Trusts and Trustees

A trust is a legal arrangement whereby one person manages assets on behalf of another and the trust itself is managed by trustees. Pension funds are often constituted as a trust and administered by trustees, many historic monuments and stately homes are administered through trusts and charities are often set up as trusts.

A trust is usually set up through a trust deed. This document will set out the purpose of the trust, how the trustees are appointed, what their powers are and it also will say who the beneficiaries are, or, in the case of a discretionary trust, leave the selection of beneficiaries to the trustees.

Becoming as trustee is not something to be done lightly.

A trustee's main duty is to carry out the trust purposes in accordance with the trust deed and the law demands "utmost good faith" in doing so: a high degree of probity, honesty and integrity. The standard of management expected of a trustee is the same standard of care that a prudent business person would take in managing their own affairs. Decisions should be reasoned and reasonable.

All trustees have a duty to ensure that the actions of the other trustees comply with the trust deed and with the law: they have joint responsibility in this respect. Nor can they rely on the delegation of their powers to others. That means that the trustee to whom the administration of the trust has been delegated cannot delegate that duty further.

Trustees have a duty to take advice as appropriate but must make their own decisions in light of that advice.

All trustees must avoid conflicts of interest but, if this is impossible, the trustee should abstain from participating in relevant decisions.

Trustees must avoid a breach of trust. A breach of trust can involve a failure to observe the law but it can also involve a failure to seek advice, bad management or neglect or the commission of any act that goes against the purposes of the trust. Allowing a fellow trustee to commit a breach of trust is in itself a breach of trust – and acting in good faith is no defence.

Trustees incur personal liability on a joint and several basis. It is possible to take out indemnity insurance to cover the trustees but this can only be paid for out of trust funds if the deed so allows.

Employee Ownership Trust

The EOT

The Employee Ownership Trust (EOT) was created in 2014 to help facilitate the creation of stable, long term, employee owned companies. To assist with this, the trusts benefit from two key tax reliefs:

• If the trust acquires a majority shareholding in a trading company (or group), all share sales to that trust during that tax year will be free from Capital Gains Tax.

• If the trust holds a majority shareholding in a trading company (or group), that company can pay bonuses to employees of up to £3,600 per employee, per tax year, free from income tax (although national insurance will still be payable).

• These new rules apply to organisations that already include qualifying Employee Benefit Trusts as part of their structure and for those that are considering a move to an employee owned structure.

Requirements

All-employee benefit requirement

The Trust must not permit:

- any of the trust property to be applied otherwise than for all eligible employees on the same terms;
- the application of the trust property by creating a new trust or transferring property to another trust;
- the making of any loans to beneficiaries; and
- any changes that could allow any of the above. Eligible employees are all employees in the company / group, with the exception of certain employees who hold 5% of more of the shares in the company. The trustees of the trust can also choose to exclude employees with less than 12 months of service.

Equality Requirement

An "Equality Requirement" applies if:

- the trustees of the EOT wish to distribute any assets to the beneficiaries; or
- the company wishes to pay a bonus to the employees using the new income tax relief (as noted above, this can allow payments of bonuses of up to £3,600 per employee per tax year, free from income tax).

The equality requirement means that any such payments must either be paid equally to all eligible employees or paid proportionately according to one or more of the following criteria:

- Remuneration
- Hours worked
- Length of service

These criteria are similar to the criteria already used in relation to HMRC approved Share Incentive Plans and will be familiar to anyone who makes use of these plans.

Participation Requirement

The Participation Requirement is that all employees of the company's group must be eligible to participate in the bonus.

When determining whether a company is a member of the group, they must be a 75% subsidiary, with at least 75% of their shares held either by the ultimate holding company or by another subsidiary of the ultimate holding company.

Note that the relevant date for confirming whether an individual is an employee is the date when the bonus award is determined (which may differ from when it is actually paid).

There are some limited exceptions to the Participation Requirement:

- You can exclude employees with up to 12 months of service from the award. You can set a shorter period than 12 months for such an exclusion, but you cannot set a longer period.
- If, on the date that the award is determined, an employee is subject to disciplinary proceedings that could result in gross misconduct, the award can be made conditional on there being no finding of gross misconduct.
- If, in the last 12 months, disciplinary proceedings were commenced against an employee that resulted in a finding of gross misconduct, such an employee can be excluded from the award.
- You can exclude an individual who is an employee on the date that the award is determined, but before the award is actually paid: (i) the employee is summarily dismissed for gross misconduct; or (ii) a finding of gross misconduct is made against the employee.
- An employee can waive their entitlement to the bonus.

Governance Position

Where the Trust holds the majority of the shares, the Trustees influence the significant shareholding of the company. The prime responsibility is to hold the board to account in ensuring they are leading the business in the best interests of the trust beneficiaries (usually the employees).

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