
DRAFT STATUTORY INSTRUMENTS

2013 No.

The Employment and Support Allowance Regulations 2013

PART 10

Income and earnings

Calculation of earnings derived from employed earner's employment and income other than earnings

76.—(1) Earnings derived from employment as an employed earner and income which does not consist of earnings are to be taken into account over a period determined in accordance with the following provisions of this regulation and at a weekly amount determined in accordance with regulation 79 (calculation of weekly amount of income).

(2) Subject to the following provisions of this regulation, the period over which a payment is to be taken into account is to be—

- (a) where the payment is monthly, a period equal to the number of weeks beginning with the date on which the payment is treated as paid and ending with the date immediately before the date on which the next monthly payment would have been treated as paid whether or not the next monthly payment is actually paid;
- (b) where the payment is in respect of a period which is not monthly, a period equal to the length of the period for which payment is made;
- (c) in any other case, a period equal to such number of weeks as is equal to the number obtained (see paragraph (9)) by applying the formula—

$$\frac{E}{J}$$

where—

E is the net earnings;

J is the amount of an employment and support allowance which would be payable had the payment not been made;

and that period is to begin on the date on which the payment is treated as paid under regulation 78 (date on which income is treated as paid).

(3) Where—

- (a) earnings are derived from the same source but are not of the same kind; and
- (b) but for this paragraph, the periods in respect of which those earnings would fall to be taken into account overlap, wholly or partly,

those earnings are to be taken into account over a period equal to the aggregate length of those periods, and that period is to begin with the earliest date on which any part of those earnings would be treated as paid under regulation 78.

(4) In a case to which paragraph (5) applies, earnings under regulation 80 (earnings of employed earners) are to be taken into account in the following order of priority—

- (a) earnings normally derived from the employment;
- (b) any payment to which paragraph (1)(b) or (c) of that regulation applies;
- (c) any payment to which paragraph (1)(j) of that regulation applies;
- (d) any payment to which paragraph (1)(d) of that regulation applies.

(5) Where earnings to which regulation 80(1)(b) to (d) applies are paid in respect of part of a day, those earnings are to be taken into account over a period equal to a day.

(6) Any earnings to which regulation 80(1)(j) applies which are paid in respect of, or on the termination of, part-time employment, are to be taken into account over a period of one week.

(7) For the purposes of this regulation the claimant's earnings are to be calculated in accordance with regulations 80 and 81.

(8) For the purposes of paragraph 10 of Schedule 2 to the Act (effect of work), the income which consists of earnings of a claimant is to be calculated on a weekly basis by determining the weekly amount of those earnings in accordance with regulations 77 to 84.

(9) For the purposes of the number obtained as mentioned in paragraph (2)(c), any fraction is to be treated as a corresponding fraction of a week.

Calculation of earnings of self-employed earners

77.—(1) Where a claimant's income consists of earnings from employment as a self-employed earner, the weekly amount of the claimant's earnings is to be determined by reference to the claimant's average weekly earnings from that employment—

- (a) over a period of one year; or
- (b) where the claimant has recently become engaged in that employment or there has been a change which is likely to affect the normal pattern of business, over such other period as may, in any particular case, enable the weekly amount of the claimant's earnings to be determined more accurately.

(2) For the purposes of this regulation the claimant's earnings are to be calculated in accordance with regulations 82 to 84.

Date on which income is treated as paid

78. A payment of income to which regulation 76 (calculation of earnings derived from employed earner's employment and income other than earnings) applies is to be treated as paid—

- (a) in the case of a payment which is due to be paid before the first benefit week pursuant to the claim, on the date on which it is due to be paid;
- (b) in any other case, on the first day of the benefit week in which it is due to be paid or the first succeeding benefit week in which it is practicable to take it into account.

Calculation of weekly amount of income

79.—(1) For the purposes of regulation 76 (calculation of earnings derived from employed earner's employment and income other than earnings) and regulations 64 to 72 (deductions from employment and support allowance), subject to paragraphs (2) to (5), where the period in respect of which a payment is made—

- (a) does not exceed a week, the weekly amount is to be the amount of that payment;
- (b) exceeds a week, the weekly amount is to be determined—

- (i) in a case where that period is a month, by multiplying the amount of the payment by 12 and dividing the product by 52;
- (ii) in a case where that period is three months, by multiplying the amount of the payment by four and dividing the product by 52;
- (iii) in a case where that period is a year and the payment is income, by dividing the amount of the payment by 52;
- (iv) in any other case, by multiplying the amount of the payment by seven and dividing the product by the number equal to the number of days in the period in respect of which it is made.

(2) Where a payment for a period not exceeding a week is treated under regulation 78(a) (date on which income is treated as paid) as paid before the first benefit week and a part is to be taken into account for some days only in that week (the relevant days), the amount to be taken into account for the relevant days is to be calculated by multiplying the amount of the payment by the number of relevant days and dividing the product by the number of days in the period in respect of which it is made.

(3) Where a payment is in respect of a period equal to or in excess of a week and a part thereof is to be taken into account for some days only in a benefit week (the relevant days), the amount to be taken into account for the relevant days is to be calculated by multiplying the amount of the payment by the number of relevant days and dividing the product by the number of days in the period in respect of which it is made.

(4) Except in the case of a payment which it has not been practicable to treat under regulation 78(b) (date on which income is treated as paid) as paid on the first day of the benefit week in which it is due to be paid, where a payment of income from a particular source is or has been paid regularly and that payment falls to be taken into account in the same benefit week as a payment of the same kind and from the same source, the amount of that income to be taken into account in any one benefit week is not to exceed the weekly amount determined under paragraph (1)(a) or (b) of the payment which under regulation 78(b) is treated as paid first.

(5) Where the amount of the claimant's income fluctuates and has changed more than once, or a claimant's regular pattern of work is such that the claimant does not work every week, the foregoing paragraphs may be modified so that the weekly amount of the claimant's income is determined by reference to the claimant's average weekly income—

- (a) if there is a recognisable cycle of work, over the period of one complete cycle (including, where the cycle involves periods in which the claimant does no work, those periods but disregarding any other absences);
- (b) in any other case, over a period of five weeks or such other period as may, in the particular case, enable the claimant's average weekly income to be determined more accurately.

Earnings of employed earners

80.—(1) Subject to paragraphs (2) and (3), “earnings” means, in the case of employment as an employed earner, any remuneration or profit derived from that employment and includes—

- (a) any bonus or commission;
- (b) any payment in lieu of remuneration except any periodic sum paid to a claimant on account of the termination of the claimant's employment by reason of redundancy;
- (c) any payment in lieu of notice;
- (d) any holiday pay except any payable more than four weeks after the termination or interruption of employment;
- (e) any payment by way of a retainer;

- (f) any payment made by the claimant’s employer in respect of expenses not wholly, exclusively and necessarily incurred in the performance of the duties of the employment, including any payment made by the claimant’s employer in respect of—
 - (i) travelling expenses incurred by the claimant between the claimant’s home and place of employment;
 - (ii) expenses incurred by the claimant under arrangements made for the care of a member of the claimant’s family owing to the claimant’s absence from home;
 - (g) any award of compensation made under section 112(4) or 117(3)(a) of the Employment Rights Act 1996 (the remedies: orders and compensation, enforcement of order and compensation)(1);
 - (h) any payment made or remuneration paid under sections 28, 34, 64, 68 and 70 of the Employment Rights Act 1996 (right to guarantee payments, remuneration on suspension on medical or maternity grounds, complaints to employment tribunals)(2);
 - (i) any such sum as is referred to in section 112(3) of the Contributions and Benefits Act (certain sums to be earnings for social security purposes)(3);
 - (j) where a payment of compensation is made in respect of employment which is part-time employment, the amount of the compensation;
 - (k) the amount of any payment by way of a non-cash voucher which has been taken into account in the computation of a person’s earnings in accordance with Part 5 of Schedule 3 to the Social Security (Contributions) Regulations 2001(4).
- (2) “Earnings” are not to include—
- (a) subject to paragraph (3), any payment in kind;
 - (b) any remuneration paid by or on behalf of an employer to the claimant in respect of a period throughout which the claimant is on maternity leave, paternity leave or adoption leave (which means a period of absence from work on ordinary or additional adoption leave under section 75A or 75B of the Employment Rights Act 1996(5)) or is absent from work because the claimant is ill;
 - (c) any payment in respect of expenses wholly, exclusively and necessarily incurred in the performance of the duties of the employment;
 - (d) any occupational pension (which means any pension or other periodical payment under an occupational pension scheme but does not include any discretionary payment out of a fund established for relieving hardship in particular cases);
 - (e) any lump sum payment made under the Iron and Steel Re-adaptation Benefits Scheme(6);
 - (f) any payment in respect of expenses arising out of the claimant participating as a service user.
- (3) Paragraph (2)(a) is not to apply in respect of any non-cash voucher referred to in paragraph (1)(k).

(1) 1996 c.18. Section 112(4) was amended by paragraph 36 of Schedule 7 to the Employment Act 2002 (c.22), section 8 of the Public Interest Disclosure Act 1998 (c.23) and Schedule 9 to the Employment Relations Act 1999 (c.26). Section 117(3)(a) was amended by paragraph 37 of Schedule 7 to the Employment Act 2002, section 8 of the Public Interest Disclosure Act 1998 and Schedule 9 to the Employment Relations Act 1999.

(2) Sections 34 and 70 were amended by section 1 of the Employment Rights (Dispute Resolution) Act 1998 (c.8) and S.I. 2011/1133. Section 64 was amended by S.I. 1999/3232.

(3) Section 112(3) was amended by paragraph 51 of Schedule 1 to the Employment Rights Act 1996.

(4) S.I. 2001/1004.

(5) Section 75A was inserted by section 3 of the Employment Act 2002 and amended by paragraph 33 of Schedule 1 to the Work and Families Act 2006 (c.18). Section 75B was inserted by section 3 of the Employment Act 2002 and amended by paragraph 34 of Schedule 1 to the Work and Families Act 2006.

(6) The Scheme is set out in regulation 4 of, and the Schedule to, the European Communities (Iron and Steel Employees Re-adaptation Benefits Scheme) (No.2) Regulations 1996/3182.

(4) In this regulation—

“compensation” means any payment made in respect of, or on the termination of, employment in a case where a claimant has not received or received only part of a payment in lieu of notice due or which would have been due to the claimant had that claimant not waived the right to receive it, other than—

- (a) any payment specified in paragraph (1)(a) to (i);
 - (b) any payment specified in paragraph (2)(a) to (f);
 - (c) any redundancy payment within the meaning of section 135(1) of the Employment Rights Act 1996;
 - (d) any refund of contributions to which that person was entitled under an occupational pension scheme; and
 - (e) any compensation payable by virtue of section 173 of the Education Reform Act 1988(7);
- “paternity leave” means a period of absence from work on ordinary paternity leave by virtue of section 80A or 80B of the Employment Rights Act 1996(8) or on additional paternity leave by virtue of section 80AA or 80BB of that Act(9).

(5) The reference in paragraph (2)(f) to a person participating as a service user is to—

- (a) a person who is being consulted by or on behalf of—
 - (i) a body which has a statutory duty to provide services in the field of health, social care or social housing; or
 - (ii) a body which conducts research or undertakes monitoring for the purpose of planning or improving such services,in the person’s capacity as a user, potential user, carer of a user or person otherwise affected by the provision of those services; or
- (b) the carer of a person consulted under sub-paragraph (a).

Calculation of net earnings of employed earners

81.—(1) For the purposes of regulation 76 (calculation of earnings derived from employed earner’s employment and income other than earnings) the earnings of a claimant derived from employment as an employed earner to be taken into account are the claimant’s net earnings.

(2) For the purposes of paragraph (1) net earnings are to be calculated by taking into account the gross earnings of the claimant from that employment less—

- (a) any amount deducted from those earnings by way of—
 - (i) income tax;
 - (ii) primary Class 1 contributions under section 6(1)(a) of the Contributions and Benefits Act(10);
- (b) one-half of any sum paid by the claimant in respect of a pay period by way of a contribution towards an occupational or personal pension scheme.

(7) 1988 c.40. Section 173 was amended by Schedule 3 to the Employment Rights Act 1996.

(8) Section 80A was inserted by section 1 of the Employment Act 2002 and amended by paragraph 35 of Schedule 1 to the Work and Families Act 2006. Section 80B was inserted by section 1 of the Employment Act 2002 and amended by paragraph 36 of Schedule 1 to the Work and Families Act 2006.

(9) Section 80AA was inserted by section 3 of the Work and Families Act 2006. Section 80BB was inserted by section 4 of the Work and Families Act 2006.

(10) Section 6 was substituted by paragraph 2 of Schedule 9 to the Welfare Reform and Pensions Act 1999 (c.30).

Earnings of self-employed earners

82.—(1) Subject to paragraph (2), “earnings”, in the case of employment as a self-employed earner, means the gross receipts of the employment and include any allowance paid under section 2 of the Employment and Training Act 1973 or section 2 of the Enterprise and New Towns (Scotland) Act 1990 to the claimant for the purpose of assisting the claimant in carrying on the claimant’s business.

(2) “Earnings” do not include—

- (a) where a claimant is involved in providing board and lodging accommodation for which a charge is payable, any payment by way of such a charge;
- (b) any award made by one of the Sports Councils named in section 23(2) of the National Lottery etc Act 1993⁽¹¹⁾ out of sums allocated to it for distribution under that section.

(3) In this regulation, “board and lodging” means—

- (a) accommodation provided to a person or, if the person is a member of a family, to that person or any other member of that person’s family, for a charge which is inclusive of the provision of that accommodation and at least some cooked or prepared meals which both are cooked or prepared (by a person other than the person to whom the accommodation is provided or a member of that person’s family) and are consumed in that accommodation or associated premises; or
- (b) accommodation provided to a person in a hotel, guest house, lodging house or some similar establishment,

except accommodation provided by a close relative of the person or any other member of the person’s family, or other than on a commercial basis.

Calculation of net profit of self-employed earners

83.—(1) For the purposes of regulation 77 (calculation of earnings of self-employed earners), the earnings of a claimant to be taken into account are to be—

- (a) in the case of a self-employed earner who is engaged in employment on that self-employed earner’s own account, the net profit derived from that employment;
- (b) in the case of a self-employed earner whose employment is carried on in partnership or is that of a share fisherman within the meaning of the Social Security (Mariners’ Benefits) Regulations 1975⁽¹²⁾, that self-employed earner’s share of the net profit derived from that employment less—
 - (i) an amount in respect of income tax and of National Insurance contributions payable under the Contributions and Benefits Act calculated in accordance with regulation 84 (deduction of tax and contributions for self-employed earners); and
 - (ii) one half of any contribution paid in the period that is relevant under regulation 77 (calculation of earnings of self-employed earners) in respect of a personal pension scheme.

(2) For the purposes of paragraph (1)(a) the net profit of the employment, except where paragraph (8) applies, is to be calculated by taking into account the earnings of the employment over the period determined under regulation 77 less—

- (a) subject to paragraphs (4) to (6), any expenses wholly and exclusively defrayed in that period for the purposes of that employment;
- (b) an amount in respect of—
 - (i) income tax; and

⁽¹¹⁾ 1993 c.39. Section 23(2) was amended by S.I.s 1996/3095, 1999/1563 and 2006/654.

⁽¹²⁾ S.I. 1975/529.

- (ii) National Insurance contributions payable under the Contributions and Benefits Act, calculated in accordance with regulation 84 (deduction of tax and contributions for self-employed earners); and
 - (c) one half of any contribution paid in the period that is relevant under regulation 77 in respect of a personal pension scheme.
- (3) For the purposes of paragraph (1)(b), the net profit of the employment is to be calculated by taking into account the earnings of the employment over the period determined under regulation 77 less, subject to paragraphs (4) to (6), any expenses wholly and exclusively defrayed in that period for the purpose of that employment.
- (4) Subject to paragraph (5), a deduction is not to be made under paragraph (2)(a) or (3) in respect of—
 - (a) any capital expenditure;
 - (b) the depreciation of any capital asset;
 - (c) any sum employed or intended to be employed in the setting up or expansion of the employment;
 - (d) any loss incurred before the beginning of the period determined under regulation 77 (calculation of earnings of self-employed earners);
 - (e) the repayment of capital on any loan taken out for the purposes of the employment;
 - (f) any expenses incurred in providing business entertainment.
- (5) A deduction is to be made under paragraph (2)(a) or (3) in respect of the repayment of capital on any loan used for—
 - (a) the replacement in the course of business of equipment or machinery; and
 - (b) the repair of an existing business asset except to the extent that any sum is payable under an insurance policy for its repair.
- (6) The Secretary of State must refuse to make a deduction in respect of any expenses under paragraph (2)(a) or (3) where the Secretary of State is not satisfied that the expense has been defrayed or, having regard to the nature of the expense and its amount, that it has been reasonably incurred.
- (7) A deduction—
 - (a) is not to be made under paragraph (2)(a) or (3) in respect of any sum unless it has been expended for the purposes of the business;
 - (b) is to be made under paragraph (2)(a) or (3) in respect of—
 - (i) the excess of any Value Added Tax paid over Value Added Tax received in the period determined under regulation 77;
 - (ii) any income expended in the repair of an existing asset except to the extent that any sum is payable under an insurance policy for its repair;
 - (iii) any payment of interest on a loan taken out for the purposes of the employment.
- (8) Where a claimant is engaged in employment as a child minder the net profit of the employment is to be one-third of the earnings of that employment, less—
 - (a) an amount in respect of—
 - (i) income tax; and
 - (ii) National Insurance contributions payable under the Contributions and Benefits Act, calculated in accordance with regulation 84 (deduction of tax and contributions for self-employed earners); and
 - (b) one half of any contribution paid in respect of a personal pension scheme.

(9) Notwithstanding regulation 77 (calculation of earnings of self-employed earners) and the foregoing paragraphs, the Secretary of State may assess any item of a claimant's income or expenditure over a period other than that determined under regulation 77 as may, in the particular case, enable the weekly amount of that item of income or expenditure to be determined more accurately.

(10) Where a claimant is engaged in employment as a self-employed earner and that claimant is also engaged in one or more other employments as a self-employed or employed earner, any loss incurred in any one of the claimant's employments is not to be offset against the claimant's earnings in any other of the claimant's employments.

Deduction of tax and contributions for self-employed earners

84.—(1) Subject to paragraph (2), the amount to be deducted in respect of income tax under regulation 83(1)(b)(i), (2)(b)(i) or (8)(a)(i) (calculation of net profit of self-employed earners) is to be calculated on the basis of the amount of chargeable income and as if that income were assessable to income tax at the basic rate of tax less only the personal allowance to which the claimant is entitled under sections 35 and 38 to 40 of the Income Tax Act 2007 (personal reliefs)(**13**) as is appropriate to the claimant's circumstances.

(2) If the period determined under regulation 77 is less than a year, the earnings to which the basic rate of tax is to be applied and the amount of the personal reliefs deductible under paragraph (1) are to be calculated on a pro rata basis.

(3) The amount to be deducted in respect of National Insurance contributions under regulation 83(1)(b)(i), (2)(b)(ii) or (8)(a)(ii) is to be the total of—

- (a) the amount of Class 2 contributions payable under section 11(1) or, as the case may be, (3) of the Contributions and Benefits Act(**14**) at the rate applicable at the date of claim except where the claimant's chargeable income is less than the amount specified in section 11(4) of that Act (small earnings exception) for the tax year in which the date of claim falls; but if the assessment period is less than a year, the amount specified for that tax year is to be reduced pro rata; and
- (b) the amount of Class 4 contributions (if any) which would be payable under section 15 of that Act (Class 4 contributions recoverable under the Income Tax Acts)(**15**) at the percentage rate applicable at the date of claim on so much of the chargeable income as exceeds the lower limit but does not exceed the upper limit of profits applicable for the tax year in which the date of claim falls; but if the assessment period is less than a year, those limits are to be reduced pro rata.

(4) In this regulation—

“assessment period” means the period mentioned in regulation 77 over which the weekly amount of the claimant's earnings is to be determined;

“basic rate” has the same meaning as in the Income Tax Act 2007 (see section 989 of that Act);

“chargeable income” means—

- (a) except where paragraph (b) applies, the earnings derived from the employment less any expenses deducted under paragraph (2)(a) or, as the case may be, (3) of regulation 83;

(13) 2007 c.3. Section 35 was amended by section 4 of the Finance Act 2009 (c.10) and sections 3 and 4 of the Finance Act 2012 (c.14). Section 38 was amended by S.I. 2011/2926. Section 40 was amended by paragraph 55 of Schedule 9 to the Finance Act 2008 (c.9).

(14) Section 11 was amended by paragraph 12 of Schedule 3 to the Social Security Contributions (Transfer of Functions, etc) Act 1999 (c.2) and S.I. 2012/807.

(15) Section 15 was amended by paragraph 420 of Schedule 1 to the Income Tax (Trading and Other Income) Act 2005 (c.5), sections 2 and 3 of the National Insurance Contributions Act 2002 (c.19), section 13 of the Limited Liability Partnerships Act 2000 (c.12) and S.I.s 2011/938 and 2012/807.

- (b) in the case of employment as a child minder, one-third of the earnings of that employment.