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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—
  - (i) a member of the Disability Living Allowance Advisory Board; or
  - (ii) a panel member with a disability qualification, as defined in regulation 1(3) (interpretation) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999(1), acting as a member of an appeal tribunal constituted under Chapter 1 of Part 1 of the Social Security Act 1998;
- (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 28 or 29 of Schedule 8 (sums to be disregarded in the calculation of income other than earnings) where the claimant is in receipt of any payment specified in those paragraphs;
- (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.

(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 paragraph (5) above, 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(2) or sub-sections 49(1) or 49(1A) of the Local Government (Scotland) Act 1973(3), of which the claimant is a member by reason of being a councillor.

#### **Meaning of “remunerative work” for the purposes of paragraph 6(1)(e) of Schedule 1 to the Act**

**41.**—(1) For the purposes of paragraph 6(1)(e) of Schedule 1 to the Act (conditions of entitlement to an income-related allowance), “remunerative work” means any work which a claimant does for which payment is made or which is done in expectation of payment, other than work listed in paragraph (2) of regulation 40.

(2) Subject to paragraph (3), a claimant who was, or who was being treated as—

(a) engaged in remunerative work; and

(b) in respect of that work earnings to which regulation 95(1)(b) and (d) applies are paid,

is to be treated as being engaged in remunerative work for the period for which those earnings are taken into account in accordance with Part 10 of these Regulations.

(3) Paragraph (2) does not apply to earnings disregarded under paragraph 1 of Schedule 7 (sums to be disregarded in the calculation of earnings).

#### **Meaning of “remunerative work” for the purposes of paragraph 6(1)(f) of Schedule 1 to the Act**

**42.**—(1) For the purposes of paragraph 6(1)(f) of Schedule 1 to the Act, (conditions of entitlement to an income-related allowance where a claimant must not be a member of a couple the other member of which is engaged in remunerative work), “remunerative work” means work in which the claimant’s partner is engaged or, where the partner’s hours of work fluctuate, the partner is engaged on average, for not less than 24 hours a week, being work for which payment is made or which is done in expectation of payment.

(2) In calculating the number of hours for which a claimant’s partner is engaged in work so as to determine whether that partner is engaged in remunerative work, the number of hours are to be determined in accordance with paragraphs (8) and (9) of regulation 45 and those paragraphs are to be read as though they referred to the claimant’s partner.

(2) 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.

(3) 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.

(3) The claimant's partner is to be treated as engaged in remunerative work during any period for which that partner is absent from work referred to in paragraph (1) if the absence is either without good cause or by reason of a recognised, customary or other holiday.

(4) Subject to paragraph (5), a claimant's partner who was, or who was being treated as—

(a) engaged in remunerative work; and

(b) in respect of that work earnings to which regulation 95(1)(b) and (d) applies are paid,

is to be treated as being engaged in remunerative work for the period for which those earnings are taken into account in accordance with Part 10 of these Regulations.

(5) Paragraph (4) does not apply to earnings disregarded under paragraph 1 of Schedule 7 (sums to be disregarded in the calculation of earnings).

(6) For the purposes of this regulation, in determining the number of hours in which a claimant's partner is engaged or treated as engaged in remunerative work, no account is to be taken of any hours in which the claimant's partner is engaged in an employment or a scheme to which regulation 43(1) or (2) (claimants' partners not treated as engaged in remunerative work) applies.

#### **Circumstances under which partners of claimants entitled to an income-related allowance are not to be treated as engaged in remunerative work**

**43.**—(1) A claimant's partner is not to be treated as engaged in remunerative work in so far as—

(a) the partner is engaged in child minding in the partner's home;

(b) the partner is engaged by a charity or voluntary organisation, or is a volunteer, where the only payment received by the partner or due to be paid to the partner, is a payment which is to be disregarded under regulation 104(2) (calculation of income other than earnings) and paragraph 2 of Schedule 8 (sums to be disregarded in the calculation of income other than earnings);

(c) the partner is engaged on a scheme for which a training allowance is being paid;

(d) the partner is receiving assistance under the self-employment route;

(e) the partner is engaged in employment as any one of the following—

(i) a part-time fireman in a fire brigade maintained in pursuance of the Fire and Rescue Services Act 2004<sup>(4)</sup>;

(ii) a part-time fire-fighter employed by a fire and rescue authority;

(iii) a part-time fire-fighter employed by a fire and rescue authority (as defined in section 1 of the Fire (Scotland) Act 2005<sup>(5)</sup> or a joint fire and rescue board constituted by an amalgamation scheme made under section 2(1) of that Act;

(iv) an auxiliary coastguard in respect of coast rescue activities;

(v) a person engaged part-time in the manning or launching of a life boat;

(vi) a member of any territorial or reserve force prescribed in Part 1 of Schedule 6 to the Social Security (Contributions) Regulations 2001<sup>(6)</sup>; or

(f) the partner is undertaking work as a councillor;

(g) the partner is engaged in caring for a person who is accommodated with the partner by virtue of arrangements made under any of the provisions referred to in paragraphs 28 or 29 of Schedule 8 (sums to be disregarded in the calculation of income other than earnings) and the partner is in receipt of any payment specified in those paragraphs;

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(4) 2004 c. 21.

(5) 2005 asp. 5.

(6) S.I. 2001/1004.

- (h) the partner is engaged in an activity in respect of which—
- (i) a sports award has been made, or is to be made, to the partner; and
  - (ii) no other payment is made or is expected to be made to the partner.
- (2) A claimant's partner is not to be treated as engaged in remunerative work, where the partner is—
- (a) a person who is mentally or physically disabled and by reason of that disability—
    - (i) the person's earnings are reduced to 75% or less of what a person without that disability and working the same number of hours would reasonably be expected to earn in that employment or in comparable employment in the area; or
    - (ii) the person's number of hours are 75% or less of what a person without that disability would reasonably be expected to undertake in that employment or in comparable employment in the area;
  - (b) subject to regulation 42(4) (partners treated as engaged in remunerative work), a person who would otherwise have satisfied section 126(1) of the Contributions and Benefits Act (trade disputes)(7) or in respect of whom section 124(1) of that Act (conditions of entitlement to income support)(8) would otherwise have had effect as modified by section 127(b) of that Act (effect of return to work)(9);
  - (c) a person who would otherwise satisfy the conditions set out in paragraph 4 of Schedule 1B to the Income Support Regulations(10);
  - (d) a person who—
    - (i) is in employment;
    - (ii) lives in, or is temporarily absent from, a care home, an Abbeyfield Home or an independent hospital; and
    - (iii) requires personal care by reason of old age, disablement, past or present dependence on alcohol or drugs, past or present mental disorder or a terminal illness.
- (3) The claimant's partner is not to be treated as engaged in remunerative work on any day on which that partner is on maternity leave, paternity leave or adoption leave or is absent from work because the partner is ill.
- (4) In this regulation—
- “work as a councillor” has the same meaning as in regulation 40;
- “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.

(7) Section 126(1) was amended by paragraph 31 of Schedule 1 to the Incapacity Act 1994 (c. 18) and paragraph 31(a) and (b) of Schedule 2 to the Jobseekers Act 1995 (c. 18).

(8) Section 124(1) was amended by paragraph 30(2) to (5) of Schedule 2 to the Jobseekers Act 1995 and by section 14 of and paragraphs 1, 2(1) and (2) of Part 1 of Schedule 2 to the State Pension Credit Act 2002 (c. 16).

(9) Section 127(b) was amended by paragraph 44 of Schedule 24 to the Civil Partnership Act 2004 (c. 33).

(10) Schedule 1B to the Income Support Regulations was inserted by regulation 22 of and Schedule 1 to the Income Support (Jobseeker's Allowance Consequential Amendments) Regulations 1996 (S.I. 1996/206). Paragraph 4 was amended by regulation 33 of the Jobseekers Allowance and Income Support (General) (Amendment) Regulations 1996 (S.I. 1996/1517), by paragraph 2 of Schedule 2 to the Social Security Amendment (Carer's Allowance) Regulations 2002 (S.I. 2002/2497) and by regulation 4(1) of the Social Security (Loss of Benefit) (Consequential Amendments) Regulations 2002 (S.I. 2002/490).

**Claimants who are treated as not entitled to any allowance at all by reason of regulation 40(1) are to be treated as not having limited capability for work**

**44.**—(1) Where a claimant is treated as not entitled to an employment and support allowance by reason of regulation 40(1), subject to paragraph (2), the claimant is to be treated as not having limited capability for work.

(2) Paragraph (1) does not apply where the claimant remains entitled to a contributory allowance, but is not entitled to an income-related allowance by reason of regulation 40(1).

(3) 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 20 (certain claimants to be treated as having limited capability for work), 25 (hospital in-patients), 26 (claimants undergoing certain regular treatment) or 29 (exceptional circumstances), limited capability for work; or
- (b) the claimant meets the conditions set out in regulation 30(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**

**45.**—(1) The categories of work referred to in regulation 40(2)(f) are set out in the following paragraphs.

(2) Work for which the earnings in any week do not exceed £20.00.

(3) Work for which the earnings in any week do not exceed £88.50 and which—

- (a) 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
- (b) is supervised by a person employed by a public or local authority or voluntary organisation engaged in the provision or procurement of work for persons who have disabilities.

(4) Work which is done for less than 16 hours a week, for which earnings in any week do not exceed £88.50 and which—

- (a) is done during a 52 week period beginning on the first day on which the work is done, provided that—
  - (i) the claimant has not previously done specified work;
  - (ii) since the beginning of the last period of specified work, the claimant has ceased to be entitled to a relevant benefit for a continuous period exceeding 12 weeks;
  - (iii) not less than 52 weeks have elapsed since the claimant previously did the specified work; or
- (b) done by a claimant who has or is treated as having limited capability for work-related activity.

(5) Work done in the course of receiving assistance in pursuing self-employed earner's employment whilst participating in a programme provided or other arrangements made under section 2 of the Employment and Training Act 1973(11) (functions of the Secretary of State) or

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(11) 1973 c. 50. Section 2 was substituted by section 25(1) of the Employment Act 1988. Subsections (4) and (6) of section 2 were repealed by section 29(4) of and Schedule 7 to the Employment Act 1989. Subsections (3A) and (3B) of section 2, which apply to Scotland only, inserted by the Trade Union Reform and Employment Rights Act 1993.

section 2 of the Enterprise and New Towns (Scotland) Act 1990(12) (functions in relation to training for employment etc.).

- (6) Work done where the claimant receives no payment of earnings and where the claimant—
- (a) is engaged by a charity or voluntary organisation; or
  - (b) is a volunteer,

where the Secretary of State is satisfied in any of those cases that it is reasonable for the claimant to provide the service free of charge.

(7) Work done in the course of participating in a work placement approved in writing by the Secretary of State before the placement starts.

- (8) 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 (decisions superseding earlier decisions) of the Social Security Act 1998(13), 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.

(9) 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.

(10) 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(14),

in respect of which the question of the claimant's limited capability for work arises under the Act;

“specified work” means work done in accordance with paragraph (4);

“supervised work” means work done in accordance with paragraph (3)(a) or (b);

“volunteer” has the same meaning it has in regulation 43;

“work placement” means practical work experience with an employer, which is neither paid nor undertaken in expectation of payment.

(12) 1990 c. 35. Section 2 amended by sections 47(4)(a) and (b) and 51 of and Schedule 10 to the Trade Union Reform and Employment Rights Act 1993. Section 2 also amended by articles 1(2) and 4 of and paragraph 100(2) of Schedule 2 to Scotland Act 1998 (Consequential Modifications) Order (No. 2) 1999.

(13) 1998 c. 14. Section 10 was amended by sections 18 and 26(3) of and by paragraph 23 of Schedule 7 to and by Schedule 10 to the Transfer of Functions Act 1999.

(14) 1992 c. 4. Section 22 was amended by Paragraph 22 of Schedule 2 to the Jobseeker's Act 1995.

**Effect of work on entitlement to contributory allowance where claimant is receiving certain regular treatment**

**46.** Where a claimant who is entitled to a contributory allowance and is treated as having limited capability for work by virtue of regulation 26 works on any day during a week when the claimant is, in accordance with regulation 26, receiving certain regular treatment or recovering from that treatment, that work is to have no effect on the claimant's entitlement to the contributory allowance.