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DRAFT STATUTORY INSTRUMENTS

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**2013 No.**

**The Employment and Support Allowance Regulations 2013**

**PART 6**

Effect of work on entitlement to an Employment and Support Allowance

**A claimant who works to be treated as not entitled to an employment and support allowance**

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

(2) Paragraph (1) does not apply to—

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

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

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

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

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

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

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

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

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

- (a) any payment made to the claimant with whom a person is accommodated by virtue of arrangements made—
- (i) by a local authority under section 22C(2), (3), (5) or (6)(a) or (b) of the Children Act 1989 (provision of accommodation and maintenance for a child whom the local authority is looking after)**(2)**;
  - (ii) by a local authority under section 26 of the Children (Scotland) Act 1995 (manner of provision of accommodation to child looked after by local authority)**(3)**;
  - (iii) by a local authority under regulations 33 or 51 of the Looked After Children (Scotland) Regulations 2009 (fostering and kinship care allowances and fostering allowances)**(4)**; or
  - (iv) by a voluntary organisation under section 59(1)(a) of the 1989 Act (provision of accommodation by voluntary organisations)**(5)**;
- (b) any payment made to the claimant or the claimant’s partner for a person (“the person concerned”), who is not normally a member of the claimant’s household but is temporarily in the claimant’s care, by—
- (i) the National Health Service Commissioning Board**(6)**;
  - (ii) a local authority but excluding payments of housing benefit made in respect of the person concerned;
  - (iii) a voluntary organisation;
  - (iv) the person concerned pursuant to section 26(3A) of the National Assistance Act 1948**(7)**;
  - (v) a clinical commissioning group established under section 14D of the Health Service Act**(8)**; or
  - (vi) a Local Health Board established by an order made under section 11 of the Health Service (Wales) Act.
- (8) In this regulation—
- “week” means a week in respect of which a claimant is entitled to an employment and support allowance;
- “work” means any work which a claimant does, whether or not that claimant undertakes it in expectation of payment;
- “work as a councillor” includes any work which a claimant undertakes as a member of any of the bodies referred to in section 177(1) of the Local Government Act 1972 or section 49(1) or (1A) of the Local Government (Scotland) Act 1973**(9)**, of which the claimant is a member by reason of being a councillor.

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(2) 1989 c.41. Section 22C was inserted by section 8(1) of the Children and Young Persons Act 2008 (c.23).

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

(4) S.I. 2009/210. Regulation 33 was amended by S.S.I. 2009/290.

(5) Section 59(1)(a) was amended by section 49 of the Children Act 2004 (c.31).

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

(7) 1948 c.29. Section 26(3A) was inserted by section 42 of the National Health Service and Community Care Act 1990 (c.19).

(8) Section 14D was inserted by section 25 of the Health and Social Care Act 2012.

(9) 1973 c.65. Section 49(1) was amended by Schedule 7 to the Local Government (Scotland) Act 1975 (c.30) and S.S.I. 2007/265. Section 49(1A) was inserted by paragraph 46 of Schedule 6 to the Local Government (Scotland) Act 1975.

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

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

(2) Paragraph (1) applies even if—

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

**Exempt work**

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

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

(2) The number of hours for which a claimant is engaged in work is to be determined—

- (a) where no recognisable cycle has been established in respect of a claimant's work, by reference to the number of hours or, where those hours are likely to fluctuate, the average of the hours, which the claimant is expected to work in a week;
- (b) where the number of hours for which the claimant is engaged fluctuate, by reference to the average of hours worked over—
- (i) if there is a recognisable cycle of work, the period of one complete cycle (including, where the cycle involves periods in which the claimant does no work, those periods but disregarding any other absences);
  - (ii) in any other case, the period of five weeks immediately before the date of claim or the date on which a superseding decision is made under section 10 of the Social Security Act 1998 (decisions superseding earlier decisions)<sup>(10)</sup>, or such other length of time as may, in the particular case, enable the claimant's average hours of work to be determined more accurately.
- (3) For the purposes of determining the number of hours for which a claimant is engaged in work, that number is to include any time allowed to that claimant by the claimant's employer for a meal or for refreshment, but only where that claimant is, or expects to be, paid earnings in respect of that time.
- (4) Where the amount determined by the calculation in paragraph (1)(b) or (c) would, but for this paragraph, include an amount of—
- (a) less than 50p, that amount is to be rounded up to the nearest 50p; or
  - (b) less than £1 but more than 50p, that amount is to be rounded up to the nearest £1.
- (5) Part 10 applies for the purposes of calculating any income which consists of earnings under this regulation.
- (6) In this regulation—
- “relevant benefit” means—
- (a) an employment and support allowance; or
  - (b) credits under regulations made under section 22(5) of the Contributions and Benefits Act<sup>(11)</sup>,
- in respect of which the question of the claimant's limited capability for work arises under the Act;
- “volunteer” means a person who is engaged in voluntary work otherwise than for a relative, where the only payment received or due to be paid to the person by virtue of being so engaged is in respect of any expenses reasonably incurred by the person in connection with that work;
- “work period” means a period which begins on the first day on which any work referred to in paragraph (1)(c) is undertaken and continues for a period of 52 weeks, whether or not any further work referred to in paragraph (1)(c) is undertaken during that period;
- “work placement” means practical work experience with an employer, which is neither paid nor undertaken in expectation of payment.
- (7) This paragraph applies where—
- (a) the claimant has not previously done any work under paragraph (1)(c);
  - (b) since the beginning of the last work period, the claimant has ceased to be entitled to a relevant benefit for a continuous period exceeding 12 weeks; or
  - (c) not less than 52 weeks have elapsed since the last work period.

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<sup>(10)</sup> 1998 c.14. Section 10 was amended by paragraph 23 of Schedule 7 to the Social Security Contributions (Transfer of Functions, etc) Act 1999 (c.2) and paragraph 4 of Schedule 12, and Schedule 14, to the Welfare Reform Act 2012 and S.I. 2008/2833.

<sup>(11)</sup> Section 22(5) was amended by paragraph 22 of Schedule 2 to the Jobseekers Act 1995 (c.18), paragraph 9 of Schedule 3 to the Welfare Reform Act 2007 (c.5) and paragraph 2 of Schedule 3, and Schedule 14, to the Welfare Reform Act 2012.

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

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