner, as is specified by HMRC.

(5) No application may be made for a refund in respect of a qualifying employee after the end of the period of 4 years beginning with the day on which the last deduction could be made in respect of the qualifying employee.

(6) For the purposes of—

(a) Part 2 of the Social Security Contributions (Transfer of Functions, etc.) Act 1999, and

(b) Part 3 of the Social Security Contributions (Transfer of Functions, etc.) (Northern Ireland) Order 1999,

(decisions and appeals), the decisions to which this subsection applies are decisions of an officer of Revenue and Customs under section 8 of that Act or article 7 of that Order.

(7) Subsection (6) applies to—

(a) a decision whether P is or was entitled to make a deduction under this section and, if so, the amount that P is or was entitled to deduct, and

(b) a decision whether P is entitled to a refund under this section and, if so, the amount of the refund.

6 Retention of records

(1) This section applies where P is or was entitled to make a deduction under section 5 in respect of a qualifying employee.

(2) P must keep and preserve any documents or records relating to—

(a) P's entitlement to make a deduction in respect of the employee, and

(b) the calculation of any amount that has been, or could have been, deducted,

for not less than 3 years beginning with the date on which the last deduction under section 5 is, or could be, made in respect of the employee.

(3) Accordingly, the duty imposed by paragraph 26(1) of Schedule 4 to the 2001 Regulations (retention by employer of contribution and election records) does not apply to any such documents or records.

(4) The duty imposed by this section may be discharged by preserving the documents or records in any form or by any means.

(5) For the purposes of Schedule 36 to the Finance Act 2008 (information and inspection powers), as applied by section 110ZA of SSAA 1992 and section 104ZA of SSA(NI)A 1992, the duty imposed by this section is to be treated as if it were a duty imposed under or by virtue of SSCBA 1992 or SSCB(NI)A 1992.

7 Anti-avoidance

(1) This Part does not apply if P starts the new business pursuant to avoidance arrangements.

(2) Arrangements are “avoidance arrangements” if the main purpose, or one of the main purposes, of P in being a party to them is to secure that activities which might otherwise have been carried on as part of another business (whether by P or any other person) are carried on by P as part of the new business in order to obtain deductions or refunds (or increased deductions or refunds) under this Part.

8 Interpretation of Part 2

(1) In this Part—

“the 2001 Regulations” means the Social Security (Contributions) Regulations 2001;

“the appropriate amount” is to be read in accordance with section 4;

“arrangements” includes any agreement, understanding, scheme, transaction or series of transactions (whether or not legally enforceable);

“Class 1 contributions payments” means payments under—

(a) paragraph 10 of Schedule 4 to the 2001 Regulations (monthly payments), or

(b) paragraph 11 of that Schedule (quarterly payments);

“the Eastern Region” means—

(a) the counties of Bedford, Cambridgeshire, Central Bedfordshire, Essex, Hertfordshire, Norfolk and Suffolk, and

(b) the non-metropolitan districts of Luton, Peterborough, Southend-on-Sea and Thurrock;

“the excluded regions” has the meaning given by section 1(5);

“HMRC” means the Commissioners for Her Majesty’s Revenue and Customs;

“holiday period” has the meaning given by section 3(4);

“qualifying employee” has the meaning given by section 3;

“the relevant period” has the meaning given by section 1(4);

“the South East Region” means—

(a) the counties of Buckinghamshire, East Sussex, Hampshire, the Isle of Wight, Kent, Oxfordshire, Surrey and West Sussex, and

(b) the non-metropolitan districts of Bracknell Forest, Brighton and Hove, Medway, Milton Keynes, Portsmouth, Reading, Slough, Southampton, West Berkshire, Windsor and Maidenhead and Wokingham.

(2) Expressions used in this Part and in Part 1 of SSCBA 1992 or SSCB(NI)A 1992 have the same meaning for the purposes of this Part as they have for the purposes of that Part.

PART 2

GENERAL

9 Abbreviations of Acts

In this Act—

“SSAA 1992” means the Social Security Administration Act 1992;

“SSA(NI)A 1992” means the Social Security Administration (Northern Ireland) Act 1992;

“SSCBA 1992” means the Social Security Contributions and Benefits Act 1992;

“SSCB(NI)A 1992” means the Social Security Contributions and Benefits (Northern Ireland) Act 1992.

10 Commencement

Part 1 and this Part come into force on the day on which this Act is passed.

11 Extent

Part 1 and this Part extend to England and Wales, Scotland and Northern Ireland.

12 Short title

This Act may be cited as the National Insurance Contributions Act 2010.

Chapter 3 – Draft Explanatory Notes

Commentary on clauses

Part 1: Regional secondary contributions holiday for new businesses

Clause 1: 'Holiday' for new businesses

1. This clause introduces Part 1 of the Bill, which provides for the regional secondary contributions holiday for new businesses.
2. *Subsection (1)* sets three conditions, all of which must be met if the clause is to apply.
3. The first condition, in subsection (1)(a), restricts the clause to new businesses started during the relevant period.
4. Paragraph (a) also introduces the person, or a number of persons in partnership ('P') starting the new business.
5. 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.
6. The third condition, in subsection (1)(c), provides P's new business will not qualify for the holiday unless there are 'qualifying employees' in relation to it.
7. *Subsection (2)* sets out how the benefit of the Holiday will be provided. It gives two alternative means by which P can benefit.
8. First, P may deduct the appropriate amount in respect of each qualifying employee from Class 1 contribution payments that P is liable to make.
9. Second, if P has not deducted this amount, it may be refunded to P.
10. The phrase 'Class 1 contributions payments' is used for the first time in subsection (2)(a). It is defined in clause 8.
11. *Subsection (1)* refers to the situation where P 'starts' a new business'. *Subsection (3)* is a signpost to the definition of this phrase.
12. *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.
13. *Subsection (5)* defines the 'excluded' regions for the purposes of the Holiday as Greater London, the South East Region and the Eastern Region. Clause 8 defines 'the South East Region' and 'the Eastern Region'.

14. *Subsections (1) and (2)* use the phrases 'qualifying employee' and 'appropriate amount'.
15. *Subsections (6) and (7)* are signposts to the definitions of these phrases.
16. *Subsection (8)* is a signpost to the provisions explaining how a deduction or refund is made.
17. *Subsection (9)* is a signpost to the provisions creating a record keeping requirement in respect of the Holiday.
18. *Subsection (10)* is a sign post to an anti avoidance rule.
19. *Subsection (11)* is a signpost to the interpretations used in Part 1.

Clause 2: Starting a new business

20. This clause defines what is meant by 'P 'starts a new business'.
21. *Subsection (1)* defines 'starts'. A new business starts when P begins to carry on a new business.
22. *Subsection (2)* defines when a business is not to be regarded as a 'new business'.
23. *Subsection (2)(a)* provides that a business is not a 'new' business if most of the activities carried on by P in the business are activities which P carried on as part of another business in the 6 months before beginning the business.
24. *Subsections (2)(b) and (3)* provide that a business is not a 'new' business if 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.
25. *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.
26. *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).

27. *Subsection (5)* prevents a holiday being enjoyed if, before beginning to carry on a business, P enters into arrangements that mean that at some point after P's business has started he could undertake activities carried on by another business and, had P been undertaking those activities at the time he started his business, a holiday would have been prevented by subsection 2(b).
28. Subsection (6) defines 'business' for the purposes of Clause 2. A business means something which is -
- (i) a trade, profession or vocation for the purposes of the Income Tax Acts and 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.

Clause 3: Qualifying employees

29. This clause specifies when a person is a qualifying employee in relation to a new business.
30. *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.
31. The first condition, in subsection (1)(a), is, broadly speaking, that the person is a new employee in relation to the new business. 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 SSCBA 1992 and its Northern Ireland equivalent. It thus includes employees and office-holders (such as company directors).
32. The second condition, in subsection (1)(b), is, broadly speaking, that P is 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 employee. Specifically, 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.
33. *Subsection (2)* limits the holiday to the first 10 qualifying employees.
34. Under subsection (1)(a), the person must become employed before the end of the 'initial period'. *Subsection (3)* defines the 'initial period'.
35. The initial period begins 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.

36. 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'.
37. The holiday period in relation to a person begins with 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 with the end of the period of one year from the date it begins, or the end of the relevant period, whichever of those dates is the earlier.
38. Under certain circumstances, the anti-avoidance legislation on 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 on those deemed payments.

Clause 4: The appropriate amount

39. This clause specifies what is the appropriate amount in respect of a qualifying employee.
40. *Subsection (1)* provides that this amount is 'the relevant amount of secondary Class 1 contributions'.
41. That phrase is then defined in *subsection (2)* as 'the amount of secondary Class 1 contributions' (i.e. employer NICs) which P is liable to pay in respect of relevant earnings.
42. *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.
43. Thus subsection (3) incorporates the regional criteria for the Holiday, to the payment of earnings as well as to the definition of a new business in clause 1(b).
44. *Subsection (4)* caps the appropriate amount at the first £5,000 of employer NICs. This limit is applied in relation to each qualifying employee separately.
45. *Subsection (5)* ensures that this clause is consistent with the special NICs timing rules applying to earnings paid to mariners.

46. 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 over 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 over the rebate to the pension provider.

Clause 5: Making of deductions or refunds

47. This clause explains how a deduction or refund is made.

48. *Subsection (1)* lays down the primary means of obtaining the benefit of the Holiday. The appropriate amount (see clause 4) may be deducted from any one or more 'Class 1 contributions payments' made by P in respect of the same tax year as the earnings giving rise to the appropriate amount were paid. Clause 8(1) defines 'Class 1 contributions payments' as monthly or quarterly payments of Class 1 NICs.

49. *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 clause, P is entitled to a refund from HMRC if P requests a refund.

50. *Subsection (3)* provides that no deductions or refund may be made until an application is made to HMRC and HMRC grants the application.

51. Under *subsection (4)*, HMRC will 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.

52. *Subsection (5)* provides that the deadline for making an application for a refund is four years from the day on which the last deduction could be made in respect of the qualifying employee.

53. Subsection (6) provides for a right of appeal. The standard NIC appeal procedures which apply in relation to decisions about (for example) categorisation of earners as employed or self-employed also apply to decisions about deductions or refunds under clause 5. *Paragraphs (a) and (b)* apply, respectively, the Great Britain legislation and the Northern Ireland legislation relating to NIC appeals to the decisions to which this subsection applies.

54. *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 if entitled and decisions about refunds and the amount if entitled.

Clause 6: Retention of records

55. This paragraph introduces a record-keeping obligation on P relating to records concerning the Holiday.

56. *Subsection (1)* states when the subsection applies. It applies where P is or was entitled to make a deduction under clause 5 in respect of a qualifying employee.
57. *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 issues:
- *whether* P was entitled to make a deduction; and, if so,
 - how P calculated any amount that has been or could have been deducted.
58. 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 clause 5 is, or could be made, in respect of each qualifying employee. The period provided - three years - is consistent with the period over which employers are required to retain other contribution related records.
59. *Subsection (3)* provides that this requirement overrides the general NIC record-keeping requirement imposed on employers.
60. *Subsection (4)* explains that the duty under this clause may be discharged by preserving the relevant documents or records in any form or by any means.
61. *Subsection (5)* applies to this clause, the information and inspection powers given by Schedule 36 to the Finance Act 2008.

Clause 7: Anti-avoidance

62. This clause sets out an anti-avoidance rule.
63. *Subsection (1)* provides that the Holiday is not available if P starts the new business pursuant to 'avoidance arrangements'.
64. *Subsection (2)* defines 'avoidance arrangements' and, in so doing, uses a purpose test. The Holiday will not be available to P if the main purpose, or one of the main purposes, of P 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).
65. '*Arrangements*' are then defined at clause 8(1) in a non-exhaustive manner to include 'any agreement, understanding, scheme, transaction or series of transactions (whether or not legally enforceable)'.

Clause 8: Interpretation

66. This clause is interpretative.
67. *Subsection (1)* defines, or gives signposts to the definitions of, phrases which have been used in Part 1.

68. 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.

Part 2: General

Clause 9: Abbreviations of Act

69. This clause sets out the abbreviations used in this Bill.

Clause 10: Commencement

70. The Holiday will come into force on the day on which this Bill is passed but it will have retrospective effect back to 6 September 2010.

Clause 11: Extent

71. NICs are a reserved matter in Scotland and Wales and an excepted matter in Northern Ireland; hence the provisions in this Part will relate to England, Scotland, Wales and Northern Ireland.

Clause 12: Short title

72. This clause specifies the short title of the Bill which will contain these provisions.

Annex A: overview of NICS²

The National Insurance Scheme was first established in 1911 and expanded in the late 1940s to provide funds for a more comprehensive and inclusive range of contributory benefits and to provide assistance with the funding for a new National Health Service.

Briefly, the scheme consists of a number of benefits financed by contributions payable by earners, employers and others. The money is collected via National Insurance contributions (NICs). Employees pay NICs on their earnings, employers pay NICs on the earnings they pay to their employees and the self employed pay NICs on their profits and gains.

The scheme defines the category of a worker as either an employed earner or a self employed earner. An employed earner is a person who is gainfully employed in the UK either under a contract of service, or in an office (including elective office) with general earnings. A self-employed earner is a person who is gainfully employed in the UK otherwise than as an employed earner. Provision is made within the scheme to allow those who are not compulsorily covered to protect their entitlement to pension by means of voluntary NIC payments.

National Insurance contributions are divided into six classes.

- **Class 1** contributions which are paid by both employees and employers on the employee's earnings – the employee's share is known as the **primary contribution**, the employer's as the **secondary contribution**. Class 1 contributions are payable on all gross earnings including commissions, overtime and bonuses, on readily convertible assets given to employees and on employees' liabilities paid by employers. Primary contributions are payable at 11 per cent of earnings above £110 up to £844 per week (£5,715 to £43,875 per year) and 1 per cent of all earnings above this limit. Secondary contributions are payable at 12.8 per cent of all earnings above £110 per week. There are arrangements for reducing the rates of both primary and secondary contributions where the employee has contracted out of the State Second Pension. Class 1 contributions are normally collected monthly by HMRC along with PAYE Income Tax.
- **Class 1A** contributions are payable annually by employers on most taxable benefits in kind. They are payable by employers only. Class 1A contributions are payable at a rate of 12.8 per cent.
- **Class 1B** contributions are payable annually by employers on items which are dealt with under a PAYE Settlement Agreement (PSA) for Income Tax. Class 1B contributions are payable at a rate of 12.8 per cent on the value of the items included in the PSA and on the total tax payable by the employer under the PSA.

² Amounts and rates are for the 2010-11 tax year.

- **Class 2** contributions are paid by the self-employed at a flat rate of £2.40 per week – a self-employed person can be exempted from liability where earnings are below £5,075 per year. Class 2 contributions are paid either monthly or quarterly.
- **Class 3** contributions are paid on a voluntary basis by people who fall outside the scope of Class 1 and 2 contributions at a flat rate of £12.05 per week.
- **Class 4** contributions are paid annually by the self-employed on profits that are immediately derived from a trade, profession or vocation and which are chargeable to Income Tax. Class 4 NICs are payable at a rate of 8 per cent on profits between £5,715 and £43,875 and 1 per cent of profits above £43,875.