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STATUTORY INSTRUMENTS

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**2013 No. 379**

**SOCIAL SECURITY**

**The Employment and Support Allowance Regulations 2013**

Made - - - - 25th February 2013

Coming into force - - 29th April 2013

The Secretary of State for Work and Pensions makes the following Regulations in exercise of the powers conferred by sections 2(1)(a) and (c) and (4)(a) and (c), 3(1)(c), (2)(b) and (d) and (3), 8(1) to (3), (4)(a) and (b), (5) and (6), 9(1) to (3) and (4)(a) and (b), 11A(5), 11B(2) and (3), 11D(2)(d), 11E(1), 11H(5) and (6), 11J(3), (4) and (8), 17(1), (2) and (3)(a) and (b), 18(1), (2) and (4), 20(2) to (7), 24(1), (2)(b) and (3) and 25(2) to (5) of, and paragraphs 1(3) and (4), 3(2) and 4(1)(a) and (c), (3) and (4) of Schedule 1 and paragraphs 1 to 4A, 5, 6, 9 and 10 of Schedule 2 to, the Welfare Reform Act 2007 <sup>M1</sup>, sections 5(1A), 189(4) to (6) and 191 of the Social Security Administration Act 1992 <sup>M2</sup>, section 21(1)(a) of the Social Security Act 1998 <sup>M3</sup> and paragraphs 2(3) and 3 of Schedule 5 to the Welfare Reform Act 2012 <sup>M4</sup>.

The Social Security Advisory Committee has agreed that the proposals in respect of these Regulations should not be referred to it <sup>M5</sup>.

A draft of these Regulations has been laid before Parliament in accordance with section 26(1) of the Welfare Reform Act 2007 <sup>M6</sup> and approved by a resolution of each House of Parliament.

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**Modifications etc. (not altering text)**

**C1** Regulations modified (24.4.2013) by The Welfare Reform Act 2012 (Commencement No. 9 and Transitional and Transitory Provisions and Commencement No. 8 and Savings and Transitional Provisions (Amendment)) Order 2013 ([S.I. 2013/983](#)), {art. 10} (with application in accordance with art. 10(1)) (as amended: (20.6.2013 (with application in accordance with art. 8(1) of the amending S.I.) by S.I. 2013/1511); (as amended: (24.11.2014 (with application in accordance with [art. 7\(a\)](#) of the amending S.I.)) by S.I.2014/3067)

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**Marginal Citations**

**M1** [2007 c.5](#). Section 2(1) was amended by paragraph 24 of Schedule 3 and paragraph 6(2) of Schedule 5 to the [Welfare Reform Act 2012 \(c.5\)](#). Section 3(2)(d) was amended by paragraph 26(c) of Schedule 3 to the Welfare Reform Act 2012. Sections 11A to 11J were inserted by section 57(2) of the Welfare Reform Act 2012. Section 18(4) was amended by paragraph 26(d) of Schedule 3 to the Welfare Reform Act 2012. Section 20(2) to (7) was amended by paragraph 26(e) of Schedule 3 to the Welfare Reform Act 2012. Paragraph 1(3) of Schedule 1 was substituted by section 13(4) of the [Welfare Reform Act 2009 \(c.24\)](#) and paragraph 1(4) was amended by section 13(5) of that Act. Paragraph

*Status: Point in time view as at 29/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2013. (See end of Document for details)*

3(2) of Schedule 1 was amended by paragraph 26(f) of Schedule 3 to the Welfare Reform Act 2012. Paragraph 4A of Schedule 2 was inserted by section 54(6) of the Welfare Reform Act 2012 and paragraph 6 was amended by paragraph 26(g) of Schedule 3 to the Welfare Reform Act 2012. Section 24(1) is cited for the meaning it gives to “prescribed” and “regulations”.

**M2** 1992 c.4. Section 5(1A) was inserted by section 99(3) of the Welfare Reform Act 2012.

**M3** 1998 c.14.

**M4** 2012 c.5.

**M5** See sections 172(1) and 173(1)(b) of the Social Security Administration Act 1992.

**M6** Section 26(1) was amended by paragraph 8(4) of Schedule 3 to the Welfare Reform Act 2008 and section 57(6) of, and Schedule 14 to, the Welfare Reform Act 2012.

## PART 1

### General

#### Citation, commencement and application

1.—(1) These Regulations may be cited as the Employment and Support Allowance Regulations 2013.

(2) They come into force on 29th April 2013.

(3) They apply in relation to a particular case on any day on which section 33(1)(b) of the Welfare Reform Act 2012 <sup>M7</sup> (abolition of income-related employment and support allowance) is in force and applies in relation to that case.

#### Marginal Citations

**M7** 2012 c.5.

#### Interpretation

2. In these Regulations—

“the Act” means the Welfare Reform Act 2007;

“advanced education” means education for the purposes of—

- (a) a course in preparation for a degree, a diploma of higher education, a higher national diploma, a higher national diploma of the Business and Technology Education Council or the Scottish Qualifications Authority, or a teaching qualification; or
- (b) any other course which is of a standard above ordinary national diploma, a diploma of the Business and Technology Education Council or a higher or advanced higher national certificate of the Scottish Qualifications Authority or a general certificate of education (advanced level);

“benefit week” means a period of seven days ending on such day as the Secretary of State may direct, but for the purposes of calculating any payment of income “benefit week” means the period of seven days ending on—

- (a) the day before the first day of the first period of seven days which—
  - (i) ends on such day as the Secretary of State may direct; and
  - (ii) follows the date of claim for an employment and support allowance; or

(b) the last day on which an employment and support allowance is paid if it is in payment for less than a week;

“carer's allowance” means an allowance under section 70 of the Contributions and Benefits Act <sup>M8</sup>;

“child” means a person under the age of 16;

“Claims and Payments Regulations 2013” means the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013 <sup>M9</sup>;

“close relative” means a parent, parent-in-law, son, son-in-law, daughter, daughter-in-law, step-parent, step-son, step-daughter, brother, sister or, if any of the preceding persons is one member of a couple, the other member of that couple;

“confinement” has the meaning given to it by section 171(1) of the Contributions and Benefits Act <sup>M10</sup>;

“councillor” means—

(a) in relation to England and Wales, a member of a London borough council, a county council, a county borough council, a district council, a parish or community council, the Common Council of the City of London or the Council of the Isles of Scilly; and

(b) in relation to Scotland, a member of a council constituted under section 2 of the Local Government etc. (Scotland) Act 1994 <sup>M11</sup>;

“councillor's allowance” means—

(a) in England, an allowance under or by virtue of—

(i) section 173 or 177 of the Local Government Act 1972 <sup>M12</sup>; or

(ii) a scheme made by virtue of section 18 of the Local Government and Housing Act 1989 <sup>M13</sup>,

other than such an allowance as is mentioned in section 173(4) of the Local Government Act 1972;

(b) in Wales, an allowance under or by virtue of a scheme made by virtue of section 18 of the Local Government and Housing Act 1989 other than such an allowance as is mentioned in section 173(4) of the Local Government Act 1972; or

(c) in Scotland, an allowance or remuneration under or by virtue of—

(i) a scheme made by virtue of section 18 of the Local Government and Housing Act 1989; or

(ii) section 11 of the Local Governance (Scotland) Act 2004 <sup>M14</sup>;

“couple” means—

(a) a man and woman who are married to each other and are members of the same household;

(b) a man and woman who are not married to each other but are living together as husband and wife;

(c) two people of the same sex who are civil partners of each other and are members of the same household; or

(d) two people of the same sex who are not civil partners of each other but are living together as if they were civil partners,

and for the purposes of paragraph (d), two people of the same sex are to be regarded as living together as if they were civil partners only if they would be regarded as living together as husband and wife were they instead two people of the opposite sex;

*Status: Point in time view as at 29/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2013. (See end of Document for details)*

“Decisions and Appeals Regulations 1999” means the Social Security and Child Support (Decisions and Appeals) Regulations 1999 <sup>M15</sup>;

“Decisions and Appeals Regulations 2013” means the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013 <sup>M16</sup>;

“descriptor” means, in relation to an activity specified in column (1) of Schedule 2, a descriptor in column (2) of that Schedule which describes a person's ability to perform that activity;

“employed earner” is to be construed in accordance with section 2(1)(a) of the Contributions and Benefits Act <sup>M17</sup>;

“employment” includes any trade, business, profession, office or vocation; and “employed” has a corresponding meaning;

“enactment” includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament or the National Assembly of Wales;

“family” means—

- (a) a couple;
- (b) a couple and a member of the same household for whom one of them is or both are responsible and who is a child or a young person;
- (c) a person who is not a member of a couple and a member of the same household for whom that person is responsible and who is a child or a young person;

“first contribution condition” means the condition set out in paragraph 1(1) of Schedule 1 to the Act <sup>M18</sup>;

“First-tier Tribunal” has the meaning given by section 3(1) of the Tribunals, Courts and Enforcement Act 2007 <sup>M19</sup>;

“health care professional” means—

- (a) a registered medical practitioner;
- (b) a registered nurse; or
- (c) an occupational therapist or physiotherapist registered with a regulatory body established by an Order in Council under section 60 of the Health Act 1999 <sup>M20</sup>;

“Health Service Act” means the National Health Service Act 2006 <sup>M21</sup>;

“Health Service (Wales) Act” means the National Health Service (Wales) Act 2006 <sup>M22</sup>;

“Income Support Regulations” means the Income Support (General) Regulations 1987 <sup>M23</sup>;

“limited capability for work assessment” means the assessment described in regulation 15(2) and in Schedule 2;

“Medical Evidence Regulations” means the Social Security (Medical Evidence) Regulations 1976 <sup>M24</sup>;

“medical treatment” means medical, surgical or rehabilitative treatment (including any course or diet or other regimen), and references to a person receiving or submitting to medical treatment are to be construed accordingly;

“member of Her Majesty's forces” means a person, other than one mentioned in Part 2 of Schedule 1, who is—

- (a) over 16 years of age; and
- (b) a member of an establishment or organisation specified in Part 1 of that Schedule, but does not include any such person while absent on desertion;

“National Minimum Wage” means the rate of the national minimum wage specified in regulation 11 of the National Minimum Wage Regulations 1999 <sup>M25</sup> (rate of the national minimum wage);

“net earnings” means such earnings as are calculated in accordance with regulation 81;

“occupational pension scheme” has the meaning given by section 1 of the Pension Schemes Act 1993 <sup>M26</sup>;

“part-time employment” means, if the claimant were entitled to income support, employment in which the claimant is not to be treated as engaged in remunerative work under regulation 5 or 6(1) and (4) of the Income Support Regulations (persons treated, or not treated, as engaged in remunerative work) <sup>M27</sup>;

“partner” means—

- (a) where a claimant is a member of a couple, the other member of that couple; or
- (b) where a claimant is a husband or wife by virtue of a polygamous marriage, the other party to the marriage or any spouse additional to either party to the marriage;

“payment” includes a part of a payment;

“pay period” means the period in respect of which a claimant is, or expects to be, normally paid by the claimant's employer, being a week, a fortnight, four weeks, a month or other shorter or longer period as the case may be;

“period of limited capability for work” means, except in regulation 3(2), a period throughout which a person has, or is treated as having, limited capability for work under these Regulations, and does not include a period which is outside the prescribed time for claiming as specified in regulation 28 of the Claims and Payments Regulations 2013;

“permanent health insurance payment” means any periodical payment arranged by an employer under an insurance policy providing benefits in connection with physical or mental illness or disability, in relation to a former employee on the termination of that person's employment;

“personal pension scheme” means—

- (a) a personal pension scheme as defined by section 1 of the Pension Schemes Act 1993 <sup>M28</sup>;
- (b) an annuity contract, trust scheme or substituted contract which is treated as having become a registered pension scheme by virtue of paragraph 1(1)(f) of Schedule 36 to the Finance Act 2004 <sup>M29</sup>;
- (c) a personal pension scheme which is treated as having become a registered pension scheme by virtue of paragraph 1(1)(g) of Schedule 36 to the Finance Act 2004;

“polygamous marriage” means any marriage entered into under a law which permits polygamy where—

- (a) either party has for the time being any spouse additional to the other party; and
- (b) the claimant, the other party to the marriage and the additional spouse are members of the same household;

“qualifying young person” has the meaning given by section 142 of the Contributions and Benefits Act (child and qualifying young person) <sup>M30</sup>;

“relative” means close relative, grand-parent, grand-child, uncle, aunt, nephew or niece;

“second contribution condition” means the condition set out in paragraph 2(1) of Schedule 1 to the Act;

“self-employed earner” is to be construed in accordance with section 2(1)(b) of the Contributions and Benefits Act;

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“state pension credit” means a state pension credit under the State Pension Credit Act 2002 <sup>M31</sup>;

“Tax Credits Act” means the Tax Credits Act 2002 <sup>M32</sup>;

“terminally ill”, in relation to a claimant, means the claimant is suffering from a progressive disease and death in consequence of that disease can reasonably be expected within six months;

“training” means—

- (a) training in pursuance of arrangements made under section 2(1) of the Employment and Training Act 1973 <sup>M33</sup> or section 2(3) of the Enterprise and New Towns (Scotland) Act 1990 <sup>M34</sup>, or
- (b) any training received on a course which a person attends for 16 hours or more a week, the primary purpose of which is the teaching of occupational or vocational skills;

“training allowance” means an allowance (whether by way of periodical grants or otherwise) payable—

- (a) out of public funds by a Government department or by or on behalf of the Secretary of State, Skills Development Scotland, Scottish Enterprise, Highlands and Islands Enterprise, the Chief Executive of Skills Funding or the Welsh Ministers;
- (b) to a person for that person's maintenance or in respect of a member of that person's family; and
- (c) for the period, or part of the period, during which the person is following a course of training or instruction provided by, or in pursuance of arrangements made with, that department or approved by that department in relation to that person or provided or approved by or on behalf of the Secretary of State, Skills Development Scotland, Scottish Enterprise, Highlands and Islands Enterprise, or the Welsh Ministers,

but does not include an allowance paid by any Government department to or in respect of a person by reason of the fact that that person is following a course of full-time education, other than under arrangements made under section 2 of the Employment and Training Act 1973 or section 2 of the Enterprise and New Towns (Scotland) Act 1990, or is training as a teacher;

“voluntary organisation” means a body, other than a public or local authority, the activities of which are carried on otherwise than for profit;

“week” means a period of seven days except in relation to regulation 22;

“working tax credit” means a working tax credit under section 10 of the Tax Credits Act;

“young person” is a person who, except where section 6 of the Children (Leaving Care) Act 2000 <sup>M35</sup> (exclusion from benefits) applies, falls within the definition of qualifying young person in section 142 of the Contributions and Benefits Act (child and qualifying young person).

#### **Marginal Citations**

**M8** Section 70 was amended by S.I.s 1994/2556, 2002/1457 and 2011/2426.

**M9** [S.I. 2013/380](#).

**M10** The definition of “confinement” in section 171(1) of the Contributions and Benefits Act was amended by section 4(2) of the Still-Birth (Definition) Act 1992.

**M11** [1994 c.39](#). Section 2 was amended by section 232(1) of the [Environment Act 1995 \(c.25\)](#).

**M12** [1972 c.70](#). Section 173 and 177 were repealed by the Local Government (Wales) Measure 2011. Section 173 was amended by paragraph 26 of Schedule 11 to the [Local Government and Housing Act 1989 \(c.42\)](#), [section 24](#) of the [Local Government, Planning and Land Act 1980 \(c.42\)](#) and [S.I. 1977/1710](#). Section 173 was modified by [S.I. 2002/2899](#). Section 177 was amended by paragraph 28 of Schedule 11 to the Local Government and Housing Act 1989, paragraph 3 of Schedule 30 to the

- School Standards and Framework Act 1998 (c.31), **paragraph 1** of Schedule 21 to the Education Act 2002 (c.32), **paragraph 1** of Schedule 3 to the Education and Inspections Act 2006 (c.40), **paragraph 42** of Schedule 1 and Schedule 2 to the Education and Skills Act 2002 (c.25) and paragraph 1 of Schedule 1 to the Education Act 2011 (c.21). Section 177 was modified by S.I.s 1985/1884, 1996/1243 and 2005/421.
- M13** 1989 c.42. Parts of section 18 were repealed and amended by the Local Government (Wales) Measure 2011. Section 18 was amended by section 99 of the Local Government Act 2000 (c.22), **paragraph 37** of Schedule 4 to the Police and Magistrates' Court Act 1994 (c.29) and paragraph 97 of Schedule 37 to the Education Act 1996 (c.56). Section 18 was modified by paragraph 11 of Schedule 7 to the Environment Act 1995 (c.25).
- M14** 2004 asp 9.
- M15** S.I. 1999/991.
- M16** S.I. 2013/381.
- M17** Section 2(1) was amended by paragraph 171 of Schedule 6 to the Income Tax (Earnings and Pensions) Act 2003 (c.1).
- M18** Paragraph 1(1) of Schedule 1 was amended by section 13(1) of the Welfare Reform Act 2009 (c.24)
- M19** 2007 c.15.
- M20** 1998 c.8. Section 60 was amended by section 26(9) of the National Health Service Reform and Health Care Professions Act 2002 (c.17), **paragraph 1** of Schedule 8 and paragraph 10 of Schedule 10 to the Health and Social Care Act 2008 (c.14), **sections 209, 210** and 213 of, and paragraphs 60 and 72 of Schedule 15 to, the Health and Social Care Act 2012 (c.7) and S.I.s 2002/253 and 243 and 2010/231.
- M21** 2006 c.41.
- M22** 2006 c.42.
- M23** S.I. 1987/1967.
- M24** S.I. 1976/615.
- M25** S.I. 1999/584. Relevant amendments were made by S.I. 2012/2397.
- M26** 1993 c.48. Relevant amendments were made by section 239 of the Pensions Act 2004 and S.I. 2007/3014.
- M27** Regulation 5 was amended by S.I.s 1988/1445 and 2022, 1989/1323, 1990/547, 1991/1559, 1993/2119, 1995/516, 1996/1944, 1998/663, 1999/2556 and 3178, 2000/681, 2001/488, 2002/2689 and 2007/2618. Regulation 6(1) and (4) was amended by S.I.s 1988/1445, 1991/1559, 1992/468 and 2155, 1994/2139, 1995/516, 1999/2165, 2556 and 3156, 2000/681, 2004/963, 2009/3228 and 2010/641.
- M28** Relevant amendments were made by section 239 of the Pensions Act 2004 and paragraph 23 of Schedule 20 to the Finance Act 2007 (c.11).
- M29** 2007 c.11.
- M30** Section 142 was substituted by section 1 of the Child Benefit Act 1995 (c.6).
- M31** 2002 c.16.
- M32** 2002 c.21.
- M33** 1973 c.50. Section 2 was substituted by section 25 of the Employment Act 1988 (c.19).
- M34** 1990 c.35. Section 2(3) was amended by section 47 of, and Schedule 10 to, the Trade Union Reform and Employment Rights Act 1993 (c.19).
- M35** 2000 c.35. Section 6 was amended by Schedule 7 to the Welfare Reform Act 2009.

### Further interpretation

3.—(1) In these Regulations, any reference to the claimant's family is to be construed as if it included in relation to a polygamous marriage a reference to any partner and any child or young person who is a member of the claimant's household.

(2) For the purposes of paragraph 4 of Schedule 1 to the Act (condition relating to youth), “period of limited capability for work” means a period throughout which a person has, or is treated as having, limited capability for work.

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(3) For the purposes of paragraph 5 of Schedule 1 to the Act, “week” means a period of seven days.

### **Rounding of fractions**

4. For the purposes of these Regulations—
- (a) where any calculation under these Regulations results in a fraction of a penny, that fraction is, if it would be to the claimant's advantage, to be treated as a penny, but otherwise it must be disregarded;
  - (b) where an employment and support allowance is awarded for a period which is not a complete benefit week and the applicable amount in respect of the period results in an amount which includes a fraction of a penny, that fraction is to be treated as a penny.

## **PART 2**

### The assessment phase

#### **The end of the assessment phase**

5.—(1) Subject to paragraphs (2) and (3) and regulation 6, the assessment phase in relation to a claimant ends on the last day of a period of 13 weeks beginning on the first day of the assessment phase as determined under section 24(2)(a) of the Act.

(2) Where paragraph (3) applies, the assessment phase is to end when it is determined whether the claimant has limited capability for work.

- (3) This paragraph applies where, at the end of the 13 week period referred to in paragraph (1)—
- (a) the claimant has not been assessed in accordance with a limited capability for work assessment; and
  - (b) the claimant has not been treated as having limited capability for work in accordance with regulation 16, 21, 22 or 25.

#### **The assessment phase – previous claimants**

6.—(1) Where the circumstances in paragraph (2) apply in relation to a claimant, the assessment phase—

- (a) begins on the first day of the period for which the claimant was previously entitled to an employment and support allowance; and
  - (b) subject to paragraphs (3), (4) and (5), ends on the day when the sum of the period for which the claimant was previously entitled to an employment and support allowance and the period for which the claimant is currently entitled to such an allowance is 13 weeks.
- (2) The circumstances are that—
- (a) all of the following apply—
    - (i) the claimant's current period of limited capability for work is to be treated as a continuation of an earlier period of limited capability for work under regulation 86;
    - (ii) the claimant was entitled to an employment and support allowance in the earlier period of limited capability for work;
    - (iii) the assessment phase had not ended in the previous period for which the claimant was entitled to an employment and support allowance; and
    - (iv) the period for which the claimant was previously entitled was no more than 13 weeks;

- (b) all of the following apply—
  - (i) the claimant's current period of limited capability for work is to be treated as a continuation of an earlier period of limited capability for work under regulation 86;
  - (ii) the claimant was entitled to an employment and support allowance in the earlier period of limited capability for work;
  - (iii) the previous period of limited capability for work was terminated by virtue of a determination that the claimant did not have limited capability for work;
  - (iv) the period for which the claimant was previously entitled was no more than 13 weeks; and
  - (v) a determination is made in relation to the current period of limited capability for work that the claimant has or is treated, other than under regulation 26, as having limited capability for work; or
- (c) all of the following apply—
  - (i) the claimant's current period of limited capability for work is to be treated as a continuation of an earlier period of limited capability for work under regulation 86;
  - (ii) the claimant was entitled to an employment and support allowance in the earlier period of limited capability for work;
  - (iii) in relation to the previous award of an employment and support allowance, a determination was made that the claimant had limited capability for work or was treated, other than under regulation 26, as having limited capability for work; and
  - (iv) the period for which the claimant was previously entitled was no more than 13 weeks.
- (3) Where paragraph (4) applies, the assessment phase is to end when it is determined whether the claimant has limited capability for work.
- (4) This paragraph applies where, on the day referred to in paragraph (1)(b)—
  - (a) the claimant has not been assessed in accordance with a limited capability for work assessment; and
  - (b) the claimant has not been treated as having limited capability for work in accordance with regulation 16, 21, 22 or 25.
- (5) Where a person has made and is pursuing an appeal against a decision of the Secretary of State that embodies a determination that the claimant does not have limited capability for work—
  - (a) paragraphs (3) and (4) do not apply; and
  - (b) paragraph (1) does not apply to any period of limited capability for work to which regulation 87(2) applies until a determination of limited capability for work has been made following the determination of the appeal by the First-tier Tribunal.

**Circumstances where the condition that the assessment phase has ended before entitlement to the support component or the work-related activity component arises does not apply**

- 7.—(1) Subject to paragraph (4), section 2(2)(a) and (3)(a) of the Act does not apply where—
- (a) a claimant is terminally ill and has either—
    - (i) made a claim expressly on the ground of being terminally ill; or
    - (ii) made an application for supersession or revision in accordance with the Decisions and Appeals Regulations 1999 or the Decisions and Appeals Regulations 2013 which contains an express statement that the claimant is terminally ill;
  - (b) the case is a relevant linked case;
  - (c) the case is one where—

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- (i) the claimant's entitlement to an employment and support allowance commences within 12 weeks of the claimant's entitlement to income support coming to an end;
  - (ii) in relation to that entitlement to income support, immediately before it ended, the claimant's applicable amount included the disability premium by virtue of their satisfying the conditions in paragraphs 11 and 12 of Schedule 2 to the Income Support Regulations <sup>M36</sup>; and
  - (iii) that entitlement to income support ended only by virtue of the coming into force, in relation to the claimant, of the Social Security (Lone Parents and Miscellaneous Amendments) Regulations 2008 <sup>M37</sup>; or
- (d) a claimant is entitled to an employment and support allowance by virtue of section 1B of the Act (further entitlement after time-limiting) <sup>M38</sup>.
- (2) For the purposes of paragraph (1)(b) a relevant linked case is a case mentioned in paragraph (3) where a period of limited capability for work is to be treated as a continuation of an earlier period of limited capability for work under regulation 86.
- (3) For the purposes of paragraph (2), the cases are as follows—
- (a) case 1 is where—
    - (i) the claimant was entitled to an employment and support allowance (including entitlement to a component under section 2(2) or (3) of the Act) in the earlier period of limited capability for work; and
    - (ii) the previous period for which the claimant was entitled to an employment and support allowance was terminated other than by virtue of a determination that the claimant did not have limited capability for work;
  - (b) case 2 is where—
    - (i) the claimant was entitled to an employment and support allowance in the earlier period of limited capability for work;
    - (ii) the previous period for which the claimant was entitled to an employment and support allowance was 13 weeks or longer;
    - (iii) the previous period for which the claimant was entitled to an employment and support allowance was terminated by virtue of a determination that the claimant did not have, or was treated as not having, limited capability for work; and
    - (iv) it is determined in relation to the current period of limited capability for work that the claimant has limited capability for work or is treated, other than under regulation 26, as having limited capability for work;
  - (c) case 3 is where—
    - (i) the claimant was entitled to an employment and support allowance in the earlier period of limited capability for work;
    - (ii) the previous period for which the claimant was entitled to an employment and support allowance was 13 weeks or longer;
    - (iii) the previous period for which the claimant was entitled to an employment and support allowance was terminated before it could be determined whether the claimant had limited capability for work or was treated, other than under regulation 26, as having limited capability for work; and
    - (iv) it is determined in relation to the current period of limited capability for work that the claimant has limited capability for work or is treated, other than under regulation 26, as having limited capability for work; and
  - (d) case 4 is where—

- (i) the claimant was entitled to an employment and support allowance (including entitlement to a component under section 2(2) or (3) of the Act) in the earlier period of limited capability for work;
- (ii) the previous period for which the claimant was entitled to an employment and support allowance was terminated because it was determined that the claimant did not have limited capability for work or was treated as not having limited capability for work; and
- (iii) it is determined in relation to the current period of limited capability for work that the claimant has limited capability for work or is treated, other than under regulation 26, as having limited capability for work.

(4) Paragraph (1)(b) does not apply to any period of limited capability for work to which regulation 87(2) applies until the determination of limited capability for work has been made following the determination of the appeal by the First-tier Tribunal.

**Marginal Citations**

**M36** Paragraph 11 was amended by S.I.s 2002/3019, 2003/2379, 2007/719 and 2009/1488. Paragraph 12 was amended by S.I.s 1988/663 and 2022, 1989/1678, 1991/2742, 1994/2139, 1995/482 and 2303, 1998/2231, 1999/2556, 2002/3019, 2003/455, 1589 and 2379, 2004/1141, 2005/3360, 2006/2378, 2007/719 and 2010/1907.

**M37** [S.I. 2008/3051](#).

**M38** Section 1B was inserted by section 52 of the Welfare Reform Act 2012.

## PART 3

### Conditions of entitlement

#### Conditions relating to national insurance and relevant earnings

**8.—**(1) A claimant's relevant earnings for the purposes of paragraph 1(2)(a) of Schedule 1 to the Act (employment and support allowance: conditions relating to national insurance)<sup>M39</sup> are the total amount of the claimant's earnings equal to the lower earnings limit for the base tax year.

(2) For the purposes of paragraph (1), earnings which exceed the lower earnings limit are to be disregarded.

**Marginal Citations**

**M39** Paragraph 1(2) was substituted by section 13 of the Welfare Reform Act 2009.

#### Relaxation of the first contribution condition

**9.—**(1) A claimant who satisfies any of the conditions in paragraph (2) is to be taken to satisfy the first contribution condition if—

- (a) the claimant paid Class 1 or Class 2 contributions before the relevant benefit week in respect of any one tax year; and
- (b) the claimant has—
  - (i) earnings equal to the lower earnings limit in that tax year on which primary Class 1 contributions have been paid or treated as paid which in total, and disregarding any

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- earnings which exceed the lower earnings limit for that year, are not less than that limit multiplied by 26; or
- (ii) earnings factors in that tax year derived from Class 2 contributions multiplied by 26.
- (2) The conditions referred to in paragraph (1) are that the claimant—
- (a) was entitled to a carer's allowance in the last complete tax year immediately preceding the relevant benefit year;
- (b) had been—
- (i) engaged in qualifying remunerative work (which has the meaning given by Part 1 of the Tax Credits Act) for a period of more than two years immediately before the first day of the period of limited capability for work; and
- (ii) entitled to working tax credit where the disability element or the severe disability element of working tax credit specified in regulation 20(1)(b) or (f) of the Working Tax Credit (Entitlement and Maximum Rate) Regulations 2002<sup>M40</sup> was included in the award;
- (c) in respect of any week in any tax year preceding the relevant benefit year—
- (i) is entitled to be credited with earnings or contributions in accordance with regulation 9D of the Social Security (Credits) Regulations 1975 (credits for certain periods of imprisonment or detention in legal custody)<sup>M41</sup>; or
- (ii) would have been so entitled had an application to the Secretary of State been made for the purpose of that regulation; or
- (d) in respect of any week in the last complete tax year preceding the relevant benefit year, is entitled to be credited with earnings in accordance with regulation 9E of the Social Security (Credits) Regulations 1975 (credits for certain spouses and civil partners of members of Her Majesty's forces)<sup>M42</sup>.

#### **Marginal Citations**

**M40** [S.I. 2002/2005](#).

**M41** [S.I. 1975/556](#). Regulation 9D was inserted by [S.I. 2001/573](#).

**M42** Regulation 9E was inserted by [S.I. 2010/385](#).

#### **Condition relating to youth – claimants aged 20 or over but under 25**

**10.**—(1) For the purposes of paragraph 4(1)(a) of Schedule 1 to the Act, a claimant who satisfies the conditions specified in paragraph (2) falls within a prescribed case.

- (2) The conditions are that the claimant—
- (a) registered on a course of—
- (i) full-time advanced or secondary education; or
- (ii) training,
- at least three months before attaining the age of 20; and
- (b) not more than one academic term immediately after registration attended one or more such courses in respect of a period referred to in paragraph (3).
- (3) The period mentioned in paragraph (2)(b) is a period which—
- (a) began on or before a day at least three months before the day the claimant attained the age of 20; and

- (b) ended no earlier than the beginning of the last two complete tax years before the relevant benefit year which would have applied if the claimant was entitled to an employment and support allowance having satisfied the first contribution condition and the second contribution condition.
- (4) For the purposes of this regulation a claimant is to be treated as attending a course on any day on which the course is interrupted by an illness or domestic emergency.
- (5) In this regulation—
  - “full-time” includes part-time where the person's disability prevents attendance at a full-time course;
  - “secondary education” means a course of education below a course of advanced education by attendance—
    - (a) at an establishment recognised by the Secretary of State—
      - (i) as being a university, college or school; or
      - (ii) as comparable to a university, college or school;
    - (b) at an establishment that is not mentioned in paragraph (a) where the Secretary of State is satisfied that the education is equivalent to that given in an establishment recognised—
      - (i) as being a university, college or school; or
      - (ii) as comparable to a university, college or school.
- (6) A claimant is to be treated as not having limited capability for work on a day which is not, for the purposes of paragraph 4(1)(d)(ii) of Schedule 1 to the Act (period of 196 consecutive days preceding the relevant period of limited capability for work), part of a period of consecutive days of limited capability for work.

#### **Condition relating to youth – previous claimants**

- 11.—(1) Paragraph 4(1)(a) of Schedule 1 to the Act does not apply to a claimant—
  - (a) who has previously ceased to be entitled to an employment and support allowance to which the claimant was entitled by virtue of satisfying the condition set out in paragraph 4(1) of Schedule 1 to the Act;
  - (b) whose previous entitlement had not been ended by a decision which embodied a determination (other than a determination in the circumstances applicable to a claimant under paragraph (2)(a)) that the claimant did not have limited capability for work;
  - (c) in relation to whom regulation 86 (linking rules) does not apply;
  - (d) who is aged 20 or over or, where regulation 10 would otherwise apply to the person, aged 25 or over; and
  - (e) to whom paragraph (2) applies.
- (2) This paragraph applies to a claimant—
  - (a) whose previous entitlement to an employment and support allowance ended only with a view to that person taking up employment or training;
  - (b) whose earnings factor from an employment or series of employments pursued in the period from the end of the previous entitlement to the beginning of the period of limited capability for work, was below the lower earnings limit multiplied by 25 in any of the last three complete tax years before the beginning of the relevant benefit year; and
  - (c) who—
    - (i) in respect of the last two complete tax years before the beginning of the relevant benefit year has either paid or been credited with earnings equivalent in each of

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those years to the year's lower earnings limit multiplied by 50, of which at least one such payment or credit, in the last complete tax year, was in respect of the disability element or severe disability element of working tax credit; or

- (ii) makes a claim for an employment and support allowance within the period of 12 weeks after the day on which the last employment referred to in sub-paragraph (b) ceased.

### **Condition relating to youth – residence or presence**

**12.**—(1) The conditions prescribed for the purposes of paragraph 4(1)(c) of Schedule 1 to the Act as to residence and presence in Great Britain are that the claimant—

- (a) is ordinarily resident in Great Britain;
- (b) is not a person subject to immigration control within the meaning of section 115(9) of the Immigration and Asylum Act 1999 <sup>M43</sup> or is a person to whom paragraph (3) applies;
- (c) is present in Great Britain; and
- (d) has been present in Great Britain for a period of, or for periods amounting in aggregate to, not less than 26 weeks in the 52 weeks immediately preceding the relevant benefit week.

(2) For the purposes of paragraph (1), a claimant is to be treated as being resident and present in Great Britain where the claimant is absent from Great Britain by reason only of being—

- (a) the spouse, civil partner, son, daughter, father, father-in-law, mother or mother-in-law of, and living with, a member of Her Majesty's forces who is abroad in that capacity;
- (b) in employment prescribed for the purposes of paragraph 7(1)(c) of Schedule 2 to the Act <sup>M44</sup> in connection with continental shelf operations; or
- (c) abroad in the capacity of being an aircraft worker or mariner.

(3) This paragraph applies where a person is—

- (a) a member of a family of a national of an European Economic Area state;
- (b) a person who is lawfully working in Great Britain and is a national of a State with which the European Union has concluded an agreement under Article 217 of the Treaty on the Functioning of the European Union providing, in the field of social security, for the equal treatment of workers who are nationals of the signatory State and their families;
- (c) a person who is a member of a family of, and living with, a person specified in sub-paragraph (b); or
- (d) a person who has been given leave to enter, or remain in, the United Kingdom by the Secretary of State upon an undertaking by another person or persons pursuant to the immigration rules within the meaning of the Immigration Act 1971 <sup>M45</sup> to be responsible for that person's maintenance and accommodation.

(4) A person is to be treated as having satisfied the residence or presence conditions in paragraph (1) throughout a period of limited capability for work where those conditions are satisfied on the first day of that period of limited capability for work.

(5) In this regulation—

“aircraft worker” means a person who is, or has been, employed under a contract of service either as a pilot, commander, navigator or other member of the crew of any aircraft, or in any other capacity on board any aircraft where—

- (a) the employment in that other capacity is for the purposes of the aircraft or its crew or of any passengers or cargo or mail carried on that aircraft; and

- (b) the contract is entered into in the United Kingdom with a view to its performance (in whole or in part) while the aircraft is in flight,  
but does not include a person who is in employment as a member of Her Majesty's forces;  
“mariner” means a person who is, or has been, in employment under a contract of service either as a master or other member of the crew of any ship or vessel, or in any other capacity on board any ship or vessel where—
- (a) the employment in that other capacity is for the purposes of that ship or vessel or its crew or any passengers or cargo or mail carried by the ship or vessel; and
- (b) the contract is entered into in the United Kingdom with a view to its performance (in whole or in part) while the ship or vessel is on its voyage,  
but does not include a person who is in employment as a member of Her Majesty's forces.
- (6) In the definition of “mariner” in paragraph (5), “passenger” means any person carried on a ship or vessel except—
- (a) a person employed or engaged in any capacity on board the ship or vessel on the business of the ship or vessel; or
- (b) a person on board the ship or vessel either in pursuance of an obligation to carry shipwrecked, distressed or other persons, or by reason of any circumstance that neither the master nor the owner nor the charterer (if any) could have prevented or forestalled.

#### Marginal Citations

M43 1999 c.33.

M44 Paragraph 7 was amended by paragraph 26 of Schedule 3 and Schedule 14 to the Welfare Reform Act 2012.

M45 1971 c.77.

#### Condition relating to youth – full-time education

13.—(1) For the purposes of paragraph 4(1)(b) of Schedule 1 to the Act, a claimant is to be treated as receiving full-time education for any period during which the claimant—

- (a) is at least 16 years old but under the age of 19; and
- (b) attends a course of education for 21 hours or more a week.

(2) For the purposes of paragraph (1)(b), in calculating the number of hours a week during which a claimant attends a course, no account is to be taken of any instruction or tuition which is, in the opinion of the Secretary of State, not suitable for persons of the same age who do not have a disability.

(3) In determining the duration of a period of full-time education under paragraph (1) any temporary interruption of that education may be disregarded.

(4) A claimant who is 19 years of age or over is not to be treated for the purposes of paragraph 4(1)(b) of Schedule 1 to the Act as receiving full-time education.

#### Modification of the relevant benefit year

14.—(1) Where paragraph (2) applies, paragraph 3(1)(f) of Schedule 1 to the Act has effect as if the “relevant benefit year” were any benefit year which includes all or part of the period of limited capability for work which includes the relevant benefit week.

(2) This paragraph applies where a claimant has made a claim for employment and support allowance but does not satisfy—

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- (a) the first contribution condition;
- (b) the second contribution condition; or
- (c) either contribution condition,

but would satisfy both of those conditions if the modified definition of “relevant benefit year” provided in paragraph (1) applied.

## **PART 4**

### Limited Capability for Work

#### **Determination of limited capability for work**

**15.**—(1) For the purposes of Part 1 of the Act, whether a claimant's capability for work is limited by the claimant's physical or mental condition and, if it is, whether the limitation is such that it is not reasonable to require the claimant to work is to be determined on the basis of a limited capability for work assessment of the claimant in accordance with this Part.

(2) The limited capability for work assessment is an assessment of the extent to which a claimant who has some specific disease or bodily or mental disablement is capable of performing the activities prescribed in Schedule 2 or is incapable by reason of such disease or bodily or mental disablement of performing those activities.

(3) Subject to paragraph (6), for the purposes of Part 1 of the Act a claimant has limited capability for work if, by adding the points listed in column (3) of Schedule 2 against each descriptor listed in that Schedule which applies in the claimant's case, the claimant obtains a total score of at least—

- (a) 15 points whether singly or by a combination of descriptors specified in Part 1 of that Schedule;
- (b) 15 points whether singly or by a combination of descriptors specified in Part 2 of that Schedule; or
- (c) 15 points by a combination of descriptors specified in Parts 1 and 2 of that Schedule.

(4) In assessing the extent of a claimant's capability to perform any activity listed in Part 1 of Schedule 2, the claimant is to be assessed as if—

- (a) fitted with or wearing any prosthesis with which the claimant is normally fitted or normally wears; or, as the case may be,
- (b) wearing or using any aid or appliance which is normally, or could reasonably be expected to be, worn or used.

(5) In assessing the extent of a claimant's capability to perform any activity listed in Schedule 2, it is a condition that the claimant's incapability to perform the activity arises—

- (a) in respect of any descriptor listed in Part 1 of Schedule 2, from a specific bodily disease or disablement;
- (b) in respect of any descriptor listed in Part 2 of Schedule 2, from a specific mental illness or disablement; or
- (c) in respect of any descriptor or descriptors listed in—
  - (i) Part 1 of Schedule 2, as a direct result of treatment provided by a registered medical practitioner for a specific physical disease or disablement; or
  - (ii) Part 2 of Schedule 2, as a direct result of treatment provided by a registered medical practitioner for a specific mental illness or disablement.

(6) Where more than one descriptor specified for an activity applies to a claimant, only the descriptor with the highest score in respect of each activity which applies is to be counted.

(7) Where a claimant—

(a) has been determined to have limited capability for work; or

(b) is to be treated as having limited capability for work under regulation 16, 21, 22 or 25, the Secretary of State may, if paragraph (8) applies, determine afresh whether the claimant has or is to be treated as having limited capability for work.

(8) This paragraph applies where—

(a) the Secretary of State wishes to determine whether there has been a relevant change of circumstances in relation to the claimant's physical or mental condition;

(b) the Secretary of State wishes to determine whether the previous determination of limited capability for work or that the claimant is to be treated as having limited capability for work, was made in ignorance of, or was based on a mistake as to, some material fact; or

(c) at least three months have passed since the date on which the claimant was determined to have limited capability for work or to be treated as having limited capability for work.

#### **Certain claimants to be treated as having limited capability for work**

**16.—**(1) A claimant is to be treated as having limited capability for work if—

(a) the claimant is terminally ill;

(b) the claimant is—

(i) receiving treatment for cancer by way of chemotherapy or radiotherapy;

(ii) likely to receive such treatment within six months after the date of the determination of capability for work; or

(iii) recovering from such treatment,

and the Secretary of State is satisfied that the claimant should be treated as having limited capability for work;

(c) the claimant is—

(i) excluded or abstains from work pursuant to a request or notice in writing lawfully made or given under an enactment; or

(ii) otherwise prevented from working pursuant to an enactment,

by reason of it being known or reasonably suspected that the claimant is infected or contaminated by, or has been in contact with a case of, a relevant infection or contamination;

(d) in the case of a pregnant woman, there is a serious risk of damage to her health or to the health of her unborn child if she does not refrain from work;

(e) in the case of a pregnant woman, she—

(i) is within the maternity allowance period (which has the meaning it has in section 35(2) of the Contributions and Benefits Act); and

(ii) is entitled to a maternity allowance under section 35(1) of the Contributions and Benefits Act<sup>M46</sup>;

(f) in the case of a pregnant woman whose expected or actual date of confinement has been certified in accordance with the Medical Evidence Regulations, on any day in the period—

(i) beginning with the first date of the 6th week before the expected week of her confinement or the actual date of her confinement, whichever is earlier; and

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- (ii) ending on the 14th day after the actual date of her confinement, if she would have no entitlement to a maternity allowance or statutory maternity pay were she to make a claim in respect of that period;
  - (g) the claimant meets any of the descriptors at paragraph 15 or 16 of Schedule 3 in accordance with regulation 30(2), (3) and (6) where applicable; or
  - (h) the claimant is entitled to universal credit and it has previously been determined that the claimant has limited capability for work on the basis of an assessment under Part 5 of the Universal Credit Regulations 2013 <sup>M47</sup>.
- (2) In this regulation, “relevant infection or contamination” means—
- (a) in England and Wales—
    - (i) any incidence or spread of infection or contamination, within the meaning of section 45A(3) of the Public Health (Control of Disease) Act 1984 <sup>M48</sup> in respect of which regulations are made under Part 2A of that Act (public health protection) for the purpose of preventing, protecting against, controlling or providing a public health response to, such incidence or spread; or
    - (ii) tuberculosis or any infectious disease to which regulation 9 of the Public Health (Aircraft) Regulations 1979 (powers in respect of persons leaving aircraft) <sup>M49</sup> applies or to which regulation 10 of the Public Health (Ships) Regulations 1979 (powers in respect of certain persons on ships) <sup>M50</sup> applies; and
  - (b) in Scotland, any—
    - (i) infectious disease within the meaning of section 1(5) of the Public Health etc (Scotland) Act 2008 <sup>M51</sup>, or exposure to an organism causing that disease; or
    - (ii) contamination within the meaning of section 1(5) of that Act, or exposure to a contaminant,
 to which sections 56 to 58 of that Act (compensation) apply.

#### Marginal Citations

- M46** Section 35(1) was substituted by section 53 of the [Welfare Reform and Pensions Act 1999 \(c.30\)](#) and amended by paragraph 4 of Schedule 7 to the [Employment Act 2002 \(c.22\)](#) and section 63 of the Welfare Reform Act 2012.
- M47** [S.I. 2013/376](#)
- M48** [1984 c.22](#). Section 45A and Part 2A were inserted by section 129 of the [Health Act 2008 \(c.14\)](#).
- M49** [S.I. 1979/1434](#).
- M50** [S.I. 1979/1435](#). Regulation 10 was amended by S.I.s 2007/1446 and 1901.
- M51** [2008 asp 5](#).

#### Information required for determining capability for work

- 17.—(1) Subject to paragraphs (2) and (3), the information or evidence required to determine whether a claimant has limited capability for work is—
- (a) evidence of limited capability for work in accordance with the Medical Evidence Regulations (which prescribe the form of doctor's statement or other evidence required in each case);
  - (b) any information relating to a claimant's capability to perform the activities referred to in Schedule 2 as may be requested in the form of a questionnaire; and

(c) any such additional information as may be requested.

(2) Where the Secretary of State is satisfied that there is sufficient information to determine whether a claimant has limited capability for work without the information specified in paragraph (1) (b), that information must not be required for the purposes of making the determination.

(3) Paragraph (1) does not apply in relation to a determination whether a claimant is to be treated as having limited capability for work under any of regulations 16 (certain claimants to be treated as having limited capability for work), 21 (hospital in-patients) and 22 (claimants receiving certain treatment).

#### **Failure to provide information in relation to limited capability for work**

**18.**—(1) Where a claimant fails without good cause to comply with the request referred to in regulation 17(1)(b), that claimant is, subject to paragraph (2), to be treated as not having limited capability for work.

(2) Paragraph (1) does not apply unless—

- (a) the claimant was sent a further request at least three weeks after the date of the first request; and
- (b) at least one week has passed since the further request was sent.

#### **Claimant may be called for a medical examination to determine whether the claimant has limited capability for work**

**19.**—(1) Where it falls to be determined whether a claimant has limited capability for work, that claimant may be called by or on behalf of a health care professional approved by the Secretary of State to attend for a medical examination.

(2) Subject to paragraph (3), where a claimant fails without good cause to attend for or to submit to an examination mentioned in paragraph (1), the claimant is to be treated as not having limited capability for work.

(3) Paragraph (2) does not apply unless—

- (a) written notice of the date, time and place for the examination was sent to the claimant at least seven days in advance; or
- (b) that claimant agreed to accept a shorter period of notice whether given in writing or otherwise.

#### **Matters to be taken into account in determining good cause in relation to regulations 18 or 19**

**20.** The matters to be taken into account in determining whether a claimant has good cause under regulation 18 (failure to provide information in relation to limited capability for work) or 19 (failure to attend a medical examination to determine limited capability for work) include—

- (a) whether the claimant was outside Great Britain at the relevant time;
- (b) the claimant's state of health at the relevant time; and
- (c) the nature of any disability the claimant has.

#### **Hospital patients**

**21.**—(1) A claimant is to be treated as having limited capability for work on any day on which that claimant is undergoing medical or other treatment as a patient in a hospital or similar institution, or which is a day of recovery from that treatment.

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(2) The circumstances in which a claimant is to be regarded as undergoing treatment falling within paragraph (1) include where the claimant is attending a residential programme of rehabilitation for the treatment of drug or alcohol addiction.

(3) For the purposes of this regulation, a claimant is to be regarded as undergoing treatment as a patient in a hospital or similar institution only if that claimant has been advised by a health care professional to stay overnight or for a longer period following medical or other treatment.

(4) For the purposes of this regulation, “day of recovery” means a day on which a claimant is recovering from treatment as a patient in a hospital or similar institution as referred to in paragraph (1) and the Secretary of State is satisfied that the claimant should be treated as having limited capability for work on that day.

### **Claimants receiving certain treatment**

**22.**—(1) Subject to paragraph (2), a claimant receiving—

- (a) regular weekly treatment by way of haemodialysis for chronic renal failure;
- (b) treatment by way of plasmapheresis; or
- (c) regular weekly treatment by way of total parenteral nutrition for gross impairment of enteric function,

is to be treated as having limited capability for work during any week in which that claimant is engaged in receiving that treatment or has a day of recovery from that treatment.

(2) A claimant who receives the treatment referred to in paragraph (1) is only to be treated as having limited capability for work from the first week of treatment in which the claimant undergoes no fewer than—

- (a) two days of treatment;
- (b) two days of recovery from any of the forms of treatment listed in paragraph (1)(a) to (c); or
- (c) one day of treatment and one day of recovery from that treatment,

but the days of treatment or recovery from that treatment or both need not be consecutive.

(3) For the purpose of this regulation “day of recovery” means a day on which a claimant is recovering from any of the forms of treatment listed in paragraph (1)(a) to (c) and the Secretary of State is satisfied that the claimant should be treated as having limited capability for work on that day.

### **Claimant to be treated as having limited capability for work throughout a day**

**23.** A claimant who, at the commencement of any day has, or after that develops, limited capability for work as determined in accordance with the limited capability for work assessment is to be treated as having limited capability for work on that day.

### **Night workers**

**24.**—(1) Where a claimant works for a continuous period which extends over midnight into the following day, that claimant is to be treated as having limited capability for work on the day on which the lesser part of that period falls if that claimant had limited capability for work for the remainder of that day.

(2) Where, in relation to a period referred to in paragraph (1), the number of hours worked before and after midnight is equal—

- (a) if the days in question fall at the beginning of a period of limited capability for work, the claimant is to be treated as having limited capability on the second day; and

- (b) if the days in question fall at the end of a period of limited capability for work, the claimant is to be treated as having limited capability for work on the first day.

### **Exceptional circumstances**

**25.**—(1) A claimant who does not have limited capability for work as determined in accordance with the limited capability for work assessment is to be treated as having limited capability for work if paragraph (2) applies to the claimant.

(2) Subject to paragraph (3), this paragraph applies if—

- (a) the claimant is suffering from a life-threatening disease in relation to which—
  - (i) there is medical evidence that the disease is uncontrollable, or uncontrolled, by a recognised therapeutic procedure; and
  - (ii) in the case of a disease that is uncontrolled, there is a reasonable cause for it not to be controlled by a recognised therapeutic procedure; or
- (b) the claimant suffers from some specific disease or bodily or mental disablement and, by reason of such disease or disablement, there would be a substantial risk to the mental or physical health of any person if the claimant were found not to have limited capability for work.

(3) Paragraph (2)(b) does not apply where the risk could be reduced by a significant amount by—

- (a) reasonable adjustments being made in the claimant's workplace; or
- (b) the claimant taking medication to manage the claimant's condition where such medication has been prescribed for the claimant by a registered medical practitioner treating the claimant.

(4) In this regulation “medical evidence” means—

- (a) evidence from a health care professional approved by the Secretary of State; and
- (b) evidence (if any) from any health care professional or a hospital or similar institution,

or such part of such evidence as constitutes the most reliable evidence available in the circumstances.

### **Conditions for treating a claimant as having limited capability for work until a determination about limited capability for work has been made**

**26.**—(1) A claimant is, if the conditions set out in paragraph (2) are met, to be treated as having limited capability for work until such time as it is determined—

- (a) whether or not the claimant has limited capability for work;
- (b) whether or not the claimant is to be treated as having limited capability for work otherwise than in accordance with this regulation; or
- (c) whether the claimant falls to be treated as not having limited capability for work in accordance with regulation 18 (failure to provide information in relation to limited capability for work) or 19 (failure to attend a medical examination to determine limited capability for work).

(2) The conditions are—

- (a) that the claimant provides evidence of limited capability for work in accordance with the Medical Evidence Regulations; and
- (b) that it has not, within the six months preceding the date of claim for employment and support allowance, been determined, in relation to the claimant's entitlement to any benefit, allowance or advantage which is dependent on the claimant having limited capability for

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work, that the claimant does not have limited capability for work or is to be treated as not having limited capability for work under regulation 18 or 19 unless paragraph (4) applies.

(3) Paragraph (2)(b) does not apply where a claimant has made and is pursuing an appeal against a decision that embodies a determination that the claimant does not have limited capability for work and that appeal has not yet been determined by the First-tier Tribunal.

(4) This paragraph applies where—

- (a) the claimant is suffering from some specific disease or bodily or mental disablement from which the claimant was not suffering at the time of that determination;
- (b) a disease or bodily or mental disablement from which the claimant was suffering at the time of that determination has significantly worsened; or
- (c) in the case of a claimant who was treated as not having limited capability for work under regulation 18 (failure to provide information), the claimant has since provided the information requested under that regulation.

#### **Certain claimants to be treated as not having limited capability for work**

**27.**—(1) A claimant who is or has been a member of Her Majesty's forces is to be treated as not having limited capability for work on any day which is recorded by the Secretary of State as a day of sickness absence from duty.

(2) A claimant is to be treated as not having limited capability for work on any day on which the claimant attends a training course in respect of which the claimant is paid a training allowance or premium pursuant to arrangements made under section 2 of the Employment and Training Act 1973 or section 2(3) of the Enterprise and New Towns (Scotland) Act 1990.

(3) Paragraph (2) is not to apply—

- (a) for the purposes of any claim to an employment and support allowance for a period commencing after the claimant ceased attending the training course in question; or
- (b) where any training allowance or premium paid to the claimant is paid for the sole purpose of travelling or meal expenses incurred or to be incurred under the arrangements made under section 2 of the Employment and Training Act 1973 or section 2(3) of the Enterprise and New Towns (Scotland) Act 1990.

(4) A claimant is to be treated as not having limited capability for work where—

- (a) it has previously been determined, within the six months preceding the date of claim for employment and support allowance, on the basis of an assessment under Part 5 of the Universal Credit Regulations 2013, that the claimant does not have limited capability for work; and
- (b) it appears to the Secretary of State that—
  - (i) the determination was not based on ignorance of, or mistake as to, a material fact; and
  - (ii) there has been no relevant change of circumstances in relation to the claimant's physical or mental condition since the determination.

#### **Claimants to be treated as not having limited capability for work at the end of the period covered by medical evidence**

**28.**—(1) Where the Secretary of State is satisfied that it is appropriate in the circumstances of the case, a claimant may be treated as not having limited capability for work if—

- (a) the claimant has supplied medical evidence;
- (b) the period for which medical evidence was supplied has ended;

- (c) the Secretary of State has requested further medical evidence; and
  - (d) the claimant has not, before whichever is the later of either the end of the period of six weeks beginning with the date of the Secretary of State's request or the end of six weeks beginning with the day after the end of the period for which medical evidence was supplied—
    - (i) supplied further medical evidence; or
    - (ii) otherwise made contact with the Secretary of State to indicate that they wish to have the question of limited capability for work determined.
- (2) In this regulation “medical evidence” means evidence provided under regulation 2 or 5 of the Medical Evidence Regulations.

**Additional circumstances where claimants are to be treated as having limited capability for work**

**29.** For the purposes of paragraph 4(1)(d)(ii) of Schedule 1 to the Act, a claimant is to be treated as having limited capability for work on any day in respect of which that claimant is entitled to statutory sick pay.

## **PART 5**

### **Limited Capability for Work-related Activity**

**Determination of limited capability for work-related activity**

**30.—(1)** For the purposes of Part 1 of the Act, where, by reason of a claimant's physical or mental condition, at least one of the descriptors set out in Schedule 3 applies to the claimant, the claimant has limited capability for work-related activity and the limitation must be such that it is not reasonable to require that claimant to undertake such activity.

(2) A descriptor applies to a claimant if that descriptor applies to the claimant for the majority of the time or, as the case may be, on the majority of the occasions on which the claimant undertakes or attempts to undertake the activity described by that descriptor.

- (3) In determining whether a descriptor applies to a claimant, the claimant is to be assessed as if—
  - (a) the claimant were fitted with or wearing any prosthesis with which the claimant is normally fitted or normally wears; or, as the case may be
  - (b) wearing or using any aid or appliance which is normally, or could reasonably be expected to be, worn or used.
- (4) Where a determination has been made about whether a claimant—
  - (a) has limited capability for work-related activity;
  - (b) is to be treated as having limited capability for work-related activity; or
  - (c) is to be treated as not having limited capability for work-related activity,

the Secretary of State may, if paragraph (5) applies, determine afresh whether the claimant has or is to be treated as having limited capability for work-related activity.

- (5) This paragraph applies where—
  - (a) the Secretary of State wishes to determine whether there has been a relevant change of circumstances in relation to the claimant's physical or mental condition;
  - (b) the Secretary of State wishes to determine whether the previous determination about limited capability for work-related activity or about treating the claimant as having or as

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not having limited capability for work-related activity, was made in ignorance of, or was based on a mistake as to, some material fact; or

- (c) at least three months have passed since the date of the previous determination about limited capability for work-related activity or about treating the claimant as having or as not having limited capability for work-related activity.

(6) In assessing the extent of a claimant's capability to perform any activity listed in Schedule 3, it is a condition that the claimant's incapability to perform the activity arises—

- (a) in respect of descriptors 1 to 8, 15(a), 15(b), 16(a) and 16(b)—
  - (i) from a specific bodily disease or disablement; or
  - (ii) as a direct result of treatment provided by a registered medical practitioner for a specific physical disease or disablement; or
- (b) in respect of descriptors 9 to 14, 15(c), 15(d), 16(c) and 16(d)—
  - (i) from a specific mental illness or disablement; or
  - (ii) as a direct result of treatment provided by a registered medical practitioner for a specific mental illness or disablement.

#### **Certain claimants to be treated as having, or not having, limited capability for work-related activity**

**31.—(1)** A claimant is to be treated as having limited capability for work-related activity if—

- (a) the claimant is terminally ill;
- (b) the claimant is—
  - (i) receiving treatment for cancer by way of chemotherapy or radiotherapy;
  - (ii) likely to receive such treatment within six months after the date of the determination of capability for work-related activity; or
  - (iii) recovering from such treatment,
 and the Secretary of State is satisfied that the claimant should be treated as having limited capability for work-related activity;
- (c) in the case of a woman, she is pregnant and there is a serious risk of damage to her health or to the health of her unborn child if she does not refrain from work-related activity; or
- (d) the claimant is entitled to universal credit and it has previously been determined that the claimant has limited capability for work and work-related activity on the basis of an assessment under Part 5 of the Universal Credit Regulations 2013.

(2) A claimant who does not have limited capability for work-related activity as determined in accordance with regulation 30(1) is to be treated as having limited capability for work-related activity if—

- (a) the claimant suffers from some specific disease or bodily or mental disablement; and
  - (b) by reason of such disease or disablement, there would be a substantial risk to the mental or physical health of any person if the claimant were found not to have limited capability for work-related activity.
- (3) A claimant is to be treated as not having limited capability for work-related activity where—
- (a) it has previously been determined, within the six months preceding the date of claim for employment and support allowance, on the basis of an assessment under Part 5 of the Universal Credit Regulations 2013, that the claimant does not have limited capability for work and work-related activity; and
  - (b) it appears to the Secretary of State that—

- (i) the determination was not based on ignorance of, or mistake as to, a material fact; and
- (ii) there has been no relevant change of circumstances in relation to the claimant's physical or mental condition.

**Relevant linked cases – limited capability for work-related activity**

- 32.** A claimant is to be treated as having limited capability for work-related activity where—
- (a) they fall within case 1, as defined in regulation 7(3)(a); and
  - (b) in respect of the earlier period of limited capability for work referred to in regulation 7(3)(a)(i), they had been entitled to a support component under section 2(2) of the Act.

**Information required for determining capability for work-related activity**

**33.—**(1) Subject to paragraph (2), the information or evidence required to determine whether a claimant has limited capability for work-related activity is—

- (a) any information relating to the descriptors set out in Schedule 3 as may be requested in the form of a questionnaire; and
- (b) any such additional information as may be requested.

(2) Where the Secretary of State is satisfied that there is sufficient information to determine whether a claimant has limited capability for work-related activity without the information specified in paragraph (1)(a), that information must not be required for the purposes of making the determination.

**Failure to provide information in relation to work-related activity**

**34.—**(1) Where a claimant fails without good cause to comply with the request referred to in regulation 33(1)(a), the claimant is, subject to paragraph (2), to be treated as not having limited capability for work-related activity.

- (2) Paragraph (1) does not apply unless—
- (a) the claimant was sent a further request at least three weeks after the date of the first request; and
  - (b) at least one week has passed since the further request was sent.

**Claimant may be called for a medical examination to determine whether the claimant has limited capability for work-related activity**

**35.—**(1) Where it falls to be determined whether a claimant has limited capability for work-related activity, that claimant may be called by or on behalf of a health care professional approved by the Secretary of State to attend for a medical examination.

(2) Subject to paragraph (3), where a claimant fails without good cause to attend for or to submit to an examination mentioned in paragraph (1), the claimant is to be treated as not having limited capability for work-related activity.

- (3) Paragraph (2) does not apply unless—
- (a) written notice of the date, time and place for the examination was sent to the claimant at least seven days in advance; or
  - (b) the claimant agreed to accept a shorter period of notice whether given in writing or otherwise.

**Matters to be taken into account in determining good cause in relation to regulations 34 or 35**

36. The matters to be taken into account in determining whether a claimant has good cause under regulation 34 (failure to provide information in relation to work-related activity) or 35 (failure to attend a medical examination to determine limited capability for work-related activity) include—

- (a) whether the claimant was outside Great Britain at the relevant time;
- (b) the claimant's state of health at the relevant time; and
- (c) the nature of any disability the claimant has.

**PART 6****Effect of work on entitlement to an Employment and Support Allowance****A claimant who works to be treated as not entitled to an employment and support allowance**

37.—(1) Subject to the following paragraphs, a claimant is to be treated as not entitled to an employment and support allowance in any week in which that claimant does work.

(2) Paragraph (1) does not apply to—

- (a) work as a councillor;
- (b) duties undertaken on either one full day or two half-days a week as a member of the First-tier Tribunal where the member is eligible for appointment to be such a member in accordance with article 2(3) of the Qualifications for Appointment of Members to the First-tier Tribunal and Upper Tribunal Order 2008 <sup>M52</sup>;
- (c) domestic tasks carried out in the claimant's own home or the care of a relative;
- (d) duties undertaken in caring for another person who is accommodated with the claimant by virtue of arrangements made under any of the provisions referred to in paragraph (7) or where the claimant is in receipt of any payment specified in that paragraph;
- (e) any activity the claimant undertakes during an emergency to protect another person or to prevent serious damage to property or livestock; or
- (f) any of the categories of work set out in regulation 39(1) (exempt work).

(3) This regulation is subject to regulation 40 (effect of work on entitlement to an employment and support allowance where claimant is receiving certain treatment).

(4) A claimant who does work to which this regulation applies in a week which is—

- (a) the week in which the claimant first becomes entitled to a benefit, allowance or advantage on account of the claimant's limited capability for work in any period; or
- (b) the last week in any period in which the claimant has limited capability for work or is treated as having limited capability for work,

is to be treated as not entitled to an employment and support allowance by virtue of paragraph (1) only on the actual day or days in that week on which the claimant does that work.

(5) Regulation 86 (linking rules) does not apply for the purposes of calculating the beginning or end of any period of limited capability for work under paragraph (4).

(6) The day or days in a week on which a night worker works, for the purposes of paragraph (4), are to be calculated by reference to regulation 24 (night workers).

(7) The payments and provisions mentioned in paragraph (2)(d) are—

- (a) any payment made to the claimant with whom a person is accommodated by virtue of arrangements made—
- (i) by a local authority under section 22C(2), (3), (5) or (6)(a) or (b) of the Children Act 1989 (provision of accommodation and maintenance for a child whom the local authority is looking after) <sup>M53</sup>;
  - (ii) by a local authority under section 26 of the Children (Scotland) Act 1995 (manner of provision of accommodation to child looked after by local authority) <sup>M54</sup>;
  - (iii) by a local authority under regulations 33 or 51 of the Looked After Children (Scotland) Regulations 2009 (fostering and kinship care allowances and fostering allowances) <sup>M55</sup>; or
  - (iv) by a voluntary organisation under section 59(1)(a) of the 1989 Act (provision of accommodation by voluntary organisations) <sup>M56</sup>;
- (b) any payment made to the claimant or the claimant's partner for a person (“the person concerned”), who is not normally a member of the claimant's household but is temporarily in the claimant's care, by—
- (i) the National Health Service Commissioning Board <sup>M57</sup>;
  - (ii) a local authority but excluding payments of housing benefit made in respect of the person concerned;
  - (iii) a voluntary organisation;
  - (iv) the person concerned pursuant to section 26(3A) of the National Assistance Act 1948 <sup>M58</sup>;
  - (v) a clinical commissioning group established under section 14D of the Health Service Act <sup>M59</sup>; or
  - (vi) a Local Health Board established by an order made under section 11 of the Health Service (Wales) Act.
- (8) In this regulation—
- “week” means a week in respect of which a claimant is entitled to an employment and support allowance;
- “work” means any work which a claimant does, whether or not that claimant undertakes it in expectation of payment;
- “work as a councillor” includes any work which a claimant undertakes as a member of any of the bodies referred to in section 177(1) of the Local Government Act 1972 or section 49(1) or (1A) of the Local Government (Scotland) Act 1973 <sup>M60</sup>, of which the claimant is a member by reason of being a councillor.

#### Marginal Citations

**M52** [S.I. 2008/2692](#). Article 2(3) was amended by [S.I. 2009/1592](#).

**M53** [1989 c.41](#). Section 22C was inserted by section 8(1) of the [Children and Young Persons Act 2008](#) (c.23).

**M54** [1995 c.36](#). Section 26 was amended by Schedule 3 to the [Adoption and Children \(Scotland\) Act 2007](#) (asp 4) and paragraph 9 of Schedule 1 to the Children and Young Persons Act 2008.

**M55** [S.I. 2009/210](#). Regulation 33 was amended by [S.S.I. 2009/290](#).

**M56** Section 59(1)(a) was amended by section 49 of the [Children Act 2004](#) (c.31).

**M57** The National Health Service Commissioning Board is established by section 1H of the [National Health Service Act 2006](#) (c.41), as inserted by section 9 of the [Health and Social Care Act 2012](#) (c.7).

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- M58** 1948 c.29. Section 26(3A) was inserted by section 42 of the [National Health Service and Community Care Act 1990 \(c.19\)](#).
- M59** Section 14D was inserted by section 25 of the Health and Social Care Act 2012.
- M60** 1973 c.65. Section 49(1) was amended by Schedule 7 to the [Local Government \(Scotland\) Act 1975 \(c.30\)](#) and [S.S.I. 2007/265](#). Section 49(1A) was inserted by paragraph 46 of Schedule 6 to the Local Government (Scotland) Act 1975.

### **Claimants who are treated as not entitled to any allowance at all by reason of regulation 37(1) are to be treated as not having limited capability for work**

**38.**—(1) Where a claimant is treated as not entitled to an employment and support allowance by reason of regulation 37(1), the claimant is to be treated as not having limited capability for work.

(2) Paragraph (1) applies even if—

- (a) it has been determined that the claimant has or is to be treated as having, under any of regulations 16 (certain claimants to be treated as having limited capability for work), 21 (hospital in-patients), 22 (claimants undergoing certain treatment) and 25 (exceptional circumstances), limited capability for work; or
- (b) the claimant meets the conditions set out in regulation 26(2) for being treated as having limited capability for work until a determination is made in accordance with the limited capability for work assessment.

### **Exempt work**

**39.**—(1) The categories of work referred to in regulation 37(2)(f) are—

- (a) work for which the total earnings in any week does not exceed £20;
- (b) work for which the total earnings in any week does not exceed 16 multiplied by the National Minimum Wage, subject to paragraph (4), and which—
  - (i) is part of the claimant's treatment programme and is done under medical supervision while the claimant is an in-patient, or is regularly attending as an out-patient, of a hospital or similar institution; or
  - (ii) is supervised by a person employed by a public or local authority or by a voluntary organisation or community interest company engaged in the provision or procurement of work for persons who have disabilities;
- (c) work which is done for less than 16 hours a week, for which total earnings in any week does not exceed 16 multiplied by the National Minimum Wage, subject to paragraph (4), and which is done—
  - (i) during a work period, provided that paragraph (7) applies; or
  - (ii) by a claimant who has or is treated as having limited capability for work-related activity;
- (d) work done in the course of receiving assistance in pursuing self-employed earner's employment whilst participating in a programme provided, or in other arrangements made, under section 2 of the Employment and Training Act 1973 (functions of the Secretary of State) or section 2 of the Enterprise and New Towns (Scotland) Act 1990 (functions in relation to training for employment etc);
- (e) work done where the claimant receives no payment of earnings and where the claimant is—
  - (i) engaged by a charity or voluntary organisation; or
  - (ii) a volunteer,

- and where the Secretary of State is satisfied in either of those cases that it is reasonable for the claimant to do the work free of charge;
- (f) work done in the course of participating in a work placement approved in writing by the Secretary of State before the placement starts.
- (2) The number of hours for which a claimant is engaged in work is to be determined—
- (a) where no recognisable cycle has been established in respect of a claimant's work, by reference to the number of hours or, where those hours are likely to fluctuate, the average of the hours, which the claimant is expected to work in a week;
- (b) where the number of hours for which the claimant is engaged fluctuate, by reference to the average of hours worked over—
- (i) if there is a recognisable cycle of work, the period of one complete cycle (including, where the cycle involves periods in which the claimant does no work, those periods but disregarding any other absences);
- (ii) in any other case, the period of five weeks immediately before the date of claim or the date on which a superseding decision is made under section 10 of the Social Security Act 1998 (decisions superseding earlier decisions)<sup>M61</sup>, or such other length of time as may, in the particular case, enable the claimant's average hours of work to be determined more accurately.
- (3) For the purposes of determining the number of hours for which a claimant is engaged in work, that number is to include any time allowed to that claimant by the claimant's employer for a meal or for refreshment, but only where that claimant is, or expects to be, paid earnings in respect of that time.
- (4) Where the amount determined by the calculation in paragraph (1)(b) or (c) would, but for this paragraph, include an amount of—
- (a) less than 50p, that amount is to be rounded up to the nearest 50p; or
- (b) less than £1 but more than 50p, that amount is to be rounded up to the nearest £1.
- (5) Part 10 applies for the purposes of calculating any income which consists of earnings under this regulation.
- (6) In this regulation—
- “relevant benefit” means—
- (a) an employment and support allowance; or
- (b) credits under regulations made under section 22(5) of the Contributions and Benefits Act<sup>M62</sup>,
- in respect of which the question of the claimant's limited capability for work arises under the Act;
- “volunteer” means a person who is engaged in voluntary work otherwise than for a relative, where the only payment received or due to be paid to the person by virtue of being so engaged is in respect of any expenses reasonably incurred by the person in connection with that work;
- “work period” means a period which begins on the first day on which any work referred to in paragraph (1)(c) is undertaken and continues for a period of 52 weeks, whether or not any further work referred to in paragraph (1)(c) is undertaken during that period;
- “work placement” means practical work experience with an employer, which is neither paid nor undertaken in expectation of payment.
- (7) This paragraph applies where—
- (a) the claimant has not previously done any work under paragraph (1)(c);

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- (b) since the beginning of the last work period, the claimant has ceased to be entitled to a relevant benefit for a continuous period exceeding 12 weeks; or
- (c) not less than 52 weeks have elapsed since the last work period.

#### **Marginal Citations**

- M61** 1998 c.14. Section 10 was amended by paragraph 23 of Schedule 7 to the [Social Security Contributions \(Transfer of Functions, etc\) Act 1999 \(c.2\)](#) and paragraph 4 of Schedule 12, and Schedule 14, to the Welfare Reform Act 2012 and S.I. 2008/2833.
- M62** [Section 22\(5\)](#) was amended by paragraph 22 of Schedule 2 to the [Jobseekers Act 1995 \(c.18\)](#), [paragraph 9](#) of Schedule 3 to the [Welfare Reform Act 2007 \(c.5\)](#) and paragraph 2 of Schedule 3, and Schedule 14, to the Welfare Reform Act 2012.

#### **Effect of work on entitlement to an employment and support allowance where claimant is receiving certain treatment**

**40.** Where a claimant who is entitled to an employment and support allowance and is treated as having limited capability for work by virtue of regulation 22 works on any day during a week when the claimant is receiving certain treatment mentioned in regulation 22 or recovering from that treatment, that work is to have no effect on the claimant's entitlement to the employment and support allowance.

## **PART 7**

### **Claimant responsibilities**

#### **Interpretation**

**41.—(1)** In this Part—

“responsible carer”, in relation to a child, means—

- (a) a person who is the only person responsible for the child; or
- (b) a person who is a member of a couple where—
  - (i) both members of the couple are responsible for the child; and
  - (ii) the person has been nominated by the couple jointly as responsible for the child;

“responsible foster parent”, in relation to a child, means—

- (a) a person who is the only foster parent in relation to the child; or
- (b) a person who is a member of a couple where—
  - (i) both members of the couple are foster parents in relation to the child; and
  - (ii) the person has been nominated by the couple jointly as the responsible foster parent.

(2) The nomination of a responsible carer or responsible foster parent for the purposes of paragraph (1) may be changed—

- (a) once in a 12 month period, beginning with the date of the previous nomination; or
- (b) on any occasion where the Secretary of State considers that there has been a change of circumstances which is relevant to the nomination.

(3) Only one person may be nominated as a responsible carer or a responsible foster parent.

(4) The nomination applies to all of the children for whom the claimant is responsible.

### Application of regulations where there is dual entitlement

42.—(1) This regulation applies where a person is entitled to universal credit and an employment and support allowance.

(2) The work-related requirements under sections 11B to 11I of the Act<sup>M63</sup> and regulations 46 to 49 of these Regulations do not apply to such a person.

(3) Reductions relating to the award of an employment and support allowance under section 11J of the Act<sup>M64</sup> and regulations 50 to 60 of these Regulations do not apply to such a person.

#### Marginal Citations

**M63** Sections 11B to 11I were inserted by section 57 of the Welfare Reform Act 2012.

**M64** Section 11J was inserted by section 57 of the Welfare Reform Act 2012.

### Sanction ceases to apply to employment and support allowance

43.—(1) This regulation applies where—

- (a) a person is entitled to an employment and support allowance;
- (b) there is a reduction relating to the award of the employment and support allowance under section 11J of the Act;
- (c) the person becomes entitled to universal credit; and
- (d) the person remains entitled to an employment and support allowance.

(2) Any reduction relating to the award of the employment and support allowance is to cease being applied to the award of the employment and support allowance.

### Claimant commitment – date and method of acceptance

44.—(1) For the purposes of section 1(3)(aa) of the Act<sup>M65</sup>, a claimant who has accepted a claimant commitment within such period after making a claim for an employment and support allowance as the Secretary of State specifies is to be treated as having accepted that claimant commitment on the first day of the period in respect of which the claim is made.

(2) In a case where an award of an employment and support allowance may be made without a claim, a claimant who accepts a claimant commitment within such period as the Secretary of State specifies is to be treated as having accepted a claimant commitment on the day that would be the first day of the first benefit week in relation to the award.

(3) The Secretary of State may extend the period within which a claimant is required to accept a claimant commitment or an updated claimant commitment where the claimant requests an extension and the Secretary of State considers that the request is reasonable.

(4) A claimant must accept a claimant commitment by one of the following methods, as specified by the Secretary of State—

- (a) electronically;
- (b) by telephone; or
- (c) in writing.

#### Marginal Citations

**M65** Section 1(3)(aa) was inserted by section 54 of the Welfare Reform Act 2012.

### **Claimant commitment – exceptions**

**45.** A claimant may be entitled to an employment and support allowance without having accepted a claimant commitment if the Secretary of State considers that—

- (a) the claimant cannot accept a claimant commitment because they lack capacity to do so; or
- (b) there are exceptional circumstances in which it would be unreasonable to expect the person to accept a claimant commitment.

### **Purposes of a work-focused interview**

**46.** The purposes of a work-focused interview are any or all of the following—

- (a) assessing the claimant's prospects for remaining in or obtaining work;
- (b) assisting or encouraging the claimant to remain in or obtain work;
- (c) identifying activities that the claimant may undertake that will make remaining in or obtaining work more likely;
- (d) identifying training, educational or rehabilitation opportunities for the claimant which may make it more likely that the claimant will remain in or obtain work or be able to do so;
- (e) identifying current or future work opportunities for the claimant that are relevant to the claimant's needs and abilities.

### **Claimants subject to no work-related requirements**

**47.—(1)** A claimant falls within section 11D of the Act (persons subject to no work-related requirements) if they are a claimant who—

- (a) has caring responsibilities for one or more severely disabled persons for at least 35 hours a week but does not meet the conditions of entitlement to a carer's allowance;
- (b) is the responsible foster parent of a child under the age of one;
- (c) is an adopter and it is 52 weeks or less since—
  - (i) the date on which the child was placed with the claimant; or
  - (ii) if the claimant requested that the 52 weeks should run from a date within 14 days before the child was expected to be placed, that date;
- (d) has been enrolled on, been accepted for or is undertaking, a full-time course of study or training which is not a course of advanced education and—
  - (i) is under the age of 21, or is 21 and reached that age whilst undertaking the course; and
  - (ii) is without parental support;
- (e) is entitled to an employment and support allowance which is payable at a nil rate;
- (f) is pregnant and it is 11 weeks or less before her expected week of confinement; or
- (g) was pregnant and it is 15 weeks or less since the date of her confinement.

(2) Subject to paragraph (3), for the purposes of section 11D of the Act, a person has regular and substantial caring responsibilities for a severely disabled person if the person—

- (a) satisfies the conditions for entitlement to a carer's allowance; or
- (b) would satisfy those conditions but for the fact that their earnings have exceeded the limit prescribed for the purposes of that allowance.

(3) A person does not have regular and substantial caring responsibilities for a severely disabled person if the person derives earnings from those caring responsibilities.

(4) Paragraph (2) applies whether or not the person has made a claim for a carer's allowance.

(5) In this regulation—

“adopter” means a person who has been matched with a child for adoption and who is, or is intended to be, the responsible carer for the child, but excluding a person who is a foster parent or close relative of the child;

“matched with a child for adoption” means an adoption agency has decided that the person would be a suitable adoptive parent for the child;

“severely disabled” has the meaning in section 70 of the Contributions and Benefits Act <sup>M66</sup>;

“without parental support” means the person is not being looked after by a local authority and—

- (a) has no parent (in this definition, “parent” includes any person acting in the place of a parent);
- (b) cannot live with their parents because the person is estranged from them or there is a serious risk—
  - (i) to the person's physical or mental health; or
  - (ii) that the person would suffer significant harm if the person lived with them; or
- (c) is living away from their parents, and neither parent is able to support the person financially because that parent—
  - (i) has a physical or mental impairment;
  - (ii) is detained in custody pending trial or sentence upon conviction or under a sentence imposed by a court; or
  - (iii) is prohibited from entering or re-entering Great Britain.

**Marginal Citations**

**M66** Section 70 was amended by S.I.s 1994/2556, 2002/1457 and 2011/2426.

**Claimants subject to work-focused interview requirement only**

**48.**—(1) For the purposes of section 11E(1)(a) of the Act (claimant is the responsible carer for a child aged at least one and under a prescribed age) the prescribed age is five.

(2) A claimant falls within section 11E of the Act (claimants subject to work-focused interview requirement only) if—

- (a) the claimant is the responsible foster parent in relation to a child aged at least one;
- (b) the claimant is the responsible foster parent in relation to a qualifying young person and the Secretary of State is satisfied that the qualifying young person has care needs which would make it unreasonable to require the claimant to comply with a work preparation requirement;
- (c) the claimant is a foster parent, but not the responsible foster parent, in relation to a child or qualifying young person and the Secretary of State is satisfied that the child or qualifying young person has care needs which would make it unreasonable to require the claimant to comply with a work preparation requirement;
- (d) the claimant is a foster parent who—
  - (i) does not have a child or qualifying young person placed with them, but intends to; and
  - (ii) fell within sub-paragraph (a) within the past eight weeks; or

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(e) the claimant has become a friend or family carer in relation to a child within the past 12 months and is also the responsible carer in relation to that child.

(3) In paragraph (2)(e), “friend or family carer” means a person who is responsible for a child, but is not the child's parent or step-parent, and has undertaken the care of the child in the following circumstances—

- (a) the child has no parent or has parents who are unable to care for the child; or
- (b) it is likely that the child would otherwise be looked after by a local authority because of concerns in relation to the child's welfare.

### **Victims of domestic violence**

**49.**—(1) Where a claimant has recently been a victim of domestic violence and the circumstances set out in paragraph (3) apply—

- (a) a requirement imposed on that claimant under sections 11 to 11G of the Act <sup>M67</sup> ceases to have effect for a period of 13 consecutive weeks starting on the date of the notification referred to in paragraph (3)(a); and
- (b) the Secretary of State must not impose any other such requirement on that claimant during that period.

(2) A person has recently been a victim of domestic violence if a period of six months has not expired since the violence was inflicted or threatened.

(3) The circumstances are that—

- (a) the claimant notifies the Secretary of State, in such manner as the Secretary of State specifies, that domestic violence has been inflicted on or threatened against the claimant by a person specified in paragraph (4) during the period of six months ending on the date of the notification;
- (b) this regulation has not applied to the claimant for a period of 12 months before the date of the notification;
- (c) on the date of the notification the claimant is not living at the same address as the person who inflicted or threatened the domestic violence; and
- (d) as soon as possible, and no later than one month, after the date of the notification the claimant provides evidence from a person acting in an official capacity which demonstrates that—
  - (i) the claimant's circumstances are consistent with those of a person who has had domestic violence inflicted on or threatened against them during the period of six months ending on the date of the notification; and
  - (ii) the claimant has made contact with the person acting in an official capacity in relation to such an incident, which occurred during that period.

(4) A person is specified in this paragraph if the person is—

- (a) where the claimant is, or was, a member of a couple, the other member of the couple;
- (b) the claimant's grandparent, grandchild, parent, parent-in-law, son, son-in-law, daughter, daughter-in-law, step-parent, step-son, step-daughter, brother, step-brother, brother-in-law, sister, step-sister or sister-in-law; or
- (c) where any of the persons listed in sub-paragraph (b) is a member of a couple, the other member of that couple.

(5) In this regulation—

“domestic violence” means abuse of a kind specified on page 11 of section 2.2 of ‘Responding to domestic abuse: a handbook for health professionals’ published by the Department of Health in December 2005 <sup>M68</sup>;

“person acting in an official capacity” means a person who is a member of a profession regulated by a body mentioned in section 25(3) of the National Health Service Reform and Health Care Professions Act 2002 <sup>M69</sup>, a police officer, a registered social worker, the claimant’s employer, a representative of the claimant’s trade union or any public, voluntary or charitable body which has had direct contact with the claimant in connection with domestic violence;

“registered social worker” means a person registered as a social worker in a register maintained by—

- (a) the General Social Care Council;
- (b) the Care Council for Wales;
- (c) the Scottish Social Services Council; or
- (d) the Northern Ireland Social Care Council.

#### Marginal Citations

**M67** Sections 11 to 11G were inserted by section 57 of the Welfare Reform Act 2012.

**M68** The handbook is available on the Department of Health website [www.dh.gov.uk](http://www.dh.gov.uk) at [/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH\\_4126161](#) and from Department of Health Publications, PO Box 777, London SE1 6XH.

**M69** 2002 c.17. Section 25(3) was amended by paragraph 17 of Schedule 10 to the [Health and Social Care Act 2008 \(c.14\)](#) and paragraph 56 of Schedule 15 to the [Health and Social Care Act 2012 \(c.7\)](#) and [S.I. 2010/231](#).

## PART 8

### Sanctions

#### Interpretation

**50.** For the purposes of this Part—

“JSA sanctionable failure” means a failure by a claimant which is sanctionable under section 6K of the Jobseekers Act 1995;

“low-level sanction” means a reduction of an employment and support allowance in accordance with section 11J of the Act for a sanctionable failure by the claimant to comply with—

- (a) a work-focused interview requirement imposed under section 11F(2) of the Act (persons subject to work preparation requirement and work-focused interview requirement);
- (b) a work preparation requirement imposed under section 11F(2) of the Act; or
- (c) a requirement under section 11G of the Act (connected requirements);

“lowest-level sanction” means a reduction of an employment and support allowance in accordance with section 11J of the Act for a sanctionable failure by the claimant to comply with a requirement imposed under section 11E(2) of the Act (persons subject to work-focused interview requirement only);

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*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2013. (See end of Document for details)*

“reduction period” means the number of days for which a reduction in the amount of an award of an employment and support allowance is to have effect;

“sanctionable failure” means a failure which is sanctionable under section 11J of the Act;

“total outstanding reduction period” means the total number of days for which no reduction has yet been applied for all of the claimant's low-level sanctions, lowest-level sanctions and reductions to which regulation 61 applies;

“UC sanctionable failure” means a failure by a claimant which is sanctionable under section 26 or 27 of the Welfare Reform Act 2012.

### General principles for calculating reduction periods

**51.**—(1) Subject to paragraphs (3) and (4), the reduction period is to be determined in relation to each sanctionable failure in accordance with regulations 52 and 53.

(2) Reduction periods are to run consecutively.

(3) Where the reduction period calculated in relation to a sanctionable failure in accordance with regulation 52 or 53 would result in the total outstanding reduction period exceeding 1095 days, the number of days in the reduction period in relation to that failure is to be adjusted so that 1095 days is not exceeded.

(4) In determining the reduction period in relation to a sanctionable failure, a previous sanctionable failure, UC sanctionable failure or JSA sanctionable failure is to be disregarded if it—

- (a) occurred in the 14 days immediately preceding the failure in question; and
- (b) gave rise to a reduction under these Regulations, the Universal Credit Regulations 2013 or the Jobseeker's Allowance Regulations 2013 <sup>M70</sup>.

#### Modifications etc. (not altering text)

- C2** Reg. 51 modified (24.4.2013) by The Welfare Reform Act 2012 (Commencement No. 9 and Transitional and Transitory Provisions and Commencement No. 8 and Savings and Transitional Provisions (Amendment)) Order 2013 (S.I. 2013/983), {art. 14(4)} (with application in accordance with art. 14(1)-(3))
- C3** Reg. 51 modified (24.4.2013) by The Welfare Reform Act 2012 (Commencement No. 9 and Transitional and Transitory Provisions and Commencement No. 8 and Savings and Transitional Provisions (Amendment)) Order 2013 (S.I. 2013/983), {art. 15(4)} (with application in accordance with art. 15(1)-(3))

#### Marginal Citations

**M70** S.I. 2013/378.

### Low-level sanction

**52.** The reduction period for a low-level sanction is the total of—

- (a) the number of days beginning with the date of the sanctionable failure and ending with—
  - (i) the day before the date on which the claimant meets a compliance condition specified by the Secretary of State;
  - (ii) the day before the date on which the claimant falls within section 11D of the Act;
  - (iii) the day before the date on which the claimant is no longer required to take a particular action specified as a work preparation requirement by the Secretary of State under section 11C(1) or 11F(2) of the Act; or

- (iv) the day on which the award of an employment and support allowance is terminated, whichever is soonest; and
- (b) whichever of the following number of days is applicable in the claimant's case—
- (i) seven days, if sub-paragraphs (ii) and (iii) do not apply;
  - (ii) 14 days, if in the 365 days preceding the failure in question there was another sanctionable failure giving rise to a low-level sanction for which a seven day reduction period applies;
  - (iii) 14 days, if in the 365 days preceding the failure in question there was a UC sanctionable failure giving rise to a low-level sanction under regulation 104 of the Universal Credit Regulations 2013 for which a seven day reduction period applies;
  - (iv) 14 days, if in the 365 days preceding the failure in question there was a JSA sanctionable failure giving rise to a low-level sanction under regulation 21 of the Jobseeker's Allowance Regulations 2013 for which a seven day reduction period applies;
  - (v) 28 days, if in the 365 days preceding the failure in question there was another sanctionable failure giving rise to a low-level sanction for which a 14 day or 28 day reduction period applies;
  - (vi) 28 days, if in the 365 days preceding the failure in question there was a UC sanctionable failure giving rise to a low-level sanction under regulation 104 of the Universal Credit Regulations 2013 for which a 14 day or 28 day reduction period applies; or
  - (vii) 28 days, if in the 365 days preceding the failure in question there was a JSA sanctionable failure giving rise to a low-level sanction under regulation 21 of the Jobseeker's Allowance Regulations 2013 for which a 14 day or 28 day reduction period applies.

#### **Lowest-level sanction**

**53.** The reduction period for a lowest-level sanction is the number of days beginning with the date of the sanctionable failure and ending with—

- (a) the day before the date on which the claimant meets a compliance condition specified by the Secretary of State;
- (b) the day before the date on which the claimant falls within section 11D of the Act; or
- (c) the day on which the claimant's award of an employment and support allowance is terminated,

whichever is soonest.

#### **Start of the reduction**

**54.** A reduction period determined in relation to a sanctionable failure takes effect from—

- (a) where the claimant has not been paid an employment and support allowance for the benefit week in which the Secretary of State determines that the amount of the award of employment and support allowance is to be reduced under section 11J of the Act, the first day of that benefit week;
- (b) where the claimant has been paid an employment and support allowance for the benefit week referred to in paragraph (a), the first day of the first benefit week for which the claimant has not been paid an employment and support allowance; or

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- (c) where the amount of the award of the employment and support allowance for the benefit week referred to in paragraph (a) or (b) is already subject to a reduction because of a previous sanctionable failure, the first day in respect of which the amount of the award is no longer subject to that reduction.

### **Reduction period to continue where award of employment and support allowance terminates**

**55.**—(1) Where an award of an employment and support allowance terminates while there is an outstanding reduction period—

- (a) the period continues to run as if a daily reduction were being applied; and
- (b) if the claimant becomes entitled to a new award of an employment and support allowance before the period expires, that new award is subject to a reduction for the remainder of the total outstanding reduction period.

(2) Paragraph (3) applies where—

- (a) an award of an employment and support allowance terminates before the Secretary of State determines that the amount of the award is to be reduced under section 11J of the Act in relation to a sanctionable failure; and
- (b) that determination is made after the claimant becomes entitled to a new award of an employment and support allowance.

(3) Where this paragraph applies—

- (a) the reduction period in relation to the sanctionable failure referred to in paragraph (2) is to be treated as having taken effect on the day before the previous award terminated;
- (b) that reduction period is treated as having continued to run as if a daily reduction were being applied; and
- (c) if the new award referred to in paragraph (2)(b) begins before that reduction period expires, that new award is subject to a reduction for the remainder of the total outstanding reduction period.

### **Suspension of a reduction where a fraud sanction applies**

**56.**—(1) A reduction in the amount of an award of an employment and support allowance in accordance with section 11J of the Act is to be suspended for any period during which section 6B or 7 of the Social Security Fraud Act 2001 <sup>M71</sup> applies to the award.

(2) The reduction ceases to have effect on the day on which that period begins and has effect again on the day after that period ends.

#### **Marginal Citations**

**M71** 2001 c.11. Section 6B was inserted by section 24 of the Welfare Reform Act 2009. Sections 6B was amended by paragraph 10 of Schedule 2 and Schedule 7 to the Welfare Reform Act 2009 and sections 113, 118, 119 and 121 of, and paragraph 58 of Schedule 2, paragraph 16 of Schedule 3 and Schedule 14 to, the Welfare Reform Act 2012. Section 7 was amended by paragraph 45 of Schedule 2 to the [State Pension Credit Act 2002 \(c.16\)](#), [section 49](#) of, and paragraph 23 of Schedule 3 to, the Welfare Reform Act 2007, paragraph 11 of Schedule 2, paragraph 2 of Schedule 4 and Schedule 7 to the Welfare Reform Act 2009, sections 118 and 119 of, and paragraph 59 of Schedule 2, paragraph 17 of Schedule 3 and Schedule 14 to, the Welfare Reform Act 2012, paragraph 45 of Schedule 2 to the [Criminal Justice and Licensing \(Scotland\) Act 2010 \(asp 13\)](#) and [S.I. 2011/2298](#).

### Termination of a reduction

57.—(1) A reduction in the amount of an award of an employment and support allowance under section 11J of the Act is to be terminated where, since the date of the most recent sanctionable failure which gave rise to such a reduction, the claimant has been in paid work—

- (a) for a period of at least 26 weeks; or
- (b) for more than one period where the total of those periods amounts to at least 26 weeks.

(2) The termination of the reduction has effect—

- (a) where the date on which paragraph (1) is satisfied falls within a period of entitlement to an employment and support allowance, from the beginning of the benefit week in which that date falls; or
- (b) where that date falls outside a period of entitlement to an employment and support allowance, from the beginning of the first benefit week in relation to any subsequent award of an employment and support allowance.

(3) The claimant is in paid work for the purposes of paragraph (1) where their weekly earnings are at least equal to 16 multiplied by the national minimum wage which would apply for a person of the claimant's age under the National Minimum Wage Regulations 1999 <sup>M72</sup>.

#### Marginal Citations

M72 [S.I. 1999/584](#).

### Amount of reduction for each benefit week

58. Where it has been determined that an award of an employment and support allowance is to be reduced in accordance with section 11J of the Act, the amount of the reduction for each benefit week in respect of which a reduction has effect is to be calculated as follows.

#### Step 1

Take the number of days—

- (a) in the benefit week; or
- (b) if lower, in the total outstanding reduction period,

and deduct any days in that benefit week or total outstanding reduction period for which the reduction is suspended in accordance with regulation 56.

#### Step 2

Multiply the number of days produced by step 1 by the daily reduction rate.

#### Step 3

Deduct the amount produced by step 2 from the amount of the award of employment and support allowance for the benefit week.

### Daily reduction rate

59.—(1) The daily reduction rate for the purposes of regulation 58 is, unless regulation 60 applies, the amount prescribed for the claimant under regulation 62(1) or, where applicable, regulation 63(2), multiplied by 52 and divided by 365.

(2) The amount of the daily reduction rate is to be rounded down to the nearest 10 pence.

### **Lower daily reduction rate**

**60.**—(1) The daily reduction rate is 40% of the rate applicable under regulation 59(1) if, at the end of the benefit week, the claimant falls within—

- (a) section 11E of the Act;
- (b) section 11D(2)(c) of the Act; or
- (c) regulation 47(1)(b), (c), (f) or (g).

(2) The daily reduction rate is nil if, at the end of the benefit week, the claimant falls within section 11D(2)(a) of the Act.

### **Sanctions where universal credit ends and the person is entitled to an employment and support allowance**

**61.**—(1) This regulation applies where—

- (a) a person ceases to be entitled to universal credit;
- (b) there is a reduction relating to the person's award of universal credit under section 26 or 27 of the Welfare Reform Act 2012; and
- (c) the person is entitled to an employment and support allowance.

(2) Any reduction relating to the award of the universal credit is to be applied to the award of the employment and support allowance.

(3) The period for which the reduction relating to the award of employment and support allowance is to have effect is the number of days which apply to the person under regulation 102, 103, 104 or 105 of the Universal Credit Regulations 2013 minus any such days which—

- (a) have already resulted in a reduction in the amount of universal credit; or
- (b) fall after the date on which the person ceases to be entitled to universal credit and before the date on which the person becomes entitled to an employment and support allowance.

(4) The daily reduction rate for the reduction relating to the award of employment and support allowance is—

- (a) the amount referred to in regulation 60(1) where, on the date the claimant becomes entitled to an employment and support allowance, the claimant falls within—
  - (i) section 11E of the Act;
  - (ii) section 11D(2)(c) of the Act; or
  - (iii) regulation 47(1)(b), (c), (f) or (g);
- (b) zero where the claimant falls within section 11D(2)(a) of the Act; or
- (c) the amount referred to in regulation 59(1) in all other cases.

(5) The amount of the reduction of the claimant's award of an employment and support allowance is the number of days arrived at under paragraph (3) multiplied by the daily reduction rate referred to in paragraph (4).

## PART 9

### Amounts of Allowance

#### Prescribed amounts

**62.**—(1) Subject to regulation 63 (special cases) the amount prescribed for the purposes of the calculation of the amount of a claimant's employment and support allowance under section 2(1)(a) of the Act is—

- (a) where the claimant satisfies the conditions set out in section 2(2) or (3) of the Act, £71.70; or
  - or
  - (b) where the claimant does not satisfy the conditions set out in section 2(2) or (3) of the Act—
    - (i) where the claimant is aged not less than 25, £71.70; or
    - (ii) where the claimant is aged less than 25, £56.80.
- (2) Subject to regulation 63, the amount of—
- (a) the work-related activity component is £28.45; and
  - (b) the support component is £34.80.

#### Special cases

**63.**—(1) The amount prescribed for the purposes of the calculation of the amount of a claimant's employment and support allowance under section 2(1)(a) of the Act in respect of a claimant who—

- (a) satisfies either of the conditions in paragraphs (3) or (4); or
- (b) has been a patient for a continuous period of more than 52 weeks,

is the amount applicable under regulation 62(1) and the amount of nil under regulation 62(2).

(2) The amount prescribed for those purposes in respect of a claimant who is a person in hardship, is the amount to which the claimant is entitled—

- (a) under regulation 62(1) reduced by 20%; and
- (b) under regulation 62(2).

(3) The first condition mentioned in paragraph (1)(a) is that—

- (a) the claimant is being detained under section 45A or 47 of the Mental Health Act 1983 (power of higher courts to direct hospital admission; removal to hospital of persons serving sentences of imprisonment etc) <sup>M73</sup>; and
- (b) in any case where there is in relation to the claimant a release date within the meaning of section 50(3) of that Act <sup>M74</sup>, the claimant is being detained on or before the day which the Secretary of State certifies to be that release date.

(4) The second condition mentioned in paragraph (1)(a) is that the claimant is being detained under—

- (a) section 59A of the Criminal Procedure (Scotland) Act 1995 (hospital direction) <sup>M75</sup>; or
- (b) section 136 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (transfer of prisoners for treatment of mental disorder) <sup>M76</sup>.

(5) In this regulation—

“patient” means a person (other than a prisoner) who is regarded as receiving free in-patient treatment within the meaning of regulation 2(4) and (5) of the Social Security (Hospital In-Patients) Regulations 2005 <sup>M77</sup>;

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“prisoner” means a person who—

- (a) is detained in custody pending trial or sentence on conviction or under a sentence imposed by a court; or
- (b) is on temporary release in accordance with the provisions of the Prison Act 1952 <sup>M78</sup> or the Prisons (Scotland) Act 1989 <sup>M79</sup>,

other than a person who is detained in hospital under the provisions of the Mental Health Act 1983 or, in Scotland, under the provisions of the Mental Health (Care and Treatment) (Scotland) Act 2003 or the Criminal Procedure (Scotland) Act 1995 <sup>M80</sup>.

(6) For the purposes of this regulation—

- (a) except where sub-paragraph (b) applies, a person is a “person in hardship” if they satisfy regulation 94; and
- (b) where a person satisfies regulation 94 for more than six weeks, they are a “person in hardship” only for the first six weeks.

#### Marginal Citations

**M73** 1983 c.20. Section 45A was inserted by section 46 of the [Crime \(Sentences\) Act 1997 \(c.43\)](#). Section 45A was amended by paragraph 39 of Schedule 37 to the [Criminal Justice Act 2003 \(c.44\)](#) and sections 4 and 10 of, and paragraph 9 of Schedule 1 and Schedule 11 to, the [Mental Health Act 2007 \(c.12\)](#). Section 47 was amended by section 4 of, and paragraph 10 of Schedule 1 and Schedule 11 to, the [Mental Health Act 2007](#), paragraphs 97 and 98 of Schedule 16 to the [Armed Forces Act 2006 \(c.52\)](#), [paragraph 18](#) of Schedule 10 to the [Domestic Violence, Crime and Victims Act 2004 \(c.28\)](#) and Schedule 6 to the [Crime \(Sentences\) Act 1997](#). [S.I. 1999/672](#) transferred functions under sections 45A and 47 to the National Assembly for Wales.

**M74** Section 50(3) was substituted by section 294 of the [Criminal Justice Act 2003](#).

**M75** 1995 c.46. Section 59A was inserted by section 6(1) of the [Crime and Punishment \(Scotland\) Act 1997 \(c.48\)](#) and substituted by paragraph 8(6) of Schedule 4 to the [Mental Health \(Care and Treatment\) \(Scotland\) Act 2003 \(asp 13\)](#).

**M76** 2003 asp 13.

**M77** [S.I. 2005/3360](#).

**M78** 1952 c.52.

**M79** 1989 c.45.

**M80** 1995 c.46.

#### Permanent health insurance

**64.** For the purposes of sections 2(1)(c) and 3(3) of the Act (deductions from an employment and support allowance) “pension payment” is to include a permanent health insurance payment.

#### Financial Assistance Scheme

**65.**—(1) For the purposes of sections 2(1)(c) and 3(3) of the Act (deductions from an employment and support allowance) “pension payment” is to include a Financial Assistance Scheme payment.

(2) In this regulation “Financial Assistance Scheme payment” means a payment made under the [Financial Assistance Scheme Regulations 2005](#) <sup>M81</sup>.

#### Marginal Citations

**M81** [S.I. 2005/1986](#).

### Councillor's allowance

66. For the purposes of section 3(1)(c) of the Act—

- (a) a councillor's allowance is a payment of a prescribed description; and
- (b) the prescribed bodies carrying out public or local functions are—
  - (i) in relation to England and Wales, a London borough council, a county council, a county borough council, a district council, a parish or community council, the Common Council of the City of London or the Council of the Isles of Scilly; and
  - (ii) in relation to Scotland, a council constituted under section 2 of the Local Government etc. (Scotland) Act 1994.

### Deductions for pension payment and PPF payment

67.—(1) Where—

- (a) a claimant is entitled to an employment and support allowance in respect of any period of a week or part of a week;
- (b) there is—
  - (i) a pension payment;
  - (ii) a PPF periodic payment; or
  - (iii) both of the payments specified in paragraphs (i) and (ii),payable to that person in respect of that period (or a period which forms part of that period or includes that period or part of it); and
- (c) the amount of the payment, or payments when taken together, exceeds—
  - (i) if the period in question is a week, £85; or
  - (ii) if that period is not a week, such proportion of £85 as falls to be calculated in accordance with regulation 79(1) or (5) (calculation of weekly amount of income),

the amount of that allowance is to be reduced by an amount equal to 50% of the excess.

(2) For the purposes of regulations 67 to 72 “payment” means a payment or payments, as the case may be, referred to in paragraph (1)(b).

### Payments treated as not being payments to which section 3 applies

68. The following payments are to be treated as not being payments to which section 3 of the Act applies—

- (a) any pension payment made to a claimant as a beneficiary on the death of a member of any pension scheme;
- (b) any PPF periodic payment made to a claimant as a beneficiary on the death of a person entitled to such a payment;
- (c) where a pension scheme is in deficit or has insufficient resources to meet the full pension payment, the extent of the shortfall;
- (d) any pension payment made under an instrument specified in section 639(2) of the Income Tax (Earnings and Pensions) Act 2003 <sup>M82</sup>;
- (e) any guaranteed income payment (which means a payment made under article 15(1)(a) or 29(1)(a) of the Armed Forces and Reserved Forces (Compensation Schemes) Order 2011 <sup>M83</sup>);

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- (f) any permanent health insurance payment in respect of which the employee had contributed to the premium to the extent of more than 50%.

#### **Marginal Citations**

**M82** 2003 c.1. Section 639(2) was inserted by section 19 of the [Finance Act 2005 \(c.7\)](#).

**M83** [S.I. 2011/517](#).

#### **Deductions for councillor's allowance**

**69.**—(1) Where the net amount of councillor's allowance to which a claimant is entitled in respect of any week exceeds 16 multiplied by the National Minimum Wage, subject to paragraph (3), an amount equal to the excess is to be deducted from the amount of an employment and support allowance to which that claimant is entitled in respect of that week, and only the balance remaining (if any) is to be payable.

(2) In paragraph (1) “net amount”, in relation to any councillor's allowance to which a claimant is entitled, means the aggregate amount of the councillor's allowance or allowances, or remuneration to which that claimant is entitled for the week in question, reduced by the amount of any payment in respect of expenses wholly, exclusively and necessarily incurred by that claimant, in that week, in the performance of the duties of a councillor.

(3) Where the amount determined by the calculation in paragraph (1) would, but for this paragraph, include an amount of—

- (a) less than 50p, that amount is to be rounded up to the nearest 50p; or
- (b) less than £1 but more than 50p, that amount is to be rounded up to the nearest £1.

#### **Date from which payments are to be taken into account**

**70.** Where regulation 67(1) or 69(1) applies, a deduction must have effect, calculated where appropriate in accordance with regulation 79(1) or (5), from the first day of the benefit week in which the payment or councillor's allowance is paid to a claimant who is entitled to an employment and support allowance in that week.

#### **Date from which a change in the rate of the payment takes effect**

**71.** Where a payment or councillor's allowance is already being made to a claimant and the rate of that payment or that allowance changes, the deduction at the new rate must take effect, calculated where appropriate in accordance with regulation 79(1) or (5), from the first day of the benefit week in which the new rate of the payment or councillor's allowance is paid.

#### **Calculation of payment made other than weekly**

**72.**—(1) Where the period in respect of which a payment or councillor's allowance is paid is otherwise than weekly, an amount calculated or estimated in accordance with regulation 79(1) or (5) is to be regarded as the weekly amount of that payment or allowance.

(2) In determining the weekly payment, where two or more payments are payable to a claimant, each payment is to be calculated separately in accordance with regulation 79(1) or (5) before aggregating the sum of those payments for the purposes of the reduction of an employment and support allowance in accordance with regulation 67.

### Effect of statutory maternity pay on an employment and support allowance

73.—(1) This regulation applies where—

- (a) a woman is entitled to statutory maternity pay and, on the day immediately preceding the first day in the maternity pay period, she—
  - (i) is in a period of limited capability for work; and
  - (ii) satisfies the conditions of entitlement to an employment and support allowance in accordance with section 1(2)(a) of the Act; and
- (b) on any day during the maternity pay period—
  - (i) she is in a period of limited capability for work; and
  - (ii) that day is not a day where she is treated as not having limited capability for work.

(2) Where this regulation applies, notwithstanding section 20(2) of the Act, a woman who is entitled to statutory maternity pay is to be entitled to an employment and support allowance in respect of any day that falls within the maternity pay period.

(3) Where by virtue of paragraph (2) a woman is entitled to an employment and support allowance for any week (including part of a week), the total amount of employment and support allowance payable to her for that week is to be reduced by an amount equivalent to any statutory maternity pay to which she is entitled in accordance with Part 12 of the Contributions and Benefits Act for the same week (or equivalent part of a week where entitlement to an employment and support allowance is for part of a week), and only the balance, if any, of the employment and support allowance is to be payable to her.

### Effect of statutory adoption pay on an employment and support allowance

74.—(1) This regulation applies where—

- (a) a claimant is entitled to statutory adoption pay and, on the day immediately preceding the first day in the adoption pay period, she—
  - (i) is in a period of limited capability for work; and
  - (ii) satisfies the conditions of entitlement to an employment and support allowance in accordance with section 1(2)(a) of the Act; and
- (b) on any day during the adoption pay period—
  - (i) that claimant is in a period of limited capability for work; and
  - (ii) that day is not a day where that claimant is treated as not having limited capability for work.

(2) Where this regulation applies, notwithstanding section 20(4) of the Act, a claimant who is entitled to statutory adoption pay is to be entitled to an employment and support allowance in respect of any day that falls within the adoption pay period.

(3) Where by virtue of paragraph (2) a claimant is entitled to an employment and support allowance for any week (including part of a week), the total amount of employment and support allowance payable to that claimant for that week is to be reduced by an amount equivalent to any statutory adoption pay to which that claimant is entitled in accordance with Part 12ZB of the Contributions and Benefits Act<sup>M84</sup> for the same week (or equivalent part of a week where entitlement to an employment and support allowance is for part of a week), and only the balance, if any, of the employment and support allowance is to be payable to that claimant.

*Status: Point in time view as at 29/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2013. (See end of Document for details)*

#### **Marginal Citations**

**M84** Part 12ZB was inserted by section 4 of the [Employment Act 2002 \(c.22\)](#).

### **Effect of additional statutory paternity pay on an employment and support allowance**

**75.**—(1) This regulation applies where—

- (a) a claimant is entitled to additional statutory paternity pay and, on the day immediately preceding the first day in the additional paternity pay period, she—
  - (i) is in a period of limited capability for work; and
  - (ii) satisfies the conditions of entitlement to an employment and support allowance in accordance with section 1(2)(a) of the Act; and
- (b) on any day during the additional statutory paternity pay period—
  - (i) that claimant is in a period of limited capability for work; and
  - (ii) that day is not a day where that claimant is treated as not having limited capability for work.

(2) Where this regulation applies, notwithstanding section 20(6) of the Act, a claimant who is entitled to additional statutory paternity pay is to be entitled to an employment and support allowance in respect of any day that falls within the additional paternity pay period.

(3) Where by virtue of paragraph (2) a person is entitled to an employment and support allowance for any week (including part of a week), the total amount of employment and support allowance payable to that claimant for that week is to be reduced by an amount equivalent to any additional statutory paternity pay to which that claimant is entitled in accordance with Part 12ZA of the Contributions and Benefits Act<sup>M85</sup> for the same week (or equivalent part of a week where entitlement to an employment and support allowance is for part of a week), and only the balance, if any, of the employment and support allowance is to be payable to that claimant.

#### **Marginal Citations**

**M85** [Part 12ZA](#) was inserted by section 2 of the [Employment Act 2002](#).

## **PART 10**

### **Income and earnings**

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

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

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

- (a) where the payment is monthly, a period equal to the number of weeks beginning with the date on which the payment is treated as paid and ending with the date immediately before

the date on which the next monthly payment would have been treated as paid whether or not the next monthly payment is actually paid;

- (b) where the payment is in respect of a period which is not monthly, a period equal to the length of the period for which payment is made;
- (c) in any other case, a period equal to such number of weeks as is equal to the number obtained (see paragraph (9)) by applying the formula—

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

where—

E is the net earnings;

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

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

(3) Where—

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

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

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

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

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

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

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

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

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

### Calculation of earnings of self-employed earners

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

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

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

#### **Date on which income is treated as paid**

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

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

#### **Calculation of weekly amount of income**

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

- (a) does not exceed a week, the weekly amount is to be the amount of that payment;
- (b) exceeds a week, the weekly amount is to be determined—
  - (i) in a case where that period is a month, by multiplying the amount of the payment by 12 and dividing the product by 52;
  - (ii) in a case where that period is three months, by multiplying the amount of the payment by four and dividing the product by 52;
  - (iii) in a case where that period is a year and the payment is income, by dividing the amount of the payment by 52;
  - (iv) in any other case, by multiplying the amount of the payment by seven and dividing the product by the number equal to the number of days in the period in respect of which it is made.

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

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

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

the same kind and from the same source, the amount of that income to be taken into account in any one benefit week is not to exceed the weekly amount determined under paragraph (1)(a) or (b) of the payment which under regulation 78(b) is treated as paid first.

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

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

### Earnings of employed earners

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

- (a) any bonus or commission;
- (b) any payment in lieu of remuneration except any periodic sum paid to a claimant on account of the termination of the claimant's employment by reason of redundancy;
- (c) any payment in lieu of notice;
- (d) any holiday pay except any payable more than four weeks after the termination or interruption of employment;
- (e) any payment by way of a retainer;
- (f) any payment made by the claimant's employer in respect of expenses not wholly, exclusively and necessarily incurred in the performance of the duties of the employment, including any payment made by the claimant's employer in respect of—
  - (i) travelling expenses incurred by the claimant between the claimant's home and place of employment;
  - (ii) expenses incurred by the claimant under arrangements made for the care of a member of the claimant's family owing to the claimant's absence from home;
- (g) any award of compensation made under section 112(4) or 117(3)(a) of the Employment Rights Act 1996 (the remedies: orders and compensation, enforcement of order and compensation) <sup>M86</sup>;
- (h) any payment made or remuneration paid under sections 28, 34, 64, 68 and 70 of the Employment Rights Act 1996 (right to guarantee payments, remuneration on suspension on medical or maternity grounds, complaints to employment tribunals) <sup>M87</sup>;
- (i) any such sum as is referred to in section 112(3) of the Contributions and Benefits Act (certain sums to be earnings for social security purposes) <sup>M88</sup>;
- (j) where a payment of compensation is made in respect of employment which is part-time employment, the amount of the compensation;
- (k) the amount of any payment by way of a non-cash voucher which has been taken into account in the computation of a person's earnings in accordance with Part 5 of Schedule 3 to the Social Security (Contributions) Regulations 2001 <sup>M89</sup>.

(2) “Earnings” are not to include—

- (a) subject to paragraph (3), any payment in kind;

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- (b) any remuneration paid by or on behalf of an employer to the claimant in respect of a period throughout which the claimant is on maternity leave, paternity leave or adoption leave (which means a period of absence from work on ordinary or additional adoption leave under section 75A or 75B of the Employment Rights Act 1996<sup>M90</sup>) or is absent from work because the claimant is ill;
  - (c) any payment in respect of expenses wholly, exclusively and necessarily incurred in the performance of the duties of the employment;
  - (d) any occupational pension (which means any pension or other periodical payment under an occupational pension scheme but does not include any discretionary payment out of a fund established for relieving hardship in particular cases);
  - (e) any lump sum payment made under the Iron and Steel Re-adaptation Benefits Scheme<sup>M91</sup>;
  - (f) any payment in respect of expenses arising out of the claimant participating as a service user.
- (3) Paragraph (2)(a) is not to apply in respect of any non-cash voucher referred to in paragraph (1)(k).
- (4) In this regulation—
- “compensation” means any payment made in respect of, or on the termination of, employment in a case where a claimant has not received or received only part of a payment in lieu of notice due or which would have been due to the claimant had that claimant not waived the right to receive it, other than—
- (a) any payment specified in paragraph (1)(a) to (i);
  - (b) any payment specified in paragraph (2)(a) to (f);
  - (c) any redundancy payment within the meaning of section 135(1) of the Employment Rights Act 1996;
  - (d) any refund of contributions to which that person was entitled under an occupational pension scheme; and
  - (e) any compensation payable by virtue of section 173 of the Education Reform Act 1988<sup>M92</sup>,
- “paternity leave” means a period of absence from work on ordinary paternity leave by virtue of section 80A or 80B of the Employment Rights Act 1996<sup>M93</sup> or on additional paternity leave by virtue of section 80AA or 80BB of that Act<sup>M94</sup>.
- (5) The reference in paragraph (2)(f) to a person participating as a service user is to—
- (a) a person who is being consulted by or on behalf of—
    - (i) a body which has a statutory duty to provide services in the field of health, social care or social housing; or
    - (ii) a body which conducts research or undertakes monitoring for the purpose of planning or improving such services,
 in the person's capacity as a user, potential user, carer of a user or person otherwise affected by the provision of those services; or
  - (b) the carer of a person consulted under sub-paragraph (a).

#### Marginal Citations

**M86** 1996 c.18. Section 112(4) was amended by paragraph 36 of Schedule 7 to the [Employment Act 2002 \(c.22\)](#), [section 8](#) of the [Public Interest Disclosure Act 1998 \(c.23\)](#) and Schedule 9 to the [Employment](#)

[Relations Act 1999 \(c.26\)](#). Section 117(3)(a) was amended by paragraph 37 of Schedule 7 to the Employment Act 2002, section 8 of the Public Interest Disclosure Act 1998 and Schedule 9 to the Employment Relations Act 1999.

**M87** Sections 34 and 70 were amended by section 1 of the [Employment Rights \(Dispute Resolution\) Act 1998 \(c.8\)](#) and [S.I. 2011/1133](#). Section 64 was amended by [S.I. 1999/3232](#).

**M88** Section 112(3) was amended by paragraph 51 of Schedule 1 to the Employment Rights Act 1996.

**M89** [S.I. 2001/1004](#).

**M90** Section 75A was inserted by section 3 of the Employment Act 2002 and amended by paragraph 33 of Schedule 1 to the [Work and Families Act 2006 \(c.18\)](#). Section 75B was inserted by section 3 of the Employment Act 2002 and amended by paragraph 34 of Schedule 1 to the Work and Families Act 2006.

**M91** The Scheme is set out in regulation 4 of, and the Schedule to, the European Communities (Iron and Steel Employees Re-adaptation Benefits Scheme) (No.2) Regulations 1996/3182.

**M92** [1988 c.40](#). Section 173 was amended by Schedule 3 to the Employment Rights Act 1996.

**M93** Section 80A was inserted by section 1 of the Employment Act 2002 and amended by paragraph 35 of Schedule 1 to the Work and Families Act 2006. Section 80B was inserted by section 1 of the Employment Act 2002 and amended by paragraph 36 of Schedule 1 to the Work and Families Act 2006.

**M94** [Section 80AA](#) was inserted by section 3 of the Work and Families Act 2006. Section 80BB was inserted by section 4 of the Work and Families Act 2006.

### Calculation of net earnings of employed earners

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

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

- (a) any amount deducted from those earnings by way of—
  - (i) income tax;
  - (ii) primary Class 1 contributions under section 6(1)(a) of the Contributions and Benefits Act <sup>M95</sup>,
- (b) one-half of any sum paid by the claimant in respect of a pay period by way of a contribution towards an occupational or personal pension scheme.

#### Marginal Citations

**M95** Section 6 was substituted by paragraph 2 of Schedule 9 to the [Welfare Reform and Pensions Act 1999 \(c.30\)](#).

### Earnings of self-employed earners

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

(2) “Earnings” do not include—

- (a) where a claimant is involved in providing board and lodging accommodation for which a charge is payable, any payment by way of such a charge;

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- (b) any award made by one of the Sports Councils named in section 23(2) of the National Lottery etc Act 1993 <sup>M96</sup> out of sums allocated to it for distribution under that section.
- (3) In this regulation, “board and lodging” means—
  - (a) accommodation provided to a person or, if the person is a member of a family, to that person or any other member of that person's family, for a charge which is inclusive of the provision of that accommodation and at least some cooked or prepared meals which both are cooked or prepared (by a person other than the person to whom the accommodation is provided or a member of that person's family) and are consumed in that accommodation or associated premises; or
  - (b) accommodation provided to a person in a hotel, guest house, lodging house or some similar establishment,

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

#### **Marginal Citations**

**M96** 1993 c.39. Section 23(2) was amended by S.I.s 1996/3095, 1999/1563 and 2006/654.

#### **Calculation of net profit of self-employed earners**

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

- (a) in the case of a self-employed earner who is engaged in employment on that self-employed earner's own account, the net profit derived from that employment;
- (b) in the case of a self-employed earner whose employment is carried on in partnership or is that of a share fisherman within the meaning of the Social Security (Mariners' Benefits) Regulations 1975 <sup>M97</sup>, that self-employed earner's share of the net profit derived from that employment less—
  - (i) an amount in respect of income tax and of National Insurance contributions payable under the Contributions and Benefits Act calculated in accordance with regulation 84 (deduction of tax and contributions for self-employed earners); and
  - (ii) one half of any contribution paid in the period that is relevant under regulation 77 (calculation of earnings of self-employed earners) in respect of a personal pension scheme.

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

- (a) subject to paragraphs (4) to (6), any expenses wholly and exclusively defrayed in that period for the purposes of that employment;
- (b) an amount in respect of—
  - (i) income tax; and
  - (ii) National Insurance contributions payable under the Contributions and Benefits Act, calculated in accordance with regulation 84 (deduction of tax and contributions for self-employed earners); and
- (c) one half of any contribution paid in the period that is relevant under regulation 77 in respect of a personal pension scheme.

(3) For the purposes of paragraph (1)(b), the net profit of the employment is to be calculated by taking into account the earnings of the employment over the period determined under regulation 77 less, subject to paragraphs (4) to (6), any expenses wholly and exclusively defrayed in that period for the purpose of that employment.

(4) Subject to paragraph (5), a deduction is not to be made under paragraph (2)(a) or (3) in respect of—

- (a) any capital expenditure;
- (b) the depreciation of any capital asset;
- (c) any sum employed or intended to be employed in the setting up or expansion of the employment;
- (d) any loss incurred before the beginning of the period determined under regulation 77 (calculation of earnings of self-employed earners);
- (e) the repayment of capital on any loan taken out for the purposes of the employment;
- (f) any expenses incurred in providing business entertainment.

(5) A deduction is to be made under paragraph (2)(a) or (3) in respect of the repayment of capital on any loan used for—

- (a) the replacement in the course of business of equipment or machinery; and
- (b) the repair of an existing business asset except to the extent that any sum is payable under an insurance policy for its repair.

(6) The Secretary of State must refuse to make a deduction in respect of any expenses under paragraph (2)(a) or (3) where the Secretary of State is not satisfied that the expense has been defrayed or, having regard to the nature of the expense and its amount, that it has been reasonably incurred.

(7) A deduction—

- (a) is not to be made under paragraph (2)(a) or (3) in respect of any sum unless it has been expended for the purposes of the business;
- (b) is to be made under paragraph (2)(a) or (3) in respect of—
  - (i) the excess of any Value Added Tax paid over Value Added Tax received in the period determined under regulation 77;
  - (ii) any income expended in the repair of an existing asset except to the extent that any sum is payable under an insurance policy for its repair;
  - (iii) any payment of interest on a loan taken out for the purposes of the employment.

(8) Where a claimant is engaged in employment as a child minder the net profit of the employment is to be one-third of the earnings of that employment, less—

- (a) an amount in respect of—
  - (i) income tax; and
  - (ii) National Insurance contributions payable under the Contributions and Benefits Act, calculated in accordance with regulation 84 (deduction of tax and contributions for self-employed earners); and
- (b) one half of any contribution paid in respect of a personal pension scheme.

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

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

#### **Marginal Citations**

**M97** [S.I. 1975/529](#).

### **Deduction of tax and contributions for self-employed earners**

**84.**—(1) Subject to paragraph (2), the amount to be deducted in respect of income tax under regulation 83(1)(b)(i), (2)(b)(i) or (8)(a)(i) (calculation of net profit of self-employed earners) is to be calculated on the basis of the amount of chargeable income and as if that income were assessable to income tax at the basic rate of tax less only the personal allowance to which the claimant is entitled under sections 35 and 38 to 40 of the Income Tax Act 2007 (personal reliefs) <sup>M98</sup> as is appropriate to the claimant's circumstances.

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

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

- (a) the amount of Class 2 contributions payable under section 11(1) or, as the case may be, (3) of the Contributions and Benefits Act <sup>M99</sup> at the rate applicable at the date of claim except where the claimant's chargeable income is less than the amount specified in section 11(4) of that Act (small earnings exception) for the tax year in which the date of claim falls; but if the assessment period is less than a year, the amount specified for that tax year is to be reduced pro rata; and
- (b) the amount of Class 4 contributions (if any) which would be payable under section 15 of that Act (Class 4 contributions recoverable under the Income Tax Acts) <sup>M100</sup> at the percentage rate applicable at the date of claim on so much of the chargeable income as exceeds the lower limit but does not exceed the upper limit of profits applicable for the tax year in which the date of claim falls; but if the assessment period is less than a year, those limits are to be reduced pro rata.

(4) In this regulation—

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

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

“chargeable income” means—

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

### Marginal Citations

- M98** 2007 c.3. Section 35 was amended by section 4 of the [Finance Act 2009 \(c.10\)](#) and sections 3 and 4 of the [Finance Act 2012 \(c.14\)](#). Section 38 was amended by [S.I. 2011/2926](#). Section 40 was amended by paragraph 55 of Schedule 9 to the [Finance Act 2008 \(c.9\)](#).
- M99** Section 11 was amended by paragraph 12 of Schedule 3 to the [Social Security Contributions \(Transfer of Functions, etc\) Act 1999 \(c.2\)](#) and [S.I. 2012/807](#).
- M100** Section 15 was amended by paragraph 420 of Schedule 1 to the [Income Tax \(Trading and Other Income\) Act 2005 \(c.5\)](#), [sections 2](#) and 3 of the [National Insurance Contributions Act 2002 \(c.19\)](#), [section 13](#) of the [Limited Liability Partnerships Act 2000 \(c.12\)](#) and S.I.s 2011/938 and 2012/807.

## PART 11

### Supplementary provisions

#### Waiting days

**85.**—(1) The number of days prescribed for the purposes of paragraph 2 of Schedule 2 to the Act (days during which a person is not entitled to an employment and support allowance at the beginning of a period of limited capability for work) is three.

(2) Paragraph 2 of Schedule 2 to the Act does not apply where—

- (a) the claimant's entitlement to an employment and support allowance commences within 12 weeks of the claimant's entitlement to income support, incapacity benefit, severe disablement allowance, state pension credit, a jobseeker's allowance, a carer's allowance, statutory sick pay or a maternity allowance coming to an end;
- (b) the claimant is terminally ill and has—
  - (i) made a claim expressly on the ground of being terminally ill; or
  - (ii) made an application for supersession or revision in accordance with the Decisions and Appeals Regulations 1999 or the Decisions and Appeals Regulations 2013 which contains an express statement that the claimant is terminally ill;
- (c) the claimant has been discharged from being a member of Her Majesty's forces and three or more days immediately before that discharge were days of sickness absence from duty, which are recorded by the Secretary of State; or
- (d) the claimant is entitled to an employment and support allowance by virtue of section 1B of the Act (further entitlement after time-limiting).

#### Linking period

**86.** Any period of limited capability for work which is separated from another such period by not more than 12 weeks is to be treated as a continuation of the earlier period.

#### Claimants appealing a decision

**87.**—(1) This regulation applies where a claimant has made and is pursuing an appeal against a decision of the Secretary of State that embodies a determination that the claimant does not have limited capability for work under these Regulations.

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(2) Subject to paragraph (3), where this regulation applies, a determination of limited capability for work by the Secretary of State under regulation 15 must not be made until the appeal is determined by the First-tier Tribunal.

(3) Paragraph (2) does not apply where either—

- (a) the claimant suffers from some specific disease or bodily or mental disablement from which the claimant was not suffering when entitlement began; or
- (b) a disease or bodily or mental disablement from which the claimant was suffering when entitlement began has significantly worsened.

(4) Where this regulation applies and the Secretary of State makes a determination—

- (a) in a case to which paragraph (3) applies (including where the determination is not the first such determination) that the claimant does not have or, by virtue of regulation 18 or 19, is to be treated as not having limited capability for work; or
- (b) subsequent to a determination that the claimant is to be treated as having limited capability for work by virtue of a provision of these Regulations other than regulation 26, that the claimant is no longer to be so treated,

this regulation and regulation 26 have effect as if that determination had not been made.

(5) Where this regulation applies and—

- (a) the claimant is entitled to an employment and support allowance by virtue of being treated as having limited capability for work in accordance with regulation 26;
- (b) neither of the circumstances in paragraph (3) applies, or, subsequent to the application of either of those circumstances, the claimant has been determined not to have limited capability for work; and
- (c) the claimant's appeal is dismissed, withdrawn or struck out,

the claimant is to be treated as not having limited capability for work with effect from the day specified in paragraph (6).

(6) The day specified for the purposes of paragraph (5) is the first day of the benefit week following the date on which the Secretary of State receives the First-tier Tribunal's notification that the appeal is dismissed, withdrawn or struck out.

(7) Where a claimant's appeal is successful, subject to paragraph (8), any finding of fact or other determination embodied in or necessary to the decision of the First-tier Tribunal or on which the First-tier Tribunal's decision is based is to be conclusive for the purposes of the decision of the Secretary of State, in relation to an award made in a case to which this regulation applies, as to whether the claimant has limited capability for work or limited capability for work-related activity.

(8) Paragraph (7) does not apply where, due to a change of circumstances after entitlement began, the Secretary of State is satisfied that it is no longer appropriate to rely on such finding or determination.

### **Absence from Great Britain**

**88.**—(1) A claimant who is entitled to an employment and support allowance is to continue to be so entitled during a period of temporary absence from Great Britain only in accordance with regulations 89 to 92.

(2) A claimant who continues to be entitled to an employment and support allowance during a period of temporary absence is not disqualified for receiving that allowance during that period under section 18(4) of the Act<sup>M101</sup>.

### **Marginal Citations**

**M101** Section 18(4) was amended by paragraph 26 of Schedule 3 to the Welfare Reform Act 2012.

### **Short absence**

**89.** A claimant is to continue to be entitled to an employment and support allowance during the first four weeks of a temporary absence from Great Britain if—

- (a) the period of absence is unlikely to exceed 52 weeks; and
- (b) while absent from Great Britain, the claimant continues to satisfy the other conditions of entitlement to that employment and support allowance.

### **Absence to receive medical treatment**

**90.**—(1) A claimant is to continue to be entitled to an employment and support allowance during the first 26 weeks of a temporary absence from Great Britain if—

- (a) the period of absence is unlikely to exceed 52 weeks;
- (b) while absent from Great Britain, the claimant continues to satisfy the other conditions of entitlement to that employment and support allowance;
- (c) the claimant is absent from Great Britain only—
  - (i) in connection with arrangements made for the treatment of the claimant for a disease or bodily or mental disablement directly related to the claimant's limited capability for work which commenced before leaving Great Britain; or
  - (ii) because the claimant is accompanying a dependent child (which means any child or qualifying young person who is treated as the responsibility of the claimant or the claimant's partner, where that child or young person is a member of the claimant's household) in connection with arrangements made for the treatment of that child for a disease or bodily or mental disablement; and
- (d) those arrangements relate to treatment—
  - (i) outside Great Britain;
  - (ii) during the period whilst the claimant is temporarily absent from Great Britain; and
  - (iii) by, or under the supervision of, a person appropriately qualified to carry out that treatment.

(2) In this regulation, “appropriately qualified” means qualified to provide medical treatment, physiotherapy or a form of treatment which is similar to, or related to, either of those forms of treatment.

### **Absence in order to receive NHS treatment**

**91.** A claimant is to continue to be entitled to an employment and support allowance during any period of temporary absence from Great Britain if—

- (a) while absent from Great Britain, the claimant continues to satisfy the other conditions of entitlement to that employment and support allowance; and
- (b) that period of temporary absence is for the purpose of the claimant receiving treatment at a hospital or other institution outside Great Britain where the treatment is being provided—

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*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2013. (See end of Document for details)*

- (i) under section 6(2) of the Health Service Act (Performance of functions outside England) <sup>M102</sup> or section 6(2) of the Health Service (Wales) Act (Performance of functions outside Wales);
- (ii) pursuant to arrangements made under section 12(1) of the Health Service Act (Secretary of State's arrangements with other bodies) <sup>M103</sup>, section 10(1) of the Health Service (Wales) Act (Welsh Ministers' arrangements with other bodies), paragraph 18 of Schedule 4 to the Health Service Act (joint exercise of functions) <sup>M104</sup> or paragraph 18 of Schedule 3 to the Health Service (Wales) Act (joint exercise of functions) <sup>M105</sup>; or
- (iii) under any equivalent provision in Scotland or pursuant to arrangements made under such provision.

#### **Marginal Citations**

**M102** Section 6(2) was amended by paragraph 2 of Schedule 4 to the [Health and Social Care Act 2012 \(c.7\)](#).

**M103** Section 12 was amended by paragraph 8 of Schedule 4 to the Health and Social Care Act 2012.

**M104** Paragraph 18 of Schedule 4 was amended by paragraph 8 of Schedule 4 to the Health and Social Care Act 2012.

**M105** Paragraph 18 of Schedule 3 was amended by paragraph 40 of Schedule 21 to the Health and Social Care Act 2012.

#### **Absence of member of family of member of Her Majesty's forces**

**92.**—(1) A claimant is to continue to be entitled to an employment and support allowance during any period of temporary absence from Great Britain if the claimant is a member of the family of a member of Her Majesty's forces and temporarily absent from Great Britain by reason only of the fact that the claimant is living with that member.

(2) In this regulation “member of the family of a member of Her Majesty's forces” means the spouse, civil partner, son, daughter, step-son, step-daughter, father, father-in-law, step-father, mother, mother-in-law or step-mother of such a member.

## **PART 12**

### **Disqualification**

#### **Disqualification for misconduct etc**

- 93.**—(1) Subject to paragraph (3), paragraph (2) applies where a claimant—
- (a) has limited capability for work by reason of the claimant's own misconduct, except in a case where the limited capability is due to a sexually transmitted disease;
  - (b) fails without good cause to attend for or submit to medical or other treatment (excluding vaccination, inoculation or surgery which the Secretary of State considers is major) recommended by a doctor with whom, or a hospital or similar institution with which, the claimant is undergoing medical treatment, which would be likely to remove the limitation on the claimant's capability for work;
  - (c) fails without good cause to refrain from behaviour calculated to retard the claimant's recovery to health; or

- (d) is, without good cause, absent from the claimant's place of residence without informing the Secretary of State where the claimant may be found.
- (2) A claimant referred to in paragraph (1) is to be disqualified for receiving an employment and support allowance for such period not exceeding six weeks as the Secretary of State may determine in accordance with Chapter 2 of Part 1 of the Social Security Act 1998 <sup>M106</sup>.
- (3) Paragraph (2) does not apply where the claimant—
  - (a) is disqualified for receiving an employment and support allowance by virtue of regulations made under section 6B or 7 of the Social Security Fraud Act 2001; or
  - (b) is a person in hardship.
- (4) In this regulation, “doctor” means a registered medical practitioner, or in the case of a medical practitioner practising outside the United Kingdom, a person registered or recognised as such in the country in which the person undertakes medical practice.

**Marginal Citations**

M106 1998 c.14.

**Meaning of “person in hardship”**

- 94.—(1) A claimant is a “person in hardship” if the claimant—
- (a) has informed the Secretary of State of the circumstances on which the claimant relies to establish that fact; and
  - (b) falls within paragraph (2), (3) or (5).
- (2) A claimant falls within this paragraph if—
- (a) she is pregnant;
  - (b) a member of the claimant's family is pregnant;
  - (c) the claimant is single and aged less than 18; or
  - (d) the claimant is a member of a couple and both members are aged less than 18.
- (3) Subject to paragraph (4), the claimant falls within this paragraph if the claimant or the claimant's partner—
- (a) has been awarded an attendance allowance, [<sup>F1</sup>armed forces independence payment,] the care component or the daily living component;
  - (b) has claimed attendance allowance, [<sup>F2</sup>armed forces independence payment,] disability living allowance or personal independence payment and the claim has not been determined;
  - (c) devotes what the Secretary of State considers is a considerable portion of each week to caring for another person who—
    - (i) has been awarded an attendance allowance, [<sup>F3</sup>armed forces independence payment,] the care component or the daily living component; or
    - (ii) has claimed attendance allowance, [<sup>F4</sup>armed forces independence payment,] disability living allowance or personal independence payment and the claim has not been determined; or
  - (d) has attained the qualifying age for state pension credit, which has the meaning given in section 1(6) of the State Pension Credit Act 2002 <sup>M107</sup>.

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(4) A claimant to whom paragraph (3)(b) or (3)(c)(ii) applies is a person in hardship only for 26 weeks from the date of the claim unless the claimant is a person in hardship under another provision of this regulation.

(5) The claimant falls within this paragraph where the Secretary of State is satisfied, having regard to all the circumstances and, in particular, the matters set out in paragraph (6), that unless an employment and support allowance is paid, the claimant, or a member of the claimant's family, will suffer hardship.

(6) The matters referred to in paragraph (5) are—

- (a) the resources which are likely to be available to the claimant and the claimant's family and the length of time for which they might be available; and
- (b) whether there is a substantial risk that essential items, including food, clothing and heating, will cease to be available to the claimant or a member of the claimant's family, or will be available at considerably reduced levels and the length of time for which this might be so.

(7) In this regulation—

[<sup>F5</sup>“armed forces independence payment” means armed forces independence payment under the Armed Forces and Reserve Forces (Compensation Scheme) Order 2011;]

“attendance allowance” means—

- (a) an attendance allowance under section 64 of the Contributions and Benefits Act <sup>M108</sup>;
- (b) an increase of disablement pension under section 104 or 105 of that Act;
- (c) a payment under regulations made under section 111 of, and paragraph 7(2)(b) of Schedule 8 to, that Act;
- (d) an increase in allowance which is payable in respect of constant attendance under section 111 of, and paragraph 4 of Schedule 8 to, that Act;
- (e) a payment by virtue of article 14, 15, 16, 43 or 44 of the Personal Injuries (Civilians) Scheme 1983 <sup>M109</sup> or any analogous payment;
- (f) any payment based on the need for attendance which is paid as an addition to a war disablement pension (which means any retired pay or pension or allowance payable in respect of disablement under an instrument specified in section 639(2) of the Income Tax (Earnings and Pensions) Act 2003 <sup>M110</sup>);

“care component” means the care component of disability living allowance at the highest or middle rate prescribed under section 72(3) of the Contributions and Benefits Act;

“daily living component” means the daily living component of personal independence payment at the standard or enhanced rate referred to in section 78 of the Welfare Reform Act 2012;

“disability living allowance” means a disability living allowance under section 71 of the Contributions and Benefits Act <sup>M111</sup>;

“personal independence payment” means an allowance under Part 4 of the Welfare Reform Act 2012.

#### Textual Amendments

- F1** Words in reg. 94(3)(a) inserted (8.4.2013) by [The Armed Forces and Reserve Forces Compensation Scheme \(Consequential Provisions: Subordinate Legislation\) Order 2013 \(S.I. 2013/591\)](#), arts. 2(2), 7, [Sch. para. 51\(2\)\(a\)](#)
- F2** Words in reg. 94(3)(b) inserted (8.4.2013) by [The Armed Forces and Reserve Forces Compensation Scheme \(Consequential Provisions: Subordinate Legislation\) Order 2013 \(S.I. 2013/591\)](#), arts. 2(2), 7, [Sch. para. 51\(2\)\(b\)](#)

- F3** Words in reg. 94(3)(c)(i) inserted (8.4.2013) by [The Armed Forces and Reserve Forces Compensation Scheme \(Consequential Provisions: Subordinate Legislation\) Order 2013 \(S.I. 2013/591\)](#), arts. 2(2), 7, [Sch. para. 51\(2\)\(c\)](#)
- F4** Words in reg. 94(3)(c)(ii) inserted (8.4.2013) by [The Armed Forces and Reserve Forces Compensation Scheme \(Consequential Provisions: Subordinate Legislation\) Order 2013 \(S.I. 2013/591\)](#), arts. 2(2), 7, [Sch. para. 51\(2\)\(d\)](#)
- F5** Words in reg. 94(7) inserted (8.4.2013) by [The Armed Forces and Reserve Forces Compensation Scheme \(Consequential Provisions: Subordinate Legislation\) Order 2013 \(S.I. 2013/591\)](#), arts. 2(2), 7, [Sch. para. 51\(2\)\(e\)](#)

#### Marginal Citations

- M107** 2002 c.16.
- M108** 1992 c.4. Section 64 was amended by section 66(1) of the [Welfare Reform and Pensions Act 1999 \(c.30\)](#) and paragraph 5 of Schedule 9 to the [Welfare Reform Act 2012](#).
- M109** [S.I. 1983/686](#). Article 14 was substituted by [S.I. 2001/420](#). Article 15 was amended by [S.I. 2001/420](#). Article 16 was amended by S.I.s 1984/1675 and 2001/420.
- M110** 2003 c.1. Section 639(2) was inserted by the [Finance Act 2005 \(c.7\)](#).
- M111** Section 71 was amended by section 67 of the [Welfare Reform and Pensions Act 1999](#).

### Treating a claimant as not having limited capability for work

**95.** The claimant is to be treated as not having limited capability for work if the claimant is disqualified for receiving an employment and support allowance during a period of imprisonment or detention in legal custody if that disqualification is for more than six weeks.

### Exceptions from disqualification for imprisonment

**96.—(1)** Notwithstanding section 18(4)(b) of the Act <sup>M112</sup>, a claimant is not disqualified for receiving an employment and support allowance for any period during which that claimant is undergoing imprisonment or detention in legal custody—

- (a) in connection with a charge brought or intended to be brought against the claimant in criminal proceedings;
- (b) pursuant to any sentence of a court in criminal proceedings; or
- (c) pursuant to any order for detention made by a court in criminal proceedings,

unless paragraph (2) applies.

(2) This paragraph applies where—

- (a) a penalty is imposed on the claimant at the conclusion of the proceedings referred to in paragraph (1); or
- (b) in the case of default of payment of a sum adjudged to be paid on conviction, a penalty is imposed in respect of such default.

(3) Notwithstanding section 18(4)(b) of the Act, a claimant (“C”) is not to be disqualified for receiving an employment and support allowance, for any period during which C is undergoing detention in legal custody after the conclusion of criminal proceedings if it is a period during which C is detained in a hospital or similar institution in Great Britain as a person suffering from mental disorder unless C satisfies either of the following conditions.

(4) The first condition is that—

- (a) C is being detained under section 45A or 47 of the [Mental Health Act 1983](#) (power of higher courts to direct hospital admission; removal to hospital of persons serving sentences of imprisonment etc); and

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- (b) in any case where there is in relation to C a release date within the meaning of section 50(3) of that Act, C is being detained on or before the day which the Secretary of State certifies to be that release date.
- (5) The second condition is that C is being detained under—
- (a) section 59A of the Criminal Procedure (Scotland) Act 1995 (hospital direction); or
- (b) section 136 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (transfer of prisoners for treatment of mental disorder).
- (6) For the purposes of this regulation—
- (a) “court” means any court in the United Kingdom, the Channel Islands or the Isle of Man or in any place to which the Colonial Prisoners Removal Act 1884 <sup>M113</sup> applies or any naval court-martial, army court-martial or air force court-martial within the meaning of the Courts-Martial (Appeals) Act 1968 <sup>M114</sup> or the Courts-Martial Appeal Court;
- (b) “hospital or similar institution” means any place (not being a prison, a young offender institution, a secure training centre, secure accommodation in a children's home or a remand centre, and not being at or in any such place) in which persons suffering from mental disorder are or may be received for care or treatment;
- (c) “penalty” means a sentence of imprisonment or detention under section 90 or 91 of the Powers of Criminal Courts (Sentencing) Act 2000 <sup>M115</sup>, a detention and training order under section 100 of that Act <sup>M116</sup>, a sentence of detention for public protection under section 226 of the Criminal Justice Act 2003 <sup>M117</sup> or an extended sentence under section 228 of that Act <sup>M118</sup> or, in Scotland, under section 205, 207 or 208 of the Criminal Procedure (Scotland) Act 1995 <sup>M119</sup>;
- (d) in relation to a person who is liable to be detained in Great Britain as a result of any order made under the Colonial Prisoners Removal Act 1884, references to a prison must be construed as including references to a prison within the meaning of that Act;
- (e) criminal proceedings against any person must be deemed to be concluded upon that person being found insane in those proceedings so that the person cannot be tried or that person's trial cannot proceed.
- (7) Where a claimant outside Great Britain is undergoing imprisonment or detention in legal custody and, in similar circumstances in Great Britain, the claimant would, by virtue of this regulation, not have been disqualified for receiving an employment and support allowance, the claimant is not disqualified for receiving that allowance by reason only of the imprisonment or detention.

#### **Marginal Citations**

**M112** Section 18(4) was amended by paragraph 26 of Schedule 3 to the Welfare Reform Act 2012.

**M113** 1884 c.31.

**M114** 1968 c.20.

**M115** 2000 c.6. Section 90 was amended by section 60 of the [Criminal Justice and Court Services Act 2000](#) (c.43). Section 91 was amended by paragraph 181 of Schedule 7 to the Criminal Justice and Court Services Act 2000, paragraph 43 of Schedule 6 to the [Sexual Offences Act 2003](#) (c.42), [section 289](#) of, and Schedule 7 and paragraph 110 of Schedule 32 to, the [Criminal Justice Act 2003](#) (c.44), [paragraph 7](#) of Schedule 1 to the [Violent Crime Reduction Act 2006](#) (c.38) and paragraph 56 of Schedule 4 to the [Criminal Justice and Immigration Act 2008](#) (c.4).

**M116** Section 100 was amended by paragraph 111 of Schedule 32 to the Criminal Justice Act 2003 and paragraph 184 of Schedule 7 to the Criminal Justice and Court Services Act 2000.

**M117** Section 226 was amended by section 14 of the Criminal Justice and Immigration Act 2008.

**M118** Section 228 was amended by section 16 of, and Schedule 28 to, the Criminal Justice and Immigration Act 2008.

**M119** 1995 c. 46. Section 205 was amended by section 2(1) of the [Convention Rights \(Compliance\) \(Scotland\) Act 2001 \(asp 7\)](#). Section 207 was amended by paragraph 4(3) of the [Violent Crime Reduction Act 2006 \(c.38\)](#) and section 6(4) of, and paragraph 21(25) of Schedule 1 to, the [Crime and Punishment \(Scotland\) Act 1997 \(c.48\)](#). Section 208 was amended by section 290(3) of the [Criminal Justice Act 2003 \(c.44\)](#), [section 10\(3\)](#) and (4) of the [Antisocial Behaviour etc. \(Scotland\) Act 2004 \(asp 8\)](#), [section 49](#) of the [Violent Crime Reduction Act 2006](#) and section 21(2) and (3) of the [Criminal Justice and Licensing \(Scotland\) Act 2010 \(asp 13\)](#).

### **Suspension of payment of an employment and support allowance during imprisonment**

**97.**—(1) Subject to the following provisions of this regulation, the payment of an employment and support allowance to any claimant—

- (a) which is excepted from the operation of section 18(4)(b) of the Act by virtue of the provisions of regulation 96(1), (3) or (7); or
- (b) which is payable otherwise than in respect of a period during which the claimant is undergoing imprisonment or detention in legal custody,

is suspended while that claimant is undergoing imprisonment or detention in legal custody.

(2) An employment and support allowance is not to be suspended while the claimant is liable to be detained in a hospital or similar institution, as defined in regulation 96(6), during a period for which in the claimant's case, the allowance is or would be excepted from the operation of section 18(4)(b) by virtue of the provisions of regulation 96(3).

(3) Where, by virtue of this regulation, payment of an employment and support allowance is suspended for any period, the period of suspension is not to be taken into account in calculating any period under the provisions of regulation 55 of the Claims and Payments Regulations 2013 (extinguishment of right to payment if payment is not obtained within the prescribed time).

## **PART 13**

### **Periods of less than a week**

#### **Entitlement for less than a week – amount of an employment and support allowance payable**

**98.**—(1) This regulation applies where the claimant is entitled to an employment and support allowance for a part-week and this regulation is subject to the following provisions of this Part.

(2) The amount payable by way of an employment and support allowance in respect of a part-week is to be calculated by applying the formula—

$$(N \times X) / 7$$

where—

X is the amount calculated in accordance with section 2(1) of the Act;

N is the number of days in the part-week.

(3) In this Part—

“part-week” means an entitlement to an employment and support allowance in respect of any period of less than a week; and

“relevant week” means the period of seven days determined in accordance with regulation 99.

### **Relevant week**

**99.**—(1) Where a part-week—

- (a) is the whole period for which an employment and support allowance is payable, or occurs at the beginning of an award, the relevant week is the period of seven days ending on the last day of that part-week; or
- (b) occurs at the end of an award, the relevant week is the period of seven days beginning on the first day of the part-week.

(2) Where a claimant has an award of an employment and support allowance and that claimant's benefit week changes, for the purpose of calculating the amounts of an employment and support allowance payable for the part-week beginning on the day after the last complete benefit week before the change and ending immediately before the change, the relevant week is the period of seven days beginning on the day after the last complete benefit week.

### **Modification in the calculation of income**

**100.** For the purposes of regulation 98 (entitlement for less than a week – amount of an employment and support allowance payable), a claimant's income is to be calculated in accordance with regulations 76 to 84 subject to the following changes—

- (a) any income which is due to be paid in the relevant week is to be treated as paid on the first day of that week;
- (b) any widow's benefit, training allowance, widowed parent's allowance, bereavement allowance, carer's allowance and any increase in disablement pension payable in accordance with Part 1 of Schedule 7 to the Contributions and Benefits Act (unemployability supplement) which is payable in the relevant week but not in respect of any day in the part-week is to be disregarded;
- (c) where the part-week occurs at the end of the claim—
  - (i) any income; or
  - (ii) any change in the amount of income of the same kind, which is first payable within the relevant week but not on any day in the part-week is to be disregarded;
- (d) where only part of the weekly balance of income is taken into account in the relevant week, the balance is to be disregarded.

### **Reduction in certain cases**

**101.**—(1) Where a disqualification is to be made in accordance with regulation 93 in respect of a part-week, the amount referred to in paragraph (2) is to be payable by way of an employment and support allowance in respect of that part-week.

(2) The amount mentioned in paragraph (1) is—

- (a) one seventh of the employment and support allowance which would have been paid for the part-week if—
  - (i) there was no disqualification under regulation 93; and
  - (ii) it was not a part-week; multiplied by
- (b) the number of days in the part-week in respect of which no disqualification is to be made in accordance with regulation 93.

### **Payment of an employment and support allowance for days of certain treatment**

**102.**—(1) Where a claimant is entitled to an employment and support allowance as a result of being treated as having limited capability for work in accordance with regulation 22, the amount payable is to be equal to one seventh of the amount of the employment and support allowance which would be payable in respect of a week in accordance with section 2(1) of the Act multiplied by N.

(2) In paragraph (1), N is the number of days in that week on which the claimant was receiving treatment referred to in regulation 22 or recovering from that treatment, but does not include any day during which the claimant does work.

Signed by authority of the Secretary of State for Work and Pensions.

Department for Work and Pensions  
25th February 2013

*Freud*  
Parliamentary Under-Secretary of State,

**Status:** Point in time view as at 29/04/2013.

**Changes to legislation:** There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2013. (See end of Document for details)

## SCHEDULE 1

Regulation 2

### Her Majesty's Forces

#### **PART 1**

##### Prescribed establishments and organisations

1. Any of the regular naval, military or air forces of the Crown.
2. Royal Fleet Reserve.
3. Royal Navy Reserve.
4. Royal Marines Reserve.
5. Army Reserve.
6. Territorial Army.
7. Royal Air Force Reserve.
8. Royal Auxiliary Air Force.
9. The Royal Irish Regiment, to the extent that its members are not members of any force falling within paragraph 1.

#### **PART 2**

##### Establishments and organisations of which Her Majesty's forces do not consist

**10.** Her Majesty's forces are not to be taken to consist of any of the establishments or organisations specified in Part 1 of this Schedule by virtue only of the employment in such establishment or organisation of the following persons—

- (a) any person who is serving as a member of any naval force of Her Majesty's forces and who (not having been an insured person under the National Insurance Act 1965<sup>M120</sup> and not having been a contributor under the Social Security Act 1975<sup>M121</sup> or not being a contributor under the Contributions and Benefits Act) locally entered that force at an overseas base;
- (b) any person who is serving as a member of any military force of Her Majesty's forces and who entered that force, or was recruited for that force outside the United Kingdom, and the depot of whose unit is situated outside the United Kingdom;
- (c) any person who is serving as a member of any air force of Her Majesty's forces and who entered that force, or was recruited for that force, outside the United Kingdom, and is liable under the terms of engagement to serve only in a specified part of the world outside the United Kingdom.

#### **Marginal Citations**

**M120** 1965 c.51.

**M121** 1975 c.14.

## SCHEDULE 2

Regulation 15(2) and (3)

## Assessment of Whether a Claimant has Limited Capability for Work

**PART 1**

## Physical Disabilities

<b>(1) Activity</b>	<b>(2) Descriptors</b>	<b>(3) Points</b>
1. Mobilising unaided by another person with or without a walking stick, manual wheelchair or other aid if such aid is normally or could reasonably be worn or used.	1(a) Cannot, unaided by another person, either: (i) mobilise more than 50 metres on level ground without stopping in order to avoid significant discomfort or exhaustion; or (ii) repeatedly mobilise 50 metres within a reasonable timescale because of significant discomfort or exhaustion.	15 9 9 6 0
	(b) Cannot, unaided by another person, mount or descend two steps even with the support of a handrail. (c) Cannot, unaided by another person, either: (i) mobilise more than 100 metres on level ground without stopping in order to avoid significant discomfort or exhaustion; or (ii) repeatedly mobilise 100 metres within a reasonable timescale because of significant discomfort or exhaustion. (d) Cannot, unaided by another person, either: (i) mobilise more than 200 metres on level ground without stopping in order to avoid significant discomfort or exhaustion; or (ii) repeatedly mobilise 200 metres within a reasonable timescale because of significant discomfort or exhaustion. (e) None of the above applies.	
2. Standing and sitting.	2(a) Cannot move between one seated position and another seated position which are located next to one another without receiving physical assistance from another person.	15 9 6
	(b) Cannot, for the majority of the time, remain at a work station: (i) standing unassisted by another person (even if free to move around); (ii) sitting (even in an adjustable chair); or (iii) a combination of paragraphs (i) and (ii), for more than 30 minutes, before needing to move away in order to avoid significant discomfort or exhaustion. (c) Cannot, for the majority of the time, remain at a work station: (i) standing unassisted by another person (even if free to move around); (ii) sitting (even in an adjustable chair); or (iii) a combination of paragraphs (i) and (ii), for more than an hour before needing to move away in order to avoid significant discomfort or exhaustion. (d) None of the above applies.	0

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|---|---|--------------------|
| 3. Reaching.  | 3(a) Cannot raise either arm as if to put something in the top pocket of a coat or jacket.                                    | 15<br>9            |
|   | (b) Cannot raise either arm to top of head as if to put on a hat.   | 6                  |
|   | (c) Cannot raise either arm above head height as if to reach for something.   | 0                  |
|   | (d) None of the above applies.  |                    |
| 4. Picking up and moving or transferring by the use of the upper body and arms.   | 4(a) Cannot pick up and move a 0.5 litre carton full of liquid.   | 15                 |
|   | (b) Cannot pick up and move a one litre carton full of liquid.  | 9                  |
|   | (c) Cannot transfer a light but bulky object such as an empty cardboard box.  | 6<br>0             |
|   | (d) None of the above applies.  |                    |
| 5. Manual dexterity.  | 5(a) Cannot press a button (such as a telephone keypad) with either hand or cannot turn the pages of a book with either hand. | 15<br>15<br>9      |
|   | (b) Cannot pick up a £1 coin or equivalent with either hand.  | 9                  |
|   | (c) Cannot use a pen or pencil to make a meaningful mark with either hand.  | 0                  |
|   | (d) Cannot single-handedly use a suitable keyboard or mouse.  |                    |
|   | (e) None of the above applies.  |                    |
| 6. Making self understood through speaking, writing, typing, or other means which are normally used, or could reasonably be used, unaided by another person.  | 6(a) Cannot convey a simple message, such as the presence of a hazard.  | 15<br>15           |
|   | (b) Has significant difficulty conveying a simple message to strangers.   | 6<br>0             |
|   | (c) Has some difficulty conveying a simple message to strangers.  |                    |
|   | (d) None of the above applies.  |                    |
| 7. Understanding communication by:<br>(i) verbal means (such as hearing or lip reading) alone;<br>(ii) non-verbal means (such as reading point print or Braille) alone; or<br>(iii) a combination of sub-paragraphs (i) and (ii),<br>using any aid that is normally or could reasonably be used, unaided by another person. | 7(a) Cannot understand a simple message, such as the location of a fire escape, due to sensory impairment.                    | 15<br>15           |
|   | (b) Has significant difficulty understanding a simple message from a stranger due to sensory impairment.                      | 6<br>0             |
|   | (c) Has some difficulty understanding a simple message from a stranger due to sensory impairment.                             |                    |
|   | (d) None of the above applies.  |                    |
| 8. Navigation and maintaining safety using a guide dog or other aid if either or both are normally used   | 8(a) Unable to navigate around familiar surroundings, without being accompanied by another person, due to sensory impairment. | 15<br>15<br>9<br>0 |

<p>or could reasonably be used.</p>	<p>(b) Cannot safely complete a potentially hazardous task such as crossing the road, without being accompanied by another person, due to sensory impairment.</p> <p>(c) Unable to navigate around unfamiliar surroundings, without being accompanied by another person, due to sensory impairment.</p> <p>(d) None of the above applies.</p>	
<p>9. Absence or loss of control whilst conscious leading to extensive evacuation of the bowel and/or bladder, other than enuresis (bed-wetting), despite the wearing or use of any aids or adaptations which are normally or could reasonably be worn or used.</p>	<p>9(a) At least once a month experiences:</p> <p>(i) loss of control leading to extensive evacuation of the bowel and/or voiding of the bladder; or</p> <p>(ii) substantial leakage of the contents of a collecting device, sufficient to require cleaning and a change in clothing.</p> <p>(b) The majority of the time is at risk of loss of control leading to extensive evacuation of the bowel and/or voiding of the bladder, sufficient to require cleaning and a change in clothing, if not able to reach a toilet quickly.</p> <p>(c) Neither of the above applies.</p>	<p>15</p> <p>6</p> <p>0</p>
<p>10. Consciousness during waking moments.</p>	<p>10(a) At least once a week, has an involuntary episode of lost or altered consciousness resulting in significantly disrupted awareness or concentration.</p> <p>(b) At least once a month, has an involuntary episode of lost or altered consciousness resulting in significantly disrupted awareness or concentration.</p> <p>(c) Neither of the above applies.</p>	<p>15</p> <p>6</p> <p>0</p>

## PART 2

### Mental, cognitive and intellectual function assessment

<b>(1) Activity</b>	<b>(2) Descriptors</b>	<b>(3) Points</b>
<p>11. Learning tasks.</p>	<p>11(a) Cannot learn how to complete a simple task, such as setting an alarm clock.</p> <p>(b) Cannot learn anything beyond a simple task, such as setting an alarm clock.</p> <p>(c) Cannot learn anything beyond a moderately complex task, such as the steps involved in operating a washing machine to clean clothes.</p> <p>(d) None of the above applies.</p>	<p>15</p> <p>9</p> <p>6</p> <p>0</p>
<p>12. Awareness of everyday hazards (such as boiling water or sharp objects).</p>	<p>12(a) Reduced awareness of everyday hazards leads to a significant risk of:</p> <p>(i) injury to self or others; or</p> <p>(ii) damage to property or possessions, such that the claimant requires supervision for the majority of the time to maintain safety.</p> <p>(b) Reduced awareness of everyday hazards leads to a significant risk of:</p> <p>(i) injury to self or others; or</p>	<p>15</p> <p>9</p> <p>6</p> <p>0</p>

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- (ii) damage to property or possessions, such that the claimant frequently requires supervision to maintain safety.
  - (c) Reduced awareness of everyday hazards leads to a significant risk of:
    - (i) injury to self or others; or
    - (ii) damage to property or possessions, such that the claimant occasionally requires supervision to maintain safety.
    - (d) None of the above applies.
13. Initiating and completing personal action (which means planning, organisation, problem solving, prioritising or switching tasks).
- 13(a) Cannot, due to impaired mental function, reliably initiate or complete at least two sequential personal actions. 15 9
  - (b) Cannot, due to impaired mental function, reliably initiate or complete at least two sequential personal actions for the majority of the time. 6 0
  - (c) Frequently cannot, due to impaired mental function, reliably initiate or complete at least two sequential personal actions.
  - (d) None of the above applies.
14. Coping with change.
- 14(a) Cannot cope with any change to the extent that day to day life cannot be managed. 15 9
  - (b) Cannot cope with minor planned change (such as a pre-arranged change to the routine time scheduled for a lunch break), to the extent that, overall, day to day life is made significantly more difficult. 6 0
  - (c) Cannot cope with minor unplanned change (such as the timing of an appointment on the day it is due to occur), to the extent that, overall, day to day life is made significantly more difficult.
  - (d) None of the above applies.
15. Getting about.
- 15(a) Cannot get to any place outside the claimant's home with which the claimant is familiar. 15 9
  - (b) Is unable to get to a specified place with which the claimant is familiar, without being accompanied by another person. 6 0
  - (c) Is unable to get to a specified place with which the claimant is unfamiliar without being accompanied by another person.
  - (d) None of the above applies.
16. Coping with social engagement due to cognitive impairment or mental disorder.
- 16(a) Engagement in social contact is always precluded due to difficulty relating to others or significant distress experienced by the claimant. 15 9 6
  - (b) Engagement in social contact with someone unfamiliar to the claimant is always precluded due to difficulty relating to others or significant distress experienced by the claimant. 0
  - (c) Engagement in social contact with someone unfamiliar to the claimant is not possible for the majority of the time due to difficulty relating to others or significant distress experienced by the claimant.
  - (d) None of the above applies.

17. Appropriateness of behaviour with other people, due to cognitive impairment or mental disorder.	17(a) Has, on a daily basis, uncontrollable episodes of aggressive or disinhibited behaviour that would be unreasonable in any workplace.	15 15 9
	(b) Frequently has uncontrollable episodes of aggressive or disinhibited behaviour that would be unreasonable in any workplace.	0
	(c) Occasionally has uncontrollable episodes of aggressive or disinhibited behaviour that would be unreasonable in any workplace.	
	(d) None of the above applies.	

SCHEDULE 3

Regulation 30(1)

Assessment of whether a claimant has limited capability for work-related activity

<i>Activity</i>	<i>Descriptors</i>
1. Mobilising unaided by another person with or without a walking stick, manual wheelchair or other aid if such aid is normally or could reasonably be worn or used.	1 Cannot either: (a) mobilise more than 50 metres on level ground without stopping in order to avoid significant discomfort or exhaustion; or (b) repeatedly mobilise 50 metres within a reasonable timescale because of significant discomfort or exhaustion.
2. Transferring from one seated position to another.	2 Cannot move between one seated position and another seated position located next to one another without receiving physical assistance from another person.
3. Reaching.	3 Cannot raise either arm as if to put something in the top pocket of a coat or jacket.
4. Picking up and moving or transferring by the use of the upper body and arms (excluding standing, sitting, bending or kneeling and all other activities specified in this Schedule).	4 Cannot pick up and move a 0.5 litre carton full of liquid.
5. Manual dexterity.	5 Cannot press a button (such as a telephone keypad) with either hand or cannot turn the pages of a book with either hand.
6. Making self understood through speaking, writing, typing, or other means which are normally, or could reasonably be, used unaided by another person.	6 Cannot convey a simple message, such as the presence of a hazard.
7. Understanding communication by: (i) verbal means (such as hearing or lip reading) alone;	7 Cannot understand a simple message, such as the location of a fire escape, due to sensory impairment.

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- (ii) non-verbal means (such as reading 16 point print or Braille) alone; or
- (iii) a combination of subparagraphs (i) and (ii), using any aid that is normally, or could reasonably, be used unaided by another person.

- |   |  |
|---|--|
| 8. Absence or loss of control whilst conscious leading to extensive evacuation of the bowel and/or voiding of the bladder, other than enuresis (bed-wetting), despite the wearing or use of any aids or adaptations which are normally or could reasonably be worn or used. | 8 At least once a week experiences:<br>(a) loss of control leading to extensive evacuation of the bowel and/or voiding of the bladder; or<br>(b) substantial leakage of the contents of a collecting device sufficient to require the individual to clean themselves and change clothing.  |
| 9. Learning tasks.  | 9 Cannot learn how to complete a simple task, such as setting an alarm clock, due to cognitive impairment or mental disorder.  |
| 10. Awareness of hazard.  | 10 Reduced awareness of everyday hazards, due to cognitive impairment or mental disorder, leads to a significant risk of:<br>(a) injury to self or others; or<br>(b) damage to property or possessions, such that the claimant requires supervision for the majority of the time to maintain safety.   |
| 11. Initiating and completing personal action (which means planning, organisation, problem solving, prioritising or switching tasks).   | 11 Cannot, due to impaired mental function, reliably initiate or complete at least two sequential personal actions.  |
| 12. Coping with change.   | 12 Cannot cope with any change, due to cognitive impairment or mental disorder, to the extent that day to day life cannot be managed.  |
| 13. Coping with social engagement, due to cognitive impairment or mental disorder.  | 13 Engagement in social contact is always precluded due to difficulty relating to others or significant distress experienced by the claimant.  |
| 14. Appropriateness of behaviour with other people, due to cognitive impairment or mental disorder.   | 14 Has, on a daily basis, uncontrollable episodes of aggressive or disinhibited behaviour that would be unreasonable in any workplace.   |
| 15. Conveying food or drink to the mouth.   | 15(a) Cannot convey food or drink to the claimant's own mouth without receiving physical assistance from someone else;<br>(b) Cannot convey food or drink to the claimant's own mouth without repeatedly stopping or experiencing breathlessness or severe discomfort;<br>(c) Cannot convey food or drink to the claimant's own mouth without receiving regular prompting given by someone else in the claimant's presence; or |

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- (d) Owing to a severe disorder of mood or behaviour, fails to convey food or drink to the claimant's own mouth without receiving:
- (i) physical assistance from someone else; or
  - (ii) regular prompting given by someone else in the claimant's presence.
16. Chewing or swallowing food or drink.
- 16(a) Cannot chew or swallow food or drink;
- (b) Cannot chew or swallow food or drink without repeatedly stopping or experiencing breathlessness or severe discomfort;
- (c) Cannot chew or swallow food or drink without repeatedly receiving regular prompting given by someone else in the claimant's presence; or
- (d) Owing to a severe disorder of mood or behaviour, fails to:
- (i) chew or swallow food or drink; or
  - (ii) chew or swallow food or drink without regular prompting given by someone else in the claimant's presence.
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## EXPLANATORY NOTE

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

These Regulations provide for a social security benefit to be known as an employment and support allowance, which replaces the existing benefit of the same name. The new benefit is for people who have a health condition or disability which limits their capability to work. People will only be able to claim the new benefit where they have made sufficient National Insurance contributions. People will no longer be able to claim employment and support allowance where they have low or no other income but have not made sufficient National Insurance contributions. Many rules for the existing benefit are replicated in these Regulations for the new benefit.

Most claimants will be required to serve an assessment phase which will normally last for 13 weeks from the start of the claim (regulations 5 to 7). During this period claimants will receive a rate of benefit that depends on whether they are aged under or over 25 years. Once the assessment phase is complete and subject to satisfying the assessment of “limited capability for work” (see Part 4) claimants will move onto the main phase of the benefit. Their entitlement will then consist of the basic rate – a flat rate of benefit, regardless of age – and, on top of this, a work-related activity or support component. Some claimants will be entitled to the work-related activity component and will be required to engage in “conditionality” (Part 7). Failure to engage can lead to the imposition of a reduction in benefit (Part 8). Claimants who demonstrate “limited capability for work-related activity” (Part 5) will be entitled to the support component instead of the work-related activity component, in addition to the basic rate. These claimants will be those with the most severe health conditions and will not be subject to any conditionality requirements.

Part 2 provides detailed provisions on when the assessment phase will end.

Part 3 deals with conditions of entitlement.

Part 4 deals with the determination of whether or not a claimant has limited capability for work. The assessment used to determine this is set out in Schedule 2. It also provides for the circumstances in which a claimant is to be treated as having or not having limited capability for work.

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Part 5 deals with the determination of whether or not a claimant has limited capability for work-related activity. The assessment used to determine this is set out in Schedule 3. It also provides for the circumstances in which a claimant is to be treated as having or not having limited capability for work-related activity.

Part 6 provides for the circumstances in which the work a claimant does affects the claimant's entitlement.

Part 7 makes provision in relation to the claimant's responsibilities. The claimant can be required to prepare for work and attend interviews in relation to work or work preparation. The provisions in Part 2 include details on which requirements apply to which claimants, how those requirements are met and circumstances in which they do not apply. Regulation 42 deals with the claimant's responsibilities where they are entitled to Universal Credit as well as an employment and support allowance. Regulations 44 and 45 contain provisions for accepting the claimant commitment which is usually a condition of entitlement.

Part 8 contains provisions relating to the reduction of benefit where a claimant fails to meet their responsibilities without good reason. This is known as a sanction. This includes the cases in which a sanction cannot be imposed, how long a sanction is to last and how much of the claimant's employment and support allowance will be sanctioned. There are also provisions for transferring sanctions to and from Universal Credit, for example where a claimant with a sanction ceases to be entitled to Universal Credit and becomes entitled to an employment and support allowance.

Part 9 specifies the amounts of employment and support allowance which are payable.

Part 10 deals with the calculation of a claimant's income and earnings.

Part 11 provides for supplementary provisions. This includes providing that a claimant must wait a number of days at the start of a period of limited capability for work before becoming entitled to ESA (regulation 85) and rules which enable two periods of limited capability for work separated by not more than 12 weeks to be linked together (regulation 86).

Part 12 provides for the circumstances in which a claimant may be disqualified from receiving an employment and support allowance and includes provision to deal with the situation where this would leave a person in hardship.

Part 13 contains details enabling the amount of an employment and support allowance to be calculated where the claimant is entitled for a period of less than a week.

A full impact assessment has not been published for these Regulations as they have no impact on the private sector or civil society organisations. An assessment has been made of the impact of the introduction of Universal Credit. The Welfare Reform Act 2012 abolishes income-related employment and support allowance as a consequence of the introduction of Universal Credit. That assessment is therefore relevant, in part, for these Regulations. Copies of that impact assessment may be obtained from the Better Regulation Unit of the Department for Work and Pensions, 2D Caxton House, Tothill Street, London SW1 9NA or from the DWP website: <http://www.dwp.gov.uk/policy/welfare-reform/legislation-and-key-documents/welfare-reform-act-2012/impact-assessments-and-equality>.

**Status:**

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**Changes to legislation:**

There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2013.