ICAEW
REPRESENTATION ICAEW REP 43/24

IMPROVING THE DATA HMRC COLLECTS FROM ITS CUSTOMERS: DRAFT LEGISLATION

Issued 9 May 2024

ICAEW welcomes the opportunity to comment on the *Draft legislation: Improving the data HMRC collects from its customers* consultation published by HMRC on 14 March 2024, a copy of which is available from this link.

Employee hours

- We continue to question the legislative vires for these regulations. Given the additional compliance costs that will be imposed on employers, we would welcome feedback from HMRC over each of the first five years as to how much additional tax has been collected to establish whether the measure provides value for money.
- Linking the hours worked to payments is over-administratively burdensome. The admin burden would be reduced if the hours reported were for the pay period.
- Guidance on how to calculate employee hours for salaried workers is needed as a matter of urgency to provide a clear six-month lead-in time before testing by software developers, implementation by employers and/or their payroll agents, followed by testing by employers/payroll agents, all ahead of being able to prepopulate payroll in advance of the implementation date of 6 April 2025.
- The list of NIL hours reportable descriptions needs to be expanded so that software can be programmed to recognise that such a payment has been made, withhold reporting of hours, and automatically insert the correct reportable description as to why hours have not been declared.
- Double counting of hours needs to be eliminated.
- Confirmation is requested that pension payments, modified and other expat payrolls and numerous other categories of payment are excluded.
- Given all the changes also needed to payroll processes for mandatory payrolling of BIK from April 2026, reporting employee hours should be delayed until April 2026.

Owner-managed company directors' dividends

- Guidance is needed where companies have issued more than one class of share.

Start and end dates of self-employment

- We recommend that HMRC includes guidance in the notes to the self-employment pages of the tax return explaining when a trade begins and finishes.
- We also recommend that start dates are only required for actual trades that need to be disclosed on the tax return. Trades operating under the £1,000 trading allowance (save where taxpayer has opted to pay Class 2 NIC) and deemed trades should be excluded.

ICAEW
Chartered Accountants' Hall Moorgate Place London EC2R 6EA UK
T +44 (0)1908 248 250 F +44 (0)20 7920 0547 icaew.com

This response of 9 May 2024 has been prepared by the ICAEW Tax Faculty. Internationally recognised as a source of expertise, the ICAEW Tax Faculty is a leading authority on taxation and is the voice of tax for ICAEW. It is responsible for making all submissions to the tax authorities on behalf of ICAEW, drawing upon the knowledge and experience of ICAEW's membership. The Tax Faculty's work is directly supported by over 130 active members, many of them well-known names in the tax world, who work across the complete spectrum of tax, both in practice and in business. ICAEW Tax Faculty's Ten Tenets for a Better Tax System, by which we benchmark the tax system and changes to it, are summarised in Appendix 1.

ICAEW is a world-leading professional body established under a Royal Charter to serve the public interest. In pursuit of its vision of a world of strong economies, ICAEW works with governments, regulators and businesses and it leads, connects, supports and regulates more than 166,000 chartered accountant members in over 146 countries. ICAEW members work in all types of private and public organisations, including public practice firms, and are trained to provide clarity and rigour and apply the highest professional, technical and ethical standards.

EMPLOYEE HOURS

General comments

1. As mentioned by member after member at HMRC's Employment & Payroll Group meeting, HMRC has ignored previous representations on this measure. Those representations remain valid – please see for example our Finance Bill briefing note for MPs ICAEW REP 5/24.
2. We would appreciate confirmation of the legal vires of this measure. And given the additional employer compliance costs it will create, we would welcome feedback from HMRC over, say, the next five years, of how much extra tax has been collected so that it can be determined whether the measure is providing value for money.
3. We recommend that the regulations and guidance need to comply with our *Ten Tenets for a Better Tax System* by which we benchmark the tax system and changes to it, summarised in Appendix 1, notably Tenets 2 – Certain, 3 – Simple and 4 – Easy to collect and calculate.
4. We would welcome as a matter of urgency practical guidance for employers and payroll agents, and detailed software specifications for payroll IT developers, on this measure. Ideally this would include, inter alia, explanations as to how many hours to report for salaried workers and expatriates, and clarification on whether the double counting in reg 21(5) is intended.
5. Our understanding is that the reportable hours of salaried employees will be their annual contractual hours divided by twelve, or 52 times weekly contractual hours divided by twelve, or similar, without adjustments for the number of working days in the month, leap years, paid and unpaid leave, etc. This calls into question the value of the data that the obligation to report employee hours would provide.
6. We believe that the regulations are flawed – please see specific comments below. As the regulations will need amendment, can the purpose for which the data is collected be considered when rewriting the regulations to reduce the administration burden of reporting by payment. It would be simpler if an employer merely had to report the hours worked in the PAYE pay period, in other words, remove the requirement to report per payment. The explanatory memorandum to the regulations suggests that only one figure of hours worked is required per pay period. This however is not our interpretation of the regulations.
7. The list of "reportable descriptions" in reg 21A(3) needs expanding, as explained below, to enable employers to be able to report NIL hours in all appropriate cases. Software developers need to update payroll and HMRC's systems in good time to enable testing by software developers, implementation by employers and/or their payroll agents, followed by testing by employers/payroll agents, all ahead of being able to prepopulate payrolls in advance of the implementation date of 6 April 2025 – now only 11 months away. This reporting change will require new full payment submission fields and they need to be available in software a long time prior to Week 1 / Month 1 2025/26.
8. Confirmation is requested that, in particular, pensions, modified and other expat payrolls are excluded.
9. An April 2025 start date leaves insufficient time for employers and software houses to get ready for this requirement because there still is no clear guidance as to how the employee hours are to be calculated and there are omissions in the list of NIL hour reportable descriptions.
10. Given all the required changes to payroll software and in-house processes to deal with the proposed mandatory payrolling of all benefits-in-kind from April 2026, if the proposal to report employee hours is pursued, final regulations need to be laid as soon as possible along with detailed guidance, and implementation should be delayed until at least 6 April 2026.

Specific comments

11. **Legal vires** Legal vires for these regulations hinge on whether the Commissioners of HMRC consider that "the information is relevant for the purpose of the collection and management of any of those taxes listed in section 1 of TMA 1970".
12. We expressed our doubts about the legal vires for these regulations in our Finance Bill briefing for MPs ICAEW REP 5/24 and requested clarification.

13. We note that the justification now provided in the explanatory memorandum to the draft regulations is that it will help HMRC to identify under-reported earnings and support HMRC's upstream compliance approach to positively influence changes in customer behaviour.
14. Given that *"the reportable hours of salaried employees will be their annual contractual hours divided by twelve, or 52 times weekly contractual hours, or similar, without adjustments for the number of working days in the month, leave, etc*", we do not believe that HMRC will be able to spot under reporting, especially given HMRC's poor processing of RTI data and the state of PAYE liabilities and payments reconciliations on ETMP reported in our letter dated 1 March 2023 to HMRC ICAEW REP 21/23.
15. In the light of the additional compliance costs that will be imposed on employers (one-off impacts of £58m on employers / agents / bookkeepers plus £10m on-going costs per the consultation document, and the fact that these estimated compliance costs are "based on assumptions about data employers are already required to keep, to satisfy National Living Wage and National Minimum wage rules", the rules for which require hours worked to be calculated differently from employee hours in the draft regulations), we would welcome, over, say, the next five years, post-implementation cost/benefit reports from HMRC as to how much additional tax has been collected in each year compared to the administrative cost to employers as a result of this measure, to support its legal vires.
16. **Practical guidance** Please clarify and provide guidance for software developers and employers/payroll agents to explain how the regulations should be applied in practice (including for payrolls with a cross-border element).
17. This reporting change will require new full payment submission fields and they need to be available in software a long time prior to Week 1 / Month 1 2025/26 to enable employers to prepopulate payrolls ahead of a go-live date of 6 April 2025. The regulations come into effect on 6 April 2025, which is only 11 months away, and software houses will have already started to design, build, test and install software, and employers and payroll agencies must change their processes and train users. Final secondary legislation and detailed HMRC guidance is required as a matter of urgency before testing by software developers, implementation by employers and/or their payroll agents, followed by testing by employers / payroll agents.
18. Has HMRC informed software developers that hours worked is not required in respect of payments of employer NIC (Class 1 secondary and Class 1A)?
19. **Modified and other cross-border payrolls** We believe that the regulations will not apply to modified payrolls under Appendix 6. Given the specialised nature of these payrolls, the estimated nature of the payrolls and the fact that they operate by contract with the employer and not under the usual payroll regulations, we assume that these regulations will not apply.
20. Can we please have this confirmation in writing.
21. **New regulation 21(3)** As requested in our Finance Bill briefing for MPs ICAEW REP 5/24, we should welcome clarification of how many hours should be reported for employees who are not paid by the hour.
22. If a contract specifies 40 hours per week, how is that converted into a pay period number of hours if the employee is paid monthly. Is it 40 X 52 / 12?
23. Another example is for a salaried employee paid calendar monthly whose contract specifies that they:
    - should work 35 hours per week,
    - are allowed 27 days paid leave,
    - are paid bank holidays,
    - receive a paid privilege day off around Christmas, and
    - have a paid day off around their birthday.
24. Will the number of hours to report each month be 35 hours multiplied by 52 weeks divided by twelve, (ie the number of hours per the contract even if for some of the hours the employee has not been at work)? Or will leave days taken and/ or not taken in each pay period need to be taken into account, and, if so, how?

25. If employers report just the annual hours divided by 12 with no adjustments for the number of workdays in the month and for leave, etc, whilst making the process more practical, it does call in to question the value of the data collected through this new obligation and HMRC will not be able to spot underpayments.

26. **New regulation 21(5)** says: *"Where the payment comprises two or more constituent amounts to which sub-paragraphs (2), (3) or (4) would have applied if they had been paid separately, the number of worked hours is the sum of the worked hours determined in respect of each constituent amount as if it had been paid separately.".*

27. In other words, the number of hours worked is the sum of the hours of each constituent part of the payment. This will lead to double counting of hours in certain circumstances.

28. For example, if an hour worked is paid at two positive rates. Suppose an employee's contract states that the individual is paid a basic salary to work 40 hours per week including weekends on an "as required" basis and is paid supplementary sums based on hours worked when some of the 40 contractual hours are worked at weekends.

29. The basic 40 hours will be within new reg 21(3) and the additional pay for (say 6) hours worked at an example weekend will be within new reg 21(2). The obligation under reg 21(5) is to add together the constituent number of hours (40+say 6=46) which means that the (say 6) hours worked at the example weekend will be double counted.

30. We assume that double counting of hours is not intended and recommend that this regulation is changed to eliminate the double counting.

31. Another example of where the regulation appears to give an erroneous result is where an employee works, say, 160 hours per month and is paid salary, disturbance allowance, housing allowance, cost of living allowance and seniority payment. The reality is that the employee has worked 160 hours, but doesn't the regulation require the 160 hours to be reported in respect of each payment?

32. By way of a further example, let us consider the month of January for an employee who receives a bonus for the prior calendar year alongside January's salary. The regulations appear to require the employer to report say 173.33 hours for salary and 2,080 hours for the bonus. The requirement to break down the hours worked by payment seems an unnecessary administrative burden. What is the data going to be used for? In this example surely the relevant information is the number of hours worked in the pay period which for monthly paid employees is the number of hours per the contract. If the hours are needed for the bonus period, the hours worked could be obtained by looking at the prior RTI submissions but this would double count hours previously reported in the prior year. Is this intended?

33. We believe that if the reporting per payment is to remain then guidance has to be issued regarding when a payment has to be split for the purpose of these regulations. In practice many payments are added together for payroll purposes partly because of limitations in the software. When do they have to be reported separately?

34. Let us again consider by way of another example the payment of a bonus. The amount of a bonus is calculated by reference to the rise in the share price of the employer. Starters get an apportioned amount based on their start date and similarly leavers get an apportioned amount dependent on their leave date. Is this apportionment enough to bring the reporting for all employees, i.e. those who have not started or left in the bonus year, those who have left and those who have started, within reg 21(3), or is it only the starters and leavers who are within reg 21(3), or are none of the employees who receive such a bonus within reg 21(3)?

35. If the government is determined to go ahead with this proposal, to reduce the excessive administrative burden of these regulations, the requirement to report per payment should be removed and replaced with an hours per PAYE period.

36. **New regulation 21A(3)** suffers from numerous omissions and needs augmentation. Amended regulations need to be laid as soon as possible to enable software developers to reprogramme payroll to enable new reporting fields to be pre-populated before Week 1 / Month 1 of 2025/26 and HMRC's systems to be updated to cater for all necessary reportable descriptions.

37. New reg 21A(3)(b): We note that if benefits-in-kind are payrolled then the number of hours worked is NIL. We also note that reg 21(5) refers to "payments" and BIK are not "paid" which is

why the current draft regulations state that BIK should be reported as NIL. This is counterintuitive and should be highlighted in guidance. Most employees would expect that they were earning, for example, their company car, over the same period as the salary.

38. Where payrolled BIK are provided to employees who are not otherwise paid in cash, should hours worked be reported?

39. New reg 21A(3)(c) refers to "a termination award". The inclusion of this term is likely to lead to inconsistent reporting because it is not clear how the requirement to use this description interacts with the tax legislation and in particular s402D ITEPA 2003. Part of the award can under that section be deemed to be a payment in lieu of notice and arguably that payment for tax purposes is for that notice period for the calculation of PAYE. It does not appear to be for that period for the purposes of these regulations – it is just part of the termination payment.

40. The intent of the regulations appears to be to require termination awards that are taxable under s401 ITEPA 2003 to be reported with NIL hours. Such an approach to termination payments is sensible as they are not usually paid for a period – they are paid for not being an employee, so the hours worked should indeed be NIL.

41. A deficiency of the primary legislation that introduced the concept of "post-employment notice pay" (PENP) under s402D ITEPA 2003 is that the termination payment has no sourcing period, which supports the view that the hours worked reported under the draft regulations should be NIL for termination awards. That said, when applying s401, HMRC seem to only take the approach that they should be sourced over the last 12 months of the payment even though the amount may be calculated based on the whole period of the employment. If there is such a calculation and the payment does not qualify for exemption under s401 ITEPA 2003, should the number of hours be the total for the whole period of employment, or the last 12 months to match the aforementioned HMRC approach, or NIL?

42. If not NIL, has HMRC provided software developers with an upper limit of the number of hours worked? Will the system cope with payments made in respect of, for example, twenty years of employment?

43. When a payment qualifies for exemption under s406 ITEPA 2003 again the most appropriate number of hours to report under the proposed new provisions, given the payment is for disability and not for working a number of hours, would be NIL. It would be useful if HMRC published a list of circumstances when the number of hours to be reported should be NIL. Should not the reportable descriptions for NIL hours include disability payments under s406?

44. When part of a termination is considered a PENP under s402D ITEPA 2003, part of the termination payment is taxed as if for the period of notice. In order for payroll software to calculate Class 1 NIC on the PENP as well as any Class 1A NIC on the termination award, the termination award has to be split into two payments. Per the draft regulations, due to the definition of a termination payment in s402A(1) ITEPA 2003, the hours worked reported should be NIL and the description should be termination award albeit the PENP is treated differently for tax and NIC purposes from a termination payment in the normal sense of the words. Matching the tax and NIC treatment for the reporting of hours would enable software developers to automate the appropriate descriptions i.e. "Termination award" and "PENP".

45. If a genuine, i.e. not deemed, payment in lieu of notice is made, what hours should be reported? Again, shouldn't they be NIL? If someone is on garden leave, shouldn't the hours be NIL? We recommend that both these options are added to regulation 21A.

46. When a s690 ITEPA 2003 determination is issued, the amount of earnings that is put through payroll will be a certain percentage of earnings. For example, the amount may be 60% of earnings. The actual taxable percentage is then reconciled on the employee's self-assessment tax return. Given that the in-year PAYE reporting is an estimate – here, 60% – we believe that where a s690 determination is in place the hours reported should be NIL and the description "Section 690 determination" added to reg 21A.

47. Deferred remuneration does not appear to be catered for by the regulations. Deferred remuneration may be reported three to five years after the earnings period, or, in exceptional cases, over 20 years later. Reporting the hours worked based on the time of payment is misguided. As we have suggested, the number of hours per the PAYE earnings period would be

a better measure overall but if that approach is not accepted any data reported in respect of such deferred payments should be NIL and the description added to reg 21A.

48. Share incentives can also be sourced over a long period or the period prior to the award. In any event, the reporting date is far removed from when any hours were worked. We note the exception in reg 21A(3)(b) for benefits-in-kind. There should be a similar exemption added to reg 21A for share incentives unless the regulations are modified to only report based on the PAYE month etc.
49. Sign-on bonuses such as the one in Julian Martin [2014] UKUT 0429 (TCC) are not linked to hours worked and therefore should be added to reg 21A.
50. Pensions are subject to PAYE and are not earned at the time of payment but over the period during which contributions are paid, so, for the purposes of reporting employee hours, pensions needs to be added to the list of reportable descriptions in reg 21A.
51. Also to be added to the list of reportable descriptions in reg 21A should be payments for restrictive undertakings under s225 ITEPA 2003.
52. Non-qualifying relocation expenses do not relate to any particular period but are paid in respect of a move, and consequently should be added to the list in reg 21A.
53. In addition, when an employee is tax equalised or tax protected, the tax that is paid by the employer can depend on overseas withholding requirements and overseas tax return filing requirements as well as UK withholding and UK tax return filing requirements. Given that the tax paid under overseas and UK withholding may well change due to overseas and UK filing requirements, and the payment of tax may be in respect of a complete overseas or UK tax year, or longer, for example in respect of share incentives with a ten year earnings period, we believe that tax paid by an employer on behalf of the employee in these circumstances should be added to the list of reportable descriptions in reg 21A.
54. Where an employee is within the circumstances explained in the previous paragraph, overseas and UK employee social security contributions may be paid by the employer. Again, such items should be added to the list of reportable descriptions in reg 21A.
55. As tax and social security contributions paid by the employer as described in in the two preceding paragraphs may well be paid as one payment, we suggest that the description to add to reg 21A is “Tax and/or social security contributions paid by the employer”.

OWNER-MANAGED DIRECTORS’ DIVIDENDS AND PERCENTAGE SHARES

56. The regulations do not set out any penalties or other consequences of failing to provide the information requested. Would this be considered part of the return for the tax year in question? If such a return is filed without this information, would it be considered an incomplete return?
57. The percentage shareholding in a company could be difficult to determine where there are multiple classes of shares and the shares in each class attract different rights. Does the percentage refer to the percentage of total nominal shares in issue?
58. For example, if a company had a class of non-voting preference shares, an ordinary shareholder would have a higher percentage of voting power than the shareholder’s percentage of the total shares in issue. Would it be easier for the regulations to ask the taxpayer to confirm the total number of shares they hold in each class issued by the company?

START AND END DATES OF SELF-EMPLOYMENT

59. The date when a trade starts or ceases is not always clear cut and additional HMRC guidance would therefore be useful for agents and taxpayers to determine appropriate dates to include on their tax returns. This should ideally be added to the notes to the self-employment pages of the tax return so that it is easily to hand when the return is being completed, along with links to any relevant material in the Business Income Manual.
60. There may be reasons why a taxpayer has not included details of a trade on their return, the most likely being that they have not exceeded the £1,000 trading allowance. Would the taxpayer need to include the trade commencement date in those cases, for example where they opt voluntarily to pay Class 2 NIC? If so, it may look strange if the commencement date disclosed is in a tax year earlier than the one in which profits are first disclosed. We therefore recommend

that, in these cases, the start date disclosed is the beginning of the tax year in which the trade first needs to be included in the return.

61. It is not clear whether a trade commencement or end date needs to be provided for “deemed trades” such as under the Disguised Investment Management Fees (DIMF) and Income Bases Carried Interest (IBCI) rules. We recommend that disclosures are only required for actual, rather than deemed, trades.

APPENDIX 1

ICAEW TAX FACULTY'S TEN TENETS FOR A BETTER TAX SYSTEM

The tax system should be:

1. Statutory: tax legislation should be enacted by statute and subject to proper democratic scrutiny by Parliament.
2. Certain: in virtually all circumstances the application of the tax rules should be certain. It should not normally be necessary for anyone to resort to the courts in order to resolve how the rules operate in relation to his or her tax affairs.
3. Simple: the tax rules should aim to be simple, understandable and clear in their objectives.
4. Easy to collect and to calculate: a person's tax liability should be easy to calculate and straightforward and cheap to collect.
5. Properly targeted: when anti-avoidance legislation is passed, due regard should be had to maintaining the simplicity and certainty of the tax system by targeting it to close specific loopholes.
6. Constant: Changes to the underlying rules should be kept to a minimum. There should be a justifiable economic and/or social basis for any change to the tax rules and this justification should be made public and the underlying policy made clear.
7. Subject to proper consultation: other than in exceptional circumstances, the Government should allow adequate time for both the drafting of tax legislation and full consultation on it.
8. Regularly reviewed: the tax rules should be subject to a regular public review to determine their continuing relevance and whether their original justification has been realised. If a tax rule is no longer relevant, then it should be repealed.
9. Fair and reasonable: the revenue authorities have a duty to exercise their powers reasonably. There should be a right of appeal to an independent tribunal against all their decisions.
10. Competitive: tax rules and rates should be framed so as to encourage investment, capital and trade in and with the UK.

These are explained in more detail in our discussion document published in October 1999 as TAXGUIDE 4/99 (see https://goo.gl/x6UjJ5).