

# **Lecturers, teachers, instructors or those in a similar capacity**

In relation to the amendment of the Social Security  
(Categorisation of Earners) Regulations 1978.

|  |   |
|--|---|
| <b>Subject of this consultation:</b>       | How the Social Security (Categorisation of Earners) Regulations 1978 as they affect lecturers, teachers, instructors or those in a similar capacity, should be amended to provide clarity regarding their intended application.   |
| <b>Scope of this consultation:</b>         | We are seeking input into how the 1978 Regulations relate currently to lecturers, teachers, instructors or those in a similar capacity. We have been advised of problems that some people in the First Aid Training sector have in knowing whether to apply the Regulations in certain circumstances. We want to establish whether the Regulations are problematic for other training sectors and if so, how. We also want views on our proposals to amend the Regulations detailed on page 13. |
| <b>Impact Assessment:</b>                  | A consultation stage <a href="#">impact assessment (PDF 48K)</a> , on which we would welcome comments, is published separately.   |
| <b>Who should read this:</b>               | Lecturers, teachers, instructors or those in a similar capacity classed as self-employed for tax purposes and any business that delivers training. Representative bodies and advisors that represent any of these.  |
| <b>Duration:</b>                           | All responses should reach HMRC by 8 January 2010   |
| <b>Enquiries:</b>                          | All enquires regarding the content or scope of the consultation or further information about the consultation should be addressed to: <p style="text-align: center;">Philip Hogan<br/>HM Revenue &amp; Customs<br/>PAYE, SA &amp; NICs<br/>Room 1E/08<br/>100 Parliament Street<br/>London<br/>SW1A 2BQ</p> <p>Telephone: 0207 147 2480</p> <p>Fax: 0207 147 2530</p> <p>Email: <a href="mailto:Philip.Hogan@hmrc.gsi.gov.uk">Philip.Hogan@hmrc.gsi.gov.uk</a></p>                              |
| <b>How to respond:</b>                     | Responses can be made to Philip Hogan at the above postal or email address.   |
| <b>Additional ways to become involved:</b> | In order to engage as wide an audience as possible with the consultation, we would be happy to meet with representative bodies. Please use the contact details above if you wish to arrange such a meeting.   |
| <b>After the consultation:</b>             | A summary of the responses to this consultation will be published. Draft amended Regulations will be published.   |
| <b>Getting to this stage:</b>              | HMRC's discussions with the First Aid Training sector have identified problems in the practical application of the Regulations which amended guidance has been unable to resolve. HMRC has concluded that amending guidance further will not provide the necessary clarity for the First Aid Training sector and training providers more widely.  |
| <b>Previous engagement:</b>                | HMRC has met with representative bodies of the First Aid Training sector whose members are affected by the Social Security (Categorisation of Earners) Regulations 1978 and other stakeholders operating in the First Aid Training sector.  |

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# 1. The Consultation Process

## 1.1 How to Respond

A summary of the questions in this consultation is included at chapter 8.

Responses should be sent by 8 January 2010

by e-mail to [Philip.Hogan@hmrc.gsi.gov.uk](mailto:Philip.Hogan@hmrc.gsi.gov.uk)

or by post to: Philip Hogan  
HM Revenue & Customs  
PAYE, SA & NICs  
Room 1E/08  
100 Parliament Street  
London  
SW1A 2BQ

Telephone: 0207 147 2480

Fax: 0207 147 2530

This document can be accessed from the HMRC Internet site at <http://www.hmrc.gov.uk/consultations>. All responses will be acknowledged, but it will not be possible to give substantive replies to individual representations.

When responding please say if you are a business, individual or representative body. In the case of representative bodies please provide information on the number and nature of people you represent. In the case of advisors please provide information on the number and type of clients you work with and the nature of your work with them.

## 1.2 Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes. These are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004.

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals with, amongst other things, obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on HM Revenue and Customs (HMRC).

HMRC will process your personal data in accordance with the DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

## 1.3 The Government's Consultation Code of Practice

This consultation is being conducted in accordance with Government's Code of Practice on Consultation. A copy of the Code of Practice criteria and a contact for any comments on the consultation process can be found in Annex A.

## 2. How employment status for tax and National Insurance is determined

2.1 In the United Kingdom, whether a person is subject to income tax and National Insurance contributions (NICs) as an employee or self-employed is generally determined by the terms and conditions under which they work, having regard to criteria set out in judgments handed down by the Courts, known as case law.

2.2 Where an individual is engaged by a party (the engager) to undertake work, the Taxes Act\* and the Social Security Act\*\* require the engager to determine whether the individual is being engaged under a contract of service (employment) or contract for services (self-employment).

2.3 For National Insurance purposes, where the contract between engager and worker is one of employment, the Social Security Contributions and Benefits Act 1992 prescribes that the worker is an employed earner liable to primary Class 1 NICs and their engager (employer) is the secondary contributor liable to secondary Class 1 NICs.

2.4 Employed earners paying Class 1 NICs are entitled to a wider range of contributory benefits than self-employed earners. Particularly, employed earners' contributions provide entitlement to: -

- Jobseeker's Allowance
- Incapacity Benefit
- Maternity Allowance
- Basic State Pension
- Additional State Pension
- Bereavement Benefits:
  - Widowed Parent's Allowance
  - Bereavement Allowance
  - Bereavement Payment

### **The Social Security (Categorisation of Earners) Regulations 1978**

2.5 The Social Security (Categorisation of Earners) Regulations 1978 (The Regulations), came into force on 27 December 1978. These are consolidated Regulations which replaced the Social Security (Categorisation of Earners) Regulations 1975.

2.6 The Regulations provide, amongst other things, that certain categories of individual who would normally be classed as self-employed for NICs purposes are treated as being in an employed earner's employment. The Regulations also prescribe who, in these circumstances, is classed as the secondary contributor, liable for payment of the secondary (employer's) NI contributions.

2.7 The purpose of the Regulations, to the extent that they provide for certain categories of individual who would normally be classed as self-employed for NICs purposes to be treated

\* Income Tax (Earnings and Pensions) Act 2003

\*\* Social Security Contributions and Benefits Act 1992

as being in an employed earner's employment, is to ensure that those persons receive entitlement to the wider range of benefits afforded to employed earners. The Regulations are also intended to obtain some measure of uniformity amongst workers who, whilst not being employed under a contract of service by an employer, were working under conditions broadly analogous. The Regulations only apply for NICs and the individual remains self-employed for tax and employment law purposes.

2.8 The Regulations prescribe five categories of individuals who are treated as employed earners and who for each category and other specified employments is treated as the secondary contributor. One such category of individuals is persons employed as "a lecturer, teacher, and instructor or in any similar capacity in an educational establishment..... providing education". This consultation relates only to this category of individual.

### **Historical Context**

2.9 Provisions to prescribe earners between the different categories have been a feature of the UK system of social security since it was introduced. The Unemployment Act 1934 included a provision the purpose of which was described in Parliament as "to remove anomalies under which a man is one day engaged in an insurable occupation and the next day finds himself in a non-insurable occupation, although, as far as one can see, there is no difference in the kind of work he is doing." The purpose was further explained by the Minister; "it is clear that the anomalies will not be all of one class, and it may be that in some cases it will be easier to remedy the situation by excluding one or two persons from insurance than by including a very much larger number of other persons. We think it desirable to have the power to include or to exclude as we may think desirable."

2.10 In a report in 1948 the National Insurance Advisory Committee recommended "that Minister's power to bring persons into unemployment insurance by regulation may and should be used in the case of persons *who are substantially in the position of employed persons* either to remove doubt when it is not clear whether the Courts would hold that a contract of service exists, or even to remove the necessity for the existence in law of such a contract".

2.11 More recently, on 1 April 1993, the Parliamentary Under Secretary for Social Security explained in a Parliamentary debate that the "special provisions embodied in the Social Security (Categorisation of Earners) Regulations exist with the aim of achieving parity of treatment for workers under the social security scheme."

### **The purpose of this consultation**

2.12 The application of the Regulations as they relate to lecturers, teachers, instructors or persons in a similar capacity, does not generally appear to result in problems for either the workers or engagers affected. It is possible that some engagers, particularly in the non academic training/education sector, whom the Regulations class as secondary contributors, are unaware of the Regulations, but HMRC's compliance programme has not indicated a widespread lack of knowledge or application of the Regulations by those affected.

2.13 The exception to this general position, HMRC has been advised, is the First Aid Training sector. During discussions with the First Aid Training sector about the Regulations, HMRC has been told that due to the wide range of courses in the sector, and the diverse circumstances under which first aid training is delivered, it is has become progressively more difficult to apply the Regulations in a way that the sector believes is consistent and in keeping with what the Regulations were intended to achieve. Furthermore, although HMRC has a clearer understanding about the structure of first aid training provision, some of those in the sector have told HMRC that there remain difficulties in the practical application of the Regulations by that sector. This is despite the fact that HMRC has provided revised guidance.

2.14. HMRC has concluded that simply providing further guidance on the application of the Regulations is unlikely to provide the clarity the First Aid Training sector, and other education and training sectors, need. Equally there is a risk that in seeking to clarify matters for the First

Aid Training sector, other sectors will in fact be less clear as to how the Regulations affect their particular sector. Accordingly HMRC is consulting on how the Regulations should be amended in order to provide greater clarity regarding the persons to whom, and the circumstances in which, the Regulations apply.

2.15 Although some may argue that widening or narrowing the scope of the Regulations is desirable, that is not the purpose of the proposals in this consultation document. Rather the purpose of this exercise is to seek views on how the Regulations should be amended in order to clarify those to whom it is intended they apply.

2.16 Despite the fact that the aim of the amendments is to clarify the existing scope of the Regulations, HMRC is keen that those who may be affected by changes to the Regulations have an opportunity to make their views known on the proposed amendments (see paragraph 7.6) before amendments are made.

# 3. Employment as a lecturer, teacher, instructor or those in a similar capacity

## Lecturers, teachers and instructors generally

3.1 The vast majority of lecturers, teachers, instructors etc will be employed earners (e.g. University lecturer, school teacher in a Local Authority school), whilst some will be self-employed earners under the case law principles as set out in paragraphs 2.1 to 2.4. There are, however, some lecturers, teachers, instructors or those in a similar capacity who, whilst self-employed applying employment status case law, are to be treated as employed earners under the Regulations. These special provisions were introduced by The Social Security (Categorisation of Earners) Amendment Regulations 1977 with effect from 17 August 1977. The National Insurance Advisory Committee when it considered the draft Regulations in 1977, in accepting the need for this special provision, noted that the Department for Social Security (the DSS, which became the Department for Work and Pensions) explained that the Regulations were necessary because of the lack of uniformity of the treatment of workers of this type.

3.2 The text of the Regulations relating to lecturers, teachers instructors etc, is:  
“Employment .... as a lecturer, teacher, instructor or in any similar capacity in an educational establishment by any person providing education being employment in which the person employed gives the instruction in the presence of the persons to whom the instruction is given except where the employment is in the Open University; and the earnings in respect of the employment are paid by, or on behalf of, the person providing the education.”

3.3 There are two specific exclusions from the application of the Regulations:  
(a) the person employed has agreed, prior to giving the instruction, to give it on not more than three days in three consecutive months; or  
(b) the instruction is given as public lectures.

3.4 The Regulations, therefore, contain three key aspects: that education is ‘provided’; that it is provided in an ‘educational establishment’; and that the earnings are paid by or on behalf of ‘the education provider.’

3.5 The Regulations do not explicitly define “education” but in the interpretation provision, they set out that an “educational establishment” includes:  
“(a) a place where instruction is provided in any course or part of a course designed to lead to a certificate, diploma, degree or professional qualification; or  
(b) a place where instruction is provided in any course or part of a course being the same as, or substantially similar to, any course or part of a course as is referred to in (a) above but which is not designed to lead to a certificate, diploma, degree or professional qualification.”

3.6 The Regulations also provide that the person to be treated as the secondary Class 1 contributor is – “the person providing the education.”

# 4. The practical consequence of the Regulations

## Application of the Regulations

4.1 The Regulations require that it must first be decided whether a lecturer, teacher, instructor etc is engaged under a contract for services, and is thus self-employed. It is then necessary to decide whether the lecturer, teacher, instructor etc. should be treated as an employed earner under the Regulations.

## HMRC's interpretation of the Regulations up until 12 June 2000

4.2 For many years the Department of Social Security (DSS) and subsequently its Executive Agency the Contributions Agency, who administered NICs, interpreted the meaning of the term 'education' relatively narrowly as academic education in the context of educational institutions which prevailed at the time, such as grammar schools, comprehensive schools, universities, polytechnics and adult education centres. Thus it was the prevailing view that the terms "educational establishment" and "providing education" applied only in the context of general development of an individual rather than training of a limited skill. As a consequence the Regulations were not generally applied to vocational or recreational courses, although on a plain reading of the Regulations they could equally be read as applying to non-academic subjects. In addition there was a general view that the 'education' must be provided in a building, the primary purpose of which was the provision of education.

4.3 On 1 April 1999 the Contributions Agency and the Inland Revenue merged and the Inland Revenue assumed responsibility for the Regulations. The Inland Revenue continued to apply the DSS/ Contributions Agency's interpretation of the Regulations.

4.4 Over time the variety of educational institutions and subject areas on offer have vastly increased to the extent that many traditional educational institutions now also offer vocational, social and recreational courses. There has also been a growth in the number of independent education providers offering these courses.

## The St John's College case

4.5 In this case decided in the High Court on 12 June 2000\*, there was a dispute in respect of the proper treatment for the purposes of Class 1 NICs of visiting instrumental teachers (VITs), who taught a variety of musical instruments to some (but not all) of the pupils of St John's College. The two issues considered by the Court were: -

- Was St John's an "educational establishment" for the purpose of the Regulations; and
- By whom were the VITs employed?

4.6 Up to this point the VITs had been treated by engagers as self-employed for tax and NICs purposes. However, the DSS argued that the Social Security (Categorisation of Earners) Regulations 1978 applied. Counsel for the college argued that it was not an "educational establishment" in accordance with the Regulations because the definition provided was exhaustive. Counsel also argued that the college itself did not provide courses leading to a certificate of any kind, but rather that it was the VITs who provided such courses. Finally,

\*St John's College School, Cambridge v Secretary of State for Social Security (Unreported)[CO/3246/99]

Counsel also argued that the VITs were not employed by the school but by the parents and the school was only acting as a paying agent.

4.7 Mr Justice Mumby found for the Secretary of State of Social Security: -

- The course provided does not have to be part of the educational establishment's own curriculum and all that is required is that the educational establishment must be a "place" where instruction is given
- The definition of educational establishment in the Regulations was not exhaustive because the term "includes" in the Regulations had to be given its ordinary meaning;
- An educational establishment can be any place where instruction of the relevant kind is provided; it does not have to be a building; and
- The school was the "*person providing the education*" for the purposes of ascribing who is the secondary contributor under the Regulations.

#### **HMRC's interpretation of the Regulations following the St John's College case**

4.8 Following the outcome of the St John's College case the Inland Revenue (now HMRC) published guidance concerning the Regulations in its Employment Status Manual (ESM). This set out that the Regulations were considered to apply to *all* training and instruction that took place in a recognised school or college whether or not that training or instruction was part of that establishment's own curriculum. The guidance was also intended to make clear that this judgment effectively widened the scope of the legislation so that all academic instruction and any instruction leading to a recognised qualification, whether part of an academic or vocational course, would fall within the Regulations, even if this did not take place in a recognised educational establishment.

4.9 Although no particular reference was made in the published guidance to first aid training, it was HMRC's policy intention, which it considered fully accorded with the St John's judgment, that a distinction could and should be made between the more substantive Health and Safety Executive (HSE) approved courses leading to a formal certificate and the type of basic and informal one day course that resulted in a certificate for simply attending a course. The purpose of this differentiation was to distinguish practically between vocational and non-vocational training courses.

4.10 In practice, HMRC has been advised that this interpretation has proved difficult for first aid training providers to apply for the reasons stated in Chapter 5, and further clarification of the guidance was published on 1 April 2009 by way of Revenue & Customs Brief 25/09: <http://www.hmrc.gov.uk/briefs/national-insurance/brief2509.htm>, and revisions to the ESM.

#### **Vocational training**

4.11 Several references have been made to vocational training and it is accepted that this is a term which itself can be open to varying interpretations. As explained, in the context of the First Aid Training sector, HMRC attempted to differentiate between vocational and non-vocational training by reference to the nature of the resulting document provided to the person trained. It is accepted that this is, in reality, an artificial distinction.

## 5. The First Aid Training Sector

### **Why the Regulations have proved difficult for the First Aid Training sector**

5.1 The diversity of first aid training and the wide range of different types of courses has meant, HMRC has been told, that training providers have great difficulty in applying the Regulations and guidance to differentiate between the types of courses which fall within the Regulations and those which do not.

5.2 A first aid trainer might present a combination of courses within the same week some of which, under existing guidance, would fall within the legislation and others would not. HMRC has been told that this complicates matters both for the course provider and the trainer.

5.3 The first aid training representative bodies have argued that the possession of a first aid certificate from a HSE course is not a necessity for an individual to practice first aid in the workplace. Provided they have the necessary skills/received training they could still be the recognised first-aider. The same courses and certificates are available for individuals whether they have been sent by their place of work or are attending to protect their own family. This highlights the difficulty, HMRC has been told, in applying the Regulations whilst having regard to the attainment of a recognised qualification.

5.4 HMRC understands that there is no clear distinction between many first aid courses and different HSE rules for different types of work places. There are two main, nationally recognised accrediting bodies relating to first aid; the HSE and the Qualifications Curriculum Authority. Certain qualifications are accredited by both, others are not.

5.5 Views have been expressed that the Regulations discriminate against privately owned first aid training providers and that the legislation is not being applied consistently by HMRC throughout the First Aid Training sector and across other sectors. Additionally, very differing views on the application of the Regulations have been expressed by some within the First Aid Training sector. HMRC refutes that there has been any discrimination but acknowledges the issues highlighted and that the differing views held are causing difficulty. It is precisely because there remains a risk of inconsistent interpretation and application that HMRC is consulting on amendments to the Regulations.

5.6 It is HMRC's view that the Regulations apply to all vocational training in addition to academic training. However, HMRC has concluded that trying to differentiate between vocational and non-vocational training by reference to the perceived status of a first aid course has not provided the desired clarity.

## 6. Other affected sectors

### Is the problem restricted to the First Aid Training sector

6.1 In Chapter 5 we set out the problems being experienced by the First Aid Training sector in applying the Regulations. However, as is explained in Chapter 2, the Regulations are not sector specific. The Regulations apply to all academic educational institutions and the wider commercial training sector providing vocational training. The Regulations do not tend to cause a problem where the instruction takes place in a school, college or university etc. The following table demonstrates how HMRC currently interprets the Regulations in relation to those institutions/ industries in the commercial training sector where the instruction does not take place in a recognised educational establishment.

How HMRC interprets the Regulations in relation to wider commercial training

| Category  | Subject/not subject to Class 1 liability by virtue of the Regulations            | Comments   |
|---|--|--|
| HGV, Fork Lift, PSV driving qualification                               | Subject to Class 1 liability   | The course leads to a recognised vocational qualification (NVQ)  |
| Health & Safety Certification e.g. Power Plant, Scaffolding etc.        | Subject to Class 1 liability   | The course leads to a recognised vocational qualification (Institute of Occupational Health & Safety)                            |
| Commercial Pilot's licence  | Subject to Class 1 liability apart from those duties which are non-instructional | Both theory classes (flying school/training room) and practical aspects of course (in flight) lead to a recognised qualification |
| Sport & Recreational training (e.g. Tennis coaches, sailing instructor) | Not subject to Class 1 liability   | Unless the purpose of the course is for the student is to attain a recognised professional or academic qualification, e.g. NVQ   |
| IT/ language courses for Businesses                                     | Subject to Class 1 liability   | Where the purpose of the course is to attain recognised professional or academic qualification e.g. NVQ, GCSE                    |
| Driving instruction   | Not subject to Class 1 liability   | Certificate only denotes a required or particular level of competence.   |
| Home tuition (where earnings are paid directly to the tutor)            | Not subject to Class 1 liability   | Earnings are not paid by the person providing the education.   |

## 7. Proposals

7.1 It is important to bear in mind when considering the purpose of the Regulations that the intention was to bring into the category of employed earner all teachers, lecturers and instructors etc who provide face-to-face sessional or part-time teaching or instruction of an academic or vocational nature. There will inevitably be a wide spectrum of opinion and there may be some respondents who feel that the legislation as currently drafted meets that requirement.

7.2 Accordingly HMRC have concluded that any further attempt to set out in guidance the meaning of the Regulations will not resolve the current difficulties. It was, therefore, announced in Revenue & Customs Brief 25/09 that HMRC would undertake consultation with the training sector and other interested parties with a view to clarifying the scope of the Regulations and their practical application so that they better reflect the nature of education and training delivery today.

7.3 This consultation now seeks the views of educationalists, training providers and other interested parties on HMRC's proposals for amending the Regulations in order to provide clarity as to their scope across all relevant sectors.

7.4 It is acknowledged that amending the Regulations may affect various sectors and individuals in different ways depending on precisely what changes are made.

7.5 The St John's College case highlights that the concept of an educational establishment is in reality redundant because such a place is anywhere where tuition of a prescribed nature is delivered. Accordingly, it is the intention to remove the concept of educational establishment and concentrate on the nature of the tuition provided.

7.6 Having regard to the purpose of the Regulations, the proposal is that the Regulations be amended as follows:

- By clarifying that all instruction given by a person in the presence of the persons to whom it is given, irrespective of where it is given, falls within the Regulations (other than instruction in a private dwelling where the person giving the instruction is paid directly by the person in receipt of the instruction);
- That instruction means all academic and vocational instruction (but excludes recreational instruction);
- By defining 'academic' and 'vocational' instruction for the purposes of the Regulations;
- Where the instruction provided is a mixture of vocational and recreational, the Regulations will apply to the total tuition fees paid for the mixed instruction; and
- By clarifying who is the secondary contributor (neither the individual instructor nor the person/body commissioning the instruction.)

7.7 By definition the Regulations would exclude all recreational instruction including sports tuition, driving tuition (unless for a PSV/HGV), flying instruction (unless for a commercial licence).

7.8 Following responses to this consultation it is the intention to publish draft Regulations reflecting the proposed amendments in order that prior to the Regulations being laid before Parliament interested parties will be able to see precisely how the proposed changes will be given effect.

7.9 The intention is that amended Regulations will come into force on 6 April 2010. Amended guidance will also be published, which amongst other things will make clear that for periods up to the date the amended Regulations come into effect, HMRC will continue to apply the Regulations in accordance with its current guidance.

## 8. Questions

8.1 Does any sector other than the First Aid Training sector, currently have difficulties in applying the Regulations?

8.2 If, other than the First Aid Training sector, difficulties are currently being experienced, what specific aspects of the Regulations are causing problems?

8.3 Will the proposals to clarify the Regulations result in the inclusion of sectors or groups of individuals currently excluded from the Regulations?

8.4 Do the proposals to remove reference to educational establishment and define the nature of the instruction within the scope of the Regulations (academic and vocational), remove perceived ambiguities?

8.5 Do the proposed changes to the Regulations remove perceived ambiguities regarding who is the secondary contributor for the purpose of the Regulations?

8.6 Do you have any comments on the consultation stage Impact Assessment at annex B

# Annex A

## The Government's Code of Practice on Consultation

### About the consultation process

This consultation is being conducted in accordance with the Government's Code of Practice on Consultation. If you wish to access the full version of the Code, you can obtain it online at:

<http://www.berr.gov.uk/files/file47158.pdf>

### The consultation criteria

1. When to consult - Formal consultation should take place at a stage when there is scope to influence the policy outcome.
2. Duration of consultation exercises - Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.
3. Clarity of scope and impact - Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.
4. Accessibility of consultation exercise - Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
5. The burden of consultation - Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
6. Responsiveness of consultation exercises - Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
7. Capacity to consult - Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

If you feel that this consultation does not satisfy these criteria, or if you have any complaints or comments about the process, please contact:

Richard Bowyer, Better Regulation Unit  
020 7147 0062 or [richard.bowyer@hmrc.gsi.gov.uk](mailto:richard.bowyer@hmrc.gsi.gov.uk)

# Annex B

## Impact Assessment

Please see the consultation stage [Impact Assessment \(PDF 48K\)](#) published separately

# Annex C

## Current Legislation

These Regulations are made under the vires of Section 2(2) of the Social Security Contributions and Benefits Act 1992

### **S.I. 1978 No. 1689**

The Social Security (Categorisation of Earners) Regulations 1978

|  |                                     |
|--|-------------------------------------|
| <i>Made</i>                            | <i>24th November</i><br><i>1978</i> |
| <i>Laid before parliament</i>          | <i>6th December 1978</i>            |
| <i>Coming into</i><br><i>Operation</i> | <i>27th December</i><br><i>1978</i> |

The Secretary of State for Social Services, in exercise of powers conferred on him by sections 2(2), 4(4) and (5) of, and paragraph 6(1)(k) of Schedule 1 to, the Social Security Act 1975<sup>11</sup> and of all other powers enabling him in that behalf, hereby makes the following regulations, which are made for the purpose only of consolidating the regulations hereby revoked and accordingly, by virtue of section 139(2) of, and paragraph 20 of Schedule 15 to, that Act, are not subject to the requirements of section 139(1) of that Act for prior reference to the National Insurance Advisory Committee:

#### **Citation, commencement and interpretation**

- 1.-(1) These regulations may be cited as the Social Security (Categorisation of Earners) Regulations 1978, and shall come into operation on 27th December 1978.  
(2) In these regulations, unless the context otherwise requires

"the Act" means the Social Security Act 1975;

"educational establishment" includes-

(a) a place where instruction is provided in any course or part of a course designed to lead to a certificate, diploma, degree or professional qualification;  
or

(b) a place where instruction is provided in any course or part of a course being the same as, or substantially similar to, any such course or part of a course as is referred to in (a) above but which is not designed to lead to a certificate, diploma, degree or professional qualification;

Defn. of "entertainer" in force from 17.7.98 until 31.1.99 only. S.I. 1998/1728 refers

"entertainer" means a person who is employed as an actor, singer or musician, or in any similar performing capacity; and "entertainment" shall be construed accordingly<sup>12</sup>;"

["foreign employer" in paragraph 9<sup>13</sup> of Schedule 3 to these regulations means a person-

- (a) who does not fulfil the conditions as to residence or presence in Great Britain prescribed under section 1(6)(a) of the Social Security Contributions and Benefits Act 1992<sup>14</sup>; and
  - (b) who, if he did fulfil those conditions as to residence or presence in Great Britain referred to in (a) above, would be the secondary contributor in relation to any payment of earnings to or for the benefit of the person employed;
- "host employer" in paragraph 9 of Schedule 3 to these regulations means a person having a place of business in Great Britain;]  
"remuneration" in paragraph 8 of Schedule 3 to these regulations includes any payment in respect of stipend or salary and excludes-
- (a) any payment disregarded or, as the case may be, deducted from the amount of a person's earnings by virtue of regulations made under section 3(3) of the Act; or
  - (b) any specific and distinct payment made towards the maintenance or education of a dependant of the person receiving the payment;

and other expressions have the same meaning as in the Act.

(3) Any reference in these regulations to any provision made by or contained in any enactment or instrument shall, except in so far as the context otherwise requires, be construed as including a reference to that provision as amended or extended by any enactment or instrument, and as including a reference to any provision which it re-enacts or replaces with or without modification.

(4) The rules for the construction of Acts of Parliament contained in the Interpretation Act 1889<sup>15</sup> shall apply for the purposes of the interpretation of these regulations as they apply for the purposes of the interpretation of an Act of Parliament.

#### **Treatment of earners in one category of earners as falling within another category and disregard of employments**

2.-(1) For the purposes of the Act an earner in one category of earners shall be treated as falling within another category in accordance with the following provisions of this regulation.

(2) Subject to the provisions of paragraph (4) of this regulation, every earner shall, in respect of any employment described in any paragraph in column (A) of Part I of Schedule 1 to these regulations, be treated as falling within the category of an employee earner in so far as he is gainfully employed in such employment and is not a person specified in the corresponding paragraph in column (B) of that Part, notwithstanding that the employment is not under a contract of service, or in an office (including elective office) with emoluments chargeable to income tax under Schedule E.

(3) Subject to the provisions of paragraph (4) of this regulation, every earner shall, in respect of any employment described in any paragraph in column (A) of Part II of the said Schedule 1, be treated as falling within the category of a self-employed earner in so far as he is gainfully employed in such employment and is not a person specified in the corresponding paragraph in column (b) of that Part, notwithstanding that the employment is under a contract of service, or in an office (including elective office) with emoluments chargeable to income tax under Schedule E.

(4) Every employment described in any paragraph in column (A) of Part III of the said Schedule 1 shall, in relation to liability for contributions otherwise arising from

employment of that description, be disregarded, except in so far as it is employment of a person specified in the corresponding paragraph in column (B) of that Part.

#### **Employments treated as continuing**

3. For the purposes of the Act with respect to the computation, collection and recovery of, and otherwise with respect to, contributions (other than Class 4 contributions which under section 9 of the Act are to be recovered by the Inland Revenue), the employment of a person shall be treated as continuing in the circumstances specified in Schedule 2 to these regulations.

#### **Special provisions with respect to persons declared by the High Court to be persons falling within a particular category of earners**

4.-(1) Where, under the provisions of the Act relating to references and appeals to the High Court<sup>16</sup>, the High Court decides any question whether in respect of any employment a person is an earner and, if so, as the category of earners in which he is to be included, and that decision is inconsistent with some previous determination of a question by the Secretary of State<sup>17</sup>, then, if the Secretary of State is satisfied that contributions appropriate to another category of earners have been paid by or in respect of any person by reason of that determination or in the reasonable belief that that determination was applicable, the Secretary of State may, if it appears to him that it would be in the interests of the person by or in respect of whom such contributions have been paid, or of any claimant or beneficiary by virtue of that person's contributions, so to do, direct that that person shall be treated as though he had been included in the category of earners corresponding to the contributions paid during the period for which contributions appropriate to that other category were so paid before the date on which the decision of the High Court was given, and, if such a direction is given, that person shall be deemed to have been included in that category accordingly for such period.

(2) Where the Secretary of State, on review under section 96(1) of the Act, has revised a determination of a question previously given by him, the provisions of this regulation shall apply with the necessary modifications in the same manner as they apply where the High Court has given a decision inconsistent with a determination previously given by the Secretary of State.

(3) In the application of this regulation to Scotland, for any reference to the High Court, there shall be substituted a reference to the Court of Session<sup>18</sup>.

#### **Persons to be treated as secondary contributors**

5. For the purposes of section 4 of the Act (Class 1 contributions), in relation to any payment of earnings to or for the benefit of an employed earner in any employment described in any paragraph in column (A) of Schedule 3 to these regulations, the person specified in the corresponding paragraph in column (B) of that Schedule shall be treated as the secondary Class 1 contributor in relation to that employed earner.

#### **Revocation and general savings**

6.-(1) The regulations specified in column (1) of Schedule 4 to these regulations are hereby revoked to the extent mentioned in column (3) of that Schedule.

(2) Anything whatsoever done under or by virtue of any regulation revoked by these regulations shall be deemed to have been done under or by virtue of the corresponding provision of these regulations and anything whatsoever begun under any such regulation may be continued under these regulations as if begun thereunder.

*David Ennals*

24th November 1978 Secretary of State for Social Services

SCHEDULE 1  
Regulation 2  
Part 1

**Column (A)**

**Column (B)**

*Employment in respect of which, subject to the provisions of regulation 2 and to the exceptions in column (b) of this Part, earners are treated as falling within the category of employed earner*

*Persons excepted from the operation of column (A)*

[1. Employment - (a) as an office cleaner or as an operative in any similar capacity in any premises other than those used as a private dwelling-house; or (b) as a cleaner of any telephone apparatus and associated fixtures, other than of apparatus and fixtures in premises used as a private dwelling-house.<sup>19</sup>]

1. None

2. Employment (not being employment in respect of which a person is, under the provisions of paragraph 1, 3 or 5 of this Schedule, treated as falling within the category of an employed earner) in which the person employed renders, or is under obligation to render, personal service and is subject to supervision, direction or control, or to the right of supervision, direction or control, as to the manner of the rendering of such service and where the person employed is supplied by or through some third person (including, in the case of a body of persons unincorporate, a body of which the person employed is a member) and - (a) where earnings for such service are paid by or through, or on the basis of accounts submitted by, that third person or in accordance with arrangements made with that third person; or (b) where payments, other than to the person employed, are made by way of fees, commission or other payments of like nature which relate to the continued employment in that employment of the person employed.

2. Any person in employment described in paragraph 2 in column (A)-(a) where the service of the person employed is rendered in his own home or on other premises not under the control or management of the person to whom the person employed is supplied (except where such other premises are premises at which the person employed is required, by reason of the nature of the service, to render service); or (b) who is employed as an [*actor, singer, musician or other*<sup>20</sup>] entertainer or as a fashion, photographic or artist's model; or (c) in a case where earnings are not paid by or through, or on the basis of accounts submitted by, that third person - (i) where the person employed has obtained that employment through a third person as part of that third person's activities in which persons seeking employment are introduced to persons requiring their services; and (ii) where as a result of such an introduction the person employed and the person to whom he has been introduced have entered into a contract with each other for the rendering of such service; and

(iii) where only the person employed and the person to whom he has been introduced have a direct financial interest

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|  | in the continued employment in that employment of the person employed.   |
| 3. Employment of a person by his or her spouse for the purposes of the spouse's employment.  | 3. None.   |
| 4. Employment(not being employment described in paragraph 2 in column (A) of this Schedule) as a lecturer, teacher, instructor or in any similar capacity in an educational establishment by any person providing education being employment in which-(a) <sup>21</sup> (b) the person employed gives the instruction in the presence of the persons to whom the instruction is given except where the employment is in the Open University, and (c) the earnings in respect of the employment are paid by, or on behalf of, the person providing the education. | [4. Any person in employment described in paragraph 4 in column (A) where - (a) the person employed has agreed, prior to giving the instruction, to give it on not more than three days in three consecutive months; or (b) the instruction is given as public lectures <sup>22</sup> .] |
| 5. Employment as a minister of religion, not being employment under a contract of service or in an office with emoluments chargeable to income tax under Schedule E.   | 5. Any person in employment described in paragraph 5 of column (A) whose remuneration in respect of that employment (disregarding any payment in kind) does not consist wholly or mainly of stipend or salary.   |
| <i>Para 5A in force from 17.7.98. S.I. 1998/1728 and 1999/3 refer. 5A.</i>   | 5A. Any person in employment described in paragraph 5A in column (A) whose remuneration in respect of that employment (disregarding any payment in kind) does not consist wholly or mainly of salary.  |
| Employment as an entertainer, not being employment under a contract of service or in an office with emoluments chargeable to income tax under Schedule E.  |  |

## Part II

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| <p>Column (A)</p> <p><b><i>Employment in respect of which, subject to the provisions of regulation 2 and to the exceptions in column (b) of this Part, earners are treated as falling within the category of self-employed earner</i></b></p>  | <p>Column (B)</p> <p><b><i>Persons excepted from the operation of column (A)</i></b></p> |
| 6. Employment (not being employment described in paragraph 2 in column (A) of this Schedule) by any person responsible for the conduct or administration of any examination leading to any certificate, diploma, degree or professional qualification - (a) as an examiner, moderator or invigilator or in any similar | 6. None.   |

capacity; or (b) in which the person employed is engaged to set questions or tests for any such examination, under a contract where the whole of the work to be performed is to be performed in less than twelve months.

### PART III

| <b>Column (A)</b>   | <b>Column (B)</b>   |
|---|---|
| <b><i>Employment in respect of which, subject to the exceptions in column (B) of this Part, are to be disregarded</i></b>   | <b><i>Persons excepted from the operation of column (A)</i></b>           |
| 7. Employment by the father, mother, None. grandfather, grandmother, stepfather, stepmother, son, daughter, grandson, granddaughter, stepson, stepdaughter, brother, sister, half-brother or half-sister of the person employed, in so far as the employment - (a) is employment in a private dwelling-house in which both the person employed and the employer reside; and (b) is not employment for the purposes of any trade or business carried on there by the employer. | 7. None.  |
| 8. Employment (whether or not under a None. contract of service) of a person by his or her spouse otherwise than for the purposes of the spouse's employment.   | 8. None.  |
| 9. Any employment or employments as a 9. None. self-employed earner (including any employment in respect of which a person is, under these regulations, treated as falling within the category of a self-employed earner) where the earner is not ordinarily employed in such employment or employments.  | 9. None   |
| 10. Employment for the purpose of any election or referendum authorised by Act of Parliament - (a) as a returning officer or acting returning officer; or (b) as a Chief Counting Officer or counting officer; or (c) of any person by any officer referred to in (a) or (b) above.   | 10. None  |
| [11. Employment:(a) as a member of the naval, military or air forces of a country   | 11. Any employment described in paragraph 11(b) in column (A) of a person |

to which a provision of the Visiting Forces Act 1952<sup>23</sup> applies by virtue of section 1 thereof; (b) as a civilian by any such force.

12. Employment as a member of any international headquarters or defence organisation designated under section 1 of the International Headquarters and Defence Organisations Act 1946<sup>24</sup>.

who is ordinarily resident in the United Kingdom.

12. Any employment described in paragraph 12 in Column (A) of a person who is - (a) a serving member of the regular naval, military or air forces of the Crown raised in the United Kingdom, and any officer of the Brigade of Gurkhas holding Her Majesty's commission who is not a Queen's Gurkha officer; or (b) a civilian ordinarily resident in the United Kingdom who is not a member of a [scheme providing a pension, lump sum, gratuity or like benefit on cessation of the employment which is<sup>25</sup>] established under arrangements made by the international headquarters or, as the case may be, defence organisation of which he is a member.<sup>26</sup>]

[13. Employment (other than employment described in paragraph 12 of Column (A) of this Schedule) as a Queen's Gurkha officer or as any other member of the Brigade of Gurkhas of a person who was recruited for that Brigade in Nepal.

13. None.<sup>27</sup>]

## SCHEDULE 2 Regulation 3

### CIRCUMSTANCES IN WHICH EMPLOYMENT IS TREATED AS CONTINUING

Where a person is employed as a self-employed earner or in an employment in respect of which he is, under these regulations, treated as falling within the category of a self-employed earner, the employment shall in either case be treated as continuing unless and until he is no longer ordinarily employed in that employment.

## SCHEDULE 3 Regulation 5

### EMPLOYMENTS IN RESPECT OF WHICH PERSONS ARE TREATED AS SECONDARY CLASS 1 CONTRIBUTORS

**Column (A)**

***Employments***

**Column (B)**

***Persons treated as  
secondary Class 1  
contributors***

- [1. Employment - (a) as an office cleaner or as an operative in any similar capacity in any premises other than those used as a private dwelling-house; or (b) as a cleaner of any telephone apparatus and associated fixtures, other than of apparatus and fixtures in premises used as a private dwelling-house.<sup>28</sup>]
2. Employment, whether or not under a contract of service (not being employment described in paragraph 2 in column (B) of Schedule 1 to these regulations or an employment to which paragraph 1, 4, 5, 7 or 8 of this Schedule applies) in which the person employed renders, or is under an obligation to render, personal service and is subject to supervision, direction or control, or to the right of supervision, direction or control, as to the manner of the rendering of such service and where the person employed is supplied by or through some third person (including, in the case of a body of persons unincorporate, a body of which the person employed is a member) and - (a) where earnings for such service are paid by or through, or on the basis of accounts submitted by, that third person or in accordance with arrangements made with that third person; or (b) where payments, other than to the person employed, are made by way of fees, commission or other payments of like nature which relate to the continued employment in that employment of the person employed.
3. Employment of a person by his or her spouse for the purposes of the spouse's employment.
4. Employment (not being employment in respect of which a secondary contributor, in any particular case, is prescribed in paragraph 1(a) in column (B) of this Schedule, and not being employment described in paragraph 2 in column (A) of that Schedule) by a company, being a company within the meaning of the Companies Act 1948<sup>31</sup> and in voluntary liquidation but carrying on business under a liquidator.
- 1.(a) Where the person employed is supplied by, or through the agency of, some third person and receives his remuneration from, or through the agency of, that third person, that third person; (b) in any other case, except where the employment is also one described in paragraph 4 in column (A) of this Schedule, the person with whom the person employed contracted to do the work.
- 2.(a) In England and Wales where the person employed is supplied by or through the agency of a body of persons unincorporate and the person employed is a member of that body, the other members of that body, and, in any other case, the third person by whom or through whose agency the person employed is supplied; (b) in Scotland, the third person by whom or through whose agency the person employed is supplied; (c) where the other members of the body or the third person specified in sub-paragraph (a) or, as the case may be, the third person specified in sub-paragraph (b) of this paragraph do not fulfil the conditions as to residence or presence in Great Britain prescribed in [regulation 119(1)(b) of the Social Security (Contributions) Regulations 1979<sup>29 30</sup>], the person to whom the person employed is supplied (and in that case sub-paragraph (a) or, as the case may be, sub-paragraph (b) shall not apply).
3. The spouse.
4. The person who at the time of the employment holds the office of liquidator.

5. Employment in chambers as a barrister's clerk.
6. Employment (not being employment described in paragraph 4 in column (B) of Schedule 1 to these regulations or an employment which paragraph 2 of this Schedule applies) as a lecturer, teacher, instructor or in any similar capacity in an educational establishment by any person providing education being employment in which - (a) <sup>32</sup>(b) the person employed gives the instruction in the presence of the persons to whom the instruction is given except where the employment is in the Open University; and (c) the earnings in respect of the employment are paid by, or on behalf of, the person providing the education.
7. Employment as a minister of the Church of England, not being employment under a contract of service.
8. Employment as a minister of religion not being employment - (a) as a minister of the Church of England; or (b) under a contract of service; or (c) described in paragraph 5 in column (B) of Schedule 1 to these regulations.
- <sup>33</sup>9. Employment by a foreign employer where - (a) in pursuance of that employment the personal service of the person employed is made available to a host employer; and (b) the personal
5. The head of chambers.
6. The person providing the education.
7. The Church Commissioners for England.
- 8.(a) Where the remuneration in respect of the employment is paid from one fund, the person responsible for the administration of that fund; (b) where the remuneration in respect of the employment is paid from more than one fund and - (i) remuneration is also paid from one of those funds to other ministers of religion, the person responsible for the administration of that fund;(ii) remuneration is also paid from two or more of those funds to other ministers of religion, the person responsible for the administration of the fund from which remuneration is paid to the greatest number of ministers of religion who carry out their duties in Great Britain;(iii) no person falls to be treated as a secondary contributor by virtue of subparagraph (b)(i) or (ii) of this paragraph, the person responsible for the administration of the fund from which the minister of religion first receives a payment of remuneration in the tax year.
9. The host employer to whom the personal service of the person employed is made available.

service is rendered for the purposes of the business of that host employer; and (c) that personal service for the host employer begins on or after 6th April 1994. <sup>34</sup>]

*Para. 10 in force from 17.7.98 until 31.1.99 only. S.I. 1998/1728 refers.* 10. Employment as an entertainer (not being employment under a contract of service or in an office with emoluments chargeable to income tax under Schedule E) except where the earner is a person to whom paragraph 5A in column (B) of Schedule 1 to these Regulations applies. 10. The person who has engaged the entertainer under a contract for services for the provision of the entertainment which constitutes that employment".

SCHEDULE 4  
Regulation 6(1)  
REVOCATIONS

*See 2000 edition for Categorisation of Earners regulations revoked.*

**EXPLANATORY NOTE**

*(This note is not part of the Regulations)*

These Regulations are made for the purpose only of consolidating the Regulations hereby revoked.

They provide for persons in employments of prescribed descriptions to be treated for the purposes of the Social Security Act 1975 as falling within another category of earners. The Regulations also provide for other employments of prescribed descriptions to be disregarded (regulation 2 and Schedule 1).

Provision is also made for the circumstances in which employment as a self-employed earner is treated as continuing (regulation 3 and Schedule 2).

Provision is also made for the special categorisation of a person following a decision of the High Court or a revised decision of the Secretary of State so as to enable the original determination concerning that person's category to stand where this would be in the interests of the person concerned (regulation 4).

The Regulations provide for prescribed persons to be treated for the purposes of the Social Security Act 1975 as the secondary Class 12 contributor in respect of persons in specified employments (regulation 5 and Schedule 3).

11 1975 c.14

12 [Defns. "foreign employer" and "host employer" inserted in reg. 1(2) by reg. 2 of S.I.1994/726 as from 6.4.94]

13 Paragraph 9 is added by regulation 4 of these Regulations.

14 See regulation 119 of S.I. 1979/591; relevant amending instrument is S.I. 1992/97.

15 1889 c.63.

16 See section 94 of the Social Security Act 1975.

17 See section 93 of the Social Security Act 1975.

18 See section 94(1) of the Social Security Act 1975.

19 S.I.1990/1894 regn.2 with effect on and after 16 October 1990.

20 Words omitted by S.I.1998/1728 for period 17 July 1998 to 31 January 1999.

21 Para.(a) omitted by S.I.1984/350 regn.2(a) with effect on and after 6 April 1984.

22 S.I.1984/350 regn.2(b) with effect on and after 6 April 1984.

23 1952 c.67

24 1964 c.5.

25 Words substituted by S.I.1984/350 regn.3 with effect on and after 6 April 1984.

26 S.I.1980/1713 regn.2(a),(b) with effect on and after 1 December 1980.

27 S.I.1994/726 regn.3 with effect on and after 6 April 1994.

28 Para. substituted by S.I.1990/1894 regn.3(10) with effect on and after 16 October 1990.

29 S.I. 1979/591.

30 Words substituted by S.I.1990/1894 regn.3(2) with effect on and after 16 October 1990.

31 1948 c.38.

32 Words omitted by S.I.1984/350 regn.4 with effect on and after 6 April 1984.

33 [Para. 9 inserted by reg. 4 of S.I. 1994/726 as from 6.4.94.]

34 S.I.1994/726 regn.4 with effect on and after 6 April 1994.