

**EXPLANATORY MEMORANDUM TO  
THE EMPLOYMENT AND SUPPORT ALLOWANCE (MISCELLANEOUS  
AMENDMENTS) REGULATIONS 2008**

**No. 2008/2428**

**1.** This explanatory memorandum has been prepared by the Department for Work and Pensions and is laid before Parliament by Command of Her Majesty.

**2. Description**

2.1 As part of the Government's strategy for welfare reform, the Welfare Reform Act 2007 provides for the introduction of Employment and Support Allowance (ESA). It is planned that ESA will replace Incapacity Benefit (IB) and Income Support (IS) claimed on the grounds of incapacity for work from 27 October 2008.

2.2 This set of regulations contains corrections to the Employment and Support Regulations 2008 (the ESA Regulations) the Employment and Support Allowance (Consequential Provisions) Regulations 2008 (the ESA(CP) Regulations), and the Employment and Support Allowance (Consequential Provisions) (No.2) Regulations 2008.

**3. Matters of special interest to the Joint Committee on Statutory Instruments**

3.1 None

**4. Legislative Background**

4.1 The Welfare Reform Act 2007 has introduced ESA as a new means of support for those currently unable to work due to a health condition or disability. Underpinning this new benefit are the ESA Regulations 2008 (The Principal Regulations) which were laid on 27 March and define the conditions of entitlement for that benefit.

4.2 This instrument

- makes a number of minor amendments to the principal regs; these include the routine increase to the higher permitted work earnings limit, tax rate changes, clarification of the treatment of training allowances, alignment of the disregard of concessionary payments in the income-related benefits and changes resulting from the extension of the Financial Assistance Scheme and child maintenance redesign. We are also making changes to waive the requirement to serve waiting days in certain circumstances.
  
- clarifies the ESA (CP) Regulations to ensure the original policy intention that:

- the date a component should be awarded is the start of the week following the date entitlement to a component in ESA begins or the same week if it is awarded from a Monday;
  - in the case of a couple both of whom are entitled to a component, the component appropriate to the customer should be awarded in Housing Benefit (HB) and Council Tax Benefit (CTB); and
  - an easement allowing automatic entitlement to the Enhanced Disability Premium applies in HB/CTB but only where the HB/CTB customer is entitled to a support component.
- adds a provision to ensure HB customers also claiming ESA would be able to satisfy certain conditions enabling an award of HB prior to the customer occupying the dwelling - as is the case for Incapacity Benefit customers.
  - makes general amendments to clarify references and definitions and improve the wording of the ESA(CP) Regulations.
  - clarifies the ESA regulations and the ESA(CP)(No.2) regulations in so far that they amend Schedule 6 of the ESA Regulations and Schedule 3 of the IS Regulations. Those Schedules provide for assistance with housing costs for homeowners. Again, the amendments are designed to ensure that the original policy intention is achieved.
  - amends further miscellaneous changes to the ESA Regulations to correct a number of drafting errors and omissions identified since publication. We have also addressed further minor consequential amendments.

## **5. Territorial Extent and Application**

5.1 This instrument extends to Great Britain.

## **6. European Convention on Human Rights**

The Minister for Employment and Welfare Reform, Stephen Timms, has made the following statement regarding Human Rights:

In my view the provisions of the Employment and Support Allowance (Amendment) Regulations 2008 are compatible with the Convention rights.

## **7. Policy background**

### ***Policy***

### **Tax Rate**

7.1 Regulations 3(a), 8(3), 8(4) and 8(6) amend the Principal Regulations by removing references to “starting rate” and where appropriate replaces them with “basic

rate”. As from April 2008, the starting rate of tax was abolished and taxation commences at the basic rate.

### **Training Allowances**

7.2 Regulation 5(2)(c) amends the Principal Regulations by bringing forward the rule that where an IB claimant participates in training, the unpaid training does not affect benefit entitlement, whereas paid training in the form of a training allowance means that benefit entitlement is lost. This ensures that the claimant receives appropriate support from one source of public funds only.

### **Higher Permitted Work Earnings Limit**

7.3 Regulations 6(2), 7(3) and 19 amend the Principal Regulations by making a provision that, from 27 October 2008, the upper earnings limits that apply to exempt work and the excess amount for councillor’s allowance will increase in line with the increase in the National Minimum Wage. The increase to the exempt work higher limit will be from £88.50 to £92.00 a week.

### **Financial Assistance Scheme**

7.4 Payments made under the Financial Assistance Scheme (FAS) are to be made available on the ground of ill health to people when they are at an age of up to 5 years under state pensionable age. Consequently, the ESA policy has been changed so that these payments are treated in the same way as occupational pensions. This will mean that any contributory ESA (ESA (C)) is reduced by 50% of any FAS payment in excess of £85.00. Regulation 7 amends the Principal Regulations to take this into account.

### **Waiting Days**

7.5 Claimants are required to serve 3 waiting days before entitlement can begin. Regulation 9 amends the Principal Regulations and waives the requirement for a claimant to serve waiting days where a couple, one of whom is in receipt of income-related ESA (ESA (IR)), decides that the other person should be the ESA claimant. The policy is that the new claimant should not be required to serve waiting days.

### **Independent Living Fund**

7.6 Regulations have been amended (see Annex A - 1) to clarify that with effect from 1 October 2007, the Independent Living (1993) Fund and the Independent Living (Extension) Fund were replaced by the Independent Living Fund (2006). The old funds closed down completely at the end of the 2007/2008 financial year although they had stopped making payments to individual customers on 30 September 2007.

### **Concessionary Payments**

7.7 Regulation 18(a) amends the Principal Regulations by aligning the way we treat concessionary payments of ESA and Jobseeker’s Allowance (JSA) with the working age Housing Benefit and Council Tax Benefit provisions. This means that concessionary

payments made in lieu of income-based jobseeker's allowance (JSA(IB)) or ESA(IR) will be disregarded, but concessionary payments made in lieu of contributory ESA or JSA will be taken into account as income in the normal way. We propose to make parallel changes to the IS and JSA provisions, so that all of the working age income-related benefits treat these concessionary payments in the same way.

### **Child Maintenance Amendments**

7.8 Regulation 20 amends the Principal Regulations by making a provision so that all payments of child maintenance income are treated equally and taken into account in the same manner regardless of source. The change also increases the disregard on child maintenance income to £20 per household and extends the disregard to all forms of child maintenance. This change will align the way ESA treats child maintenance income with IS and JSA(IB) regulations.

### **Amendments to the ESA(CP) Regulations**

7.9 ESA will consist of two elements, income-related (ESA(IR)) or contributory (ESA(C)). Both elements will have two stages. The first stage, the assessment phase, will last for 13 weeks during which a basic amount will be awarded. If the customer satisfies the Work Capability Assessment, the customer will enter the main phase, and either a work-related activity component or a support component will be awarded.

7.10 In ESA(IR) in the case of a couple both of whom are entitled to a component, the component appropriate to the ESA(IR) customer is to be awarded. Also in ESA(IR) there is an easement whereby the customer is automatically entitled to additional money by way of an Enhanced Disability Premium, if he is entitled to the support component. However, this easement does not apply to the partner.

7.11 The policy intention for HB and CTB is that they should contain the provisions described above. Amendments to achieve this were included in the ESA(CP) Regulations. However, legal advice is that those regulations did not achieve the policy intention.

7.12 The corrections in regulations 26, 31(b) & (c) and 39(b) & (c) would provide that:

- the component awarded in ESA will also be awarded in HB/CTB from the following week or the same week if it is awarded from a Monday. Currently the regulations could be interpreted to provide that in HB/CTB the component may be awarded as soon as the decision is made that one is appropriate in ESA. That decision could be made several weeks before the component is put into payment;
- in the case of a customer who has a partner and both are entitled to an ESA component, the component awarded to the customer will be awarded in HB/CTB. Currently, the regulations may allow the local authority to decide to award the one appropriate to the partner;
- in the case of a customer who has a partner, the easement allowing automatic entitlement to the Enhanced Disability Premium, where a person is entitled to

the support component, applies only to the customer and not to the partner. Currently, the regulations may allow the local authority to decide that the easement applies to the partner.

7.13 Like ESA(IR) the Disability Premium cannot be awarded in HB/CTB for ESA customers. However, the premium can mean enhancements to the HB/CTB calculation, for example, a higher amount of earnings is disregarded. Therefore, the ESA(CP) Regulations provided a substitute for the Disability Premium for ESA customers also claiming HB/CTB, where the Disability Premium provides an enhancement. The substitute was receipt of either the work-related activity component or the support component.

7.14 Generally, HB cannot be awarded before the customer moves into the dwelling. However, it may be awarded prior to moving in where a set of certain conditions are satisfied. A part of that set is receipt of a Disability Premium. The ESA(CP) Regulations did not amend the HB Regulations so that receipt of either of the components would act as a substitute for the Disability Premium in that particular provision. Regulation 28 would do so thereby ensuring that ESA customers are not disadvantaged compared with their counterparts claiming Incapacity Benefit.

7.15 The corrections would also remove an otiose provision in respect of the date a deduction should be made from a customer's HB for a non-dependant aged less than 25 receiving main phase ESA(IR). The provision included in the ESA(CP) Regulations provided that where the decision to award main phase ESA(IR) was made after 13 weeks, the deduction for the non-dependant would be made from the date to award main phase was made and would not be backdated to the start of week 14. This would prevent an overpayment through no fault of the HB customer.

7.16 Legal advice is that the existing HB provisions for determining the date a change should take effect would already prevent such an overpayment. Therefore, the provision in the ESA(CP) regulations is to be removed. The removal has been achieved by not including the provision in regulation 26, which replaces the regulation (regulation 3) in the ESA(CP) Regulations containing the provision.

7.17 The corrections would also tidy up references to "limited capability for work" and "main phase employment and support allowance"; add a definition of "limited capability for work-related activity" and of "contributory employment and support allowance"; and make general improvements to the wording of the ESA(CP) Regulations.

### **Amendments to the ESA Regulations and the ESA(CP)(No.2) Regulations**

7.18 Schedule 6 of the ESA Regulations contains provisions for assistance with homeowners' eligible housing costs, for example interest on mortgages. The provisions were modelled upon the existing Income Support, income-based Jobseeker's Allowance and State Pension Credit provisions.

7.19 However, as drafted some of the housing cost provisions will not work as originally intended unless amendments are made, namely:

- the remunerative work definition contained in Schedule 6 should only apply to non-dependants living in the customer's household. Deciding whether or not the non-dependant is in remunerative work is the first step in the process of deciding which rate of deduction to apply to the customer's housing costs in respect of the expected contribution the non-dependant should make to those costs.

The standard rule across all the income-related benefits is that the non-dependant is in remunerative work if they are working 16 hours or more per week. However, there are linking rules within the Schedule in the event of the customer or partner returning to ESA after a period in remunerative work. These reflect the remunerative work definitions in the main part of the ESA regulations, otherwise a more stringent test will be applied to certain ESA customers with housing costs. The amendments will clarify the operation of the remunerative work rules with regard to non-dependants on the one hand and the ESA customer and partner on the other;

- other typing errors in Schedule 6 need to be corrected;
- the Income Support housing cost Schedule must be amended to ensure customers transferring from ESA to Income Support do not lose out in terms of help with housing costs because of that transfer.

The amendments are in regulation 16(b), (c) & (g) and 41.

### **Consequential Amendments**

7.20 Regulation 21 amends regulation 20 of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983 to reflect the introduction of ESA.

7.21 Regulation 22 amends regulation 7 of the Social Security (Payments on account, Overpayments and Recovery) Regulations 1988 to reflect the introduction of ESA.

7.22 Regulation 23 amends section 74 of the Social Security Administration Act to reflect the introduction of ESA.

7.23 Regulation 42 amends regulation 1(4) of the Employment and Support Allowance (Transitional Provisions) Regulations 2008 to reflect the introduction of ESA.

### **Consultation**

7.24 These regulations make necessary changes to existing Employment and Support Allowance legislation, mainly to correct omissions and errors. The policies the existing regulations support were consulted upon extensively before the regulations were laid. The Government had a formal consultation period lasting 12 weeks on its strategy for helping those with a health condition or disability as set out in its Green Paper 'A new deal for welfare: Empowering people to work' (Cm 6730) published in January 2006

7.25 In devising the new capability assessments which will be integral to the ESA regime, two technical working groups, consisting of medical and other relevant experts, were set up to consider how the current Incapacity Benefit ‘Personal Capability Assessment’ could be improved and updated. As well as the technical working groups, consultation groups, consisting of organisations representing the main user groups were set up.

7.26 Officials continue to meet voluntary organisations on request to listen to their concerns in relation to the detailed policy. As ESA has moved into the implementation stage Jobcentre Plus is sharing the development of operational plans with representative organisations through a series of events, including workshops and presentations at existing forums and local meetings. Jobcentre Plus will continue to keep representative organisations informed as operational plans develop.

7.27 The Department has consulted the Local Authority Associations on the changes to the regulations affecting HB/CTB. The Associations broadly supported the changes.

### ***Consolidation***

7.28 There are no plans to consolidate the legislation. We are not intending to consolidate the existing regulations once this S.I. has been laid; our reasons being that the Blue Volumes provide this function and will eventually incorporate this S.I. into the existing regulations. They are held on line and are available to the public free of charge. The Housing Benefit and Council Tax Benefit regulations were consolidated in 2006.

### ***Guidance***

7.29 Jobcentre Plus recognises that a broad range of audiences need to have information about the new allowance, for example, that customer representative organisations know how customers should make a claim, and that GPs understand how to provide their evidence. In developing the ESA communication strategy Jobcentre Plus has put a great deal of effort into compiling desk research and insights from across government in order to identify all of the audiences who need to be aware of the introduction of ESA and its implications for them. The strategy has already been put into effect as communications have started with staff, representative organisations and other stakeholders to raise awareness about the ESA regime and create an understanding about what it will achieve and how it will work. The strategy employs a wide variety of methods to suit the particular audience including changes to the Department’s range of benefit leaflets, articles in magazines and on websites aimed at welfare advisers, healthcare practitioners, representative organisations, employer organisations and others.

7.30 Guidance will be available to local authorities concerning the amendments made to HB/CTB by this instrument.

## **8. Impact**

- 8.1 A full impact assessment has not been published for this instrument as it has no impact on the private or voluntary sectors.
- 8.2 The impact on the public sector is negligible as the corrections are made to secure the original policy intention, not to change the policy.

## **9. Contact**

Any queries regarding this instrument should be directed to the following;

- John Hedley at the Department for Work and Pensions (Telephone 01132324463); e-mail [john.hedley@jobcentreplus.gsi.gov.uk](mailto:john.hedley@jobcentreplus.gsi.gov.uk)
- Anila Naseem at the Department for Work and Pensions (Telephone 01132324899); e-mail [anila.naseem@jobcentreplus.gsi.gov.uk](mailto:anila.naseem@jobcentreplus.gsi.gov.uk)
- Christine Watkins at the Department for Work and Pensions (Telephone 02077122742); e-mail [christine.watkins@dwp.gsi.gov.uk](mailto:christine.watkins@dwp.gsi.gov.uk) (regarding the housing benefit changes).



## Annex A

These amendments are to correct small errors that have been uncovered since the ESA regulations were laid and to make changes to ensure consistency.

1. **Regulation 2(1)** (made under sec. 25 WRA 2007). References to the “Independent Living Fund” removed. The only extant Living Fund definition was added to the Income Related Benefit regulations by the Independent Living Fund 2006 Order 2007 (SI 2007/2538). Therefore the only definition that should remain in regulation 2(1) is the “Independent Living Fund 2006”. Further references amended at Regulations 107(5)(a), 112(8), 115(5)(a) and 164(1)(a)(i) and at Schedule 6 paragraph 19(8)(b), Schedule 8 paragraph 22(2) and 41(1) and Schedule 9 paragraph 27(1) and 31.
2. **Regulation 9** Amended to provide for the equivalent of regulation 4(1)(aa) of the Social Security Incapacity Benefit regulations 1994. This provision limits the calculation of the 196 days of incapacity for work for claimants incapacitated during youth to consecutive days of incapacity.
3. **Regulation 26** To clarify that two days treatment in one week needs to be served after ESA has been claimed. Inserted:  
“(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.”
4. **Regulation 32** This regulation to clearly state that it applies only to members of HM Forces.
5. **Regulation 40(6)** Amended “paragraph (5)” to read “paragraph (4)”.
6. **Regulation 74(1)(a)** The word “a” inserted at the beginning of this sub-paragraph to read “a claimant is...” rather than “claimant is...”.
7. **Regulation 94(8)** Amended “paragraph (9) of regulation 91” to read “paragraph (8) of regulation 91”.
8. **Regulation 95(1)** References to “paragraphs 3 and 4 of this regulation...” amended to references to “paragraphs 2 and 3 of this regulation...”.
9. **Regulation 111(1)** Reference to “sections 1(3) and 4 amended to references to “sections 1(2) and 4”.
10. **Regulation 131(1)** In the definition of ‘student loan’ amended 73(3) to 73(f).

11. **Regulation 146(3)(b)** For '29' substituted '30'.
12. **Regulation 156(6)(g)** Replaced 'Adoption Agencies Regulation 1983' with 'Adoption and Children Act 2002.'
13. **Regulation 160(3)(b)** Removed from "section 136" to "mental disorder);"
14. **Regulation 164(2)(c)** Removed "Part 2 or".
15. **Schedule 2 para 3(b) and 3(c)** Amended "...pick a light object..." "... pick up a light object..."
16. **Schedule 2 para 10(c)(iv)** After the first comma, changed "last" to read "least".
17. **Schedule 2 para 12(e)** Removed the phrase "the following day"
18. **Schedule 2 para 16(b)** Inserted the word "daily" before "verbal prompting" and deleted "for the majority of the time"
19. **Schedule 2 para 19(b)** Added "9" in Column 3.
20. **Schedule 2 para 21(d)** After the second occurrence of the word "himself", added "...or herself".
21. **Schedule 3 para 7(b) and 7(c)** Changed the words in brackets to read (excluding own back).
22. **Schedule 4 para 1(3)(h)** included the same wording as paragraph 3(f)(i) of Schedule 4.
23. **Schedule 4 para 11(3)** Amended "paragraph 9(1)" to read "paragraph 8(1)".
24. **Schedule 4 para 11(4)(b)** Amended "paragraph 89" to read "paragraph 7".
25. **Schedule 5 para 9(2)(b)** Changed "parents" to "partners".
26. **Schedule 6 Heading** The reference to regulations to read 67(1)(c) and 68(1)(d).
27. **Schedule 6 para 6(2)(b)** This paragraph currently reflects the IS equivalent. However, it cannot operate in the same way, as it is not possible to refuse a loan as described in the 26 weeks preceding 27 October 2008. In order to properly reflect the policy intention it now reads:

"(b) after 2nd May 1994 and the housing costs applicable to that loan were not met by virtue of the former paragraph 5A of Schedule 3 to the Income Support Regulations, or paragraph 4(2)(a) of Schedule 3 to the Income Support Regulations, para 4(2)(a) of Schedule 2 to the Jobseeker's Allowance Regulations or paragraph 5(2)(a) of Schedule 2 to the State Pension Credit Regulations;"

A definition of state pension credit is required as a consequence of this insertion.

28. **Schedule 6 para 6(12)(b)** "... children of different sexes aged 10 or over..." replaced with "...persons of different sexes aged 10 or over but aged under 20..."
29. **Schedule 6 para 9(3)** Amended reference to "paragraph 2" to read "paragraph 3".
30. **Schedule 6 para 12** Amended to read:

“(11) Sub-paragraph (12) applies to a person who, had the person been entitled to income support and not an employment and support allowance, would have been a person to whom any of the following transitional or savings provisions would have applied—

  - (a) regulation 4 of the Income Support (General) Amendment No. 3 Regulations 1993 (“the 1993 Regulations”);;
  - (b) regulation 28 of the Income-related Benefits Schemes (Miscellaneous Amendments) Regulations 1995 (“the 1995 Regulations”).”
31. **Schedule 6 para 19(7)(a)** Amended “non-dependent” to “non-dependant”.
32. **Schedule 6 para 19(7)(f)** Amended “but for paragraph (4) of regulation 71 (definition of non-dependant) paragraph (5)...” to read “but for paragraph (5) of regulation 71 (definition of non-dependant) paragraph (4)...”
33. **Schedule 8 para 52(1)(a)** Amended to read “to a widow, widower or surviving civil partner of a person”.
34. **Schedule 9 para 17(2)(a)** Amended to read “... any payment in consequence of that personal injury;”
35. **Schedule 9 para 35** Inserted “a” in front of “reduction”.
36. **Schedule 9 para 47** Amended “Any payment for a sports award...” to read “Any payment of a sports award...”

## **Annex B**

The consequential amendments that have been identified are as follows:

1. Social Security Administration Act 1992
2. Social Security (Payments on account, Overpayments and Recovery) Regulations 1988
3. Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983
4. Employment and Support Allowance (Transitional Provisions) Regulations 2008.