

## EXPLANATORY MEMORANDUM TO

### THE CHILDCARE (EARLY YEARS PROVISION FREE OF CHARGE) (EXTENDED ENTITLEMENT) (AMENDMENT) REGULATIONS 2021

2021 No. 674

#### 1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Education and is laid before Parliament by Command of Her Majesty.

#### 2. Purpose of the instrument

- 2.1 This instrument makes minor consequential changes to regulations governing 30 hours free childcare for working parents of three and four year olds to reflect the fact that the UK is no longer an European Economic Area (EEA) state.
- 2.2 The instrument also corrects minor typographical errors to The Childcare (Early Years Provision Free of Charge) (Extended Entitlement) Regulations 2016 (“the 2016 Regulations”).
- 2.3 The procedure for free issue of these Regulations has been applied and these Regulations are being issued free of charge to all known recipients of The Tax Credits, Childcare Payments and Childcare (Extended Entitlement) (Coronavirus and Miscellaneous Amendment) Regulations 2020 (SI 2020/1515).

#### 3. Matters of special interest to Parliament

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

- 3.1 None.

##### *Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)*

- 3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

#### 4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is England and Wales.
- 4.2 The territorial application of this instrument is England only.

#### 5. European Convention on Human Rights

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

#### 6. Legislative Context

- 6.1 The Childcare Act 2016 Act (the “2016 Act”) places a duty on the Secretary of State to ensure that 30 hours free childcare is available for three and four year old children of working parents. The 2016 Act also allows the Secretary of State to delegate this duty to local authorities (see section 2(2)(a)).

- 6.2 The 2016 Regulations, made under the 2016 Act, set out details about who is a ‘qualifying child’ of working parents, conditions of eligibility, declarations that are needed from working parents to confirm eligibility (importantly, see regulation 11, that the parent with whom the young child normally lives makes the declaration), mechanisms for reviews and appeals, and the requirements on local authorities to secure the free early years provision.
- 6.3 These Regulations make a change to the eligibility criteria for 30 hours free childcare to ensure the criteria align with Home Office rules on the immigration status of EEA nationals and Swiss nationals as a result of the UK leaving the EU.
- 6.4 HMRC will make a similar change to the Childcare Payments (Eligibility) Regulations 2015<sup>1</sup> to align with Home Office rules which will maintain consistency between 30 hours free childcare and Tax Free Childcare.
- 6.5 The Tax Credits, Childcare Payments and Childcare (Extended Entitlement) (Coronavirus and Miscellaneous Amendment) Regulations 2020 (SI 2020/1515) laid by HMT on 11<sup>th</sup> December inserted amendments into the 2016 Regulations. These regulations correct minor typographical errors to the amendments made to those regulations.

## **7. Policy background**

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

#### 30 hours and Tax Free Childcare background

- 7.1 Since September 2010, all three and four year olds have been entitled to 570 hours of free early education over no fewer than 38 weeks of the year (which equates to 15 hours a week for 38 weeks of the year).
- 7.2 The Childcare Payments Act 2014 enacted a new scheme, commonly known as Tax-Free Childcare (TFC), designed to provide financial support to help working parents with the costs of childcare.
- 7.3 Since September 2017, all three and four year olds whose parents meet the eligibility criteria set out in the 2016 Regulations have been entitled to 30 hours free childcare (the equivalent of 1140 hours of free early education over no fewer than 38 weeks of the year), which can enable them to move into work, or work more hours. This was extended to foster parents in September 2018.
- 7.4 Parents can apply for either 30 hours free childcare or TFC or both, through a joint online application – the Childcare Service. HMRC determine whether parents meet the eligibility criteria for either or both schemes. The eligibility criteria for 30 hours free childcare set out in the 2016 Regulations broadly aligns with TFC policy and legislation.

#### Changes as a result of the UK leaving the EU

- 7.5 Regulation 11 of the 2016 Regulations sets out the conditions to be met by the parent making the 30 hours declaration (i.e., making the application for 30 hours free childcare). These include at Regulation 11(b) that the parent must be in the UK. Regulation 12(1) sets out the categories of people who are treated as being in the UK for the purpose of Regulation 11(b). Regulation 12(2) sets out the categories of people

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<sup>1</sup> [The Childcare Payments \(Eligibility\) Regulations 2015 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

who are not treated as being in the UK. A person who is not a resident in an EEA state who is in paid work in the UK or a Person who is Subject to Immigration Controls (PSIC) are treated as not being in the UK and so are ineligible for 30 hours childcare.

- 7.6 The Home Office has introduced the Future Borders and Immigration System<sup>2</sup> (FBIS) from 1st January 2021 following the end of the transition period. As a result of this change, EEA and Swiss nationals who have arrived in the UK after 1st January 2021 are subject to the FBIS and are PSIC which carries with it a condition of no recourse to public funds which means that they are not entitled to 30 hours free childcare, unless they have recourse to public funds from another source, i.e. relying on the rules allowing family of European Union Settlement Scheme (EUSS) holders residence in the UK.
- 7.7 EEA and Swiss nationals who were living in the UK by 31st December 2020 can apply for EU settled status<sup>3</sup> which will allow them to have a retained right to reside that carries the right of recourse to public funds and so allows them to be eligible for 30 hours free childcare as they would not be subject to immigration controls.
- 7.8 Following the UK's departure from the EU and the end of the transition period on 31st December 2020, EEA and Swiss nationals not covered by EU Settlement Scheme (EUSS) rules will be treated as persons subject to immigration control. Prior to 1st January 2021, EEA and Swiss nationals were covered by an exemption from being subject to immigration control in section 115(9) of Immigration and Asylum Act 1999. However, after 1st January 2021, in order to access the 30 hours free childcare entitlement, EEA and Swiss nationals not covered by the EU Settlement Scheme will need to confirm they are not subject to immigration control and that they have recourse to public funds, (as is the case for other third country nationals<sup>4</sup>).
- 7.9 EEA and Swiss national parents arriving in the UK after 1st January 2021 will be treated as third country nationals immediately and will be asked to confirm they are not subject to immigration control and have recourse to public funds in order to access the 30 hours free childcare entitlement unless they are able to rely on rules allowing family of EUSS holders residence in the UK.
- 7.10 In order to allow parents a period of transition, Home Office have allowed a transition period for getting EU settled status from 1st January to 30th June 2021, for those EEA and Swiss nationals who were in the UK before 1st January 2021. Many EEA and Swiss nationals who had a right to reside in the UK prior to 1st January 2021 have already secured settled status, but those who have not will retain a right to reside (and therefore not be subject to immigration control) in the UK that carries with it recourse to public funds until 30th June 2021.
- 7.11 After the 30th June 2021, all EEA and Swiss national parents, regardless of their date of entry into the UK, will be treated as third country nationals and will be required to confirm they are a person not subject to immigration control in order to access the 30 hours free childcare entitlement. This may be through EUSS or through a visa that allows recourse to public funds. The amendments are being made to ensure the 30

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<sup>2</sup> [New immigration system: what you need to know - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/new-immigration-system-what-you-need-to-know)

<sup>3</sup> [Apply to the EU Settlement Scheme \(settled and pre-settled status\) - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/apply-to-the-eu-settlement-scheme-settled-and-pre-settled-status)

<sup>4</sup> A third country national, is somebody who is not a national of any of the Member States but who is resident in a Member State

hours free childcare entitlement follows the advice of the Home Office and takes account of the changing immigration status of EEA and Swiss nationals, except Irish nationals, following the UK's departure from the EU. It aims to ensure the department does not favour EEA and Swiss nationals over those parents from other third countries when assessing eligibility for 30 hours.

*Correction of minor typographical errors*

- 7.12 These regulations correct minor typographical errors to the 2016 Regulations which ensures that parents whose income has been impacted by coronavirus and who are receiving payments from a coronavirus job support scheme implemented by Government remain eligible to both TFC and to 30 hours free childcare for three to four year old children of working parents. These corrections are minor typographical technical changes which do not change the effect of the regulations.

**8. European Union Withdrawal and Future Relationship**

- 8.1 This instrument is not being made under the European Union (Withdrawal) Act but relates to the withdrawal of the United Kingdom from the European Union because eligibility for 30 hours free childcare will only be available in future to EU and Swiss nationals who have EU settled status.

**9. Consolidation**

- 9.1 There are no plans for consolidating regulations at present.

**10. Consultation outcome**

- 10.1 The eligibility criteria for 30 hours free childcare were extensively debated during the passage of the Childcare Act 2016 through Parliament, and the 2016 Regulations were subject to the affirmative procedure and received formal approval from both Houses of Parliament.
- 10.2 There is no statutory requirement to consult on changes to the 2016 Regulations however there is a past practice to consult on significant changes. The amendment to the eligibility of EEA and Swiss nationals for 30 hours free childcare is being made as a result of changes to the immigration rules made by the Home Office as a result of the UK leaving the European Union<sup>5</sup>. We consider this to be a technical change as a result of changes to immigration rules as stated in paragraph 7.6 and so no consultation was considered necessary. Parents will be updated as stated in paragraph 11.2 below.

**11. Guidance**

- 11.1 There is already [statutory guidance](#) for local authorities on early education and childcare which came into effect on 1st September 2018 and sets out how local authorities should discharge their duty to secure 30 hours free childcare for working parents of three and four year olds. The Department does not intend to revise the guidance as the amendments relate to the eligibility criteria for 30 hours free childcare which is determined through the application process managed by HMRC.

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<sup>5</sup> Home Office Policy Equality Statement published on 2nd December 2020?  
<https://www.gov.uk/government/publications/eu-settlement-scheme-policy-equality-statement/policy-equality-statement-eu-settlement-scheme#public-sector-equality-duty-and-immigration-control>

11.2 Parents have been advised of changes as a result of EU exit, through banners on the Childcare Service website and through the questions asked when completing their application/reconfirmation. Parents were advised of the changes on 1st January 2021 to reflect the position for the 1st January to 30th June 2021 transition period and banners will be updated on 1st July 2021 to reflect the final position.

## **12. Impact**

12.1 There is no, or no significant, impact on business, charities, or voluntary bodies.

12.2 There is no, or no significant, impact on the public sector.

12.3 Parents who obtain EU settled status will be able to continue to access 30 hours free childcare at their childcare provider.

12.4 An Impact Assessment has not been prepared for this instrument because the amendments to the eligibility criteria for EEA and Swiss nationals for 30 hours free childcare are as a result of the UK leaving the EU and the introduction by the Home Office of the Future Borders and Immigration System.

## **13. Regulating small business**

13.1 The legislation does not apply to activities that are undertaken by small businesses including childcare providers as the instrument makes a change to the eligibility criteria of the 30 hours free childcare entitlement for working parents of three and four year olds.

## **14. Monitoring & review**

14.1 The amendment to the eligibility criteria for EEA and Swiss Nationals does not include a statutory review clause as the amendment is as result of the UK leaving the EU. It will be reviewed if the Home Office makes any further changes to the immigration rules for EEA and Swiss nationals.

## **15. Contact**

15.1 Natalie Mitchell at the Department for Education Telephone 024 7666 0593 or email: [Natalie.Mitchell@education.gov.uk](mailto:Natalie.Mitchell@education.gov.uk) can be contacted with queries regarding 30 hours change in the instrument.

15.2 Joanna Mackie, Deputy Director for Early Years Sufficiency and Entitlements at the Department for Education can confirm that this Explanatory Memorandum meets the required standard.

15.3 Minister Vicky Ford, Parliamentary Under Secretary of State for Children and Families at the Department for Education, can confirm that this Explanatory Memorandum meets the required standard.