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STATUTORY INSTRUMENTS

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**2008 No. 794**

**The Employment and Support Allowance Regulations 2008**

**PART 10**

INCOME AND CAPITAL

CHAPTER 3

Employed earners

**Earnings of employed earners**

**95.**—(1) Subject to [<sup>F1</sup>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 4 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 <sup>F2</sup> (the remedies: orders and compensation, enforcement of order and compensation);
- (h) any payment or remuneration made under [<sup>F3</sup>section] 28, 34, 64, 68 [<sup>F4</sup>or] 70 of the Employment Rights Act 1996 <sup>F5</sup> (right to guarantee payments, remuneration on suspension on medical or maternity grounds, complaints to employment tribunals);
- (i) any such sum as is referred to in section 112(3) of the Contributions and Benefits Act <sup>F6</sup> (certain sums to be earnings for social security purposes);
- (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 <sup>F7</sup>.
- (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<sup>F8</sup>, shared parental leave<sup>F9</sup>, parental bereavement leave] or adoption leave 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;
  - (e) any lump sum payment made under the Iron and Steel Re-adaptation Benefits Scheme <sup>F10</sup>.
- <sup>F11</sup>(f) any payment in respect of expenses arising out of the [<sup>F12</sup>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).
- (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 [<sup>F13</sup>(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 <sup>F14</sup>;
- "part-time employment" means, if the claimant were entitled to income support, employment in which the claimant is not to be treated as engaged in remunerative work under regulation 5 or 6(1) and (4) of the Income Support Regulations (persons treated, or not treated, as engaged in remunerative work).

#### Textual Amendments

- F1** Words in reg. 95(1) substituted (27.10.2008) by [The Employment and Support Allowance \(Miscellaneous Amendments\) Regulations 2008 \(S.I. 2008/2428\)](#), regs. 1(2), **8(2)**
- F2** 1996 c. 18.
- F3** Word in reg. 95(1)(h) substituted (28.4.2014) by [The Social Security \(Miscellaneous Amendments\) Regulations 2014 \(S.I. 2014/591\)](#), regs. 1, **10(2)(a)**
- F4** Word in reg. 95(1)(h) substituted (28.4.2014) by [The Social Security \(Miscellaneous Amendments\) Regulations 2014 \(S.I. 2014/591\)](#), regs. 1, **10(2)(b)**
- F5** Sections 34 and 70 were amended by the [Employment Rights \(Dispute Resolution\) Act 1998 \(c. 8\)](#), **section 1(2)(a)** and (b) and section 64 was amended by [S.I. 1999/3232](#), **regulation 41(1)** and paragraph 2 of Schedule 9.

- F6** Section 112(3) was amended by the Employment Rights Act 1996, paragraph 51(4)(a) to (c) of Schedule 1.
- F7** S.I. 2001/1004, the relevant amending instruments are S.I. 2001/2412, S.I. 2002/307, S.I. 2003/2958, S.I. 2004/770, S.I. 2005/778, S.I. 2006/883, S.I. 2006/2003 and S.I. 2007/2091.
- F8** Words in reg. 95(2)(b) inserted (31.12.2014) by The Shared Parental Leave and Statutory Shared Parental Pay (Consequential Amendments to Subordinate Legislation) Order 2014 (S.I. 2014/3255), arts. 1(2), **20(7)**
- F9** Words in reg. 95(2)(b) inserted (6.4.2020) by The Parental Bereavement Leave and Pay (Consequential Amendments to Subordinate Legislation) Regulations 2020 (S.I. 2020/354), regs. 1, **19(4)**
- F10** S.I.1996/3182.
- F11** Reg. 95(2)(f) added (for specified purposes and with effect in accordance with reg. 1(2) of the amending S.I.) by The Social Security (Miscellaneous Amendments) (No. 4) Regulations 2009 (S.I. 2009/2655), regs. 1(2)(d), **11(6)**
- F12** Words in reg. 95(2)(f) substituted (29.10.2013) by The Social Security (Miscellaneous Amendments) (No. 3) Regulations 2013 (S.I. 2013/2536), regs. 1(1), **13(26)(a)**
- F13** Word in reg. 95(4)(b) substituted (29.10.2013) by The Social Security (Miscellaneous Amendments) (No. 3) Regulations 2013 (S.I. 2013/2536), regs. 1(1), **13(26)(b)**
- F14** 1988 c. 40.

### Calculation of net earnings of employed earners

**96.**—(1) For the purposes of regulation 91 (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, subject to paragraph (2), are the claimant's net earnings.

(2) There is to be disregarded from a claimant's net earnings, any sum, where applicable, specified in paragraphs 1 to 12 of Schedule 7 (sums to be disregarded in the calculation of earnings).

(3) 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 <sup>F15</sup>;
- (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.

### Textual Amendments

- F15** Section 6 was substituted by the Welfare Reform and Pensions Act 1999 (c. 30), section 73 and paragraph 2 of Schedule 9.

**Changes to legislation:**

There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008, CHAPTER 3.