



Low Incomes  
Tax Reform  
Group  
A voice for the unrepresented

**Good Work Plan: one-sided flexibility – addressing unfair flexible working practices  
Response from the Low Incomes Tax Reform Group (LITRG)**

**1 Executive Summary**

- 1.1 As tax specialists with a particular interest in pay, tax and benefit matters affecting those on low incomes, we welcome the opportunity to respond to this consultation.
- 1.2 We would like to commend the Department for Business, Energy and Industrial Strategy (BEIS) for producing a good quality impact assessment. Setting out the information about the potential impacts – positive and negative, intended and unintended, direct and indirect means that stakeholders can offer more meaningful input and hopefully help improve the policy making process.
- 1.3 We share concerns about one-sided flexibility, in particular, last minute shift cancellations and short notice of work schedules. We have no objection to any of the recommendations put forward in this regard by the Low Pay Commission.
- 1.4 We are interested in the fact that the three options being consulted on here appear to be considered as ‘either/or’ options by BEIS. It seems to us that they could work best in conjunction with each other – for example, minimum notice of say, 72 hours, and then minimum payment of say, 3 hours x base pay rate if the shift is cancelled within that same period.
- 1.5 This could then be *supplemented* by guidance to employers on best practice around flexible workers and going beyond the bare minimum with regards to shift scheduling and cancellations.
- 1.6 We have picked 72 hours and 3 hours x base pay rate as, intuitively, these seem to us to provide the fairest balance between the needs of employees and the cost to employers. However, we



have done no real research in this area, so offer no further views as to what the 'reasonable' notice or appropriate levels of compensation might be.

- 1.7 We focus the second half of our response on the part of the consultation that looks at the payment of compensation for cancelled shifts, as this is more directly within our remit. We raise some points for BEIS to consider, in terms of how the payment of compensation for cancelled shifts will work for pay, tax and benefit purposes.
- 1.8 For example, it needs to be made very clear to both employee and employers, that payments of compensation reckon as taxable income. For employers, this means that they must be subject to Pay As You Earn (PAYE) through the payroll like ordinary taxable income. Employees need to understand that they are not getting anything 'free' or 'extra' – we wonder if they may think of it more as a 'gift' than taxable remuneration.
- 1.9 BEIS need to consider whether the payment might count as pay for minimum wage purposes. If so (and the cancelled hours do not), then this could be used by some employers to disguise an otherwise lower pay rate for the rest of the pay reference period, which would possibly be an unintended consequence.
- 1.10 The benefits position also needs to be analysed. For example, will the hours that were initially planned and are not worked (but are paid for), be treated as 'remunerative work' for tax credits?
- 1.11 It might be better for those on tax credits, if the compensated hours *are* treated as remunerative work hours but, say in a case where there is a restriction on the number of hours of work you are allowed to do (for example, permitted work for Employment and Support Allowance) it could potentially be better if they were not treated as remunerative work hours.
- 1.12 Ideally, whatever is decided should be consistent across tax credits and benefits. BEIS must appreciate that it may be difficult to find an answer that works for everyone. This will require very careful thought.

## **2 About Us**

- 2.1 The LITRG is an initiative of the Chartered Institute of Taxation (CIOT) to give a voice to the unrepresented. Since 1998, LITRG has been working to improve the policy and processes of the tax, tax credits and associated welfare systems for the benefit of those on low incomes. Everything we do is aimed at improving the tax and benefits experience of low-income workers, pensioners, migrants, students, disabled people and carers.
- 2.2 LITRG works extensively with HM Revenue & Customs (HMRC) and other government departments, commenting on proposals and putting forward our own ideas for improving the system. Too often the tax and related welfare laws and administrative systems are not designed with the low-income user in mind and this often makes life difficult for those we try to help.

- 2.3 The CIOT is a charity and the leading professional body in the United Kingdom concerned solely with taxation. The CIOT's primary purpose is to promote education and study of the administration and practice of taxation. One of the key aims is to achieve a better, more efficient, tax system for all affected by it – taxpayers, advisers and the authorities.

### **3 Introduction**

- 3.1 We welcome the opportunity to respond to this consultation.
- 3.2 We would like to commend BEIS for producing a good quality impact assessment. Setting out the information about the potential impacts – positive and negative, intended and unintended, direct and indirect means that stakeholders can offer more meaningful input and hopefully help improve the policy making process.
- 3.3 We have not framed our response directly to the questions posed as none cover the potential tax and benefit issues that arise from the proposals. Nevertheless we hope the general comments and anecdotal evidence we provide about the proposed interventions, plus the more technical points we make around the treatment of the compensatory payment for pay, tax and benefits purposes, will provide useful input.
- 3.4 We are happy to discuss any aspect of our response in more detail if that would be helpful.

### **4 General comments on proposed interventions**

- 4.1 We support the fact that the Low Pay Commission have recommended government intervention to address the imbalance of power amongst egregious employers and vulnerable workers.
- 4.2 One-sided flexibility is obviously a difficult subject – the problem is that because of the diverse nature of the employers and motivations involved, there is probably not one immediately solution to the problem.
- 4.3 However, we think that the Low Pay Commissions proposed package of measures<sup>1</sup> would work well together to bring a little more balance to employment relationships (which are currently out of balance with a tendency to favour the employer).

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<sup>1</sup> The proposed package of measures are set out here <https://www.gov.uk/government/publications/low-pay-commission-response-to-the-government-on-one-sided-flexibility> and comprise:

- 1) A right to switch to a contract which reflects your normal hours. This is not about a worker requesting a change to the amount of work they do, but rather proper recognition of their normal hours. We believe this will help to tackle the fear of employer retaliation by providing a guarantee of the worker's normal hours. Workers already worried about raising

- 4.4 We are interested in the fact that the options being consulted on here appear to be considered as ‘either/or’ options by BEIS.<sup>1</sup> It seems to us that they could work best in conjunction with each other – for example, minimum notice of say, 72 hours (with relevant protections for workers if they want to take work offered at shorter notice), and then minimum payment of say, 3 hours x base pay rate if the shift is cancelled within that same period.
- 4.5 It goes without saying that any new regime like this will need to be accompanied by good employer and employee guidance (including examples of how it might work in more complex/nuanced situations and best practice guidance for employers on how to go beyond the bare minimum); along with an easily accessible path to recourse for employees if things go wrong.
- 4.6 In our response to the original Low Pay Commission consultation on a higher minimum wage for hours that are not ‘guaranteed’, to help illustrate a point about the likely employer reaction, we gave the example of John which, to be helpful, we have reproduced below:
- ‘John is a genuinely self-employed plumber in the construction industry. He is building his business slowly and has taken on Toby, 19, to help him as his labourer. John wants to do things right so pays Toby through the Pay As You Earn (PAYE) system, even though it is a huge hassle administratively and even though it is typical in his line of work for labourers to be treated as self-employed (possibly incorrectly).*
- Because John does not know himself what his work schedule looks like from one day to the next, he cannot guarantee Toby set hours, although he tries his best to find work for him on ‘quiet’ days e.g. by asking him to tidy his van (mainly Toby likes to just have the time off anyway). He also makes sure that Toby receives holiday pay and is aware of his auto enrolment position (and everything else that he should do as the engager of a ‘worker’ under employment law.’*
- 4.7 John and Toby are based on real life people and, as we thought it might be useful anecdotal evidence for you, we sought their views of the current proposals.

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issues in the workplace are less likely to raise a ‘request’ so the right needs to be stronger than this.

- 2) A right to reasonable notice of work schedule – to encourage employers to provide workers with their work schedule in advance so that individuals can plan their lives.
- 3) Compensation for shift cancellation or curtailment without reasonable notice –to discourage employers from cancelling shifts at the last minute or partway through a shift.
- 4) Information to workers – the written statement of terms from employers should detail the rights we are proposing here.

<sup>1</sup> As set out in the impact assessment (page 13 onwards):

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/822675/One-Sided\\_Flexibility\\_Consultation\\_Stage\\_Impact\\_Assessment.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/822675/One-Sided_Flexibility_Consultation_Stage_Impact_Assessment.pdf)

- 4.8 Toby thought that 3 hours pay (but at his normal rate of £8 an hour, not the minimum wage rate) would make the loss of a days' work more tolerable and provide him with some certainty. John felt that that having to pay Toby, for, say 3 hours work, if he cancelled a shift with less than, say, 72 hours' notice (even if this was because he himself had had a job cancelled at the last minute) would be 'fair enough' and that it sounded straightforward to understand and administer.
- 4.9 We have used 3 hours pay and 72 hours' notice as a reference point in this section as they seem to us to strike a fair balance between the needs of employer and employee. However we offer no other views as to what the 'reasonable' notice should be or, or how much compensation should be paid, as this is really outside of our experience or expertise.

## 5 **Administrative considerations around payment of compensation**

5.1 In this section, we would like to raise some points for BEIS to think about, in terms of how the payment of compensation for cancelled shifts will work for pay, tax and benefit purposes.

### 5.2 ***Tax***

- 5.2.1 We think it is important for both employers and employees to appreciate that any such payment will be earnings and will be taxable.
- 5.2.2 This means for employers that it needs to be included as pay in their PAYE calculations and submissions (it is not something that can be paid 'cash in hand' without consequence, for example).
- 5.2.3 Employees need to understand that it is not something 'extra' or 'free' and that they should expect tax, National Insurance and auto-enrolment contributions, etc. to be deducted from it (we think that some employees may think of this as akin to more of a gift than employment income).
- 5.2.4 Similarly, if an employee picks up a different shift instead of the compensated planned shift, that would increase their earnings and they would need to know that the higher earnings could filter through to any means-tested benefit they are claiming – leading to a reduced award or causing them to float off the benefit altogether (we discuss more on benefits below).

### 5.3 ***Minimum wage***

- 5.3.1 Under the National Minimum Wage Regulations 2015<sup>1</sup> employers are required to pay their workers at least the national minimum wage (NMW) for the hours worked in each pay reference period, for example, a week or a month.

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<sup>1</sup> <https://www.legislation.gov.uk/uk/si/2015/621/contents/made>

- 5.3.2 The calculation for establishing a worker's rate of pay for a pay reference period is  $P/H$  – where  $P$  is the worker's NMW pay and  $H$  is the hours worked.
- 5.3.3 We are not minimum wage experts but it seems to us, that both the rules around  $P$  and  $H$  need to be checked to make sure that there will be no unintended impact on a worker's NMW position. For example, if the hours cancelled do not count as  $H$ , but the payments made do count as  $P$  (in accordance with general principles), then any compensatory payment could be used to help 'top up' (and thus 'disguise') an otherwise lower pay rate.
- 5.3.4 Currently Reg 35 (1) says: (Hours not treated as time work) The hours a worker is absent from work are not treated as hours of time work, except as specified in regulations 32 to 34.
- 5.3.5 Currently Reg 10 (h) says: (Payments and benefits in kind which do not form part of a worker's remuneration) payments as respects hours which are not, or not treated as— (i) hours of time work in accordance with regulation 35 (absences, industrial action, rest breaks).
- 5.3.6 Will the cancelled hours fall under Reg 35 (1) as an 'absence'? If they do then it seems to us that neither the cancelled hours nor the compensation payment made, will count for minimum wage purposes, so that there is no net effect on the worker's minimum wage position for the pay reference period. However, for complete certainty, we suggest that this is a point that is clarified (perhaps 'absence' ('the state of being away from a place' is more likely to be construed as something that is instigated by the employee?)).

#### 5.4 **Benefits**

- 5.4.1 Some thought will need to be given as to whether or not the hours that were initially planned and are not worked (but are compensated), are treated as 'remunerative work' for benefits purposes.
- 5.4.2 For example, working tax credit (WTC) is payable to claimants who are in 'qualifying remunerative work' and who are on a low income (qualifying remunerative work is work for which the claimant is, or expects to be, paid).<sup>1</sup>
- 5.4.3 There are certain age and hours of work qualifications. Briefly, the conditions are:
- If you are single and responsible for a child, qualify for the disability element of WTC, or are 60 years old or over, you must work at least 16 hours per week.
  - If you are a couple and responsible for a child you must, in most cases, work at least 24 hours between you (with one of you working at least 16 hours). If your partner is incapacitated, in prison, in hospital or entitled to Carer's Allowance then you can qualify if you work at least 16 hours.

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<sup>1</sup> We explain WTC, in full, on our website: <https://www.litrg.org.uk/tax-guides/tax-credits-and-benefits/tax-credits/what-working-tax-credit>

- Otherwise, you must be aged 25 or over and work at least 30 hours a week.
- 5.4.4 If the hours that were initially planned and are not worked (but are compensated), are treated as ‘remunerative work’ for tax credits, then this could help people qualify for WTC.
- 5.4.5 On the other hand, in a case where there is a restriction on the number of hours work you are allowed to do (e.g. permitted work for Employment and Support Allowance<sup>1</sup>), it could potentially be better if the compensated hours were not treated as remunerative work hours, as otherwise people could lose their benefit, for example if they pick up other paid work to replace the cancelled shifts.
- 5.4.6 It would be best if there was consistent treatment across tax credits and benefits, but this can create winners and losers, so will need to be carefully thought through and communicated clearly.
- 5.4.7 In terms of universal credit (UC), while there is no minimum number of hours a claimant must work to claim UC, they may be expected to carry out ‘work related activity’ as part of their Claimant Commitment if they are not earning above their Conditionality Earnings Threshold (CET) – or risk sanctions, such as having their UC stopped.<sup>2</sup>
- 5.4.8 Where a UC claimant has a contract which does not guarantee their hours of work, there needs to be a decision whether or not shifts cancelled at short notice by the employer and compensated are looked upon as meeting part (or all, depending on the circumstances ) of the UC claimant’s work-related requirement in their claimant commitment.
- 5.4.9 We recommend that work is done to ensure that all such interactions have been considered before making a decision on how best to move forward.

LITRG

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<sup>1</sup> <https://www.entitledto.co.uk/help/Permitted-Work-Rules>

<sup>2</sup> You can read more about UC on our website: <https://revenuebenefits.org.uk/universal-credit/guidance/entitlement-to-uc/>