

Explanatory Memorandum for the Social Security Advisory Committee

The Employment and Support Allowance Regulations 2012
For the meeting of the Social Security Advisory Committee on
Wednesday 13 June 2012

The Employment and Support Allowance Regulations 2012 ¹

Introductory note

1. The following explanatory memorandum sets out the proposals for how Employment and Support Allowance (ESA) will be changed, the work-related requirements which will apply to claimants and the sanctions proposals. Draft regulations are also provided, so that the Committee can see how the drafts attempt to reflect those proposals. We will continue to refine the draft regulations between now and the Autumn to ensure they reflect the policy fully and accurately and to improve the drafting where appropriate.
2. As a consequence of the introduction of Universal Credit (UC) and the abolition of a number of income-related benefits, ESA will cease to be a benefit with both contributory and income-related strands and become a contributory benefit only. These regulations duly replace the Employment and Support Allowance Regulations 2008², effectively removing all references to income-related ESA, and re-introduce ESA as a contributory benefit only. All references in these Regulations to ESA are therefore implicitly to contributory ESA – no further distinction or elaboration is required.
3. With two main exceptions, the regulations for contributory ESA have been brought forward from the 2008 regulations with no change. In other words, the contributory ESA legislation has been consolidated in these regulations. There will be a number of minor updates to the existing provisions, but they are not

¹ Section 33 of the Welfare Reform Act 2012 provides for the abolition of income-based JSA and income-related ESA. The proposed regulations, therefore, only apply to JSA & ESA when those benefits are contributory-only benefits. The existing (Decisions and Appeals) Regulations will, however, continue in force in relation to current-style JSA (which is both an income-based and contributions-based benefit) and current-style ESA (again an income-based and contributions-based benefit) until such a time as all claimants are claiming Universal Credit, new-style JSA (as a contributory-only benefit) and new-style ESA (as a contributory-only benefit).

The existing Decisions and Appeals Regulations will be revoked in so far as they apply to JSA & ESA, with savings for claimants still entitled to current-style JSA & ESA (including where certain groups of claimant are still able to claim current-style JSA or ESA after the launch of Universal Credit, as a result of the phased approach to migration).

Only one version of the Regulations will apply to a person at any one time.

² The 2008 Regulations are being revoked, with savings provisions to allow them to continue to apply to existing contributory ESA claimants, and to existing income-related ESA claimants until such a time as they are migrated to Universal Credit. These revocations and savings are included in a different set of Regulations.

intended to change the effect of the provisions e.g. these regulations will use gender neutral drafting. Most of these minor updates are not yet included in the draft regulations. There are a number of benefits of consolidating, for example to make the regulations easier to read by renumbering all the amendments that have been made since 2008.

4. As the Committee will be aware, there is no requirement to refer to the Committee regulations which are made for the purpose only of consolidating other regulations (paragraph 10 of Schedule 7 to the Social Security Administration Act 1992). These regulations are referred to the Committee because even though they are mainly consolidating, there are provisions which are not just consolidating.
5. The two main sets of provisions which are not just consolidating are the conditionality regime and the sanctions regime. These will change significantly so that they align with the Universal Credit regime. There are also new provisions about how the new sanctions regimes work for a claimant who is entitled to both ESA and UC and for a claimant who moves from claiming ESA only to UC only (and vice versa).
6. There are also new provisions in relation to assessing whether claimants have Limited Capability for Work. Where it has been determined on an assessment under UC that a claimant has LCW, that determination will also apply for ESA. Similarly, where it has been determined on an assessment under UC that a claimant has not got LCW, no further assessment is needed on ESA. The draft UC Regulations contain similar provisions. This ensures that the claimant is not required to undergo the same assessment twice. There are exceptions to this e.g. a second assessment can be carried out where the claimant's circumstances have changed. In this memorandum, references to 'conditionality' mean the requirements a claimant has to meet when they are on ESA. This can include things like attending work-focused interviews and carrying out a work preparation requirement.

Conditionality and sanctions

7. Section 57 of the Welfare Reform Act 2012 introduces new provisions into the Welfare Reform Act 2007. These provisions build on the changes to the ESA sanctions regime to be introduced in December 2012 (also to be considered by the Social Security Advisory Committee on 13 June 2012) by further aligning the ESA sanctions approach with Universal Credit and substantially aligning ESA conditionality requirements with those under Universal Credit.
8. By aligning the two regimes we will create a simpler system for claimants and advisers, allow for easier transitions between UC and ESA and cater for cases of dual entitlement to UC and ESA.

Claimant responsibilities

Claimant Commitment

9. To be entitled to ESA claimants must usually accept a Claimant Commitment. It is expected that the initial Claimant Commitment will be accepted as part of the normal claims process.
10. The Claimant Commitment will be revised on an on-going basis to record the expectations placed upon a claimant. We intend that the Claimant Commitment will record what we require the claimant to do in return for their payment of ESA, and what will happen if they do not comply with those requirements, clearly setting out the sanctions they could face.
11. Where a claimant refuses to accept their Claimant Commitment we will allow a 'cooling off' period to give the claimant the opportunity to reconsider their decision and to understand the consequences of their decision.
12. In exceptional circumstances where a claimant is unable to accept a claimant commitment we intend to remove the requirement to do so.

Claimant Responsibilities – basic structure

13. There are two basic types of work related requirement that can be imposed on ESA claimants. They are:
 - **Work-focused interviews:** attend periodic interviews to discuss plans and opportunities for returning to work (immediately or in the future).
 - **Work preparation:** actions to prepare for work – such as attending training courses, preparing a CV or taking part in the Work Programme.
14. The requirements that are imposed on any individual claimant will depend on what we can reasonably expect given the claimant's capability and circumstances. To support this each ESA claimant will fall into one of three conditionality groups that reflect our basic expectations and determine the requirements that may be imposed. The groups are:
 - **No work related requirements** – this is for claimants who we cannot reasonably expect to work or prepare for work; No labour market requirements will be placed on claimants in this group.
 - **Work focused interviews only** – for claimants who we only expect to stay in touch with the labour market and begin thinking about a move into work, more work, or better paid work.
 - **Work Preparation:** for claimants we expect to prepare for a move into work, more work or better paid work by, for example, participating in the Work Programme. We do not expect these claimants to look for work.

No work related requirements group – detail

15. Claimants in this group will be subject to no conditionality beyond a requirement to give correct information and advise if their circumstances change (these information requirements apply to all claimants).
16. The Welfare Reform Act and regulations set out the claimants who would not reasonably be expected to work or prepare for work over a sustained period:-
 - Claimants with limited capability for work related activity
 - Claimants who are in receipt of the Carer's Element within UC
 - Claimants who are not in receipt of the Carer's Element within UC but who do have caring responsibilities of at least 35 hours in a week for a severely disabled person/s
 - A lone parent with a child under the age of one year
 - A lone or nominated foster parent of a child under the age of one year
 - A nominated parent in a couple with a child under the age of one year
 - A lone adopter or a nominated carer in an adoptive couple for up to one year after adoption
 - A claimant who is pregnant, for 11 weeks before the expected week of confinement, and for 15 weeks afterwards.

Work focused interviews only group - detail

17. Claimants in this group will be expected to stay in touch with the labour market and begin thinking about preparing for work or moving into work in due course. Claimants that fall into this group are:
 - Lone parents of, or a parent in a couple who is the nominated carer for, a child between 1 and 5 years old
 - nominated foster carer for a foster child under 16 years old, or 18 years old if the child has proven care needs.
18. We recognise that relatives or other persons who are responsible carers of a child who cannot live with their parents may face particular difficult circumstances when first taking on responsibility for the child. (These claimants could include, for example, older siblings of a child, grandparents and those with a special guardianship order). Where these carers need time to adjust when a child first enters the household, they will be placed in the work focused interview only group for the first year the claimant has responsibility for that child.

Work Preparation group - detail

19. Claimants in this group will be expected to prepare for a move into work, more work, or better paid work but will not be required to take steps to apply for or take up work as a condition of their claim. This is for claimants who are not in either of the other two groups.

Sanctions

20. Research suggests that increased conditionality (the principle of benefit receipt being dependant on meeting certain requirements) for claimants with limited capability for work to engage in employment preparation programmes has been successful in increasing participation and reducing benefit caseloads³. This is supported by DWP research which shows that around 83% of ESA claimants felt that the compulsory nature of work focused interviews (which are backed by sanctions for failure to attend) made them more likely to participate⁴.
21. The introduction of ESA in 2008 signalled a recognition that many disabled people and people with health conditions can and should move towards employment if they are given support and encouragement. ESA is aligned more closely with Jobseeker's Allowance than old style incapacity benefits, placing greater emphasis on a claimant's functional capabilities and the importance of moving towards employment. It is therefore important that claimants engage with requirements designed to help them prepare for work, and where they fail to engage then there should be proportionate consequences. The revised sanction for ESA claimants is designed to reflect the importance of meeting work-related requirements as more of the benefit will be sanctioned.
22. The UC sanctions regime that we are generally replicating in ESA is designed to drive engagement with requirements by providing:
- clarity about the consequences of non compliance;
 - a clear and robust deterrent against non compliance;
 - and tougher sanctions for repeated non-compliance.
23. Our intention is that the sanctions approach for ESA claimants will feature two levels of sanction. The level of sanction a particular claimant will receive will depend on the nature of their failure.
24. Where the Secretary of State has determined that a sanction will apply it will take effect from the first day of the benefit week in which that determination is made (or the following week if a payment has already been released). The sanction or sanctions applicable to a claimant will run consecutively to form a total outstanding reduction period. Our intention is that any outstanding sanction period will be applied to a subsequent claim for UC.
25. After a first failure the length of sanction applied for subsequent failures of the same type will increase. We will notify claimants in advance of the

³ - *Realising Potential: A vision for personalised conditionality and support* - An independent report to the Department of Work and Pensions by Professor Paul Gregg, 2008

⁴ DWP Research Report (2011) Barnes, Sissons, Stevens : Employment and Support Allowance: Findings from a follow up survey with customers

consequences of any further failures.

26. The daily reduction amount is currently set out in the regulations and illustrate the level we expect them to be. However, we are considering whether to put actual amounts in the legislation or whether a formula that does not require annual uprating might be preferable.

Low level sanctions

27. Low level sanctions will apply to claimants subject to work – preparation and work-focused interview requirements and connected requirements. They may be imposed when claimants fail to comply with the following requirements which are designed to help them move into or prepare for work without good reason:

- Failure to comply with a work preparation requirement without good reason;
- Failure to comply with a work-focused interview requirement without good reason;
- Failure to comply with a requirement to provide evidence or confirm compliance with a work-related requirement without good reason;
- Failure to comply with a requirement relating to interviews which are not work-focused interviews.

28. The duration of low level sanctions will be the sum of:

- an open ended period which starts from the date of the sanctionable failure and ends when the claimant meets a compliance condition or the award is terminated; and
- a fixed period of 7 days for a first failure, 14 days for a second failure at the same level within 365 days of a first and 28 days for a third or subsequent failure at the same level within 365 days of the previous failure.

29. In most cases the compliance condition will be the activity the claimant originally failed to do but where this is no longer appropriate, for example, if he failed to attend a training course which is no longer running, then he can be required to meet an alternative requirement. The open ended reduction period is intended to encourage claimants to quickly re-engage with specific requirements and the fixed component will ensure there is always a consequence for failure to comply.

Lowest level sanctions

30. Lowest level sanctions will apply:

- Where claimants subject to work-focused interview only requirements fail to participate in a work-focused interview.

31. The sanction will be open ended. It will start from the date of the sanctionable failure and end when a claimant meets a compliance condition or the award is terminated.

Other features of the approach

32. The sanctions approach will be consecutive. This means that where a claimant is subject to one sanction, again fails a requirement and receives another sanction, the claimant's award amount will be reduced for the entire duration of both sanctions. This approach is intended to ensure that claimant failures always carry consequences and that there is a deterrent against further non-compliance for sanctioned claimants.

33. It would be wrong for a sanctioned claimant to be able to avoid their sanction by terminating their award and then re-claiming within the period of any sanction. The regime is therefore designed to ensure that, where a claimant's ESA award is terminated and they subsequently re-claim and receive a new award of ESA during the period of the sanction, any outstanding reduction period will be applied.

34. We do though want to encourage and reward claimants for moving into work. Therefore where a claimant moves into work at or above his/her conditionality threshold level for 182 days or more after their last sanctionable failure then his/her outstanding sanction will be terminated. The threshold level is calculated by establishing the number of hours a claimant can reasonably be expected to work and then multiplying the expected hours of work by the relevant National Minimum Wage for the age of the claimant. In ESA there are no expected hours of work and we therefore plan to adopt the same approach we are taking for claimants in the UC work preparation group where we plan to set a nominal 16 hours as the basis for the threshold. The 182 days does not have to be a continuous period so the claimant will be able to terminate the sanction where they have several short periods of work.

35. In line with the approach to be taken for UC, where a claimant is in receipt of an ESA conditionality sanction and a fraud loss of benefit sanction is also imposed the conditionality sanction is suspended for the duration of the fraud sanction. When the fraud sanction expires the conditionality sanction will resume, this approach ensures that claimants will serve the full duration of both sanctions without both amounts being deducted at the same time.

36. Aligned with the approach for UC where a claimant's circumstances change so that they are subject to no work-related requirements because of limited capability for work-related activity, we will no longer apply a reduction to the claimant's award. The amount of the reduction will change to zero in such cases. The sanction period will continue to run down during any time the amount of a reduction is zero. If the claimant is subsequently re-assessed as not having a limited capability for work and work-related activity before the

sanction period had expired, the reduction amount would return to the amount relevant for that claimant.

37. In addition, claimants who move into the no work related requirements group on the grounds of their childcare responsibilities will have their sanctionable amount reduced to the lowest level.

Daily reduction amount

38. The intention is to apply daily reduction amounts in line with the approach for UC, however, this is one of the areas where we are currently exploring whether IT functionality will support this approach. We intend that for low level sanctions the daily reduction amount will be calculated at a rate equivalent to the personal allowance rate. Therefore if a 7 day sanction is applied the amount of the reduction will be equivalent to a one week award of Employment and Support Allowance personal allowance.
39. We intend that in the case of lowest level sanctions the daily reduction amount will be calculated at a rate equivalent to 40% of the claimant's ESA personal allowance.

Safeguards

40. The sanctions regime will incorporate a range of safeguards for claimants, these include:

Reasonable requirements

41. Whilst changes are proposed to ensure that sanctions more effectively encourage claimants to engage with requirements, important elements of the existing system are being retained. Work preparation requirements will continue to be tailored to the claimant's needs and circumstances and must be reasonable for the individual claimant. The New Joiner's work focused interview is also diagnostic so the adviser will find out more about the claimant's circumstances in order to determine which (if any) work preparation requirements are appropriate. As requirements will continue to be tailored to claimants' needs we will only impose activity which is reasonable in their circumstances. As only reasonable requirements will be set this will help to ensure that sanctions are not applied inappropriately.
42. As now claimants will have an opportunity to explain why they failed to meet the requirement (show good reason). The Department will continue to ensure that claimants know they can explain the reasons for any failure. We will expect the claimant to provide clear evidence within a specified period.
43. Where an ESA claimant does not meet their work preparation requirements but is able to show that they had good reason for this, they will not be sanctioned. Where they feel that the requirements placed on them are

unreasonable, they can request that the adviser or provider reconsiders the activity. A DWP decision maker must then consider the case and notify the claimant of their decision in writing.

44. Moreover, Jobcentre Plus will attempt to contact ESA claimants who are deemed to be vulnerable before a sanction is considered. These are claimants with a mental health condition, learning disability or condition affecting communication or cognition which affects their ability to understand the requirements placed on them. Claimants will also continue to be able to request further information about the decision to sanction, request a reconsideration and appeal the decision.

Appeal

45. Claimants will be able to appeal any decision to reduce their benefit to the First Tier Tribunal within one month of being notified of the decision to sanction.

Dual entitlement to ESA and UC

46. Where a claimant has entitlement to both Universal Credit and ESA they will only be subject to the conditionality regime in Universal Credit. This means they will have a single claimant commitment and be subject to the same requirements across both claims.
47. In cases of dual entitlement sanctions will be applied to the Universal Credit award. This includes any new sanctions applied during the dual entitlement or any sanctions which were already applied when the claimant became dual entitled. The numbers of people with dual entitlement who also face a sanction are likely to be very low but if it appears that the rules are being manipulated by claimants then we will look at this interaction again.
48. Where a claimant who has an existing sanction claims either UC or ESA, we intend that the unexpired sanction is carried across to the new benefit.

Annex A

The Regulations –

- set out when they will commence, provide definitions for the terms used within the Regulations, and provide for the rounding of fractions;
- lay out the conditions that must be satisfied for entitlement to ESA to arise. In ESA the first contribution condition (relating to national insurance contributions actually paid) has to be met in one of the last two tax years, in line with Jobseeker's Allowance;
- set out how the main conditions are modified for people such as carers who are unable to meet the normal requirements;
- set the length of the assessment phase at 13 weeks, and set out the way in which the assessment phase will work for new claimants and for claimants who return to ESA under the linking rules (including those who return after leaving during the assessment phase);
- outlines the processes and for exceptional cases such as terminally ill claimants;
- provide for those who appeal against their Work Capability Assessment decision to remain on ESA at a rate equivalent to the rate payable during the assessment phase for the duration of their appeal;
- set out the criteria for, and the manner of determining whether a person's capability for work is limited by his physical or mental condition and if so, whether it is so limited that it is unreasonable to require him to work, and as a consequence, that he should be entitled to the ESA. If it is determined that the claimant has limited capability for work but not limited capability for work-related activity (see below), they will be placed in the work-related activity group and will have to undertake work-related activity as a condition of receiving benefit. If it is determined that the claimant has limited capability for work-related activity they will be placed in the support group and will not be subject to conditionality
- set out the information that will be needed to determine whether a person has limited capability for work or limited capability for work-related activity, and that a person may be called for a medical examination as part of the determination;
- set out the consequences of not providing information or failing without good cause to attend a medical examination;
- set out special circumstances which list those people who will be treated as having limited capability for work or limited capability for work-related activity

without the need for an assessment (for example people who are terminally ill or who fall into certain prescribed exceptional circumstances);

- explain the limited circumstances in which ESA claimants can undertake work without it affecting their entitlement to benefit. All ESA claimants are allowed to earn up to £20 a week, and the majority are allowed to carry out permitted work for 52 weeks for up to 16 hours a week - subject to them not earning more than £97.50;
- outline a number of exceptions to these rules, which include those claimants undertaking supported permitted work - who are exempt from the 16 hour rule - as well as councillors and foster carers;
- set out the amounts of ESA to which a claimant is entitled. A claimant's total award is made up of a basic rate of personal allowance (which is age-related during the assessment phase) plus, where appropriate, the addition of the relevant component;
- provide for deductions that are to be made from ESA. Most of these deductions are made where claimants are in receipt of a pension payment (including a permanent health insurance payment); however, deductions are also made for claimants in receipt of councillor's allowance;
- provide for exemptions from the normal rules, for example, where a pension scheme is in deficit and unable to pay;
- provide for claimants who are in receipt of a statutory payment (Statutory Maternity Pay, Statutory Adoption Pay or Statutory Paternity Pay) and who are in a period of limited capability for work to be able to claim ESA;
- set out how the amount of net earnings or net profit that a claimant has from permitted work is to be calculated. Once the net earnings or profit have been calculated, there is provision for certain sums to be disregarded;
- provide that people will normally be excluded from receiving ESA for the first three days of a period of sickness or disability ("waiting days"). This is in order to prevent large numbers of claims for very short spells of illness;
- set out the circumstances in which waiting days need not be served, for example, where a claimant makes a new claim for benefit within the period covered by the linking rules, or when waiting days have been served already in respect of another benefit;
- provide for "linked" claims. This allows claimants who leave ESA for any reason (other than not meeting the level of the WCA) and who return within twelve weeks to return to the point in their claim when they left;
- set out provisions relating to a claimant's temporary absence from Britain. A claimant is allowed to continue receiving ESA for up to four weeks of absence from the UK provided they continue to meet all the conditions of entitlement. If

either the claimant, or a child for whom the claimant is responsible, have to receive medical treatment abroad they are entitled to a longer period of temporary absence. The claimant is allowed to continue receiving benefit for up to 26 weeks if the treatment is not covered by the NHS, provided the expected period of absence is not expected to be longer than 52 weeks. An unlimited period of temporary absence is allowed for treatment abroad covered by the NHS;

- outline the circumstances in which an ESA claimant can be disqualified for receipt of the benefit. This can happen if a claimant is responsible - through their own misconduct - for their limited capacity for work, if they refuse medical treatment and advice or if they are absent without notice from their residence;
- set out the exceptions from the general rule that a person is disqualified from receiving ESA for any period during which they are undergoing imprisonment or detention in legal custody; and
- explain that although ESA is a weekly benefit, there will be circumstances where it is necessary to calculate a claimant's entitlement for only part of a week. For example, at the beginning of a claim there may be less than a week payable up to the first designated payment date, depending on the day of the week the claimant becomes entitled. Similarly part-week payments may be made at the end of a claim where a claimant has limited capability for work for part of a benefit week because they have returned to work.

The Schedules to the Regulations –

support the definition of “member of Her Majesty’s forces” in the Regulations;

- set out the assessment to be used to determine limited capability for work. This is done by listing 17 areas of function, each incorporating a number of specific activities (descriptors) which set out particular mental and physical activities against which the claimant’s function is compared and scored. Where a claimant meets a descriptor, he will be awarded the points corresponding to that descriptor. If he scores 15 points or more on the whole assessment (whether by a single descriptor or a combination of any of the descriptors) he will be determined as having limited capability for work;
- set out the 16 activities which will be assessed to ascertain whether someone should be considered to have limited capability for work-related activity; and
- provides for the disregard of a claimant’s net earnings (as calculated) below the permitted work levels