

---

STATUTORY INSTRUMENTS

---

**2008 No. 794**

**The Employment and Support Allowance Regulations 2008**

**PART 1**

**GENERAL**

**Citation and commencement**

1. These Regulations may be cited as the Employment and Support Allowance Regulations 2008 and shall come into force—

- (a) subject to paragraphs (b) and (c), on 27th October 2008;
- (b) in relation to regulation 128(6)(a) and paragraph 15(2) of Schedule 6, so far as it applies to a maintenance calculation, in relation to a particular case, on the day on which paragraph 11(20)(d) of Schedule 3 to the 2000 Act comes into force for the purposes of that type of case;
- (c) in relation to regulation 82 and paragraph 4 of Schedule 8, so far as it applies to additional statutory paternity pay, on the day on which regulations made under or by virtue of sections 171ZEA to 171ZEE of the Contributions and Benefits Act <sup>F1</sup> come into force.

**Textual Amendments**

**F1** 1992 c. 4. Sections 171ZEA to 171ZEE were inserted by sections 6 to 10 of the [Work and Families Act 2006](#) (c. 18).

**Interpretation**

2.—(1) In these Regulations—

“Abbeyfield Home” means an establishment run by the Abbeyfield Society including any body corporate or incorporate which is affiliated to that Society;

“the Act” means the Welfare Reform Act 2007 <sup>F2</sup>;

<sup>F3</sup> ...

“adoption leave” 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>F4</sup>;

“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,

---

*Status: Point in time view as at 02/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008. (See end of Document for details)*

---

but does not include a person who is in employment as a member of Her Majesty's forces;  
 “Armed Forces and Reserve Forces Compensation Scheme” means the scheme established under section 1(2) of the Armed Forces (Pensions and Compensation) Act 2004 <sup>F5</sup>;

“attendance allowance” means—

- (a) an attendance allowance under section 64 of the Contributions and Benefits Act;
- (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>F6</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;

[<sup>F7</sup>“basic rate” has the same meaning as in the Income Tax Act 2007 (see section 989 of that Act);]

“benefit Acts” means the Contributions and Benefits Act, Jobseekers Act and Part 1 of the Act;

“benefit week” means a period of 7 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 7 days ending on the day before the first day of the first benefit week following the date of claim or the last day on which an employment and support allowance is paid if it is in payment for less than a week;

“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;

“care home” in England and Wales has the meaning assigned to it by section 3 of the Care Standards Act 2000<sup>F8</sup>, and in Scotland means a care home service within the meaning assigned to it by [<sup>F9</sup>paragraph 2 of schedule 12 to the Public Services Reform (Scotland) Act 2010];

“carer's allowance” means an allowance under section 70 of the Contributions and Benefits Act;

[<sup>F10</sup>“the Caxton Foundation” means the charitable trust of that name established on 28th March 2011 out of funds provided by the Secretary of State for the benefit of certain persons suffering from hepatitis C and other persons eligible for payment in accordance with its provisions;]

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

“child tax credit” means a child tax credit under section 8 of the Tax Credits Act;

“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;

“college of further education” means a college of further education within the meaning of Part 1 of the Further and Higher Education (Scotland) Act 1992<sup>F11</sup>;

“concessionary payment” means a payment made under arrangements made by the Secretary of State with the consent of the Treasury which is charged<sup>F12</sup>... to a Departmental Expenditure Vote to which payments of benefit or tax credits under the benefit Acts or the Tax Credits Act are charged;

“confinement” has the meaning given to it by section 171(1) of the Contributions and Benefits Act<sup>F13</sup>;

“co-ownership scheme” means a scheme under which a dwelling is let by a housing association and the tenant, or the tenant's personal representative, will, under the terms of the tenancy agreement or of the agreement under which the tenant became a member of the association, be entitled, on that tenant ceasing to be a member and subject to any condition stated in either agreement, to a sum calculated by reference directly or indirectly to the value of the dwelling and “co-ownership agreement” will be construed accordingly;

“councillor” means—

- (a) in relation to England and Wales, a member of a London borough council, a county 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>F14</sup>;

“councillor's allowance” means—

- (a) in England or Wales, an allowance under or by virtue of—
  - (i) section 173 or 177 of the Local Government Act 1972<sup>F15</sup>; or
  - (ii) a scheme made by virtue of section 18 of the Local Government and Housing Act 1989<sup>F16</sup>,other than such an allowance as is mentioned in section 173(4) of the Local Government Act 1972; or
- (b) 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) sections 11 and 16 of the Local Governance (Scotland) Act 2004<sup>F17</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 if, but 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 02/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008. (See end of Document for details)*

---

“Crown tenant” means a person who occupies a dwelling under a tenancy or licence where the interest of the landlord belongs to Her Majesty in right of the Crown or to a government department or is held in trust for Her Majesty for the purposes of a government department, except (in the case of an interest belonging to Her Majesty in right of the Crown) where the interest is under the management of the Crown Estate Commissioners;

“dependent child” 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;

“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;

“disability living allowance” means a disability living allowance under section 71 of the Contributions and Benefits Act;

“doctor” means a registered medical practitioner, or in the case of a medical practitioner practising outside the United Kingdom of whom the Secretary of State may request a medical opinion, a person registered or recognised as such in the country in which the person undertakes medical practice;

“dwelling” means any residential accommodation, whether or not consisting of the whole or part of a building and whether or not comprising separate and self-contained premises;

“dwelling occupied as the home” means the dwelling together with any garage, garden and outbuildings, normally occupied by the claimant as the claimant's home including any premises not so occupied which it is impracticable or unreasonable to sell separately, in particular, in Scotland, any croft land on which the dwelling is situated;

“Eileen Trust” means the charitable trust of that name established on 29th March 1993 out of funds provided by the Secretary of State for the benefit of persons eligible for payment in accordance with its provisions;

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

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

F18 ...

“employment zone” means an area within Great Britain designated for the purposes of section 60 of the Welfare Reform and Pensions Act 1999 <sup>F19</sup> and an “employment zone programme” means a programme established for such an area or areas designed to assist claimants for a jobseeker's allowance to obtain sustainable employment;

[<sup>F20</sup>“enactment” includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament;]

“failure determination” has the meaning given by regulation 63(1);

“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>F21</sup>“First-tier Tribunal” has the meaning given by section 3(1) of the Tribunals, Courts and Enforcement Act 2007;]

“full-time student” has the meaning prescribed in regulation 131 (students: interpretation);

“the Fund” means monies made available from time to time by the Secretary of State for the benefit of persons eligible for payment in accordance with the provisions of a scheme established by the Secretary of State on 24th April 1992 or, in Scotland, on 10th April 1992;

“guaranteed income payment” means a payment made under article 14(1)(b) or 21(1)(a) of the Armed Forces and Reserve Forces (Compensation Scheme) Order 2005 <sup>F22</sup>;

[<sup>F23</sup>“hardship payment” means an income-related employment and support allowance payable at a reduced rate in accordance with the provisions of regulation 64D;]

“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>F24</sup>;

“Health Service Act” means the National Health Service Act 2006 <sup>F25</sup>;

“Health Service (Wales) Act” means the National Health Service (Wales) Act 2006 <sup>F26</sup>;

“housing association” has the meaning given to it by section 1(1) of the Housing Associations Act 1985 <sup>F27</sup>;

“housing benefit expenditure” means expenditure in respect of which housing benefit is payable as specified in regulation 12(1) of the Housing Benefit Regulations 2006 <sup>F28</sup> but does not include any such expenditure in respect of which an additional amount is applicable under regulation 67(1)(c) or 68(1)(d)(housing costs);

“Immigration and Asylum Act” means the Immigration and Asylum Act 1999 <sup>F29</sup>;

“income-related benefits” means the benefits listed in section 123(1) of the Contributions and Benefits Act;

“Income Support Regulations” means the Income Support (General) Regulations 1987 <sup>F30</sup>;

[<sup>F31</sup>“independent hospital”—

- (a) in England, means a hospital as defined by section 275 of the National Health Service Act 2006 that is not a health service hospital as defined by that section;
- (b) in Wales, has the meaning assigned to it by section 2 of the Care Standards Act 2000; and
- (c) [<sup>F32</sup>in Scotland, means an independent health care service as defined in section 10F(1)(a) and (b) of the National Health Service (Scotland) Act 1978;]

<sup>F33</sup> ...

<sup>F33</sup> ...

<sup>F33</sup> ...

“the Independent Living Fund (2006)” means the Trust of that name established by a deed dated 10th April 2006 and made between the Secretary of State for Work and Pensions of the one part and Margaret Rosemary Cooper, Michael Beresford Boyall and Marie Theresa Martin of the other part;

<sup>F33</sup> ...

“Jobseekers Act” means the Jobseekers Act 1995;

---

*Status: Point in time view as at 02/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008. (See end of Document for details)*

---

“Jobseeker's Allowance Regulations” means the Jobseeker's Allowance Regulations 1996 <sup>F34</sup>;  
 “last day of the course” means the last day of the final academic term of the course in which the student is enrolled;

“limited capability for work assessment” means the assessment of whether a person has limited capability for work as set out in regulation 19(2) and in Schedule 2;

[<sup>F35</sup>“local welfare provision” means occasional financial or other assistance given by a local authority, the Scottish Ministers or the Welsh Ministers, or a person authorised to exercise any function of, or provide a service to, them, to or in respect of individuals for the purpose of—

- (a) meeting, or helping to meet, an immediate short term need—
  - (i) arising out of an exceptional event, or exceptional circumstances; and
  - (ii) that requires to be met in order to avoid a risk to the well-being of an individual; or
- (b) enabling individuals to establish or maintain a settled home, where those individuals have been or, without the assistance, might otherwise be—
  - (i) in prison, hospital, a residential care establishment or other institution; or
  - (ii) homeless or otherwise living an unsettled way of life;]

“London Bombings Relief Charitable Fund” means the company limited by guarantee (number 5505072) and registered charity of that name established on 11th July 2005 for the purpose of (amongst other things) relieving sickness, disability or financial need of victims (including families or dependants of victims) of the terrorist attacks carried out in London on 7th July 2005;

<sup>F36</sup> ...

“long tenancy” means a tenancy granted for a term of years certain exceeding twenty one years, whether or not the tenancy is, or may become, terminable before the end of that term by notice given by or to the tenant or by re-entry, forfeiture (or, in Scotland, irritancy) or otherwise and includes a lease for a term fixed by law under a grant with a covenant or obligation for perpetual renewal unless it is a lease by sub-demise from one which is not a long tenancy;

[<sup>F37</sup>“MFET Limited” means the company limited by guarantee (number 7121661) of that name, established for the purpose in particular of making payments in accordance with arrangements made with the Secretary of State to persons who have acquired HIV as a result of treatment by the NHS with blood or blood products;]

“Macfarlane (Special Payments) Trust” means the trust of that name, established on 29th January 1990 partly out of funds provided by the Secretary of State, for the benefit of certain persons suffering from haemophilia;

“Macfarlane (Special Payments) (No. 2) Trust” means the trust of that name, established on 3rd May 1991 partly out of funds provided by the Secretary of State, for the benefit of certain persons suffering from haemophilia and other beneficiaries;

“Macfarlane Trust” means the charitable trust, established partly out of funds provided by the Secretary of State to the Haemophilia Society, for the relief of poverty or distress among those suffering from haemophilia;

“main phase employment and support allowance” means an employment and support allowance where the calculation of the amount payable in respect of the claimant includes a component under section 2(1)(b) or 4(2)(b) of the Act;

[<sup>F38</sup>“the Mandatory Work Activity Scheme” means a scheme within section 17A of the Jobseekers Act 1995, known by that name and provided pursuant to arrangements made by the Secretary of State that is designed to provide work or work-related activity for up to 30

hours per week over a period of four consecutive weeks with a view to assisting claimants to improve their prospects of obtaining employment;]

“mariner” means a person who is or has been in employment under a contract of service either as a master or 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 her crew or any passengers or cargo or mails 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 her voyage;

but does not include a person who is in employment as a member of Her Majesty's forces;

“maternity allowance period” has the meaning it has in section 35(2) of the Contributions and Benefits Act;

“medical evidence”<sup>F39</sup>, except in regulation 32A,] 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;

“Medical Evidence Regulations” means the Social Security (Medical Evidence) Regulations 1976<sup>F40</sup>;

<sup>F41</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 who gives full pay service,

but does not include any such person while absent on desertion;

“mobility supplement” means any supplement under article 20 of the Naval, Military and Air Forces Etc. (Disablement and Death) Service Pensions Order 2006<sup>F42</sup> including such a supplement by virtue of any other scheme or order or under article 25A of the Personal Injuries (Civilians) Scheme 1983<sup>F43</sup>;

[<sup>F44</sup>“National Minimum Wage” means the rate of the national minimum wage specified in regulation 11 of the National Minimum Wage Regulations 1999 (rate of the national minimum wage);]

“net earnings” means such earnings as are calculated in accordance with regulation 96;

“net profit” means such profit as is calculated in accordance with regulation 98;

“New Deal options” means the employment programmes specified in regulation 75(1)(a)(ii) of the Jobseeker's Allowance Regulations and the training scheme specified in regulation 75(1)(b)(ii) of those Regulations;

“non-dependant” has the meaning prescribed in regulation 71;

“non-dependant deduction” means a deduction that is to be made under regulation 67(1)(c) (prescribed amounts) and paragraph 19 of Schedule 6 (housing costs);

---

*Status: Point in time view as at 02/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008. (See end of Document for details)*

---

“occupational pension” 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;

“occupational pension scheme” has the meaning given by section 1 of the Pension Schemes Act 1993 <sup>F45</sup>;

“ordinary clothing or footwear” means clothing or footwear for normal daily use, but does not include school uniforms, or clothing or footwear used solely for sporting activities;

“partner” means where a claimant—

- (a) is a member of a couple, the other member of that couple;
- (b) 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;

“passenger” means any person carried on a ship except—

- (a) a person employed or engaged in any capacity on board the ship on the business of the ship; or
- (b) a person on board the ship either in pursuance of the 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;

[<sup>F46</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 or on additional paternity leave by virtue of section 80AA or 80BB of that Act;]

“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;

“pension fund holder” means in relation to a personal pension scheme or an occupational pension scheme, the trustees, managers or scheme administrators, as the case may be, of the scheme concerned;

“pensionable age” has the meaning given by the rules in paragraph 1 of Schedule 4 to the Pensions Act 1995 <sup>F47</sup>;

“period of limited capability for work” means [<sup>F48</sup>except in paragraph (5), a period throughout which a person has, or is treated as having, limited capability for work, and does not include a period which is outside the prescribed time for claiming as specified in regulation 19 of the Social Security (Claims and Payments) Regulations 1987];

“period of study” means the period beginning with the date on which a person starts attending or undertaking a course of study and ending with the last day of the course or such earlier date (if any) as that person finally abandons it or is dismissed from it;

“personal pension scheme” means—

- (a) a personal pension scheme as defined by section 1 of the Pension Schemes Act 1993 <sup>F49</sup>;
- (b) an annuity contract or trust scheme approved under section 620 or 621 of the Income and Corporation Taxes Act 1988 <sup>F50</sup> or a substituted contract within the meaning of section 622(3) of that Act 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>F51</sup>;
- (c) a personal pension scheme approved under Chapter 4 of Part 14 of the Income and Corporation Taxes Act 1988 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;



“policy of life insurance” means any instrument by which the payment of money is assured on death (except death by accident only) or the happening of any contingency dependent on human life, or any instrument evidencing a contract which is subject to payment of premiums for a term dependent on human life;

“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;

[<sup>F52</sup>“public authority” includes any person certain of whose functions are functions of a public nature;]

[<sup>F52</sup>“the qualifying age for state pension credit” means—

- (a) in the case of a woman, pensionable age, and
- (b) in the case of a man, the age which is pensionable age in the case of a woman born on the same day as the man;]

“qualifying person” means a person in respect of whom payment has been made from the Fund, the Eileen Trust<sup>F53</sup>, MFET Limited], the Skipton Fund<sup>F54</sup>, the Caxton Foundation] or the London Bombings Relief Charitable Fund;

“qualifying remunerative work” has the meaning given by Part 1 of the Tax Credits Act;

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

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

<sup>F55</sup> ...

“relevant enactment” means the Army Act 1955<sup>F56</sup>, the Air Force Act 1955<sup>F57</sup>, the Naval

[<sup>F58</sup>“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>F59</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) any disease, food poisoning, infection, infectious disease or notifiable disease to which regulation 9 (powers in respect of persons leaving aircraft) of the Public Health (Aircraft) Regulations 1979<sup>F60</sup> applies or to which regulation 10 (powers in respect of certain persons on ships) of the Public Health (Ships) Regulations 1979<sup>F61</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, 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.]

Discipline Act 1957<sup>F62</sup>, the Matrimonial Proceedings Children Act 1958<sup>F63</sup>, the Social Work (Scotland) Act 1968<sup>F64</sup>, the Family Law Reform Act 1969<sup>F65</sup>, the Children and Young Persons

*Status: Point in time view as at 02/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008. (See end of Document for details)*

Act 1969<sup>F66</sup>, the Matrimonial Causes Act 1973<sup>F67</sup>, the Domestic Proceedings and Magistrates' Courts Act 1978<sup>F68</sup>, [<sup>F69</sup>the Adoption and Children (Scotland) Act 2007], the Family Law Act 1986<sup>F70</sup>, the Children Act 1989<sup>F71</sup> and the Adoption and Children Act 2002<sup>F72</sup>;

“remunerative work” has the meaning prescribed in regulations 41 and 42 except in relation to Schedules 6 and 7;

“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;

“self-employment route” means assistance in pursuing self-employed earner's employment whilst participating in—

- (a) an employment zone programme; or
- (b) a programme provided or other arrangements made under section 2 of the Employment and Training Act 1973<sup>F73</sup> (functions of the Secretary of State) or section 2 of the Enterprise and New Towns (Scotland) Act 1990<sup>F74</sup> (functions in relation to training for employment etc.);

[<sup>F52c</sup>“service user group” means a group of individuals that is consulted by or on behalf of—

- (a) a Health Board, Special Health Board or the Agency in consequence of a function under section 2B of the National Health Service (Scotland) Act 1978,
- (b) a landlord authority in consequence of a function under section 105 of the Housing Act 1985,
- (c) a public authority in consequence of a function under section 49A of the Disability Discrimination Act 1995,
- (d) a best value authority in consequence of a function under section 3 of the Local Government Act 1999,
- (e) a local authority landlord or registered social landlord in consequence of a function under section 53 of the Housing (Scotland) Act 2001,
- (f) a relevant English body or a relevant Welsh body in consequence of a function under section 242 of the National Health Service Act 2006,
- (fa) [<sup>F75</sup>the National Institute for Health and Care Excellence in consequence of a function under Part 8 of the Health and Social Care Act 2012,]
- (fb) [<sup>F75</sup>a clinical commissioning group in consequence of a function under section 14Z2 of the National Health Service Act 2006,]
- (fc) [<sup>F75</sup>the National Health Service Commissioning Board in consequence of a function under section 13Q of the National Health Service Act 2006,]
- (g) a Local Health Board in consequence of a function under section 183 of the National Health Service (Wales) Act 2006,
- (h) the Commission or the Office of the Health Professions Adjudicator in consequence of a function under sections 4, 5, or 108 of the Health and Social Care Act 2008,
- (i) the regulator or a [<sup>F76</sup>private registered provider of social housing] in consequence of a function under sections 98, 193 or 196 of the Housing and Regeneration Act 2008, or
- (j) a public or local authority in Great Britain in consequence of a function conferred under any other enactment,

for the purposes of monitoring and advising on a policy of that body or authority which affects or may affect persons in the group, or of monitoring or advising on services provided by that body or authority which are used (or may potentially be used) by those persons;]

“single claimant” means a claimant who neither has a partner nor is a lone parent [<sup>F77</sup>or a person who has no partner and who is responsible for and a member of the same household as a young person];

“Skipton Fund” means the ex-gratia payment scheme administered by the Skipton Fund Limited, incorporated on 25th March 2004, for the benefit of certain persons suffering from hepatitis C and other persons eligible for payment in accordance with the scheme's provisions;

“sports award” means an award made by one of the Sports Councils named in section 23(2) of the National Lottery etc. Act 1993 <sup>F78</sup> out of sums allocated to it for distribution under that section;

<sup>F33</sup>  
...

[<sup>F79</sup>“state pension credit” means a state pension credit under the State Pension Credit Act 2002;]

“subsistence allowance” means an allowance which an employment zone contractor has agreed to pay to a person who is participating in an employment zone programme;

“the Tax Credits Act” means the Tax Credits Act 2002 <sup>F80</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 6 months;

“training” means—

- (a) training in pursuance of arrangements made under section 2(1) of the Employment and Training Act 1973 or section 2(3) of the Enterprise and New Towns (Scotland) Act 1990; 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 for Work and Pensions, [<sup>F81</sup>Skills Development Scotland,] Scottish Enterprise or Highlands and Islands Enterprise, the <sup>F82</sup>[<sup>F83</sup>..., 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 so provided or approved by or on behalf of the Secretary of State for Work and Pensions, [<sup>F81</sup>Skills Development Scotland,] Scottish Enterprise or 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;

*Status: Point in time view as at 02/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008. (See end of Document for details)*

“war disablement pension” means any [<sup>F84</sup>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>F85</sup>;

“war widow's pension” [<sup>F86</sup>means any pension or allowance] payable to a woman as a widow under an instrument specified in section 639(2) of the Income Tax (Earnings and Pensions) Act 2003 in respect of the death or disablement of any person;

“war widower's pension” [<sup>F86</sup>means any pension or allowance] payable to a man as a widower or to a surviving civil partner under an instrument specified in section 639(2) of the Income Tax (Earnings and Pensions) Act 2003 in respect of the death or disablement of any person;

“water charges” means—

- (a) as respects England and Wales, any water and sewerage charges under Chapter 1 of Part 5 of the Water Industry Act 1991<sup>F87</sup>;
- (b) as respects Scotland, any water and sewerage charges under Part 2 of the Local Government etc. (Scotland) Act 1994<sup>F88</sup>;

in so far as such charges are in respect of the dwelling which a person occupies as the home;

“week” means a period of 7 days except in relation to regulation 26;

<sup>F89</sup> ...

“working day” means any day except for a Saturday, Sunday, Christmas Day, Good Friday or bank holiday under the Banking and Financial Dealings Act 1971<sup>F90</sup> in England, Wales or Scotland;

“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>F91</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).

- (2) In <sup>F92</sup>... paragraph 15(2) of Schedule 6 (housing costs – linking rule)—

“child support maintenance” means such periodical payments as are referred to in section 3(6) of the Child Support Act 1991<sup>F93</sup> and includes any payments made by the Secretary of State in lieu of such payments;

“the 1991 Act” means the Child Support Act 1991;

“the 2000 Act” means the Child Support, Pensions and Social Security Act 2000<sup>F94</sup>;

“maintenance assessment” has the same meaning as in the 1991 Act by virtue of section 54 of that Act as it has effect apart from the 2000 Act;

“maintenance calculation” has the same meaning as in the 1991 Act by virtue of section 54 of that Act as amended by the 2000 Act.

(3) 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.

- (4) For the purposes of paragraph 5 of Schedule 1 to the Act, “week” means a period of 7 days.

[<sup>F95</sup>(5) 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.]

[<sup>F96</sup>(6) Subject to paragraph (7), for the purposes of section 24(3A)(b) of the Act, a lone parent is to be treated as responsible for, and a member of the same household as, a person under the age of 16 only where the circumstances set out in regulation 156 apply.

(7) For the purposes of sections 12 and 13 of the Act, and regulations made under those sections, a lone parent is to be treated as responsible for, and a member of the same household as a child only where the lone parent would be treated as responsible for and a member of the same household as such a child under regulations 15 and 16 of the Income Support (General) Regulations 1987, if references in those Regulations to income support were to employment and support allowance.]

### Textual Amendments

- F2** 2007 c. 5.
- F3** Words in reg. 2(1) omitted (1.6.2011) by virtue of [The Employment and Support Allowance \(Work-Related Activity\) Regulations 2011 \(S.I. 2011/1349\)](#), regs. 1, **10**
- F4** 1996 c. 18. Sections 75A and 75B were inserted by section 3 of the [Employment Act 2002 \(c. 22\)](#).
- F5** 2004 c. 32.
- F6** S.I. 1983/686. Article 14 was substituted by S.I. 2001/420, **article 15** was amended by S.I. 2001/420 and article 16 was amended by S.I. 1984/1675 and S.I. 2001/420.
- F7** Words in reg. 2(1) inserted (27.10.2008) by [The Employment and Support Allowance \(Miscellaneous Amendments\) Regulations 2008 \(S.I. 2008/2428\)](#), regs. 1(2), **3(a)**
- F8** 2000 c. 14.
- F9** Words in reg. 2(1) substituted (28.10.2011) by [The Public Services Reform \(Scotland\) Act 2010 \(Consequential Modifications of Enactments\) Order 2011 \(S.I. 2011/2581\)](#), art. 1(2)(b), **Sch. 2 para. 58(a)**
- F10** Words in reg. 2(1) inserted (31.10.2011) by [The Social Security \(Miscellaneous Amendments\) \(No. 3\) Regulations 2011 \(S.I. 2011/2425\)](#), regs. 1(2), **23(2)(a)**
- F11** 1992 c. 37.
- F12** Words in reg. 2(1) omitted (5.1.2009) by virtue of [The Social Security \(Miscellaneous Amendments\) \(No. 7\) Regulations 2008 \(S.I. 2008/3157\)](#), regs. 1(1), **11(2)(a)**
- F13** 1992 c. 4. Section 171(1) was amended by the [Still-Birth \(Definition\) Act 1992 \(c. 29\)](#), **sections 2(1)** and 4(2).
- F14** 1994 c. 39.
- F15** 1972 c. 70. Section 173 was amended by the [Local Government, Planning and Land Act 1980 \(c. 65\)](#), **section 24(1)** and by the [Local Government and Housing Act 1989 \(c. 42\)](#), section 194 and Schedule 11, paragraph 26 and S.I. 1977/1710, **article 3(c)**. Section 177(1A) was inserted by the [School Standards and Framework Act 1998 \(c. 31\)](#), **section 140(1)** and Schedule 30, paragraph 3(3) and amended by the [Education and Inspections Act 2006 \(c. 40\)](#), **sections 30** and 184 and Schedule 3, paragraph 1 and Schedule 18, Part 3. Section 177(2) was substituted by, and section 177(4) was amended by the [Local Government and Housing Act 1989 \(c. 42\)](#), **section 194** and Schedule 11, paragraph 28(3) and (4), respectively.
- F16** 1989 c. 42. Section 18(1) was amended by the [Local Government Act 2000 \(c. 22\)](#) (“the 2000 Act”), section 99(3) and (4). Section 18(1A) was inserted by the 2000 Act, section 99(3) and (4). Section 18(2A) was inserted by the 2000 Act, section 99(3) and (5). Section 18(3) was amended by the 2000 Act, section 99(3) and (6). Section 18(3A) to (3G) were inserted by the 2000 Act, section 99(3) and (7). Section 18(4) was amended by the 2000 Act, section 99(3) and (8). Section 18(5) was amended by the [Police and Magistrates' Courts Act 1994 \(c. 29\)](#), **section 43** and Schedule 4, Part 1, paragraph 37 and the [Education Act 1996 \(c. 56\)](#), **section 582(1)** and Schedule 37, paragraph 97 and the 2000 Act, section 99(3) and (9).
- F17** 2004 asp. 9.
- F18** Words in reg. 2 omitted (12.2.2013) by virtue of [The Jobseeker's Allowance \(Schemes for Assisting Persons to Obtain Employment\) Regulations 2013 \(S.I. 2013/276\)](#), regs. 1, **15(a)**
- F19** 1999 c. 30.

*Status: Point in time view as at 02/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008. (See end of Document for details)*

- F20** Words in reg. 2(1) substituted (for specified purposes and with effect in accordance with reg. 1(2) of the amending S.I.) by The Social Security (Miscellaneous Amendments) (No. 4) Regulations 2009 (S.I. 2009/2655), regs. 1(2)(d), **11(2)(a)**
- F21** Words in reg. 2(1) inserted (11.4.2011) by The Social Security (Miscellaneous Amendments) Regulations 2011 (S.I. 2011/674), regs. 1(4), **16(2)(a)**
- F22** S.I. 2005/439.
- F23** Words in reg. 2(1) inserted (3.12.2012) by The Employment and Support Allowance (Sanctions) (Amendment) Regulations 2012 (S.I. 2012/2756), regs. 1(1), **2** (with reg. 1(2))
- F24** 1999 c. 8. Section 60(1) was amended by the National Health Service Reform and Health Care Professions Act 2002 (c. 17), **section 26(9)**. Section 60(2) was amended by S.I. 2002/253, **article 54(3)** and Schedule 5, paragraph 16(a) and S.I. 2002/254, **article 48(3)** and Schedule 4, paragraph 8(a).
- F25** 2006 c. 41.
- F26** 2006 c. 42.
- F27** 1985 c. 69.
- F28** S.I. 2006/213.
- F29** 1999 c. 33.
- F30** S.I. 1987/1967.
- F31** Words in reg. 2(1) substituted (1.10.2010) by The Health and Social Care Act 2008 (Miscellaneous Consequential Amendments) Order 2010 (S.I. 2010/1881), arts. 1(1), **25**
- F32** Words in reg. 2(1) substituted (28.10.2011) by The Public Services Reform (Scotland) Act 2010 (Consequential Modifications of Enactments) Order 2011 (S.I. 2011/2581), art. 1(2)(b), **Sch. 2 para. 58(b)**
- F33** Words in reg. 2(1) omitted (27.10.2008) by virtue of The Employment and Support Allowance (Miscellaneous Amendments) Regulations 2008 (S.I. 2008/2428), regs. 1(2), **3(b)**
- F34** S.I. 1996/1207.
- F35** Words in reg. 2(1) inserted (2.4.2013) by The Social Security (Miscellaneous Amendments) Regulations 2013 (S.I. 2013/443), regs. 1, **9(2)**
- F36** Words in reg. 2(1) omitted (31.10.2011) by virtue of The Social Security (Work-focused Interviews for Lone Parents and Partners) (Amendment) Regulations 2011 (S.I. 2011/2428), regs. 1, **5(2)(a)(i)**
- F37** Words in reg. 2(1) inserted (6.4.2010) by The Social Security (Miscellaneous Amendments) (No. 2) Regulations 2010 (S.I. 2010/641), regs. 1(1), **12(2)**
- F38** Words in reg. 2(1) inserted (5.8.2011) by The Social Security (Miscellaneous Amendments) (No. 2) Regulations 2011 (S.I. 2011/1707), regs. 1, **4(2)(3)**
- F39** Words in reg. 2(1) inserted (11.4.2011) by The Social Security (Miscellaneous Amendments) Regulations 2011 (S.I. 2011/674), regs. 1(4), **16(2)(b)**
- F40** S.I. 1976/615.
- F41** Words in reg. 2(1) omitted (28.6.2010) by virtue of The Social Security (Miscellaneous Amendments) (No. 3) Regulations 2010 (S.I. 2010/840), regs. 1, **9(2)(a)(i)**
- F42** S.I. 2006/606.
- F43** S.I. 1983/686.
- F44** Words in reg. 2(1) inserted (11.4.2011) by The Social Security (Miscellaneous Amendments) Regulations 2011 (S.I. 2011/674), regs. 1(4), **16(2)(c)**
- F45** 1993 c. 48. Section 1(1) was amended by the Pensions Act 2004 (c. 35), **section 239(1)** and (3), S.I. 1999/1820, **article 4** and Schedule 2, Part 1, paragraph 113(a) and (b) and S.I. 2007/3014, **regulation 2(b)** and paragraph 1(a) of the Schedule.
- F46** Words in reg. 2(1) inserted (1.4.2012) by The Social Security (Miscellaneous Amendments) Regulations 2012 (S.I. 2012/757), regs. 1(4), **6**
- F47** 2005 c. 26.
- F48** Words in reg. 2(1) substituted (28.6.2010) by The Social Security (Miscellaneous Amendments) (No. 3) Regulations 2010 (S.I. 2010/840), regs. 1, **9(2)(a)(ii)**
- F49** 1993 c. 48. Section 1(1) has been amended by the Pensions Act 2004 (c. 35), **section 239(1)**, (2) and (3), S.I. 1999/1820, **article 4** and Schedule 2, Part 1, paragraph 113(a) and (b) and S.I. 2007/3014,

- regulation 2(b)** and paragraph 1(a) of the Schedule. Section 1(2) to (6) was inserted by the Pensions Act 2004 (c. 35), **section 239(1)** and (4).
- F50** 1988 c. 1. Sections 620, 621 and 622 were repealed by the Finance Act 2004 (c. 12), **section 326** and Schedule 42, Part 3.
- F51** 2004 c. 12.
- F52** Words in reg. 2(1) inserted (for specified purposes and with effect in accordance with reg. 1(2) of the amending S.I.) by The Social Security (Miscellaneous Amendments) (No. 4) Regulations 2009 (S.I. 2009/2655), regs. 1(2)(d), **11(2)(b)**
- F53** Words in reg. 2(1) inserted (6.4.2010) by The Social Security (Miscellaneous Amendments) (No. 2) Regulations 2010 (S.I. 2010/641), regs. 1(1), **12(3)(a)**
- F54** Words in reg. 2(1) inserted (31.10.2011) by The Social Security (Miscellaneous Amendments) (No. 3) Regulations 2011 (S.I. 2011/2425), regs. 1(2), **23(2)(b)**
- F55** Words in reg. 2(1) omitted (31.10.2011) by virtue of The Social Security (Miscellaneous Amendments) (No. 3) Regulations 2011 (S.I. 2011/2425), regs. 1(2), **23(2)(c)**
- F56** 1955 c. 18.
- F57** 1955 c. 19.
- F58** Words in reg. 2(1) inserted (31.10.2011) by The Social Security (Miscellaneous Amendments) (No. 3) Regulations 2011 (S.I. 2011/2425), regs. 1(2), **23(2)(c)**
- F59** 1984 c. 22. Section 20 was amended by section 59 of, and Schedule 3 to, the Food Safety Act 1990 (c. 16).
- F60** S.I. 1979/1434.
- F61** S.I. 1979/1435.
- F62** 1957 c. 53.
- F63** 1958 c. 40.
- F64** 1968 c. 49.
- F65** 1969 c. 46.
- F66** 1969 c. 54.
- F67** 1973 c. 18.
- F68** 1978 c. 22.
- F69** Words in reg. 2 substituted (15.7.2011) by The Adoption and Children (Scotland) Act 2007 (Consequential Modifications) Order 2011 (S.I. 2011/1740), art. 1(2), **Sch. 1 para. 47(2)**
- F70** 1986 c. 55.
- F71** 1989 c. 41.
- F72** 2002 c. 38.
- F73** 1973 c. 50. Section 2 was substituted by the Employment Act 1988 (c. 19), **section 25(1)**. Sections 2(3A) and (3B) were inserted by the Trade Union Reform and Employment Rights Act 1993 (c. 19) section 47(1) and apply to Scotland only.
- F74** 1990 c. 35. Section 2(3) was amended by the Trade Union Reform and Employment Rights Act 1993, sections 47(2) and (4)(a) and 51 and Schedule 10. Section 2(4) was amended by the Trade Union Reform and Employment Rights Act 1993, section 47(2) and (4)(b). Section 2(6) was repealed by S.I. 1999/1820.
- F75** Words in reg. 2(1) inserted (1.4.2013) by The National Treatment Agency (Abolition) and the Health and Social Care Act 2012 (Consequential, Transitional and Saving Provisions) Order 2013 (S.I. 2013/235), art. 1(2), **Sch. 2 para. 116(2)**
- F76** Words in reg. 2(1)(i) substituted (1.4.2010) by The Housing and Regeneration Act 2008 (Consequential Provisions) (No. 2) Order 2010 (S.I. 2010/671), art. 1(2), **Sch. 1 para. 70** (with Sch. 2); S.I. 2010/862, art. 2
- F77** Words in reg. 2(1) inserted (31.10.2011) by The Social Security (Work-focused Interviews for Lone Parents and Partners) (Amendment) Regulations 2011 (S.I. 2011/2428), regs. 1, **5(2)(a)(ii)**
- F78** 1993 c. 39. Section 23(2) was amended by S.I. 1996/3095, **article 2** and S.I. 1999/1563, **article 2(1)** and (6). There are other amending instruments but none is relevant.
- F79** Words in reg. 2(1) inserted (27.10.2008) by The Employment and Support Allowance (Miscellaneous Amendments) Regulations 2008 (S.I. 2008/2428), regs. 1(2), **3(e)**

*Status: Point in time view as at 02/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008. (See end of Document for details)*

- F80** 2002 c. 21.
- F81** Words in reg. 2(1) inserted (6.4.2009) by The Social Security (Miscellaneous Amendments) Regulations 2009 (S.I. 2009/583), regs. 1(2), **10(2)(a)**
- F82** Words in reg. 2(1) omitted (1.5.2012) by virtue of The Young Peoples Learning Agency Abolition (Consequential Amendments to Subordinate Legislation) (England) Order 2012 (S.I. 2012/956), arts. 1, **22(2)**
- F83** Words in reg. 2(1) substituted (1.9.2010) by The Apprenticeships, Skills, Children and Learning Act 2009 (Consequential Amendments to Subordinate Legislation) (England) Order 2010 (S.I. 2010/1941), **art. 28(2)**, reg. 1
- F84** Words in reg. 2(1) substituted (5.1.2009) by The Social Security (Miscellaneous Amendments) (No. 7) Regulations 2008 (S.I. 2008/3157), regs. 1(1), **11(2)(b)**
- F85** 2003 c. 1.
- F86** Words in reg. 2(1) substituted (5.1.2009) by The Social Security (Miscellaneous Amendments) (No. 7) Regulations 2008 (S.I. 2008/3157), regs. 1(1), **11(2)(c)**
- F87** 1991 c. 56.
- F88** 1994 c. 39.
- F89** Words in reg. 2(1) omitted (1.5.2012) by virtue of The Employment and Support Allowance (Amendment of Linking Rules) Regulations 2012 (S.I. 2012/919), regs. 1(2), **5(2)**
- F90** 1971 c. 80.
- F91** 2000 c. 35.
- F92** Words in reg. 2(2) omitted (27.10.2008) by virtue of The Employment and Support Allowance (Miscellaneous Amendments) Regulations 2008 (S.I. 2008/2428), regs. 1(2), **20(1)**
- F93** 1991 c. 48. Section 3(6) was amended by the Child Support, Pensions and Social Security Act (c. 19), section 1(2)(a).
- F94** 2000 c. 19.
- F95** Reg. 2(5) inserted (28.6.2010) by The Social Security (Miscellaneous Amendments) (No. 3) Regulations 2010 (S.I. 2010/840), regs. 1, **9(2)(b)**
- F96** Reg. 2(6)(7) inserted (31.10.2011) by The Social Security (Work-focused Interviews for Lone Parents and Partners) (Amendment) Regulations 2011 (S.I. 2011/2428), regs. 1, **5(2)(b)**

### [<sup>F97</sup>Disapplication of section 1(1A) of the Social Security Administration Act 1992

**2A.** Section 1(1A) of the Social Security Administration Act 1992 (requirement to state a national insurance number) shall not apply to a person who—

- (a) is a person in respect of whom a claim for employment and support allowance is made;
- (b) is subject to immigration control within the meaning of section 115(9)(a) of the Immigration and Asylum Act;
- (c) does not satisfy the basic conditions of entitlement to employment and support allowance for the purposes of section 1(3) of the Act; and
- (d) has not previously been allocated a national insurance number.]

#### Textual Amendments

- F97** Reg. 2A inserted (6.4.2009) by The Social Security (National Insurance Number Information: Exemption) Regulations 2009 (S.I. 2009/471), regs. 1, **13**

### Rounding of fractions

- 3.** 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, 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

4.—(1) Subject to paragraph (2) and [<sup>F98</sup>regulation 5], 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) If at the end of the period of 13 weeks referred to in paragraph (1), it has not yet been determined whether the claimant has limited capability for work—

- (a) the claimant having been assessed in accordance with a limited capability for work assessment; or
- (b) as a result of the claimant being treated as having limited capability for work in accordance with regulation 20, 25, 26, 29 or regulation 33(2) (persons to be treated as having limited capability for work),

the assessment phase will end when the limited capability for work determination is made.

#### Textual Amendments

**F98** Words in reg. 4(1) substituted (28.6.2010) by [The Social Security \(Miscellaneous Amendments\) \(No. 3\) Regulations 2010 \(S.I. 2010/840\)](#), regs. 1, **9(3)**

#### The assessment phase – previous claimants

5.—(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 paragraph (3) and [<sup>F99</sup>(4)], 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) (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 145(1) <sup>F100</sup>...;
- (ii) the claimant was entitled to an employment and support allowance in the earlier period of limited capability for work; <sup>F101</sup>...
- (iii) the assessment phase had not ended in the previous period for which the claimant was entitled to an employment and support allowance; [<sup>F102</sup>and]

*Status: Point in time view as at 02/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008. (See end of Document for details)*

- [<sup>F103</sup>(iv) the period for which the claimant was previously entitled was no more than 13 weeks; or]
- [<sup>F104</sup>(b) (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 145(1),
- (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 as having limited capability for work, other than under regulation 30; or]
- [<sup>F104</sup>(c) (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 145(1),
- (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 as having limited capability for work, other than under regulation 30, and
- (iv) the period for which the claimant was previously entitled was no more than 13 weeks.]
- (3) If, on the day referred to in paragraph (1)(b), it has not yet been determined whether the claimant has limited capability for work—
- (a) the claimant having been assessed in accordance with a limited capability for work assessment; or
- (b) as a result of the claimant being treated as having limited capability for work in accordance with regulation 20, 25, 26, 29 or regulation 33(2) (persons to be treated as having limited capability for work),

the assessment phase will end when the limited capability for work determination is made.

- [<sup>F105</sup>(4) 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) paragraph (3) does not apply; and
- (b) paragraph (1) does not apply to any period of limited capability for work to which regulation 147A(2) applies until a determination of limited capability for work has been made following the determination of the appeal by the First-tier Tribunal.]

#### Textual Amendments

- F99** Words in reg. 5(1)(b) substituted (28.6.2010) by [The Social Security \(Miscellaneous Amendments\) \(No. 3\) Regulations 2010 \(S.I. 2010/840\)](#), regs. 1, **9(4)(a)**
- F100** Words in [reg. 5\(2\)\(a\)\(i\)](#) omitted (1.5.2012) by virtue of [The Employment and Support Allowance \(Amendment of Linking Rules\) Regulations 2012 \(S.I. 2012/919\)](#), regs. 1(2), **5(3)(a)**
- F101** Word in reg. 5(2)(a)(ii) omitted (28.6.2010) by virtue of [The Social Security \(Miscellaneous Amendments\) \(No. 3\) Regulations 2010 \(S.I. 2010/840\)](#), regs. 1, **9(4)(b)**

- F102** Word in reg. 5(2)(a)(iii) substituted (28.6.2010) by The Social Security (Miscellaneous Amendments) (No. 3) Regulations 2010 (S.I. 2010/840), regs. 1, **9(4)(c)**
- F103** Reg. 5(2)(a)(iv) inserted (28.6.2010) by The Social Security (Miscellaneous Amendments) (No. 3) Regulations 2010 (S.I. 2010/840), regs. 1, **9(4)(d)**
- F104** Reg. 5(2)(b)(c) substituted for reg. 5(2)(b) (1.5.2012) by The Employment and Support Allowance (Amendment of Linking Rules) Regulations 2012 (S.I. 2012/919), regs. 1(2), **5(3)(b)**
- F105** Reg. 5(4) added (28.6.2010) by The Social Security (Miscellaneous Amendments) (No. 3) Regulations 2010 (S.I. 2010/840), regs. 1, **9(4)(h)**

### The assessment phase – claimants appealing against a decision

<sup>F106</sup>6. ....

#### Textual Amendments

- F106** Reg. 6 omitted (28.6.2010) by virtue of The Social Security (Miscellaneous Amendments) (No. 3) Regulations 2010 (S.I. 2010/840), regs. 1, **9(5)**

### 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 (2), sections 2(2)(a), 2(3)(a), 4(4)(a) and 4(5)(a) of the Act do 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 Social Security and Child Support (Decisions and Appeals) Regulations 1999 <sup>F107</sup> which contains an express statement that the claimant is terminally ill; <sup>F108</sup>...

[<sup>F109</sup>(b) the case is a relevant linked case;]

- [<sup>F110</sup>(c) (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 satisfying the conditions in paragraphs 11 and 12 of Schedule 2 to the Income Support Regulations; and
- (iii) that entitlement to income support ended solely by virtue of the coming into force, in relation to the claimant, of the Social Security (Lone Parents and Miscellaneous Amendments) Regulations [<sup>F111</sup>2012][<sup>F112</sup>; or]

[<sup>F112</sup>(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>F113</sup>(1A) For the purposes of paragraph (1)(b) a relevant linked case is a case mentioned in paragraph (1B) 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 145(1).

(1B) Paragraph (1A) applies to the following cases—

- (a) case 1 is where—

*Status: Point in time view as at 02/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008. (See end of Document for details)*

- (i) the claimant was entitled to an employment and support allowance (including entitlement to a component under sections 2(2), 2(3), 4(4) or 4(5) 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 as having limited capability for work, other than under regulation 30;
- (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 as having limited capability for work, other than under regulation 30, 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 as having limited capability for work, other than under regulation 30; and
- (d) case 4 is where–
- (i) the claimant was entitled to an employment and support allowance (including entitlement to a component under sections 2(2), 2(3), 4(4) or 4(5) 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 as having limited capability for work, other than under regulation 30.]
- (2) Paragraph (1)(b) does not apply [<sup>F114</sup>to any period of limited capability for work to which regulation 147A(2) applies until the determination of limited capability for work has been made following the determination of the appeal by the First-tier Tribunal].

#### Textual Amendments

**F107** [S.I. 1999/991](#).

- F108** Word in reg. 7(1)(a) omitted (24.11.2008) by virtue of The Social Security (Lone Parents and Miscellaneous Amendments) Regulations 2008 (S.I. 2008/3051), regs. 1(2), **12(2)(a)** (with reg. 13)
- F109** Reg. 7(1)(b) substituted (1.5.2012) by The Employment and Support Allowance (Amendment of Linking Rules) Regulations 2012 (S.I. 2012/919), regs. 1(2), **5(4)(a)**
- F110** Reg. 7(1)(c) and word inserted (24.11.2008) by The Social Security (Lone Parents and Miscellaneous Amendments) Regulations 2008 (S.I. 2008/3051), regs. 1(2), **12(2)(b)** (with reg. 13)
- F111** Word in reg. 7(1)(c)(iii) substituted (21.5.2012) by The Social Security (Lone Parents and Miscellaneous Amendments) Regulations 2012 (S.I. 2012/874), regs. 1(2), **6(2)**
- F112** Reg. 7(1)(d) and words added (1.5.2012) by The Employment and Support Allowance (Duration of Contributory Allowance) (Consequential Amendments) Regulations 2012 (S.I. 2012/913), regs. 1(2), **9(2)(b)**
- F113** Reg. 7(1A)(1B) inserted (1.5.2012) by The Employment and Support Allowance (Amendment of Linking Rules) Regulations 2012 (S.I. 2012/919), regs. 1(2), **5(4)(b)**
- F114** Words in reg. 7(2) substituted (28.6.2010) by The Social Security (Miscellaneous Amendments) (No. 3) Regulations 2010 (S.I. 2010/840), regs. 1, **9(6)(b)**

## PART 3

### CONDITIONS OF ENTITLEMENT – CONTRIBUTORY ALLOWANCE

#### [<sup>F115</sup>Conditions relating to national insurance and relevant earnings

**7A.—(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) are the total amount of the claimant's earnings at 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.]

#### Textual Amendments

- F115** Reg. 7A inserted (1.11.2010) by The Social Security (Contribution Conditions for Jobseekers Allowance and Employment and Support Allowance) Regulations 2010 (S.I. 2010/2446), regs. 1, **3(2)**

#### Relaxation of the first contribution condition

**8.—(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

[<sup>F116</sup>(b) the claimant has—

- (i) earnings at 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 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;

*Status: Point in time view as at 02/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008. (See end of Document for details)*

- (b) had been engaged in qualifying remunerative work for a period of more than 2 years immediately before the first day of the period of limited capability for work and who was 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>F117</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 <sup>F118</sup> (credits for certain periods of imprisonment or detention in legal custody); or
  - (ii) would have been so entitled had an application to the Secretary of State been made for the purpose of that regulation; [<sup>F119</sup>or]
- [<sup>F120</sup>(ca) 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>F121</sup> ...]
- <sup>F122</sup>(d) .....

**Textual Amendments**

**F116** Reg. 8(1)(b) substituted (31.10.2011) by [The Social Security \(Miscellaneous Amendments\) \(No. 3\) Regulations 2011 \(S.I. 2011/2425\)](#), regs. 1(2), **23(3)**

**F117** S.I. 2002/2005.

**F118** S.I. 1975/556. Regulation 9D was inserted by S.I.2001/573, **regulation 2**.

**F119** Word in reg. 8(2)(c) added (1.5.2012) by [The Social Security \(Miscellaneous Amendments\) Regulations 2012 \(S.I. 2012/757\)](#), regs. 1(3), **20(2)(a)**

**F120** Reg. 8(2)(ca) inserted (1.1.2012) by [The Social Security \(Contribution Conditions for Jobseeker s Allowance and Employment and Support Allowance\) Regulations 2011 \(S.I. 2011/2862\)](#), regs. 1(2), **3**

**F121** Word in reg. 8(2)(ca) omitted (1.5.2012) by virtue of [The Social Security \(Miscellaneous Amendments\) Regulations 2012 \(S.I. 2012/757\)](#), regs. 1(3), **20(2)(b)**

**F122** Reg. 8(2)(d) omitted (1.5.2012) by virtue of [The Social Security \(Miscellaneous Amendments\) Regulations 2012 \(S.I. 2012/757\)](#), regs. 1(3), **20(2)(c)**

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

9.—(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 3 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 sub-paragraph (2)(b) is a period which—
  - (a) began on or before a day at least 3 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—
- “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 Technician 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 Technical Education Council or a higher or advanced higher national certificate of the Scottish Qualifications Authority or a general certificate of education (advanced level);
- “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—
- (a) by attendance at an establishment recognised by the Secretary of State as being, or as comparable to, a university, college or school; or
- (b) elsewhere where the Secretary of State is satisfied that the education is equivalent to that given in an establishment recognised as being, or as comparable to, a university, college or school.
- [<sup>F123</sup>(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 any consecutive days of limited capability for work.]

#### Textual Amendments

**F123** Reg. 9(6) added (27.10.2008) by [The Employment and Support Allowance \(Miscellaneous Amendments\) Regulations 2008 \(S.I. 2008/2428\)](#), regs. 1(2), 4

#### Condition relating to youth – previous claimants

- 10.**—(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, entitlement for which was as a result of satisfying the condition set out in sub-paragraph (1) of that paragraph;
- (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 145 (linking rules) does not apply;
- (d) aged 20 or over, or, where regulation 9 would otherwise apply to the person, aged 25 or over; and
- (e) to whom paragraph (2) applies.
- (2) This paragraph applies to a claimant—

*Status: Point in time view as at 02/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008. (See end of Document for details)*

- (a) whose previous entitlement to an employment and support allowance ended solely 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 those years to the year's lower earnings limit multiplied by 50, of which at least one, in the last 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 a period of 12 weeks after the day on which the last such employment pursued in accordance with subparagraph (b) ceased.

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

**11.**—(1) The prescribed conditions for the purposes of paragraph 4(1)(c) of Schedule 1 to the Act as to residence or 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 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 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 [<sup>F124</sup>European Union] has concluded an agreement under [<sup>F124</sup>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 subparagraph (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>F125</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.

**Textual Amendments**

**F124** Words in Instrument substituted (22.4.2011) by [The Treaty of Lisbon \(Changes in Terminology\) Order 2011 \(S.I. 2011/1043\)](#), arts. 3-6, 8-10

**F125** 1971 c. 77.

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

**12.**—(1) For the purposes of paragraph 4(4) 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 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**

<sup>F126</sup>**13.**—(1) Where paragraph (2) applies, sub-paragraph (1)(f) of paragraph 3 of Schedule 1 to the Act has effect as if “relevant benefit year” is 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 to employment and support allowance but does not satisfy—

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

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

**Textual Amendments**

**F126** Reg. 13 substituted (28.6.2010) by [The Social Security \(Miscellaneous Amendments\) \(No. 3\) Regulations 2010 \(S.I. 2010/840\)](#), regs. 1, 9(7)

## PART 4

### CONDITIONS OF ENTITLEMENT – INCOME-RELATED ALLOWANCE

#### Meaning of education

**14.**—(1) Subject to regulations 15 and 16, for the purposes of paragraph 6 of Schedule 1 to the Act, “education” means a course of study to which paragraph (2) applies which is being undertaken at an educational establishment.

(2) This paragraph applies to a course of study which is—

(a) a full-time course which is not funded in whole or in part by—

[<sup>F127</sup>(i) the [<sup>F128</sup>Secretary of State under section 14 of the Education Act 2002];]

[<sup>F127</sup>(ia) the Chief Executive of Skills Funding;]

(ii) the Welsh Ministers; or

(iii) the Scottish Ministers at a college of further education;

(b) a full-time course of higher education which is funded in whole or in part by the Scottish Ministers;

(c) funded in whole or in part by the [<sup>F129</sup>[<sup>F130</sup>Secretary of State under section 14 of the Education Act 2002], the Chief Executive of Skills Funding] or by the Welsh Ministers if it involves more than 16 guided learning hours per week for the student in question, according to the number of guided learning hours per week for that student set out—

[<sup>F131</sup>(i) in the case of a course funded by the [<sup>F130</sup>Secretary of State under section 14 of the Education Act 2002] or the Chief Executive of Skills Funding, in the student’s learning agreement signed on behalf of the establishment which is funded by either of those [<sup>F132</sup>persons] for the delivery of that course;]

(ii) in the case of a course funded by the Welsh Ministers, in a document signed on behalf of the establishment which is funded by those Ministers for the delivery of that course;

(d) not a course of higher education and which is funded in whole or in part by the Scottish Ministers at a college of further education and involves—

(i) more than 16 hours per week of classroom-based or workshop-based programmed learning under the direct guidance of teaching staff according to the number of hours set out in a document signed on behalf of the college; or

(ii) 16 hours or less per week of classroom-based or workshop-based programmed learning under the direct guidance of teaching staff and it involves additional hours using structured learning packages supported by the teaching staff where the combined total of hours exceeds 21 per week according to the number of hours set out in a document signed on behalf of the college; or

(e) a sandwich course within the meaning prescribed in regulation 2(9) of the Education (Student Support) Regulations 2007<sup>F133</sup>, regulation 4(2) of the Education (Student Loans) (Scotland) Regulations 2007<sup>F134</sup> or regulation 2(8) of the Education (Student Support) Regulations (Northern Ireland) 2007<sup>F135</sup>.

[<sup>F136</sup>(2A) Paragraph (2) does not apply to any course of study which the claimant is required to attend for the purpose of meeting a requirement to undertake work-related activity.]

(3) In this regulation “higher education” means higher education within the meaning of Part 2 of the Further and Higher Education (Scotland) Act 1992<sup>F137</sup>.

**Textual Amendments**

- F127** Reg. 14(2)(a)(i)(ai) substituted for reg. 14(2)(a)(i) (1.9.2010) by [The Apprenticeships, Skills, Children and Learning Act 2009 \(Consequential Amendments to Subordinate Legislation\) \(England\) Order 2010 \(S.I. 2010/1941\)](#), [art. 28\(3\)\(a\)](#), reg. 1
- F128** Words in reg. 14(2)(a) substituted (1.5.2012) by [The Young Peoples Learning Agency Abolition \(Consequential Amendments to Subordinate Legislation\) \(England\) Order 2012 \(S.I. 2012/956\)](#), arts. 1, [22\(3\)\(a\)](#)
- F129** Words in reg. 14(2)(c) substituted (1.9.2010) by [The Apprenticeships, Skills, Children and Learning Act 2009 \(Consequential Amendments to Subordinate Legislation\) \(England\) Order 2010 \(S.I. 2010/1941\)](#), [art. 28\(3\)\(b\)](#), reg. 1
- F130** Words in reg. 14(2)(c) substituted (1.5.2012) by [The Young Peoples Learning Agency Abolition \(Consequential Amendments to Subordinate Legislation\) \(England\) Order 2012 \(S.I. 2012/956\)](#), arts. 1, [22\(3\)\(a\)](#)
- F131** Reg. 14(2)(c)(i) substituted (1.9.2010) by [The Apprenticeships, Skills, Children and Learning Act 2009 \(Consequential Amendments to Subordinate Legislation\) \(England\) Order 2010 \(S.I. 2010/1941\)](#), [art. 28\(3\)\(c\)](#), reg. 1
- F132** Word in reg. 14(2)(c)(i) substituted (1.5.2012) by [The Young Peoples Learning Agency Abolition \(Consequential Amendments to Subordinate Legislation\) \(England\) Order 2012 \(S.I. 2012/956\)](#), arts. 1, [22\(3\)\(b\)](#)
- F133** S.I. 2007/176.
- F134** S.S.I. 2007/154.
- F135** S.R. 2007/195.
- F136** Reg. 14(2A) inserted (1.4.2012) by [The Social Security \(Miscellaneous Amendments\) Regulations 2012 \(S.I. 2012/757\)](#), regs. 1(4), [20\(3\)](#)
- F137** 1992 c. 37, amended by the [Further and Higher Education \(Scotland\) Act 2005 \(asp. 6\)](#).

**Claimants to be treated as receiving education**

**15.** Subject to regulation 18, a qualifying young person is to be treated as receiving education for the purposes of paragraph 6(1)(g) of Schedule 1 to the Act.

**Claimants not to be treated as receiving education**

**16.** Where a claimant is under 19 but not a qualifying young person, that claimant is not to be treated as receiving education where the course of study is not—

- (a) a course leading to a postgraduate degree or comparable qualification, a first degree or comparable qualification, a diploma of higher education or a higher national diploma; or
- (b) any other course which is of a standard above advanced GNVQ or equivalent, including a course which is of a standard above a general certificate of education (advanced level) or above a Scottish national qualification (higher or advanced higher).

**Courses of study**

**17.—(1)** For the purposes of the definition of “education” in regulation 14, a person is to be regarded as undertaking a course of study—

- (a) subject to paragraph (2), in the case of a person undertaking a part of a modular course that would be a course of study for the purposes of these Regulations, for the period beginning on the day on which that part of the course starts and ending—
  - (i) on the last day on which the person is registered with the educational establishment as attending or undertaking that part as a full-time course of study; or

---

*Status: Point in time view as at 02/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008. (See end of Document for details)*

---

- (ii) on such earlier date (if any) as the person finally abandons the course or is dismissed from it;
  - (b) in any other case, throughout the period beginning on the date on which the person starts undertaking the course and ending on the last day of the course or on such earlier date (if any) as the person finally abandons it or is dismissed from it.
- (2) For the purpose of sub-paragraph (a) of paragraph (1), the period referred to in that sub-paragraph includes—
- (a) where a person has failed examinations or has failed to successfully complete a module relating to a period when the person was attending or undertaking a part of the course as a course of study, any period in respect of which the person attends or undertakes the course for the purpose of retaking those examinations or that module;
  - (b) any period of vacation within the period specified in that paragraph or immediately following that period except where the person has registered with the educational establishment to attend or undertake the final module in the course and the vacation immediately follows the last day on which the person is required to attend or undertake the course.
- (3) In paragraph (1), “modular course” means a course of study which consists of two or more modules, the successful completion of a specified number of which is required before a person is considered by the educational establishment to have completed the course.

**Circumstances in which the condition that the claimant is not receiving education does not apply**

**18.** Paragraph 6(1)(g) of Schedule 1 to the Act does not apply where the claimant is entitled to a disability living allowance.

## PART 5

### LIMITED CAPABILITY FOR WORK

**Determination of limited capability for work**

**19.**—(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 any descriptor listed in that Schedule, 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.

[<sup>F138</sup>(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.]

[<sup>F139</sup>(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;
  - (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 apply 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 regulations 20, 25, 26, 29 or 33(2),

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 3 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.

#### Textual Amendments

**F138** Reg. 19(4) substituted (28.1.2013) by [The Employment and Support Allowance \(Amendment\) Regulations 2012 \(S.I. 2012/3096\)](#), regs. 1(1), **3(2)(a)**

**F139** Reg. 19(5) substituted (28.1.2013) by [The Employment and Support Allowance \(Amendment\) Regulations 2012 \(S.I. 2012/3096\)](#), regs. 1(1), **3(2)(b)**

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

**20.** A claimant is to be treated as having limited capability for work if—

- (a) the claimant is terminally ill;

*Status: Point in time view as at 02/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008. (See end of Document for details)*

- [<sup>F140</sup>(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, or from work of such a kind, pursuant to a request or notice in writing lawfully made under an enactment; or
  - (ii) otherwise prevented from working pursuant to an enactment,
- [<sup>F141</sup>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; and
  - (ii) is entitled to a maternity allowance under section 35(1) of the Contributions and Benefits Act <sup>F142</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
  - (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.
- [<sup>F143</sup>(g) any of the descriptors at paragraph 15 or 16 of Schedule 3 apply to the claimant.]

#### Textual Amendments

- F140** Reg. 20(b) substituted (28.1.2013) by [The Employment and Support Allowance \(Amendment\) Regulations 2012 \(S.I. 2012/3096\)](#), regs. 1(1), **3(3)**
- F141** Words in reg. 20(c) substituted (31.10.2011) by [The Social Security \(Miscellaneous Amendments\) \(No. 3\) Regulations 2011 \(S.I. 2011/2425\)](#), regs. 1(2), **23(4)**
- F142** 1992 c. 4. Amended by section 53 of the [Welfare Reform and Pensions Act 1999 \(c. 30\)](#).
- F143** Reg. 20(g) inserted (with application in accordance with reg. 2 of the amending S.I.) by [The Employment and Support Allowance \(Limited Capability for Work and Limited Capability for Work-Related Activity\) \(Amendment\) Regulations 2011 \(S.I. 2011/228\)](#), regs. 1(1), **3(2)(b)**

#### Information required for determining capability for work

**21.—(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 will 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 20 (certain claimants to be treated as having limited capability for work), 25 (hospital in-patients), 26 (claimants receiving certain regular treatment) and 33(2) (additional circumstances in which a claimant is to be treated as having limited capability for work).

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

**22.**—(1) Where a claimant fails without good cause to comply with the request referred to in regulation 21(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) at least [<sup>F144</sup>4 weeks] have passed since the claimant was sent the first request for the information; and
- (b) the claimant was sent a further request at least [<sup>F145</sup>3 weeks] after the date of the first request, and at least [<sup>F146</sup>1 week has] passed since the further request was sent.

#### Textual Amendments

- F144** Words in reg. 22(2)(a) substituted (31.10.2011) by [The Social Security \(Miscellaneous Amendments\) \(No. 3\) Regulations 2011 \(S.I. 2011/2425\)](#), regs. 1(2), **23(5)** (with reg. 2)
- F145** Words in reg. 22(2)(b) substituted (31.10.2011) by [The Social Security \(Miscellaneous Amendments\) \(No. 3\) Regulations 2011 \(S.I. 2011/2425\)](#), regs. 1(2), **23(6)(a)** (with reg. 2)
- F146** Words in reg. 22(2)(b) substituted (31.10.2011) by [The Social Security \(Miscellaneous Amendments\) \(No. 3\) Regulations 2011 \(S.I. 2011/2425\)](#), regs. 1(2), **23(6)(b)** (with reg. 2)

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

**23.**—(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 listed in paragraph (1), the claimant is to be treated as not having limited capability for work.

(3) Paragraph (2) does not apply unless written notice of the time and place for the examination was sent to the claimant at least 7 days in advance, or unless 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 22 or 23**

**24.** The matters to be taken into account in determining whether a claimant has good cause under regulations 22 (failure to provide information in relation to limited capability for work) or 23 (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 in-patients**

<sup>F147</sup>**25.**—(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 on any day which is a day of recovery from that treatment.

(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 in a hospital or similar institution for a period of 24 hours or longer.

(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 and the Secretary of State is satisfied that the claimant should be treated as having limited capability for work on that day.]

**Textual Amendments**

**F147** Reg. 25 substituted (28.1.2013) by [The Employment and Support Allowance \(Amendment\) Regulations 2012 \(S.I. 2012/3096\)](#), regs. 1(1), **3(4)**

**Claimants receiving certain regular treatment**

**26.**—(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 <sup>F148</sup>...; 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 that treatment or has a day of recovery from that treatment.

<sup>F149</sup>(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.

#### Textual Amendments

**F148** Words in [reg. 26\(1\)\(b\)](#) omitted (28.1.2013) by virtue of [The Employment and Support Allowance \(Amendment\) Regulations 2012 \(S.I. 2012/3096\)](#), [regs. 1\(1\), 3\(5\)](#)

**F149** [Reg. 26\(2\)](#) substituted (27.10.2008) by [The Employment and Support Allowance \(Miscellaneous Amendments\) Regulations 2008 \(S.I. 2008/2428\)](#), [regs. 1\(2\), 5\(1\)](#)

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

**27.** A claimant who at the commencement of any day has, or thereafter 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 throughout that day.

#### Night workers

**28.—(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

**29.—(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) <sup>[F150]</sup>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 reasons 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.

<sup>[F151]</sup>(3) Paragraph (2)(b) does not apply where <sup>[F151]</sup>(3) the risk could be reduced by a significant amount by—

- (a) reasonable adjustments being made in the claimant’s workplace; or

*Status: Point in time view as at 02/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008. (See end of Document for details)*

- (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.]

#### Textual Amendments

**F150** Words in [reg. 29\(2\)](#) inserted (28.1.2013) by [The Employment and Support Allowance \(Amendment\) Regulations 2012 \(S.I. 2012/3096\)](#), regs. 1(1), **3(6)(a)**

**F151** [Reg. 29\(3\)](#) inserted (28.1.2013) by [The Employment and Support Allowance \(Amendment\) Regulations 2012 \(S.I. 2012/3096\)](#), regs. 1(1), **3(6)(b)**

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

**30.**—(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 22 (failure to provide information in relation to limited capability for work) or 23 (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 6 months preceding the date of claim, 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 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 22 or 23 unless—
  - (i) 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;
  - (ii) a disease or bodily or mental disablement from which the claimant was suffering at the time of that determination has significantly worsened; or
  - (iii) in the case of a claimant who was treated as not having limited capability for work under regulation 22 (failure to provide information), the claimant has since provided the information requested under that regulation<sup>[F152]</sup>; or]

<sup>[F152]</sup>(c) that it has not, within the 6 months preceding the date of claim, been determined, in relation to the claimant's entitlement to any benefit, allowance or advantage, which is dependent upon the claimant being incapable of work, that the claimant is capable of work, or is to be treated as capable of work under regulation 7 or 8 of the Social Security (Incapacity for Work) (General) Regulations 1995 (“the 1995 Regulations”), unless—

- (i) 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,
- (ii) a disease or bodily or mental disablement from which the claimant was suffering at the time of that determination has significantly worsened, or

(iii) in the case of a claimant who was treated as capable of work under regulation 7 of the 1995 Regulations (failure to provide information), the claimant has since provided the information requested by the Secretary of State under that regulation.]

(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 [<sup>F153</sup>the First-tier Tribunal].

**Textual Amendments**

**F152** Reg. 30(2)(c) inserted (28.6.2010) by [The Social Security \(Miscellaneous Amendments\) \(No. 3\) Regulations 2010 \(S.I. 2010/840\)](#), regs. 1, **9(8)**

**F153** Words in reg. 30(3) substituted (11.4.2011) by [The Social Security \(Miscellaneous Amendments\) Regulations 2011 \(S.I. 2011/674\)](#), regs. 1(4), **16(3)**

**Claimant who claims jobseeker's allowance to be treated as not having limited capability for work**

<sup>F154</sup>**31.** .....

**Textual Amendments**

**F154** Reg. 31 revoked (1.10.2010) by [The Employment and Support Allowance \(Transitional Provisions, Housing Benefit and Council Tax Benefit\) \(Existing Awards\) \(No. 2\) Regulations 2010 \(S.I. 2010/1907\)](#), regs. 1(2), **25(1)** (with reg. 3)

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

**32.**—[<sup>F155</sup>(1)] A claimant [<sup>F156</sup>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 for Defence as a day of sickness absence from duty.

[<sup>F157</sup>(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 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 arrangement made under section 2 of the Employment and Training Act 1973 or section 2(3) of the Enterprise and New Towns (Scotland) Act 1990.]

**Textual Amendments**

**F155** Reg. 32(1): reg 32 renumbered as reg. 32(1) (27.10.2008) by [The Employment and Support Allowance \(Miscellaneous Amendments\) Regulations 2008 \(S.I. 2008/2428\)](#), regs. 1(2), **5(2)(a)**

**F156** Words in reg. 32(1) inserted (27.10.2008) by [The Employment and Support Allowance \(Miscellaneous Amendments\) Regulations 2008 \(S.I. 2008/2428\)](#), regs. 1(2), **5(2)(b)**

*Status: Point in time view as at 02/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008. (See end of Document for details)*

**F157** Reg. 32(2)(3) added (27.10.2008) by [The Employment and Support Allowance \(Miscellaneous Amendments\) Regulations 2008 \(S.I. 2008/2428\)](#), regs. 1(2), **5(2)(c)**

**[<sup>F158</sup>Claimants to be treated as not having limited capability for work at the end of the period covered by medical evidence**

**32A.—[**

<sup>F159</sup>(1)] Where the Secretary of State is satisfied that it is appropriate in the circumstances of the case then a claimant may be treated as not having limited capability for work if—

- (a) the claimant has supplied medical evidence <sup>F160</sup> ...;
- (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 6 weeks beginning with the date of the Secretary of State’s request or the end of 6 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.]

<sup>F161</sup>(2) In this regulation “medical evidence” means evidence provided under regulation 2 or 5 of the Medical Evidence Regulations.]

**Textual Amendments**

**F158** Reg. 32A inserted (28.6.2010) by [The Social Security \(Miscellaneous Amendments\) \(No. 3\) Regulations 2010 \(S.I. 2010/840\)](#), regs. 1, **9(9)**

**F159** Reg. 32A(1): reg. 32A renumbered as reg. 32A(1) (11.4.2011) by [The Social Security \(Miscellaneous Amendments\) Regulations 2011 \(S.I. 2011/674\)](#), regs. 1(4), **16(4)(a)**

**F160** Words in reg. 32A(1)(a) omitted (11.4.2011) by virtue of [The Social Security \(Miscellaneous Amendments\) Regulations 2011 \(S.I. 2011/674\)](#), regs. 1(4), **16(4)(b)**

**F161** Reg. 32A(2) added (11.4.2011) by [The Social Security \(Miscellaneous Amendments\) Regulations 2011 \(S.I. 2011/674\)](#), regs. 1(4), **16(4)(c)**

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

**33.—(1)** 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.

(2) For the purposes of an income-related allowance, a claimant is to be treated as having limited capability for work where—

- (a) that claimant is not a qualifying young person;
- (b) that claimant is receiving education; and
- (c) paragraph 6(1)(g) of Schedule 1 to the Act does not apply in accordance with regulation 18.

## PART 6

### LIMITED CAPABILITY FOR WORK-RELATED ACTIVITY

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

**34.**—(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's capability for work-related activity will be limited and the limitation will 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.

[<sup>F162</sup>(3) In determining whether a descriptor applies to the 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.]

[<sup>F163</sup>(3A) In determining whether a descriptor applies, it is a condition that the claimant's incapability arises—

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

(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 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

*Status: Point in time view as at 02/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008. (See end of Document for details)*

- (c) at least 3 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.

#### Textual Amendments

**F162** Reg. 34(3) substituted (28.1.2013) by [The Employment and Support Allowance \(Amendment\) Regulations 2012 \(S.I. 2012/3096\)](#), regs. 1(1), **4(2)(a)**

**F163** Reg. 34(3A) inserted (28.1.2013) by [The Employment and Support Allowance \(Amendment\) Regulations 2012 \(S.I. 2012/3096\)](#), regs. 1(1), **4(2)(b)**

### Certain claimants to be treated as having limited capability for work-related activity

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

(a) the claimant is terminally ill;

[<sup>F164</sup>(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; or]

(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.

(2) A claimant who does not have limited capability for work-related activity as determined in accordance with regulation 34(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 reasons 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.

#### Textual Amendments

**F164** Reg. 35(1)(b) substituted (28.1.2013) by [The Employment and Support Allowance \(Amendment\) Regulations 2012 \(S.I. 2012/3096\)](#), regs. 1(1), **4(3)**

### [<sup>F165</sup>Relevant linked cases – limited capability for work-related activity

**35A.** 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(1B)(a); and

(b) in respect of the earlier period of limited capability for work referred to in regulation 7(1B) (a)(i), they had been entitled to a support component under sections 2(2) or 4(4) of the Act.]

#### Textual Amendments

**F165** Reg. 35A inserted (1.5.2012) by [The Employment and Support Allowance \(Amendment of Linking Rules\) Regulations 2012 \(S.I. 2012/919\)](#), regs. 1(2), **5(5)**

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

**36.**—(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 will not be required for the purposes of making the determination.

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

**37.**—(1) Where a claimant fails without good cause to comply with the request referred to in regulation 36(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) at least [<sup>F166</sup>4 weeks] have passed since the claimant was sent the first request for the information; and
  - (b) the claimant was sent a further request at least [<sup>F167</sup>3 weeks] after the date of the first request, and at least [<sup>F168</sup>1 week has] passed since the further request was sent.

#### Textual Amendments

**F166** Words in reg. 37(2)(a) substituted (31.10.2011) by [The Social Security \(Miscellaneous Amendments\) \(No. 3\) Regulations 2011 \(S.I. 2011/2425\)](#), regs. 1(2), **23(5)** (with reg. 2)

**F167** Words in reg. 37(2)(b) substituted (31.10.2011) by [The Social Security \(Miscellaneous Amendments\) \(No. 3\) Regulations 2011 \(S.I. 2011/2425\)](#), regs. 1(2), **23(6)(a)** (with reg. 2)

**F168** Words in reg. 37(2)(b) substituted (31.10.2011) by [The Social Security \(Miscellaneous Amendments\) \(No. 3\) Regulations 2011 \(S.I. 2011/2425\)](#), regs. 1(2), **23(6)(b)** (with reg. 2)

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

**38.**—(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 listed in paragraph (1), the claimant is to be treated as not having limited capability for work-related activity.

*Status: Point in time view as at 02/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008. (See end of Document for details)*

(3) Paragraph (2) does not apply unless written notice of the time and place for the examination was sent to the claimant at least 7 days in advance, or unless 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 37 or 38**

**39.** The matters to be taken into account in determining whether a claimant has good cause under regulations 37 (failure to provide information in relation to work-related activity) or 38 (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 7**

**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**

**40.**—(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—

<sup>F169</sup>(i) . . . . .

[<sup>F170</sup>(ii) 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.]

- (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 paragraphs 28 or 29 of Schedule 8 (sums to be disregarded in the calculation of income other than earnings) where the claimant is in receipt of any payment specified in those paragraphs;
- (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 45 (exempt work).

(3) This regulation is subject to regulation 46 (effect of work on entitlement to contributory allowance where claimant is receiving certain regular 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 145 (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 [F171]paragraph (4)], are to be calculated by reference to regulation 28 (night workers).

(7) 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” is to be taken to include 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<sup>F172</sup> or sub-sections 49(1) or 49(1A) of the Local Government (Scotland) Act 1973<sup>F173</sup>, of which the claimant is a member by reason of being a councillor.

#### Textual Amendments

**F169** Reg. 40(2)(b)(i) omitted (7.2.2013) by virtue of [The Public Bodies \(Abolition of the Disability Living Allowance Advisory Board\) Order 2013 \(S.I. 2013/252\)](#), art. 1(2), **Sch. Pt. 2**

**F170** Reg. 40(2)(b)(ii) substituted (3.11.2008) by [The Tribunals, Courts and Enforcement Act 2007 \(Transitional and Consequential Provisions\) Order 2008 \(S.I. 2008/2683\)](#), art. 1, **Sch. 1 para. 342**

**F171** Words in reg. 40(6) substituted (27.10.2008) by [The Employment and Support Allowance \(Miscellaneous Amendments\) Regulations 2008 \(S.I. 2008/2428\)](#), regs. 1(2), **6(1)**

**F172** 1972 c. 70. Subsection (1) was substituted by the [Local Government and Housing Act 1989 \(c. 42\)](#), **section 194** and Schedule 11, paragraph 28(2). Subsection (1) was amended by the [School Standards and Framework Act 1998](#), section 140(1) and (3), Schedule 30, paragraph 3(2) and Schedule 31.

**F173** 1973 c. 65. Subsections 49(1)(b) and (f) were repealed by Schedule 7 of the [Local Government \(Scotland\) Act 1975](#). Section 49(1A) was inserted by [Local Government \(Scotland\) Act 1975](#). Section 49(1)(a) was repealed by regulation 2(4) of the [Local Governance \(Scotland\) Act 2004 \(Allowances and Expenses\) Regulations 2007](#).

#### Meaning of “remunerative work” for the purposes of paragraph 6(1)(e) of Schedule 1 to the Act

**41.**—(1) For the purposes of paragraph 6(1)(e) of Schedule 1 to the Act (conditions of entitlement to an income-related allowance), “remunerative work” means any work which a claimant does for which payment is made or which is done in expectation of payment, other than work listed in paragraph (2) of regulation 40.

(2) Subject to paragraph (3), a claimant who was, or who was being treated as—

(a) engaged in remunerative work; and

(b) in respect of that work earnings to which regulation 95(1)(b) and (d) applies are paid,

is to be treated as being engaged in remunerative work for the period for which those earnings are taken into account in accordance with Part 10 of these Regulations.

(3) Paragraph (2) does not apply to earnings disregarded under paragraph 1 of Schedule 7 (sums to be disregarded in the calculation of earnings).

**Meaning of “remunerative work” for the purposes of paragraph 6(1)(f) of Schedule 1 to the Act**

42.—(1) For the purposes of paragraph 6(1)(f) of Schedule 1 to the Act, (conditions of entitlement to an income-related allowance where a claimant must not be a member of a couple the other member of which is engaged in remunerative work), “remunerative work” means work in which the claimant's partner is engaged or, where the partner's hours of work fluctuate, the partner is engaged on average, for not less than 24 hours a week, being work for which payment is made or which is done in expectation of payment.

(2) In calculating the number of hours for which a claimant's partner is engaged in work so as to determine whether that partner is engaged in remunerative work, the number of hours are to be determined in accordance with paragraphs (8) and (9) of regulation 45 and those paragraphs are to be read as though they referred to the claimant's partner.

(3) The claimant's partner is to be treated as engaged in remunerative work during any period for which that partner is absent from work referred to in paragraph (1) if the absence is either without good cause or by reason of a recognised, customary or other holiday.

(4) Subject to paragraph (5), a claimant's partner who was, or who was being treated as—

(a) engaged in remunerative work; and

(b) in respect of that work earnings to which regulation 95(1)(b) and (d) applies are paid,

is to be treated as being engaged in remunerative work for the period for which those earnings are taken into account in accordance with Part 10 of these Regulations.

(5) Paragraph (4) does not apply to earnings disregarded under paragraph 1 of Schedule 7 (sums to be disregarded in the calculation of earnings).

(6) For the purposes of this regulation, in determining the number of hours in which a claimant's partner is engaged or treated as engaged in remunerative work, no account is to be taken of any hours in which the claimant's partner is engaged in an employment or a scheme to which regulation 43(1) or (2) (claimants' partners not treated as engaged in remunerative work) applies.

**Circumstances under which partners of claimants entitled to an income-related allowance are not to be treated as engaged in remunerative work**

43.—(1) A claimant's partner is not to be treated as engaged in remunerative work in so far as—

(a) the partner is engaged in child minding in the partner's home;

(b) the partner is engaged by a charity or voluntary organisation, or is a volunteer, where the only payment received by the partner or due to be paid to the partner, is a payment which is to be disregarded under regulation 104(2) (calculation of income other than earnings) and paragraph 2 of Schedule 8 (sums to be disregarded in the calculation of income other than earnings);

(c) the partner is engaged on a scheme for which a training allowance is being paid;

(d) the partner is receiving assistance under the self-employment route;

(e) the partner is engaged in employment as any one of the following—

(i) a part-time fireman in a fire brigade maintained in pursuance of the Fire and Rescue Services Act 2004 <sup>F174</sup>;

(ii) a part-time fire-fighter employed by a fire and rescue authority;

(iii) a part-time fire-fighter employed by [<sup>F175</sup>the Scottish Fire and Rescue Service];

(iv) an auxiliary coastguard in respect of coast rescue activities;

(v) a person engaged part-time in the manning or launching of a life boat;

- (vi) a member of any territorial or reserve force prescribed in Part 1 of Schedule 6 to the Social Security (Contributions) Regulations 2001 <sup>F176</sup>; or
  - (f) the partner is undertaking work as a councillor;
  - (g) the partner is engaged in caring for a person who is accommodated with the partner by virtue of arrangements made under any of the provisions referred to in paragraphs 28 or 29 of Schedule 8 (sums to be disregarded in the calculation of income other than earnings) and the partner is in receipt of any payment specified in those paragraphs;
  - (h) the partner is engaged in an activity in respect of which—
    - (i) a sports award has been made, or is to be made, to the partner; and
    - (ii) no other payment is made or is expected to be made to the partner.
- (2) A claimant's partner is not to be treated as engaged in remunerative work, where the partner is—
- <sup>F177</sup>(a) .....
  - (b) subject to regulation 42(4) (partners treated as engaged in remunerative work), a person who would otherwise have satisfied section 126(1) of the Contributions and Benefits Act (trade disputes) <sup>F178</sup> or in respect of whom section 124(1) of that Act (conditions of entitlement to income support) <sup>F179</sup> would otherwise have had effect as modified by section 127(b) of that Act (effect of return to work) <sup>F180</sup>;
  - (c) a person who would otherwise satisfy the conditions set out in paragraph 4 of Schedule 1B to the Income Support Regulations <sup>F181</sup>;
  - <sup>F182</sup>(d) .....
- (3) The claimant's partner is not to be treated as engaged in remunerative work on any day on which that partner is on maternity leave, paternity leave or adoption leave or is absent from work because the partner is ill.
- (4) In this regulation—
- “work as a councillor” has the same meaning as in regulation 40;
  - “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.

**Textual Amendments**

**F174** 2004 c. 21.

**F175** Words in reg. 43(1)(e)(iii) substituted (1.4.2013) by [The Police and Fire Reform \(Scotland\) Act 2012 \(Consequential Provisions and Modifications\) Order 2013 \(S.I. 2013/602\)](#), art. 1(2), **Sch. 2 para. 91**

**F176** S.I. 2001/1004.

**F177** Reg. 43(2)(a) revoked in part (25.1.2010) by [The Social Security \(Miscellaneous Amendments\) \(No. 5\) Regulations 2009 \(S.I. 2009/3228\)](#), regs. 1(2), **4(1)(c)** (with reg. 4(3)(6))

**F178** Section 126(1) was amended by paragraph 31 of Schedule 1 to the [Incapacity Act 1994 \(c. 18\)](#) and paragraph 31(a) and (b) of Schedule 2 to the [Jobseekers Act 1995 \(c. 18\)](#).

**F179** Section 124(1) was amended by paragraph 30(2) to (5) of Schedule 2 to the [Jobseekers Act 1995](#) and by section 14 of and paragraphs 1, 2(1) and (2) of Part 1 of Schedule 2 to the [State Pension Credit Act 2002 \(c. 16\)](#).

**F180** Section 127(b) was amended by paragraph 44 of Schedule 24 to the [Civil Partnership Act 2004 \(c. 33\)](#).

**F181** Schedule 1B to the [Income Support Regulations](#) was inserted by regulation 22 of and Schedule 1 to the [Income Support \(Jobseeker's Allowance Consequential Amendments\) Regulations 1996 \(S.I. 1996/206\)](#). Paragraph 4 was amended by regulation 33 of the [Jobseekers Allowance and Income](#)

*Status: Point in time view as at 02/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008. (See end of Document for details)*

Support (General) (Amendment) Regulations 1996 (S.I. 1996/1517), by paragraph 2 of Schedule 2 to the Social Security Amendment (Carer's Allowance) Regulations 2002 (S.I. 2002/2497) and by regulation 4(1) of the Social Security (Loss of Benefit) (Consequential Amendments) Regulations 2002 (S.I. 2002/490).

**F182** Reg. 43(2)(d) revoked in part (25.1.2010) by The Social Security (Miscellaneous Amendments) (No. 5) Regulations 2009 (S.I. 2009/3228), regs. 1(2), **4(1)(c)** (with reg. 4(3)(6))

### **Claimants who are treated as not entitled to any allowance at all by reason of regulation 40(1) are to be treated as not having limited capability for work**

**44.**—(1) Where a claimant is treated as not entitled to an employment and support allowance by reason of regulation 40(1), subject to paragraph (2), the claimant is to be treated as not having limited capability for work.

(2) Paragraph (1) does not apply where the claimant remains entitled to a contributory allowance, but is not entitled to an income-related allowance by reason of regulation 40(1).

(3) 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 20 (certain claimants to be treated as having limited capability for work), 25 (hospital in-patients), 26 (claimants undergoing certain regular treatment) or 29 (exceptional circumstances), limited capability for work; or
- (b) the claimant meets the conditions set out in regulation 30(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**

**45.**—(1) The categories of work referred to in regulation 40(2)(f) are set out in the following paragraphs.

(2) Work for which the earnings in any week do not exceed £20.00.

(3) Work for which the earnings in any week do not exceed [<sup>F183</sup>16 x National Minimum Wage, subject to paragraph (9A),] and which—

- (a) 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
- (b) is supervised by a person employed by a public or local authority or [<sup>F184</sup>by a] voluntary organisation [<sup>F184</sup>or community interest company] engaged in the provision or procurement of work for persons who have disabilities.

(4) Work which is done for less than 16 hours a week, for which earnings in any week do not exceed [<sup>F185</sup>16 x National Minimum Wage, subject to paragraph (9A),] and which—

- [<sup>F186</sup>(a) is done during a period of specified work, provided that—
  - (i) the claimant has not previously done specified work,
  - (ii) since the beginning of the last period of specified work, the claimant has ceased to be entitled to a relevant benefit for a continuous period exceeding 12 weeks, or
  - (iii) not less than 52 weeks have elapsed since the last period of specified work; or]
- (b) done by a claimant who has or is treated as having limited capability for work-related activity.

[<sup>F187</sup>(c) for the purposes of this regulation, a period of specified work begins on the first day on which any specified work is undertaken and continues for a period of 52 weeks, whether or not any further specified work is undertaken during that period.]

(5) Work done in the course of receiving assistance in pursuing self-employed earner's employment whilst participating in a programme provided or other arrangements made under section 2 of the Employment and Training Act 1973 <sup>F188</sup> (functions of the Secretary of State) or section 2 of the Enterprise and New Towns (Scotland) Act 1990 <sup>F189</sup> (functions in relation to training for employment etc.).

(6) Work done where the claimant receives no payment of earnings and where the claimant—

- (a) is engaged by a charity or voluntary organisation; or
- (b) is a volunteer,

where the Secretary of State is satisfied in any of those cases that it is reasonable for the claimant to provide the service free of charge.

(7) Work done in the course of participating in a work placement approved in writing by the Secretary of State before the placement starts.

(8) 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 (decisions superseding earlier decisions) of the Social Security Act 1998 <sup>F190</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.

(9) 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.

[<sup>F191</sup>(9A) Where the amount determined by the calculation in paragraphs (3) and (4) would, but for this paragraph, include an amount of—

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

(10) 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>F192</sup>,

in respect of which the question of the claimant's limited capability for work arises under the Act;

“specified work” means work done in accordance with paragraph (4);

“supervised work” means work done in accordance with paragraph (3)(a) or (b);

*Status: Point in time view as at 02/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008. (See end of Document for details)*

“volunteer” has the same meaning it has in regulation 43;

“work placement” means practical work experience with an employer, which is neither paid nor undertaken in expectation of payment.

#### Textual Amendments

- F183** Words in reg. 45(3) substituted (11.4.2011) by [The Social Security \(Miscellaneous Amendments\) Regulations 2011 \(S.I. 2011/674\)](#), regs. 1(4), **16(5)(a)**
- F184** Words in reg. 45(3)(b) inserted (28.6.2010) by [The Social Security \(Miscellaneous Amendments\) \(No. 3\) Regulations 2010 \(S.I. 2010/840\)](#), regs. 1, **9(10)(a)**
- F185** Words in reg. 45(4) substituted (11.4.2011) by [The Social Security \(Miscellaneous Amendments\) Regulations 2011 \(S.I. 2011/674\)](#), regs. 1(4), **16(5)(a)**
- F186** Words in reg. 45(4)(a) substituted (28.6.2010) by [The Social Security \(Miscellaneous Amendments\) \(No. 3\) Regulations 2010 \(S.I. 2010/840\)](#), regs. 1, **9(10)(b)**
- F187** Reg. 45(4)(c) inserted (28.6.2010) by [The Social Security \(Miscellaneous Amendments\) \(No. 3\) Regulations 2010 \(S.I. 2010/840\)](#), regs. 1, **9(10)(c)**
- F188** 1973 c. 50. Section 2 was substituted by section 25(1) of the Employment Act 1988. Subsections (4) and (6) of section 2 were repealed by section 29(4) of and Schedule 7 to the Employment Act 1989. Subsections (3A) and (3B) of section 2, which apply to Scotland only, inserted by the Trade Union Reform and Employment Rights Act 1993.
- F189** 1990 c. 35. Section 2 amended by sections 47(4)(a) and (b) and 51 of and Schedule 10 to the Trade Union Reform and Employment Rights Act 1993. Section 2 also amended by articles 1(2) and 4 of and paragraph 100(2) of Schedule 2 to Scotland Act 1998 (Consequential Modifications) Order (No. 2) 1999.
- F190** 1998 c. 14. Section 10 was amended by sections 18 and 26(3) of and by paragraph 23 of Schedule 7 to and by Schedule 10 to the Transfer of Functions Act 1999.
- F191** Reg. 45(9A) inserted (11.4.2011) by [The Social Security \(Miscellaneous Amendments\) Regulations 2011 \(S.I. 2011/674\)](#), regs. 1(4), **16(5)(b)**
- F192** 1992 c. 4. Section 22 was amended by Paragraph 22 of Schedule 2 to the Jobseeker's Act 1995.

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

- C1** Reg. 45 modified by SI 2010/1907 Sch. 2 para. 11 (as amended) (1.11.2010) by [The Employment and Support Allowance \(Transitional Provisions, Housing Benefit and Council Tax Benefit\) \(Existing Awards\) \(No. 2\) \(Amendment\) Regulations 2010 \(S.I. 2010/2430\)](#), regs. 1(2), **17(5)** (with reg. 15(2))

#### Effect of work on entitlement to contributory allowance where claimant is receiving certain regular treatment

**46.** Where a claimant who is entitled to a contributory allowance and is treated as having limited capability for work by virtue of regulation 26 works on any day during a week when the claimant is, in accordance with regulation 26, receiving certain regular treatment or recovering from that treatment, that work is to have no effect on the claimant's entitlement to the contributory allowance.

## PART 8

### CONDITIONALITY

#### CHAPTER 1

##### Work-focused health-related assessment

##### Requirement to take part in a work-focused health-related assessment

<sup>F193</sup>47. ....

###### Textual Amendments

**F193** Reg. 47 revoked (1.6.2011) by [The Employment and Support Allowance \(Work-Related Activity\) Regulations 2011 \(S.I. 2011/1349\)](#), regs. 1, **11(a)**

##### Work-focused health-related assessment

<sup>F194</sup>48. ....

###### Textual Amendments

**F194** Reg. 48 revoked (1.6.2011) by [The Employment and Support Allowance \(Work-Related Activity\) Regulations 2011 \(S.I. 2011/1349\)](#), regs. 1, **11(b)**

##### Notification of assessment

<sup>F195</sup>49. ....

###### Textual Amendments

**F195** Reg. 49 revoked (1.6.2011) by [The Employment and Support Allowance \(Work-Related Activity\) Regulations 2011 \(S.I. 2011/1349\)](#), regs. 1, **11(c)**

##### Determination of the place of the work-focused health-related assessment

<sup>F196</sup>50. ....

###### Textual Amendments

**F196** Reg. 50 omitted (28.6.2010) by virtue of [The Social Security \(Miscellaneous Amendments\) \(No. 3\) Regulations 2010 \(S.I. 2010/840\)](#), regs. 1, **9(12)**

##### Taking part in a work-focused health-related assessment

<sup>F197</sup>51. ....

*Status: Point in time view as at 02/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008. (See end of Document for details)*

**Textual Amendments**

**F197** Reg. 51 revoked (1.6.2011) by [The Employment and Support Allowance \(Work-Related Activity\) Regulations 2011 \(S.I. 2011/1349\)](#), regs. 1, **11(d)**

**Deferral of requirement to take part in a work-focused health-related assessment**

<sup>F198</sup>**52.** .....

**Textual Amendments**

**F198** Reg. 52 revoked (1.6.2011) by [The Employment and Support Allowance \(Work-Related Activity\) Regulations 2011 \(S.I. 2011/1349\)](#), regs. 1, **11(e)**

**Failure to take part in a work-focused health-related assessment**

<sup>F199</sup>**53.** .....

**Textual Amendments**

**F199** Reg. 53 revoked (1.6.2011) by [The Employment and Support Allowance \(Work-Related Activity\) Regulations 2011 \(S.I. 2011/1349\)](#), regs. 1, **11(f)**

CHAPTER 2

Work-focused interviews

**Requirement to take part in a work-focused interview**

**54.**—(1) The Secretary of State may require a claimant who satisfies the requirements in paragraph (2) to take part in one or more work-focused interviews as a condition of continuing to be entitled to the full amount of employment and support allowance payable to the claimant.

(2) The requirements referred to in paragraph (1) are that the claimant—

- (a) is either—
  - (i) entitled to an employment and support allowance; or
  - (ii) a person in respect of whom the Secretary of State has made an award under regulation 146(1);
- (b) is not a member of the support group;
- (c) has not reached the age at which a woman of the same age as the claimant would attain pensionable age; <sup>F200</sup> ...
- (d) is not only entitled to a contributory allowance payable at a nil rate<sup>F201</sup>; and]
- <sup>F201</sup>(e) is not a lone parent who is responsible for and a member of the same household as a child under one.]

(3) Any requirement to take part in a work-focused interview ceases to have effect if the claimant ceases to satisfy the requirements in paragraph (2).



#### Textual Amendments

- F200** Word in reg. 54(2)(c) omitted (31.10.2011) by virtue of [The Social Security \(Work-focused Interviews for Lone Parents and Partners\) \(Amendment\) Regulations 2011 \(S.I. 2011/2428\)](#), regs. 1, **5(3)(a)**
- F201** Reg. 54(2)(e) and word inserted (31.10.2011) by [The Social Security \(Work-focused Interviews for Lone Parents and Partners\) \(Amendment\) Regulations 2011 \(S.I. 2011/2428\)](#), regs. 1, **5(3)(b)**

#### Work-focused interview

- 55.** 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, including self-employment opportunities, for the claimant, that are relevant to the claimant's needs and abilities.

#### Notification of interview

**56.—(1)** The Secretary of State must notify the claimant of the requirement to [<sup>F202</sup>take part in] the work-focused interview including details of the date, time and [<sup>F203</sup>if required to attend in person, the] place of the interview.

(2) A work-focused interview may take place at a claimant's home if it is determined that requiring the claimant to attend elsewhere would cause undue inconvenience to, or endanger the health of, the claimant.

(3) The notification referred to in paragraph (1) may be in writing or otherwise.

#### Textual Amendments

- F202** Words in reg. 56(1) substituted (1.6.2011) by [The Employment and Support Allowance \(Work-Related Activity\) Regulations 2011 \(S.I. 2011/1349\)](#), regs. 1, **12(a)**
- F203** Words in reg. 56(1) inserted (1.6.2011) by [The Employment and Support Allowance \(Work-Related Activity\) Regulations 2011 \(S.I. 2011/1349\)](#), regs. 1, **12(b)**

#### Taking part in a work-focused interview

**57.—(1)** A claimant is regarded as having taken part in a work-focused interview if the claimant—

- (a) [<sup>F204</sup>if required to attend in person,] attends for the interview at the place and at the date and time notified in accordance with regulation 56;
- [<sup>F205</sup>(aa) if not required to attend in person, is available and responds at the date and time notified in accordance with regulation 56 to any contact made at that time for the purpose of carrying out the interview;]
- (b) provides information, if requested by the Secretary of State, about any or all of the matters set out in paragraph (2);

*Status: Point in time view as at 02/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008. (See end of Document for details)*

(c) participates in discussions to the extent the Secretary of State considers necessary, about any or all of the matters set out in paragraph (3);

<sup>F206</sup>(d) .....

(2) The matters referred to in paragraph (1)(b) are—

- (a) the claimant's educational qualifications and vocational training;
- (b) the claimant's work history;
- (c) the claimant's aspirations for future work;
- (d) the claimant's skills that are relevant to work;
- (e) the claimant's work-related abilities;
- (f) the claimant's caring or childcare responsibilities; and
- (g) any paid or unpaid work that the claimant is undertaking.

(3) The matters referred to in paragraph (1)(c) are—

- (a) any activity the claimant is willing to undertake which may make obtaining or remaining in work more likely;
- (b) any such activity that the claimant may have previously undertaken;
- (c) any progress the claimant may have made towards remaining in or obtaining work;
- (d) any work-focused health-related assessment the claimant may have taken part in; and
- (e) the claimant's opinion as to the extent to which the ability to remain in or obtain work is restricted by the claimant's physical or mental condition.

**Textual Amendments**

**F204** Words in [reg. 57\(1\)\(a\)](#) inserted (1.6.2011) by [The Employment and Support Allowance \(Work-Related Activity\) Regulations 2011 \(S.I. 2011/1349\)](#), regs. 1, **13(2)**

**F205** [Reg. 57\(1\)\(aa\)](#) inserted (1.6.2011) by [The Employment and Support Allowance \(Work-Related Activity\) Regulations 2011 \(S.I. 2011/1349\)](#), regs. 1, **13(3)**

**F206** [Reg. 57\(1\)\(d\)](#) omitted (1.6.2011) by virtue of [The Employment and Support Allowance \(Work-Related Activity\) Regulations 2011 \(S.I. 2011/1349\)](#), regs. 1, **13(4)**

**Action plan**

<sup>F207</sup>**58.** .....

**Textual Amendments**

**F207** [Reg. 58](#) revoked (1.6.2011) by [The Employment and Support Allowance \(Work-Related Activity\) Regulations 2011 \(S.I. 2011/1349\)](#), regs. 1, **14**

**Deferral of requirement to take part in a work-focused interview**

**59.**—(1) A requirement to take part in a work-focused interview may be deferred or treated as having been deferred if at the time the work-focused interview is to take place, or was due to take place, such an interview would not at that time be or have been—

- (a) of assistance to the claimant; or
- (b) appropriate in the circumstances.

(2) A decision under paragraph (1) may be made at any time after the requirement to take part in the work-focused interview is imposed, including after the time that the work-focused interview was due to take place or took place.

(3) Where a requirement to take part in a work-focused interview is deferred, or treated as having been deferred, then the time that the work-focused interview is to take place must be re-determined.

**Requirement to take part in a work-focused interview not to apply**

**60.** The Secretary of State may determine that a requirement on a claimant to take part in a work-focused interview is not to apply, or is to be treated as not having applied, if that interview would not be, or would not have been, of assistance because the claimant is or was likely to be starting or returning to work.

**Failure to take part in a work-focused interview**

**61.—**(1) A claimant who is required to take part in a work-focused interview but fails to do so must show good cause for that failure within 5 working days of the date on which the Secretary of State gives notification of that failure.

(2) The Secretary of State must determine whether a claimant who is required to take part in a work-focused interview has failed to do so and, if so, whether the claimant has shown good cause for that failure in accordance with paragraph (1).

<sup>F208</sup>(3) .....

**Textual Amendments**  
**F208** Reg. 61(3) omitted (3.12.2012) by virtue of [The Employment and Support Allowance \(Sanctions\) \(Amendment\) Regulations 2012 \(S.I. 2012/2756\)](#), regs. 1(1), 3 (with reg. 1(2))

**Contracting out certain functions relating to work-focused interviews**

**62.—**(1) Any function of the Secretary of State specified in paragraph (2) may be exercised by, or by employees of, such person (if any) as may be authorised by the Secretary of State.

(2) The functions are any function under—

- (a) regulation 54(1) (requirement to take part in a work-focused interview);
- (b) regulation 56(1) and (2) (notification requirement);
- (c) regulation 57(1)(b) and (c) (taking part in a work-focused interview);

<sup>F209</sup>(d) .....

- (e) regulation 59(1) and (3) (deferral of requirement to take part in a work-focused interview);
- (f) regulation 60 (requirement to take part in a work-focused interview not to apply).

**Textual Amendments**  
**F209** Reg. 62(2)(d) omitted (1.6.2011) by virtue of [The Employment and Support Allowance \(Work-Related Activity\) Regulations 2011 \(S.I. 2011/1349\)](#), regs. 1, 16

## CHAPTER 3

## Reduction of employment and support allowance

**Reduction of employment and support allowance**

63.—<sup>[F210]</sup>(1) Where the Secretary of State has determined—

- (a) that a claimant who was required to take part in a work-focused interview has failed to do so and has failed to show good cause for that failure in accordance with regulation 61; or
- (b) that a claimant who was required to undertake work-related activity has failed to do so and has failed to show good cause for that failure in accordance with regulation 8 of the Employment and Support Allowance (Work-Related Activity) Regulations 2011,

(“a failure determination”) the amount of the employment and support allowance payable to the claimant is to be reduced in accordance with this regulation.]

<sup>[F211]</sup>(2) Subject to paragraph (3), the amount of the reduction in relation to each failure determination is 100% of the prescribed amount for a single claimant as set out in paragraph (1)(a) of Part 1 of Schedule 4.]

(3) In any benefit week, the amount of an employment and support allowance payable to a claimant is not, by virtue of this regulation, to be reduced—

- (a) below 10 pence;
- (b) in relation to more than—
  - (i) one failure determination relating to <sup>[F212]</sup>work-related activity]; and
  - (ii) one failure determination relating to a work-focused interview; and
- (c) by more than 100% of the <sup>[F213]</sup>prescribed amount for a single claimant as set out in paragraph 1(a) of Part 1] of Schedule 4 in any circumstances.

(4) Where a claimant is entitled to both a contributory allowance and an income-related allowance, any reduction in the claimant's allowance must first be applied to the part of that allowance treated as attributable to the claimant's contributory allowance and only if there is any amount outstanding is it to be applied to the part of that allowance treated as attributable to the claimant's income-related allowance.

(5) For the purposes of determining the amount of any income-related allowance payable, a claimant is to be treated as receiving the amount of any contributory allowance which would have been payable but for any reduction made in accordance with this regulation.

<sup>[F214]</sup>(6) Subject to paragraph (10), the reduction is to have effect for—

- (a) one week for each 7 day period during which the claimant fails to meet a compliance condition; and
- (b) a further fixed period determined in accordance with paragraph (7).

(7) The length of the fixed period is—

- (a) 1 week, where there has been no previous failure by the claimant which falls within paragraph (8);
- (b) 2 weeks, where there has been only one previous failure by the claimant which falls within paragraph (8); or
- (c) 4 weeks, where there have been two or more previous failures by the claimant and the most recent of those failures—
  - (i) falls within paragraph (8), and

- (ii) resulted in a reduction that has effect for 2 weeks under sub-paragraph (b) or 4 weeks under this sub-paragraph, or would have done but for paragraph (3).
- (8) A previous failure falls within this paragraph if—
- (a) it relates to a failure for which a reduction was imposed under this regulation, or would have been but for paragraph (3);
  - (b) that failure occurred on or after 3<sup>rd</sup> December 2012; and
  - (c) the date of that failure is within 52 weeks but not within 2 weeks of the date of the current failure.
- (9) This paragraph applies where the claimant meets a compliance condition before the end of the period of one week after the date of the failure to which the failure determination relates.
- (10) Where paragraph (9) applies, the claimant's employment and support allowance is reduced only for the fixed period set out in paragraph (7) applicable to the claimant.
- (11) In this regulation—
- “compliance condition” means—
- (a) where the failure by the claimant relates to a requirement to take part in a work-focused interview, either—
    - (i) taking part in a work-focused interview, or
    - (ii) making an agreement with the Secretary of State to take part in a work-focused interview at an agreed date;
  - (b) where the failure by the claimant relates to a requirement to undertake work-related activity, either—
    - (i) undertaking the activity specified in the action plan, or
    - (ii) where so notified by the Secretary of State, undertaking an alternative activity, or
    - (iii) making an agreement with the Secretary of State to undertake the activity referred to in sub-paragraph (i) or (ii) at an agreed date;
- “current failure” means a failure which may lead to a reduction under this regulation in relation to which the Secretary of State has not yet determined whether the amount of the employment and support allowance payable to the claimant is to be reduced in accordance with this regulation.]

### Textual Amendments

- F210** Reg. 63(1) substituted (1.6.2011) by [The Employment and Support Allowance \(Work-Related Activity\) Regulations 2011 \(S.I. 2011/1349\)](#), regs. 1, **17(2)**
- F211** Reg. 63(2) substituted (3.12.2012) by [The Employment and Support Allowance \(Sanctions\) \(Amendment\) Regulations 2012 \(S.I. 2012/2756\)](#), regs. 1(1), **4(2)** (with reg. 1(2))
- F212** Words in reg. 63(3)(b)(i) substituted (1.6.2011) by [The Employment and Support Allowance \(Work-Related Activity\) Regulations 2011 \(S.I. 2011/1349\)](#), regs. 1, **17(3)**
- F213** Words in reg. 63(3)(c) substituted (3.12.2012) by [The Employment and Support Allowance \(Sanctions\) \(Amendment\) Regulations 2012 \(S.I. 2012/2756\)](#), regs. 1(1), **4(3)** (with reg. 1(2))
- F214** Reg. 63(6)-(11) inserted (3.12.2012) by [The Employment and Support Allowance \(Sanctions\) \(Amendment\) Regulations 2012 \(S.I. 2012/2756\)](#), regs. 1(1), **4(4)** (with reg. 1(2))

Status: Point in time view as at 02/04/2013.

Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008. (See end of Document for details)

**Cessation of reduction**

64.—<sup>F215</sup>(1) Any reduction imposed as a result of a failure determination which resulted from a failure to undertake work-related activity in accordance with the Employment and Support Allowance (Work-Related Activity) Regulations 2011 ceases to have effect if—

- <sup>F216</sup>(a) . . . . .
- (b) the claimant subsequently ceases to be subject to a requirement to undertake work-related activity; or
- (c) the Secretary of State decides it is no longer appropriate to require the person to undertake work-related activity at that time.]

<sup>F217</sup>(1A) The Secretary of State must notify the person in writing—

- <sup>F218</sup>(a) . . . . .
- (b) of any decision under paragraph (1)(c).]

(2) Any reduction imposed as a result of a failure determination which resulted from a failure to take part in a work-focused interview ceases to have effect if—

- <sup>F219</sup>(a) . . . . .
- (b) the claimant subsequently ceases to meet the requirements set out in regulation 54(2).

**Textual Amendments**

**F215** Reg. 64(1) substituted (1.6.2011) by [The Employment and Support Allowance \(Work-Related Activity\) Regulations 2011 \(S.I. 2011/1349\)](#), regs. 1, **18(2)**

**F216** Reg. 64(1)(a) omitted (3.12.2012) by virtue of [The Employment and Support Allowance \(Sanctions\) \(Amendment\) Regulations 2012 \(S.I. 2012/2756\)](#), regs. 1(1), **5** (with reg. 1(2))

**F217** Reg. 64(1A) inserted (1.6.2011) by [The Employment and Support Allowance \(Work-Related Activity\) Regulations 2011 \(S.I. 2011/1349\)](#), regs. 1, **18(3)**

**F218** Reg. 64(1A)(a) omitted (3.12.2012) by virtue of [The Employment and Support Allowance \(Sanctions\) \(Amendment\) Regulations 2012 \(S.I. 2012/2756\)](#), regs. 1(1), **5** (with reg. 1(2))

**F219** Reg. 64(2)(a) omitted (3.12.2012) by virtue of [The Employment and Support Allowance \(Sanctions\) \(Amendment\) Regulations 2012 \(S.I. 2012/2756\)](#), regs. 1(1), **5** (with reg. 1(2))

<sup>F220</sup>**Hardship payments**

64A. The Secretary of State must make a hardship payment to a claimant only where—

- (a) the Secretary of State is satisfied that the claimant is or will be in hardship unless a hardship payment is made;
- (b) the claimant’s employment and support allowance has been reduced in accordance with regulation 63;
- (c) the claimant meets the conditions of entitlement to an income-related employment and support allowance;
- (d) the claimant completes and submits an application —
  - (i) approved for the purpose by the Secretary of State, or in such other form as the Secretary of State accepts as sufficient, and
  - (ii) in such manner as the Secretary of State determines; and
- (e) the claimant provides such information or evidence as the Secretary of State may require, in such manner as the Secretary of State determines.

**Textual Amendments**

**F220** Regs. 64A-64D inserted (3.12.2012) by [The Employment and Support Allowance \(Sanctions\) \(Amendment\) Regulations 2012 \(S.I. 2012/2756\)](#), regs. 1(1), 6 (with reg. 1(2))

**Circumstances in which a claimant is to be treated as being in hardship**

**64B.** A claimant is to be treated as being in hardship if the claimant's partner, or a child or qualifying young person for whom the claimant or the claimant's partner is responsible, is or will be in hardship unless a hardship payment is made.

**Textual Amendments**

**F220** Regs. 64A-64D inserted (3.12.2012) by [The Employment and Support Allowance \(Sanctions\) \(Amendment\) Regulations 2012 \(S.I. 2012/2756\)](#), regs. 1(1), 6 (with reg. 1(2))

**Matters to be taken into account in determining hardship**

**64C.**—(1) The Secretary of State must take the following matters into account in determining hardship—

- (a) whether the claimant's partner or a person in the claimant's family satisfies the requirements for a disability premium specified in paragraphs 6 and 7 of Schedule 4, or an element of child tax credit in respect of a child or young person who is disabled or severely disabled within the meaning of regulation 8 of the Child Tax Credit Regulations 2002;
- (b) the resources which are likely to be available to the household without a hardship payment, including resources from persons who are not members of the household, but excluding any payment referred to in paragraph (2);
- (c) the difference between the resources referred to in sub-paragraph (b) and the amount of the hardship payment that the claimant would receive;
- (d) whether there is substantial risk that the household will not have access to essential items (including food, clothing, heating and accommodation), or will have access to such essential items at considerably reduced levels, without a hardship payment; and
- (e) the length of time that the factors set out in sub-paragraphs (b) to (d) are likely to continue.

(2) The payments to be excluded from the resources referred to in paragraph (1)(b) are payments made under paragraph 7 (1) or (2) of Schedule 8 (sums to be disregarded in the calculation of income other than earnings: child tax credit and child benefit) to the claimant or the claimant's partner in respect of a child or young person who is a member of the claimant's household or family.

**Textual Amendments**

**F220** Regs. 64A-64D inserted (3.12.2012) by [The Employment and Support Allowance \(Sanctions\) \(Amendment\) Regulations 2012 \(S.I. 2012/2756\)](#), regs. 1(1), 6 (with reg. 1(2))

**The amount of a hardship payment**

**64D.**—(1) A hardship payment is 60 per cent of the prescribed amount for a single claimant as set out in paragraph (1)(a) of Part 1 of Schedule 4.

*Status: Point in time view as at 02/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008. (See end of Document for details)*

(2) A payment calculated in accordance with paragraph (1) shall, if it is not a multiple of 5p, be rounded to the nearest such multiple or, if it is a multiple of 2.5p but not of 5p, to the next lower multiple of 5p.]

#### Textual Amendments

**F220** Regs. 64A-64D inserted (3.12.2012) by [The Employment and Support Allowance \(Sanctions\) \(Amendment\) Regulations 2012 \(S.I. 2012/2756\)](#), regs. 1(1), 6 (with reg. 1(2))

## CHAPTER 4

### Notification

#### Notification under this Part

**65.**—(1) Where written notification is to be given in accordance with this Part, such notification may be sent by post.

(2) Any notification sent by post is to be taken to have been received on the second working day after posting.

## CHAPTER 5

### Modification of the Act in relation to claims to which section 5(1)(c) of the Administration Act applies

#### Modifications of the Act

**66.**—(1) Where a person has made a claim for an employment and support allowance to which section 5(1)(c) of the Administration Act applies, the Act applies with the following modifications.

(2) Section 11(1) of the Act applies—

(a) as if for sub-paragraph (a) there were substituted—

“(a) either—

(i) entitled to an employment and support allowance; or

(ii) a person who has made a claim for an employment and support allowance to which regulations under section 5(1)(c) of the Administration Act apply; and”;

(b) as if for “continuing to be” there were substituted “ being ”.

(3) Section 12(1) of the Act applies—

(a) as if for sub-paragraph (a) there were substituted—

“(a) either—

(i) entitled to an employment and support allowance; or

(ii) a person who has made a claim to which section 5 applies; and”;

(b) as if for “continuing to be” there were substituted “ being ”.



## PART 9

### AMOUNTS OF ALLOWANCE

#### CHAPTER 1

##### Prescribed amounts

##### Prescribed amounts

**67.**—(1) Subject to regulations 68, 69 <sup>F221</sup>... (amounts in other cases, special cases <sup>F221</sup>...), the amounts prescribed for the purposes of the calculation of the amount of an income-related allowance under section 4(2)(a) of the Act in relation to a claimant are such of the following amounts as may apply in the claimant's case—

- (a) an amount in respect of the claimant or, if the claimant is a member of a couple, an amount in respect of both of them determined in accordance with paragraph 1(1), (2) or (3) of Schedule 4 (amounts) as the case may be;
- (b) the amount of any premiums which may be applicable to the claimant determined in accordance with Parts 2 and 3 of that Schedule (premiums);
- (c) any amounts determined in accordance with Schedule 6 (housing costs) which may be applicable to the claimant in respect of mortgage interest repayments or such other housing costs as are prescribed in that Schedule.

(2) Subject to regulation 69 (special cases) the amount prescribed for the purposes of the calculation of the amount of a claimant's contributory allowance under section 2(1)(a) of the Act is the amount determined in accordance with paragraph 1(1) of Schedule 4 as may apply in the claimant's case.

(3) Subject to regulation 69, the amount of the work-related activity component and the support component are prescribed in Part 4 of Schedule 4.

##### Textual Amendments

**F221** Words in reg. 67(1) omitted (25.1.2010) by virtue of [The Social Security \(Miscellaneous Amendments\) \(No. 5\) Regulations 2009](#) (S.I. 2009/3228), regs. 1(2), **3(4)(a)**

##### Polygamous marriages

**68.**—(1) Subject to regulation 69 <sup>F222</sup>... (special cases <sup>F222</sup>...), where a claimant is a husband or wife by virtue of a polygamous marriage the amounts prescribed for the purposes of the calculation of the amount of an income-related allowance under section 4(2)(a) of the Act are such of the following amounts as may apply in the claimant's case—

- (a) an amount in respect of the claimant and the other party to the marriage determined in accordance with paragraph 1(3) of Schedule 4;
- (b) an amount equal to the difference between the amounts specified in paragraph 1(3)(a) (couple where both aged 18 and over) and 1(1)(b) (single claimant aged 25 and over) of Schedule 4 in respect of each spouse additional to the marriage;
- (c) the amount of any premiums which are applicable to the claimant determined in accordance with Parts 2 and 3 of that Schedule (premiums);
- (d) any amounts determined in accordance with Schedule 6 (housing costs) which may be applicable to the claimant in respect of mortgage interest payments or such other housing costs as are prescribed in that Schedule.

*Status: Point in time view as at 02/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008. (See end of Document for details)*

(2) In the case of a partner who is aged less than 18, the amount which applies in respect of that partner is nil unless—

- (a) that partner is treated as responsible for a child; or
- (b) that partner is a person who—
  - (i) had that partner not been a member of a polygamous marriage would have qualified for an income-related allowance; or
  - (ii) satisfies the requirements of section 3(1)(f)(iii) of the Jobseekers Act (prescribed circumstances for persons aged 16 but less than 18); or
  - (iii) is the subject of a direction under section 16<sup>F223</sup> of that Act (persons under 18: severe hardship).

#### Textual Amendments

**F222** Words in reg. 68(1) omitted (25.1.2010) by virtue of [The Social Security \(Miscellaneous Amendments\) \(No. 5\) Regulations 2009 \(S.I. 2009/3228\)](#), regs. 1(2), **3(4)(b)**

**F223** Section 16 was amended by paragraph 139(1) and (2) of Schedule 7 to the [Social Security Act 1998 \(c. 14\)](#).

#### Special cases

**69.**—(1) In the case of a claimant to whom any paragraph in column (1) of Schedule 5 applies (amounts in special cases), the amount in respect of the claimant is to be the amount in the corresponding paragraph in column (2) of that Schedule.

(2) In Schedule 5—

“partner of a person subject to immigration control” means a person—

- (a) who is not subject to immigration control within the meaning of section 115(9) of the Immigration and Asylum Act; or
- (b) to whom section 115 of that Act does not apply by virtue of regulation 2 of the Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000<sup>F224</sup>; and
- (c) who is a member of a couple and the member's partner is subject to immigration control within the meaning of section 115(9) of that Act and section 115 of that Act applies to the partner for the purposes of exclusion from entitlement to an income-related allowance;

“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>F225</sup>;

“person from abroad” has the meaning given in regulation 70;

“person in hardship” means a person who satisfies regulation 158 but only for a period not exceeding 6 weeks;

“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>F226</sup> or the Prisons (Scotland) Act 1989<sup>F227</sup>,

other than a person who is detained in hospital under the provisions of the Mental Health Act 1983 <sup>F228</sup> or, in Scotland, under the provisions of the Mental Health (Care and Treatment) (Scotland) Act 2003 <sup>F229</sup> or the Criminal Procedure (Scotland) Act 1995 <sup>F230</sup>.

[<sup>F231</sup>(3) In Schedule 5 “person serving a sentence of imprisonment detained in hospital” means a person (“P”) who satisfies either of the following conditions.

- (4) The first condition is that—
- (a) P 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
  - (b) in any case where there is in relation to P a release date within the meaning of section 50(3) of that Act, P 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 P 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).]

#### Textual Amendments

**F224** S.I. 2000/636.

**F225** S.I. 2005/3360.

**F226** 1952 c. 52.

**F227** 1989 c. 45.

**F228** 1983 c. 20.

**F229** 2003 asp. 13.

**F230** 1995 c. 46.

**F231** Reg. 69(3)-(5) added (25.3.2010) by [The Social Security \(Persons Serving a Sentence of Imprisonment Detained in Hospital\) Regulations 2010 \(S.I. 2010/442\)](#), regs. 1, **5(2)**

#### Special cases: supplemental – persons from abroad

**70.**—(1) “Person from abroad” means, subject to the following provisions of this regulation, a claimant who is not habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland.

(2) A claimant must not be treated as habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland unless the claimant has a right to reside in (as the case may be) the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland other than a right to reside which falls within paragraph (3).

(3) A right to reside falls within this paragraph if it is one which exists by virtue of, or in accordance with, one or more of the following—

- (a) regulation 13 of the Immigration (European Economic Area) Regulations 2006 <sup>F232</sup>;
- (b) regulation 14 of those Regulations, but only in a case where the right exists under that regulation because the claimant is—
  - (i) a jobseeker for the purpose of the definition of “qualified person” in regulation 6(1) of those Regulations; or
  - (ii) a family member (within the meaning of regulation 7 of those Regulations) of such a jobseeker;

*Status: Point in time view as at 02/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008. (See end of Document for details)*

- [<sup>F233</sup>(bb) regulation 15A(1) of those Regulations, but only in a case where the right exists under that regulation because the claimant satisfies the criteria in regulation 15A(4A) of those Regulations;]
- (c) Article 6 of Council Directive No. 2004/38/EC<sup>F234, F235</sup> ...
- (d) [<sup>F236</sup>Article 45 of the Treaty on the Functioning of the European Union] (in a case where the claimant is a person seeking work in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland)[<sup>F237</sup>; or]
- [<sup>F237</sup>(e) Article 20 of the Treaty on the Functioning of the European Union (in a case where the right to reside arises because a British citizen would otherwise be deprived of the genuine enjoyment of the substance of their rights as a European Union citizen).]
- (4) A claimant is not a person from abroad if the claimant is—
- (a) a worker for the purposes of Council Directive No. 2004/38/EC;
- (b) a self-employed person for the purposes of that Directive;
- (c) a person who retains a status referred to in sub-paragraph (a) or (b) pursuant to Article 7(3) of that Directive;
- (d) a person who is a family member of a person referred to in sub-paragraph (a), (b) or (c) within the meaning of Article 2 of that Directive;
- (e) a person who has a right to reside permanently in the United Kingdom by virtue of Article 17 of that Directive;
- (f) a person who is treated as a worker for the purpose of the definition of “qualified person” in regulation 6(1) of the Immigration (European Economic Area) Regulations 2006 pursuant to—
- <sup>F238</sup>(i) . . . . .
- (ii) regulation 6 of the Accession (Immigration and Worker Authorisation) Regulations 2006<sup>F239</sup> (right of residence of a Bulgarian or Romanian who is an “accession State national subject to worker authorisation”);
- (g) a refugee within the definition in Article 1 of the Convention relating to the Status of Refugees done at Geneva on 28th July 1951<sup>F240</sup>, as extended by Article 1(2) of the Protocol relating to the Status of Refugees done at New York on 31st January 1967<sup>F241</sup>;
- (h) a person who has exceptional leave to enter or remain in the United Kingdom granted outside the rules made under section 3(2) of the Immigration Act 1971<sup>F242</sup>;
- (i) a person who has humanitarian protection granted under those rules;
- (j) a person who is not a person subject to immigration control within the meaning of section 115(9) of the Immigration and Asylum Act and who is in the United Kingdom as a result of deportation, expulsion or other removal by compulsion of law from another country to the United Kingdom;<sup>F243</sup> ...
- (k) a person in Great Britain who left the territory of Montserrat after 1st November 1995 because of the effect on that territory of a volcanic eruption [<sup>F244</sup>; or
- (l) a person who—
- (i) arrived in Great Britain on or after 28th February 2009 but before 18th March 2011;
- (ii) immediately before arriving there had been resident in Zimbabwe; and
- (iii) before leaving Zimbabwe, had accepted an offer, made by Her Majesty’s Government, to assist that person to move to and settle in the United Kingdom.]

### Textual Amendments

- F232** S.I. 2006/1003.
- F233** Reg. 70(3)(bb) inserted (8.11.2012) by [The Social Security \(Habitual Residence\) \(Amendment\) Regulations 2012 \(S.I. 2012/2587\)](#), regs. 1, **9(2)**
- F234** OJL 158, 30.4.04, p. 77.
- F235** Word in reg. 70(3)(c) omitted (8.11.2012) by virtue of [The Social Security \(Habitual Residence\) \(Amendment\) Regulations 2012 \(S.I. 2012/2587\)](#), regs. 1, **9(3)**
- F236** Words in reg. 70(3)(d) substituted (1.8.2012) by [The Treaty of Lisbon \(Changes in Terminology or Numbering\) Order 2012 \(S.I. 2012/1809\)](#), art. 2(1), **Sch. Pt. 2** (with art. 2(2))
- F237** Reg. 70(3)(e) and word added (8.11.2012) by [The Social Security \(Habitual Residence\) \(Amendment\) Regulations 2012 \(S.I. 2012/2587\)](#), regs. 1, **9(4)**
- F238** Reg. 70(4)(f)(i) omitted (31.10.2011) by virtue of [The Social Security \(Miscellaneous Amendments\) \(No. 3\) Regulations 2011 \(S.I. 2011/2425\)](#), regs. 1(2), **23(7)**
- F239** S.I. 2006/3317.
- F240** Cmnd. 9171.
- F241** Cmnd. 3906.
- F242** 1971 c. 77.
- F243** Word in reg. 70(4)(j) omitted (18.3.2009) by virtue of [The Social Security \(Habitual Residence\) \(Amendment\) Regulations 2009 \(S.I. 2009/362\)](#), regs. 1(2), **9(2)**
- F244** Reg. 70(4)(l) and word added (18.3.2009) by [The Social Security \(Habitual Residence\) \(Amendment\) Regulations 2009 \(S.I. 2009/362\)](#), regs. 1(2), **9(3)**

### Definition of non-dependant

**71.—**(1) In these Regulations, “non-dependant” means any person, except someone to whom paragraph (2), (3) or (4) applies, who normally resides with a claimant or with whom a claimant normally resides.

(2) This paragraph applies to—

- (a) any member of the claimant's family;
- (b) a child or young person who is living with the claimant but who is not a member of the claimant's household;
- (c) a person who lives with the claimant in order to care for the claimant or for the claimant's partner and who is engaged for that purpose by a charitable or voluntary organisation which makes a charge to the claimant or the claimant's partner for the care provided by that person;
- (d) the partner of a person to whom sub-paragraph (c) applies.

(3) This paragraph applies to a person, other than a close relative of the claimant or the claimant's partner—

- (a) who is liable to make payments on a commercial basis to the claimant or the claimant's partner in respect of the person's occupation of the claimant's dwelling;
- (b) to whom the claimant or the claimant's partner is liable to make payments on a commercial basis in respect of the claimant's occupation of that person's dwelling;
- (c) who is a member of the household of a person to whom sub-paragraph (a) or (b) applies.

(4) Subject to paragraph (5), this paragraph applies to—

- (a) a person who jointly occupies the claimant's dwelling and who is either—
  - (i) a co-owner of that dwelling with the claimant or the claimant's partner (whether or not there are other co-owners); or

*Status: Point in time view as at 02/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008. (See end of Document for details)*

(ii) jointly liable with the claimant or the claimant's partner to make payments to a landlord in respect of the person's occupation of that dwelling;

(b) a partner of a person to whom sub-paragraph (a) applies.

(5) Where a person is a close relative of the claimant or the claimant's partner, paragraph (4) applies to that person only if the claimant's, or the claimant's partner's, co-ownership, or joint liability to make payments to a landlord in respect of occupation of the dwelling arose either before 11th April 1988 or, if later, on or before the date on which the claimant or the claimant's partner first occupied the dwelling in question.

(6) For the purposes of this regulation a person resides with another only if they share any accommodation except a bathroom, a lavatory or a communal area but not if each person is separately liable to make payments in respect of occupation of the dwelling to the landlord.

(7) In this regulation “communal area” means any area (other than rooms) of common access (including halls and passageways) and rooms of common use in sheltered accommodation.

## CHAPTER 2

### Deductions from the contributory allowance

#### Permanent health insurance

**72.**—(1) For the purposes of sections 2(1)(c) and 3 of the Act (deductions from contributory allowance) pension payment is to include a permanent health insurance payment.

(2) In this regulation “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.

#### [<sup>F245</sup>Financial Assistance Scheme

**72A.**—(1) For the purposes of sections 2(1)(c) and 3 of the Act (deductions from contributory 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.]

#### Textual Amendments

**F245** Reg. 72A inserted (27.10.2008) by [The Employment and Support Allowance \(Miscellaneous Amendments\) Regulations 2008 \(S.I. 2008/2428\)](#), regs. 1(2), **7(1)**

#### Councillor's allowance

**73.** 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 those councils referred to in the definition of “councillor”.

#### Deductions for pension payment and PPF payment

**74.**—(1) Where—

- (a) [<sup>F246</sup>a claimant] is entitled to a contributory 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) any combination 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, £85.00; or
  - (ii) if that period is not a week, such proportion of the amount mentioned in paragraph (i) as falls to be calculated in accordance with regulation 94(1) or (6) (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 this Chapter “payment” means a payment or payments, as the case may be, referred to in paragraph (1)(b).

#### Textual Amendments

**F246** Words in reg. 74(1)(a) substituted (27.10.2008) by [The Employment and Support Allowance \(Miscellaneous Amendments\) Regulations 2008 \(S.I. 2008/2428\)](#), regs. 1(2), 7(2)

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

75. The following payments are to be treated as not being payments to which section 3 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>F247</sup>;
  - (e) any guaranteed income payment;
  - (f) any permanent health insurance payment in respect of which the employee had contributed to the premium to the extent of more than 50%.

#### Textual Amendments

**F247** 2003 c. 1.

#### Deductions for councillor's allowance

76.—(1) Where the net amount of councillor's allowance to which a claimant is entitled in respect of any week exceeds [<sup>F248</sup>16 x National Minimum Wage, subject to paragraph (3)], an amount equal

*Status: Point in time view as at 02/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008. (See end of Document for details)*

to the excess is to be deducted from the amount of a contributory allowance to which that person 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.

[<sup>F249</sup>(3) Where the amount determined by the calculation in paragraph (1) would, but for this paragraph, include an amount of—

- (i) less than 50p, that amount shall be rounded up to the nearest 50p; or
- (ii) less than £1 but more than 50p, that amount shall be rounded up to the nearest £1.]

#### Textual Amendments

**F248** Words in reg. 76(1) substituted (11.4.2011) by [The Social Security \(Miscellaneous Amendments\) Regulations 2011 \(S.I. 2011/674\)](#), regs. 1(4), **16(6)(a)**

**F249** Reg. 76(3) added (11.4.2011) by [The Social Security \(Miscellaneous Amendments\) Regulations 2011 \(S.I. 2011/674\)](#), regs. 1(4), **16(6)(b)**

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

**77.** Where regulations 74(1) and 76(1) apply, deductions must have effect, calculated where appropriate in accordance with regulation 94(1) or (6), 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 a contributory allowance in that week.

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

**78.** 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 94(1) or (6), 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

**79.—(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 94(1) or (6) 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 94(1) or (6) before aggregating the sum of those payments for the purposes of the reduction of a contributory allowance in accordance with regulation 74.

### CHAPTER 3

#### Statutory payments

#### Effect of statutory maternity pay on a contributory allowance

**80.—(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—
  - (i) is in a period of limited capability for work; and
  - (ii) satisfies the conditions of entitlement to a contributory 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 a contributory 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 a contributory allowance for any week (including part of a week), the total amount of such benefit 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 a contributory allowance is for part of a week) and only the balance, if any, of the contributory allowance is to be payable to her.

### Effect of statutory adoption pay on a contributory allowance

**81.**—(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—
  - (i) is in a period of limited capability for work; and
  - (ii) satisfies the conditions of entitlement to a contributory 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 a contributory 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 a contributory allowance for any week (including part of a week), the total amount of such benefit 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>F250</sup> for the same week (or equivalent part of a week where entitlement to a contributory allowance is for part of a week) and only the balance, if any, of the contributory allowance is to be payable to that claimant.

#### Textual Amendments

**F250** Part 12ZB was inserted by section 4 of the [Employment Act 2002 \(c. 22\)](#) and amended by the [Employment Equality \(Age\) Regulations 2006 \(S.I. 2006/1031\)](#), [regulation 49\(1\)](#) and paragraph 12 of Schedule 8.

*Status: Point in time view as at 02/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008. (See end of Document for details)*

## Effect of additional statutory paternity pay on a contributory allowance

**82.**—(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—
  - (i) is in a period of limited capability for work; and
  - (ii) satisfies the conditions of entitlement to a contributory 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 a contributory 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 a contributory allowance for any week (including part of a week), the total amount of such benefit 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>F251</sup> for the same week (or equivalent part of a week where entitlement to a contributory allowance is for part of a week) and only the balance, if any, of the contributory allowance is to be payable to that claimant.

### Textual Amendments

**F251** Part 12ZA was inserted by section 2 of the Employment Act 2002 and amended by the [Work and Families Act 2006 \(c. 18\)](#), [sections 6 to 10](#) and the Employment Equality (Age) Regulations 2006, regulation 49(1) and paragraph 11 of Schedule 8.

## PART 10

### INCOME AND CAPITAL

#### CHAPTER 1

##### General

### Calculation of income and capital of members of claimant's family and of a polygamous marriage

**83.**—(1) Subject to paragraph (4), the income and capital of a claimant's partner which by virtue of paragraph 6(2) of Schedule 1 to the Act is to be treated as income and capital of the claimant, is to be calculated in accordance with the following provisions of this Part in like manner as for the claimant; and any reference to the “claimant” is, except where the context otherwise requires, to be construed, for the purposes of this Part, as if it were a reference to the claimant's partner.

(2) Subject to the following provisions of this Part, the income paid to, or in respect of, and capital of, a child or young person who is a member of the claimant's family is not to be treated as the income or capital of the claimant.

(3) Subject to paragraph (5), where a claimant or the partner of a claimant is married polygamously to two or more members of the claimant's household—

- (a) the claimant is to be treated as possessing capital and income belonging to each such member; and
  - (b) the income and capital of that member is to be calculated in accordance with the following provisions of this Part in like manner as for the claimant.
- (4) Where at least one member of a couple is aged less than 18 and the applicable amount of the couple falls to be determined under paragraph 1(3)(e), (f), (g), (h) or (i) of Schedule 4 (amounts), the income of the claimant's partner is not to be treated as the income of the claimant to the extent that—
- (a) in the case of a couple where both members are aged less than 18, the amount specified in paragraph 1(3)(c) of that Schedule exceeds the amount specified in paragraph 1(3)(i) of that Schedule; and
  - (b) in the case of a couple where only one member is aged less than 18, the amount specified in paragraph 1(3)(a) of that Schedule exceeds the amount which is specified in paragraph 1(3)(h) of that Schedule.
- (5) Where a member of a polygamous marriage is a partner aged less than 18 and the amount which applies in respect of that partner under regulation 68(2) (polygamous marriages) is nil, the claimant is not to be treated as possessing the income of that partner to the extent that an amount in respect of that partner would have been included in the applicable amount if the partner had fallen within the circumstances set out in regulation 68(2)(a) or (b).

**Income of participants in the self-employment route**

84. Chapters 2, 3, 4, 6, 8 and 9 of this Part and regulations 132 to 137, 142 and 143 do not apply to any income which is to be calculated in accordance with Chapter 5 of this Part (participants in the self-employment route).

<sup>F252</sup> ... **liable relative payments**

85. Regulations 91 to 109, 111 to 117 and Chapter 10 of this Part do not apply to any payment which is to be calculated in accordance with Chapter 8 of this Part (<sup>F253</sup>... liable relative payments)].

**Textual Amendments**

**F252** Words in reg. 85 heading omitted (for specified purposes and with effect in accordance with reg. 1(6) of the amending S.I.) by virtue of [The Social Security \(Miscellaneous Amendments\) \(No. 4\) Regulations 2009 \(S.I. 2009/2655\)](#), regs. 1(6)(c), **11(4)**

**F253** Words in reg. 85 omitted (27.10.2008) by [The Employment and Support Allowance \(Miscellaneous Amendments\) Regulations 2008 \(S.I. 2008/2428\)](#), regs. 1(2), **20(3)**

**Child support**

<sup>F254</sup>86. ....

**Textual Amendments**

**F254** Reg. 86 omitted (27.10.2008) by virtue of [The Employment and Support Allowance \(Miscellaneous Amendments\) Regulations 2008 \(S.I. 2008/2428\)](#), regs. 1(2), **20(4)(a)**

**Calculation of income and capital of students**

87. The provisions of Chapters 2 to 7 of this Part (income and capital) are to have effect in relation to students and their partners subject to the modifications set out in Chapter 10 of this Part (students).

**Calculation of income which consists of earnings of participants in exempt work**

88. Notwithstanding the other provisions of this Part, regulations 91(2), 92 to 99 and 108(3) and (4) and Schedule 7 (sums to be disregarded in the calculation of earnings) are to apply to any income which consists of earnings which is to be calculated for the purposes of regulations 45(2) to (4) (exempt work – earnings limits).

**Calculation of income where pension payments, PPF periodic payments or councillor's allowance payable**

89. Notwithstanding the other provisions of this Part, regulation 94(1) and (6) is to apply for the purposes of calculating the amount of any pension payments, PPF periodic payments or councillor's allowance to which Chapter 2 of Part 9 (deductions from the contributory allowance) applies.

## CHAPTER 2

## Income

**Calculation of income**

90.—(1) For the purposes of paragraph 6(1) of Schedule 1 to the Act (conditions of entitlement to an income-related allowance), the income of a claimant is to be calculated on a weekly basis—

- (a) by determining in accordance with this Part, other than Chapter 7, the weekly amount of the claimant's income; and
- (b) by adding to that amount the weekly income calculated under regulation 118 (calculation of tariff income from capital).

(2) For the purposes of paragraph (1) “income” includes capital treated as income under regulation 105 (capital treated as income) and income which a claimant is treated as possessing under regulations 106 to 109 (notional income).

(3) 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 91(2), 92 to 99 and 108(3) and (4) and Schedule 7.

(4) For the purposes of paragraph (3), “income which consists of earnings” includes income which a claimant is treated as possessing under regulation 108(3) and (4).

(5) For the purposes of pension payments, PPF periodic payments and a councillor's allowance to which section 3 of the Act applies, the income other than earnings of a claimant is to be calculated on a weekly basis by determining in accordance with regulation 94(1), (2), (5) and (6) the weekly amount of the pension payments, PPF periodic payment or a councillor's allowance paid to the claimant.

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

91.—(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 94 (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 from the date on which the payment is treated as paid to the date immediately before the date on which the next monthly payment would have been so 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 (and any fraction is to be treated as a corresponding fraction of a week) by dividing—
  - (i) the net earnings; or
  - (ii) in the case of income which does not consist of earnings, the amount of that income less any amount paid by way of tax on that income which is disregarded under paragraph 1 of Schedule 8 (income other than earnings to be disregarded),

by the amount of an [<sup>F255</sup>employment and support] allowance which would be payable had the payment not been made plus an amount equal to the total of the sums which would fall to be disregarded from that payment under Schedule 7 (earnings to be disregarded) or, as the case may be, any paragraph of Schedule 8 other than paragraph 1 of that Schedule, as is appropriate in the claimant's case,

and that period is to begin on the date on which the payment is treated as paid under regulation 93 (date on which income is treated as paid).

(3) The period over which a Career Development Loan, which is paid pursuant to section 2 of the Employment and Training Act 1973 <sup>F256</sup>, is to be taken into account is the period of education and training intended to be supported by that loan.

(4) Where grant income as defined in Chapter 10 of this Part has been paid to a claimant who ceases to be a full-time student before the end of the period in respect of which that income is payable and, as a consequence, the whole or part of that income falls to be repaid by that claimant, that income is to be taken into account over the period beginning on the date on which that income is treated as paid under regulation 93 (date on which income is treated as paid) and ending—

- (a) on the date on which repayment is made in full;
- (b) where the grant is paid in instalments, on the day before the next instalment would have been paid had the claimant remained a full-time student; or
- (c) on the last date of the academic term or vacation during which that claimant ceased to be a full-time student,

whichever is the earlier.

[<sup>F257</sup>(4A) Earnings derived by a claimant's partner as a member of any territorial or reserve force prescribed in Part 1 of Schedule 6 to the Social Security (Contributions) Regulations 2001 in respect of a period of annual continuous training for a maximum of 15 days in any calendar year, whether paid to the claimant's partner alone or together with other earnings derived from the same source, are to be taken into account—

- (a) in the case of a period of training exceeding 14 days, over a period of 14 days, or
- (b) in any other case, over a period which is equal to the duration of the training period.

(4B) The period over which earnings to which paragraph (4A) applies are to be taken into account shall begin on the date on which the payment is treated as paid under regulation 93.]

(5) Where, but for this paragraph—

- (a) earnings not of the same kind are derived from the same source; and

*Status: Point in time view as at 02/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008. (See end of Document for details)*

- (b) 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 otherwise be treated as paid under regulation 93.

(6) In a case to which paragraph (5) applies, earnings under regulation 95 (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.

(7) Where earnings to which regulation 95(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.

(8) Any earnings to which regulation 95(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 equal to one week.

(9) In this regulation “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);

(10) For the purposes of this regulation the claimant's earnings and income which does not consist of earnings are to be calculated in accordance with Chapters 3 and 6 respectively of this Part.

#### Textual Amendments

**F255** Words in reg. 91(2)(c) substituted (6.4.2009) by [The Social Security \(Miscellaneous Amendments\) Regulations 2009 \(S.I. 2009/583\)](#), regs. 1(2), **10(3)**

**F256** 1973 c. 50. Section 2 was substituted by the [Employment Act 1988 \(c. 19\)](#), **section 25(1)** and amended by the [Employment Act 1989 \(c. 38\)](#), **section 29(4)** and Part 1 of Schedule 7 and the [Trade Union Reform and Employment Rights Act 1993 \(c. 19\)](#), **section 47(1)**.

**F257** Reg. 91(4A)(4B) inserted (5.11.2012) by [The Social Security \(Miscellaneous Amendments\) \(No. 2\) Regulations 2012 \(S.I. 2012/2575\)](#), regs. 1(2), **5(2)**

#### Calculation of earnings of self-employed earners

**92.**—(1) Except where paragraph (2) applies, 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—

- (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.
- (a) <sup>F258</sup>(2) (a) Where the claimant's earnings consist of any items to which this paragraph applies those earnings shall be taken into account over a period equal to such number of weeks as is equal to the number obtained (and any fraction shall be treated as a corresponding fraction of a week) by dividing the earnings by the amount of employment and support allowance which would be payable had the payment not been made plus an

amount equal to the total of the sums which would fall to be disregarded from the payment under Schedule 7 (earnings to be disregarded) as is appropriate in the claimant's case;

(b) This paragraph applies to—

(i) royalties or other sums paid as a consideration for the use of, or the right to use, any copyright, design, patent or trade mark; or

(ii) any payment in respect of any book registered under the Public Lending Right Scheme 1982 or work made under any international public lending right scheme that is analogous to the Public Lending Right Scheme 1982,

where the claimant is the first owner of the copyright, design, patent or trademark, or an original contributor to the book or work concerned.]

(3) For the purposes of this regulation the claimant's earnings are to be calculated in accordance with Chapter 4 of this Part.

**Textual Amendments**

**F258** Reg. 92(2) substituted (for specified purposes and with effect in accordance with reg. 1(4) of the amending S.I.) by [The Social Security \(Miscellaneous Amendments\) Regulations 2009 \(S.I. 2009/583\)](#), **reg. 10(4)**

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

**93.**—(1) Except where paragraph (2) <sup>F259</sup> ... applies, a payment of income to which regulation 91 (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.

(2) Employment and support allowance, income support, jobseeker's allowance, maternity allowance, short-term or long-term incapacity benefit, or severe disablement allowance is to be treated as paid on the day of the benefit week in respect of which it is payable.

<sup>F260</sup>(3) .....

<sup>F261</sup>(4) .....

**Textual Amendments**

**F259** Words in reg. 93(1) omitted (11.4.2011) by virtue of [The Social Security \(Miscellaneous Amendments\) Regulations 2011 \(S.I. 2011/674\)](#), **regs. 1(4), 16(7)(a)**

**F260** Reg. 93(3) omitted (11.4.2011) by virtue of [The Social Security \(Miscellaneous Amendments\) Regulations 2011 \(S.I. 2011/674\)](#), **regs. 1(4), 16(7)(b)**

**F261** Reg. 93(4) omitted (11.4.2011) by virtue of [The Social Security \(Miscellaneous Amendments\) Regulations 2011 \(S.I. 2011/674\)](#), **regs. 1(4), 16(7)(b)**

**Calculation of weekly amount of income**

**94.**—(1) For the purposes of regulation 91 (calculation of earnings derived from employed earner's employment and income other than earnings) and Chapter 2 of Part 9 (deductions from

---

*Status: Point in time view as at 02/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008. (See end of Document for details)*

---

contributory allowance), subject to paragraphs (2) to (8), 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 3 months, by multiplying the amount of the payment by 4 and dividing the product by 52;
  - [<sup>F262</sup>(iii) in a case where that period is a year and the payment is an award of working tax credit, by dividing the payment by the number of days in the year and multiplying the result by 7;]
  - [<sup>F262</sup>(iiiia) in a case where that period is a year and the payment is income other than an award of working tax credit, by dividing the amount of the payment by 52;]
  - (iv) in any other case by multiplying the amount of the payment by 7 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 93(1)(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 equal to 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, except where paragraph (4) applies, to be calculated by multiplying the amount of the payment by the number equal to 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) In the case of a payment of—

- (a) maternity allowance, short-term or long-term incapacity benefit or severe disablement allowance, the amount to be taken into account for the relevant days is to be the amount of benefit payable in respect of those days;
- (b) an employment and support allowance, income support or a jobseeker's allowance, the amount to be taken into account for the relevant days is to be calculated by multiplying the weekly amount of the benefit by the number of relevant days and dividing the product by 7.

(5) Except in the case of a payment which it has not been practicable to treat under regulation 93(1)(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 93(1)(b) is treated as paid first.

(6) 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 5 weeks or such other period as may, in the particular case, enable the claimant's average weekly income to be determined more accurately.

(7) Where income is taken into account under paragraph (4) of regulation 91 over the period specified in that paragraph, the amount of that income to be taken into account in respect of any week in that period is to be an amount equal to the amount of that income which would have been taken into account under regulation 132 (calculation of grant income) had the person to whom that income was paid not ceased to be a full-time student.

(8) Where any payment of earnings is taken into account under [<sup>F263</sup>paragraph (8)] of regulation 91 (calculation of earnings derived from employed earner's employment and income other than earnings), over the period specified in that paragraph, the amount to be taken into account is to be equal to the amount of the payment.

#### Textual Amendments

**F262** Reg. 94(1)(b)(iii)(iia) substituted for reg. 94(1)(b)(iii) (6.4.2009) by [The Social Security \(Miscellaneous Amendments\) Regulations 2009 \(S.I. 2009/583\)](#), regs. 1(2), **10(6)**

**F263** Words in reg. 94(8) substituted (27.10.2008) by [The Employment and Support Allowance \(Miscellaneous Amendments\) Regulations 2008 \(S.I. 2008/2428\)](#), regs. 1(2), **8(1)**

## CHAPTER 3

### Employed earners

#### Earnings of employed earners

**95.**—(1) Subject to [<sup>F264</sup>paragraphs (2) and (3)], “earnings” means, in the case of employment as an employed earner, any remuneration or profit derived from that employment and includes—

- (a) any bonus or commission;
- (b) any payment in lieu of remuneration except any periodic sum paid to a claimant on account of the termination of the claimant's employment by reason of redundancy;
- (c) any payment in lieu of notice;
- (d) any holiday pay except any payable more than 4 weeks after the termination or interruption of employment;
- (e) any payment by way of a retainer;
- (f) any payment made by the claimant's employer in respect of expenses not wholly, exclusively and necessarily incurred in the performance of the duties of the employment, including any payment made by the claimant's employer in respect of—
  - (i) travelling expenses incurred by the claimant between the claimant's home and place of employment;
  - (ii) expenses incurred by the claimant under arrangements made for the care of a member of the claimant's family owing to the claimant's absence from home;
- (g) any award of compensation made under section 112(4) or 117(3)(a) of the Employment Rights Act 1996 <sup>F265</sup> (the remedies: orders and compensation, enforcement of order and compensation);
- (h) any payment or remuneration made under sections 28, 34, 64, 68 and 70 of the Employment Rights Act 1996 <sup>F266</sup> (right to guarantee payments, remuneration on suspension on medical or maternity grounds, complaints to employment tribunals);

*Status: Point in time view as at 02/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008. (See end of Document for details)*

- (i) any such sum as is referred to in section 112(3) of the Contributions and Benefits Act <sup>F267</sup> (certain sums to be earnings for social security purposes);
  - (j) where a payment of compensation is made in respect of employment which is part-time employment, the amount of the compensation;
  - (k) the amount of any payment by way of a non-cash voucher which has been taken into account in the computation of a person's earnings in accordance with Part 5 of Schedule 3 to the Social Security (Contributions) Regulations 2001 <sup>F268</sup>.
- (2) “Earnings” are not to include—
- (a) subject to paragraph (3), any payment in kind;
  - (b) any remuneration paid by or on behalf of an employer to the claimant in respect of a period throughout which the claimant is on maternity leave, paternity leave or adoption leave or is absent from work because the claimant is ill;
  - (c) any payment in respect of expenses wholly, exclusively and necessarily incurred in the performance of the duties of the employment;
  - (d) any occupational pension;
  - (e) any lump sum payment made under the Iron and Steel Re-adaptation Benefits Scheme <sup>F269</sup>.
- [<sup>F270</sup>(f) any payment in respect of expenses arising out of the claimant’s participation in a service user group.]
- (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 (e);
  - (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>F271</sup>.
- “part-time employment” means, if the claimant were entitled to income support, employment in which the claimant is not to be treated as engaged in remunerative work under regulation 5 or 6(1) and (4) of the Income Support Regulations (persons treated, or not treated, as engaged in remunerative work).

#### Textual Amendments

**F264** Words in reg. 95(1) substituted (27.10.2008) by [The Employment and Support Allowance \(Miscellaneous Amendments\) Regulations 2008 \(S.I. 2008/2428\)](#), regs. 1(2), **8(2)**

**F265** 1996 c. 18.

**F266** Sections 34 and 70 were amended by the [Employment Rights \(Dispute Resolution\) Act 1998 \(c. 8\)](#), [section 1\(2\)\(a\)](#) and (b) and section 64 was amended by [S.I. 1999/3232](#), [regulation 41\(1\)](#) and paragraph 2 of Schedule 9.

- F267** Section 112(3) was amended by the Employment Rights Act 1996, paragraph 51(4)(a) to (c) of Schedule 1.
- F268** S.I. 2001/1004, the relevant amending instruments are S.I. 2001/2412, S.I. 2002/307, S.I. 2003/2958, S.I. 2004/770, S.I. 2005/778, S.I. 2006/883, S.I. 2006/2003 and S.I. 2007/2091.
- F269** S.I.1996/3182.
- F270** Reg. 95(2)(f) added (for specified purposes and with effect in accordance with reg. 1(2) of the amending S.I.) by *The Social Security (Miscellaneous Amendments) (No. 4) Regulations 2009* (S.I. 2009/2655), regs. 1(2)(d), **11(6)**
- F271** 1988 c. 40.

### Calculation of net earnings of employed earners

**96.**—(1) For the purposes of regulation 91 (calculation of earnings derived from employed earner's employment and income other than earnings) the earnings of a claimant derived from employment as an employed earner to be taken into account, subject to paragraph (2), are the claimant's net earnings.

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

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

- (a) any amount deducted from those earnings by way of—
  - (i) income tax;
  - (ii) primary Class 1 contributions under section 6(1)(a) of the Contributions and Benefits Act <sup>F272</sup>;
- (b) one-half of any sum paid by the claimant in respect of a pay period by way of a contribution towards an occupational or personal pension scheme.

#### Textual Amendments

- F272** Section 6 was substituted by the *Welfare Reform and Pensions Act 1999* (c. 30), **section 73** and paragraph 2 of Schedule 9.

## CHAPTER 4

### Self-employed earners

#### Earnings of self-employed earners

**97.**—(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 <sup>F273</sup> or section 2 of the Enterprise and New Towns (Scotland) Act 1990 <sup>F274</sup> 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;
  - (b) any payment to which paragraph 28 or 29 of Schedule 8 refers (payments in respect of a person accommodated with the claimant under an arrangement made by a local authority or voluntary organisation and payments made to the claimant by a health authority, local

*Status: Point in time view as at 02/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008. (See end of Document for details)*

authority or voluntary organisation in respect of persons temporarily in the claimant's care);

(c) any sports award.

#### Textual Amendments

**F273** 1973 c. 50.

**F274** 1990 c. 35.

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

**98.**—(1) For the purposes of regulation 92 (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>F275</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 99 (deduction of tax and contributions for self-employed earners); and
  - (ii) one half of any premium paid in the period that is relevant under regulation 92 (calculation of earnings of self-employed earners) in respect of a personal pension scheme.

(2) There is to be disregarded from a claimant's net profit any sum, where applicable, specified in paragraphs 1 to 11 of Schedule 7.

(3) For the purposes of paragraph (1)(a) the net profit of the employment, except where paragraph (9) applies, is to be calculated by taking into account the earnings of the employment over the period determined under regulation 92 less—

- (a) subject to paragraphs (5) to (7), 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 99 (deduction of tax and contributions for self-employed earners); and
- (c) one half of any premium paid in the period that is relevant under regulation 92 in respect of a personal pension scheme.

(4) 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 92 less, subject to paragraphs (5) to (7), any expenses wholly and exclusively defrayed in that period for the purpose of that employment.

(5) Subject to paragraph (6), a deduction is not to be made under paragraph (3)(a) or (4) 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 92 (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.
- (6) A deduction is to be made under paragraph (3)(a) or (4) 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.
- (7) The Secretary of State will refuse to make a deduction in respect of any expenses under paragraph (3)(a) or (4) 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.
- (8) For the avoidance of doubt—
- (a) a deduction is not to be made under paragraph (3)(a) or (4) in respect of any sum unless it has been expended for the purposes of the business;
  - (b) a deduction is to be made thereunder in respect of—
    - (i) the excess of any VAT paid over VAT received in the period determined under regulation 92;
    - (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.
- (9) 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 99 (deduction of tax and contributions for self-employed earners); and
  - (b) one half of any premium paid in respect of a personal pension scheme.
- (10) Notwithstanding regulation 92 (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 92 as may, in the particular case, enable the weekly amount of that item of income or expenditure to be determined more accurately.
- (11) For the avoidance of doubt 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.

**Textual Amendments**

**F275** [S.I. 1975/529](#).

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

**99.**—(1) Subject to paragraph (2), the amount to be deducted in respect of income tax under regulation 98(1)(b)(i), (3)(b)(i) or (9)(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 <sup>F276</sup>... 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 <sup>F277</sup> (personal reliefs) as is appropriate to the claimant's circumstances.

(2) If the period determined under regulation 92 is less than a year the earnings to which the [<sup>F278</sup>basic rate] of tax is to be applied and the amount of the personal reliefs deductible under paragraph (1) is to be calculated on a pro rata basis.

(3) The amount to be deducted in respect of National Insurance contributions under regulation 98(1)(b)(i), (3)(b)(ii) or (9)(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, 11(3) of the Contributions and Benefits Act <sup>F279</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 <sup>F280</sup> (Class 4 contributions recoverable under the Income Tax Acts) 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 and gains 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 “chargeable income” means—
- (a) except where sub-paragraph (b) applies, the earnings derived from the employment less any expenses deducted under paragraph (3)(a) or, as the case may be, (4) of regulation 98;
  - (b) in the case of employment as a child minder, one-third of the earnings of that employment.

**Textual Amendments**

- F276** Words in reg. 99(1) omitted (27.10.2008) by virtue of [The Employment and Support Allowance \(Miscellaneous Amendments\) Regulations 2008 \(S.I. 2008/2428\)](#), regs. 1(2), **8(3)(a)**
- F277** 2007 c. 3.
- F278** Words in reg. 99(2) substituted (27.10.2008) by [The Employment and Support Allowance \(Miscellaneous Amendments\) Regulations 2008 \(S.I. 2008/2428\)](#), regs. 1(2), **8(3)(b)**
- F279** Section 11 was amended by the [Social Security Contributions \(Transfer of Functions, etc.\) Act 1999 \(c. 2\)](#), **section 2** and paragraph 12 of Schedule 3 and S.I. 2007/1052, **article 2(b)**.
- F280** Section 15 was amended by the [Income Tax \(Trading and Other Income\) Act 2005 \(c. 5\)](#), **sections 882(1)** and 884 and paragraphs 419 and 420(1), (2)(a), (c) and (d), (3) and (4) of Schedule 1 and Schedule 3, the [National Insurance Contributions Act 2002 \(c. 19\)](#), **section 3(1)**, the [Limited Liability Partnerships Act 2000 \(c. 12\)](#), **section 13** and S.I. 2007/1052, **article 4(a)** and (b).

## CHAPTER 5

### Participants in the self-employment route

#### Interpretation

**100.** In this Chapter “special account” means, where a claimant was carrying on a commercial activity in respect of which assistance is received under the self-employment route, the account into which the gross receipts from that activity were payable during the period in respect of which such assistance was received.

#### Treatment of gross receipts of participants in the self-employment route

**101.** The gross receipts of a commercial activity carried on by a claimant in respect of which assistance is received under the self-employment route, are to be taken into account in accordance with the following provisions of this Chapter.

#### Calculation of income of participants in the self-employment route

**102.—**(1) The income of a claimant who has received assistance under the self-employment route is to be calculated by taking into account the whole of the monies in the special account at the end of the last day on which such assistance was received and deducting from those monies—

- (a) an amount in respect of income tax calculated in accordance with regulation 103 (deduction in respect of tax for participants in the self-employment route); and
- (b) any sum to which paragraph (4) refers.

(2) Income calculated pursuant to paragraph (1) is to be apportioned equally over a period which starts on the date the income is treated as paid under paragraph (3) and is equal in length to the period beginning with the day on which assistance was first received under the self-employment route and ending on the last day on which such assistance was received.

(3) Income calculated pursuant to paragraph (1) is to be treated as paid—

- (a) in the case where it is due to be paid before the first benefit week in respect of which the participant or the participant's partner first claims an income-related allowance following the last day on which assistance was received under the self-employment route, on the day in the week in which it is due to be paid which corresponds to the first day of the benefit week;
- (b) in any other case, on the first day of the benefit week in which it is due to be paid.

(4) This paragraph refers, where applicable in each benefit week in respect of which income calculated pursuant to paragraph (1) is taken into account pursuant to paragraphs (2) and (3), to the sums which would have been disregarded under paragraph 7(1) of Schedule 7 had the income been earnings.

#### Deduction in respect of tax for participants in the self-employment route

**103.—**(1) The amount to be deducted in respect of income tax under regulation 102(1)(a) (calculation of income of participants in the self-employment route) in respect of the period determined under regulation 102(2) is to be calculated as if—

- (a) the chargeable income is the only income chargeable to tax;
- (b) the personal allowance applicable to the person receiving assistance under the self-employment route by virtue of sections 35 and 45 to 55 of the Income Tax Act 2007 is allowable against that income; and

*Status: Point in time view as at 02/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008. (See end of Document for details)*

(c) the rate at which the chargeable income less the personal allowance is assessable to income tax is the <sup>F281</sup>... basic rate of tax.

(2) For the purpose of paragraph (1), the [<sup>F282</sup>basic rate] of tax to be applied and the amount of the personal allowance deductible is, where the period determined under regulation 102(2) is less than a year, to be calculated on a pro rata basis.

(3) In this regulation, “chargeable income” means the monies in the special account at the end of the last day upon which assistance was received under the self-employment route.

#### Textual Amendments

**F281** Words in reg. 103(1)(c) omitted (27.10.2008) by virtue of [The Employment and Support Allowance \(Miscellaneous Amendments\) Regulations 2008 \(S.I. 2008/2428\)](#), regs. 1(2), **8(4)(a)**

**F282** Words in reg. 103(2) substituted (27.10.2008) by [The Employment and Support Allowance \(Miscellaneous Amendments\) Regulations 2008 \(S.I. 2008/2428\)](#), regs. 1(2), **8(4)(b)**

## CHAPTER 6

### Other income

#### Calculation of income other than earnings

**104.**—(1) For the purposes of regulation 91 (calculation of earnings derived from employed earner's employment and income other than earnings) <sup>F283</sup>... the income of a claimant which does not consist of earnings to be taken into account will, subject to paragraphs (2) to (7), be the claimant's gross income and any capital treated as income under regulation 105 (capital treated as income).

(2) There is to be disregarded from the calculation of a claimant's gross income under paragraph (1), any sum, where applicable, specified in Schedule 8.

(3) Where the payment of any benefit under the benefit Acts is subject to any deduction by way of recovery the amount to be taken into account under paragraph (1) is to be the gross amount payable.

(4) [<sup>F284</sup>Paragraphs (5) and (5A) apply] where—

- (a) a relevant payment has been made to a claimant in an academic year; and
- (b) that claimant abandons, or is dismissed from, that claimant's course of study before the payment to the claimant of the final instalment of the relevant payment.

(5) [<sup>F285</sup>Where a relevant payment is made quarterly, the] amount of a relevant payment to be taken into account for the assessment period for the purposes of paragraph (1) in respect of a claimant to whom paragraph (4) applies, is to be calculated by applying the formula—

$$\frac{A - (B \times C)}{D}$$

where—

A = the total amount of the relevant payment which that claimant would have received had that claimant remained a student until the last day of the academic term in which the person abandoned, or was dismissed from, the course, less any deduction under regulation 137(6) (treatment of student loans);

B = the number of benefit weeks from the benefit week immediately following that which includes the first day of that academic year to the benefit week immediately before that which includes the day on which the claimant abandoned, or was dismissed from, that claimant's course;



C = the weekly amount of the relevant payment, before the application of the £10 disregard, which would have been taken into account as income under regulation 137(3) had the claimant not abandoned or been dismissed from, the course and, in the case of a claimant who was not entitled to an income-related allowance immediately before that claimant abandoned or was dismissed from the course, had that claimant, at that time, been entitled to an income-related allowance;

D = the number of benefit weeks in the assessment period.

[<sup>F286</sup>(5A) Where a relevant payment is made by two or more instalments in a quarter, the amount of a relevant payment to be taken into account for the assessment period for the purposes of paragraph (1) in respect of a person to whom paragraph (4) applies, shall be calculated by applying the formula in paragraph (5) but as if—

A = the total amount of relevant payments which that person received, or would have received, from the first day of the academic year to the day the person abandoned the course, or was dismissed from it, less any deduction under regulation 137(6).]

(6) [<sup>F287</sup>In this regulation]—

“academic year” and “student loan” have the same meanings as for the purposes of Chapter 10 of this Part;

[<sup>F288</sup>“assessment period” means—

- (a) in a case where a relevant payment is made quarterly, the period beginning with the benefit week which includes the day on which the claimant abandoned, or was dismissed from, the course and ending with the benefit week which includes the last day of the last quarter for which an instalment of the relevant payment was payable to that claimant;
- (b) in a case where the relevant payment is made by two or more instalments in a quarter, the period beginning with the benefit week which includes the day on which the claimant abandoned, or was dismissed from, the course and ending with the benefit week which includes—
  - (i) the day immediately before the day on which the next instalment of the relevant payment would have been due had the payments continued; or
  - (ii) the last day of the last quarter for which an instalment of the relevant payment was payable to that claimant,

whichever of those dates is earlier;]

“quarter” for the purposes of the definition of “assessment period” in relation to an academic year means a period in that year—

- (a) beginning on 1st January and ending on 31st March;
- (b) beginning on 1st April and ending on 30th June;
- (c) beginning on 1st July and ending on 31st August; or
- (d) beginning on 1st September and ending on 31st December;

“relevant payment” means either a student loan or an amount intended for the maintenance of dependants referred to in regulation 132(6) (calculation of grant income) or both.

(7) In the case of income to which regulation 91(4) (calculation of income of former students) applies, the amount of income to be taken into account for the purposes of paragraph (1) is to be the amount of that income calculated in accordance with regulation 94(7) (calculation of weekly amount of income) and on the basis that none of that income has been repaid.

(8) Subject to paragraph (9), for the avoidance of doubt there is to be included as income to be taken into account under paragraph (1)—

- (a) any payment to which regulation 95(2) or 97(2) (payments not earnings) applies; or

*Status: Point in time view as at 02/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008. (See end of Document for details)*

- (b) in the case of a claimant who is receiving support provided under section 95 or 98 of the Immigration and Asylum Act <sup>F289</sup> including support provided by virtue of regulations made under Schedule 9 to that Act, the amount of such support provided in respect of essential living needs of the claimant and the claimant's partner (if any) as is specified in regulations made under paragraph 3 of Schedule 8 to that Act.

(9) In the case of a claimant who is the partner of a person subject to immigration control and whose partner is receiving support provided under section 95 or 98 of the Immigration and Asylum Act including support provided by virtue of regulations made under Schedule 9 to that Act, there is not to be included as income to be taken into account under paragraph (1) the amount of support provided in respect of essential living needs of the partner of the claimant and the claimant's dependants (if any) as is specified in regulations made under paragraph 3 of Schedule 8 to the Immigration and Asylum Act.

#### Textual Amendments

- F283** Words in reg. 104(1) omitted (11.4.2011) by virtue of [The Social Security \(Miscellaneous Amendments\) Regulations 2011 \(S.I. 2011/674\)](#), regs. 1(4), **16(8)**
- F284** Words in reg. 104(4) substituted (27.10.2008) by [The Social Security \(Students and Miscellaneous Amendments\) Regulations 2008 \(S.I. 2008/1599\)](#), regs. 1(5), **7(2)(a)**
- F285** Words in reg. 104(5) substituted (27.10.2008) by [The Social Security \(Students and Miscellaneous Amendments\) Regulations 2008 \(S.I. 2008/1599\)](#), regs. 1(5), **7(2)(b)**
- F286** Words in reg. 104(5A) substituted (27.10.2008) by [The Social Security \(Students and Miscellaneous Amendments\) Regulations 2008 \(S.I. 2008/1599\)](#), regs. 1(5), **7(2)(c)**
- F287** Words in reg. 104(6) substituted (27.10.2008) by [The Social Security \(Students and Miscellaneous Amendments\) Regulations 2008 \(S.I. 2008/1599\)](#), regs. 1(5), **7(2)(d)(i)**
- F288** Words in reg. 104(6) substituted (27.10.2008) by [The Social Security \(Students and Miscellaneous Amendments\) Regulations 2008 \(S.I. 2008/1599\)](#), regs. 1(5), **7(2)(d)(ii)**
- F289** Sections 95 and 98 and Schedule 9 were amended by the [Nationality, Immigration and Asylum Act 2002 \(c. 41\)](#), **sections 44(1)** and (6), 45(4)(a) and (b) and 50(1) and (2).

#### Capital treated as income

**105.**—(1) Capital which is payable by instalments which are outstanding on—

- (a) the first day in respect of which an income-related allowance is payable or the date of the determination of the claim, whichever is earlier; or
- (b) in the case of a supersession, the date of that supersession,

is to be treated as income if the aggregate of the instalments outstanding and the amount of the claimant's capital otherwise calculated in accordance with Chapter 7 of this Part exceeds £16,000.

(2) Any payment received under an annuity is to be treated as income.

(3) Any earnings to the extent that they are not a payment of income are to be treated as income.

(4) Any Career Development Loan paid pursuant to section 2 of the Employment and Training Act 1973 <sup>F290</sup> is to be treated as income.

(5) Where an agreement or court order provides that payments are to be made to the claimant in consequence of any personal injury to the claimant and that such payments are to be made, wholly or in part, by way of periodical payments, any such periodical payments received by the claimant (but not a payment which is treated as capital by virtue of this Part), are to be treated as income.

**Textual Amendments**

**F290** 1973 c. 50.

**Notional income – deprivation and income on application**

**106.**—(1) A claimant is to be treated as possessing income of which the claimant has deprived himself or herself for the purpose of securing entitlement to an employment and support allowance or increasing the amount of that allowance, or for the purpose of securing entitlement to, or increasing the amount of, income support or a jobseeker's allowance.

(2) Except in the case of—

- (a) a discretionary trust;
- (b) a trust derived from a payment made in consequence of a personal injury;
- (c) an employment and support allowance;
- (d) a jobseeker's allowance;
- (e) working tax credit;
- (f) child tax credit;
- (g) a personal pension scheme, occupational pension scheme or a payment made by the Board of the Pension Protection Fund where the claimant [<sup>F291</sup>has not attained the qualifying age for state pension credit];

[<sup>F292</sup>(ga) any sum to which paragraph (9) applies;]

[<sup>F293</sup>(gb) any sum to which regulation 137(4A) (treatment of student loans) applies;]

- (h) any sum to which paragraph 43(2)(a) of Schedule 9 (capital to be disregarded) applies which is administered in the way referred to in paragraph 43(1)(a) of that Schedule;
- (i) any sum to which paragraph 44(a) of Schedule 9 refers; or
- (j) rehabilitation allowance made under section 2 of the Employment and Training Act 1973,

income which would become available to the claimant upon application being made but which has not been acquired by the claimant is to be treated as possessed by the claimant but only from the date on which it could be expected to be acquired were an application made.

(3) A claimant who has attained the [<sup>F294</sup>qualifying age for state pension credit] is to be treated as possessing—

- (a) the amount of any income from an occupational pension scheme, a personal pension scheme or the Board of the Pension Protection Fund—
  - (i) for which no claim has been made; and
  - (ii) to which the claimant might expect to be entitled if a claim for it were made;
- (b) income from an occupational pension scheme which the claimant elected to defer,

but only from the date on which it could be expected to be acquired were an application for it to be made.

(4) This paragraph applies where a claimant [<sup>F295</sup>who has attained the qualifying age for state pension credit]—

- (a) is entitled to money purchase benefits under an occupational pension scheme or a personal pension scheme;
- (b) fails to purchase an annuity with the funds available in that scheme; and

*Status: Point in time view as at 02/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008. (See end of Document for details)*

(c) either—

- (i) defers in whole or in part the payment of any income which would have been payable to the claimant by that claimant's pension fund holder; or
- (ii) fails to take any necessary action to secure that the whole of any income which would be payable to the person by that claimant's pension fund holder upon the person applying for it, is so paid; or
- (iii) income withdrawal is not available to the claimant under that scheme.

(5) Where paragraph (4) applies, the amount of any income foregone is to be treated as possessed by that claimant, but only from the date on which it could be expected to be acquired were an application for it to be made.

(6) The amount of any income foregone in a case where paragraph (4)(c)(i) or (ii) applies is to be the maximum amount of income which may be withdrawn from the fund and is to be determined by the Secretary of State who will take account of information provided by the pension fund holder in accordance with regulation 7(5) of the Social Security (Claims and Payments) Regulations 1987<sup>F296</sup>.

(7) The amount of any income foregone in a case where paragraph (4)(c)(iii) applies is to be the income that the claimant could have received without purchasing an annuity had the funds held under the relevant occupational or personal pension scheme been held under a scheme where income withdrawal was available and is to be determined in the manner specified in paragraph (6).

(8) In paragraph (4), “money purchase benefits” has the meaning it has in section 181 of the Pension Schemes Act 1993<sup>F297</sup>.

[<sup>F298</sup>(9) Paragraphs (1) and (2) do not apply in respect of any amount of income other than earnings, or earnings derived from employment as an employed earner, arising out of the claimant's participation in a service user group.]

#### Textual Amendments

**F291** Words in reg. 106(2)(g) substituted (6.4.2010) by [The Social Security \(Miscellaneous Amendments\) \(No. 2\) Regulations 2010 \(S.I. 2010/641\)](#), regs. 1(1), **12(4)(a)**

**F292** Reg. 106(2)(ga) inserted (for specified purposes and with effect in accordance with reg. 1(2) of the amending S.I.) by [The Social Security \(Miscellaneous Amendments\) \(No. 4\) Regulations 2009 \(S.I. 2009/2655\)](#), regs. 1(2)(d), **11(8)(a)**

**F293** Reg. 106(2)(gb) inserted (1.11.2010) by [The Social Security \(Miscellaneous Amendments\) \(No. 5\) Regulations 2010 \(S.I. 2010/2429\)](#), regs. 1(2), **11(2)**

**F294** Words in reg. 106(3) substituted (6.4.2010) by [The Social Security \(Miscellaneous Amendments\) \(No. 2\) Regulations 2010 \(S.I. 2010/641\)](#), regs. 1(1), **12(4)(b)**

**F295** Words in reg. 106(4) substituted (6.4.2010) by [The Social Security \(Miscellaneous Amendments\) \(No. 2\) Regulations 2010 \(S.I. 2010/641\)](#), regs. 1(1), **12(4)(c)**

**F296** S.I. 1987/1967, relevant amending instruments are S.I. 1999/2572 and S.I. 2003/492.

**F297** 1993 c. 48. The definition in section 181 was amended by S.I. 2005/2053.

**F298** Reg. 106(9) added (for specified purposes and with effect in accordance with reg. 1(2) of the amending S.I.) by [The Social Security \(Miscellaneous Amendments\) \(No. 4\) Regulations 2009 \(S.I. 2009/2655\)](#), regs. 1(2)(d), **11(8)(b)**

#### Notional income – income due to be paid or income paid to or in respect of a third party

**107.**—(1) Except in the case of a discretionary trust, or a trust derived from a payment made in consequence of a personal injury, any income which is due to be paid to the claimant but—

- (a) has not been paid to the claimant;

- (b) is not a payment prescribed in regulation 8 or 9 of the Social Security (Payments on Account, Overpayment and Recovery) Regulations 1988 <sup>F299</sup> (duplication and prescribed payments or maintenance payments) and not made on or before the date prescribed in relation to it,

is, except for any amount to which paragraph (2) applies, to be treated as possessed by the claimant.

(2) This paragraph applies to—

- (a) an amount which is due to be paid to the claimant under an occupational pension scheme but which is not paid because the trustees or managers of the scheme have suspended or ceased payments due to an insufficiency of resources;
- (b) any amount by which a payment made to the claimant from an occupational pension scheme falls short of the payment to which the claimant was due under the scheme where the shortfall arises because the trustees or managers of the scheme have insufficient resources available to them to meet in full the scheme's liabilities; or
- (c) any earnings which are due to an employed earner on the termination of that employed earner's employment by reason of redundancy but which have not been paid to that employed earner.

(3) Any payment of income, other than a payment of income specified in paragraph (5), made to a third party in respect of a single claimant or the claimant's partner (but not a member of the third party's family) is to be treated—

(a) in a case where that payment is derived from—

- (i) a payment of any benefit under the benefit Acts;
- (ii) a payment from the Armed Forces and Reserve Forces Compensation Scheme;
- (iii) a war disablement pension, war widow's pension or war widower's pension; or
- (iv) a pension payable to a person as a widow, widower or surviving civil partner under any power of Her Majesty otherwise than under an enactment to make provision about pensions for or in respect of persons who have been disabled or have died in consequence of service as members of the armed forces of the Crown,

as possessed by that single claimant, if it is paid to the claimant or by the claimant's partner, if it is paid to the claimant's partner;

- (b) in a case where that payment is a payment of an occupational pension, a pension or other periodical payment made under a personal pension scheme or a payment made by the Board of the Pension Protection Fund, as possessed by that single claimant or, as the case may be, by the claimant's partner;
- (c) in any other case, as possessed by that single claimant or the claimant's partner to the extent that it is used for the food, ordinary clothing or footwear, household fuel, rent for which housing benefit is payable, or any housing costs to the extent that they are met under regulations 67(1)(c) or 68(1)(d) (housing costs), of that single claimant or, as the case may be, of the claimant's partner, or is used for any council tax or water charges for which that claimant or that partner is liable,

but, except where sub-paragraph (a) applies, this paragraph does not apply to any payment in kind to the third party.

(4) Any payment of income, other than a payment of income specified in paragraph (5), made to a single claimant or the claimant's partner in respect of a third party (but not in respect of another member of the claimant's family) is to be treated as possessed by that single claimant or, as the case may be, the claimant's partner, to the extent that it is kept or used by that claimant or used by or on behalf of the claimant's partner but, except where paragraph (3)(a) applies, this paragraph does not apply to any payment in kind to the third party.

*Status: Point in time view as at 02/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008. (See end of Document for details)*

- (5) Paragraphs (3) and (4) do not apply in respect of a payment of income made—
- (a) under [<sup>F300</sup>or by] the Macfarlane Trust, the Macfarlane (Special Payments) Trust, the Macfarlane (Special Payments) (No. 2) Trust, the Fund, the Eileen Trust<sup>F301</sup>, MFET Limited<sup>F302</sup>, the Skipton Fund, the Caxton Foundation] or [<sup>F303</sup>the Independent Living Fund (2006)];
  - (b) pursuant to section 19(1)(a) of the Coal Industry Act 1994 <sup>F304</sup> (concessionary coal); or
  - (c) pursuant to section 2 of the Employment and Training Act 1973 in respect of a person's participation—
    - (i) in an employment programme specified in regulation 75(1)(a)(ii) of the Jobseeker's Allowance Regulations <sup>F305</sup>;
    - (ii) in a training scheme specified in regulation 75(1)(b)(ii) of those Regulations;
    - (iii) in the Intensive Activity Period specified in regulation 75(1)(a)(iv) of those Regulations <sup>F306</sup>;
    - (iv) in a qualifying course within the meaning specified in regulation 17A(7) of those Regulations <sup>F307</sup>; or
  - <sup>F308</sup>(ca) in respect of a person's participation in [<sup>F309</sup>a scheme prescribed in regulation 3 of the Jobseeker's Allowance (Schemes for Assisting Persons to Obtain Employment) Regulations 2013] or the Mandatory Work Activity Scheme; or]
  - (d) under an occupational pension scheme, in respect of a pension or other periodical payment made under a personal pension scheme or a payment made by the Board of the Pension Protection Fund where—
    - (i) a bankruptcy order has been made in respect of the person in respect of whom the payment has been made or, in Scotland, the estate of that person is subject to sequestration or a judicial factor has been appointed on that person's estate under section 41 of the Solicitors (Scotland) Act 1980 <sup>F310</sup>;
    - (ii) the payment is made to the trustee in bankruptcy or any other person acting on behalf of the creditors; and
    - (iii) the person referred to in paragraph (i) and that person's partner (if any) does not possess, or is not treated as possessing, any other income apart from that payment.
- (6) Where the claimant resides in a care home, an Abbeyfield Home or an independent hospital, or is temporarily absent from such a home or hospital, any payment made by a person other than the claimant or a member of the claimant's family in respect of some or all of the cost of maintaining the claimant or the claimant's partner in that home or hospital is to be treated as possessed by the claimant or the claimant's partner.
- (7) In paragraph (2)(a) and (b) “resources” has the same meaning as in section 181(1) of the Pension Schemes Act 1993.

<sup>F311</sup>(8) Paragraphs (1), (3) and (4) do not apply in respect of any amount of income other than earnings, or earnings derived from employment as an employed earner, arising out of the claimant's participation in a service user group.]

#### Textual Amendments

**F299** S.I. 1988/664, the relevant amending instruments are S.I. 1991/387, S.I. 1991/2742, S.I. 1996/1345, S.I. 1999/2571, S.I. 1999/3178, S.I. 2000/1483, S.I. 2002/3019, S.I. 2003/492, S.I. 2005/337 and S.I. 2005/3476.

- F300** Words in reg. 107(5)(a) inserted (6.4.2010) by The Social Security (Miscellaneous Amendments) (No. 2) Regulations 2010 (S.I. 2010/641), regs. 1(1), **12(5)(a)**
- F301** Words in reg. 107(5)(a) inserted (6.4.2010) by The Social Security (Miscellaneous Amendments) (No. 2) Regulations 2010 (S.I. 2010/641), regs. 1(1), **12(3)(b)**
- F302** Words in reg. 107(5)(a) inserted (31.10.2011) by The Social Security (Miscellaneous Amendments) (No. 3) Regulations 2011 (S.I. 2011/2425), regs. 1(2), **23(8)**
- F303** Words in reg. 107(5)(a) substituted (27.10.2008) by The Employment and Support Allowance (Miscellaneous Amendments) Regulations 2008 (S.I. 2008/2428), regs. 1(2), **8(5)**
- F304** 1994 c. 27.
- F305** The relevant amending instrument is S.I. 2002/2314.
- F306** The relevant amending instruments are S.I. 2001/1029 and S.I. 2007/1316.
- F307** Regulation 17A was inserted by S.I. 1998/1274, **regulation 4**.
- F308** Reg. 107(5)(ca) inserted (5.8.2011) by The Social Security (Miscellaneous Amendments) (No. 2) Regulations 2011 (S.I. 2011/1707), regs. 1, **4(4)(5)**
- F309** Words in reg. 107(5)(ca) substituted (12.2.2013) by The Jobseeker's Allowance (Schemes for Assisting Persons to Obtain Employment) Regulations 2013 (S.I. 2013/276), regs. 1, **15(b)**
- F310** 1980 c. 46.
- F311** Reg. 107(8) added (for specified purposes and with effect in accordance with reg. 1(2) of the amending S.I.) by The Social Security (Miscellaneous Amendments) (No. 4) Regulations 2009 (S.I. 2009/2655), regs. 1(2)(d), **11(9)**

### Notional income – other income

**108.**—(1) Where a claimant's earnings are not ascertainable at the time of the determination of the claim or of any revision or supersession the Secretary of State will treat the claimant as possessing such earnings as is reasonable in the circumstances of the case having regard to the number of hours worked and the earnings paid for comparable employment in the area.

(2) Where the amount of a subsistence allowance paid to a claimant in a benefit week is less than the amount of income-based jobseeker's allowance that claimant would have received in that benefit week had it been payable to the claimant, less 50p, the claimant is to be treated as possessing the amount which is equal to the amount of income-based jobseeker's allowance which the claimant would have received in that week, less 50p.

(3) Subject to paragraph (4), where—

- (a) a claimant performs a service for another person; and
- (b) that person makes no payment of earnings or pays less than that paid for a comparable employment in the area,

the Secretary of State is to treat the claimant as possessing such earnings (if any) as is reasonable for that employment unless the claimant satisfies the Secretary of State that the means of that person are insufficient for the person to pay, or to pay more, for the service.

(4) Paragraph (3) will not apply—

- (a) to a claimant who is engaged by a charitable or voluntary organisation or who is a volunteer if the Secretary of State is satisfied in any of those cases that it is reasonable for the claimant to provide the service free of charge;
- (b) in a case where the service is performed in connection with—

- (i) the claimant's participation in an employment or training programme in accordance with regulation 19(1)(q) of the Jobseeker's Allowance Regulations, other than where the service is performed in connection with the claimant's participation in the Intensive Activity Period specified in regulation 75(1)(a)(iv) of those Regulations
- <sup>F312</sup>; or

*Status: Point in time view as at 02/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008. (See end of Document for details)*

- (ii) the claimant's or the claimant's partner's participation in an employment or training programme as defined in regulation 19(3) of those Regulations for which a training allowance is not payable or, where such an allowance is payable, it is payable for the sole purpose of reimbursement of travelling or meal expenses to the claimant or the claimant's partner participating in that programme;
- (c) to a claimant who is engaged in work experience whilst participating in—
  - (i) the New Deal for Lone Parents; or
  - (ii) a scheme which has been approved by the Secretary of State as supporting the objectives of the New Deal for Lone Parents; or
- (d) to a claimant who is participating in a work placement approved in writing by the Secretary of State before the placement starts;
- (e) in sub-paragraph (d) “work placement” means practical work experience with an employer, which is neither paid nor undertaken in expectation of payment.

[<sup>F313</sup>(5) Paragraphs (1) and (3) do not apply in respect of any amount of income other than earnings, or earnings derived from employment as an employed earner, arising out of the claimant's participation in a service user group.]

#### Textual Amendments

**F312** Regulation 75 was substituted by [S.I. 1997/2863](#).

**F313** Reg. 108(5) added (for specified purposes and with effect in accordance with reg. 1(2) of the amending S.I.) by [The Social Security \(Miscellaneous Amendments\) \(No. 4\) Regulations 2009 \(S.I. 2009/2655\)](#), regs. 1(2)(d), **11(10)**

#### Notional income – calculation and interpretation

**109.**—(1) Where a claimant is treated as possessing any income under regulation 106 or 107 the foregoing provisions of this Part are to apply for the purposes of calculating the amount of that income as if a payment had actually been made and as if it were actual income which the claimant does possess.

(2) Where a claimant is treated as possessing any earnings under regulation 108(1) or (3) the foregoing provisions of this Part are to apply for the purposes of calculating the amount of those earnings as if a payment had actually been made and as if they were actual earnings which the claimant does possess except that paragraph (3) of regulation 96 (calculation of net earnings of employed earners) does not apply and the claimant's net earnings are to be calculated by taking into account the earnings which the claimant is treated as possessing, less—

- (a) where the period over which those earnings are to be taken into account is a year or more, an amount in respect of income tax equivalent to an amount calculated by applying to those earnings the <sup>F314</sup>... basic rate of tax in the year of assessment less only the personal allowance to which the claimant is entitled under section 257(1) of the Income and Corporation Taxes Act 1988 <sup>F315</sup> (personal allowance) as is appropriate to the claimant's circumstances;
- (b) where if the period over which those earnings are to be taken into account is less than a year, the earnings to which the [<sup>F316</sup>basic rate] of tax is to be applied and the amount of the personal allowance deductible under this paragraph is to be calculated on a pro rata basis;
- (c) where the weekly amount of those earnings equals or exceeds the lower earnings limit, an amount representing primary Class 1 contributions under section 6(1)(a) of the



Contributions and Benefits Act<sup>F317</sup>, calculated by applying to those earnings the initial and main primary percentages in accordance with section 8(1)(a) and (b) of that Act<sup>F318</sup>, and (d) one-half of any sum payable by the claimant in respect of a pay period by way of a contribution towards an occupational or personal pension scheme.

#### Textual Amendments

- F314** Words in reg. 109(2)(a) omitted (27.10.2008) by virtue of [The Employment and Support Allowance \(Miscellaneous Amendments\) Regulations 2008 \(S.I. 2008/2428\)](#), regs. 1(2), **8(6)(a)**
- F315** 1988 c. 1. Section 257 was substituted by the [Finance Act 1988 \(c. 39\)](#), **section 33** and amended by the [Income Tax Act 2007 \(c. 3\)](#), **section 1027** and Schedule 1, Part 1, paragraphs 1 and 29(1) and (2) and S.I. 2006/3241.
- F316** Words in reg. 109(2)(b) substituted (27.10.2008) by [The Employment and Support Allowance \(Miscellaneous Amendments\) Regulations 2008 \(S.I. 2008/2428\)](#), regs. 1(2), **8(6)(b)**
- F317** Section 6 was substituted by the [Welfare Reform and Pensions Act 1999 \(c. 30\)](#), **section 73** and paragraph 2 of Schedule 9.
- F318** Section 8 was substituted by the [National Insurance Contributions Act 2002 \(c. 19\)](#), **section 1(1)**.

## CHAPTER 7

### Capital

#### Capital limit

**110.** For the purposes of paragraph 6(1)(b) of Schedule 1 to the Act as it applies to an income-related allowance (no entitlement to benefit if capital exceeds prescribed amount), the prescribed amount is £16,000.

#### Calculation of capital

**111.—(1)** For the purposes of [<sup>F319</sup>sections 1(2)] and 4 of, and Part 2 of Schedule 1 to, the Act as it applies to an income-related allowance, the capital of a claimant to be taken into account is, subject to paragraph (2), to be the whole of the claimant's capital calculated in accordance with this Part and any income treated as capital under regulation 112 (income treated as capital).

(2) There is to be disregarded from the calculation of a claimant's capital under paragraph (1) any capital, where applicable, specified in Schedule 9.

#### Textual Amendments

- F319** Words in reg. 111(1) substituted (27.10.2008) by [The Employment and Support Allowance \(Miscellaneous Amendments\) Regulations 2008 \(S.I. 2008/2428\)](#), regs. 1(2), **8(7)**

#### Income treated as capital

**112.—(1)** Any bounty derived from employment to which regulation 43(1)(e) and paragraph 12 of Schedule 7 apply and paid at intervals of at least one year is to be treated as capital.

(2) Any amount by way of a refund of income tax paid in respect of, or deducted from, profits or income chargeable to tax under the provisions in Part 2 of the Income Tax (Trading and Other Income) Act 2005<sup>F320</sup> or Part 2 of the Income Tax (Earnings and Pensions) Act 2003<sup>F321</sup> is to be treated as capital.

*Status: Point in time view as at 02/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008. (See end of Document for details)*

(3) Any holiday pay which is not earnings under regulation 95(1)(d) (earnings of employed earners) is to be treated as capital.

(4) Except any income derived from capital disregarded under paragraph 1, 2, 4 to 8, 10, 16, 43 or 44 of Schedule 9, any income derived from capital is to be treated as capital but only from the date it is normally due to be credited to the claimant's account.

(5) In the case of employment as an employed earner, any advance of earnings or any loan made by the claimant's employer is to be treated as capital.

(6) Any payment under section 30 of the Prison Act 1952 <sup>F322</sup> (payments for discharged prisoners) or allowance under section 17 of the Prisons (Scotland) Act 1989 <sup>F323</sup> (allowances to prisoners on discharge) is to be treated as capital.

(7) Any charitable or voluntary payment which is not made or not due to be made at regular intervals, other than one to which paragraph (8) applies, is to be treated as capital.

(8) This paragraph applies to a payment which is made under [<sup>F324</sup>or by] the Macfarlane Trust, the Macfarlane (Special Payments) Trust, the Macfarlane (Special Payments) (No. 2) Trust, the Fund, the Eileen Trust<sup>F325</sup>, MFET Limited<sup>F326</sup>, the Skipton Fund, the Caxton Foundation] or [<sup>F327</sup>the Independent Living Fund (2006)].

(9) Any arrears of subsistence allowance which are paid to a claimant as a lump sum are to be treated as capital.

#### Textual Amendments

**F320** 2005 c. 5.

**F321** 2003 c. 1.

**F322** 1952 c. 52. Section 30 was substituted by the [Criminal Justice Act 1967 \(c. 80\)](#), [section 66\(3\)](#).

**F323** 1989 c. 45.

**F324** Words in reg. 112(8) inserted (6.4.2010) by [The Social Security \(Miscellaneous Amendments\) \(No. 2\) Regulations 2010 \(S.I. 2010/641\)](#), regs. 1(1), [12\(5\)\(b\)](#)

**F325** Words in reg. 112(8) inserted (6.4.2010) by [The Social Security \(Miscellaneous Amendments\) \(No. 2\) Regulations 2010 \(S.I. 2010/641\)](#), regs. 1(1), [12\(3\)\(e\)](#)

**F326** Words in reg. 112(8) inserted (31.10.2011) by [The Social Security \(Miscellaneous Amendments\) \(No. 3\) Regulations 2011 \(S.I. 2011/2425\)](#), regs. 1(2), [23\(8\)](#)

**F327** Words in reg. 112(8) substituted (27.10.2008) by [The Employment and Support Allowance \(Miscellaneous Amendments\) Regulations 2008 \(S.I. 2008/2428\)](#), regs. 1(2), [8\(5\)](#)

#### Calculation of capital in the United Kingdom

**113.** Capital which a claimant possesses in the United Kingdom is to be calculated at its current market or surrender value less—

- (a) where there would be expenses attributable to sale, 10%; and
- (b) the amount of any incumbrance secured on it.

#### Calculation of capital outside the United Kingdom

**114.** Capital which a claimant possesses in a country outside the United Kingdom is to be calculated—

- (a) in a case in which there is no prohibition in that country against the transfer to the United Kingdom of an amount equal to its current market or surrender value in that country, at that value;

- (b) in a case where there is such a prohibition, at the price which it would realise if sold in the United Kingdom to a willing buyer,

less, where there would be expenses attributable to sale, 10% and the amount of any incumbrance secured on it.

### Notional capital

**115.**—(1) A claimant is to be treated as possessing capital of which the claimant has deprived himself or herself for the purpose of securing entitlement to an employment and support allowance or increasing the amount of that allowance, or for the purpose of securing entitlement to, or increasing the amount of, income support or a jobseeker's allowance except—

- (a) where that capital is derived from a payment made in consequence of any personal injury and is placed on trust for the benefit of the claimant;
  - (b) to the extent that the capital which the claimant is treated as possessing is reduced in accordance with regulation 116 (diminishing notional capital rule);
  - (c) any sum to which paragraph 43(2)(a) of Schedule 9 (capital to be disregarded) applies which is administered in the way referred to in paragraph 43(1)(a); or
  - (d) any sum to which paragraph 44(a) of Schedule 9 refers.
- (2) Except in the case of—
- (a) a discretionary trust;
  - (b) a trust derived from a payment made in consequence of a personal injury;
  - (c) any loan which would be obtainable only if secured against capital disregarded under Schedule 9;
  - (d) a personal pension scheme;
  - (e) an occupational pension scheme or a payment made by the Board of the Pension Protection Fund where the claimant [<sup>F328</sup>has not attained the qualifying age for state pension credit]; or
  - (f) any sum to which paragraph 43(2)(a) of Schedule 9 (capital to be disregarded) applies which is administered in a way referred to in paragraph 43(1)(a); or
  - (g) any sum to which paragraph 44(a) of Schedule 9 refers,

any capital which would become available to the claimant upon application being made but which has not been acquired by the claimant is to be treated as possessed by the claimant but only from the date on which it could be expected to be acquired were an application made.

(3) Any payment of capital, other than a payment of capital specified in paragraph (5), made to a third party in respect of a single claimant or the claimant's partner (but not a member of the third party's family) is to be treated—

- (a) in a case where that payment is derived from—
  - (i) a payment of any benefit under the benefit Acts;
  - (ii) a payment from the Armed Forces and Reserve Forces Compensation Scheme;
  - (iii) a war disablement pension, war widow's pension or war widower's pension; or
  - (iv) a pension payable to a person as a widow, widower or surviving civil partner under any power of Her Majesty otherwise than under an enactment to make provision about pensions for or in respect of persons who have been disabled or who have died in consequence of service as members of the armed forces of the Crown,

as possessed by that single claimant, if it is paid to that claimant, or by the claimant's partner, if it is paid to that partner;

*Status: Point in time view as at 02/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008. (See end of Document for details)*

- (b) in a case where that payment is a payment of an occupational pension, a pension or other periodical payment made under a personal pension scheme or a payment made by the Board of the Pension Protection Fund, as possessed by that single claimant or, as the case may be, by the claimant's partner;
  - (c) in any other case, as possessed by that single claimant or the claimant's partner to the extent that it is used for the food, ordinary clothing or footwear, household fuel, rent for which housing benefit is payable or any housing costs to the extent that they are met under regulation 67(1)(c) and 68(1)(d) (housing costs) of that single claimant or, as the case may be, of the claimant's partner, or is used for any council tax or water charges for which that claimant or partner is liable.
- (4) Any payment of capital, other than a payment of capital specified in paragraph (5) made to a single claimant or the claimant's partner in respect of a third party (but not in respect of another member of the claimant's family) is to be treated as possessed by that single claimant or, as the case may be, the claimant's partner, to the extent that it is kept or used by that claimant or used by or on behalf of the claimant's partner.
- (5) Paragraphs (3) and (4) will not apply in respect of a payment of capital made—
- (a) under [<sup>F329</sup>or by] the Macfarlane Trust, the Macfarlane (Special Payments) Trust, the Macfarlane (Special Payments) (No. 2) Trust, the Fund, the Eileen Trust<sup>F330</sup>, MFET Limited<sup>F331</sup>, the Independent Living Fund (2006), the Skipton Fund<sup>F332</sup>, the Caxton Foundation] or the London Bombings Relief Charitable Fund;
  - (b) pursuant to section 2 of the Employment and Training Act 1973 in respect of a claimant's participation—
    - (i) in an employment programme specified in regulation 75(1)(a)(ii) of the Jobseeker's Allowance Regulations;
    - (ii) in a training scheme specified in regulation 75(1)(b)(ii) of those Regulations; or
    - (iii) in the Intensive Activity Period specified in regulation 75(1)(a)(iv) of those Regulations; or
    - (iv) in a qualifying course within the meaning specified in regulation 17A(7) of those Regulations;
  - <sup>F333</sup>(ba) in respect of a person's participation in [<sup>F334</sup>a scheme prescribed in regulation 3 of the Jobseeker's Allowance (Schemes for Assisting Persons to Obtain Employment) Regulations 2013] or the Mandatory Work Activity Scheme;
  - (c) under an occupational pension scheme, in respect of a pension or other periodical payment made under a personal pension scheme or a payment made by the Board of the Pension Protection Fund where—
    - (i) a bankruptcy order has been made in respect of the person in respect of whom the payment has been made or, in Scotland, the estate of that person is subject to sequestration or a judicial factor has been appointed on that person's estate under section 41 of the Solicitors (Scotland) Act 1980;
    - (ii) the payment is made to the trustee in bankruptcy or any other person acting on behalf of the creditors; and
    - (iii) the person referred to in paragraph (i) and that person's partner (if any) does not possess, or is not treated as possessing, any other income apart from that payment.
- (6) Where a claimant stands in relation to a company in a position analogous to that of a sole owner or partner in the business of that company, the claimant is to be treated as if that claimant were such sole owner or partner and in such a case—

- (a) the value of the claimant's holding in that company, notwithstanding regulation 111 (calculation of capital), is to be disregarded; and
  - (b) the claimant will, subject to paragraph (7), be treated as possessing an amount of capital equal to the value or, as the case may be, the claimant's share of the value of the capital of that company and the foregoing provisions of this Chapter are to apply for the purposes of calculating that amount as if it were actual capital which the claimant does possess.
- (7) For so long as the claimant undertakes activities in the course of the business of the company, the amount which the claimant is treated as possessing under paragraph (6) is to be disregarded.
- (8) Where a claimant is treated as possessing capital under any of paragraphs (1) to (6), the foregoing provisions of this Chapter are to apply for the purposes of calculating its amount as if it were actual capital which the claimant does possess.
- (9) For the avoidance of doubt a claimant is to be treated as possessing capital under paragraph (1) only if the capital of which the claimant has deprived himself or herself is actual capital.

#### Textual Amendments

- F328** Words in reg. 115(2)(e) substituted (6.4.2010) by [The Social Security \(Miscellaneous Amendments\) \(No. 2\) Regulations 2010 \(S.I. 2010/641\)](#), regs. 1(1), **12(6)**
- F329** Words in reg. 115(5)(a) inserted (6.4.2010) by [The Social Security \(Miscellaneous Amendments\) \(No. 2\) Regulations 2010 \(S.I. 2010/641\)](#), regs. 1(1), **12(5)(c)**
- F330** Words in reg. 115(5)(a) inserted (6.4.2010) by [The Social Security \(Miscellaneous Amendments\) \(No. 2\) Regulations 2010 \(S.I. 2010/641\)](#), regs. 1(1), **12(3)(d)**
- F331** Words in reg. 115(5)(a) substituted (27.10.2008) by [The Employment and Support Allowance \(Miscellaneous Amendments\) Regulations 2008 \(S.I. 2008/2428\)](#), regs. 1(2), **8(8)**
- F332** Words in reg. 115(5)(a) inserted (31.10.2011) by [The Social Security \(Miscellaneous Amendments\) \(No. 3\) Regulations 2011 \(S.I. 2011/2425\)](#), regs. 1(2), **23(9)**
- F333** Reg. 115(5)(ba) inserted (5.8.2011) by [The Social Security \(Miscellaneous Amendments\) \(No. 2\) Regulations 2011 \(S.I. 2011/1707\)](#), regs. 1, **4(6)(7)**
- F334** Words in reg. 115(5)(ba) substituted (12.2.2013) by [The Jobseeker s Allowance \(Schemes for Assisting Persons to Obtain Employment\) Regulations 2013 \(S.I. 2013/276\)](#), regs. 1, **15(b)**

#### Diminishing notional capital rule

**116.—**(1) Where a claimant is treated as possessing capital under regulation 115(1) (notional capital), the amount which the claimant is treated as possessing—

- (a) in the case of a week that is subsequent to—
  - (i) the relevant week in respect of which the conditions set out in paragraph (2) are satisfied; or
  - (ii) a week which follows that relevant week and which satisfies those conditions, is to be reduced by an amount determined under paragraph (2);
- (b) in the case of a week in respect of which paragraph (1)(a) does not apply but where—
  - (i) that week is a week subsequent to the relevant week; and
  - (ii) that relevant week is a week in which the condition in paragraph (3) is satisfied, is to be reduced by the amount determined under paragraph (3).

(2) This paragraph applies to a benefit week or part-week where the claimant satisfies the conditions that—

- (a) the claimant is in receipt of an income-related allowance; and

---

*Status: Point in time view as at 02/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008. (See end of Document for details)*

---

(b) but for regulation 115(1), the claimant would have received an additional amount of an income-related allowance in that benefit week or, as the case may be, that part-week, and in such a case, the amount of the reduction for the purposes of paragraph (1)(a) is to be equal to that additional amount.

(3) Subject to paragraph (4), for the purposes of paragraph (1)(b) the condition is that the claimant would have been entitled to an income-related allowance in the relevant week, but for regulation 115(1), and in such a case the amount of the reduction is to be equal to the aggregate of—

- (a) the amount of an income-related allowance to which the claimant would have been entitled in the relevant week but for regulation 115(1); and for the purposes of this sub-paragraph if the relevant week is a part-week that amount is to be determined by dividing the amount of an income-related allowance to which the claimant would have been so entitled by the number equal to the number of days in the part-week and multiplying the quotient by 7;
- (b) the amount of housing benefit (if any) equal to the difference between the claimant's maximum housing benefit and the amount (if any) of housing benefit which the claimant is awarded in respect of the benefit week, within the meaning of regulation 2(1) of the Housing Benefit Regulations 2006 <sup>F335</sup> (interpretation), which includes the last day of the relevant week;
- (c) the amount of council tax benefit (if any) equal to the difference between the claimant's maximum council tax benefit and the amount (if any) of council tax benefit which the claimant is awarded in respect of the benefit week which includes the last day of the relevant week, and for this purpose “benefit week” <sup>F336</sup> means a period of 7 consecutive days beginning on a Monday and ending on a Sunday].

(4) The amount determined under paragraph (3) is to be re-determined under that paragraph if the claimant makes a further claim for an income-related allowance and the conditions in paragraph (5) are satisfied, and in such a case—

- (a) sub-paragraphs (a) to (c) of paragraph (3) will apply as if for the words “relevant week” there were substituted the words “relevant subsequent week”; and
- (b) subject to paragraph (6), the amount as re-determined is to have effect from the first week following the relevant subsequent week in question.

(5) The conditions are that—

- (a) a further claim is made 26 or more weeks after—
  - (i) the date on which the claimant made a claim for an income-related allowance in respect of which the claimant was first treated as possessing the capital in question under regulation 115(1);
  - (ii) in a case where there has been at least one re-determination in accordance with paragraph (4), the date on which the claimant last made a claim for an income-related allowance which resulted in the weekly amount being re-determined; or
  - (iii) the date on which the claimant last ceased to be in receipt of an income-related allowance;

whichever last occurred; and

- (b) the claimant would have been entitled to an income-related allowance but for regulation 115(1).

(6) The amount as re-determined pursuant to paragraph (4) is not to have effect if it is less than the amount which applied in that case immediately before the re-determination and in such a case the higher amount is to continue to have effect.

(7) For the purposes of this regulation—

“part-week” means a period to which Part 14 (periods of less than a week) applies;

“relevant week” means the benefit week or part-week in which the capital in question of which the claimant has deprived himself or herself within the meaning of regulation 115(1)—

- (a) was first taken into account for the purpose of determining the claimant's entitlement to an income-related allowance, a jobseeker's allowance or income support; or
- (b) was taken into account on a subsequent occasion for the purpose of determining or re-determining the claimant's entitlement to an income-related allowance, a jobseeker's allowance or income support on that subsequent occasion and that determination or re-determination resulted in the claimant's beginning to receive, or ceasing to receive, an income-related allowance, a jobseeker's allowance or income support;

and where more than one benefit week or part-week is identified by reference to paragraphs (a) and (b) of this definition the later or latest such benefit week or, as the case may be, the later or latest such part-week;

“relevant subsequent week” means the benefit week or part-week which includes the day on which the further claim or, if more than one further claim has been made, the last such claim was made.

#### Textual Amendments

**F335** S.I. 2006/213.

**F336** Words in reg. 116(3)(c) substituted (1.4.2013) by [The Council Tax Benefit Abolition \(Consequential Provision\) Regulations 2013 \(S.I. 2013/458\)](#), reg. 1, [Sch. 2 para. 8](#)

#### Capital jointly held

**117.** Except where a claimant possesses capital which is disregarded under regulation 115(6) (notional capital), where a claimant and one or more persons are beneficially entitled in possession to any capital asset they are to be treated as if each of them were entitled in possession to the whole beneficial interest therein in an equal share and the foregoing provisions of this Chapter are to apply for the purposes of calculating the amount of capital which the claimant is treated as possessing as if it were actual capital which the claimant does possess.

#### Calculation of tariff income from capital

**118.**—(1) Except where the circumstances prescribed in paragraph (3) apply to the claimant, where the claimant's capital calculated in accordance with this Part exceeds £6,000 it is to be treated as equivalent to a weekly income of £1 for each complete £250 in excess of £6,000 but not exceeding £16,000.

(2) Where the circumstances prescribed in paragraph (3) apply to the claimant and that claimant's capital calculated in accordance with this Part exceeds £10,000, it is to be treated as equivalent to a weekly income of £1 for each complete £250 in excess of £10,000 but not exceeding £16,000.

(3) For the purposes of paragraph (2) the prescribed circumstances are that the claimant lives permanently in—

- (a) a care home or an independent hospital;
- (b) an Abbeyfield Home; or
- (c) accommodation provided under section 3 of, and Part 2 of the Schedule to, the Polish Resettlement Act 1947 <sup>F337</sup> (provision of accommodation in camps) where the claimant requires personal care by reason of old age, disablement, past or present dependence on alcohol or drugs, past or present mental disorder or a terminal illness and the care is provided in the home.

*Status: Point in time view as at 02/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008. (See end of Document for details)*

- (4) For the purposes of paragraph (3), a claimant is to be treated as living permanently in such home, hospital or accommodation where the claimant is absent—
- (a) from a home, hospital or accommodation referred to in sub-paragraph (a) or (b) of paragraph (3)—
    - (i) in the case of a claimant over pensionable age, for a period not exceeding 52 weeks; and
    - (ii) in any other case, for a period not exceeding 13 weeks;
  - (b) from accommodation referred to in sub-paragraph (c) of paragraph (3), where the claimant, with the agreement of the manager of the accommodation, intends to return to the accommodation in due course.
- (5) Notwithstanding paragraphs (1) and (2), where any part of the excess is not a complete £250 that part is to be treated as equivalent to a weekly income of £1.
- (6) For the purposes of paragraphs (1) and (2), capital includes any income treated as capital under [<sup>F338</sup>regulation 112 (income treated as capital)].

#### Textual Amendments

- F337** 1947 c. 19. Section 3 of and Part 2 of the Schedule to, the 1947 Act have been amended by S.I. 1968/1699, the Supplementary Benefit Act 1966 (c. 20), **section 39(1)** and paragraph 3 of Schedule 6, Supplementary Benefits Act 1976 (c. 71), **section 35(1)** and (2) and paragraph 4 of Schedule 6 and paragraph 1 of Schedule 7, the Social Security Act 1980 (c. 30), **sections 20** and 21(4) and paragraph 1 of Schedule 4 and Part 2 of Schedule 5 and the Criminal Justice Act 2003 (c. 44), **section 304** and paragraph 154 of Schedule 32.
- F338** Words in reg. 118(6) substituted (27.10.2008) by The Employment and Support Allowance (Miscellaneous Amendments) Regulations 2008 (S.I. 2008/2428), regs. 1(2), **20(6)**

## CHAPTER 8

<sup>F339</sup>... liable relative payments

#### Textual Amendments

- F339** Words in Pt. 10 Ch. 8 heading omitted (for specified purposes and with effect in accordance with reg. 1(6) of the amending S.I.) by virtue of The Social Security (Miscellaneous Amendments) (No. 4) Regulations 2009 (S.I. 2009/2655), regs. 1(6)(c), **11(5)**

### Interpretation

**119.** In this Chapter—

<sup>F340</sup>...

“claimant” includes a young claimant;

[<sup>F341</sup>“claimant’s family” shall be construed in accordance with section 137 of the Contributions and Benefits Act (interpretation of part 7 and supplementary provisions);]

[<sup>F341</sup>“housing costs” means those costs which may be met under paragraph 1(2) of Schedule 6;]

“liable relative” means—

- (a) a spouse, former spouse, civil partner or former civil partner of a claimant or of a member of the claimant's family;



- (b) a parent of a child or young person who is a member of the claimant's family or of a young claimant;
- (c) a person who has not been adjudged to be the father of a child or young person who is a member of the claimant's family or of a young claimant where that person is contributing towards the maintenance of that child, young person or young claimant and by reason of that contribution the claimant may reasonably be treated as the father of that child, young person or young claimant;
- (d) a person liable to maintain another person by virtue of section 78(6)(c) of the Administration Act (liability to maintain) where the latter is the claimant or a member of the claimant's family,

and, in this definition, a reference to a child's, young person's or young claimant's parent includes any person in relation to whom the child, young person or young claimant was treated as a child or a member of the family;

[<sup>F342</sup>“ordinary clothing and footwear” means clothing and footwear for normal daily use but does not include school uniforms;]

“payment” means a periodical payment or any other payment made by or derived from a liable relative <sup>F343</sup>... but it does not include any payment—

- (a) arising from a disposition of property made in contemplation of, or as a consequence of—
  - (i) an agreement to separate;
  - (ii) any proceedings for judicial separation, divorce or nullity of marriage; or
  - (iii) any proceedings for separation, dissolution or nullity in relation to a civil partnership;
- (b) made after the death of the liable relative;
- (c) made by way of a gift but not in aggregate or otherwise exceeding £250 in the period of 52 weeks beginning with the date on which the payment, or if there is more than one such payment the first payment, is made; and, in the case of a claimant who continues to be in receipt of an income-related allowance at the end of the period of 52 weeks, this provision is to continue to apply thereafter with the modification that any subsequent period of 52 weeks is to begin with the first day of the benefit week in which the first payment is made after the end of the previous period of 52 weeks;
- (d) [<sup>F344</sup>made to a third party, or in respect of a third party, unless the payment is—
  - (i) in relation to the claimant or the claimant's [<sup>F345</sup>partner or is made or derived from a person falling within sub-paragraph (d) of the definition of liable relative]; and
  - (ii) <sup>F346</sup>... in respect of food, ordinary clothing or footwear, fuel, [<sup>F347</sup>rent for which housing benefit is payable, housing costs to the extent that they are met under regulation 67(1)(c) or 68(1)(d) (housing costs),] council tax or water charges;]
- (e) in kind;
- (f) to, or in respect of, a child or young person who is to be treated as not being a member of the claimant's household under regulation 156 (circumstances in which a person is to be treated as being or not being a member of the same household);
- (g) which is not a periodical payment, to the extent that any amount of that payment—
  - (i) has already been taken into account under this Part by virtue of a previous claim or determination;
  - (ii) has been recovered under section 74 of the Administration Act <sup>F348</sup> (income support and other payments) or is currently being recovered; or

*Status: Point in time view as at 02/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008. (See end of Document for details)*

- (iii) at the time the determination is made, has been used by the claimant except where the claimant has deprived himself or herself of that amount for the purpose of securing entitlement to an income-related allowance or increasing the amount of that allowance;
- (h) [<sup>F349</sup>to which paragraph 60 of Schedule 8 (sums to be disregarded in the calculation of income other than earnings) applies.]

“periodical payment” means—

- (a) a payment which is made or is due to be made at regular intervals <sup>F350</sup> ...;
- (b) in a case where the liable relative has established a pattern of making payments at regular intervals, any such payment;
- (c) any payment<sup>F351</sup> [<sup>F352</sup>...that does not exceed] the amount of an income-related allowance payable had that payment not been made;
- (d) any payment representing a commutation of payments to which paragraph (a) or (b) of this definition applies whether made in arrears or in advance,

but does not include a payment due to be made before the first benefit week pursuant to the claim which is not so made;

“young claimant” means a person aged 16 or over but under 20 who makes a claim for an income-related allowance.

#### Textual Amendments

- F340** Words in reg. 119 omitted (for specified purposes and with effect in accordance with reg. 1(6) of the amending S.I.) by virtue of [The Social Security \(Miscellaneous Amendments\) \(No. 4\) Regulations 2009 \(S.I. 2009/2655\)](#), regs. 1(6)(c), **11(11)(a)**
- F341** Words in reg. 119 inserted (27.10.2008) by [The Employment and Support Allowance \(Miscellaneous Amendments\) Regulations 2008 \(S.I. 2008/2428\)](#), regs. 1(2), **20(7)(b)**
- F342** Words in reg. 119 inserted (27.10.2008) by [The Employment and Support Allowance \(Miscellaneous Amendments\) Regulations 2008 \(S.I. 2008/2428\)](#), regs. 1(2), **20(7)(c)**
- F343** Words in reg. 119 omitted (27.10.2008) by virtue of [The Employment and Support Allowance \(Miscellaneous Amendments\) Regulations 2008 \(S.I. 2008/2428\)](#), regs. 1(2), **20(7)(d)(i)**
- F344** Words in reg. 119 substituted (27.10.2008) by [The Employment and Support Allowance \(Miscellaneous Amendments\) Regulations 2008 \(S.I. 2008/2428\)](#), regs. 1(2), **20(7)(d)(ii)**
- F345** Words in reg. 119 substituted (for specified purposes and with effect in accordance with reg. 1(6) of the amending S.I.) by [The Social Security \(Miscellaneous Amendments\) \(No. 4\) Regulations 2009 \(S.I. 2009/2655\)](#), regs. 1(6)(c), **11(11)(b)(i)**
- F346** Words in reg. 119(d)(ii) omitted (2.4.2013) by virtue of [The Social Security \(Miscellaneous Amendments\) Regulations 2013 \(S.I. 2013/443\)](#), regs. 1, **9(3)(a)**
- F347** Words in reg. 119(d)(ii) inserted (2.4.2013) by [The Social Security \(Miscellaneous Amendments\) Regulations 2013 \(S.I. 2013/443\)](#), regs. 1, **9(3)(b)**
- F348** Section 74 has been amended by the [Jobseekers Act 1995 \(c. 18\)](#), **paragraph 5** of the Schedule and the Act, paragraph 10(8) of Schedule 3.
- F349** Words in reg. 119 added (for specified purposes and with effect in accordance with reg. 1(6) of the amending S.I.) by [The Social Security \(Miscellaneous Amendments\) \(No. 4\) Regulations 2009 \(S.I. 2009/2655\)](#), regs. 1(6)(c), **11(11)(b)(ii)**
- F350** Words in reg. 119 omitted (27.10.2008) by virtue of [The Employment and Support Allowance \(Miscellaneous Amendments\) Regulations 2008 \(S.I. 2008/2428\)](#), regs. 1(2), **20(7)(e)(i)**
- F351** Words in reg. 119 omitted (for specified purposes and with effect in accordance with reg. 1(6) of the amending S.I.) by virtue of [The Social Security \(Miscellaneous Amendments\) \(No. 4\) Regulations 2009 \(S.I. 2009/2655\)](#), regs. 1(6)(c), **11(11)(c)**

**F352** Words in reg. 119 substituted (27.10.2008) by [The Employment and Support Allowance \(Miscellaneous Amendments\) Regulations 2008 \(S.I. 2008/2428\)](#), regs. 1(2), **20(7)(e)(ii)**

### Treatment of <sup>F353</sup>... liable relative payments

**120.** Subject to regulation 121 (disregard of payments treated as not relevant income) <sup>F354</sup>... a payment—

- (a) to the extent that it is not a payment of income, is to be treated as income;
- (b) is to be taken into account in accordance with the following provisions of this Chapter.

#### Textual Amendments

**F353** Words in reg. 120 heading omitted (for specified purposes and with effect in accordance with reg. 1(6) of the amending S.I.) by virtue of [The Social Security \(Miscellaneous Amendments\) \(No. 4\) Regulations 2009 \(S.I. 2009/2655\)](#), regs. 1(6)(c), **11(4)**

**F354** Words in reg. 120 omitted (for specified purposes and with effect in accordance with reg. 1(6) of the amending S.I.) by virtue of [The Social Security \(Miscellaneous Amendments\) \(No. 4\) Regulations 2009 \(S.I. 2009/2655\)](#), regs. 1(6)(c), **11(12)**

### Disregard of payments treated as not relevant income

**121.** Where the Secretary of State treats any payment as not being relevant income for the purposes of section 74A of the Administration Act <sup>F355</sup> (payment of benefit where maintenance payments collected by Secretary of State), that payment is to be disregarded in calculating a claimant's income.

#### Textual Amendments

**F355** Section 74A was inserted by the [Child Support Act 1995 \(c. 34\)](#), **section 25** and amended by the [Civil Partnership Act 2004 \(c. 33\)](#), **sections 254(1)** and 261(4), Part 4 of Schedule 24 and paragraph 60(a) to (c) of Schedule 30 and the Act, section 28(1) and paragraph 10(1) and (9) of Schedule 3.

### Period over which periodical payments are to be taken into account

**122.—(1)** The period over which a periodical payment is to be taken into account is to be—

- (a) in a case where the payment is made at regular intervals, a period equal to the length of that interval;
- (b) in a case where the payment is due to be made at regular intervals but is not so made, such number of weeks as is equal to the number (and any fraction is to be treated as a corresponding fraction of a week) obtained by dividing the amount of that payment by the weekly amount of that periodical payment as calculated in accordance with regulation 124(4) (calculation of the weekly amount of a liable relative payment);
- (c) in any other case, a period equal to a week.

(2) The period under paragraph (1) is to begin on the date on which the payment is treated as paid under regulation 125 (date on which a liable relative payment is to be treated as paid).

*Status: Point in time view as at 02/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008. (See end of Document for details)*

### Period over which payments other than periodical payments are to be taken into account

<sup>F356</sup>123.—(1) The period over which a payment other than a periodical payment (a “non-periodical payment”) is to be taken into account shall be determined as follows.

(2) Except in a case where paragraph (4) applies, the number of weeks over which a non-periodical payment is to be taken into account shall be equal to the number obtained by dividing that payment by the amount referred to in paragraph (3).

(3) The amount is the aggregate of £2 and—

(a) the amount of employment and support allowance that would be payable had no payment been made. <sup>F357</sup> ...

<sup>F357</sup>(b) .....

(4) This paragraph applies in a case where a liable relative makes a periodical payment and a non-periodical payment concurrently and the weekly amount of the periodical payment (as calculated in accordance with regulation 124) is less than B.

(5) In a case where paragraph (4) applies, the non-periodical payment shall, subject to paragraphs (6) and (7), be taken into account over a period of the number of weeks equal to the number obtained by applying the formula—

$$\frac{A}{B - C}$$

(6) If the liable relative ceases to make periodical payments, the balance (if any) of the non-periodical payment shall be taken into account over the number of weeks equal to the number obtained by dividing that balance by the amount referred to in paragraph (3).

(7) If the amount of any subsequent periodical payment varies, the balance (if any) of the non-periodical payment shall be taken into account over a period of the number of weeks equal to the number obtained by applying the formula—

$$\frac{D}{B - E}$$

(8) The period under paragraph (2) or (4) shall begin on the date on which the payment is treated as paid under regulation 125 (date on which a liable relative payment is to be treated as paid) and the period under paragraph (6) or (7) shall begin on the first day of the benefit week in which the cessation or variation of the periodical payment occurred.

(9) Any fraction which arises by applying a calculation or formula referred to in this regulation shall be treated as a corresponding fraction of a week.

(10) In paragraphs (4) to (7)—

- A = the amount of the non-periodical payment;  
 B = the aggregate of £2 and the amount of employment and support allowance that would be payable had the periodical payment not been made <sup>F358</sup> ...;  
 C = the weekly amount of the periodical payment;  
 D = the balance (if any) of the non-periodical payment;  
 E = the weekly amount of any subsequent periodical payment.]

#### Textual Amendments

**F356** Reg. 123 substituted (27.10.2008) by [The Employment and Support Allowance \(Miscellaneous Amendments\) Regulations 2008 \(S.I. 2008/2428\)](#), regs. 1(2), **20(9)**

- F357** Reg. 123(3)(b) and word omitted (for specified purposes and with effect in accordance with reg. 1(6) of the amending S.I.) by virtue of [The Social Security \(Miscellaneous Amendments\) \(No. 4\) Regulations 2009 \(S.I. 2009/2655\)](#), regs. 1(6)(c), **11(13)(a)**
- F358** Words in reg. 123(10) omitted (for specified purposes and with effect in accordance with reg. 1(6) of the amending S.I.) by virtue of [The Social Security \(Miscellaneous Amendments\) \(No. 4\) Regulations 2009 \(S.I. 2009/2655\)](#), regs. 1(6)(c), **11(13)(b)**

### Calculation of the weekly amount of a <sup>F359</sup>... liable relative payment

**124.**—(1) Where a periodical payment is made or is due to be made at intervals of one week, the weekly amount is to be the amount of that payment.

(2) Where a periodical payment is made or is due to be made at intervals greater than one week and those intervals are monthly, the weekly amount is to be determined by multiplying the amount of the payment by 12 and dividing the product by 52.

(3) Where a periodical payment is made or is due to be made at intervals and those intervals are neither weekly nor monthly, the weekly amount is to be determined by dividing that payment by the number equal to the number of weeks (including any part of a week) in that interval.

(4) Where a payment is made and that payment represents a commutation of periodical payments whether in arrears or in advance, the weekly amount is to be the weekly amount of the individual periodical payments so commuted as calculated under paragraphs (1) to (3) as is appropriate.

(5) The weekly amount of a payment to which regulation 123 (period over which payments other than periodical payments are to be taken into account) applies, is to be equal to the amount of the divisor used in calculating the period over which the payment or, as the case may be, the balance is to be taken into account.

#### Textual Amendments

- F359** Words in reg. 124 heading omitted (for specified purposes and with effect in accordance with reg. 1(6) of the amending S.I.) by virtue of [The Social Security \(Miscellaneous Amendments\) \(No. 4\) Regulations 2009 \(S.I. 2009/2655\)](#), regs. 1(6)(c), **11(4)**

### Date on which a <sup>F360</sup>... liable relative payment is to be treated as paid

**125.**—(1) A periodical payment is to be treated as paid—

- (a) in the case of a payment which is due to be made before the first benefit week pursuant to the claim, on the day in the week in which it is due to be paid which corresponds to the first day of the benefit week;
- (b) in any other case, on the first day of the benefit week in which it is due to be paid unless, having regard to the manner in which an income-related allowance is due to be paid in the particular case, it would be more practicable to treat it as paid on the first day of a subsequent benefit week.

(2) Subject to paragraph (3), any other payment is to be treated as paid—

- (a) in the case of a payment which is made before the first benefit week pursuant to the claim, on the day in the week in which it is paid which corresponds to the first day of the benefit week;
- (b) in any other case, on the first day of the benefit week in which it is paid unless, having regard to the manner in which an income-related allowance is due to be paid in the

*Status: Point in time view as at 02/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008. (See end of Document for details)*

particular case, it would be more practicable to treat it as paid on the first day of a subsequent benefit week.

(3) Any other payment paid on a date which falls within the period in respect of which a previous payment is taken into account, not being a periodical payment, is to be treated as paid on the first day following the end of that period.

**Textual Amendments**

**F360** Words in reg. 125 heading omitted (for specified purposes and with effect in accordance with reg. 1(6) of the amending S.I.) by virtue of [The Social Security \(Miscellaneous Amendments\) \(No. 4\) Regulations 2009 \(S.I. 2009/2655\)](#), regs. 1(6)(c), **11(4)**

**Liable relative payments to be treated as capital**

<sup>F361</sup>**126.** . . . . .

**Textual Amendments**

**F361** Reg. 126 omitted (27.10.2008) by virtue of [The Employment and Support Allowance \(Miscellaneous Amendments\) Regulations 2008 \(S.I. 2008/2428\)](#), regs. 1(2), **20(4)(b)**

<sup>F362</sup>**CHAPTER 9**

**Child support**

**Textual Amendments**

**F362** Pt. 10 Ch. 9 omitted (27.10.2008) by virtue of [The Employment and Support Allowance \(Miscellaneous Amendments\) Regulations 2008 \(S.I. 2008/2428\)](#), regs. 1(2), **20(4)(c)**

**127.** . . . . .

**128.** . . . . .

**129.** . . . . .

**130.** . . . . .

**CHAPTER 10**

**Students**

**Interpretation**

**131.—(1)** In this Chapter—

“academic year” means the period of twelve months beginning on 1st January, 1st April, 1st July or 1st September according to whether the course in question begins in the winter, the spring, the summer or the autumn respectively but if students are required to begin attending

the course during August or September and to continue attending through the autumn, the academic year of the course is to be considered to begin in the autumn rather than the summer;

“access funds” means—

- (a) grants made under section [F36368] of the Further and Higher Education Act 1992 F364F365 ... for the purpose of providing funds on a discretionary basis to be paid to students;
- (b) grants made under sections 73(a) and (c) and 74(1) of the Education (Scotland) Act 1980 F366,
- (c) grants made under Article 30 of the Education and Libraries (Northern Ireland) Order 1993 F367, or grants, loans or other payments made under Article 5 of the Further Education (Northern Ireland) Order 1997 F368 in each case being grants, or grants, loans or other payments as the case may be, made for the purpose of assisting students in financial difficulties;
- (d) discretionary payments, known as “learner support funds”, which are made available to students in further education by institutions out of funds provided by the [F369[F370Secretary of State under section 14 of the Education Act 2002] or the Chief Executive of Skills Funding under sections 100 and 101 of [F371the Apprenticeships, Skills, Children and Learning Act 2009]] F372; or
- (e) Financial Contingency Funds made available by the Welsh Ministers;

“college of further education” means, in Scotland, an educational establishment by which further education is provided;

[F373“contribution” means—

- (a) any contribution in respect of the income of a student or any person which the Secretary of State, the Scottish Ministers or an education authority takes into account in ascertaining the amount of a student's grant or student loan; or
- (b) any sums, which in determining the amount of a student's allowance or bursary in Scotland under the Education (Scotland) Act 1980, the Scottish Ministers or education authority takes into account being sums which the Scottish Ministers or education authority consider that it is reasonable for the following persons to contribute towards the holder's expenses—
  - (i) the holder of the allowance or bursary;
  - (ii) the holder's parents;
  - (iii) the holder's parent's spouse, civil partner or a person ordinarily living with the holder's parent as if he or she were the spouse or civil partner of that parent; or
  - (iv) the holder's spouse or civil partner;]

“course of advanced education” means—

- (a) a course leading to a postgraduate degree or comparable qualification, a first degree or comparable qualification, a diploma of higher education or a higher national diploma; or
- (b) any other course which is of a standard above advanced GNVQ, or equivalent, including a course which is of a standard above a general certificate of education (advanced level), a Scottish national qualification (higher or advanced higher);

“covenant income” means the income payable to a student under a Deed of Covenant by a person whose income is, or is likely to be, taken into account in assessing the student's grant or award;

“education authority” means a government department, [F374a local authority as defined in section 579 of the Education Act 1996 (interpretation)], an education authority as defined in

*Status: Point in time view as at 02/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008. (See end of Document for details)*

section 123 of the Local Government (Scotland) Act 1973<sup>F375</sup>, an education and library board established under Article 3 of the Education and Libraries (Northern Ireland) Order 1986<sup>F376</sup>, any body which is a research council for the purposes of the Science and Technology Act 1965<sup>F377</sup> or any analogous government department, authority, board or body, of the Channel Islands, Isle of Man or any other country outside Great Britain;

“full-time course of advanced education” means a course of advanced education which is—

- (a) a full-time course of study which is not funded in whole or in part by the [<sup>F378</sup>[<sup>F379</sup>Secretary of State under section 14 of the Education Act 2002], the Chief Executive of Skills Funding] or by the Welsh Ministers or a full-time course of study which is not funded in whole or in part by the Scottish Ministers at a college of further education or a full-time course of study which is a course of higher education and is funded in whole or in part by the Scottish Ministers;
- (b) a course of study which is funded in whole or in part by the [<sup>F378</sup>[<sup>F379</sup>Secretary of State under section 14 of the Education Act 2002], the Chief Executive of Skills Funding] or by the Welsh Ministers if it involves more than 16 guided learning hours per week for the student in question, according to the number of guided learning hours per week for that student set out—
  - (i) [<sup>F380</sup>in the case of a course funded by the [<sup>F379</sup>Secretary of State under section 14 of the Education Act 2002] or the Chief Executive of Skills Funding, in the student’s learning agreement signed on behalf of the establishment which is funded by either of those [<sup>F381</sup>persons] for the delivery of that course; or]
  - (ii) in the case of a course funded by the Welsh Ministers, in a document signed on behalf of the establishment which is funded by that Council for the delivery of that course; or
- (c) a course of study (not being higher education) which is funded in whole or in part by the Scottish Ministers at a college of further education if it involves—
  - (i) more than 16 hours per week of classroom-based or workshop-based programmed learning under the direct guidance of teaching staff according to the number of hours set out in a document signed on behalf of the college; or
  - (ii) 16 hours or less per week of classroom-based or workshop-based programmed learning under the direct guidance of teaching staff and it involves additional hours using structured learning packages supported by the teaching staff where the combined total of hours exceeds 21 per week, according to the number of hours set out in a document signed on behalf of the college;

“full-time course of study” means a full-time course of study which—

- (a) is not funded in whole or in part by the [<sup>F382</sup>[<sup>F383</sup>Secretary of State under section 14 of the Education Act 2002], the Chief Executive of Skills Funding] or by the Welsh Ministers or a full-time course of study which is not funded in whole or in part by the Scottish Ministers at a college of further education or a full-time course of study which is a course of higher education and is funded in whole or in part by the Scottish Ministers;
- (b) a course of study which is funded in whole or in part by the [<sup>F382</sup>[<sup>F383</sup>Secretary of State under section 14 of the Education Act 2002], the Chief Executive of Skills Funding] or by the Welsh Ministers if it involves more than 16 guided learning hours per week for the student in question, according to the number of guided learning hours per week for that student set out—
  - (i) [<sup>F384</sup>in the case of a course funded by the [<sup>F383</sup>Secretary of State under section 14 of the Education Act 2002] or the Chief Executive of Skills Funding, in the student’s



- learning agreement signed on behalf of the establishment which is funded by either of those [<sup>F385</sup>persons] for the delivery of that course; or]
- (ii) in the case of a course funded by the Welsh Ministers, in a document signed on behalf of the establishment which is funded by that Council for the delivery of that course; or
  - (c) is not higher education and is funded in whole or in part by the Scottish Ministers at a college of further education if it involves—
    - (i) more than 16 hours per week of classroom-based or workshop-based programmed learning under the direct guidance of teaching staff according to the number of hours set out in a document signed on behalf of the college; or
    - (ii) 16 hours or less per week of classroom-based or workshop-based programmed learning under the direct guidance of teaching staff and it involves additional hours using structured learning packages supported by the teaching staff where the combined total of hours exceeds 21 per week, according to the number of hours set out in a document signed on behalf of the college;

“full-time student” means a person who is not a qualifying young person or child within the meaning of section 142 of the Contributions and Benefits Act <sup>F386</sup> (child and qualifying young person) and who is—

- (a) aged less than 19 and is attending or undertaking a full-time course of advanced education;
- (b) aged 19 or over but under pensionable age and is attending or undertaking a full-time course of study at an educational establishment; or
- (c) on a sandwich course;

“grant” (except in the definition of “access funds”) means any kind of educational grant or award and includes any scholarship, studentship, exhibition, allowance or bursary but does not include a payment from access funds or any payment to which paragraph 13 of Schedule 8 or paragraph 52 of Schedule 9 applies;

“grant income” means—

- (a) any income by way of a grant;
- (b) in the case of a student other than one to whom paragraph (c) refers, any contribution which has been assessed whether or not it has been paid;
- (c) in the case of a student who is a lone parent<sup>F387</sup>, is a person who has no partner and who is responsible for and a member of the same household as a young person] or is a person to whom Part 4 applies, any contribution which has been assessed and which has been paid,

and any such contribution which is paid by way of a covenant is to be treated as part of the student's grant income;

“higher education” means higher education within the meaning of Part 2 of the Further and Higher Education (Scotland) Act 1992 <sup>F388</sup>;

“last day of the course” means the date on which the last day of the final academic term falls in respect of the course in which the student is enrolled;

“period of study” means—

- (a) in the case of a course of study for one year or less, the period beginning with the start of the course and ending with the last day of the course;
- (b) in the case of a course of study for more than one year, in the first or, as the case may be, any subsequent year of the course, other than the final year of the course, the period

*Status: Point in time view as at 02/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008. (See end of Document for details)*

beginning with the start of the course or, as the case may be, that year's start and ending with either—

- (i) the day before the start of the next year of the course in a case where the student's grant or loan is assessed at a rate appropriate to the student's studying throughout the year or, if the claimant does not have a grant or loan, where a loan would have been assessed at such a rate had the claimant had one; or
  - (ii) in any other case the day before the start of the normal summer vacation appropriate to the student's course;
- (c) in the final year of a course of study of more than one year, the period beginning with that year's start and ending with the last day of the course;

“periods of experience” means periods of work experience which form part of a sandwich course;

“sandwich course” has the meaning prescribed in regulation 2(9) of the Education (Student Support) Regulations 2007<sup>F389</sup>, regulation 4(2) of the Education (Student Loans) (Scotland) Regulations 2007<sup>F390</sup> or regulation 2(8) of the Education (Student Support) Regulations (Northern Ireland) 2007<sup>F391</sup>;

“standard maintenance grant” means—

- (a) except where paragraph (b) or (c) applies, in the case of a student attending or undertaking a course of study at the University of London or an establishment within the area comprising the City of London and the Metropolitan Police District, the amount specified for the time being in paragraph 2(2)(a) of Schedule 2 to the Education (Mandatory Awards) Regulations 2003<sup>F392</sup> (“the 2003 Regulations”) for such a student;
- (b) except where paragraph (c) applies, in the case of a student residing at the student's parent's home, the amount specified in paragraph 3(2) of Schedule 2 to the 2003 Regulations;
- (c) in the case of a student receiving an allowance or bursary under the Education (Scotland) Act 1980<sup>F393</sup>, the amount of money specified for the relevant year appropriate for the student set out in the Student Support in Scotland Guide issued by the Student Awards Agency for Scotland, or its nearest equivalent in the case of a bursary provided by a college of further education or a local education authority;
- (d) in any other case, the amount specified in paragraph 2(2) of Schedule 2 to the 2003 Regulations other than in paragraph (a) or (b) of that paragraph;

“student” means a person, other than a person in receipt of a training allowance, who is attending or undertaking a course of study at an educational establishment;

“student loan” means a loan towards a student's maintenance pursuant to any regulations made under section 22 of the Teaching and Higher Education Act 1998<sup>F394</sup>, sections [F395 73(f)], 73B and 74 of the Education (Scotland) Act 1980 or article 3 of the Education (Student Support) (Northern Ireland) Order 1998<sup>F396</sup> and is to include, in Scotland, amounts paid under regulation 4(1)(c) of the Students' Allowances (Scotland) Regulations 2007<sup>F397</sup>.

(2) For the purposes of the definition of “full-time student” in paragraph (1), a person is to be regarded as attending or, as the case may be, undertaking a full-time course of study, a full-time course of advanced education or as being on a sandwich course—

- (a) subject to paragraph (3), in the case of a person attending or undertaking a part of a modular course which would be a full-time course of study for the purposes of this Part, for the period beginning on the day on which that part of the course starts and ending—
  - (i) on the last day on which the claimant is registered with the educational establishment as attending or undertaking that part as a full-time course of study; or

- (ii) on such earlier date (if any) as the claimant finally abandons the course or is dismissed from it;
  - (b) in any other case, throughout the period beginning on the date on which the claimant starts attending or undertaking the course and ending on the last day of the course or on such earlier date (if any) as the claimant finally abandons it or is dismissed from it.
- (3) For the purpose of sub-paragraph (a) of paragraph (2), the period referred to in that sub-paragraph is to include—
- (a) where a person has failed examinations or has failed to successfully complete a module relating to a period when the claimant was attending or undertaking a part of the course as a full-time course of study, any period in respect of which the claimant attends or undertakes the course for the purpose of retaking those examinations or that module;
  - (b) any period of vacation within the period specified in that paragraph or immediately following that period except where the person has registered with the educational establishment to attend or undertake the final module in the course and the vacation immediately follows the last day on which the claimant is required to attend or undertake the course.
- (4) In paragraph (2), “modular course” means a course of study which consists of two or more modules, the successful completion of a specified number of which is required before a person is considered by the educational establishment to have completed the course.

#### Textual Amendments

- F363** Word in reg. 131(1) substituted (26.10.2009) by [The Social Security \(Miscellaneous Amendments\) \(No. 4\) Regulations 2009 \(S.I. 2009/2655\)](#), regs. 1(1), **11(14)(a)**
- F364** 1992 c. 13.
- F365** Words in reg. 131(1) omitted (26.10.2009) by virtue of [The Social Security \(Miscellaneous Amendments\) \(No. 4\) Regulations 2009 \(S.I. 2009/2655\)](#), regs. 1(1), **11(14)(b)**
- F366** 1980 c. 44.
- F367** [S.I. 1993/2810 \(N.I. 12\)](#). The functions under article 30 were transferred by [S.R. 1999/481](#) and the relevant amending instruments are [S.I.1997/1772 \(N.I. 15\)](#), [S.I. 2005/1116 \(N.I. 5\)](#) and [S.I. 2005/1963 \(N.I. 13\)](#).
- F368** [S.I. 1997/1772 \(N.I. 15\)](#).
- F369** Words in reg. 131(1) substituted (1.9.2010) by [The Apprenticeships, Skills, Children and Learning Act 2009 \(Consequential Amendments to Subordinate Legislation\) \(England\) Order 2010 \(S.I. 2010/1941\)](#), **art. 28(4)(a)**, reg. 1
- F370** Words in reg. 131(1) substituted (1.5.2012) by [The Young Peoples Learning Agency Abolition \(Consequential Amendments to Subordinate Legislation\) \(England\) Order 2012 \(S.I. 2012/956\)](#), arts. 1, **22(4)(a)(i)**
- F371** Words in reg. 131(1) substituted (1.5.2012) by [The Young Peoples Learning Agency Abolition \(Consequential Amendments to Subordinate Legislation\) \(England\) Order 2012 \(S.I. 2012/956\)](#), arts. 1, **22(4)(a)(ii)**
- F372** 2000 c. 21. Section 5 was amended by the [Education Act 2002 \(c. 32\)](#), **section 178(1)**, (2)(a) and (b). Section 6 was amended by the [Special Educational Needs and Disability Act 2001 \(c. 10\)](#), **sections 34(7)** and 42(6) and Schedule 9. Section 9 was amended by the [Education and Inspections Act 2006 \(c. 40\)](#), **section 176(2)**.
- F373** Words in reg. 131(1) substituted (6.4.2009) by [The Social Security \(Miscellaneous Amendments\) Regulations 2009 \(S.I. 2009/583\)](#), regs. 1(2), **10(7)**
- F374** Words in reg. 131 substituted (5.5.2010) by [The Local Education Authorities and Children’s Services Authorities \(Integration of Functions\) \(Local and Subordinate Legislation\) Order 2010 \(S.I. 2010/1172\)](#), art. 1(1), **Sch. 3 para. 81**

*Status: Point in time view as at 02/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008. (See end of Document for details)*

- F375** 1973 c. 65, **section 123** was substituted by the Local Government etc. (Scotland) Act 1994 (c. 39), **section 180** and Schedule 13, paragraph 92(28).
- F376** S.I. 1986/594 (N.I. 3).
- F377** 1965 c. 4.
- F378** Words in reg. 131(1) substituted (1.9.2010) by The Apprenticeships, Skills, Children and Learning Act 2009 (Consequential Amendments to Subordinate Legislation) (England) Order 2010 (S.I. 2010/1941), **art. 28(4)(b)(i)**, reg. 1
- F379** Words in reg. 131(1) substituted (1.5.2012) by The Young Peoples Learning Agency Abolition (Consequential Amendments to Subordinate Legislation) (England) Order 2012 (S.I. 2012/956), arts. 1, **22(4)(b)(i)**
- F380** Words in reg. 131(1) substituted (1.9.2010) by The Apprenticeships, Skills, Children and Learning Act 2009 (Consequential Amendments to Subordinate Legislation) (England) Order 2010 (S.I. 2010/1941), **art. 28(4)(b)(ii)**, reg. 1
- F381** Word in reg. 131(1) substituted (1.5.2012) by The Young Peoples Learning Agency Abolition (Consequential Amendments to Subordinate Legislation) (England) Order 2012 (S.I. 2012/956), arts. 1, **22(4)(b)(ii)**
- F382** Words in reg. 131(1) substituted (1.9.2010) by The Apprenticeships, Skills, Children and Learning Act 2009 (Consequential Amendments to Subordinate Legislation) (England) Order 2010 (S.I. 2010/1941), **art. 28(4)(c)(i)**, reg. 1
- F383** Words in reg. 131(1) substituted (1.5.2012) by The Young Peoples Learning Agency Abolition (Consequential Amendments to Subordinate Legislation) (England) Order 2012 (S.I. 2012/956), arts. 1, **22(4)(c)(i)**
- F384** Words in reg. 131(1) substituted (1.9.2010) by The Apprenticeships, Skills, Children and Learning Act 2009 (Consequential Amendments to Subordinate Legislation) (England) Order 2010 (S.I. 2010/1941), **art. 28(4)(c)(ii)**, reg. 1
- F385** Word in reg. 131(1) substituted (1.5.2012) by The Young Peoples Learning Agency Abolition (Consequential Amendments to Subordinate Legislation) (England) Order 2012 (S.I. 2012/956), arts. 1, **22(4)(c)(ii)**
- F386** Section 142 was substituted by the Child Benefit Act 2005 (c. 6), **section 1(2)**.
- F387** Words in reg. 131(1) inserted (31.10.2011) by The Social Security (Work-focused Interviews for Lone Parents and Partners) (Amendment) Regulations 2011 (S.I. 2011/2428), regs. 1, **5(4)**
- F388** 1992 c. 37.
- F389** S.I. 2007/176.
- F390** S.S.I. 2007/154.
- F391** S.R. 2007/195.
- F392** S.I. 2003/1994.
- F393** 1980 c. 44.
- F394** 1998 c. 30. Section 22 was amended by the Learning and Skills Act 2000 (c. 21), **section 146(1)** and (2)(a), the Higher Education Act 2004 (c. 8), **sections 42(1)**, 43(1), (2) and (3) and 50 and Schedule 7, the Income Tax (Earnings and Pensions) Act 2003 (c. 1), **section 722** and Schedule 6, Part 2, paragraph 236(a) and (b) and the Finance Act 2003 (c. 14), **section 147(3)**.
- F395** Word in reg. 131(1) substituted (27.10.2008) by The Employment and Support Allowance (Miscellaneous Amendments) Regulations 2008 (S.I. 2008/2428), regs. 1(2), **8(9)**
- F396** S.I. 1998/1760 (N.I. 14).
- F397** S.S.I. 2007/153.

### Calculation of grant income

**132.**—(1) The amount of student's grant income to be taken into account, subject to paragraphs (2) and (3), is to be the whole of the student's grant income.

- (2) There is to be disregarded from the amount of a student's grant income any payment—
- (a) intended to meet tuition fees or examination fees;

- (b) intended to meet additional expenditure incurred by a disabled student in respect of that student's attendance on a course;
  - (c) intended to meet additional expenditure connected with term time residential study away from the student's educational establishment;
  - (d) on account of the student maintaining a home at a place other than that at which the student resides while attending the course but only to the extent that the student's rent is not met by housing benefit;
  - (e) on account of any other person but only if that person is residing outside of the United Kingdom and there is no applicable amount in respect of that person;
  - (f) intended to meet the cost of books and equipment;
  - (g) intended to meet travel expenses incurred as a result of the student's attendance on the course;
  - (h) intended for the maintenance of a child dependant;
  - (i) intended for the child care costs of a child dependant.
- [<sup>F398</sup>(j) of higher education bursary for care leavers made under Part III of the Children Act 1989.]
- (3) Where a student does not have a student loan and is not treated as possessing such a loan, there is to be excluded from the student's grant income—
- (a) the sum of [<sup>F399</sup>£295] per academic year in respect of travel costs; and
  - (b) the sum of [<sup>F400</sup>£380] per academic year towards the costs of books and equipment, whether or not any such costs are incurred.
- (4) Subject to paragraph (6), a student's grant income except any amount intended for the maintenance of adult dependants under Part 3 of Schedule 2 to the Education (Mandatory Awards) Regulations 2003 is to be apportioned—
- (a) subject to paragraph (7), in a case where it is attributable to the period of study, equally between the weeks in the period beginning with the benefit week, the first day of which coincides with, or immediately follows, the first day of the period of study and ending with the benefit week, the last day of which coincides with, or immediately precedes, the last day of the period of study;
  - (b) in any other case, equally between the weeks in the period beginning with the benefit week, the first day of which coincides with, or immediately follows, the first day of the period for which it is payable and ending with the benefit week, the last day of which coincides with, or immediately precedes, the last day of the period for which it is payable.
- (5) Any grant in respect of an adult dependant paid under section 63(6) of the Health Services and Public Health Act 1968 <sup>F401</sup> (grants in respect of the provision of instruction to officers of hospital authorities) and any amount intended for the maintenance of an adult dependant under the provisions referred to in paragraph (4) is to be apportioned equally over a period of 52 weeks or, if there are 53 benefit weeks (including part-weeks) in the year, 53 weeks.
- (6) In a case where a student is in receipt of a student loan or where that student could have acquired a student loan by taking reasonable steps but had not done so, any amount intended for the maintenance of an adult dependant under provisions other than those referred to in paragraph (4) is to be apportioned over the same period as the student's loan is apportioned or, as the case may be, would have been apportioned.
- (7) In the case of a student on a sandwich course, any periods of experience within the period of study is to be excluded and the student's grant income is to be apportioned equally between the weeks in the period beginning with the benefit week, the first day of which immediately follows the

*Status: Point in time view as at 02/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008. (See end of Document for details)*

last day of the period of experience and ending with the benefit week, the last day of which coincides with, or immediately precedes, the last day of the period of study.

#### Textual Amendments

- F398** Reg. 132(2)(j) added (6.4.2009) by [The Social Security \(Miscellaneous Amendments\) Regulations 2009 \(S.I. 2009/583\)](#), regs. 1(2), **10(8)**
- F399** Word in reg. 132(3)(a) substituted (27.10.2008) by [The Social Security \(Students and Miscellaneous Amendments\) Regulations 2008 \(S.I. 2008/1599\)](#), regs. 1(5), **7(3)(a)**
- F400** Word in reg. 132(3)(b) substituted (27.10.2008) by [The Social Security \(Students and Miscellaneous Amendments\) Regulations 2008 \(S.I. 2008/1599\)](#), regs. 1(5), **7(3)(b)**
- F401** 1968 c. 46. Section 63(6) was amended by the [Health and Medicines Act 1988 \(c. 49\)](#), **section 20**.

#### Calculation of covenant income where a contribution is assessed

**133.**—(1) Where a student is in receipt of income by way of a grant during a period of study and a contribution has been assessed, the amount of the student's covenant income to be taken into account for that period and any summer vacation immediately following is to be the whole amount of the student's covenant income less, subject to paragraph (3), the amount of the contribution.

- (2) The weekly amount of the student's covenant income is to be determined—
- by dividing the amount of income which falls to be taken into account under paragraph (1) by 52 or, if there are 53 benefit weeks (including part-weeks) in the year, 53; and
  - by disregarding from the resulting amount, £5.

(3) For the purposes of paragraph (1), the contribution is to be treated as increased by the amount, if any, by which the amount excluded under regulation 132(2)(g) (calculation of grant income) falls short of the amount for the time being specified in paragraph 7(2) of Schedule 2 to the Education (Mandatory Awards) Regulations 2003 <sup>F402</sup> (travel expenditure).

#### Textual Amendments

- F402** [S.I. 2003/1994](#), the relevant amending instrument is [S.I. 2007/1629](#).

#### Calculation of covenant income where no grant income or no contribution is assessed

**134.**—(1) Where a student is not in receipt of income by way of a grant the amount of the student's covenant income is to be calculated as follows—

- any sums intended for any expenditure specified in regulation 132(2)(a) to (e), necessary as a result of the student's attendance on the course, are to be disregarded;
- any covenant income, up to the amount of the standard maintenance grant, which is not so disregarded is to be apportioned equally between the weeks of the period of study and there is to be disregarded from the covenant income to be so apportioned the amount which would have been disregarded under regulation 132(2)(f) and (g) and (3) had the student been in receipt of the standard maintenance grant;
- the balance, if any, is to be divided by 52 or, if there are 53 benefit weeks (including part-weeks) in the year, 53 and treated as weekly income of which £5 is to be disregarded.

(2) Where a student is in receipt of income by way of a grant and no contribution has been assessed, the amount of the student's covenant income is to be calculated in accordance with paragraph (1), except that—

- (a) the value of the standard maintenance grant is to be abated by the amount of the student's grant income less an amount equal to the amount of any sums disregarded under regulation 132(2)(a) to (e); and
- (b) the amount to be disregarded under paragraph (1)(b) is to be abated by an amount equal to the amount of any sums disregarded under regulation 132(2)(f) and (g) and (3).

### Relationships with amounts to be disregarded under Schedule 8

**135.** No part of a student's covenant income or grant income is to be disregarded under paragraph 16 of Schedule 8 (charitable and voluntary payments).

### Other amounts to be disregarded

**136.**—(1) For the purposes of ascertaining income other than grant income, covenant income and loans treated as income in accordance with regulation 137 (treatment of student loans), any amounts intended for any expenditure specified in regulation 132(2) (calculation of grant income) necessary as a result of the student's attendance on the course is to be disregarded but only if, and to the extent that, the necessary expenditure exceeds or is likely to exceed the amount of the sums disregarded under regulation 132(2) and (3), 133(3) (calculation of covenant income where a contribution is assessed), 134(1)(a) or (b) (calculation of covenant income where no grant income or no contribution is assessed) and 137(6) on like expenditure.

(2) Where a claim is made in respect of any period in the normal summer vacation and any income is payable under a Deed of Covenant which commences or takes effect after the first day of that vacation, that income is to be disregarded.

### Treatment of student loans

**137.**—(1) A student loan is to be treated as income unless it is a specified loan or award in which case it is to be disregarded.

(2) For the purposes of paragraph (1), a “specified loan or award” means—

- (a) in relation to England, a loan made by the Higher Education Funding Council for England under section 65 of the Further and Higher Education Act 1992 <sup>F403</sup>;
- (b) in relation to Wales, a loan made by the Higher Education Funding Council for Wales under section 65 of the Further and Higher Education Act 1992;
- (c) in relation to Scotland, a loan made by an educational institution from funds it has received under the Education (Access Funds) (Scotland) Regulations 1990 <sup>F404</sup>;
- (d) in relation to Northern Ireland, an award made by the Department for Employment and Learning under article 51 of the Education and Libraries (Northern Ireland) Order 1986 <sup>F405</sup>.

(3) In calculating the weekly amount of the loan to be taken in account as income—

- (a) in respect of a course that is of a single academic year's duration or less, a loan which is payable in respect of that period is to be apportioned equally between the weeks in the period beginning with—
  - (i) except in a case where paragraph (ii) applies, the benefit week, the first day of which coincides with, or immediately follows, the first day of the single academic year;
  - (ii) where the student is required to start attending the course in August or where the course is less than an academic year's duration, the benefit week, the first day of which coincides with, or immediately follows, the first day of the course,

*Status: Point in time view as at 02/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008. (See end of Document for details)*

and ending with the benefit week, the last day of which coincides with, or immediately precedes, the last day of the course;

- (b) in respect of an academic year of a course which starts other than on 1st September, a loan which is payable in respect of that academic year is to be apportioned equally between the weeks in the period beginning with the benefit week, the first day of which coincides with, or immediately follows, the first day of that academic year and ending with the benefit week, the last day of which coincides with, or immediately precedes, the last day of that academic year but excluding any benefit weeks falling entirely within the quarter during which, in the opinion of the Secretary of State, the longest of any vacation is taken;
- (c) for the purposes of sub-paragraph (b), “quarter” is to have the same meaning as for the purposes of regulation 104(6) (calculation of income other than earnings);
- (d) in respect of the final academic year of a course (not being a course of a single year's duration), a loan which is payable in respect of that final academic year is to be apportioned equally between the weeks in the period beginning with—
  - (i) except in a case where paragraph (ii) applies, the benefit week, the first day of which coincides with, or immediately follows, the first day of that academic year;
  - (ii) where the final academic year starts on 1st September, the benefit week, the first day of which coincides with, or immediately follows, the earlier of 1st September or the first day of the autumn term,

and ending with the benefit week, the last day of which coincides with, or immediately precedes, the last day of the course;

- (e) in any other case, the loan is to be apportioned equally between the weeks in the period beginning with the earlier of—
  - (i) the first day of the first benefit week in September; or
  - (ii) the benefit week, the first day of which coincides with, or immediately follows, the first day of the autumn term,

and ending with the benefit week, the last day of which coincides with, or immediately precedes, the last day of June,

and, in all cases, from the weekly amount so apportioned there is to be disregarded £10.

- (4) A student is to be treated as possessing a student loan in respect of an academic year where—
  - (a) a student loan has been made to that student in respect of that year; or
  - (b) [<sup>F406</sup>subject to paragraph (4A)] the student could acquire such a loan in respect of that year by taking reasonable steps to do so.

[<sup>F407</sup>(4A) A student is not to be treated as possessing any part of a student loan which has not been paid to that student in respect of an academic year where the educational institution at which the student was attending a course has confirmed in writing that the student has suspended attendance at the course due to a health condition or disability that renders the student incapable of continuing that course.]

(5) Where a student is treated as possessing a student loan under paragraph (4), the amount of the student loan to be taken into account as income is to be, subject to paragraph (6)—

- (a) in the case of a student to whom a student loan is made in respect of an academic year, a sum equal to the maximum student loan the student is able to acquire in respect of that year by taking reasonable steps to do so and either—
  - (i) in the case of a student other than one to whom paragraph (ii) refers, any contribution whether or not it has been paid to that student; or



- (ii) in the case of a student who is entitled to an income-related allowance by virtue of being a student to whom regulation 18 (circumstances in which the condition that the claimant is not receiving education does not apply) applies;
- (b) in the case of a student to whom a student loan is not made in respect of an academic year, the maximum student loan that would be made to the student if—
  - (i) the student took all reasonable steps to obtain the maximum student loan that student is able to acquire in respect of that year; and
  - (ii) no deduction in that loan was made by virtue of the application of a means test.
- (6) There is to be deducted from the amount of income taken into account under paragraph (5)—
  - (a) the sum of [<sup>F408</sup>£303] per academic year in respect of travel costs; and
  - (b) the sum of [<sup>F409</sup>£390] per academic year towards the costs of books and equipment, whether or not any such costs are incurred.

#### Textual Amendments

**F403** 1992 c. 13.

**F404** S.I. 1990/1534 (S. 157).

**F405** S.I. 1986/594 (N.I. 3).

**F406** Words in reg. 137(4)(b) inserted (1.11.2010) by [The Social Security \(Miscellaneous Amendments\) \(No. 5\) Regulations 2010 \(S.I. 2010/2429\)](#), regs. 1(2), **11(3)(a)**

**F407** Reg. 137(4A) inserted (1.11.2010) by [The Social Security \(Miscellaneous Amendments\) \(No. 5\) Regulations 2010 \(S.I. 2010/2429\)](#), regs. 1(2), **11(3)(b)**

**F408** Word in reg. 137(6)(a) substituted (1.8.2009 for specified purposes and with effect in accordance with reg. 1(3)) by [The Social Security \(Students and Miscellaneous Amendments\) Regulations 2009 \(S.I. 2009/1575\)](#), regs. 1(3), 2(2)(4)(e)

**F409** Word in reg. 137(6)(b) substituted (1.8.2009 for specified purposes and with effect in accordance with reg. 1(3)) by [The Social Security \(Students and Miscellaneous Amendments\) Regulations 2009 \(S.I. 2009/1575\)](#), regs. 1(3), 2(3)(4)(e)

#### Treatment of payments from access funds

**138.**—(1) This regulation applies to payments from access funds that are not payments to which regulation 142(2) or (3) (income treated as capital) applies.

(2) A payment from access funds, other than a payment to which paragraph (3) applies, is to be disregarded as income.

(3) Subject to paragraph (4) and paragraph 39 of Schedule 8, any payments from access funds which are intended and used for food, ordinary clothing or footwear, household fuel, rent for which housing benefit is payable or any housing costs to the extent that they are met under regulation 67(1)(c) or 68(1)(d) (housing costs), of a single claimant or, as the case may be, of the claimant's partner, and any payments from access funds which are used for any council tax or water charges for which that claimant or partner is liable is to be disregarded as income to the extent of £20 per week.

(4) Where a payment from access funds is made—

- (a) on or after 1st September or the first day of the course, whichever first occurs, but before receipt of any student loan in respect of that year and that payment is intended for the purpose of bridging the period until receipt of the student loan; or
- (b) before the first day of the course to a person in anticipation of that person becoming a student,

that payment is to be disregarded as income.

### **Treatment of fee loans**

**139.** A loan for fees, known as a fee loan or a fee contribution loan, made pursuant to regulations made under Article 3 of the Education (Student Support) (Northern Ireland) Order 1998 <sup>F410</sup>, section 22 of the Teaching and Higher Education Act 1998 <sup>F411</sup> or section 73(f) of the Education (Scotland) Act 1980 <sup>F412</sup>, is to be disregarded as income.

#### **Textual Amendments**

**F410** S.I. 1998/1760 (N.I. 14).

**F411** 1998 c. 30.

**F412** 1980 c. 44.

### **Disregard of contribution**

**140.** Where the claimant or the claimant's partner is a student and, for the purposes of assessing a contribution to the student's grant or student loan, the other partner's income has been taken into account, an amount equal to that contribution is to be disregarded for the purposes of assessing that other partner's income.

### **Further disregard of student's income**

**141.** Where any part of a student's income has already been taken into account for the purposes of assessing that student's entitlement to a grant or student loan, the amount taken into account is to be disregarded in assessing that student's income.

### **Income treated as capital**

**142.—(1)** Any amount by way of a refund of tax deducted from a student's income is to be treated as capital.

(2) An amount paid from access funds as a single lump sum is to be treated as capital.

(3) An amount paid from access funds as a single lump sum which is intended and used for an item other than food, ordinary clothing or footwear, household fuel, rent for which housing benefit is payable or any housing costs to the extent that they are met under regulation 67(1)(c) or 68(1)(d), of a single claimant or, as the case may be, of the claimant's partner, or which is used for an item other than any council tax or water charges for which that claimant or partner is liable is to be disregarded as capital but only for a period of 52 weeks from the date of the payment.

### **Disregard of changes occurring during summer vacation**

**143.** In calculating a student's income there is to be disregarded any change in the standard maintenance grant occurring in the recognised summer vacation appropriate to the student's course, if that vacation does not form part of the student's period of study, from the date on which the change occurred up to the end of that vacation.

## PART 11

### SUPPLEMENTARY PROVISIONS

#### CHAPTER 1

##### Miscellaneous

#### Waiting days

**144.**—(1) A claimant is not entitled to an employment and support allowance in respect of 3 days at the beginning of a period of limited capability for work.

(2) Paragraph (1) 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, [<sup>F413</sup>incapacity benefit, severe disablement allowance,] state pension credit, a jobseeker's allowance, a carer's allowance [<sup>F414</sup>, 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 Social Security and Child Support (Decisions and Appeals) Regulations 1999 <sup>F415</sup> which contains an express statement of being terminally ill; or
- (c) the claimant has been discharged from being a member of Her Majesty's forces and 3 or more days immediately before that discharge were days of sickness absence from duty, which are recorded by the Secretary of State for Defence [<sup>F416</sup>, or
- (d) the claimant is the other member of a couple to whom regulation 4I(2) of the Social Security (Claims and Payments) Regulations 1987 applies and the former claimant was not entitled to an employment and support allowance in respect of 3 days at the beginning of the period of limited capability for work which relates to the former claimant's entitlement] [<sup>F417</sup>; or]
- [<sup>F417</sup>(e) the claimant is entitled to an employment and support allowance by virtue of section 1B of the Act (further entitlement after time-limiting).]

#### Textual Amendments

- F413** Words in reg. 144(2)(a) inserted (31.1.2011) by [The Employment and Support Allowance \(Transitional Provisions, Housing Benefit and Council Tax Benefit\) \(Existing Awards\) \(No. 2\) Regulations 2010](#) (S.I. 2010/1907), regs. 1(3), **25(2)** (with reg. 3)
- F414** Words in reg. 144(2)(a) substituted (27.10.2008) by [The Employment and Support Allowance \(Miscellaneous Amendments\) Regulations 2008](#) (S.I. 2008/2428), regs. 1(2), **9(1)(a)**
- F415** S.I. 1999/991.
- F416** Reg. 144(2)(d) and word added (27.10.2008) by [The Employment and Support Allowance \(Miscellaneous Amendments\) Regulations 2008](#) (S.I. 2008/2428), regs. 1(2), **9(1)(b)**
- F417** Reg. 144(2)(e) and words added (1.5.2012) by [The Employment and Support Allowance \(Duration of Contributory Allowance\) \(Consequential Amendments\) Regulations 2012](#) (S.I. 2012/913), regs. 1(2), **9(3)**

*Status: Point in time view as at 02/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008. (See end of Document for details)*

## Linking rules

**145.**—(1) 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.

<sup>F418</sup>(2) .....

<sup>F418</sup>(3) .....

<sup>F418</sup>(4) .....

<sup>F418</sup>(5) .....

### Textual Amendments

**F418** Reg. 145(2)-(5) omitted (1.5.2012) by virtue of [The Employment and Support Allowance \(Amendment of Linking Rules\) Regulations 2012 \(S.I. 2012/919\)](#), regs. 1(2), **5(6)**

### Modifications etc. (not altering text)

**C2** [S. 145\(1\)](#) applied by [SSI 2012/303 Sch. 1 para. 27\(1\)\(c\)](#) (as amended (S.) (18.3.2013) by [The Council Tax Reduction \(Scotland\) Amendment Regulations 2013 \(S.S.I. 2013/48\)](#), regs. 1, **14(1)(ii)**)

**C3** [Reg. 145\(1\)](#) applied by [SI 2006/215 Sch. 1 para. 29\(1\)\(c\)](#) (as substituted (1.5.2012) by [The Employment and Support Allowance \(Amendment of Linking Rules\) Regulations 2012 \(S.I. 2012/919\)](#), regs. 1(2), **4(d)**)

**C4** [Reg. 145\(1\)](#) applied by [SI 2006/213 Sch. 3 para. 29\(1\)\(c\)](#) (as substituted (1.5.2012) by [The Employment and Support Allowance \(Amendment of Linking Rules\) Regulations 2012 \(S.I. 2012/919\)](#), regs. 1(2), **3(d)**)

## Advance awards

**146.**—(1) Where section 5 of the Act (advance award of income-related allowance) applies to a claim and the claimant satisfies the conditions in paragraph (3)—

- (a) the claim is to be treated as if made for a period from the relevant day; and
- (b) the Secretary of State may award an employment and support allowance from the relevant day.

(2) In this regulation the “relevant day” is the day after the end of a period of 13 weeks beginning on the first day on which the claimant would be entitled to an income-related allowance if the claimant satisfied the condition in paragraph 6(1)(a) of Schedule 1 to the Act.

(3) The conditions are that—

- (a) the Secretary of State is of the opinion that unless there is a change of circumstances the claimant will satisfy the conditions set out in section 1(3)(b) to (f) of, and Part 2 of Schedule 1 to, the Act when an income-related allowance becomes payable under the award; and
- (b) the claimant is treated as having limited capability for work under regulation 20, 25, 26, <sup>[F41930]</sup> or 33(2) (conditions for treating a person as having limited capability for work) for the period before an income-related allowance becomes payable under the award.

(4) Where an award is made under paragraph (1)—

- (a) the award for an employment and support allowance will become payable on the date on which the claimant would have been entitled to a main phase employment and support allowance if the claimant had satisfied the condition in paragraph 6(1)(a) of Schedule 1 to the Act before the relevant day;
- (b) sections 4(4)(a) and 4(5)(a) of the Act do not apply to that award.

#### Textual Amendments

**F419** Word in reg. 146(3)(b) substituted (27.10.2008) by [The Employment and Support Allowance \(Miscellaneous Amendments\) Regulations 2008 \(S.I. 2008/2428\)](#), regs. 1(2), **9(2)**

#### Recovery orders

**147.**—(1) Where an award of income-related allowance has been made to a claimant, the Secretary of State may apply to the court for a recovery order against the claimant's partner.

(2) On making a recovery order the court may order the partner to pay such amount at such intervals as it considers appropriate, having regard to all the circumstances of the partner and, in particular, the partner's income.

(3) Except in Scotland, a recovery order is to be treated for all purposes as if it were a maintenance order within the meaning of section 150(1) of the Magistrates Courts Act 1980 <sup>F420</sup>.

(4) Where a recovery order requires the partner to make payments to the Secretary of State, the Secretary of State may, by giving notice in writing to the court which made the order, the liable person and the claimant, transfer to the claimant the right to receive payments under the order and to exercise the relevant rights in relation to the order.

(5) In paragraph 4, “the relevant rights” means, in relation to a recovery order, the right to bring any proceedings, take any steps or do any other thing under or in relation to the order.

#### Textual Amendments

**F420** [1980 c. 43](#). The definition in section 150(1) was inserted by the [Family Law Reform Act 1987 \(c. 42\)](#), [section 33\(1\)](#) and Schedule 2, paragraph 88.

#### [<sup>F421</sup> Claimants appealing a decision

**147A.**—(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.

[<sup>F422</sup>(1A) A person to whom this regulation applies who has made and is pursuing an appeal against a conversion decision in respect of an existing award of incapacity benefit or severe disablement allowance shall be treated as having satisfied the conditions in Part 1 of Schedule 1 to the Act (contributory allowance: conditions relating to national insurance).]

(2) Subject to paragraph (3), where this regulation applies, a determination of limited capability for work by the Secretary of State under regulation 19 shall 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 at that date has significantly worsened.

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

*Status: Point in time view as at 02/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008. (See end of Document for details)*

- (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 22 or 23, 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 30, that the claimant is no longer to be so treated,

this regulation and regulation 30 apply 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 30;
- (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<sup>F423</sup>, struck out or has been discontinued in accordance with the provisions of regulation 33(10) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (notice of appeal)]

the claimant is to be treated as not having limited capability for work <sup>F424</sup>with effect from the day specified in paragraph (5A).]

<sup>F425</sup>(5A) 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 either—

- (a) receives the First-tier Tribunal's notification that the appeal is dismissed, withdrawn or struck out, or
- (b) discontinues action on an appeal in the circumstances to which regulation 33(10) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (notice of appeal) applies.]

(6) Where a claimant's appeal is successful, subject to paragraph (7), 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 shall 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.

(7) Paragraph (6) does not apply where, due to a change of circumstances after entitlement to which this regulation applies began, the Secretary of State is satisfied that it is no longer appropriate to rely on such finding or determination.]

#### Textual Amendments

- F421** Reg. 147A inserted (28.6.2010) by [The Social Security \(Miscellaneous Amendments\) \(No. 3\) Regulations 2010 \(S.I. 2010/840\)](#), regs. 1, **9(15)**
- F422** Reg. 147A(1A) inserted by SI 2010/1907 Sch. 2 para. 15 (as amended) (1.11.2010) by [The Employment and Support Allowance \(Transitional Provisions, Housing Benefit and Council Tax Benefit\) \(Existing Awards\) \(No. 2\) \(Amendment\) Regulations 2010 \(S.I. 2010/2430\)](#), regs. 1(2), **17(7)**
- F423** Words in reg. 147A(5)(c) substituted (31.10.2011) by [The Social Security \(Miscellaneous Amendments\) \(No. 3\) Regulations 2011 \(S.I. 2011/2425\)](#), regs. 1(2), **23(10)(a)**
- F424** Words in reg. 147A(5) substituted (31.10.2011) by [The Social Security \(Miscellaneous Amendments\) \(No. 3\) Regulations 2011 \(S.I. 2011/2425\)](#), regs. 1(2), **23(10)(b)**
- F425** Reg. 147A(5A) inserted (31.10.2011) by [The Social Security \(Miscellaneous Amendments\) \(No. 3\) Regulations 2011 \(S.I. 2011/2425\)](#), regs. 1(2), **23(11)**

## CHAPTER 2

### Work or training beneficiaries

#### Work or training beneficiaries

<sup>F426</sup>148. ....

##### Textual Amendments

**F426** Reg. 148 omitted (1.5.2012) by virtue of [The Employment and Support Allowance \(Amendment of Linking Rules\) Regulations 2012 \(S.I. 2012/919\)](#), regs. 1(2), **5(7)(a)**

#### Linking rules – limited capability for work

<sup>F427</sup>149. ....

##### Textual Amendments

**F427** Reg. 149 omitted (1.5.2012) by virtue of [The Employment and Support Allowance \(Amendment of Linking Rules\) Regulations 2012 \(S.I. 2012/919\)](#), regs. 1(2), **5(7)(b)**

#### Linking rules – limited capability for work-related activity

<sup>F428</sup>150. ....

##### Textual Amendments

**F428** Reg. 150 omitted (1.5.2012) by virtue of [The Employment and Support Allowance \(Amendment of Linking Rules\) Regulations 2012 \(S.I. 2012/919\)](#), regs. 1(2), **5(7)(c)**

## CHAPTER 3

### Temporary absence from Great Britain

#### Absence from Great Britain

**151.**—(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 this Chapter.

(2) A claimant who continues to be entitled to a contributory allowance during a period of temporary absence will not be disqualified for receiving that allowance during that period under section 18(4) of the Act.

#### Short absence

**152.** A claimant is to continue to be entitled to an employment and support allowance during the first 4 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.

*Status: Point in time view as at 02/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008. (See end of Document for details)*

**Absence to receive medical treatment**

**153.**—(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 solely—
  - (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 in connection with arrangements made for the treatment of that child for a disease or bodily or mental disablement;
- (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; and

<sup>F429</sup>(e) .....

(2) In paragraph (1)(d)(iii), “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.

**Textual Amendments**  
**F429** Reg. 153(1)(e) omitted (26.10.2009) by virtue of [The Social Security \(Miscellaneous Amendments\) \(No. 4\) Regulations 2009 \(S.I. 2009/2655\)](#), regs. 1(1), **11(15)**

**Absence in order to receive NHS treatment**

**154.** 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;
- (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—
  - (i) under section 6(2) of the Health Service Act (Performance of functions outside England) 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), 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) or paragraph 18 of Schedule 3 to the Health Service (Wales) Act (Joint exercise of functions); or
  - (iii) under any equivalent provision in Scotland or pursuant to arrangements made under such provision; <sup>F430</sup> ...



<sup>F430</sup>(c) .....

**Textual Amendments**

**F430** Reg. 154(c) and word omitted (28.6.2010) by virtue of [The Social Security \(Miscellaneous Amendments\) \(No. 3\) Regulations 2010 \(S.I. 2010/840\)](#), regs. 1, **9(16)**

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

**155.**—(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—

- (a) 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; <sup>F431</sup> ...

<sup>F431</sup>(b) .....

(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.

**Textual Amendments**

**F431** Reg. 155(1)(b) omitted (28.6.2010) by virtue of [The Social Security \(Miscellaneous Amendments\) \(No. 3\) Regulations 2010 \(S.I. 2010/840\)](#), regs. 1, **9(17)**

CHAPTER 4

Membership of household

**Circumstances in which a person is to be treated as being or not being a member of the household**

**156.**—(1) Subject to the following provisions of this regulation—

- (a) the claimant and the claimant's partner; and
- (b) where the claimant or the claimant's partner is responsible for a child or young person, that child or young person and any child of that child or young person,

are to be treated as being members of the same household.

(2) Paragraph (1) applies even where any of them is temporarily living away from the other members of the family.

(3) Paragraph (1) does not apply to a person who is living away from the other members of the family where—

- (a) that person does not intend to resume living with the other members of the family; or
- (b) that person's absence from the other members of the family is likely to exceed 52 weeks, unless there are exceptional circumstances (for example where the person is in hospital or otherwise has no control over the length of absence), and the absence is unlikely to be substantially more than 52 weeks.

(4) Paragraph (1) does not apply in respect of any member of a couple or of a polygamous marriage where—

---

*Status: Point in time view as at 02/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008. (See end of Document for details)*

---

- (a) one, both or all of them are patients detained in a hospital provided under section 4 of the Health Service Act (high security psychiatric services), section 4 of the Health Service (Wales) Act (high security psychiatric services) or section 102 of the National Health Service (Scotland) Act 1978 <sup>F432</sup> (state hospitals);
  - (b) one, both or all of them are—
    - (i) detained in custody pending trial or sentence upon conviction or under a sentence imposed by a court; or
    - (ii) on temporary release in accordance with the provisions of the Prison Act 1952 <sup>F433</sup> or the Prisons (Scotland) Act 1989 <sup>F434</sup>;
  - (c) the claimant is abroad and does not satisfy the conditions of Chapter 4 of this Part (temporary absence from Great Britain); or
  - (d) any one of them is permanently residing in a care home, an Abbeyfield Home or an independent hospital.
- (5) A child or young person is not to be treated as a member of the claimant's household where that child or young person is—
- (a) placed with the claimant or the claimant's partner by a local authority under section 23(2) (a) of the Children Act 1989 <sup>F435</sup> or by a voluntary organisation under section 59(1)(a) of that Act <sup>F436</sup>;
  - (b) placed with the claimant or the claimant's partner prior to adoption;
  - (c) in accordance with a relevant enactment, boarded out with the claimant or the claimant's partner, whether or not with a view to adoption; or
  - (d) placed for adoption with the claimant or the claimant's partner pursuant to a decision under the [<sup>F437</sup>Adoption and Children Act 2002] or [<sup>F438</sup>the Adoption Agencies (Scotland) Regulations 2009].
- (6) Subject to paragraphs (7) and (8), paragraph (1) does not apply to a child or young person who is not living with the claimant and who—
- (a) in a case which does not fall within sub-paragraph (b), has been continuously absent from Great Britain for a period of more than four weeks commencing—
    - (i) where that child or young person went abroad before the date of the claim for an employment and support allowance, on the date of that claim;
    - (ii) in any other case, on the day which immediately follows the day on which that child or young person went abroad;
  - (b) where regulation 153 (absence to receive medical treatment) applies, has been continuously absent from Great Britain for a period of more than 26 weeks, that period commencing—
    - (i) where that child or young person went abroad before the date of the claim for an employment and support allowance, on the date of that claim;
    - (ii) in any other case, on the day which immediately follows the day on which that child or young person went abroad;
  - (c) has been an in-patient or in accommodation for a continuous period of more than 12 weeks commencing—
    - (i) where that child or young person became an in-patient or, as the case may be, entered that accommodation, before the date of the claim for an employment and support allowance, with that date; or

- (ii) in any other case, with the date on which that child or young person became an in-patient or entered that accommodation,
- and, in either case, has not been in regular contact with either the claimant or any member of the claimant's household;
- (d) is being looked after by, or in the care of, a local authority under a relevant enactment;
- (e) has been placed with a person other than the claimant prior to adoption;
- (f) has been boarded out under a relevant enactment with a person other than the claimant prior to adoption;
- (g) has been placed for adoption pursuant to a decision under the [<sup>F439</sup>Adoption and Children Act 2002] or [<sup>F440</sup>the Adoption Agencies (Scotland) Regulations 2009]; or
- (h) is detained in custody pending trial or sentence upon conviction or under a sentence imposed by a court.
- (7) Sub-paragraphs (a)(i), (b)(i) and (c)(i) of paragraph (6) do not apply in a case where immediately before the date of claim for an employment and support allowance the claimant was entitled to an income-based jobseeker's allowance or income support.
- (8) A child or young person to whom any of the circumstances mentioned in sub-paragraphs (d) or (h) of paragraph (6) applies is to be treated as being a member of the claimant's household only for that part of any benefit week where that child or young person lives with the claimant.
- (9) In this regulation—
- “accommodation” means accommodation provided by a local authority in a home owned or managed by that local authority—
- (a) under sections 21 to 24 of the National Assistance Act 1948 <sup>F441</sup> (provision of accommodation);
- (b) in Scotland, under section 13B or 59 of the Social Work (Scotland) Act 1968 <sup>F442</sup> (provision of residential or other establishment); or
- (c) under section 25 of the Mental Health (Care and Treatment) (Scotland) Act 2003 <sup>F443</sup> (care and support services etc.),
- where the accommodation is provided for a person whose stay in that accommodation has become other than temporary; and
- “voluntary organisation” has the meaning assigned to it in the Children Act 1989, or in Scotland, by section 94 of the Social Work (Scotland) Act 1968.
- (10) For the purposes of these Regulations a person is responsible for a child or young person if that child or young person usually lives with that person.

#### Textual Amendments

**F432** 1978 c. 29.

**F433** 1952 c. 52.

**F434** 1989 c. 45.

**F435** 1989 c. 41. Section 23(2)(a) was amended by section 49(3) of the [Children Act 2004 \(c. 31\)](#).

**F436** Section 59(1)(a) was amended by section 49(4) of the [Children Act 2004 \(c. 31\)](#).

**F437** Words in reg. 156(5)(d) substituted (27.10.2008) by [The Employment and Support Allowance \(Miscellaneous Amendments\) Regulations 2008 \(S.I. 2008/2428\)](#), regs. 1(2), **9(3)**

**F438** Words in reg. 156(5)(d) substituted (15.7.2011) by [The Adoption and Children \(Scotland\) Act 2007 \(Consequential Modifications\) Order 2011 \(S.I. 2011/1740\)](#), art. 1(2), **Sch. 1 para. 47(3)**

*Status: Point in time view as at 02/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008. (See end of Document for details)*

- F439** Words in reg. 156(6)(g) substituted (27.10.2008) by [The Employment and Support Allowance \(Miscellaneous Amendments\) Regulations 2008 \(S.I. 2008/2428\)](#), regs. 1(2), **9(3)**
- F440** Words in reg. 156(6)(g) substituted (15.7.2011) by [The Adoption and Children \(Scotland\) Act 2007 \(Consequential Modifications\) Order 2011 \(S.I. 2011/1740\)](#), art. 1(2), **Sch. 1 para. 47(3)**
- F441** 1948 c. 29.
- F442** 1968 c. 49.
- F443** 2003 asp 13.

## PART 12

### DISQUALIFICATION

#### Disqualification for misconduct etc.

**157.**—(1) Subject to paragraph (3), paragraph (2) applies where a claimant—

- (a) has limited capability for work through the claimant's own misconduct, except in a case where the limited capability is due to pregnancy or a sexually transmitted disease; or
- (b) fails without good cause to attend for or submit to medical or other treatment (excluding vaccination, inoculation or major surgery) 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; or
- (d) is, without good cause, absent from the claimant's place of residence without leaving word with 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 6 weeks as the Secretary of State may determine.

(3) Paragraph (1) does not apply where the claimant—

- (a) is disqualified for receiving an employment and support allowance by virtue of regulations made under section [<sup>F444</sup>6B or] 7 of the Social Security Fraud Act 2001<sup>F445</sup>; or
- (b) is a person in hardship.

#### Textual Amendments

- F444** Words in reg. 157(3)(a) inserted (1.4.2010) by [The Social Security \(Loss of Benefit\) Amendment Regulations 2010 \(S.I. 2010/1160\)](#), regs. 1, **12(2)**
- F445** 2001 c. 11.

#### Meaning of “person in hardship”

**158.**—(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 a single claimant 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) is responsible for a child or young person who is a member of the claimant's household;
  - (b) has been awarded an attendance allowance or the care component;
  - (c) has claimed either attendance allowance or disability living allowance and the claim has not been determined;
  - (d) devotes a considerable portion of each week to caring for another person who—
    - (i) has been awarded an attendance allowance or the care component; or
    - (ii) has claimed either attendance allowance or disability living allowance and the claim has not been determined; or
  - (e) <sup>F446</sup>has attained the qualifying age for state pension credit].
- (4) A claimant to whom paragraph (3)(c) or (3)(d)(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 “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.

#### Textual Amendments

**F446** Words in reg. 158(3)(e) substituted (6.4.2010) by [The Social Security \(Equalisation of State Pension Age\) Regulations 2009 \(S.I. 2009/1488\)](#), regs. 1, **43(2)**

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

**159.**—(1) Subject to paragraph (2), the claimant is to be treated as not having limited capability for work if the claimant is disqualified for receiving a contributory allowance during a period of imprisonment or detention in legal custody if that disqualification is for more than 6 weeks.

(2) Where the claimant is entitled to an amount under paragraph 3 of Schedule 5 (special cases: prisoners) during a period of imprisonment or detention in legal custody, the claimant is to be treated as not having limited capability for work from the day after the day on which entitlement ended.

**Exceptions from disqualification for imprisonment**

**160.**—(1) Notwithstanding section 18(4)(b) of the Act, a claimant is not disqualified for receiving a contributory 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; or
- (c) pursuant to any order for detention,

made by a court in such 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 [<sup>F447</sup>“C”] is not to be disqualified for receiving a contributory allowance, for any period during which [<sup>F448</sup>C] is undergoing detention in legal custody after the conclusion of criminal proceedings if it is a period during which [<sup>F449</sup>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] —

- (a) the claimant is detained or liable to be detained under section 45A of the Mental Health Act 1983 <sup>F450</sup> (hospital and limitation directions) or section 59A of the Criminal Procedure (Scotland) Act 1995 <sup>F451</sup> (hospital direction); or
- (b) the claimant is detained or liable to be detained under section 47 of the Mental Health Act 1983 <sup>F452</sup> (removal to hospital of persons serving sentences of imprisonment, etc.) <sup>F453</sup> ...; or
- (c) section 136 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (transfer of prisoners for treatment for mental disorder).

[<sup>F454</sup>(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
- (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.]

[<sup>F454</sup>(4A) 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).]

(5) 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>F455</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>F456</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>F457</sup>, a detention and training order under section 100 of that Act, a sentence of detention for public protection under section 226 of the Criminal Justice Act 2003<sup>F458</sup> or an extended sentence under section 228 of that Act or, in Scotland, under section 205, 207 or 208 of the Criminal Procedure (Scotland) Act 1995;
- (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.

(6) 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 a contributory allowance, the claimant is not disqualified for receiving that allowance by reason only of the imprisonment or detention.

#### Textual Amendments

- F447** Word in reg. 160(3) inserted (25.3.2010) by [The Social Security \(Persons Serving a Sentence of Imprisonment Detained in Hospital\) Regulations 2010 \(S.I. 2010/442\)](#), regs. 1, **5(3)(a)(i)**
- F448** Word in reg. 160(3) substituted (25.3.2010) by [The Social Security \(Persons Serving a Sentence of Imprisonment Detained in Hospital\) Regulations 2010 \(S.I. 2010/442\)](#), regs. 1, **5(3)(a)(ii)**
- F449** Words in reg. 160(3) substituted (25.3.2010) by [The Social Security \(Persons Serving a Sentence of Imprisonment Detained in Hospital\) Regulations 2010 \(S.I. 2010/442\)](#), regs. 1, **5(3)(a)(iii)**
- F450** 1983 c. 20. Section 45A was inserted by the [Crime \(Sentences\) Act 1997 \(c. 43\)](#), **section 46** and amended by the [Criminal Justice Act 2003 \(c. 44\)](#), **Schedule 32**, paragraphs 37 and 39 and Schedule 37, Part 7.
- F451** 1995 c. 46. Section 59A was inserted by the [Mental Health \(Care and Treatment\) \(Scotland\) Act 2003 \(asp. 13\)](#), **Schedule 4**, paragraph 8(6).
- F452** Section 47 was amended by the [Crime \(Sentences\) Act 1997](#), section 49(3).
- F453** Words in reg. 160(3)(b) omitted (27.10.2008) by virtue of [The Employment and Support Allowance \(Miscellaneous Amendments\) Regulations 2008 \(S.I. 2008/2428\)](#), regs. 1(2), **10**
- F454** Reg. 160(4)(4A) substituted for reg. 160(4) (25.3.2010) by [The Social Security \(Persons Serving a Sentence of Imprisonment Detained in Hospital\) Regulations 2010 \(S.I. 2010/442\)](#), regs. 1, **5(3)(b)**
- F455** 1884 c. 31.
- F456** 1968 c. 20.
- F457** 2000 c. 6. Section 90 was amended by the [Criminal Justice and Court Services Act 2000 \(c. 43\)](#), **section 60(2)** and (3).
- F458** 2003 c. 44.

#### Suspension of payment of a contributory allowance during imprisonment

**161.**—(1) Subject to the following provisions of this regulation, the payment of a contributory 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 160<sup>F459</sup>(1), (3) or (6); or
- (b) which is payable otherwise than in respect of a period during which the claimant is undergoing imprisonment or detention in legal custody,

*Status: Point in time view as at 02/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008. (See end of Document for details)*

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

(2) A contributory allowance is not to be suspended while the claimant is liable to be detained in a hospital or similar institution, as defined in regulation 160(5), 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 160(3).

(3) Where, by virtue of this regulation, payment of a contributory 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 38 of the Social Security (Claims and Payments) Regulations 1987<sup>F460</sup> (extinguishment of right to sums payable by way of benefit which are not obtained within the prescribed time).

#### Textual Amendments

**F459** Word in reg. 161(1)(a) substituted (31.10.2011) by [The Social Security \(Miscellaneous Amendments\) \(No. 3\) Regulations 2011 \(S.I. 2011/2425\)](#), regs. 1(2), **23(13)**

**F460** S.I. 1987/1968.

## PART 13

### URGENT CASES

#### Urgent cases

**162.**—<sup>F461</sup>(1) In a case to which this regulation applies a claimant's weekly applicable amount and that claimant's income and capital are to be calculated in accordance with the following provisions of this Part.

(2) Subject to paragraph (3), this regulation applies to a claimant who is treated as possessing income under regulation 107(1) (notional income).

(3) This regulation is only to apply to a claimant to whom paragraph (2) applies, where the income that claimant is treated as possessing by virtue of regulation 107(1) is not readily available to that claimant; and—

- (a) the amount of an income-related allowance which would be payable but for this Part is less than the amount of an income-related allowance payable by virtue of the provisions of this Part; and
- (b) the Secretary of State is satisfied that, unless the provisions of this Part are applied to the claimant, the claimant or the claimant's family will suffer hardship.]

#### Textual Amendments

**F461** Pt. 13 revoked in part (for specified purposes and with effect in accordance with reg. 1(3) of the amending S.I.) by [The Social Security \(Miscellaneous Amendments\) \(No. 5\) Regulations 2009 \(S.I. 2009/3228\)](#), **reg. 2(1)(d)** (with reg. 2(2)-(4))

#### Applicable amounts in urgent cases

**163.** <sup>F461</sup>For the purposes of calculating any entitlement to an income-related allowance under this Part—



- (a) except in a case to which sub-paragraph (b) or (c) applies, a claimant's weekly applicable amount is to be the aggregate of—
- (i) 90% of the amount applicable in respect of himself or herself or, if the claimant is a member of a couple or of a polygamous marriage, of the amount applicable in respect of both of them under paragraph 1(1), (2) or (3) of Schedule 4 or, as the case may be, the amount applicable in respect of them under regulation 68 (polygamous marriages);
  - (ii) the amount, if applicable, specified in Part 2 of Schedule 4 (premiums);
  - (iii) the amount, if applicable, specified in Part 4 of Schedule 4 (components); and
  - (iv) any amounts applicable under regulation 67(1)(c) or, as the case may be, 68(1)(d) (housing costs);
- (b) in the case of a claimant to whom any paragraph of Schedule 5 (special cases) applies, the applicable amount is to be the aggregate of—
- (i) 90% of the amount applicable in column 2 of that Schedule in respect of the claimant and partner (if any);
  - (ii) the amount, if applicable, specified in Part 2 of Schedule 4;
  - (iii) the amount, if applicable, specified in Part 4 of Schedule 4; and
  - (iv) any amounts applicable under regulation 67(1)(c) or, as the case may be, 68(1)(d); or
- (c) in the case of a claimant to whom regulation 162(2) applies, where that claimant is appealing to an appeal tribunal constituted under Chapter 1 of Part 1 of the Social Security Act 1998, against a decision which embodies a determination that the claimant does not have limited capability for work, the applicable amount is to be the aggregate of—
- (i) 90% of the amount applicable in respect of himself or herself or, if the claimant is a member of a couple or of a polygamous marriage, of the amount applicable in respect of both of them under paragraph 1(1), (2) or (3) of Schedule 4 or, as the case may be, the amount applicable in respect of them under regulation 68 (polygamous marriages);
  - (ii) the amount, if applicable, specified in Part 2 of Schedule 4 (premiums); and
  - (iii) any amounts applicable under regulation 67(1)(c) or, as the case may be, 68(1)(d).]

#### Textual Amendments

**F461** Pt. 13 revoked in part (for specified purposes and with effect in accordance with reg. 1(3) of the amending S.I.) by [The Social Security \(Miscellaneous Amendments\) \(No. 5\) Regulations 2009 \(S.I. 2009/3228\)](#), **reg. 2(1)(d)** (with [reg. 2\(2\)-\(4\)](#))

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

- C5** Reg. 163(a)(i) modified (with effect in accordance with art. 1(2)(l) (3)(a) 6 of the amending S.I.) by [The Social Security Benefits Up-rating Order 2009 \(S.I. 2009/497\)](#), arts. 1(2)(l), 27(6), **Sch. 20**
- C6** Reg. 163(b)(i) modified (with effect in accordance with art. 1(2)(l) (3)(a) 6 of the amending S.I.) by [The Social Security Benefits Up-rating Order 2009 \(S.I. 2009/497\)](#), arts. 1(2)(l), 27(6), **Sch. 20**
- C7** Reg. 163(c)(i) modified (with effect in accordance with art. 1(2)(l) (3)(a) 6 of the amending S.I.) by [The Social Security Benefits Up-rating Order 2009 \(S.I. 2009/497\)](#), arts. 1(2)(l), 27(6), **Sch. 20**

#### Assessment of income and capital in urgent cases

**164.**—<sup>F461</sup>(1) The claimant's income is to be calculated in accordance with Part 10 subject to the following modifications—

*Status: Point in time view as at 02/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008. (See end of Document for details)*

- (a) any income other than—
- (i) a payment of income or income in kind made under the Macfarlane Trust, the Macfarlane (Special Payments) Trust, the Macfarlane (Special Payments) (No. 2) Trust, the Fund, the Eileen Trust or [<sup>F462</sup>the Independent Living Fund (2006)] ; or
  - (ii) income to which paragraph 9 (but only to the extent that a concessionary payment would be due under that paragraph for any non-payment of an income-related allowance under regulation 162 (urgent cases) or of jobseeker's allowance under regulation 147 of the Jobseeker's Allowance Regulations (urgent cases)), 35, 41(2), (3) or (4), 42, 64 or 65 of Schedule 8 (disregard of income other than earnings) applies,
- possessed or treated as possessed by the claimant, is to be taken into account in full notwithstanding any provision in that Part disregarding the whole or any part of that income;
- (b) any income to which regulation 118 (calculation of tariff income from capital) applies is to be disregarded;
  - (c) income treated as capital by virtue of regulation 112(1), (2), (3) and (7) (income treated as capital) is to be taken into account as income;
  - (d) in a case to which regulation 162(2) (urgent cases) applies, any income to which regulation 107(1) applies is to be disregarded.
- (2) The claimant's capital calculated in accordance with Part 10, but including any capital referred to in—
- (a) paragraph 3;
  - (b) to the extent that such assets as are referred to in paragraph 10 consist of liquid assets, paragraph 10;
  - (c) except to the extent that the arrears referred to in paragraph 11 consist of arrears of housing benefit payable under <sup>F463</sup>... Part 7 of the Contributions and Benefits Act or any arrears of benefit due under regulation 162, or regulation 147 of the Jobseeker's Allowance Regulations (urgent cases), paragraph 11; and
  - (d) paragraphs 13(b), 24 and 32,
- of Schedule 9 (capital to be disregarded), are to be taken into account in full and the amount of an income-related allowance which would, but for this paragraph be payable under this regulation, is to be payable only to the extent that it exceeds the amount of that capital.]

#### Textual Amendments

**F461** Pt. 13 revoked in part (for specified purposes and with effect in accordance with reg. 1(3) of the amending S.I.) by [The Social Security \(Miscellaneous Amendments\) \(No. 5\) Regulations 2009 \(S.I. 2009/3228\)](#), [reg. 2\(1\)\(d\)](#) (with [reg. 2\(2\)-\(4\)](#))

**F462** Words in reg. 164(1)(a)(i) substituted (27.10.2008) by [The Employment and Support Allowance \(Miscellaneous Amendments\) Regulations 2008 \(S.I. 2008/2428\)](#), regs. 1(2), **11(a)**

**F463** Words in reg. 164(2)(c) omitted (27.10.2008) by virtue of [The Employment and Support Allowance \(Miscellaneous Amendments\) Regulations 2008 \(S.I. 2008/2428\)](#), regs. 1(2), **11(b)**

## PART 14

### PERIODS OF LESS THAN A WEEK

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

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

(2) The amount payable by way of an income-related allowance in respect of that part-week is to be calculated by applying the formula—

(a) where the claimant has no income—

$$\frac{(NxA)}{7}$$

or

(b) where the claimant has an income—

$$\frac{Nx(A - I)}{7} - B$$

where—

A is the claimant's weekly applicable amount in the relevant week;

B is the amount of any employment and support allowance, jobseeker's allowance, income support, maternity allowance, incapacity benefit or severe disablement allowance payable to the claimant or the claimant's partner in respect of any day in the part-week;

I is the claimant's weekly income in the relevant week; and

N is the number of days in the part week.

(3) The amount payable by way of a contributory allowance in respect of a part-week is to be calculated by applying the formula—

$$\frac{(NxX) - Y}{7}$$

where—

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

Y is the amount of any widow's benefit, widowed parent's allowance, bereavement allowance, training 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) payable in respect of any day in the part-week;

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

(4) In this Part—

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

“relevant week” means the period of 7 days determined in accordance with regulation 166.

#### Relevant week

**166.**—(1) Where a part-week—

---

*Status: Point in time view as at 02/04/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008. (See end of Document for details)*

---

- (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 7 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 7 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 7 days beginning on the day after the last complete benefit week.

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

**167.** For the purposes of regulation 165 (entitlement for less than a week – amount of an employment and support allowance payable), a claimant's income and, in determining the amount payable by way of an income-related allowance, the income of any person which the claimant is treated as possessing under regulations made under section 17(3) of the Act, regulation 68 (polygamous marriages) or regulation 83 (calculation of income and capital of members of claimant's family and of a polygamous marriage), is to be calculated in accordance with Parts 10 (income and capital) and 13 (urgent cases) 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) in determining the amount payable by way of an income-related allowance, any jobseeker's allowance, employment and support allowance, income support, maternity allowance, incapacity benefit or severe disablement allowance payable in the relevant week but not in respect of any day in the part-week is to be disregarded;
- (c) the amount referred to as B in regulation 165(2) is to be disregarded;
- (d) in determining the amount payable by way of a contributory allowance, 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;
- (e) 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;
- (f) 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**

**168.** The reduction to be made in accordance with regulations 157 and 158 is an amount equal to one seventh of the reduction which would be made under those regulations for a week, multiplied by the number of days in a part-week.

### **Payment of a contributory allowance for days of certain regular treatment**

**169.**—(1) Where a claimant is entitled to a contributory allowance as a result of being treated as having limited capability for work in accordance with regulation 26 the amount payable is to be equal to one seventh of the amount of the contributory 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 26 or recovering from that treatment, but does not include any day during which the claimant does work.

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

Department for Work and Pensions

*Stephen. C. Timms*  
Minister of State,

**Status:**

Point in time view as at 02/04/2013.

**Changes to legislation:**

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