

**EXPLANATORY MEMORANDUM TO  
THE EMPLOYMENT AND SUPPORT ALLOWANCE (TRANSITIONAL PROVISIONS,  
HOUSING BENEFIT AND COUNCIL TAX BENEFIT) (EXISTING AWARDS) (NO. 2)  
(AMENDMENT) REGULATIONS 2010**

**2010 No. 2430**

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. Purpose of the instrument**

- 2.1 The Employment and Support Allowance (Transitional Provisions, Housing Benefit and Council Tax Benefit) (Existing Awards) Regulations 2010 (S.I.2010/875) (the original Migration Regulations), designed to support the reassessment of current incapacity benefits claimants using the Work Capability Assessment, were laid on 29<sup>th</sup> March 2010. The original Migration Regulations were then revoked and remade as the Employment and Support Allowance (Transitional Provisions, Housing Benefit and Council Tax Benefit) (Existing Awards) (No.2) Regulations 2010 (S.I.2010/1907), (the re-laid Migration Regulations), on 27<sup>th</sup> July 2010 after it came to light that that some of the primary powers cited in the original Migration Regulations had not been commenced.
- 2.2 These Regulations (referred to in this memorandum as “the amendment Regulations”) are now being laid before Parliament to further clarify the policy intent of the reassessment exercise, as well as to correct drafting errors contained in the re-laid Migration Regulations. Consequently, they are being issued free of charge.
- 2.3 The purpose of the original Migration Regulations was explained in the Explanatory Memorandum laid with those Regulations; this was attached to the Explanatory Memorandum for the re-laid Migration Regulations.

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

None

**4. Legislative Context**

- 4.1 The re-laid Migration Regulations already provide for the reassessment of most current incapacity benefits claimants<sup>1</sup> using the Work Capability Assessment and the subsequent change to, or cessation of, their benefit entitlement. The amendment Regulations are principally made under the same

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<sup>1</sup> Not all current incapacity benefits claimants will fall to be reassessed, as if such a claimant reaches pensionable age at any time before 6th April 2014, they will not be subject to the reassessment process.

powers as those Regulations, contained in Schedule 4 to the Welfare Reform Act 2007.

- 4.2 A number of amendments are necessary to the re-laid Migration Regulations to ensure that the policy intent is fully delivered and that the process is as seamless as possible for customers.
- 4.3 The amendment Regulations will mainly come into force on 1st November 2010, one month after the re-laid Migration Regulations come into force. This means that the whole legislative package providing for the reassessment of current incapacity benefits recipients will be in place in time for the full roll-out of the reassessment programme, which is currently scheduled to commence in spring 2011.

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

This instrument applies to Great Britain.

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

As this instrument is subject to the negative resolution procedure and does not amend primary legislation, no statement is required.

## **7. Policy Background**

### **What is being done and why**

- 7.1 Subsequent to laying the re-laid Migration Regulations, a number of amendments have been identified that are necessary to further clarify the policy intent of the reassessment exercise and to ensure that the process and the customer experience of that process is as seamless as possible, as well as to prevent unintended outcomes for customers.
- 7.2 The amendment Regulations are now being laid before Parliament to allow the required amendments to be made. The policy background to the original Migration Regulations was set out in the Explanatory Memorandum to those Regulations; this was attached to the Explanatory Memorandum for the re-laid Migration Regulations.
- 7.3 The amendments to the re-laid Migration Regulations include the following which are intended to:
  - make special provision for the conversion of cases where, exceptionally, a customer is entitled to Incapacity Benefit but is already entitled to Employment and Support Allowance as well (by virtue of having appealed a disallowance of Incapacity Benefit and claiming Employment and Support Allowance in the interim until the appeal is successful). These amendments allow the determinations of limited capability for work and limited capability for work-related activity made in respect of the Employment and Support Allowance award, to be used to convey the customers in question through the

- clarify the composition of the weekly rate of Incapacity Benefit or Severe Disability Allowance to which we will have regard in calculating whether to award any transitional addition.(regulation 6);
- clarify that someone who, prior to being reassessed, was claiming Income Support on the grounds of incapacity, whose award qualifies for conversion to Employment and Support Allowance, but who nevertheless chooses to continue to receive Income Support on another ground, will lose the Disability Premium if that was paid with their Income Support solely on incapacity grounds (regulation 7);
- clarify that someone who, prior to being reassessed, was claiming Income Support on the grounds of incapacity and is found fit for work at the Work Capability Assessment and chooses to continue to receive Income Support on another ground, will lose the disability premium if that was paid with their Income Support solely on incapacity grounds (regulation 8);
- clarify that customers who return to benefit after a break of less than 12 weeks will regain entitlement to any transitional addition previously in payment only if they are determined as having limited capability for work (regulation 12);
- ensure that those people receiving Income Support who are already exempt from the habitual residence test continue to be exempt for the purposes of converting that award to one of Employment and Support Allowance (regulation 16(3));
- modify the Income Tax (Earnings and Pensions) Act 2003 to clarify that transitional additions payable on top of contributory Employment and Support Allowance are chargeable to tax as social security income (regulation 17(4));
- clarify that if someone who is in receipt of Incapacity Benefit or Severe Disablement Allowance chooses to appeal a conversion decision that they are fit for work, the Department will treat them as having fulfilled the conditions to receive contributory Employment and Support Allowance at the assessment phase rate pending the outcome of the appeal (regulation 17(6) and (7));
- remove the existing barrier to continuing awards of Jobseeker's Allowance where the customer on Jobseeker's Allowance who is only temporarily incapable of work has been in receipt of Incapacity Benefit, Severe Disablement Allowance or Income Support within the previous 8 weeks (regulation 19(2)); and
- clarify that work or training beneficiaries who return to Employment and Support Allowance after a break of less than 104 weeks will immediately be restored to the financial position they would have been in if they had not left Employment and Support Allowance (regulations 22 and 23)

7.4 These Regulations also correct drafting errors in the re-laid Migration Regulations.

## **8. Consultation Outcome**

- 8.1 For details of consultation relating to the original Migration Regulations, see the attached memorandum relating to those Regulations.
- 8.2 The Department consulted extensively on the original Migration Regulations as well as with the Social Security Advisory Committee<sup>2</sup>. The Department has also formally consulted the Social Security Advisory Committee about the amendment Regulations: the Committee has decided not to formally refer these Regulations for consultation.
- 8.3 Since the original Migration Regulations were laid, consultation has continued with key stakeholder groups through events such as:
- the National Stakeholder event;
  - Jobcentre Plus Customer Representative Group Meetings;
  - DWP Annual Forum; and
  - Local Authority Association meetings in relation to Housing Benefit and Council Tax Benefit.
- 8.4 In advance of the national roll-out of Incapacity Benefit reassessment, a trial will be undertaken. This trial activity will involve around 1,700 customers in the Jobcentre Plus-led Pathways Districts supported by Burnley and Aberdeen Benefit Delivery Centres. The linked Contact Centres will be Bangor, Bridgend and Coventry. The trial will be evaluated and will provide early indicators about customer and staff reactions and the reassessment process that can inform national reassessment. We also have plans to engage with customer representative groups in these trial areas to assess the impact of the trial on them and their customers.

## **9. Guidance**

Readers of this Explanatory Memorandum are directed to the Memorandum for the re-laid Migration Regulations. This has the memorandum for the original Migration Regulations attached and there has been no change.

## **10. Impact**

- 10.1 This legislation does not impact on business, charities or voluntary bodies.
- 10.2 This legislation has a negligible impact on the public sector. However, the impact on the public sector of the original Migration Regulations is as described in the Impact Assessment appended to the Explanatory Memorandum for those Regulations.
- 10.3 As the amendment Regulations are designed to further clarify the original policy intent, the Impact Assessment that accompanied the original Migration

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<sup>2</sup> The Act Paper was published on 29 March 2009 which contained the Report by the Social Security Advisory Committee and the Statement by the Secretary of State in accordance with section 173 and 174 of the Social Security Administration Act 1992 about the Migration Regulations.

Regulations is still relevant, a new Impact Assessment has therefore not been produced. The Impact Assessment was attached to the Explanatory Memorandum for the original Migration Regulations as that Memorandum appeared on the OPSI website<sup>3</sup>.

### **11. Regulating Small Business**

The legislation does not apply to small business.

### **12. Monitoring and Review**

Details of how the migration process will be monitored and reviewed was set out in the Explanatory Memorandum relating to the original Migration Regulations.

### **13. Contact**

Trevor Pendergast at the Department for Work and Pensions (Tel: 020 7449 5639 email: [trevor.pendergast@dpw.gsi.gov.uk](mailto:trevor.pendergast@dpw.gsi.gov.uk)) can answer any queries regarding this instrument.

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<sup>3</sup> <http://www.legislation.gov.uk/ukxi/2010/875/notes/contents?type=em>