

# Chapter V3: ESA - effect of work

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# Chapter V3: ESA – effect of work

## Introduction

V3001 This Chapter gives guidance on entitlement to ESA when a claimant works.

## The general rule

V3002 Unless V3015 et seq applies, a claimant is treated as not entitled to ESA in any week in which they work<sup>1</sup> (the “general rule”).

*1 ESA Regs 13, reg 37(1)*

V3003 – V3004

## Definitions

### Meaning of week

V3005 Week, for the purposes of a claimant who works, is a week in respect of which a claimant is entitled to ESA<sup>1</sup>.

**Note:** DMs should not confuse this definition with the general definition of week<sup>2</sup>.

*1 ESA Regs 13, reg 37(8); 2 reg 2*

### Meaning of work

V3006 Work is any work which a claimant does, whether or not it is undertaken in expectation of payment<sup>1</sup>.

*1 ESA Regs 13, reg 37(8)*

### Meaning of work as a councillor

V3007 Work as a councillor includes work as a member of specified bodies<sup>1</sup> of which a claimant is a member by reason of being a councillor<sup>2</sup> (see V3032).

*1 Local Government Act 72, s 177(1); Local Government (Scotland) Act 73, s 49(1) & (1A)*

*2 ESA Regs 13, reg 37(8)*

### Meaning of relative

V3008 A relative is a close relative, grand-parent, grand-child, uncle, aunt, nephew or niece<sup>1</sup>.

*1 ESA Regs 13, reg 2*

### Meaning of close relative

V3009 A close relative is<sup>1</sup>

1. a parent, parent-in-law, son, son-in-law, daughter, daughter-in-law, step-parent, step-son, step-son-in-law, step-daughter, step-daughter-in-law, brother, brother-in-law, sister, sister-in-law **and**
2. similar relationships arising through civil partnerships<sup>2</sup>.

*1 ESA Regs 13, reg 2; 2 CP Act 04, s 246*

V3010 “Brother” and “sister” includes half-brother and half-sister. A child who is adopted becomes a child of the adoptive parents and the brother or sister of any other child of those parents. The adopted child stops being the child of, or the brother or sister of any children of, the natural parents. Whether an adopted person is a close relative of another person depends on the **legal relationship** not the blood relationship<sup>1</sup>.

*1 R(SB) 22/87*

V3011 – V3014

## Exceptions to the general rule

V3015 V3002 gives guidance on the general rule that a claimant is treated as not entitled to ESA in any week in which they work<sup>1</sup>.

*1 ESA Regs 13, reg 37(1)*

V3016 However, there are exceptions to the general rule. These exceptions are claimants who

1. do certain categories of work<sup>1</sup> (see V3030 et seq)
2. are receiving certain treatment<sup>2</sup> (see V3050 and ADM Chapter U2)
3. do work in the first or last week of LCW<sup>3</sup> (see V3051).

*1 ESA Regs 13, reg 37(2); 2 reg 37(3); 3 reg 37(4)*

V3017 A claimant who is treated as not entitled to ESA in any week in which they work may be treated as not having LCW<sup>1</sup> (see ADM Chapter U2).

*1 ESA Regs 13, reg 38(1)*

## Work

V3018 Work<sup>1</sup> has the meaning in V3006. It is not employment and there does not have to be a legal contractual relationship.

*1 ESA Regs 13, reg 37(8)*

### Example

A publican hires James to conduct two quiz nights per week and expects to pay him for doing this. There is no written contract and James does not usually accept payment when it is offered by the publican. This is work not a hobby because it is

done for the commercial enterprise of the publican and James feels morally obliged to the publican to fulfil his agreement with him.

V3019 Negligible work is considered under a general principle that the law is not concerned with trivialities. This principle is called “de minimis”. Negligible amounts of work can be disregarded before the specific rules are applied so that the claimant is not regarded as working on the day or days in question.

V3020 Whether work on part of a day is negligible depends on its proportion to the normal working hours, the type of work and the effort required in relation to full normal duties<sup>1</sup>. When deciding if work is “de minimis”, the DM should consider the relevant case law.

*1 R(S) 2/61*

V3021 The question of negligible work can arise in self-employment when a sick person can still attend to some aspects of a business. Work cannot be considered negligible if it contributes materially to the running of the business or involves a significant amount of supervisory or administrative work. For example if the person occasionally does small jobs such as signing cheques, the contribution to the business can be disregarded as negligible<sup>1</sup>.

*1 R(S) 5/51; R(S) 13/52; R(S) 24/52; R(S) 34/52; R(S) 37/52; R(S) 8/55;  
R(S) 2/61; R(S) 2/74; R(S) 10/79*

## **Community service**

V3022 Community service should not be regarded as work. Courts will take account of a person’s limited capability and the type and extent of activities prescribed by the court should be appropriate to the limited capability.

V3023 – V3029

## **Claimants who do certain categories of work**

V3030 The general rule in V3002 does not apply to a claimant who

1. works as a councillor<sup>1</sup> **or**
2. undertakes duties on not more than one full day or two half-days a week as a member of the FtT who is eligible for appointment under specified legislation<sup>2</sup> **or**
3. undertakes domestic tasks in their own home or takes care of a relative<sup>3</sup> **or**
4. undertakes duties in caring for another person who is accommodated with them under arrangements for
  - 4.1 fostering **or**
  - 4.2 providing respite careand they receive payment for doing so<sup>4</sup> **or**

5. undertakes any activity during an emergency to
  - 5.1 protect another person **or**
  - 5.2 prevent serious damage to property or livestock<sup>5</sup> **or**
6. does work which is exempt work<sup>6</sup> (see V3055\* et seq).

*1 ESA Regs 13, reg 37(2)(a); 2 reg 37(2)(b);  
The Qualifications for Appointment of Members to the First-tier Tribunal and Upper Tribunal Order 2008;  
3 ESA Regs 13, reg 37(2)(c); 4 reg 37(2)(d) & (7); 5 reg 37(2)(e); 6 reg 37(2)(f) & reg 39(1)*

## **Work as a councillor**

V3031 Work as a councillor has the meaning<sup>1</sup> in V3007.

*1 ESA Regs 13, reg 37(8)*

V3032 A councillor<sup>1</sup> is

1. in England and Wales a member of
  - 1.1 a London borough council **or**
  - 1.2 a county council **or**
  - 1.3 a county borough council **or**
  - 1.4 a district council **or**
  - 1.5 a parish or community council **or**
  - 1.6 the Common Council of the City of London **or**
  - 1.7 the Council of the Isles of Scilly **or**
2. in Scotland a member of a council for a local government area<sup>2</sup>.

*1 ESA Regs 13, reg 2; 2 Local Government (Scotland) Act 1994, s 2*

V3033 Guidance on the effect of councillors' allowances on ESA is in ADM Chapter V1 (ESA amounts).

## **Member of the FtT**

V3034 A claimant who is a member of the FtT who is eligible for appointment under specified legislation<sup>1</sup> (see ADM Chapter A6) is exempt from the general rule only when they undertake duties on not more than one full day or two half-days a week<sup>2</sup>. If a claimant undertakes such duties for a longer period, they will be treated as not entitled to ESA.

*1 The Qualifications for Appointment of Members to the First-tier Tribunal and Upper Tribunal Order 2008;  
2 ESA Regs 13, reg 37(2)(b)*

## **Domestic tasks and care of a relative**

V3035 To be exempt from the general rule, domestic tasks must be carried out in the claimant's own home. Domestic tasks is not defined but means "of the home,

household or family affairs". Examples of domestic tasks are preparing and cooking food, shopping, cleaning, washing clothes or dishes, making beds.

V3036 In addition to taking place in the claimant's own home a domestic task must relate to the claimant's home, household or family affairs. Personal care such as attending to bodily functions or supervision or education of children, are domestic tasks if carried out for a member of the family (including a close relative). If carried out for others, the tasks do not relate to the home, household or family affairs. This includes providing accommodation and food to students<sup>1</sup> and other activities carried out in the claimant's home, such as child minding other than of relatives, or tuition.

*1 R(IB) 1/03*

V3037 Although child minding may include some tasks which could be said to be domestic, the activity as a whole does not relate to the home, household or family affairs.

V3038 Care means to provide for or look after and should be interpreted broadly. It includes personal care, such as bodily functions but can also include domestic tasks such as cooking, shopping, cleaning and supervision of children.

V3039

### **Caring for another person**

V3040 Caring for other people's children or adults comes within the definition of work<sup>1</sup> (see V3006). However, claimants undertaking such caring are exempt from the general rule in V3002<sup>2</sup>.

*1 ESA Regs 13, reg 37(8); 2 reg 37(2)(d) & (7)*

V3041 The general rule does not apply when the claimant receives payment<sup>1</sup>

1. for children placed with them by
  - 1.1 a LA<sup>2</sup> **or**
  - 1.2 a voluntary organisation<sup>3</sup> **or**
2. for a person who is temporarily in the claimant's care where the payment is made by
  - 2.1 the NHS Commissioning Board<sup>4</sup> **or**
  - 2.2 a LA (but not where the payment is HB)<sup>5</sup> **or**
  - 2.3 a voluntary organisation **or**
  - 2.4 a clinical commissioning group<sup>6</sup> **or**
  - 2.5 a Local Health Board<sup>7</sup>.

*1 ESA Regs 13, reg 39(7); 2 Children Act 89, s 22C(2), (3), (5) or (6)(a); Children (Scotland) Act 95, s 26; Looked After Children (Scotland) Regs 09, reg 33 & 51; 3 Children Act 89, s 59(1)(a); 4 NHS Act 06, s 1H; 5 NA Act 48, s 26(3A); 6 NHS Act 06, s 14D; NHS (Wales) Act 06, s 11*

V3042 The types of payments in V3041 include payments for adult placement schemes and foster parenting. Looking after a child or children other than relatives includes fostering and pre-adoption situations. In these cases the child is living as part of the family and their care will normally consist of domestic tasks in the claimant's home unless the care includes activities which do not relate to the home, household or family affairs.

V3043 Placement of difficult, mentally ill or sick children, or children with a learning difficulty, attracts an allowance as well as expenses in recognition of the extra supervision, education or care necessary. However, any such placement with a claimant will not prevent that claimant from being exempt from the general rule.

### **Activities undertaken during an emergency**

V3044 The general rule does not apply to any activity undertaken during an emergency to

1. protect another person **or**
2. prevent serious damage to property or livestock<sup>1</sup>.

*1 ESA Regs 13, reg 37(2)(e)*

V3045 – V3049

### **Claimants receiving certain treatment**

V3050 The general rule does not apply to claimants who receive certain treatment<sup>1</sup>.

**Note:** See ADM Chapter U2 for guidance on certain treatment.

*1 ESA Regs 13, reg 37(3); reg 40*

### **Work in the first or last week of LCW**

V3051 A claimant who works in a week which is

1. the first week in which the claimant becomes entitled to a benefit, allowance or advantage because of LCW in any period<sup>1</sup> **or**
2. the last week in which the claimant
  - 2.1 has LCW **or**
  - 2.2 is treated as having LCW<sup>2</sup>

is treated as not entitled to ESA only on the actual day or days in that week on which the claimant works<sup>3</sup>.

**Note:** See ADM Chapter U2 for guidance on the meaning of a benefit, allowance or advantage.

*1 ESA Regs 13, reg 37(4)(a); 2 reg 37(4)(b); 3 reg 37(4)*



## Example

Cassandra has in receipt of ESA for several months. Her benefit week is Wednesday to Tuesday. She starts work which comes within the general rule on a Monday. The DM decides that Cassandra is entitled to ESA until Sunday, and is treated as not entitled to ESA on Monday and Tuesday, of the last week of ESA entitlement.

## Linking rule

V3052 When considering V3051, DMs should note that the linking rule (see ADM Chapter U1) does not apply for the purposes of deciding the beginning or end of any period of LCW<sup>1</sup>.

*1 ESA Regs 13, reg 37(5) & 86*

## Night shift workers

V3053 When V3051 is being considered and the claimant is a night shift worker, the DM should decide the day or days the claimant works under the rules for night shift workers<sup>1</sup> (see ADM Chapter U1).

*1 ESA Regs 13, reg 24 & 37(6)*

V3054

## Exempt work

### Categories of exempt work

V3055 The general rule (see V3002) does not apply to claimants who do exempt work. The categories of exempt work are

1. PWK<sup>1</sup> (see V3056 et seq)
2. work done whilst test trading as a S/E earner<sup>2</sup> (see V3090)
3. voluntary work<sup>3</sup> (see V3091)
4. work done in a work placement<sup>4</sup> (see V3094).

*1 ESA Regs 13, reg 39(1)(a)-(c); 2 reg 39(1)(d); 3 reg 39(1)(e); 4 reg 39(1)(f)*

## Permitted Work

V3056 There are three types of PWK, each with its own conditions. Claimants can only be in one type of PWK at any one time. It is not always necessary to have medical

approval to do PWK. If claimants have two or more jobs the hours and earnings are added together to determine if the work is exempt.

V3057 The three types of PWK are

1. PWLL<sup>1</sup> (see V3065)
2. SPW<sup>2</sup> (see V3066 et seq)
3. PW<sup>3</sup> (see V3075 et seq).

*1 ESA Regs 13, reg 39(1)(a); 2 reg 39(1)(b); 3 reg 39(1)*

### Calculation of weekly earnings

V3058 Weekly earnings limits apply in PWK<sup>1</sup>. The DM should calculate a claimant's earnings under the normal rules for calculating earnings<sup>2</sup> (see ADM Chapters V4 and V5).

*1 ESA Regs 13, reg 39(1)(a)-(c); 2 reg 76 - 84*

V3059 Where the weekly earnings limit is 16 x NMW, this means the highest rate of NMW as specified in legislation<sup>1</sup> (see Appendix). Where 16 x NMW includes an amount less than

1. 50p, the amount is rounded up to the nearest 50p **or**
2. £1, but more than 50p, the amount is rounded up to the nearest £1<sup>2</sup>.

*1 The National Minimum Wage Regulations 1999, reg 11; 2 ESA Regs 13, reg 39(4)*

### Example

Meryl is entitled to ESA, and starts work on 9.9.13 for 15 hours weekly. The NMW is 15 x £6.19 = £92.85. As this includes an amount which is more than 50p and less than £1, it is rounded up to £93.00. The DM uses this amount to consider whether Meryl's work is exempt work.

V3060 – V3064

### Permitted work lower limit

V3065 Claimants can work as long as their earnings in any week are no more than £20<sup>1</sup> without the general rule in V3002 applying. There is no limit to the period during which they can do this work. This is known as PWLL. Claimants move out of this type of PWK if their earnings in any week are more than £20.

*1 ESA Regs 13, reg 39(1)(a)*

### Supported permitted work

V3066 Claimants can do SPW<sup>1</sup> as long as their earnings in any week are no more than 16 x NMW without the general rule in V3002 applying. There is no limit to the period

during which they can do this work as long as they continue to meet the requirements for SPW.

*1 ESA Regs 13, reg 39(1)(b)*

V3067 SPW is appropriate for claimants whose disability has stable and established effects with a significant impact on their ability to learn or sustain a traditional job which will

1. always **or**
2. for a number of years

prevent them from working more than a few hours each week.

V3068 To be SPW, the work must be

1. part of a treatment programme done under medical supervision while the claimant is

1.1 an in-patient **or**

1.2 regularly attending as an out-patient

of a hospital or similar institution<sup>1</sup> (see ADM Chapter U2) **or**

2. supervised by a person employed by

2.1 a public or local authority **or**

2.2 a voluntary organization **or**

2.3 a Community Interest Company

which provides or finds work for persons with disabilities<sup>2</sup>.

*1 ESA Regs 13, reg 39(1)(b)(i); 2 reg 39(1)(b)(ii)*

V3069 A voluntary organization<sup>1</sup> is one that carries out activities otherwise than for profit. It does not include public or local authorities.

*1 ESA Regs 13, reg 2*

## **Community Interest Companies**

V3070 A CIC, as established under relevant legislation<sup>1</sup>, is a profit making organisation. However, it is restricted to using its assets and profits for the benefit of the community rather than for the benefit of the owners of the company. DMs should view the official CIC website for a current list of such companies ([www.cicregulator.gov.uk](http://www.cicregulator.gov.uk)).

*1 The Companies (Audit, Investigations and Community Enterprise) Act 2004*

V3071 The support worker must direct and oversee the performance of the claimant regularly although the frequency of contact is not laid down. Some claimants may require daily contact; with others it may be as infrequent as, for example, monthly. The extent and the frequency of the support may vary according to the progress of each individual claimant.

V3072 The supervision must be more than the normal supports put in place by employers. The support worker will, at least initially, have close involvement in the day to day routine of the claimant and, by implication, with the employer. This involvement will be ongoing at regular intervals according to each claimant's circumstances.

### **Example 1**

Peter's appointee returns form PW1. Peter wants to work in a local market garden for four hours on a Friday afternoon, earning £17 a week. Part 3 of the form PW1 has been completed by Peter's caseworker who works for Kaleidoscope NSF. It is a charitable organization that supports disabled people in work through a Social Firm. Peter's caseworker will visit him regularly and this support will continue. The DM determines that even though the work is for less than £20 a week and could be PWLL, it should be SPW because the work is supported. He can do this work without the general rule applying for as long as his earnings are no more than the set weekly limit and the support continues.

### **Example 2**

Sarah's appointee returns form PW1. It states that Sarah who has Down's Syndrome intends to start work. The work is in a supermarket collecting trolleys from the car park and stacking shelves. She will be working for four hours a day each Wednesday and Thursday earning £40 a week. Sarah's work has been arranged by Bexley Twofold, an organization funded by Bexley Council and Mencap to arrange work for people with disabilities. Sarah's support worker visits regularly and this support will continue. The DM determines that the work she is doing is SPW. She can do this work without the general rule applying for as long as the earnings remain no more than the set weekly limit and the support continues.

V3073 – V3074

### **Permitted work**

V3075 PW is work done for less than 16 hours, or an average of less than 16 hours (see V3081 et seq) in any week, for which the earnings do not exceed 16 x NMW<sup>1</sup>.

*1 ESA Regs 13, reg 39(1)*

V3076 - V3080

### **Calculating the hours for permitted work**

V3081 Where no recognizable cycle has been established, it is

1. the number of hours **or**
2. the average number of hours where the hours worked are likely to fluctuate a claimant is expected to work in a week<sup>1</sup>.

*1 ESA Regs 13, reg 39(2)(a)*

V3082 Where the number of hours a claimant works fluctuate and there is a recognizable cycle, it is over one complete cycle of work. This complete cycle includes periods in which the claimant does no work but excludes other absences such as holidays or sickness<sup>1</sup>.

*1 ESA Regs 13, reg 39(2)(b)(i)*

V3083 Where the number of hours a claimant works fluctuate and there is no recognizable cycle, it is

1. over the five week period **or**
2. any other period to enable the average hours to be decided more accurately immediately before the date of claim, or the date a supersession decision is made<sup>1</sup>.

*1 ESA Regs 13, reg 39(2)(b)(ii); SS Act 98, s 10*

V3084 – V3089

## **Self-employed test trading**

V3090 Work done whilst receiving help to become a S/E earner is exempt work<sup>1</sup> as long as the programme or arrangement the claimant is on is set up under certain legislation<sup>2</sup>.

*1 ESA Regs 13, reg 39(1)(d); 2 E&T Act 73 s 2; Enterprise & New Towns (Scotland) Act 1990, s 2*

## **Voluntary work**

V3091 Voluntary work is where a claimant receives no payment of earnings and where that claimant is

1. engaged by a charity or voluntary organization **or**
2. a volunteer

where the DM is satisfied that it is reasonable for the claimant to provide the service free of charge is exempt work<sup>1</sup>.

*1 ESA Regs 13, reg 39(1)(e)*

V3092 A claimant who is working but does not accept a wage is not necessarily a volunteer. The work must be other than for a relative (see V3008) and the only payment

1. received **or**
2. due to be paid

is expenses reasonably incurred in connection with the work<sup>1</sup>.

*1 ESA Regs 13, reg 39(6)*

## **Magistrates**

V3093 Magistrates who only receive expenses should be considered as volunteers.

## **Work placement**

V3094 Claimants who work in the course of participating in a work placement approved in writing by the DM before the placement starts are in exempt work<sup>1</sup>.

*1 ESA Regs 13, reg 39(1)(f)*

V3095 A work placement is practical work experience with an employer, which is neither paid nor undertaken in expectation of payment<sup>1</sup>.

*1 ESA Regs 13, reg 39(6)*

V3096 A claimant who is participating in a work placement must still provide information or evidence to show whether they have LCW and are required to comply with the WCA process<sup>1</sup> (see ADM Chapter U2).

*1 ESA Regs 13, reg 17*

V3097 – V3999

# Appendix

## National Minimum Wage rates

<b>Date</b>	<b>Hourly rate</b>
1.10.10	£5.93
1.10.11	£6.08
1.10.12	£6.19
1.10.13	£6.31
1.10.14	£6.50
1.10.15	£6.70
1.4.16	£7.20
1.4.17	£7.50

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