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STATUTORY INSTRUMENTS

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**2008 No. 794**

**The Employment and Support Allowance Regulations 2008**

**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>F1</sup>(i) . . . . .

<sup>F2</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 [<sup>F3</sup>28, 29 or 29A] of Schedule 8 (sums to be disregarded in the calculation of income other than earnings) [<sup>F4</sup>or] where the claimant is in receipt of any payment specified in those paragraphs;

<sup>F5</sup>(da) duties undertaken in caring for another person who is provided with continuing care by a local authority by virtue of arrangements made under section 26A of the Children (Scotland) Act 1995 and is in receipt of a payment made under that section of that Act;]

- (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.

*Status: Point in time view as at 07/11/2017.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008, Section 40. (See end of Document for details)*

(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 [F6 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>F7</sup> or sub-sections 49(1) or 49(1A) of the Local Government (Scotland) Act 1973 <sup>F8</sup>, of which the claimant is a member by reason of being a councillor.

#### Textual Amendments

- F1** 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**
- F2** 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**
- F3** Words in reg. 40(2)(d) substituted (7.11.2017) by [The Social Security and Child Support \(Care Payments and Tenant Incentive Scheme\) \(Amendment\) Regulations 2017 \(S.I. 2017/995\)](#), regs. 1, **7(2)**
- F4** Word in reg. 40(2)(d) inserted (29.10.2013) by [The Social Security \(Miscellaneous Amendments\) \(No. 3\) Regulations 2013 \(S.I. 2013/2536\)](#), regs. 1(1), **13(21)**
- F5** Reg. 40(2)(da) inserted (7.11.2017) by [The Social Security and Child Support \(Care Payments and Tenant Incentive Scheme\) \(Amendment\) Regulations 2017 \(S.I. 2017/995\)](#), regs. 1, **13(2)**
- F6** 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)**
- F7** 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.
- F8** 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](#).

**Status:**

Point in time view as at 07/11/2017.

**Changes to legislation:**

There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008, Section 40.