

Chapter 41 - ESA conditions of entitlement

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Chapter 41 - ESA - conditions of entitlement

Entitlement to employment and support allowance

Introduction

41001 ESA was introduced for new claimants on 27.10.08¹. It replaces

1. IB
2. SDA
3. IS on the grounds of disability² (see DMG 45204 et seq).

*1 WR Act 07, Part 1; WR Act 07 (Commencement No. 6 and Consequential Provisions) Order 2008, art 2(4);
2 ESA (Trans Provs) Regs, reg 1(4)*

41002 However, people entitled to

1. IB
2. SDA
3. IS on the grounds of disability

when ESA was introduced on 27.10.08 can continue to receive those benefits until a decision is made on whether their award qualifies for conversion to ESA at a later date. There are also rules allowing claims for IS or IB to be made on or after 31.1.11 in limited circumstances. See DMG Chapter 45 for detailed guidance.

Scope of this Chapter

41003 This Chapter contains guidance on

1. the conditions of entitlement for ESA including the maximum period of entitlement for ESA(Cont)
2. waiting days
3. effect of work - claimant
4. effect of work - partner
5. education

Where the rules differ between ESA(Cont) and ESA(IR) this is stated in the guidance.

41004 - 41010

Conditions of entitlement

General

- 41011 Claimants are entitled to ESA if they
1. satisfy the basic conditions¹ (see DMG 41012) **and**
 2. satisfy the additional conditions for
 - 2.1 ESA(Cont)² (see DMG 41020 et seq) **or**
 - 2.2 ESA(IR)³ (see DMG 41091) **and**
 3. make a claim⁴ (see DMG Chapter 02) **and**
 4. satisfy the NINO provisions⁵ (see DMG Chapter 02).

Note 1: When people claim ESA(IR) for a partner, their partner will also have to satisfy 4..

Note 2: See DMG 41800 et seq for guidance on where entitlement to ESA(Cont) is limited to the maximum number of days.

*1 WR Act 07, s 1(2) & (3); 2 s 1(2)(a) & Sch 1, Part 1; 3 s 1(2)(b) & Sch 1, Part 2; 4 SSA Act 92, s 1(1) & (4)
5 s 1(1A)*

Basic conditions

- 41012 Claimants are entitled to ESA¹ if they
1. have LCW (see DMG Chapter 42) **and**
 2. are aged 16 or over **and**
 3. have not reached pensionable age (see DMG 41014) **and**
 4. are in GB (except for certain temporary absences abroad) (see DMG Chapter 07 Part 2) **and**
 5. are not entitled to IS **and**
 6. are not
 - 6.1 entitled to JSA **or**
 - 6.2 a member of a couple entitled to joint-claim JSA excluding a couple as in DMG 20023 et seq².

1 WR Act 07, s 1(3); 2 s 1(6) & (6A); JS Act 95, s 1(2B) & Sch 1, para 8A

Note: See DMG 41800 et seq for guidance on where entitlement to ESA(Cont) is limited to the maximum number of days.

- 41013 A claimant is not entitled to ESA if they are entitled to SSP¹. See DMG Chapter 44 for further guidance.

1 WR Act 07, s 20(1)

Pensionable age

- 41014 See DMG Chapter 75 for guidance on the meaning of pensionable age¹.

1 WR Act 07, s 1(6); Pensions Act 95, Sch 4, Part 1

41015 - 41019

Additional conditions for ESA(Cont)

Introduction

41020 In addition to the basic conditions (see DMG 41012), to be entitled to ESA(Cont)¹ a claimant must satisfy the

1. contribution conditions (see DMG 41022 et seq) **or**
2. conditions relating to youth for claims made before 1.5.12 (see DMG 41046 et seq).

Note: see DMG Chapter 44 for guidance on the effect on entitlement to ESA(Cont) where the claimant is entitled to statutory payments such as SSP and SMP.

1 WR Act 07, s 1(2)(a) & Sch 1, Part 1

41021 From 1.5.12 entitlement to ESA(Cont) for claimants who are not in the support group is limited to a period of no more than 365 days¹. This includes awards of ESA(Cont) made under

1. the youth conditions **and**
2. the IB Reassessment rules².

See DMG 41800 et seq for guidance on where this applies to ESA(Cont) and ESA(Y) awards, and DMG Chapter 45 for guidance on awards of ESA(Cont) made under the IB Reassessment rules.

1 WR Act 07, s 1A; 2 WR Act 07, Sch 4, para 7(2)(f); ESA (TP, HB & CTB)(EA)(No. 2) Regs, Sch 2, para 2A

Contribution conditions

What the DM decides

41022 There are two contribution conditions¹. The DM decides whether the claimant is entitled to ESA(Cont) because the contribution conditions are satisfied including

1. the earnings factor derived from them
2. which are the relevant income tax years
3. the years in which the contributions must have been paid or credited
4. the commencement of a PLCW
5. the start of the relevant benefit year.

1 WR Act 07, s 1(2)(a) & Sch 1, Part 1

Reference to HMRC

41023 Entitlement to ESA(Cont) depends on the contribution conditions being satisfied. In practice the NI contribution record is usually obtained and any decision is based on the assumption that the record is factually correct. However, where there is a dispute about the record, the matter must be referred by the DM to HMRC for a formal decision¹.

Note 1: See DMG Chapters 03, 04 and 06 for guidance on how decisions and appeals are handled after a reference to HMRC.

Note 2: See DMG Chapter 01 where the dispute is about whether credits should be awarded.

1 SS CS (D&A) Regs, reg 11A and 38A

Meaning of terms

41024 When deciding whether the contribution conditions are satisfied, the DM should note that

1. “benefit year” means a period beginning with the first Sunday in January in any calendar year and ending with the Saturday immediately before the first Sunday in January in the following year¹
2. “class 1 NI contributions” and “class 2 NI contributions” are the NI contributions paid by employed earners and S/E earners respectively²
3. “lower earnings limit” and “upper earnings limit” are lowest and highest amounts of earnings on which class 1 NI contributions are paid in any tax year³ (see Appendix 2 to this Chapter)
4. “relevant benefit year” means the benefit year which includes the beginning of the PLCW which includes the relevant benefit week⁴
5. “tax year” is the period of 12 months beginning with 6 April each year⁵
6. “relevant benefit week” means the week in relation to which entitlement to ESA(Cont) is being considered⁶
7. “PLCW” means a period throughout which a person has, or is treated as having, LCW, **excluding** periods which are outside the time for claiming (see DMG Chapter 02 for guidance on the time for claiming)⁷.

Note 1: See DMG 41026 - 41028 for guidance on when the meaning of “relevant benefit year” in 4. is modified.

Note 2: See DMG 41048 5. for guidance on when the meaning of “PLCW” is modified.

1 WR Act 07, Sch 1, Part 1, para 3(1)(a); SS CB Act 92, s 21(6); 2 WR Act 07, Sch 1, Part 1, para 3(1)(b); SS CB Act 92, s 1; 3 WR Act 07, Sch 1, Part 1, para 3(1)(e); SS CB Act 92, s 22 & 23; 4 WR Act 07, Sch 1, Part 1, para 3(1)(f); 5 Sch 1, Part 1, para 3(1)(g); 6 Sch 1, Part 1, para 5; 7 ESA Regs, reg 2(1); SS (C&P) Regs, reg 19(1) & Sch 4

41025 The definition of PLCW in DMG 41024 **7.** ensures that, when considering whether the contributions conditions in DMG 41029 et seq are satisfied, the relevant benefit year is decided on the basis of the date from which ESA is claimed, provided it falls within the 3 months time limit for claiming ESA.

Modification of the meaning of relevant benefit year

41026 Where DMG 41027 applies the meaning of “relevant benefit year” at DMG 41024 **4.** is modified so that it is any benefit year which includes all or part of the PLCW which includes the relevant benefit week¹.

1 ESA Regs, reg 13(1)

41027 The modification in DMG 41026 applies to a claimant who¹

1. does not satisfy
 - 1.1 the first or second contribution conditions **or**
 - 1.2 both conditions **and**
2. would satisfy the conditions in 1. if that modification applied.

1 ESA Regs, reg 13(2)

41028 This enables a claimant to become entitled to ESA(Cont) on a further claim in a subsequent benefit year where

1. they now satisfy the contribution conditions **and**
2. an earlier ESA claim was disallowed because they did not satisfy one or both of the contributions conditions when the PLCW began.

The first contribution condition

41029 The first contribution condition is satisfied¹ if

1. the claimant has actually paid class 1 or class 2 NI contributions in respect of any one of the last two complete tax years before the beginning of the relevant benefit year **and**
2. those contributions have been paid before the relevant benefit week **and**
3. the claimant's earnings for that year as determined in accordance with DMG 41030 must be at least 26 times the LEL for that year.

1 WR Act 07, Sch 1, Part 1, para 1(1)

41030 For the purposes of DMG 41029 **3.** the earnings are the aggregate of the claimant's

1. relevant earnings for that year on which class 1 NI contributions have been paid or treated as paid **and**
2. earnings factors derived from class 2 NI contributions¹.

1 WR Act 07, Sch 1, Part 1, para 1(2)

41031 In DMG 41030 1., a claimant's relevant earnings are the amount of earnings at the LEL for the year in which the first contribution condition is satisfied. Earnings which exceed the LEL are disregarded¹.

1 WR Act 07, Sch 1, para 1(3): ESA Regs, reg 7A

Relaxation of the first contribution condition

41032 The first contribution condition is taken to be satisfied¹ if

1. the claimant has paid Class 1 or 2 contributions for any one tax year before the relevant benefit week² **and**
2. the claimant has
 - 2.1 earnings at the LEL in that tax year on which Class 1 contributions have been paid or treated as paid which in total, and disregarding any earnings which exceed the LEL for that year, are not less than the LEL multiplied by 26³ **or**
 - 2.2 earnings factors in that tax year derived from Class 2 contributions multiplied by 26⁴ **and**
3. the claimant
 - 3.1 was entitled to CA in the last complete tax year immediately before the relevant benefit year in which the first day of LCW occurred⁵ **or**
 - 3.2 had been engaged in QRW⁶ for a period of more than 2 years immediately before the first day of LCW and was entitled to the disability element, or the severe disability element, of WTC throughout that period⁷ **or**
 - 3.3 is entitled to be credited with earnings or contributions following release from prison where a conviction is quashed⁸, or would be if an application was made, in respect of any week in any tax year preceding the relevant benefit year⁹ **or**
 - 3.4 is entitled to be credited with earnings equal to LEL on the grounds that they
 - 3.4.a. are a spouse or civil partner of a member of HMF **and**
 - 3.4.b. accompanied that member of HMF on an assignment outside the UK or treated as such by the Secretary of State¹⁰.

1 WR Act 07, Sch 1, Part 1, para 1(4)(b); ESA Regs, reg 8; 2 reg 8(1)(a); 3 reg 8(1)(b)(i); 4 reg 8(1)(b)(ii); 5 reg 8(2)(a); 6 reg 2(1), Tax Credit Act 2002, Part 1; 7 ESA Regs, reg 8(2)(b); 8 SS (Credits) Regs, reg 9D; 9 ESA Regs, reg 8(2)(c); 10 reg 8(2)(ca); SS (Credits) Regs, reg 9E

The second contribution condition

41033 The second contribution condition is satisfied¹ if

1. in the last two complete relevant income tax years before the beginning of the relevant benefit year the claimant has
 - 1.1 paid or been credited with class 1 or class 2 NI contributions **or**
 - 1.2 been credited with earnings **and**
2. the earnings factor in each of those years is not less than 50 times the LEL for those last two complete relevant income tax years.

1 WR Act 07, Sch 1, Part 1, para 2(1)

41034 For the purposes of DMG 41033 **2.** the earnings factor is the aggregate of the claimant's earnings factors derived¹ from

1. the amount of earnings which did not exceed the upper earnings limit for the last two complete relevant income tax years in DMG 41033 **1.** on which class 1 NI contributions have been paid or treated as paid **and**
2. class 2 NI contributions.

Note: See DMG 41037 for guidance on when earnings exceed the UEL.

1 WR Act 07, Sch 1, Part 1, para 2(2)

41035

The first and second contribution condition

41036 Where

1. class 1 NI contributions have been paid or treated as paid in any tax year from 1987/88 **and**
2. the amount paid, plus any class 2 or class 3 NI contributions paid or credited, is not enough to make the year a qualifying year by
 - 2.1 £25.00 or less for the first contribution condition **or**
 - 2.2 £50.00 or less for the second contribution condition

the earnings factor is increased by the amount required to make the year a qualifying year¹.

1 Social Security (Earnings Factor) Regulations 1979, Sch 1, para 4

Earnings exceeding the UEL

41037 For the purposes of DMG 41034 **1.** where class 1 NI contributions have been paid or treated as paid, the earnings factor is calculated on earnings that did not exceed the UEL¹.

1 WR Act 07, Sch 1, Part 1, para 2(3)

Late payment of contributions

41038 The DM determines whether the contribution conditions for ESA(Cont) are satisfied. Contributions paid after the due date are generally treated as paid on the date of payment. However, there are circumstances in which contributions may be accepted as having been paid on an earlier date¹. The DM will need to liaise with HMRC.

1 SS (Conts) Regs, reg 60-65; SS (Crediting etc) Regs, reg 4

41039 If there is an existing decision, the DM may need to consider revising or superseding it. A change of circumstances will occur on the date it is accepted that late contributions are treated as having been paid¹. See DMG Chapter 03 for full guidance on revision and DMG Chapter 04 for full guidance on supersession.

1 SS (Crediting etc) Regs, reg 4-8

41040 - 41044

Condition relating to youth

Introduction

41045 From 1.5.12 no further claims can be made for ESA(Cont) under the youth conditions¹. The guidance at DMG 41046 – 41083 is retained for the purposes of

1. claims made before 1.5.12 which were not decided by that date **and**
2. existing awards.

Note: See DMG 41800 et seq for guidance on where ESA(Cont) entitlement under the youth conditions is limited to a maximum number of days.

1 WR Act 07, s 1(3A)

Conditions of entitlement

41046 The conditions for receiving ESA(Cont) relating to youth, including the age conditions, are set out in DMG 41047. In some circumstances the upper age condition can be extended (see DMG 41050). In some circumstances a claimant who does not satisfy the upper age condition can be entitled to ESA(Cont) because of previous entitlement to ESA(Cont) relating to youth (see DMG 41081).

41047 The conditions of entitlement¹ for ESA(Cont) relating to youth are that

1. the claimant is aged under 20 (or under 25 in the circumstances described in DMG 41050) when the relevant PLCW began (see DMG 41048)
2. the claimant is not receiving FTE (see DMG 41058 et seq)
3. the claimant satisfies the conditions of residence and presence in GB and is not a PSIC² (see DMG Chapter 07)

4. there has been a day in the relevant PLCW which was
 - 4.1 a day on which the claimant was aged at least 16 **and**
 - 4.2 preceded by a period of 196 consecutive days throughout which the claimant had LCW.

1 WR Act 07, Sch 1, Part 1, para 4(1); 2 ESA Regs, reg 11(1)

41048 When considering whether a claimant satisfies the conditions of entitlement at DMG 41047, the DM should note that

1. the relevant PLCW means the PLCW which includes the relevant benefit week¹
2. the effect of DMG 41047 1. is that a claimant who is entitled to ESA(Cont) in a PLCW does not lose entitlement on becoming 20 (or where relevant 25) in the same PLCW
3. although SSP days are not part of a PLCW (see DMG Chapter 42) a claimant may satisfy the relevant age conditions on a day in a period of entitlement to SSP immediately preceding the relevant PLCW which means that any days of entitlement to SSP immediately preceding the relevant PLCW are treated as days of LCW for the purposes of ESA(Cont) for those satisfying the condition relating to youth²
4. for the purposes of DMG 41047 4.
 - 4.1 consecutive days may be made up of days of LCW which form part of a PLCW and days of LCW which do not **and**
 - 4.2 linking provisions cannot be used to meet this condition when days of LCW are not consecutive³
 - 4.3 periods of IfW **cannot** be treated as forming part of a PLCW
5. the definition of PLCW at DMG 41024 7. does not apply. For the purposes of DMG 41047, a PLCW is a period throughout which the claimant has, or is treated as having, LCW⁴.

Note: Where 4.3 applies DMs should consider whether a claim for ESA(Cont) should be treated as a claim for IB (see DMG Chapter 45). Also, the effect of 4.3 is that a claimant receiving IB credits will **not** satisfy DMG 41047 4.2 through receipt of those credits.

1 WR Act 07, Sch 1, Part 1, para 4(2) & 5; 2 ESA Regs, reg 33(1); 3 reg 9(6); 4 reg 2(5)

41049 An example of where DMG 41048 4.1 may apply is where days for which a claimant is not entitled to ESA(Cont) because of a late claim do not form part of a PLCW (see DMG Chapter 42) but may count towards the 196 day condition if there is sufficient evidence of LCW.

Extension of upper age limit to 25

41050 The upper age condition can be extended to 25¹ if a claimant

1. registered on a course of
 - 1.1 F/T advanced or secondary education (see DMG 41056) **or**
 - 1.2 training (see DMG 41057)at least 3 months before the claimant's 20th birthday² **and**
2. attended one or more such courses in the academic term after registration during the period in DMG 41051³.

1 ESA Regs, reg 9(1); 2 reg 9(2)(a); 3 reg 9(2)(b)

41051 For the purposes of DMG 41050 2. the period is one which

1. began on or before a day at least 3 months before the claimant's 20th birthday¹ **and**
2. ended no earlier than the beginning of the last two complete tax years before the relevant benefit year which would have applied if the claimant was entitled to ESA(Cont) because the first and second contribution conditions were satisfied².

1 ESA Regs, reg 9(3)(a); reg 9(3)(b)

41052 When considering DMG 41050 DMs should note that a claimant is attending a course on any day on which the course is interrupted by an illness or domestic emergency¹.

1 ESA Regs, reg 9(4)

41053 - 41055

Full-time advanced or secondary education

41056 When considering whether DMG 41050 1.1 is satisfied, the DM should note that¹

1. "advanced education" means education for the purposes of
 - 1.1 a course in preparation for
 - 1.1.a a degree **or**
 - 1.1.b a diploma of higher education **or**
 - 1.1.c a higher national diploma **or**
 - 1.1.d a higher national diploma of the BTEC or the Scottish Qualifications Authority **or**
 - 1.1.e a teaching qualification **or**
 - 1.2 any other course which is of a standard above

- 1.2.a ordinary national diploma **or**
 - 1.2.b a diploma of the BTEC **or**
 - 1.2.c a higher or advanced higher national certificate of the Scottish Qualifications Authority **or**
 - 1.2.d a general certificate of education (advanced level).
2. "F/T" includes P/T where a claimant's disability prevents attendance at a F/T course
 3. "secondary education" means a course of education below a course of advanced education by attendance at
 - 3.1 an establishment recognized by the Secretary of State as being, or comparable to, a university, college or school **or**
 - 3.2 another establishment where the Secretary of State is satisfied that education is equivalent to that given in an establishment at 3.1.

Note 1: Education for this purpose is **not** the same as its meaning at DMG 41552 et seq.

Note 2: There is no specific requirement as to hours. If there is a doubt as to whether or not a course is F/T evidence should be obtained from the education authorities.

1 ESA Regs, reg 9(5)

Training

- 41057 When considering whether DMG 41050 **1.2** is satisfied the DM should note that "training" means¹
1. training in pursuance of arrangements made under prescribed legislation² **or**
 2. any training received on a course which a person attends for 16 hours or more a week for the primary purpose of being taught occupational or vocational skills.

1 ESA Regs, reg 2(1); 2 E & T Act 73, s 2(1), Enterprise and New Towns (Scotland) Act 1990, s 2(3)

Full-time education condition

- 41058 For the purpose of DMG 41047 **2.** a claimant is treated as receiving FTE for any period during which the claimant
1. is aged 16 or over but under 19 **and**
 2. attends a course of education for 21 hours or more a week¹.

1 ESA Regs, reg 12(1)

41059 In determining the duration of a period of FTE any temporary interruption of that education may be disregarded¹.

1 ESA Regs, reg 12(3)

41060 A claimant who is 19 years of age or over is not treated as receiving FTE¹. This applies whether or not the claimant is undergoing FTE. DMs should note that a claimant is over 19 from and including the 19th birthday.

1 ESA Regs, reg 12(4)

Calculation of hours of attendance

41061 In calculating the number of hours of attendance at a course of education, the DM should take into account time spent in following the particular course, not the time spent at a particular place of education.

41062 The DM should **include** time spent on

1. classroom instruction suitable for people of the same age with no disabilities (see DMG 41066 et seq)
2. supervised study
3. examinations
4. practical work
5. taking part in any exercise, experiment or project which is part of the course.

41063 The DM should **exclude** time spent on

1. any instruction or tuition which is not suitable for claimants of the same age who does not have a disability¹ (see DMG 41066 et seq)
2. unsupervised private study whether
 - 2.1 at home **or**
 - 2.2 on the premises of the educational establishment
3. morning assemblies
4. normal meal and relaxation breaks.

1 ESA Regs, reg 12(2)

41064 - 41065

Instruction or tuition which is “not suitable”

41066 The words “instruction” or “tuition” cover the content as well as the method. Instruction or tuition which is not suitable for ordinary students includes

1. the teaching of special skills required by people with disabilities **and**

2. the methods of teaching, where these would not be suitable for people of the same age who do not have a disability¹.

1 R(S) 2/87

41067 A course of education includes

1. attendance at an ordinary school or college including grammar, comprehensive and 6th form college
2. attendance at a special school or training centre designed specifically for people with disabilities
3. home tuition arranged by the LEA.

41068 People attending special schools may be in FTE. Similarly students attending ordinary schools may not be in FTE.

41069 The DM should consider the circumstances of each claimant to decide whether

1. the course content and method of teaching for each subject is suitable for people without disabilities **and**
2. the course amounts to 21 or more hours a week.

41070 For the purposes of DMG 41069 1. it may be clear that the entire course content is either

1. suitable **or**
2. not suitable

for people with no disabilities of the same age as the claimant. Many claimants may receive a mixture of 1. and 2. The DM should consider each lesson to determine whether the content is or is not suitable for people without disabilities.

41071 Examples of what the DM should exclude when calculating the time spent on the course include

1. activities connected with the student's disability (life skills or independence training)
2. curriculum levels intended for a younger person.

41072 Where

1. people are following the normal subject curriculum for people of that age with no disabilities **and**
2. the time spent is 21 or more hours

there is no entitlement to ESA(Cont) even though the number of subjects undertaken is limited by the disability.

41073 It will be clear in some cases that the method of teaching is not suitable for people of the same age without disabilities, for example

1. a profoundly deaf person using radio links or sign language **or**
2. a blind person using Braille.

41074 In deciding whether the claimant is receiving FTE, the DM should exclude time spent on instruction

1. which is slower **or**
2. where the hours for each subject are far greater than would be necessary for people without disabilities.

41075 - 41080

Over the upper age limit but previously entitled

41081 People who do not satisfy the upper age condition (see DMG 41047 and 41050) may still be entitled to ESA(Cont) if

1. they previously ceased to be entitled to ESA(Cont) as a claimant satisfying the condition relating to youth¹ **and**
2. their previous entitlement was not ended by a determination that they did not have LCW² (apart from a determination under 5.) **and**
3. the linking rules do not apply³ **and**
4. they are aged⁴
 - 4.1 20 or over **or**
 - 4.2 25 or over if DMG 41050 et seq applies **and**
5. their previous entitlement ended with a view to taking up employment or training⁵ **and**
6. their earnings factor from employment or employments pursued between the termination of the previous entitlement and the beginning of the period of LCW was less than 25 times the lower earnings limit in any of the last 3 complete tax years before the relevant benefit year⁶ **and**
7. they
 - 7.1 in the last two complete tax years before the relevant benefit year had
 - 7.1.a paid **or**
 - 7.1.b been credited with earnings equivalent to 50 times the lower earnings limit in each of those years and, in the last tax year, at least one credit was in respect of the disability element or severe disability element of WTC **or**
 - 7.2 make a claim for ESA within a period of 12 weeks after the day the employment in 6. ended⁷.

Note 1: “Training” has the same meaning as in DMG 41057.

Note 2: See DMG 41111 et seq for guidance on linking rules.

*1 ESA Regs, reg 10(1)(a); 2 reg 10(1)(b); 3 reg 10(1)(c); 4 reg 10(1)(d); 5 reg 10(2)(a);
6 reg 10(2)(b); 7 reg 10(2)(c)*

ESA(Cont) for claimant satisfying the condition relating to youth and overlapping benefits

41082 For the purpose of overlapping benefits ESA(Cont) is a contributory benefit. This applies even though ESA(Cont) for those satisfying the condition relating to youth is not based on contribution conditions. For the purpose of overlapping benefits contributory benefits are those benefits prescribed in legislation¹.

1 SS (OB) Regs, reg 2(1); SS CB Act 92, Part II

ESA(Cont) for claimant satisfying the condition relating to youth and CHB

41083 A claimant is not entitled to CHB for any week in which that claimant is entitled to ESA(Cont) under the provisions for people incapacitated in youth¹.

Note: See DMG Chapter 09 if an offset is appropriate.

1 CHB (Gen) Regs, reg 8(2)

Members of Her Majesty’s Forces

41084 Members of HMF¹ are not entitled to ESA(Cont) unless they are² members of

1. any prescribed territorial or reserve force³ not undergoing training or instruction continuously for longer than 72 hours **or**
2. the Royal Irish Regiment who are **not** also serving as members of any regular naval, military or air forces
 - 2.1 on the F/T permanent staff **or**
 - 2.2 serving or undergoing training or instruction continuously for longer than 72 hours.

Note: See DMG 41106 et seq for the meaning of member of HMF.

1 ESA Regs, reg 2(1); 2 SS (Conts) Regs, Sch 6; 3 Social Security (Benefit) (Members of Forces) Regs 1975, reg 2

41085 - 41090

Additional conditions for ESA(IR)

41091 In addition to the basic conditions (see DMG 41012), to be entitled to ESA(IR)¹ a claimant must

1. have no income, or an income which does not exceed the applicable amount **and**
2. not have capital, or a prescribed part of capital, which exceeds the prescribed amount **and**
3. not be entitled to SPC **and**
4. not have a partner who is entitled to
 - 4.1 ESA(IR) **or**
 - 4.2 SPC **or**
 - 4.3 IS **or**
 - 4.4 JSA(IB) **and**
5. not be in remunerative work (see DMG 41271 et seq) **and**
6. not have a partner who is in remunerative work (see DMG 41301 et seq) **and**
7. not be receiving education (see DMG 41552 et seq).

Note 1: See DMG Chapter 44 for guidance on the effect on entitlement to ESA where the claimant is entitled to SSP.

Note 2: See DMG Chapter 44 for guidance on the applicable amount, DMG Chapters 48, 49, 50 and 51 for guidance on income and DMG Chapter 52 for guidance on capital.

1 WR Act 07, s 1(2)(b) & Sch 1, Part 2, para 6(1)

41092 - 41100

Waiting days

No entitlement to ESA

41101 A claimant is not entitled to ESA for the first seven days of a PLCW¹. These seven days are called waiting days.

1 WR Act 07, Sch 2, para 2; ESA Regs, reg 144(1)

41102 However, claimants do not have to serve waiting days where DMG 41103 et seq applies or there is a linking PLCW (see DMG 41111 et seq).

Note: See DMG Chapter 42 for guidance on people undergoing certain regular treatment and the effect on waiting days.

Claimants who do not have to serve waiting days

- 41103 Claimants do not have to serve waiting days¹ if
1. their entitlement to ESA begins within twelve weeks of the end of their entitlement to
 - 1.1 IS **or**
 - 1.2 SPC **or**
 - 1.3 JSA **or**
 - 1.4 CA **or**
 - 1.5 SSP **or**
 - 1.6 MA **or**
 - 1.7 IB **or**
 - 1.8 SDA **or**
 2. they are terminally ill² (see DMG 41105) and have made
 - 2.1 a claim expressly for that reason **or**
 - 2.2 an application for supersession³ or revision⁴ which contains a statement that they are terminally ill **or**
 3. they have been discharged from being a member of HMF (see DMG 41106 et seq) and three or more days immediately before that discharge were days of sickness from duty which were recorded by the Secretary of State for Defence⁵ **or**
 4. they claim ESA **and**
 - 4.1 are a member of a couple **and**
 - 4.2 their partner is entitled to ESA(IR) and has served seven waiting days on that award **and**
 - 4.3 the DM considers that the claimant is entitled to ESA(IR) **and**
 - 4.4 their partner's award ends on the date the new claim is made or treated as made⁶ **or**
 5. they claim ESA **and**
 - 5.1 an award cannot be made because the claimant or their partner has an existing award of ESA, IS or JSA⁷ **and**

- 5.2 the DM ends that award by supersession on the day immediately before the date the award on the new claim takes effect⁸
- 6. they are awarded ESA(Cont) after
 - 6.1 entitlement has previously terminated because it exceeded the maximum number of days **and**
 - 6.2 their health condition has deteriorated⁹ (see DMG 41856).

1 ESA Regs, reg 144(2)(a); SS CS (D&A) Regs, reg 14A(5); 2 ESA Regs, reg 144(2)(b); 3 SS CS (D&A) Regs, reg 6; 4 reg 3; 5 ESA Regs, reg 144(2)(c); 6 reg 144(2)(d); SS (C&P) Regs, reg 4I(2); 7 SS CS (D&A) Regs, reg 14A(1); 8 reg 14A(2) & (3); 9 ESA Regs, reg 144(2)(e)

Example 1

Dolores was entitled to IS until Sunday 26.10.08. She then claims and satisfies the main conditions to be entitled to ESA from and including Monday 19.1.09. Dolores has to serve three waiting days and is not entitled to ESA on Monday 19.1.09, Tuesday 20.1.09 and Wednesday 21.1.09. To be within twelve weeks of her entitlement to IS coming to an end, Dolores would have had to have claimed ESA and satisfied the main entitlement conditions on Sunday 18.1.09.

Example 2

Fred is entitled to ESA(IR) for himself and his wife Jo. She is expecting their first child, and her GP tells her that she has serious pregnancy complications and should bed rest. Jo claims ESA, and the DM awards her ESA(IR) after ending Fred's entitlement from the date of her claim. Jo is treated as having LCWRA, and does not have to serve waiting days before her ESA award begins.

- 41104 DMs should note that entitlement to ESA can exist even though nothing is payable. An example of when this may happen is where people are entitled to ESA(Cont) only but they have a pension payment that exceeds the allowable limit so no ESA(Cont) is payable.

Meaning of terminally ill

- 41105 For the purposes of DMG 41103 2. people are terminally ill¹ if
- 1. they are suffering from a progressive disease **and**
 - 2. their death in consequence of that disease can reasonably be expected within six months.

1 ESA Regs, reg 2(1)

Meaning of member of HMF

- 41106 A member of HMF¹ is a person
- 1. over 16 years old **and**

2. who gives full-pay service (see DMG 41109) as a member of certain named establishments or organizations² (see DMG 41107).

1 ESA Regs, reg 2(1); 2 Sch 1, Part 1

41107 For the purposes of DMG 41106 **2.** a member of certain named establishments or organizations means¹ any member of the

1. regular naval, military or air forces of the Crown
2. Royal Fleet Reserve
3. Royal Naval Reserve
4. Royal Marines Reserve
5. Army Reserve
6. Territorial Army
7. Royal Air Force Reserve
8. Royal Auxiliary Air Force
9. Royal Irish Regiment.

1 ESA Regs, Sch 1, Part 1

41108 However, a person who is

1. recruited locally overseas in certain circumstances¹ **or**
2. a deserter² **or**
3. a person to whom DMG 41084 **1.** or **2.** applies³

is not a member of HMF.

1 ESA Regs, Sch 1, Part 2; 2 reg 2(1); 3 Social Security (Benefit) (Members of Forces) Regs 1975, reg 2

Meaning of full-pay service

41109 A member of the armed forces is giving full-pay service if normal salary continues to be paid from

1. a civilian employer **or**
2. one of the branches of the armed forces.

41110 A person on unpaid leave or less than normal salary is not giving full-pay service.

Linking PLCW

41111 Claimants do not have to serve waiting days if there is a linking PLCW. There is a linking PLCW when a PLCW is separated from another such period by not more than 12 weeks¹.

1 ESA Regs, reg 145(1)

41112 - 41120

Effect of work - claimant

Introduction

41121 This part gives guidance on entitlement to ESA when a claimant works. Guidance on entitlement to ESA(IR) when a claimant's partner works is at DMG 41301 et seq. What the DM has to consider depends on whether the claimant is entitled to

1. ESA(Cont) or
2. ESA(IR).

The general rule

41122 Unless DMG 41141 et seq applies, a claimant is treated as not entitled to ESA in any week in which they work¹ (the "general rule") .

1 ESA Regs, reg 40(1)

Remunerative work exclusion

41123 In addition, a claimant who works is not entitled to ESA(IR) if the remunerative work exclusion applies¹ (see DMG 41272 et seq). A claimant who is in remunerative work will usually be in work under the general rule, and therefore not entitled to ESA(IR) because of the general rule. Where the general rule applies, the DM need not consider the remunerative work exclusion.

1 WR Act 07, Sch 1, Part 2, para 6(1)(e)

Example

Moira is entitled to ESA(IR). She starts work in a shop. She works 20 hours a week and earns more than £20. The DM decides that Moira's work is not PWK and does not come within any of the other exceptions to the general rule (see DMG 41141 et seq). The DM therefore decides that the general rule applies and Moira is treated as not entitled to ESA(IR) for the weeks she works in the shop.

41124 DMs should note that a claimant may not be working under the general rule, but may still be treated as not entitled to ESA(IR) because of the remunerative work exclusion, for example where they are treated as being in remunerative work. See DMG 41276 for further guidance.

41125 - 41130

Definitions

Meaning of Week

41131 Week, for the purposes of a claimant who works, is a week in respect of which a claimant is entitled to ESA¹.

Note: DMs should not confuse this definition with the general definition of week².

1 ESA Regs, reg 40(7); 2 reg 2(1)

Meaning of work

41132 Work is any work which a claimant does, whether or not it is undertaken in expectation of payment¹.

Note: DMs should not confuse this definition with the definition of remunerative work (see DMG 41271 et seq).

1 ESA Regs, reg 40(7)

Meaning of work as a councillor

41133 Work as a councillor includes work as a member of specified bodies¹ of which a claimant is a member by reason of being a councillor² (see DMG 41153).

1 Local Authority Act 72, s 177(1); Local Government (Scotland) Act 73, s 49(1) & (1A); 2 ESA Regs, reg 40(7)

Meaning of relative

41134 A relative is a close relative, grand-parent, grand-child, uncle, aunt, nephew or niece¹.

1 ESA Regs, reg 2(1)

Meaning of close relative

41135 A close relative is¹

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 partnerships².

1 ESA Regs, reg 2(1); 2 CP Act 04, s 246

41136 “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 relationship¹.

1 R(SB) 22/87

41137 - 41140

Exceptions to the general rule

41141 DMG 41122 gives guidance on the general rule that a claimant is treated as not entitled to ESA in any week in which they work¹.

1 ESA Regs, reg 40(1)

41142 However, there are exceptions to the general rule. These exceptions are claimants who

1. do certain categories of work¹ (see DMG 41151 et seq)
2. are receiving certain regular treatment² (see DMG 41176 - 41177)
3. do work in the first or last week of LCW³ (see DMG 41178 - 41180).

1 ESA Regs, reg 40(2); 2 reg 40(3); 3 reg 40(4)

41143 A claimant who is treated as not entitled to ESA in any week in which they work may be treated as not having LCW¹ (see DMG Chapter 42). DMs should note that this does not apply where the claimant remains entitled to ESA(Cont), but is treated as being in remunerative work for ESA(IR)².

1 ESA Regs, reg 44(1); 2 reg 44(2)

Work

41144 Work¹ has the meaning in DMG 41132. It is not employment and there does not have to be a legal contractual relationship.

1 ESA Regs, reg 40(7)

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.

41145 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.

41146 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 duties¹. When deciding if work is “de minimis”, the DM should consider the relevant case law.

1 R(S) 2/61

41147 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 negligible¹.

*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

41148 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.

41149 - 41150

Claimants who do certain categories of work

41151 The general rule in DMG 41122 does not apply to a claimant who

1. works as a councillor¹ **or**
2. undertakes duties on not more than one full day or two half-days a week as²
 - 2.1 a member of the DLA Advisory Board **or**
 - 2.2 a member of the FtT who is eligible for appointment under specified legislation³ **or**
3. undertakes domestic tasks in their own home or takes care of a relative⁴ **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 so⁵ **or**
5. undertakes any activity during an emergency to
 - 5.1 protect another person **or**
 - 5.2 prevent serious damage to property or livestock⁶ **or**
6. does work which is exempt work⁷ (see DMG 41186 et seq).

1 ESA Regs, reg 40(2)(a); 2 reg 40(2)(b);

3 The Qualifications for Appointment of Members to the First-tier Tribunal and Upper Tribunal Order 2008;

4 ESA Regs, reg 40(2)(c); 5 reg 40(2)(d) & Sch 8, para 28 & 29; 6 reg 40(2)(e); 7 reg 40(2)(f) & reg 45

Work as a councillor

41152 Work as a councillor has the meaning¹ in DMG 41133.

1 ESA Regs, reg 40(7)

41153 A councillor¹ 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 district council **or**
 - 1.4 a parish or community council **or**
 - 1.5 the Common Council of the City of London **or**
 - 1.6 the Council of the Isles of Scilly **or**
2. in Scotland a member of a council for a local government area².

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

41154 Guidance on the effect of councillors' allowances for

1. ESA(Cont) is in DMG Chapter 44 **and**
2. ESA(IR) is in DMG Chapter 49.

Member of the DLA advisory board or member of the FtT

41155 A claimant who is

1. a member of the DLA Advisory Board **or**
2. a member of the FtT who is eligible for appointment under specified legislation¹ (see DMG Chapter 06 for further guidance)

will be exempt from the general rule only when they undertake duties on not more than one full day or two half-days a week². 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, reg 40(2)(b)

Domestic tasks and care of a relative

41156 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.

41157 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 students¹ 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

41158 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.

41159 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.

41160 - 41165

Caring for another person

41166 Caring for other people's children or adults comes within the definition of work¹ (see DMG 41132). However, claimants undertaking such caring are exempt from the general rule in DMG 41122².

1 ESA Regs, reg 40(7); 2 reg 40(2)(d)

41167 The types of work will include adult placement schemes and foster parenting. Looking after a child or children other than relatives will include 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.

41168 Placement of difficult, mentally ill or sick children, or children with a learning difficulty will attract 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

41169 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 livestock¹.

1 ESA Regs, reg 40(e)

41170 - 41175

Claimants receiving certain regular treatment

41176 The general rule does not apply to claimants who have entitlement to ESA(Cont) and receive certain regular treatment¹. However, unless DMG 41151 et seq applies, the general rule will apply to claimants who have entitlement to ESA(IR) and receive certain regular treatment.

Note: See DMG Chapter 42 for guidance on certain regular treatment.

1 ESA Regs, reg 40(3); reg 46

41177 Therefore claimants who have entitlement to ESA(Cont) and ESA(IR) may remain entitled to ESA(Cont) but lose their entitlement to ESA(IR) while they receive certain regular treatment (see DMG Chapter 42).

Work in the first or last week of LCW

41178 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 period¹ **or**
2. the last week in which the claimant
 - 2.1 has LCW **or**
 - 2.2 is treated as having LCW²

is treated as not entitled to ESA only on the actual day or days in that week on which the claimant works³.

Note: See DMG Chapter 42 for guidance on the meaning of a benefit, allowance or advantage.

1 ESA Regs, reg 40(4)(a); 2 reg 40(4)(b); 3 reg 40(4)

Example

Cassandra has been 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

41179 When considering DMG 41178, DMs should note that the linking rule (see DMG 41111) does not apply for the purposes of deciding the beginning or end of any period of LCW¹.

1 ESA Regs, reg 40(5)

Night shift workers

41180 When DMG 41178 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 workers¹ (see DMG Chapter 42).

1 ESA Regs, reg 40(6); reg 28

41181 - 41185

Exempt work

Categories of exempt work

41186 The general rule (see DMG 41122) does not apply to claimants who do exempt work. The categories of exempt work are

1. PWK¹ (see DMG 41187 et seq)
2. work done whilst test trading as a S/E earner² (see DMG 41256)
3. voluntary work³ (see DMG 41257 - 41259)
4. work done in a work placement⁴ (see DMG 41260 - 41262).

1 ESA Regs, reg 45(2)-(4); 2 reg 45(5); 3 reg 45(6); 4 reg 45(7)

Permitted Work

41187 There are four 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.

41188 The four types of PWK are

1. PWLL¹ (see DMG 41196)
2. SPW² (see DMG 41197)
3. PWHL³ (see DMG 41211)
4. PWK (LCWRA)⁴ (see DMG 41212).

1 ESA Regs, reg 45(2); 2 reg 45(3); 3 reg 45(4)(a); 4 reg 45(4)(b)

Calculation of weekly earnings

41189 Weekly earnings limits apply in PWK¹. The DM should calculate a claimant's earnings under some of the normal rules for calculating earnings for ESA(IR) purposes² (see DMG Chapters 48 and 49). This applies even if the DM is considering entitlement to ESA(Cont) only.

1 ESA Regs, reg 45(2)-(4); 2 reg 88, reg 91(2), reg 92-99, reg 108(3) & (4) & Sch 7

41190 Where the weekly earnings limit is 16 x NMW, this means the highest rate of NMW as specified in legislation¹ (see Appendix 5). 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 £1².

1 The National Minimum Wage Regulations 1999, reg 11; 2 ESA Regs, reg 45(9A)

Example

Meryl starts work on 9.5.11 for 15 hours weekly. The NMW is $16 \times \text{£}5.93 = \text{£}94.88$. As this includes an amount which is more than 50p and less than £1, it is rounded up to £95.00. The DM uses this amount to consider whether Meryl's work is exempt work.

41191 - 41195

Permitted work lower limit

41196 Claimants can work as long as their earnings in any week are no more than £20¹ without the general rule in DMG 41122 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. The DM should consider whether the claimant meets the requirement for a different type of PWK.

Note: See DMG 41189 – 41190 for guidance on calculation of weekly earnings.

1 ESA Regs, reg 45(2)

Supported permitted work

41197 Claimants can do SPW¹ as long as their earnings in any week are no more than 16 x NMW without the general rule in DMG 41122 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, reg 45(3)

41198 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.

41199 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-patientof a hospital or similar institution¹ (see DMG 54018) **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 disabilities².

1 ESA Regs, reg 45(3)(a); 2 reg 45(3)(b)

41200 A voluntary organization¹ is one that carries out activities otherwise than for profit. It does not include public or local authorities.

1 ESA Regs, reg 2(1)

Community Interest Companies

41201 A CIC, as established under relevant legislation¹, 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.

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

41202 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.

41203 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 on 30.03.09. 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.

41204 - 41210

Permitted work higher limit

41211 [\[See DMG Memo 7/17\]](#) Specified work¹, commonly known as PWHL, is work done for less than 16 hours, or an average of less than 16 hours (see DMG 41213 et seq) in any week, for which the earnings do not exceed 16 x NMW. It can only be done for a limited period, known as the PWP, and certain conditions must be satisfied before another PWP can start² (see DMG 41251 et seq).

1 ESA Regs, reg 45(10); 2 reg 45(4)(a)

Permitted work (LCWRA)

41212 Claimants who have or are treated as having LCWRA can work for an indefinite period if they

1. work for less than 16 hours, or an average of less than 16 hours (see DMG 41213 et seq), in a week **and**
2. earn no more than 16 x NMW a week¹.

1 ESA Regs, reg 45(4)(b)

Calculating the hours for permitted work higher limit and permitted work (LCWRA)

41213 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 week¹.

1 ESA Regs, reg 45(8)(a)

41214 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 sickness¹.

1 ESA Regs, reg 45(8)(b)(i)

41215 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 made¹.

1 ESA Regs, reg 45(8)(b)(ii)

41216 DMs should consider the guidance at DMG 41346 - 41434 in order to decide

1. which hours count towards the weekly total **and**
2. how to identify a recognizable cycle **and**
3. how to calculate the hours if a
 - 3.1 recognizable cycle is established **or**
 - 3.2 recognizable cycle is not established.

41217 - 41250

Permitted work period

41251 [\[See DMG Memo 7/17\]](#) Where DMG 41211 applies, the first day of a PWP is calculated from the first day of a period of specified work provided that

1. the person has not previously done specified work **or**
2. since the beginning of the last period of specified work, the person has ceased to be entitled to a relevant benefit for a continuous period exceeding 12 weeks **or**
3. not less than 52 weeks have elapsed since the last period of specified work¹.

Note : A relevant benefit is ESA or credits².

1 ESA Regs, reg 45(4)(a); 2 reg 45(10)

41252 For the purposes of the PWP, a period of specified work begins on the first day on which any specified work is undertaken and continues for a period of 52 weeks, whether or not any further specified work is undertaken during that period¹.

1 ESA Regs, reg 45(4A)

Example 1

John is in receipt of ESA. On 20.8.09 he starts working for 10 hours a week with earnings of £60.00 a week. This is specified work. John has not previously done any PWK. Therefore his PWP runs from 20.8.09 to 18.8.10. John last works on 20.11.09 but his PWP continues until 18.8.10 even if no further work is done.

Example 2

Susan claims ESA from 3.11.08. On her claim form she reports that she has been working for the last five years and continues to work. She earns £40 for five hours work on Thursday each week. This work is specified work. The 52 week period starts on Thursday 6.11.08 and runs until 4.11.09 regardless of whether the work continues.

- 41253 Claimants who have previously done specified work will have to satisfy certain conditions before they can have a further period of specified work (see DMG 41252).

Example 1

David was in receipt of ESA and doing PWHL that started on 10.11.08. From 24.11.08 his hours and earnings increase and his work is no longer exempt. He did not fall within any of the exceptions to the general rule (see DMG 41141 et seq). Therefore he is no longer entitled to ESA.

At the end of February 2009 his hours and earnings drop to within the limits for PWHL and he reclaims ESA on 9.3.09. The previous PWHL from 10.11.08 was specified work. Because he has had a break of more than twelve weeks during which he was not entitled to a relevant benefit he starts a new PWP from 9.3.09 (he works on Monday 9.3.09) and the work he is doing is PWHL.

Example 2

Diane is in receipt of ESA. On 31.8.10 she starts work of five hours a week earning £30. She last did work which is PWHL from 5.1.09 to 30.10.09 and has not had a break in her entitlement to ESA. Her work is not PWHL because 52 weeks have not elapsed since the end of her last PWP.

Example 3

Catherine is entitled to ESA, and started PWHL on 10.3.11. Her entitlement to ESA ends on 18.5.11 after she is found not to have LCW following application of the WCA. Her condition deteriorates, and she makes a further claim to ESA from 2.8.11. She is still doing the same work as in the previous PLCW, which links to the current PLCW. The DM determines that this is PWHL, and that as there has not been a break in entitlement of more than 12 weeks since the last period of specified work began, the PWP will end on 7.3.12.

41254 - 41255

Self-employed test trading

41256 Work done whilst receiving help to become a S/E earner is exempt work¹ as long as the programme or arrangement the claimant is on is set up under certain legislation².

1 ESA Regs, reg 45(5); 2 E & T Act 1973 s 2; Enterprise & New Towns (Scotland) Act 1990, s 2

Voluntary work

41257 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 work¹.

1 ESA Regs, reg 45(6)

41258 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 DMG 41134) and the only payment

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

is expenses reasonably incurred in connection with the work¹.

1 ESA Regs, reg 45(10); reg 43(4)

Magistrates

41259 Magistrates who only receive expenses should be considered as volunteers.

Work placement

41260 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 work¹.

1 ESA Regs, reg 45(7)

41261 A work placement is practical work experience with an employer, which is neither paid nor undertaken in expectation of payment¹.

1 ESA Regs, reg 45(10)

41262 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 process¹ (see DMG Chapter 42).

1 ESA Regs, reg 21

41263 - 41270

Remunerative work

ESA(Cont)

41271 Remunerative work does not affect ESA(Cont). If a person claiming ESA(Cont) is working¹, the DM should consider DMG 41141 et seq.

1 ESA Regs, reg 40(1)

ESA(IR)

41272 Remunerative work¹ for ESA(IR) purposes is any work which a claimant does for which payment is made or in expectation of payment other than²

1. work as a councillor³ **or**
2. duties undertaken on not more than one full day or two half-days a week as⁴
 - 2.1 a member of the DLA Advisory Board **or**
 - 2.2 a member of the FtT who is eligible for appointment under specified legislation⁵ **or**
3. domestic tasks carried out in the claimant's own home or the care of a relative⁶ **or**
4. where the claimant 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 so⁷ **or**
5. any activity done during an emergency solely to
 - 5.1 protect another person **or**
 - 5.2 prevent serious damage to property or livestock⁸ **or**
6. any of the categories of exempt work⁹.

Note 1: See DMG 41152 et seq for full guidance on **1. - 6.**

Note 2: Work as a councillor has the same meanings as at DMG 41133.

*1 WR Act 07, Sch 1, Part 1, paras 6(1)(e), ESA Regs, reg 41; 2 reg 40(2); 3 reg 40(2)(a); 4 reg 40(2)(b);
5 The Qualifications for Appointment of Members to the First-tier Tribunal and Upper Tribunal Order 2008;
6 ESA Regs, reg 40(2)(c); 7 reg 40(2)(d) & Sch 8, para 28 & 29; 8 reg 40(2)(e); 9 reg 40(2)(f) & reg 45*

41273 However, where a claimant who is entitled to ESA(IR) does some work, the DM should follow the guidance at DMG 41123 - 41124. The DM should consider whether the general rule applies before considering the remunerative work exclusion. If the general rule does apply, the DM should decide that a claimant is treated as not entitled to ESA(IR) because they are working, and need not consider the remunerative work exclusion.

Work done for payment or in expectation of payment

41274 Whether or not a claimant is in remunerative work is a question of fact rather than legal interpretation. The DM should look at all the relevant facts in each case. Regard work as remunerative if

1. payment is made for it **or**
2. it is done in expectation of payment¹.

Remunerative does not mean profitable.

1 ESA Regs, reg 41; R(IS) 1/93

41275 DMs should consider the guidance at DMG 41327 - 41334 to decide whether work is done for payment or in expectation of payment.

Payment to a claimant on termination or interruption of employment

41276 A claimant is not entitled to ESA(IR) if they were, or were treated as being, engaged in remunerative work. The period of the exclusion is the period over which certain payments, paid on termination of that employment, fall to be taken into account¹ (see DMG Chapter 48). Some payments are disregarded² (see DMG Chapter 49).

1 ESA Regs, reg 41(2); 2 reg 41(3) & Sch 7, para 1

41277 - 41300

Effect of work - partner

Introduction

41301 This part gives guidance on entitlement to ESA(IR) when a claimant's partner works. Guidance on entitlement to ESA when a claimant works is at DMG 41121 et seq.

41302 A claimant's entitlement to ESA(IR) is affected if they have a partner who is in remunerative work¹. If a claimant's partner is working but is not in remunerative work, the DM should calculate the amount of earnings, if any, to be taken into account (see DMG Chapters 49 and 50 for guidance on how to calculate the amount of a partner's earnings).

Note: Entitlement to ESA(Cont) is not affected by a claimant's partner being in remunerative work.

1 WR Act 07, Sch 1, Part 2, para 6(1)(f)

41303 Before DMs apply the law to establish how many hours a claimant's partner is working, they must decide whether or not the work is continuing.

41304 - 41305

Do claimants' partners have employment

41306 DMs should decide that claimants' partners are not in remunerative work if they do not have any employment and are between jobs. DMs will need to decide whether employment has ended if someone has been engaged in remunerative work (see DMG Chapter 49).

41307 DMs should decide that a claimant's partner is still in employment and not between jobs if

1. the contract of employment (which can be written or verbal) is still current **or**
2. the contract of employment ends at the beginning of what would be a period of absence even if the contract continued (e.g. a school holiday) and it is expected that the person will return to employment after that period because
 - 2.1 there is an express agreement (written or verbal) **or**
 - 2.2 it is reasonable to assume that a long standing practice of re-employment will continue.

41308 Off-shore workers are an example of those workers who may be employed on an ad-hoc basis. They may be contracted by companies to perform work for a specific

period with no obligations on either party to provide work or to accept offers of work.

Example

Dennis works for an oil company as a welder on oil rigs. He does not have a recognizable pattern of work as the company request his services on an irregular basis and he is not guaranteed a specific amount of work in any period. Dennis's partner Maureen claims ESA. When she makes that claim Dennis is not working but intends to work for the company again. On looking at the facts of Dennis's past work for the company, the DM is satisfied that there has been a continuing provision of employment that has been accepted by Dennis, and that it averages 24 hours or more a week. The DM decides that there is a continuing relationship and that Dennis continues to be in remunerative work during periods when he is not physically working.

41309 It is a question of fact for the DM whether the work is continuing or not. DMs will need to consider such things as

1. the type and nature of the work
2. the frequency and length of the contracts/periods of work
3. the process of securing the work
4. the employment situation/opportunities in the area
5. whether there is a continuing relationship between the claimant and the employer
6. whether there is evidence of the relationship between the claimant and the employer having ended, e.g. the production of a P45.

This list is not prescriptive or exhaustive and other considerations may be equally valid in the circumstances of each case.

41310 DMs should also look at whether there is a mutual expectation between the person and the employer that they will resume after a period of no work. This mutual expectation should be more than just a hope of re-employment.

Example

Carol has worked as a housekeeper at a holiday village in an east coast seaside resort for the past three summer seasons (April to October). The village closes down between November and March so no work is available. There are very limited employment opportunities in the area in the winter months. In November Carol's civil partner Ivy makes a claim for ESA. The DM establishes that Carol has to put in her application for the housekeeper post every February along with other candidates. While she is hopeful of securing further work for the following season she has no guarantee from the employer that she will be successful. The DM decides that as there is no mutual expectation of the work resuming then Carol does not have employment in the "off" season and therefore she is not in remunerative work.

41311 - 41315

Meaning of remunerative work

41316 Remunerative work for a claimant's partner¹ is work for which payment is made, or which is done in expectation of payment and in which the claimant's partner is engaged for not less than

1. 24 hours a week **or**
2. 24 hours a week on average where the hours of work fluctuate.

1 WR Act 07, Sch 1, Part 1, paras 6(1)(f); ESA Regs, reg 42(1)

Claimant's partner treated as in or not in remunerative work

41317 If a claimant's partner is engaged in remunerative work it does not necessarily mean that the claimant is excluded from ESA(IR). In certain circumstances a claimant's partner who is **actually** in remunerative work may be **treated as not** being in remunerative work¹ (see DMG 41471 et seq).

1 ESA Regs, reg 43

41318 Also, there are circumstances in which a claimant's partner who is **not actually** in remunerative work may be **treated** as engaged in remunerative work¹ (see DMG 41441 et seq).

1 ESA Regs, reg 42(3)-(6)

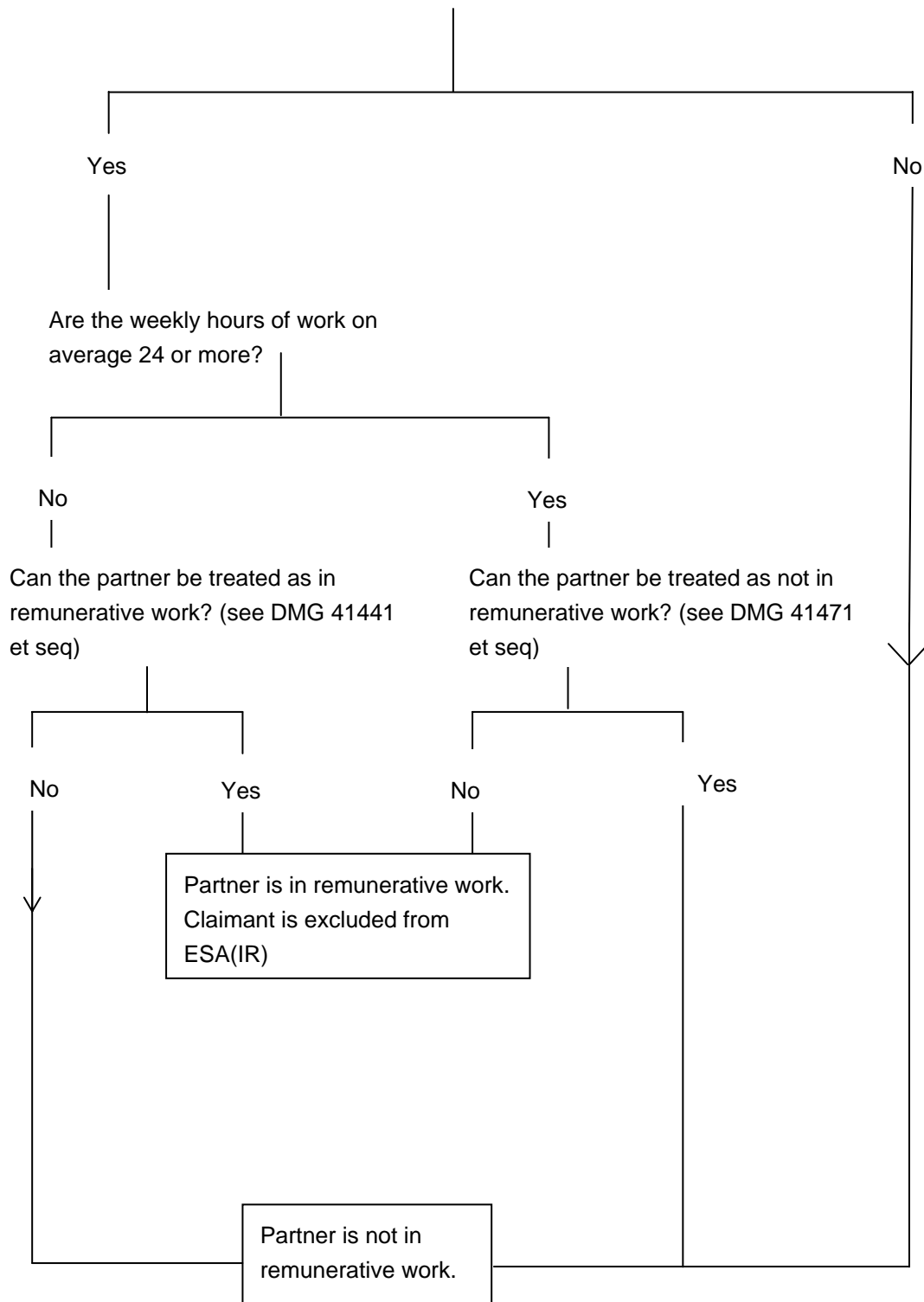
41319 The flow chart on the following page shows the link between a claimant's partner being

1. engaged in remunerative work **and**
2. treated or not treated as being engaged in remunerative work.

41320 - 41325

Remunerative work exclusion – claimant’s partner

Is work done for payment or in expectation of payment? (see DMG 41326 et seq)



Work done for payment or in expectation of payment

Introduction

41326 Whether or not a claimant's partner is in remunerative work is a question of fact rather than legal interpretation. The DM should look at all the relevant facts in each case. Regard work as remunerative if

1. payment is made for it **or**
2. it is done in expectation of payment¹.

Remunerative does not mean profitable (see DMG 41330).

1 ESA Regs, reg 42(1); R(IS) 1/93

Work for no monetary reward

41327 A claimant's partner cannot be in remunerative work if the work done is neither paid nor done in expectation of payment. If the only "payment" is notional earnings¹ the work cannot be treated as remunerative.

1 ESA Regs, reg 108(3)

Payment in kind

41328 "Payment" includes payment in kind provided it is made in return for work done. It does not matter that the definition of earnings excludes any payment in kind.

Expectation of payment

41329 Work "done in expectation of payment" means more than a mere hope that payment will be made at a future date¹. There should be a realistic expectation of payment. An established author writing a book in his field has a realistic expectation of payment. A person who is not an established author and has no agreement for publication does not have a realistic expectation of payment.

1 R(IS) 1/93

Self-employed earners

- 41330 A claimant's partner providing a service for payment for not less than 24 hours a week on average is engaged in remunerative work regardless of profit or loss. There can be an expectation of payment derived from profit but it must be a realistic expectation of payment for work being done at the time. The DM need not make detailed forecasts of profitability. Where a claimant's partner is involved in a commercial activity it is likely that this is remunerative work if it is for not less than 24 hours a week on average. It is for the claimant to show that their partner is working for nothing and explain why¹.

1 R(IS) 22/95

Sale of goods

- 41331 Payment received from the sale of goods is not necessarily payment for work. Payment is made for the goods not for the work of the salesman. But where a person is paid commission on sales, the commission itself is payment for work.

Note: Also that payment may be derived from takings.

Business start up

- 41332 An allowance payable under certain schemes to assist people to become S/E is not payment for work¹.

Note: The former name of business start up scheme no longer applies generally and schemes are likely to have local names.

1 R(IS) 21/95

- 41333 Drawings from any business to meet living expenses, in cash or in kind, will be payment for work except where the drawings are from business capital.

Example

Annie is claiming ESA. She and her civil partner Rosie run a grocery shop at a loss. The business is for sale. They are living on the stock and money taken from the till. If that money was banked it would merely reduce the business overdraft. The couple are living off the capital of the business and are therefore not working for payment or in expectation of payment.

Company directors

41334 A director of a limited company is an office holder and will usually be an employee of the company. The current or future receipts of the business are not payment to the director¹. A director can own or be a shareholder in the company and receive payment or have a realistic expectation of payment in that capacity. It is possible for an office-holding director to also have a contract for service with the company and thus be a S/E earner. In such cases DMG 41330 applies.

1 R(IS) 5/95

41335 - 41340

Establishing hours of work for a claimant's partner

Introduction

41341 DMs should establish the weekly total of hours worked. Normally, only hours for which payment is made or expected count for remunerative work purposes. These are not necessarily the same as hours of attendance. For example, if a claimant's partner works additional hours without pay and without expectation of payment the extra hours would not count, although the question of notional earnings¹ would arise. See DMG 41357 et seq for guidance on teachers.

1 ESA Regs, reg 108(3)

41342 Hours worked as a carer or in certain specified occupations do not count for remunerative work purposes (see DMG 41343 et seq).

Carers and specified occupations

41343 DMs should take no account of the hours worked by a claimant's partner falling within DMG 41471 1. to 8. or DMG 41472 1. to 4.¹. However, hours worked in any other occupation by a claimant's partner who satisfies DMG 41471 1. to 8. should be taken into account in the normal way.

1 ESA Regs, reg 42(6)

Example 1

Margery's partner Henry claims ESA(IR). Margery minds children in her home from Monday to Friday, 8am to 1pm. She also works in the evenings in a supermarket from 7pm to 10pm, 5 nights a week. The hours she spends childminding do not count for remunerative work purposes. Margery's total hours of work are 15 a week in the supermarket. She is not in remunerative work.

Example 2

Trevor is required at home to care for his disabled civil partner who gets AA and ESA(IR). He also works 25 hours a week as a barman. Because he is a carer he is treated as not engaged in remunerative work and none of the hours count, not even those spent in bar work.

41344 - 41345

Counting the hours

Flexible working schemes

- 41346 Most people in paid employment are required to work, and are paid for, the same number of hours each week. Flexible working hours does not affect this.

Overtime

- 41347 Overtime for which payment is made or expected counts towards the weekly total.

Breaks

- 41348 Any time allowed by the employer for meals or refreshments counts towards the total hours worked provided earnings are paid or are expected to be paid for this time¹.

1 ESA Regs, reg 42(2); reg 45(9)

Night Duty

- 41349 Any time spent on night duty in addition to normal daytime duties counts towards the total hours worked if payment is made or expected for that night duty. This applies even if
1. payment made or expected is less than for normal daytime duties **or**
 2. the time on night duty is spent sleeping.

Example

Edward makes a claim for ESA(IR). His wife, Michelle, works in a care home. Her daytime working is 16 hours a week. Michelle is also contracted for night duty of 20 hours a week. For her night duty, Michelle receives a retainer which is paid at a lower hourly rate than for her daytime work. If she is called upon to deal with an emergency she is paid at the daytime rate. She is not required to perform any duties unless there is an emergency so she sleeps in the bedroom provided for her. The DM decides that Michelle is in remunerative work.

Evidence of hours

- 41350 DMs should accept a statement from the claimant's partner or the employer about the number of hours worked unless it is unclear or there is reason to doubt it. They should make further enquiries where necessary. If it becomes necessary to examine the contract of employment note that it will not usually specify overtime hours. Where appropriate, DMs should add these to the number of contracted hours.

Company directors

- 41351 A director of a limited company is an office holder and in that role may have only limited duties to carry out. However, where a director also has a contract for service with the company and is a S/E earner follow the guidance at DMG 41330 to establish any additional hours worked.

Musicians

- 41352 Practising is not remunerative work unless the practice is necessary to do the work the claimant's partner is engaged in.

Example 1

Paul is a musician who teaches at a school for six hours a week. He also practices his instrument for 20 hours a week in order to maintain his skill as a musician. He is not engaged in remunerative work.

Example 2

Emily is a musician who is engaged to perform music. The performances last for 12 hours a week. She practices the performances for 15 hours a week. She is engaged in remunerative work.

Self-employed

- 41353 DMs should include all the hours necessary to run the business, for example, time spent in
1. trips to wholesalers and retailers
 2. visits to potential customers
 3. advertising or canvassing
 4. cleaning the business premises
 5. cleaning and maintaining items used in the business, for example a taxi or driving school car
 6. providing estimates
 7. book-keeping
 8. research work, for example where the claimant's partner is a writer.

41354 Where a S/E person is running a business which is

1. building up **or**
2. winding down

it may be appropriate for the DM to re-determine the remunerative work issue week by week until hours of work reach a consistent level.

41355 DMs should accept a statement from the claimant's partner about the number of hours worked unless there is reason for doubt. Where there is doubt, DMs should make a decision on the basis of all the available evidence.

Example

Larry makes a claim for ESA(IR). His civil partner Peter, is a window cleaner in good health and with all the necessary window cleaning equipment who claims to have worked 15 hours a week during a period of fine weather. His accounts book revealed that he operated a long-standing window cleaning round with an average of ten customers per day, five days a week. He agreed that it took him about 30 minutes to clean each house plus an hours travelling in total between houses. Based on this evidence the DM concludes that Peter worked six hours a day, five days a week, a total of 30 hours a week.

41356 If a S/E person has been doing undisclosed work or working more hours than is claimed, the DM must determine on the probable number of hours worked. Consider all the available evidence, including any reports of what times of day and for how many days that person was observed working.

Teachers

41357 The conditions of employment of most LA schoolteachers, except headteachers, are laid down in an Order¹ or Agreement². They have a contractual duty to spend whatever time is necessary to carry out their professional duties effectively in non-teaching activities such as

1. preparing and planning lessons and timetables
2. assessing and reporting on pupils
3. helping to administer and organize the school
4. advising pupils and ensuring their discipline, health and safety
5. discussing pupils' progress with parents.

Time spent in these activities should be counted. This list is not exhaustive. If the DM is unsure whether a teacher is obliged to do a particular activity, consult the Order or Agreement.

1 Education (School Teachers Pay and Conditions of Service) Order;
2 Scottish Negotiating Committee for Teachers Conditions of Service Agreement

41358 Before either the Order or Agreement came into force, teachers were generally required by their contracts to carry out the duties now laid down¹. Members of the teaching profession not covered by the Order or Agreement (for example higher education lecturers and teachers in private schools) have similar obligations unless their contract provides that

1. they are not required to do such work **or**
2. any such work is included in the hours of work laid down in the contract.

1 Sim v. Rotherham Metropolitan Borough Council [1986] 3WLR 851; R(U) 5/88

41359 In most cases the contract of employment will not state the amount of time to be spent in duties other than actual teaching. DMs should accept the person's own evidence if it seems reasonable. If a person states that the time spent on non-teaching duties is anything up to one third of the time spent teaching, DMs should accept this without question.

41360 It may be reasonable to accept a larger proportion than a third depending on the

1. teacher's experience
2. subjects being taught
3. method of teaching
4. amount of homework to be marked
5. number of pupils.

In these cases the DM should ask the person to provide a detailed list of non-teaching duties. If there is still doubt the employer may be able to provide evidence.

41361 The amount of non-teaching work may vary from week to week. For example, a teacher may need to spend more time marking examination papers or writing reports at certain times of the year.

41362 - 41370

Calculating average hours

41371 If the claimant's partner is engaged in work where the hours fluctuate, the DM should calculate the average weekly hours¹.

1 ESA Regs, reg 42(1)

Identifying a recognizable cycle

41372 DMs should see if there is any pattern of work over a period of time. This is known as a recognizable cycle¹. A recognizable cycle is a recurring round of events where the end of a cycle marks the beginning of the next cycle.

Example 1

week 1 X hours

week 2 Y hours

week 3 X hours

week 4 X hours

week 5 Y hours

week 6 X hours

There is a recognizable cycle of three weeks (weeks 1 to 3 repeated in weeks 4 to 6).

Example 2

month 1 A hours

month 2 B hours

month 3 A hours

month 4 B hours

There is a recognizable cycle of 2 months.

Example 3

week 1 X hours

week 2 X hours

week 3 Y hours

week 4 W hours

week 5 V hours

There is no recognizable cycle.

Note: A cycle may include weeks in which no work is done².

1 ESA Regs, reg 42(2) & 45(8)(b)(i); 2 reg 45(8)(b)(i)

Permanent or indefinite contract

41373 A recognizable cycle of work can exist at the outset of employment. This would happen where a person has a permanent or indefinite contract that expressly provides for a cycle. The contract may expressly provide for periods of work and periods of no work, for example, school holidays for school ancillary workers are usually periods of no work.

Example

Julia works as a school clerk under an indefinite contract that provides for work during school terms and no work during school holidays. Her partner Mark makes a claim to ESA(IR) during the Easter holidays. The DM decides that Julia's contract establishes a cycle from its outset.

Fixed term contracts and casual workers

- 41374 A cycle may be established after one or two years where a claimant's partner is employed under a succession of fixed term contracts or on a casual basis (perhaps with no contract)¹. DMs should decide each case on its facts. The DM will need to consider whether two complete cycles would be necessary if one year had not been sufficient to establish a cycle (e.g. in the case of relief cover or occasional work). DMs should consider whether there is a mutual expectation between the person and the employer that work will resume after a period of no work.

1 R(JSA) 5/02

Example

Bill is a catering assistant at a secondary school. He has been working on a casual basis for just over a year. His partner Phoebe is in receipt of ESA(Cont). However, she makes a claim to ESA(IR) at the start of the Christmas holiday stating that Bill is unwell but has been asked to return to work after the holidays if he is well enough to do so. Phoebe tells the DM that Bill expects to return to work as he did the previous January. The DM decides that Bill has established a recognizable cycle of work and that it has not been broken. Phoebe is not entitled to ESA(IR) because on average Bill works 24 hours or more a week.

Supply teachers

- 41375 Supply teachers are likely to be employed on intermittent contracts, each of varying lengths and separated by periods of non-employment. Every case should be considered on its own facts with a view to ascertaining whether or not a cycle exists. Therefore although it is possible that a supply teacher has a recognizable cycle of work, in practice, work as a supply teacher is unlikely to give rise to a cycle.

Extra work

- 41376 A person may have a contract for work that specifies when they will and won't be expected to work. If they work any additional hours during a holiday period, either for their usual employer or another employer, it does not mean that the contract does not establish a cycle¹.

1 R(JSA) 5/02

Example

Celeste is employed as a shop assistant by a students union. The terms of her employment contract are “Monday to Friday, 8.15 am to 1.15 pm term time only”. Celeste agrees to do extra work stocktaking during the first week of the summer holidays. Her civil partner Justine makes a claim to ESA(IR) the day after Celeste finishes the extra work. The DM decides that Celeste’s contract establishes a cycle from the outset of the work, and that the cycle has not been broken by the extra hours of work done during the holiday period.

Probation

41377 A recognizable cycle of work can exist from the outset of the contract even if there is an initial period of probation.

Example

Harry is employed at a secondary school for 37 hours a week for 38 weeks a year as a workshop technician. His contract of employment, subject to a 6 month probationary period, specifies that he is expected to work during term times and not during school holidays. Harry’s partner Sally makes a claim to ESA(IR) during the school summer holidays. The DM decides that Harry is in a recognizable cycle from the outset of the contract and, on average, works 24 hours or more a week. Sally is not entitled to ESA(IR) because Harry is in remunerative work.

41378 - 41380

Recognizable cycle established

41381 Where there is a recognizable cycle DMs should calculate average hours over one complete cycle¹. They should include, where the cycle involves periods where the person does no work, those periods, but disregard any other absences.

1 ESA Regs, reg 45(8)(b)(i)

Periods when a claimant’s partner does not work

41382 Periods when a claimant’s partner does not work can fall into periods

1. of absence because of sickness, maternity leave, paternity leave or adoption leave
2. of unauthorized absence “without good cause”
3. of no work (other than holidays) during which someone is not working because work is not provided by the employer
4. during which someone can be properly regarded as on holiday.

Sickness, maternity leave, paternity leave, adoption leave and periods of unauthorized absence

41383 When a claimant's partner is absent from work due to sickness, ordinary or additional paternity leave¹, adoption leave² or maternity leave the DM should decide that they are not in remunerative work during such absences³. See DMG Chapter 49 for guidance on the meaning of ordinary or additional paternity leave. When a claimant's partner has a period of absence without good cause the DM should treat such an absence in the same way as proper holidays⁴ (see DMG 41384).

1 ER Act 96, s 80A, 80AA, 80B & 80BB; 2 s 75A & 75B; 3 ESA Regs, reg 43(3); 4 reg 42(3)

Holidays or periods of no work

41384 The DM should decide that a claimant's partner (including a member of a teaching staff) should only be regarded as being on holiday for the weeks of holiday for which they are paid¹. These can be ascertained from the contract of employment (which will usually be in writing but can be verbal). The fact that pay is

1. spread over a year in equal instalments **and**
2. enhanced to take account of a lack of holiday entitlement

should not be taken into account when deciding whether someone has paid holidays.

1 R(JSA) 5/03

41385 Most workers have a right to paid holidays. A worker is usually entitled to four weeks paid holiday in any leave year¹.

1 Working Time Regulations 1998 No. 1833

Calculating the number of hours for which a claimant's partner is engaged in work

41386 When the claimant's partner is in employment (and they are not absent from work due to sickness, maternity, adoption or paternity leave) DMs will need to calculate the number of hours for which the claimant's partner is engaged in work.

Note: If the claimant's partner is in a recognizable cycle but found not to be in remunerative work, the normal income rules apply. DMs should note that there cannot be a disregard for final earnings because the work is continuing.

41387 If the claimant's partner works the same number of hours each week when not on holiday, that is the number of hours worked in each week.

41388 If the claimant's partner's hours of work fluctuate, the DM should take an average

1. as per DMG 41381 if there is a cycle of work **or**
2. as per DMG 41411 et seq if there is no cycle of work.

Calculating the average hours

41389 Where the hours of work fluctuate, the average should be calculated by taking into account periods in which the person does not work while disregarding other absences¹. DMs should only deduct periods of holiday, absences without good cause, sickness, maternity, adoption or paternity leave from the number of weeks in the cycle before dividing the result into the total number of hours worked in the cycle². Periods of no work should not be deducted. Put another way, it is only periods of holiday, absences without good cause, sickness, maternity, adoption and paternity leave which are "other absences to be disregarded".

1 ESA Regs, reg 45(8)(b)(i); 2 R(JSA) 5/03

Yearly cycle with school holidays or similar vacations

41390 Where a person has a contract of employment (written, verbal or implied) which continues throughout the year, there is a recognizable cycle of one year. Where a person with such a contract works at a school, educational establishment or any other place of employment where there are school holidays or similar vacations, the DM should divide the total number of hours worked during the year by 52 weeks less any weeks of "other absence"¹ (see DMG 41389).

1 R(JSA) 5/03

Example 1

Jeff, a qualified teacher, has worked as a school tutor for children with special needs since October 2003. He works on a sessional basis, completing a monthly return of the number of hours he has taught for which he is paid accordingly. He does not get paid for holidays. His partner Patricia claims ESA(IR) in October 2008. For the academic year 2007/2008 Jeff worked 520 hours.

Note: An academic year includes the summer holidays. By the time Patricia claims ESA(IR) in October 2008 Jeff has completed at least four cycles of academic work, so the DM decides that his employment has not ended. Jeff has no paid holidays, so the total hours worked (520) are divided by the weeks in the cycle (52). This gives 10 hours a week, meaning that Jeff is not in remunerative work.

Example 2

Megan, a lecturer at a college of further education, has a contract of employment, which started in January 2006 for 23.5 hours of work a week during academic terms. There is no entitlement to paid holiday, but the contract states “your rate of pay allows for the fact that you have no formal entitlement to holiday with the result that the pay you receive for each hour worked is comparable to that paid to employees who are entitled to holiday”. The academic terms cover 38 weeks but Megan receives her pay over the calendar year in twelve equal monthly instalments.

In addition to the above work, Megan is employed under additional contracts, which depend on the demand for other courses which she teaches. In the 2007/2008 academic year she has four other such contracts

1. 10.5 hours a week for 12 weeks in the Autumn term
2. 11.5 hours a week for 10 weeks in the Spring term
3. 10.5 hours a week for 4 weeks in the Summer term
4. 8 hours a week for 6 weeks in the Summer term.

Megan’s civil partner Geraldine is in receipt of ESA(Cont) but makes a claim for ESA(IR) in June 2009 for the summer vacation.

The hours of work from all Megan’s contracts have to be added together, but should they be viewed as fluctuations in the cycle of work established by the main contract and averaged over the whole year, or only added in during the periods covered by the additional contracts?

The additional contracts are with the same employer as the main contract, involve the same type of work as the main contract and the work under them is done during the periods of work in the cycle established under the main contract. So the hours from them should be added to the hours from the main contract and taken into account over the whole cycle.

Megan is not entitled to holiday pay. The fact that she receives her pay spread over the year in equal instalments does not affect this, nor does the fact that she receives an enhanced rate of pay.

The “holidays” should therefore be taken into account as periods of no work and included in the averaging.

Total number of hours is 1224. Divided by 52 equals 23.5 (i.e. below 24)

Megan is not in remunerative work.

Example 3

Steve claims ESA(IR). His partner Sunita is employed in a student's union shop for 37.5 hours per week term-time only. The academic year covers 31 weeks. She has an annual cycle of work from September to September. Contractually she was entitled to 30 days paid holiday. This consisted of 18 days holiday plus 12 public holidays. Four of the public holidays fell in term-time and Sunita did not have to work for those days.

The total number of hours worked during the cycle was 1132.5 (31 weeks x 37.5 hours - 30 hours of public holidays that fell in term-time).

The total number of paid holidays, 30 days or 6 weeks, should be subtracted from the number of weeks in the cycle, which gives 46 weeks. The number of hours worked, 1132.5, is divided by 46 giving an average of hours worked of 24.62.

Sunita is in remunerative work¹.

1 R (JSA) 3/04

Ancillary school workers

41391 Ancillary school workers are members of the non-teaching staff of schools and other educational establishments. Where such workers have a yearly cycle of work during term-time only DMs should follow the guidance at DMG 41390. Examples of ancillary school workers include

1. school meals services employees
2. domestic staff
3. clerical staff (such as secretaries and clerks)
4. laboratory workers
5. nursing assistants
6. school bus drivers.

41392 - 41410

No recognizable cycle established

Estimating future hours

41411 Where

1. a claimant's partner has just started work or is about to start work **or**
2. the hours of work have just changed or are about to change and the change does not form part of the normal pattern of work **or**

3. because of absences from work a recognizable cycle has not been established

the DM should estimate the hours or the average hours the person is **expected** to work in a week¹.

1 ESA Regs, reg 42(2); reg 45(8)(a)

- 41412 DMs should average the estimated hours over a period long enough to cover the expected pattern of work¹. They should consider the case where there is sufficient evidence to average the actual hours worked.

1 R(IS) 8/95

Averaging past hours

- 41413 Where a claimant's partner has been in work before the date of claim, decision or application for supersession and a recognizable cycle has not been established the DM should calculate average weekly hours over

1. the five weeks immediately before the date of claim or the date on which a superseding decision is made¹ **or**
2. a longer or shorter period immediately before the date of claim, the date of decision or the date of application for supersession if this enables the average hours to be calculated more accurately.

Note: "Immediately before" in this context means the end of the last complete week before the date of claim, date of decision or date of application for supersession.

1 ESA Regs, reg 42(2); reg 45(8)(b)(ii)

- 41414 The DM should include in the calculation at DMG 41413 any periods of non-working within the normal pattern of employment (rest periods)¹. The DM should not include periods of non-working after the employment has ended.

1 R(IS) 12/95

Example

Victor's partner Elizabeth works for six months from January to June 2009 for an average of 30.5 hours a week. The employment ends in June 2009 and she does no more work. This comes to light in August 2009 and the DM supersedes on 1.8.09. When calculating the average hours the DM must use a period immediately before 1.8.09. The DM averages over the period January 2009 to 31.7.09 to get the most accurate result. The period of non-working after employment ended is not included in the calculation. Elizabeth was engaged in remunerative work for the period January to June 2009 because average hours of work were more than 24 a week.

- 41415 DMs should note that examples of circumstances in which it may not be appropriate to use the five week period in DMG 41413 1. are where the
1. five weeks contain a period of absence which distorts the average **or**
 2. five weeks do not show the claimant's partner's normal pattern of working hours, for example they include a short period of overtime which is not typical, or reduced hours because of unusual slackness in the business **or**
 3. claimant's partner is paid at intervals of longer than a week.

In either of the circumstances in 1. or 2. a period of less than five weeks as in DMG 41413 2. might give a fairer result. Extending the period beyond the last five weeks would still include the distortions so in these circumstances estimate future hours as in DMG 41411.

- 41416 If the DM bases a weekly average of hours over a period of more or less than five weeks, as in DMG 41413 2., the alternative period must still be a period immediately before the date of claim or the date the superseding decision is made. It should be either
1. more than the five week period in DMG 41413 1., in which case it will include those five weeks **or**
 2. less than the five week period in DMG 41413 1., in which case it will be a part of those five weeks immediately before the date of claim or the date on which a superseding decision is made.

Example

Hazel's partner Michael works for six months from January to June 2009 for an average of 24.5 hours a week. This comes to light in August 2009 and the DM supersedes on 1.8.09. From June 2009 Michael's working pattern changes. He then worked on average for six hours a week up to 1.8.09. When recalculating average hours the DM uses a period immediately before 1.8.09. The DM averages over the period January 2009 to 31.7.09 to get the most accurate result. Michael is not engaged in remunerative work at any time during that period because average hours of work are less than 24 a week.

- 41417 The approaches outlined in DMG 41411 and DMG 41413 are alternatives. There is no provision for the DM to calculate an average of weekly hours over a past period of actual work and a future period of expected work.

Short-time workers

41418 Employers experiencing a fall in business may put their employees on short-time working. This can be

1. a reduction in hours worked each day **or**
2. no work on certain days of the week **or**
3. work restricted to certain weeks, for example week on, week off.

DMs should follow the guidance in DMG 41411 - 41412 and estimate future hours¹ at the start of short-time working until average hours over a past period can be calculated². Periods of no work should be included in the average.

1 ESA Regs, reg 42(2); reg 45(8)(a); R(IS) 8/95; 2 ESA Regs, reg 42(2); reg 45(8)(a)

41419 - 41425

Changes to the normal hours

41426 Once the normal hours of work have been established, a claimant's partner may work different hours for a period falling outside the normal pattern of working.

Where this happens the DM should determine whether the change

1. represents a new pattern of working hours (see DMG 41427) **or**
2. represents a short-term change in the normal pattern (see DMG 41428) **or**
3. means that the period over which average hours were calculated needs to be extended to include the period of change (see DMG 41429).

41427 If DMG 41426 **1.** applies the DM should re-calculate the hours of work and supersede the decision as necessary.

41428 If DMG 41426 **2.** applies the DM should identify the period in which abnormal hours are worked and supersede the decision based on the remunerative work for that period. In this way a claimant normally entitled to ESA could be excluded under the remunerative work rules for a partner. Likewise, a claimant normally excluded could become entitled if temporary circumstances such as illness, adverse weather conditions or breakdown of equipment caused a reduction in a partner's working hours.

41429 If DMG 41426 **3.** applies, for example where an ice-cream seller's hours of work increase during a spell of hot weather and the DM decides that the previous calculation of average hours was based on an unrepresentative period, the DM should recalculate average hours over the

1. cycle of work if there is now a recognizable cycle¹ **or**
2. five week period or other more suitable period immediately before the date of application for supersession².

1 ESA Regs, reg 42(2); reg 45(8)(b)(i); 2 reg 42(2); reg 45(8)(b)(ii)

Seasonal workers

41430 The normal remunerative work rules apply to S/E seasonal workers.

Averaging the hours

41431 DMs should calculate average hours if there is

1. a recognizable cycle - over one complete cycle of work (this will usually be one year¹) including periods in which the person does no work, but exclude other absences such as holidays or sickness² **or**
2. no recognizable cycle - over the five week period, or other more suitable period, immediately before the date of claim, or the date a supersession decision is made³.

DMs should include in the calculation time spent on all activities connected with the business.

1 R(JSA) 1/03; 2 ESA Regs, reg 42(2); reg 45(8)(b)(i); 3 reg 42(2); reg 45(8)(b)(ii)

Example

Mary makes a claim for ESA(IR) for herself and her partner Ethan. For the last 5 years Ethan has been a S/E seasonal worker as a travelling showman operating children's rides. His on-season runs for 7 months June to December and for this period he worked 60 hours per week. He did no work in the off-season from January to May. He stated that he retained all of the equipment necessary for his work to recommence and that he would resume work the following June. The DM decides that Ethan had a cycle of one year and that the hours should be averaged over the whole cycle. The average hours worked were over 30 and the DM decided that Ethan was in remunerative work.

Agency and casual workers

41432 The normal remunerative work rules apply to claimants' partners who find employment through agencies or are employed on a casual basis. Whether the employment is ongoing is relevant.

41433 Where the employment ends after each period of work, periods of unemployment should not be included in the calculation of average hours.

41434 Where employment is ongoing, periods when the claimant's partner does no work should be included in the calculation of average hours.

Note: See DMG Chapter 49 for guidance on when employment ends. If a claim is made after employment is terminated, the claimant's partner will not be in remunerative work.

41435 - 41440

Claimant's partner treated as in remunerative work

Introduction

41441 For ESA(IR) claimants' partners can be treated as in remunerative work even though they are absent from remunerative work. This rule does not apply where claimants' partners are absent because they¹

1. are ill **or**
2. are pregnant and have a right to return to work **or**
3. have given birth to a child and have a right to return to work **or**
4. are on paternity leave **or**
5. are on adoption leave.

1 ESA Regs, reg 43(3)

41442 DMs should treat claimants' partners as in remunerative work for any period during which they are

1. absent without good cause¹ **or**
2. absent by reason of a recognized, customary or other holiday² **or**
3. covered by earnings received from remunerative work³ unless those earnings are disregarded⁴ (see DMG Chapter 49).

1 ESA Regs, reg 42(3); 2 reg 42(3); 3 reg 42(4); 4 reg 42(5) & Sch 7, para 1

Absence from work without good cause

41443 If a claimant's partner is absent from remunerative work **without** good cause the remunerative work exclusion will still apply. It cannot apply where the work is not remunerative as in DMG 41316 et seq.

41444 If a claimant's partner is absent from remunerative work **with** good cause the remunerative work exclusion will not apply.

Good cause

41445 "Good cause" is for the DM to determine. The onus is on claimants to show that their partners have good cause. Whether or not the employer has authorized the absence may be an indication of good cause but is not conclusive. Taking days off work for no apparent reason is not good cause.

41446 Examples of good cause include where the absence is due to

1. bereavement or sudden serious illness in the family **or**
2. a disaster at home **or**
3. suspension from work, whether or not on full pay **or**
4. a requirement to attend court.

41447 - 41450

Recognized, customary or other holiday

41451 A claimant's partner should be treated as in remunerative work for any period of absence because of a recognized, customary or other holiday¹. This is the case even if there is no permanent contract of employment. However, this will not apply where the

1. absence is not a holiday (see DMG 41384) **or**
2. work is not remunerative as in DMG 41316 et seq **or**
3. claimant's partner goes on holiday after employment ends.

Note 1: See DMG 41452 where payments on termination or interruption of employment lead to the person being treated as in remunerative work.

Note 2: See Appendix 3 to this Chapter for guidance on what is a recognized, customary or other holiday.

1 ESA Regs, reg 42(3)

Payment to a claimant's partner on termination or interruption of employment

41452 A claimant is not entitled to ESA(IR) if their partner was, or was treated as being, engaged in remunerative work. The period of the exclusion is the period over which certain payments, paid on termination of that employment, fall to be taken into account¹ (see DMG Chapter 48). Some payments are disregarded² (see DMG Chapter 49)

1 ESA Regs, reg 42(4); 2 reg 42(5) & Sch 7, para 1

41453 - 41470

Claimant's partner treated as not in remunerative work

Introduction

41471 In certain circumstances a claimant's partner who is in remunerative work should be treated as not being in remunerative work¹. These are where the claimant's partner is

1. engaged in childminding in their home **or**
2. engaged by a charity or voluntary organization or is a volunteer **or**
3. engaged on a training scheme for which a training allowance is paid **or**
4. receiving assistance under the self-employment route **or**
5. engaged in specific occupations (see DMG 41485) **or**
6. undertaking work as a councillor **or**
7. engaged as a foster parent or in providing respite care **or**
8. engaged in an activity which attracts a sports award.

Where a claimant's partner has an additional occupation the remunerative work rules apply in the normal way to the additional occupation.

1 ESA Regs, reg 43(1)

41472 In addition, there are other circumstances where a claimant's partner should be treated as not being in remunerative work, **regardless** of the type of work undertaken¹. These are where the claimant's partner is

1. disabled **or**
2. affected by a TD **or**
3. caring for another person **or**
4. living in a care home, an Abbeyfield Home or an independent hospital.

Note: The provisions for people who satisfy **1.** or **4.** were revoked from and including 25.1.10. However, see Appendix 1 to this Chapter for guidance on savings provisions.

1 ESA Regs, reg 43(2)

Childminders

41473 Claimants' partners who are childminders are treated as not being in remunerative work as long as the childminding is done in their home¹. If the childminding is done in the employer's home the hours worked will count towards the remunerative work exclusion.

1 ESA Regs, reg 43(1)(a)

Charity or voluntary workers and volunteers

41474 Claimants' partners are treated as not being in remunerative work where they are engaged by a charity or voluntary organization or are volunteers¹ **and**

1. the only payment
 - 1.1 received **or**
 - 1.2 due to be paidis for expenses incurred **and**
2. they receive no remuneration or profit **and**
3. they are not treated as having notional earnings² (see DMG Chapter 51).

1 ESA Regs, reg 43(1)(b); 2 reg 104(2) & Sch 8, para 2

Meaning of voluntary organization

41475 A voluntary organization is a body, other than a public authority or LA, whose activities are not carried out for profit¹.

1 ESA Regs, reg 2(1)

Meaning of volunteer

41476 A volunteer is a person who is engaged in voluntary work other than for a relative and the only payment

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

is expenses reasonably incurred in connection with the work¹.

1 ESA Regs, reg 43(4)

Meaning of relative

41477 A relative is a close relative, grand-parent, grand-child, uncle, aunt, nephew or niece¹.

1 ESA Regs, reg 2(1)

Meaning of close relative

41478 A close relative is¹

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 partnerships².

1 ESA Regs, reg 2(1); 2 CP Act 04, s 246

41479 “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 relationship¹.

1 R(SB) 22/87

Engaged on a training scheme

41480 DMs should treat claimants’ partners as not being in remunerative work where they are on a training scheme for which a training allowance (see DMG 41481 - 41482) is being paid¹.

1 ESA Regs, reg 43(1)(c)

Meaning of training allowance

41481 A training allowance is¹ an allowance payable

1. out of public funds by
 - 1.1 a government department **or**
 - 1.2 on behalf of
 - 1.2.a the Secretary of State **or**
 - 1.2.b Scottish Ministers **or**
 - 1.2.c Skills Development Scotland **or**
 - 1.2.d Scottish Enterprise **or**
 - 1.2.e Highlands and Islands Enterprise **or**
 - 1.2.f the Chief Executive of Skills Funding **or**
 - 1.2.g the Welsh Ministers **and**
2. to people for
 - 2.1 their maintenance **or**
 - 2.2 a member of their family **and**
3. for the period, or part of the period, that they are taking part in a course of training or instruction
 - 3.1 provided by, or under arrangements made with, that department **or**
 - 3.2 approved by that department in relation to the person **or**
 - 3.3 so provided or approved by or on behalf of the
 - 3.3.a the Secretary of State **or**

- 3.3.b** Scottish Ministers **or**
- 3.3.c** Skills Development Scotland **or**
- 3.3.d** Scottish Enterprise **or**
- 3.3.e** Highlands and Islands Enterprise **or**
- 3.3.f** the Chief Executive of Skills Funding **or**
- 3.3.g** the Welsh Ministers.

Examples of schemes which pay training allowances are Training for Work and Employment Rehabilitation.

Note: An allowance paid directly or indirectly by the European Social Fund is paid out of public funds². DMs will have to consider whether **2.** and **3.** are also satisfied.

1 ESA Regs, reg 2(1); 2 R(IS) 10/98

41482 A training allowance does not include

1. an allowance paid by a government department to, or for a person who is
 - 1.1 following a course of FTE (unless that course is arranged under prescribed legislation¹) **or**
 - 1.2 training to be a teacher² **or**
2. an allowance paid by a LA or a voluntary organization³ **or**
3. an allowance paid directly or indirectly from the public funds of a foreign country⁴.

*1 E & T Act 73, s 2; Enterprise and New Towns (Scotland) Act 1990, s 2; 2 ESA Regs, reg 2(1);
3 R(P) 13/56; 4 R(P) 5/56*

People receiving assistance under the self-employment route

41483 Claimants' partners are treated as not being in remunerative work where they are receiving assistance under the self-employment route¹.

1 ESA Regs, reg 43(1)(d)

Meaning of self-employment route

41484 Self-employment route means¹ assistance in pursuing S/E earner's employment whilst participating in

1. an EZ programme **or**
2. a programme provided or arrangements made under specified legislation².

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

Engaged in specific occupations

41485 Claimants' partners are treated as not being in remunerative work where they are

1. a P/T fire-fighter employed by¹
 - 1.1 a fire and rescue authority² **or**
 - 1.2 the Scottish Fire and Rescue Service³ **or**
2. auxiliary coastguards for coastal rescue activities⁴ **or**
3. working P/T in the manning or launching of a lifeboat⁵ **or**
4. members of a territorial or reserve force⁶.

*1 ESA Regs, reg 43(1)(e)(i); 2 Fire and Rescue Services Act 2004; 3 Fire (Scotland) Act 2005, s 1A;
4 ESA Regs, reg 43(1)(e)(iv); 5 reg 43(1)(e)(v); 6 reg 43(1)(e)(vi)*

Undertaking work as a councillor

41486 Claimants' partners who undertake work as a councillor are treated as not being in remunerative work¹.

1 ESA Regs, reg 43(1)(f)

Meaning of work as a councillor

41487 Work as a councillor includes work as a member of specified bodies¹ of which a claimant's partner is a member by reason of being a councillor².

*1 Local Authority Act 92, s 177(1); Local Government (Scotland) Act 73, s 49(1) & (1A);
2 ESA Regs, reg 42(4) & 40(7)*

41488 A councillor¹ 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 district council **or**
 - 1.4 a parish or community council **or**
 - 1.5 the Common Council of the City of London **or**
 - 1.6 the Council of the Isles of Scilly **or**
2. in Scotland a member of a council for a local government area².

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

41489 Guidance on the effect of councillors' allowances for ESA(IR) is in DMG Chapter 49.

41490 - 41495

Foster parents and people providing respite care

Foster parents

41496 Claimants' partners who receive payments from

1. a LA **or**
2. a voluntary organization **or**
3. in Scotland, a care authority

for fostering a child or young person are treated as not being in remunerative work¹.

Note: See DMG Chapter 51 for guidance on the income disregard of these payments.

1 ESA Regs, reg 43(1)(g) & Sch 8, para 28

Providing respite care

41497 Claimants' partners who provide respite care are treated as not being in remunerative work¹ if

1. the person requiring care is being cared for in the claimant's partner's home **and**
2. the person requiring care is not normally a member of the claimant's partner's household **and**
3. the only payments received are specified payments² from a
 - 3.1 HA **or**
 - 3.2 LA **or**
 - 3.3 voluntary organization **or**
 - 3.4 a primary care trust **or**
 - 3.5 the person concerned under specified legislation³.

Note: See DMG Chapter 51 for guidance on the income disregard of these payments.

1 ESA Regs, reg 43(1)(g); 2 Sch 8, para 29; 3 National Assistance Act 48, s 26(3A)

Sports awards

- 41498 Claimants' partners are treated as not being in remunerative work¹ if
1. they are engaged in an activity for which a sports award has been or is to be made² **and**
 2. no other payment is made or expected to be made to them in respect of the activity³.

1 ESA Regs, reg 43(1)(h); 2 reg 43(1)(h)(i); 3 reg 43(1)(h)(ii)

Meaning of sports award

- 41499 A sports award¹ is an award made by one of the Sports Councils named in National Lottery law² and out of sums allocated under that law.

1 ESA Regs, reg 2(1); 2 National Lottery etc. Act 1993, s 23(2)

41500 - 41510

Disabled workers

- 41511 Claimants' partners are treated as not being in remunerative work where they are mentally or physically disabled¹ and as a result of that disability they
1. earn 75 per cent or less of what a person without that disability working the same number of hours would reasonably be expected to earn² **or**
 2. work 75 per cent or less of the hours that a person without that disability would reasonably be expected to do in the same work or in a similar job in the area³.

Note: These provisions were revoked from and including 25.1.10. However, see Appendix 1 to this Chapter for guidance on savings provisions.

1 ESA Regs, reg 43(2)(a); 2 reg 43(2)(a)(i); 3 reg 43(2)(a)(ii)

- 41512 The claimant's partner's own evidence of reduced earnings or hours should normally be accepted. However, if necessary, DMs should obtain further evidence for comparison purposes. This may include information from private employment agencies, social services departments or charities for the disabled.

Claimant's partner affected by a trade dispute

41513 Where the claimant's partner is involved in a TD¹, they are treated as not being in remunerative work unless payments in accordance with DMG 41452 are being taken into account².

1 SS CB Act 92, s 126(1), 124(1) & 127(b); 2 ESA Regs, reg 43(2)(b)

Caring for another person

41514 Claimants' partners are treated as not being in remunerative work where they are¹

1. regularly and substantially engaged in caring for another person and that person
 - 1.1 is in receipt of "AA" or the care component of DLA at the highest or middle rate² **or**
 - 1.2 has claimed "AA" or DLA **or**
 - 1.3 has
 - 1.3.a made an advance claim for **and**
 - 1.3.b an award of **and**
 - 1.3.c not completed the qualifying period for "AA" or the care component of DLA at the highest or middle rate³ **or**
 - 1.4 has
 - 1.4.a made an advance claim for **and**
 - 1.4.b an award of **and**
 - 1.4.c completed the qualifying period for
"AA" or the care component of DLA at the highest or middle rate and the award is in payment **or**
2. both entitled to and in receipt of CA⁴ and caring for another person.

Note: See DMG Chapter 20 for guidance on deciding whether or not a person is regularly and substantially caring.

1 ESA Regs, reg 43(2)(c); IS (Gen) Regs, Sch 1B, para 4; 2 SS CB Act 92, s 72(3); 3 s 65(6)(a); SS (C&P) Regs, reg 13A; 4 SS CB Act 92, s 70

41515 Where DMG 41514 **1.2** applies claimants' partners are treated as not in remunerative work until the earlier of¹

1. the date the claim for "AA" or DLA is decided **or**
2. 26 weeks from the date of claim for "AA" or DLA.

1 ESA Regs, reg 43(2)(c); IS (Gen) Regs, Sch 1B, para 4(a)(ii) & (iii)

Claimant's partner living in a care home, Abbeyfield Home or an independent hospital

41516 Claimants' partners who

1. are in employment¹ **and**
2. live in certain types of accommodation

are treated as not being in remunerative work².

Note: These provisions were revoked from and including 25.1.10. However, see Appendix 1 to this Chapter for guidance on savings provisions.

1 ESA Regs, reg 43(2)(d)(i); 2 reg 43(2)(d)

41517 DMG 41516 applies only to a claimant's partner who

1. lives in or is temporarily absent from
 - 1.1 a care home **or**
 - 1.2 an Abbeyfield Home **or**
 - 1.3 an independent hospital¹ **and**
2. requires personal care because of
 - 2.1 old age **or**
 - 2.2 disablement **or**
 - 2.3 past or present dependence on alcohol or drugs **or**
 - 2.4 past or present mental disorder **or**
 - 2.5 a terminal illness².

Note: See DMG Chapter 54 for guidance on the treatment of people in a care home, Abbeyfield Home or an independent hospital.

1 ESA Regs, reg 43(2)(d)(ii); 2 reg 43(2)(d)(iii)

41518 - 41550

Education

Introduction

ESA(Cont)

- 41551 Where a claimant is entitled to ESA(Cont), being in education has no effect on entitlement to benefit. But see DMG 41046 et seq for guidance on how education affects ESA(Cont) for people claiming under the youth rules.

ESA(IR)

- 41552 Being in education affects entitlement to ESA(IR)¹. However, a claimant who is

1. in education **and**
2. entitled to
 - 2.1 DLA **or**
 - 2.2 AFIP **or**
 - 2.3 PIP

may have entitlement to ESA(IR)².

1 WR Act 07, Sch 1, Part 2, para 6(1)(g); 2 ESA Regs, reg 18

Income

- 41553 The income of a person in education may be taken into account when deciding entitlement to ESA(IR). See DMG Chapter 51 for full guidance.

41554 - 41555

Definitions

Meaning of education

41556 For the purposes of ESA(IR) education is a course of study which is being undertaken at an educational establishment¹.

1 ESA Regs, reg 14(1)

41557 A person is regarded as undertaking a course of study¹, and therefore in education, throughout the period beginning with the day the person starts the course and ending on

1. the last day of the course (see DMG 41631) **or**
2. such earlier date as the person
 - 2.1 abandons the course (see DMG 41633) **or**
 - 2.2 is dismissed from the course (see DMG 41646).

1 ESA Regs, reg 17(1)(b)

41558 Also, a person undertaking a part of a modular course that would be a course of study for the purposes of DMG 41556, is regarded as undertaking a course of study¹, and therefore in education, for the period beginning with the day that part of the course starts and ending on

1. the last day he is registered as attending or undertaking that part as a F/T course of study **or**
2. such earlier date as the student
 - 2.1 abandons the course **or**
 - 2.2 is dismissed from it.

1 ESA Regs, reg 17(1)(a)

41559 The period in DMG 41558 includes any period¹

1. that a person attends or undertakes the course to retake exams or a module where that person has failed
 - 1.1 examinations **or**
 - 1.2 to successfully complete a module relating to a period when attending or undertaking a part of the course as a course of study
2. of vacation falling within the period in 1. or immediately following it except where the vacation immediately follows the last day of the final module of the course.

1 ESA Regs, reg 17(2)

41560 Where DMG 41559 applies, a modular course means a course of study consisting of two or more modules and a person must complete a specified number of modules before they are considered to have completed the course¹.

Note: See DMG 41570 for further guidance on modular courses.

1 ESA Regs, reg 17(3)

41561 - 41565

Meaning of course of study

England and Wales

41566 In England and Wales a course of study¹ is

1. a F/T course not wholly or partly funded by the
 - 1.1 Secretary of State in England **or**
 - 1.2 Chief Executive of Skills Funding **or**
 - 1.3 Welsh Ministers² **or**
2. a course of study wholly or partly funded by the
 - 2.1 Secretary of State in England **or**
 - 2.2 Chief Executive of Skills Funding **or**
 - 2.3 Welsh Ministers

if it involves the person in more than 16 guided learning hours per week, as stated in the person's signed learning agreement in England or, in Wales, a document signed on behalf of the college³ **or**

3. a sandwich course⁴ (see DMG 41583).

Note: If a student attends more than one course the number of guided learning hours should be aggregated.

1 ESA Regs, reg 14(2); 2 reg 14(2)(a); 3 reg 14(2)(c); 4 reg 14(2)(e)

Scotland

41567 In Scotland a course of study¹ is

1. a F/T course not wholly or partly funded by the Scottish Ministers at a college of further education² **or**
2. a F/T course of higher education wholly or partly funded by the Scottish Ministers³ **or**

3. a course of study which is not higher education and is wholly or partly funded by the Scottish Ministers at a college of further education, if it involves **more than**
 - 3.1 16 hours a week of classroom or workshop based programmed learning, under the direct guidance of teaching staff, as stated in a document signed on behalf of the college **or**
 - 3.2 21 hours a week in total, as stated in a document signed on behalf of the college made up of
 - 3.2.a 16 hours or less of classroom or workshop based programmed learning, under the direct guidance of teaching staff **and**
 - 3.2.b extra hours using structured learning packages, supported by teaching staff⁴ **or**
4. a sandwich course⁵ (see DMG 41583).

Note: If a student attends more than one course the number of hours should be aggregated.

1 ESA Regs, reg 14(2); 2 reg 14(2)(a)(iii); 3 reg 14(2)b); 4 reg 14(2)(d); 5 reg 14(2)(e)

Meaning of course

- 41568 A course is an arrangement of study, tuition or training. It can be academic, practical, or a combination of both. It is usually done at, or by arrangement with, an education or training establishment.
- 41569 It will often lead to a qualification when it is completed. Some non-advanced study, tuition, or training, may not lead to a qualification. This does not mean that it is not a course.

Modular courses

- 41570 Modular courses are arranged individually to meet students' needs. Each module leads to a credit. When all the modules are successfully completed, a qualification is obtained. The course in such a case is the sequence of modules chosen.

41571 - 41575

Meaning of guided learning hours

- 41576 Some establishments may be wholly or partly funded by the
- 1.1 Secretary of State in England **or**
 - 1.2 Chief Executive of Skills Funding **or**

1.3 Welsh Ministers.

They agree with each student the number of guided learning hours that will be provided each week. That is normally the number needed to achieve the chosen qualification.

- 41577 Guided learning hours are hours when a member of staff is present to guide learning on a programme including lectures, tutorials and supervised study. Libraries, open learning centres and learning workshops are examples of where this may take place. Time spent by staff assessing students' achievements, for example in the assessment of competence for GNVQs, are also included. However, it does not include time spent in private study.
- 41578 DMs should always ask for specific written evidence of the number of guided learning hours involved. Only a document signed on behalf of the establishment concerned should be accepted. That is where the course is funded by
1. the Secretary of State in England or the Chief Executive of Skills Funding¹ - the person's learning agreement, signed on behalf of the establishment which is funded to deliver the course **or**
 2. the Welsh Ministers² - a document signed on behalf of the establishment which is funded to deliver the course.

1 ESA Regs, reg 14(2)(c)(i); 2 reg 14(2)(c)(ii)

Meaning of terms used in Scotland

College of further education

- 41579 College of further education means¹ an educational establishment providing further education.

1 ESA Regs, reg 2(1); F & HE (Scot) Act 92, s 36(1)

Further education

- 41580 Further education¹ is for people in Scotland who are over school age. The programmes of learning provided
1. prepare a person for
 - 1.1 a vocational qualification **or**
 - 1.2 a Scottish Qualification Authority qualification **or**
 - 1.3 a GCE qualification of England, Wales or Northern Ireland **or**
 - 1.4 access to higher education **or**
 2. are designed to help people whose first language is not English to achieve competence in it **or**

3. provide instruction for people on a programme mentioned in **1.** or **2.** who have a learning difficulty **or**
4. are designed mainly to prepare a person to take part in any programme mentioned in **1.** to **3.**

1 F & HE (Scot) Act 92, s 1(3) & 6

Higher education

41581 Higher education¹ is education provided by means of a

1. course at higher level in preparation for a higher diploma or certificate
2. first degree course
3. course for the education and training of teachers
4. course of post graduate studies, including a higher degree course
5. course at a higher level in preparation for a qualification from a professional body
6. course at a higher level not within **1.** to **5.**

1 ESA Regs, reg 14(3); F & HE (Scot) Act 92, Part 2

41582 A course is of a higher level¹, if its standard is higher than courses in preparation for examinations for the

1. GCE of England and Wales or Northern Ireland at advanced level
2. national certificate of the Scottish Qualifications Authority.

1 F & HE (Scot) Act 92, s 38(3)

Meaning of sandwich course

41583 A sandwich course¹ is a course, other than a course of initial teacher training, made up of alternative periods of F/T study in the educational establishment and work experience. The F/T study must be for an average of at least

1. in England and Wales - 18 weeks a year²
2. in Scotland and Northern Ireland - 19 weeks a year³.

The average is worked out by dividing the total number of weeks attendance by the number of years in the course. For this purpose the course starts with the first period of F/T study and ends with the last period of F/T study.

1 ESA Reg, reg 14(2)(e); 2 Support Regs, reg 2(9); 3 SL (Scot) Regs, reg 4(2); Education (Student Support) Regulations (Northern Ireland) 2007, reg 2(8)

Work-related activity and education

41584 The guidance on course of study at DMG 41566 – 41583 does not apply where the claimant is required to attend a course of study as part of a requirement to undertake WRA². For example, a claimant who is required to attend a training course of more than 16 hours a week funded by the Skills Funding Agency (or in Wales, the Welsh Ministers and in Scotland, the Scottish Ministers) as part of their WRA is not treated as being in full-time education. [See DMG 53031 et seq](#) for guidance on WRA.

1 WR Act 07, Sch 1 para 6(1)(g); 2 ESA Regs, reg 14(2A)

41585 – 41590

Meaning of full-time

General

41591 The DM has to consider the meaning of F/T when deciding whether a person is in education.

41592 For courses funded by the

1.1 Scottish Ministers, except where it is a course of higher education (see DMG 41581) **or**

1.2 Secretary of State in England **or**

1.3 Chief Executive of Skills Funding **or**

1.4 Welsh Ministers

the term F/T is defined by reference to the number and type of hours involved (see DMG 41614 et seq). However, for non funded courses there is no definition.

41593 In courses not funded as in DMG 41592 and in courses of higher education funded by the Scottish Ministers, the term F/T applies to the course itself and not to a person's attendance on it¹. It is the time spent by a notional reasonable student that is considered. A person who attends a F/T course on a P/T basis is still in education.

1 R(SB) 40/83; R(SB) 41/83

41594 Each case must be decided on its facts¹. The DM must look at the sequence of studies and activities that make up the course itself. The nature of the course is not affected by²

1. a person's reasons for attending it **or**

2. a person's readiness to abandon it **or**

3. what a particular person happens to be doing.

1 R(SB) 40/83; R(SB) 41/83; 2 R(SB) 2/91

41595 In modular courses a sequence of studies is established once a person has decided which modules to take. This sequence can be distinguished from the work that the person is putting in at any given time.

41596 When deciding whether a course is F/T, DMs should note that all of the studies and activities involved in it should be taken into account. This includes both supervised and unsupervised study and activity, whether done on or off college premises. In the case of courses funded by the

1.1 Secretary of State in England **or**

1.2 Chief Executive of Skills Funding **or**

1.3 Welsh Ministers **or**

1.4 Scottish Ministers

take no account of private study (see DMG 41611 et seq).

41597 DMs should not compare the total hours involved with what may be regarded as a full working week. One approach is to look at the total time the course might require of an average student. It may take up a substantial part of a week, after allowing for reasonable rest and recreation. The course might then be regarded as F/T.

Evidence from educational establishment

41598 The way educational establishments are funded may mean that they no longer classify courses as

1. F/T **or**

2. P/T.

41599 Educational establishments may still classify courses or may be able to give an opinion on their nature. DMs should accept evidence from the educational establishment as conclusive unless there is strong relevant evidence to the contrary¹.

1 R(SB) 40/83; R(SB) 41/83

41600 If educational establishments are unable to classify courses or give an opinion on their nature, unless a course is funded as in DMG 41614 et seq, DMs will need to consider other evidence (see DMG 41601 et seq).

Other evidence

- 41601 If
1. educational establishments are unable or unwilling to say whether a course is F/T or P/T **or**
 2. a classification is provided which is considered to be implausible or unreliable

DMs will then have to decide whether the course is F/T.

- 41602 The DM should then consider other evidence, including
1. the type of qualification aimed for
 2. the number of hours a week normally required for successful completion of the course, including
 - 2.1 supervised study
 - 2.2 unsupervised study
 - 2.3 homework
 - 2.4 other work carried out on or off the college premises
 3. the claimant's own hours of attendance and recommended hours of private study
 4. the length of time normally required for successful completion of the course (for example three years)
 5. how long the claimant will take to complete the course
 6. how the course is funded
 7. the course classification for other purposes, for example, grant or student loan awards
 8. how the same course has been classified by the college in the past.

Note: When considering 7. the DM is not bound to investigate this point where the views of other authorities are not already known.

- 41603 If the claimant is taking longer than normal to complete the course, it is an indication that the course is P/T¹.

1 R(SB) 41/83

- 41604 A course may be designed for people to attend as and when they can. With such a course the DM should consider what is actually happening. If the course is F/T it is of no consequence that the person could have attended it P/T.

- 41605 The course being taken may be new, or the nature of it may have changed. It may then be helpful to compare a similar course, that is F/T, with the claimant's

1. length of study **and**
2. eventual qualification.

41606 DMs should not give weight to the classification of the other course unless it is very similar to the claimant's course. Also, a classification given by the claimant's own college should normally be preferred to that given on similar courses by different colleges.

41607 A list of the more common courses and their qualifications is included at Appendix 4 to this Chapter. DMs should not rely on it as evidence of the nature of a particular course. It is provided for information only.

41608 - 41610

Number of hours involved

41611 The DM must have regard to the hours involved. This includes both time spent

1. receiving instruction or being supervised **and**
2. in private study (unless the course is funded by the Secretary of State in England, the Chief Executive of Skills Funding, the Welsh Ministers or the Scottish Ministers).

41612 The level of a course may affect the number of hours of attendance in supervised instruction or study. For example, a F/T advanced course may involve less attendance than a F/T non advanced course.

41613 In non advanced courses, hours of supervised instruction or study usually form a larger part of the course. F/T advanced courses may involve only a few such hours. Do not consider that in isolation. Students may also have to put in many hours of private study.

Funded courses

41614 Courses of study may be wholly or partly funded by the

1. Secretary of State in England **or**
2. Chief Executive of Skills Funding **or**
3. Welsh Ministers in Wales **or**
4. Scottish Ministers in Scotland.

41615 A course funded as in DMG 41614 1. - 3. is F/T if it involves more than 16 guided learning hours per week (see DMG 41576).

41616 In Scotland, the term guided learning hours is not used. Classroom or workshop based programmed learning under the direct guidance of teaching staff is used instead. A course funded by the Scottish Ministers is F/T if, amongst other things, it involves more than 16 such hours.

41617 A funded course in Scotland is also F/T if it involves more than 21 hours a week in total made up of

1. 16 or less such hours **and**
2. extra hours using structured learning packages, supported by teaching staff.

Higher education

41618 In higher education the number of hours of attendance in supervised instruction or study may be low (see DMG 41611), but that should not be considered in isolation. Such courses usually involve many hours of private study. The classification used in an award of grant or student loan can be a useful factor.

41619 The DM should be satisfied that there is evidence of

1. a learning agreement for funded courses in England as in DMG 41614 **1.** or **2.** or
2. a document for courses funded by
 - 2.1 the Welsh Ministers **or**
 - 2.2 the Scottish Ministers.

41620 The learning agreement or document which must be signed on behalf of the college should also be signed by the claimant and identify the

1. college
2. student
3. average number of guided learning hours
4. course being undertaken
5. qualification to be achieved, if appropriate.

Non funded courses

41621 When considering the question of whether a course is F/T the DM should note the relevant definitions. But for non funded courses the DM may be unable to make a decision based solely on those definitions.

Further education and other courses

41622 Courses not funded as in DMG 41614 will involve hours spent under the guidance of teaching staff

1. in guided learning **or**
2. in a classroom or workshop **or**
3. using structured learning packages.

41623 It is for the DM to decide what approach to take in such a case. Where the course is similar to a funded course, it may be helpful to adopt a similar approach to that of funded courses. The number and type of hours involved may then be an important factor. But a different approach may be taken if it is considered more appropriate.

Meaning of educational establishment

41624 The term educational establishment is not defined and so must be given its ordinary everyday meaning. Schools, colleges and universities are clearly such places. But other less obvious places may also be included. For example, the training division of a large organisation specially set up for that purpose.

41625 A person is attending an educational establishment if they are receiving

1. training
2. instruction **or**
3. schooling

in an organisation, or at an establishment, set up for any of those purposes.

41626 - 41630

Meaning of last day of the course

41631 The last day of the course means¹ the date of the last day of the final academic term for the course in question.

1 ESA Regs, reg 2(1)

41632 A person may take their last exams before the last day of the final term. They may not then attend for the last few days of term. They are still in education until the last day of that academic term. In cases of doubt, DMs should ask the educational establishment when the academic term officially ends.

Meaning of abandons

41633 The term abandons means¹ total, final and permanent abandonment.

1 R(IS) 25/95

41634 Merely deciding to give up a course is not enough. The claimant must have actually taken enough steps to ensure that their connection with the course is permanently severed. In cases of doubt DMs should ask for documentary evidence from the educational establishment.

41635 A person may change from a F/T to a P/T course at the same educational establishment. This can be an abandonment of the F/T course. However, the new course may be very similar to the old course.

41637 DMs should make sure that the course itself has changed and not simply the student's attendance on it. When considering whether one course has been abandoned in favour of another DMs should compare

1. the course as it was at the time the student started on it **and**
2. the course as it is now.

41638 The DM should consider whether there has been any change in the

1. number of modules accessed or subjects taken
2. qualification being pursued
3. number of hours of tuition and study
4. length of the course
5. fees payable by the student.

41639 The DM should also take into account

1. whether the course could be attended F/T or P/T under the arrangements originally made with the college **and**
2. any information that may be gained from the college prospectus.

41640 - 41645

Meaning of dismissed

41646 Dismissed means the total, final and permanent ending of a person's participation on a course by the educational authorities. In cases of doubt ask for documentary evidence from the educational establishment.

Temporary absences

41647 A person cannot temporarily abandon a course or be temporarily dismissed from it. They will remain in education if

1. they
 - 1.1 take a break from studies for whatever reason **or**
 - 1.2 have not gone on to the next year of the course because they failed their end of year exams **or**
 - 1.3 have either failed or not taken their final exams **and**
2. either
 - 2.1 they have a guaranteed place on the course at some time in the future **or**
 - 2.2 a place on the course at a future date is available to them
 - 2.2.a if they undertake study at home or at the educational establishment **and**
 - 2.2.b a fresh application under the normal enrolment procedures will not be required **and**
 - 2.2.c the student has not refused to undertake the necessary study **or**
 - 2.3 they have remained continuously registered at the educational establishment **or**
 - 2.4 the educational establishment does not regard them as no longer being a student on the course **or**
 - 2.5 a final and definite decision on their status has not yet been made by the educational establishment.

41648 The fact that a grant may not cover such absences or extensions to the course is not relevant.

Example

Alberto is a University student in his final year. He failed his final exams in June. He intends to sit them in a year and is still enrolled at the University. He is still a F/T student through the summer vacation and until he has taken his exams in the following academic year.

41649 A person who has completed the last day of the final academic term may have to submit a thesis or complete course work. This may be required before a qualification can be obtained or enhanced. Such a person has passed the last day

of the course. They are not in education during the period after the end of the course when they are expected to complete any course work.

Example

Gemma completed her research working as a post graduate student in a laboratory at the University on 30 September 2008. She is completing a thesis for submission to the University for her PhD. Gemma does not need to attend the University to complete the thesis. She is also applying for jobs at the same time as completing the thesis. However, Gemma breaks both her legs badly and suffers other injuries in a road traffic accident and claims ESA(IR). The DM decides that Gemma is no longer in education as she has completed her course of study. Gemma is entitled to ESA(IR) because she would complete the thesis on a P/T basis while recovering from her accident.

Re-enrolment

- 41650 A person who has completed a course of study may be going on to do further study. For example, a student with a degree may want to do a postgraduate course. Such a person is not a student in the meantime.
- 41651 A fresh period of study begins when the next course starts. The usual rules then apply to the new period of study.

41652 - 41660

Claimant treated as receiving education

41661 Unless DMG 41552 applies, a qualifying young person is treated as receiving education¹ and is therefore not entitled to ESA(IR).

1 ESA Regs, reg 15

Meaning of a qualifying young person

41662 Where any of the conditions at DMG 41663 to 41671 apply, a person is a qualifying young person and treated as in education. Where more than one of the conditions in DMG 41663 to 41671 apply, a person remains a qualifying young person until the last of them ceases to be satisfied¹.

1 CHB (Gen) Regs, reg 2(2)

Education and training condition

41663 This condition applies to a person who

1. has not reached age 20¹ **and**
2. is undertaking a course of FTE which is not advanced education or provided by virtue of employment or any office held but which is provided
 - 2.1 at a school or college² **or**
 - 2.2 elsewhere but is approved by HMRC Commissioners and the FTE was being received there when the person was a child³ **or**
3. is undertaking approved training that is not provided through a contract of employment⁴ **or**
4. having undertaken a course or approved training in **2.** has been accepted or is enrolled on a further course or approved training⁵.

Note: For the purposes of **2.2** a child is a person under the age of 16⁶.

1 CHB (Gen) Regs, reg 3(1); 2 reg 3(2)(a)(i); 3 reg 3(2)(a)(ii) & reg 3(3); 4 reg 3(2)(c); 5 reg 3(2)(b); 6 SS CB Act 92, s 142(1)

41664 A person aged 19 can only satisfy the conditions in DMG 41663 **2.** and **3.** if

1. the education or training began **or**
 2. the person was accepted or enrolled on the education or training
- before they were 19¹.

1 CHB (Gen) Regs, reg 3(4)

16 year olds (15 year olds in Scotland)

41665 A 16 year old (in Scotland also a 15 year old) who has left education or training will still be a qualifying young person until the 31st August following their 16th birthday¹.

1 CHB (Gen) Regs, reg 4

Extension period for 16 and 17 year olds

41666 The extension period¹

1. begins on the first day of the week after that in which a 16 or 17 year old ceased to be in education or training **and**
2. ends 20 weeks later.

1 CHB (Gen) Regs, reg 5(3)

41667 The extension period applies to people aged 16 and 17¹

1. who have ceased to be in education or training **and**
2. who are registered for work, education or training with a qualifying body (see DMG 41668) **and**
3. who are not engaged in remunerative work **and**
4. whose extension period has not expired **and**
5. where the person who is responsible for the 16 or 17 year old
 - 5.1 was entitled to CHB for them immediately before the extension period began **and**
 - 5.2 has made a written request to the HMRC Commissioners within three months of the education or training ceasing for the payment of CHB during the extension period

and so are still a qualifying young person by virtue of being in the CHB extension period.

Note: Whilst a person is under age 18, CHB can be extended every time the conditions are satisfied.

1 CHB (Gen) Regs, reg 5(2)

41668 For the purposes of DMG 41667 2. a qualifying body¹ is

1. the Careers Service or Connexions Service
2. the Ministry of Defence

3. in Northern Ireland
 - 3.1 the Department for Employment and Learning **or**
 - 3.2 an Education and Library Board established under prescribed legislation²
4. any body corresponding to 1. - 3. in another EU State³.

*1 CHB (Gen) Regs, reg 5(4); 2 Education and Libraries (Northern Ireland) Order 1986, Art 3;
3 Council Regulation (EEC) No. 1408/71*

Interruptions

41669 Up to the age of 20¹, where

1. a person's education or training has been interrupted **and**
2. immediately before it was interrupted a person was a qualifying young person under the conditions in DMG 41663 to 41667

that person will remain a qualifying young person for the duration of the interruption².

1 CHB (Gen) Regs, reg 6(1); 2 reg 6(2)

41670 Unless DMG 41671 applies, the condition in DMG 41669 will only apply where the period of interruption is

1. one of up to six months duration, even if it began before the person was 16, but only to the extent that it is considered to be reasonable in the opinion of the HMRC Commissioners **and**
2. due to illness or disability and for a period that is considered reasonable in the opinion of the HMRC Commissioners¹.

1 CHB (Gen) Regs, reg 6(3)

41671 Where the period of interruption is or is likely to be immediately followed by a period during which the person

1. has provision made to undertake non approved training **or**
2. is receiving advanced education **or**
3. is receiving education by virtue of his employment or any office held

they will not satisfy the condition in DMG 41670¹.

1 CHB (Gen) Regs, reg 6(4)

Reasonable cause

41672 Examples of reasonable cause for interruption include

1. individual holidays, other than official holidays, during term-time
2. temporary closure of the educational establishment during term-time
3. authorized absence following contact with an infectious disease
4. illness or disability (mental or physical)
5. absence due to illness or death in the family
6. disruption of normal transport with no reasonable alternative available
7. change of educational establishment
8. authorized absences to follow a course of study elsewhere, for example
 - 8.1 to study at home for an examination **or**
 - 8.2 a field course **or**
 - 8.3 an educational cruise.

School holidays

41673 Treat school holidays as a period of interruption due to a reasonable cause if the person intends to return after the holidays. If there is no intention to return see DMG 41706 et seq.

41674 - 41675

Education received abroad

41676 Education received abroad should be treated in the same way as if it had been received in GB. This is important when considering whether a person who has recently arrived in GB is affected by the terminal date provisions.

Young person held in custody

41677 Any young person under the statutory school leaving age who is held in custody in a

1. remand centre **or**
2. detention centre **or**
3. youth custody centre

will normally be in FTE.

Cases of doubt

41678 If there is any doubt about whether a person is to be treated as receiving education the DM should

1. immediately ask the DM (CBC) for an opinion **and**
2. deal with the claim on the assumption that the opinion of the DM (CBC) will be adverse to the claimant¹ **and**
3. when the DM (CBC) opinion is received, revise the decision at **2.** if the person is not to be treated as receiving education.

1 SS CS (D&A) Regs, reg 13

Cases of doubt about recognized establishment or education

41679 In cases of doubt, the question of the recognition of

1. a particular establishment **or**
2. the education received by the claimant

should be referred to the F/T Education and Schools Advice section at CBC, who will make a determination on behalf of the Secretary of State. The DM is bound by the opinion of the F/T Education and School Advice section at CBC on recognition of an establishment or the education.

41680 - 41685

Hours of attendance

41686 FTE is education undertaken in pursuit of a course which exceeds twelve hours a week. In calculating the hours of attendance, DMs should only count time spent on¹

1. receiving tuition **and**
2. practical work **and**
3. supervised study **and**
4. taking examinations.

Meal breaks or any time spent on unsupervised study should not be included.

1 CHB (Gen) Regs, reg 1(2)

Evening courses

41687 DMs should include time spent on evening courses if it is a course of non-advanced education.

Example

Lynn is 17 years old. She is studying for three A levels. She studies for two of them at school during the day and for the third one at an evening class in the local college. The DM calculates the total hours of attendance at both school and college.

Hours of study in education elsewhere

41688 Where there are special reasons and study is done elsewhere, the method of study might be quite different from that at an educational establishment. For this reason, the twelve hour requirement in DMG 41686 is not binding but may be used as a guide in deciding if the education is F/T. Count all time spent on

1. all activities mentioned in DMG 41686 **and**
2. unsupervised study.

If the hours in **1.** and **2.** do not exceed twelve a week, the person should not be treated as receiving education. The DM must consider all other cases on their merit.

41689 - 41700

School leavers

Introduction

41701 A person who has completed F/T non-advanced education may be treated as still in education for ESA until the next terminal date. The terminal date is defined in DMG 41707 and depends on the school leaving date. DMs may find the flow chart after DMG 41703 helpful.

School leaving dates

41702 Pupils can leave school at, but not before

1. in England and Wales¹, the single school leaving date which is the last Friday in June in the school year in which they are 16
2. in Scotland²

2.1 the Friday before the last Monday in May - where age 16 is reached between 1 March and 30 September inclusive **or**

2.2 the end of the Christmas term - where age 16 is reached between 1 October and the last day in February of the next year inclusive.

1 Education (School Leaving Dates) Order 97; 2 Education (Scotland) Act 80

Person between 16 and 18

41703 While a person can leave school at 16, they must do one of the following until they are 18

1. stay in full-time education, for example at a college
2. start an apprenticeship or traineeship
3. spend 20 hours a week or more working or volunteering, while in part-time education or training.

Person under 16

41704 A person who is under the age of 16 at the

1. date F/T non-advanced education ends **and**
2. terminal date next following the date in 1.

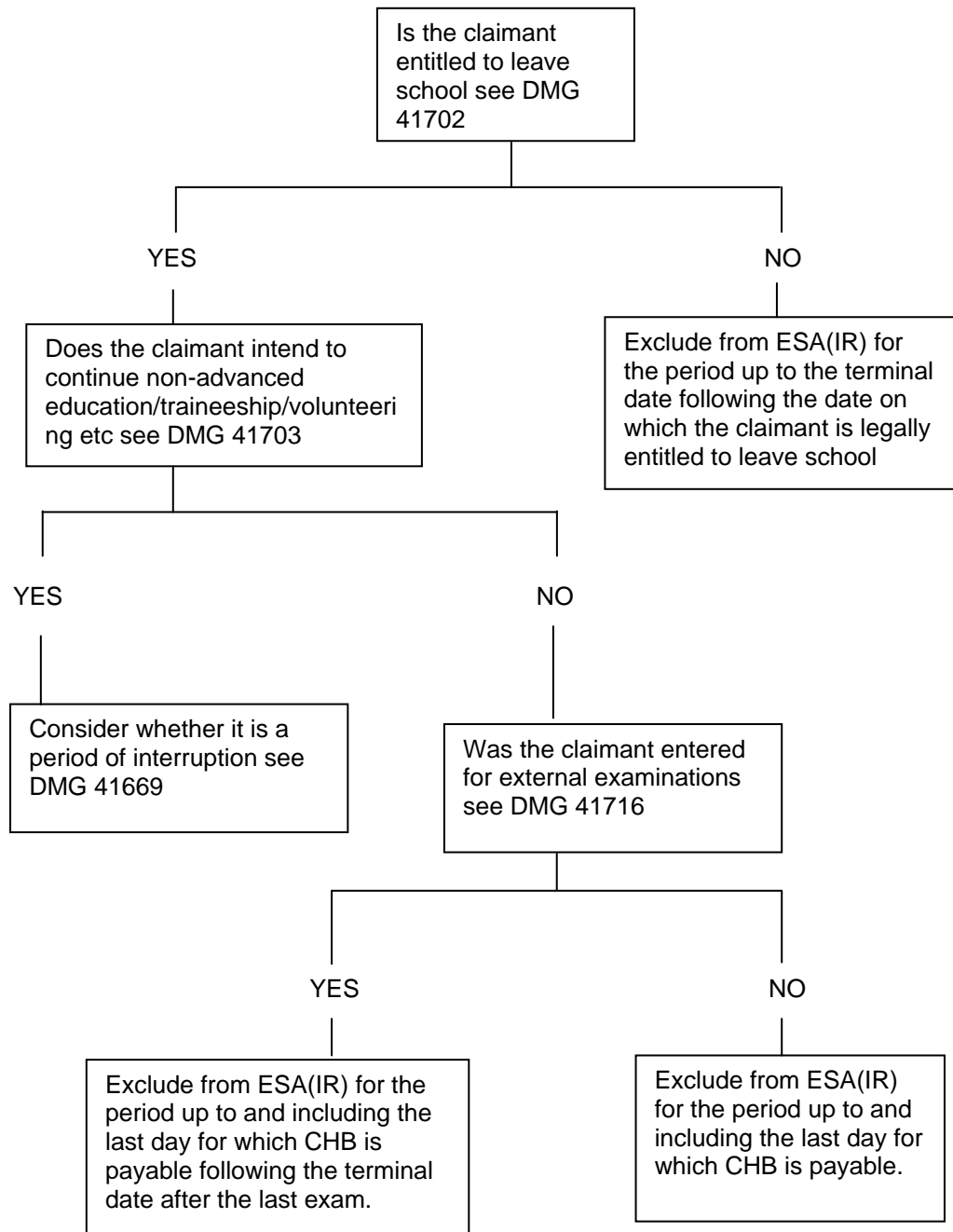
will not be entitled to ESA(IR) until the 16th birthday¹ and then only if the conditions in DMG 41012 and 41091 are satisfied.

1 CHB (Gen) Regs, reg 7(2) Case 1

41705

School leavers aged 16-18

Education received before leaving school exceeds 12 hours a week of supervised study



Terminal dates

England and Wales

41706 A person continues to be treated as a qualifying young person and entitled to CHB where they have left education or approved training up to and including

1. the week including the terminal date **or**
2. if they attain the age of 20 on or before that date, the week including the last Monday before they were 20¹.

1 CHB (Gen) Regs, reg 7(2), Case 1.1

41707 For the purposes of DMG 41706 the terminal dates are

1. the last day in February
2. the last day in May
3. the last day in August
4. the last day in November

whichever occurs first after they have ceased education or approved training¹.

1 CHB (Gen) Regs, reg 7(2), Case 1.2

Scotland

41708 In Scotland where a person

1. undertakes the Higher Certificate or Advanced Higher Certificate immediately before ceasing education **and**
2. ceases education earlier than they would have done had they taken the comparable examination in England and Wales

the terminal date is calculated by reference to the date that applies had they taken the examination in England and Wales¹.

Note: In England, Wales and Scotland if a person leaves school and reaches 20 before the next terminal date see DMG 41719.

1 CHB (Gen) Regs, reg 7(2), Case 1.3

Leaving school

41709 Leaving school is not necessarily the same as ceasing education. Education can cease when the hours of attendance reduce to twelve hours a week or less (see DMG 41686). In this case the date of leaving school is irrelevant.

41710 See DMG 41669 if a school leaver intends to resume education at the same or another educational establishment.

When entitlement to ESA(IR) begins

41711 Entitlement to ESA(IR) begins on the Monday following the terminal date. From the Monday following the terminal date the person is no longer a qualifying young person for CHB purposes¹ and ceases to be treated as a member of the parent's family.

1 CHB (Gen) Regs, reg 7(2) Case 1

41712 - 41715

External examinations

41716 Where a person has ceased to receive education and

1. was entered for external examinations before education ceased **and**
2. was still entered for those examinations when education ceased **and**
3. the examinations are in connection with the education received

treat them as a qualifying young person up to the first terminal date, as described in DMG 41707 and 41708, after the last examination¹.

1 CHB (Gen) Regs, reg 7(2), Case 2

Period up to the terminal date

41717 In the period up to the terminal date young people are not entitled to ESA(IR) because they are treated as

1. a child for CHB purposes¹ **and**
2. receiving education²

unless they come within the exception³ in DMG 41552.

1 CHB (Gen) Regs, reg 7(1); 2 ESA Regs, reg 15; 3 reg 18

Person starts work or training

41718 CHB ceases when a young person starts work or WBTfYP but the terminal date still applies. If work or training ends before the terminal date is reached CHB can be reinstated on application.

Age 20

41719 A person who reaches 20

1. whilst still receiving F/T non-advanced education **or**
2. before reaching the terminal date

is no longer treated as receiving education but may be in education for the purposes of DMG 41556 et seq.

41720 - 41730

Claimant not treated as receiving education

41731 A claimant who is under age 19 but not a qualifying young person (see DMG 41662) is not treated as receiving education where the course of study (see DMG 41566 – 41567) is not¹

1. a course leading to a
 - 1.1 postgraduate degree or comparable qualification **or**
 - 1.2 first degree or comparable qualification **or**
 - 1.3 diploma of higher education **or**
 - 1.4 higher national diploma **or**
2. any other course which is a standard above
 - 2.1 advanced GNVQ or equivalent **or**
 - 2.2 GCE (A level) **or**
 - 2.3 Scottish National qualification (higher or advanced higher).

1 ESA Regs, reg 16

41732 - 41799

Duration of ESA(Cont)

Introduction

41800 From 1.5.12 entitlement to ESA(Cont) for claimants who are not in the support group will be limited to a period of no more than 365 days¹. This includes awards of ESA(Cont) made under

1. the youth conditions **and**
2. the IB Reassessment rules².

See DMG Chapter 45 for guidance on duration of ESA(Cont) awards made under the IB Reassessment rules.

1 WR Act 07, s 1A; 2 WR Act 07, Sch 4, para 7(2)(f); ESA (TP, HB & CTB)(EA)(No. 2) Regs, Sch 2, para 2A

Further awards of ESA(Cont)

41801 There are special provisions allowing claimants to become entitled to a further award of ESA(Cont)¹ after a previous award has ended due to time limiting where

1. they satisfy the contribution conditions **and**
2. in relation to the second condition, at least one of the relevant income tax years is later than those used for the previous period of entitlement.

See DMG 41847 for further details.

1 WR Act 07, s 1A(3)

41802 Awards made under the youth conditions are not based on tax years. Any further claim after entitlement is terminated because of time limiting must be based on the normal conditions of entitlement (but see DMG 41803 where the claimant's health condition deteriorates).

41803 A further provision also allows claimants whose ESA(Cont) has ceased as a result of time limiting to qualify for a further award of ESA(Cont) where their health condition deteriorates to the extent that they have, or are treated as having, LCWRA, provided certain conditions are satisfied¹. See DMG 41856 – 41870 for further details.

41804 – 41809

1 WR Act 07, s 1B

Period of entitlement

Contribution conditions satisfied

41810 Entitlement to an award of ESA(Cont) where

1. the first and second contribution conditions are satisfied¹ (see DMG 41021 – 41039) **and**
2. entitlement is based on the same two tax years

cannot exceed the relevant maximum number of days².

Note: See DMG 41820 – 41823 for days which do not count towards the maximum number of days.

1 WR Act 07, s 1(2)(a) & Sch 1, paras 1 – 3; 2 s 1A(1) & (2)

Relevant maximum number of days

41811 The relevant maximum number of days is¹

1. 365 **or**
2. a greater number of days where specified by order of the Secretary of State.

At present no order has been made, and the maximum number of days is therefore 365.

1 WR Act 07, s 1A(2)

41812 – 41814

Youth conditions satisfied

41815 Entitlement to an award of ESA(Cont) where

1. the youth conditions are satisfied **and**
2. the claim was made before 1.5.12

cannot exceed 365 days¹. See DMG 41046 – 41083 for guidance on the youth conditions.

Note: See DMG 41820 – 41823 for days which do not count towards the maximum number of days.

1 WR Act 07, s 1A(4)

41816 – 41819

Which days are not included

Claimant has, or is treated as having, LCWRA

- 41820 When calculating the period of entitlement for the purposes of DMG 41810 or 41815, days where the claimant is
1. a member of the support group¹ **or**
 2. not a member of the support group, but is entitled to the support component²
or
 3. in the assessment phase³, when this is immediately followed by a determination that the claimant is a member of the support group and entitled to the support component
- are **not** included⁴.

Note : See DMG 41875 – 41878 for guidance on where the claimant’s health condition improves.

1 WR Act 07, s 24(4); 2 s 2(1)(b); 3 s 24(2); 4 s 1A(5)

- 41821 A claimant is a member of the support group from the date the determination is made that they have, or are treated as having, LCWRA¹. This determination may be made before or after the effective date of entitlement to the support component.

Example

Miranda has been entitled to ESA(Cont) at the assessment phase rate since 15.2.12. On 6.6.12, after application of the WCA, the DM determines that Miranda has LCW and LCWRA. Miranda is a member of the support group from 6.6.12. The DM then supersedes the decision awarding ESA(Cont) and awards the support component from 16.5.12, the 14th week of entitlement. None of the days when Miranda is entitled to ESA(Cont) count towards the relevant maximum number of days. Miranda continues to be entitled to ESA(Cont) for as long as she has LCW and LCWRA. If her health improves to such an extent that she is later found to have LCW but no longer has LCWRA, the 365 day count would begin from the date of that determination.

Waiting days

- 41822 A claimant is not entitled to ESA for the first seven days of a PLCW¹, known as waiting days (see DMG 41101). Waiting days are therefore not included in the period of entitlement at DMG 41810 or 41815.

1 WR Act 07, Sch 2, para 2; ESA Regs, reg 144(1)

Days of disqualification

41823 DMG 53112 gives guidance on treating the claimant as not having LCW if they are disqualified for receiving ESA(Cont) during a period of imprisonment of more than six weeks¹. These days are not days of entitlement to ESA(Cont), and are therefore not included in the period of entitlement at DMG 41810 or 41815.

1 ESA Regs, reg 159(1)

41824 – 41829

Which days are included

41830 When calculating the period of entitlement for the purposes of DMG 41810 or 41815, **all** days of entitlement, both before and after 1.5.12, **except** those in DMG 41820 – 41823, are included in the count¹. This also includes days where the claimant is entitled to ESA(Cont) paid at the assessment phase rate pending an appeal against a disallowance following application of the WCA (see DMG 42450 et seq).

1 WR Act 07, s 1A(6)

Example 1

John has been entitled to ESA (Cont) since 17.1.11. As at 1.5.12, this exceeds 365 days. He is not a member of the support group. John's entitlement to ESA (Cont) is terminated from and including 1.5.12. He remains entitled to NI credits for as long as he would have LCW if he had remained entitled to ESA(Cont).

Example 2

Sally has been entitled to ESA(Cont) at the assessment phase rate since 7.7.11. She is not entitled to ESA(IR). On 16.11.11 after application of the WCA the DM determines that Sally does not have LCW, and terminates her entitlement to ESA(Cont) from the same date. Sally appeals to the FtT, and is awarded ESA(Cont) at the assessment phase rate from 16.11.11 pending determination of the appeal. As none of these days is excluded from the 365 day period, her last day of entitlement is 5.7.12, the 365th day, if the appeal is still outstanding at that time.

If the FtT subsequently allows Sally's appeal, but finds that she does not have LCWRA, Sally is entitled to arrears of the WRAC from the 14th week of entitlement for the period 6.10.11 – 5.7.12 only. The decision terminating ESA(Cont) from 6.7.12 stands.

If the FtT allows the appeal, and finds that Sally has LCWRA, the decision terminating ESA(Cont) from 6.7.12 should be revised to reinstate entitlement, and arrears of the support component paid as normal. As Sally is in the support group her ESA(Cont) is not time limited for as long as she has LCW and LCWRA. None of the days from 7.7.11 count towards the 365 day time limit.

41831 The period of 365 days includes all days of entitlement, including previous periods of entitlement, which are based on the same two tax years¹. This may be where the 12 week linking provisions apply², or where two awards for claims made in the same relevant benefit year. See DMG 41111 for guidance on linking PLCWs.

1 WR Act 07, s 1A(1); 2 ESA Regs, reg 145(1)

Example

Roberto was entitled to ESA(Cont) from 20.1.12. He was found to have LCW, but was not placed in the support group, so was awarded the WRAC. He returned to work on 3.9.12, and his award of ESA was terminated from that date. On 8.10.12 Roberto makes a repeat claim for ESA(Cont). The PLCWs link, and he is awarded ESA(Cont) including the WRAC from 8.10.12. Roberto's entitlement to ESA(Cont) will end on 22.2.13, the combined 365th day of entitlement, unless he is found to have LCWRA before that date.

41832 DMs should note that the number of days of entitlement includes days where ESA(Cont) is not payable, but entitlement continues. This includes days where ESA is not payable

1. for periods of disqualification, for example for imprisonment (see DMG 53071 et seq) **or**
2. because the overlapping rules apply (see DMG Chapter 17) **or**
3. because it is reduced to nil through pension payments or councillor's allowances (see DMG Chapter 44561 et seq).

Note: See DMG 41823 where days of disqualification due to imprisonment exceed six weeks.

Example

Kylie has been entitled to ESA(Cont) since 10.5.11. She is not a member of the support group. On 20.4.12 she is sentenced to a period of imprisonment, and the DM decides that Kylie is disqualified from receiving ESA(Cont) which is therefore not payable. Kylie is released on 25.5.12. Her entitlement to ESA(Cont) terminates on 8.5.12, even though on that day it is not payable.

41833 – 41839

Claimant also entitled to ESA(IR)

41840 Where the ESA(Cont) claimant

1. is also entitled to ESA(IR)¹ **or**
2. would be entitled to ESA(IR) but for the rules about amounts payable² (see DMG 44049) **or**
3. would be entitled to ESA(IR) once entitlement to ESA(Cont) terminates

the DM may need to reassess entitlement from the date that ESA(Cont) terminates. This includes pending appeal awards and converted awards of ESA(Cont).

1 WR Act 07, s 6(5); 2 s 6(4)

Example 1

Mervyn is entitled to ESA(Cont) and ESA(IR), including the WRAC, for himself and his partner Keira. His entitlement to ESA(Cont) ends on 24.5.12 as it reaches 365 days. Mervyn and Keira have no other income. As the overall amount of ESA Mervyn is entitled to does not change once ESA(Cont) ends, the DM does not supersede the decision awarding ESA.

Example 2

Aisha is entitled to ESA(Cont) including the WRAC. Her underlying entitlement to ESA(IR) is less than the amount of ESA(Cont) awarded. Aisha's entitlement to ESA(Cont) ends on 30.4.12 as she has been entitled since 2.3.11, which is more than 365 days as at 1.5.12. She has an occupational pension of £55 a week which is disregarded for the purposes of ESA(Cont) as it is below the £85 threshold. She has no other income, and there have been no changes since the award of ESA(Cont) began. When her ESA(Cont) terminates, the DM supersedes the last awarding decision to award ESA(IR), taking the occupational pension into account as income.

Credits

- 41841 A person whose entitlement to ESA(Cont) has been terminated after 365 days remains entitled to NI credits for any day which would have been a day of LCW if the ESA award had not been terminated¹.

1 SS (Credits) Regs, reg 8B(2)(a)(iva)

41842 – 41844

Repeat claim for ESA(Cont)

Introduction

41845 Where

1. an award of ESA(Cont) has terminated as in DMG 41810 or 41815 **and**
2. a further claim for ESA(Cont) is made

the DM should firstly consider whether the guidance on establishing a further 365 days entitlement based on a later tax year in DMG 41847 applies. If not, the DM should next consider whether the guidance on deterioration in the claimant's health condition in DMG 41856 – 41870 applies.

41846 If neither of those circumstances apply, the claimant cannot be entitled to ESA(Cont). The DM should consider whether the claimant is entitled to ESA(IR) as normal.

Claim based on a later tax year

41847 A further claim for ESA(Cont) where the claimant has already been entitled for 365 days on the basis of the contribution conditions can succeed if

1. the claimant satisfies the first and second contribution conditions (but see DMG 41032 for guidance on relaxation of the first contribution condition) **and**
2. in relation to the second contribution condition, at least one tax year is later than the second of the two years on which the previous entitlement was based¹.

Note: See DMG 41875 – 41878 where an award is made and the claimant's condition improves.

1 WR Act 07, s 1A(3)

Example 1

Nicholas has been entitled to ESA(Cont) since February 2011. He is not a member of the support group. His entitlement was based on 52 paid contributions for the tax year 2009/2010 in relation to the first condition, and a combination of paid contributions and NI credits for unemployment for the tax years 2008/2009 and 2009/2010 in relation to the second condition. Nicholas's last day of entitlement to ESA(Cont) is 30.4.12. He is not entitled to ESA(IR), as his partner is in full-time remunerative work. He remains entitled to NI credits on the basis that, if he had remained entitled to ESA(Cont), he would have LCW.

Nicholas makes a further claim for ESA(Cont) on 3.8.12. There has been a break of more than 12 weeks in the PLCWs for benefit purposes so the contribution conditions can be considered afresh in the later benefit year. He satisfies the first condition with paid contributions for the tax year 2009/2010. In relation to the second contribution condition, the tax years are 2009/2010 and 2010/2011. As one of these years is later than the years on which his previous period of entitlement was based, Nicholas is entitled to a further 365 days of ESA(Cont) as long as he continues to satisfy the conditions of entitlement.

Example 2

Zelda has been entitled to ESA(Cont) since she took ill–health retirement in October 2009, based on the tax years 2006/2007 and 2007/2008. She is not a member of the support group, and has a partner in full–time remunerative work. Her last day of entitlement is 30.4.12. Zelda finds work on 7.5.12, but gives this up when her condition deteriorates in March 2014. She makes a further claim from 10.3.14, and the DM determines that the tax years are 2011/2012 and 2012/2013. Zelda satisfies the first and second conditions, and the tax years are later than her previous award of ESA(Cont).

On application of the WCA, the DM determines that Zelda has LCW and LCWRA. Zelda is entitled to ESA(Cont), with the support component payable from week 14. None of the days when Zelda is entitled to ESA(Cont) count towards the relevant maximum number of days. Zelda continues to be entitled to ESA(Cont) for as long as she has LCW and LCWRA. If her health improves to such an extent that she is later found to have LCW but not LCWRA, the 365 day count would begin from the date of that determination.

41848 – 41849

ESA in youth

41850 Where an award of ESA(Cont) based on the claimant satisfying the youth conditions terminates

1. as in DMG 41815 **or**
2. for any other reason

any further claim must be based on the normal conditions of entitlement. The claimant cannot benefit from the youth conditions again, even if the PLCWs link. But see DMG 41856 – 41870 where the claimant’s health condition deteriorates.

Example 1

Fran has been entitled to ESA(Cont) since January 2011 as a result of an accident while she was a student. Her entitlement was based on the youth conditions, and she is not a member of the support group. She continues studying on a part–time

basis. Her entitlement terminates on 30.4.12. Fran is not entitled to ESA(IR) due to excess capital. She remains entitled to NI credits. On 25.6.12, after finishing her part-time studies, Fran makes a further claim for ESA. She has never worked, and the DM determines that she does not satisfy the contribution conditions. Fran can only be entitled to ESA if she satisfies the conditions for ESA(IR).

Example 2

Dipesh has been entitled to ESA(Cont) since March 2009 when he reached age 16. He has LCW, but is not a member of the support group. His entitlement terminates on 30.4.12. He has capital of £20,000, and is not entitled to ESA(IR). He remains entitled to NI credits.

Dipesh finds work from 4.6.12, and is treated as not having LCW for the purposes of NI credits. On 17.1.14 he makes a further claim for ESA(Cont) after his health deteriorates, and is found to have LCW but not LCWRA. Dipesh is entitled to ESA(Cont) for a further 365 days because he now satisfies the relevant contribution conditions for the tax years 2011/12 and 2012/13. The award will continue for as long as he continues to have or be treated as having LCW until the 365 day time limit is reached. If during this time he becomes a member of the support group the 365 day count would stop.

Example 3

Jasmine's award of ESA(Cont) based on the youth conditions began on 23.1.12. She is not entitled to ESA(IR) as she has savings which exceed the capital limit. The award is terminated from 14.5.12 when she started full-time work. Jasmine makes a further claim for ESA on 6.8.12 after the job contract comes to an end. She provides evidence of LCW. Her claim cannot be considered under the ESA(Cont) youth conditions as it was made after 30.4.12, and she has not worked for long enough to satisfy the contribution conditions. Jasmine's claim can only succeed if she satisfies the conditions of entitlement to ESA(IR).

41851 – 41854

Change in claimant's health condition – ESA(Cont) awards

41855 During the period of an award, the claimant's health condition may deteriorate or improve to the extent that the DM determines that they

1. have, or are treated as having, LCWRA **or**
2. no longer have, or are treated as having, LCWRA.

These changes can occur more than once throughout the period of entitlement.

Health condition deteriorates

41856 Where the claimant's health condition deteriorates, this can affect further entitlement to ESA(Cont). The action to take depends on whether an award of ESA(Cont) has already terminated before it is determined that the claimant has, or is treated as having, LCWRA. DMs are reminded that they should always firstly consider whether a claim could succeed because one of the tax years for the second contribution condition is later than those on which the earlier award was based, before consideration is given to a further award solely based on deterioration in their health.

Example

Amy's entitlement to ESA(Cont) began on 22.2.11, and ended on 30.4.12, as her entitlement exceeded 365 days and she was not in the support group. Entitlement was based on tax years 2008/2009 and 2009/2010. She is not entitled to ESA(IR) as she has excess income from an occupational pension, but entitlement to NI credits continues. On 6.8.12 she makes a further claim for ESA(Cont) stating that her condition has deteriorated since her previous entitlement ended. The relevant tax years are 2009/2010 and 2010/2011, and Amy satisfies both the first and second contribution conditions, with a later tax year for the second contribution condition. The DM awards ESA(Cont) at the assessment phase rate from 9.8.12.

Following application of the WCA, the DM determines that Amy has LCW and LCWRA. The award is superseded to award the support component from week 14. The deterioration rule does not apply.

41857 – 41859

Application made during current award

41860 A claimant who is already entitled to ESA(Cont) and the WRAC may apply for supersession on the basis that they consider they have LCWRA. If, following application of the WCA, the DM determines that the claimant has, or is treated as

having, LCWRA, the decision awarding the WRAC should be superseded as normal

to award the support component. See DMG 04709 for guidance on the effective date rule.

1 SS CS (D&A) Regs, reg 6(2)(r) & 7(39)

- 41861 The award of ESA(Cont) may have terminated as in DMG 41810 or 41815 before the determination of LCWRA has been made. In this case the DM should revise¹ the decision ending entitlement to ESA(Cont), and supersede the previous decision awarding ESA(Cont) as in DMG 41860.

1 SS CS (D&A) Regs, reg 3(5I)

Application made after award has terminated

41862 Where

1. entitlement to ESA(Cont), including under the youth provisions, has been terminated as in DMG 41810 or 41815 because it exceeded 365 days **and**
2. the claimant
 - 2.1 reports a deterioration in their health condition **or**
 - 2.2 makes a further claim for ESA(Cont) **and**
3. the claimant had, or is treated as having had, LCW since the previous entitlement ended **and**
4. the claimant satisfies the basic conditions of entitlement (see DMG 41012) **and**
5. the DM determines that the claimant has, or is treated as having, LCWRA

the claimant is entitled to an award of ESA(Cont), even though they do not satisfy the contribution conditions¹. The award is regarded as an award of ESA(Cont) for all other purposes, for example amounts payable².

1 WR Act 07, s 1B(1); 2 s 1B(2)

Example

Bogdan's award of ESA(Cont) ended on 30.4.12 as it exceeded 365 days. Entitlement was based on tax years 2008/2009 and 2009/2010. He is not entitled to ESA(IR) as he has a partner in full-time remunerative work. He remains entitled to NI credits. Bogdan makes a further claim to ESA(Cont) from 10.7.12 on the grounds that his condition has deteriorated. As the PLCWs link, the tax years on which entitlement could be based do not change. The claim cannot be decided until the DM determines whether or not Bogdan has, or is treated as having, LCWRA.

Following application of the WCA, the DM determines that Bogdan has LCWRA. He is entitled to ESA(Cont) and the support component from 10.7.12. He does not have to serve waiting days or the assessment phase.

- 41863 Where the claimant reports a change in their condition other than by making a claim, the DM should consider whether the contact satisfies the conditions for claiming ESA¹ (see DMG 02153 et seq).

1 SS (C&P) Regs, reg 4G & 4H

41864

Deterioration identified on routine WCA

- 41865 The guidance at DMG 41862 also applies where the DM determines that the claimant has, or is treated as having, LCWRA, after application of the WCA where the claimant is entitled to NI credits.

Example

Mina's entitlement to ESA(Cont) began on 18.11.08 and terminated on 30.4.12 as it exceeded 365 days. She is not a member of the support group, and remains entitled to NI credits on the basis that she would have LCW if her entitlement to ESA(Cont) had not ended due to time limiting. She is not entitled to ESA(IR) as she has a partner who is entitled to JSA(IB) for her. On 18.9.12, following a routine WCA, the DM determines that Mina has LCW and LCWRA, and invites her to make a further claim for ESA. Mina's claim for ESA(Cont), stating she wishes to claim from 10.9.12, is received on 14.11.12. The DM determines that she does not satisfy the contribution conditions, but is entitled under the deterioration rule. Mina is awarded ESA(Cont) including the support component from 10.9.12.

41866 – 41869

Date award begins

- 41870 Where an award is made as in DMG 41862 – 41865, the claimant does not have to serve waiting days before entitlement begins¹. The support component is payable from the first day of entitlement². See DMG 41875 –41878 where an award is made and the claimant's condition then improves.

Note: This does not apply if the claimant is entitled to ESA(Cont) on the basis of a later tax year as in DMG 41847. See DMG 41877 for further details.

1 ESA Regs, reg 144(2)(e); 2 reg 7(1)(d)

41871 - 41874

Health condition improves

41875 Claimants who

1. are awarded ESA (Cont) **and**
2. are not subject to time limiting for all or part of their award because they are a member of the support group

can receive a total of 365 days ESA(Cont) if, on a further application of the WCA, they are found to have LCW but no longer have LCWRA.

Example

Lily has been entitled to ESA(Cont) including the support component since 20.4.11. Following a routine WCA, the DM determines that Lily has LCW but no longer has LCWRA. The award of ESA(Cont) is superseded to award the WRAC instead of the support component from 2.10.11. As long as Lily continues to have LCW, her entitlement to ESA(Cont) will terminate on 30.9.12 unless she is subsequently found to have LCWRA again.

41876 Where entitlement to ESA(Cont) is based on the same tax years, and the claimant's health condition changes, the claimant can only be entitled for a maximum of 365 days during the period of the award, excluding days as in DMG 41820 – 41823.

Example

Liam's entitlement to ESA(Cont) began on 9.11.11. On 20.1.12 the DM determines that Liam has LCW but does not have LCWRA. Liam is awarded the WRAC from 8.2.12.

Following an accident, Liam reports a change in his health condition on 9.8.12. After a further application of the WCA, the DM determines that Liam has LCWRA. The support component is paid from 9.8.12.

Liam's condition improves following surgery. On 10.1.13 the DM determines that Liam no longer has LCWRA. Taking into account the 274 days already paid before 9.8.12, Liam's last day of entitlement to ESA(Cont) will be 10.4.13.

41877 Claimants who are awarded ESA(Cont) because

1. they satisfy the conditions in DMG 41847 (entitlement based on later tax year) **and**
2. their award includes the support component

can receive a further 365 days ESA(Cont) if, on a further application of the WCA, they are found to have LCW but no longer have LCWRA.

Example

Jessica's award of ESA(Cont) including the WRAC began on 22.3.11, and terminated on 30.4.12 as her entitlement exceeded 365 days. She makes a further claim to ESA(Cont) on 24.7.12, and the DM determines that she satisfies the contribution conditions based on different tax years. She is awarded ESA(Cont) at the assessment phase rate pending the WCA. On application of the WCA, Jessica is found to have LCWRA. She is awarded the support component from week 14. None of the days count towards the relevant maximum number of days, as the assessment phase is immediately followed by payment of the support component.

On 14.11.13 after a further routine WCA, the DM determines that Jessica has LCW but no longer has LCWRA. As long as Jessica continues to have LCW but not LCWRA, all days of entitlement from and including 14.11.13 count towards the 365 days maximum.

- 41878 Where the claimant becomes entitled to an award of ESA(Cont) as in DMG 41862 – 41865 and their condition improves to the extent that they no longer have, or are treated as having, LCWRA, entitlement to ESA(Cont) terminates from the date of the DM's decision. The claimant is not entitled to a further 365 days of ESA(Cont) even though they may still have LCW. This is because they no longer satisfy the condition at DMG 41862 5. i.e. that they have or are treated as having LCWRA¹.

1 WR Act 07, s 1B(1)(c)

Example

Marvin's award of ESA(Cont) ended on 30.4.12 as his entitlement exceeded 365 days. He is not entitled to ESA(IR), as his partner is entitled to IS for him. He remains entitled to NI credits on the grounds that he would have LCW had he remained entitled to ESA(Cont). On 13.6.12 he makes a further claim to ESA(Cont). He does not satisfy the contribution conditions. The DM determines that Marvin has LCWRA, and awards ESA(Cont) including the support component from 13.6.12 under the deterioration rule.

Following a routine WCA, the DM determines that Marvin has LCW, but no longer has LCWRA. The award of ESA(Cont) is terminated from the date of the decision. Entitlement to NI credits continues as long as Marvin would have LCW if his ESA(Cont) entitlement had not ended.

41879 - 41899

Appeal against time limit decision

41900 Claimants have a right of appeal against a decision terminating ESA(Cont), including converted awards, after 365 days, and are entitled to argue on such an appeal that the award should be extended on the grounds that, on the effective date of that decision, they had LCWRA.

41901 The DM is not required to make a further determination about LCWRA when making a decision terminating ESA(Cont) after 365 days. They can rely on any previous determination made that the claimant does not have LCWRA.

Note: See DMG 41855 et seq for guidance where the claimant states that their condition has deteriorated since the previous determination was made.

41902 The FtT is at liberty to consider whether the claimant has LCWRA when hearing an appeal against the decision to terminate ESA(Cont), even if the issue is not raised by the appeal, provided that the DM is given the opportunity to consider any further evidence.

41903 The DM can apply for an appeal against a decision to terminate ESA(Cont) to be struck out where there is no dispute about the calculation of the 365 days, and no arguments are made about whether the claimant is a member of the support group. See DMG Chapter 06 for guidance about strike out.

Example 1

Bradley is awarded ESA(Cont) from 12.6.14, and following application of the WCA, on 14.1.15 the DM determines that Bradley has LCW but not LCWRA. Bradley is placed in the WRAG from 11.9.14. Bradley is notified on 11.6.15 that his entitlement to ESA(Cont) is to terminate from 12.6.15 as he has received ESA for 365 days. Bradley applies for reconsideration of the decision of 11.6.15, on the grounds that he should be in the support group. The DM refuses to revise, as the evidence provided does not show a change in Bradley's health condition since the previous LCWRA determination was made, or indicate that it was incorrect.

Example 2

Miranda is awarded ESA(Cont) from 13.8.14. Following application of the WCA, on 11.12.14 the DM determines that Miranda has LCW but not LCWRA, and places her in the WRAG from 12.11.14. On 12.8.15 Miranda is notified that her entitlement to ESA(Cont) terminates from 13.8.15 as she has now received this for 365 days. Miranda applies for reconsideration of the decision of 12.8.15, on the grounds that she should be in the support group. Medical Services advises that the evidence shows a change in Miranda's health condition, and she is referred for the WCA. The DM determines that Miranda now has LCWRA. The supersession decision

terminating entitlement is revised, and Miranda is entitled to the support component from 13.8.15, the date from which the original decision took effect.

41904 - 41999

Appendix 1

Savings provisions - disabled workers and people living in a care home, Abbeyfield Home or an independent hospital

Introduction

1 From and including 25.1.10, amending legislation¹ removed the provisions allowing claimant's partners who are

1. disabled workers **or**
2. living in
 - 2.1 a care home **or**
 - 2.2 an Abbeyfield Home **or**
 - 2.3 an independent hospital

to be treated as not in remunerative work for ESA(IR) purposes. However, the legislation revoking these provisions also contained savings provisions and this Appendix gives guidance on when those savings provisions should be applied.

1 Social Security (Miscellaneous Amendments) (No. 5) Regulations 2009

Background

2 From and including 25.1.10, claimant's partners who are

1. disabled workers **or**
2. living in
 - 2.1 a care home **or**
 - 2.2 an Abbeyfield Home **or**
 - 2.3 an independent hospital

are removed from the list of those who are treated as not in remunerative work for ESA(IR) purposes.

1 Social Security (Miscellaneous Amendments) (No. 5) Regulations 2009, reg 4(1)

Savings provisions

3 Where paragraph 2 applies to an ESA(IR) claimant's partner for a period including 24.1.10, they shall continue to be treated as not in remunerative work until

1. they first cease to fall within paragraph 2 **or**
 2. the claimant ceases to be entitled to ESA(IR)
- whichever date is the earlier¹.

1 Social Security (Miscellaneous Amendments) (No. 5) Regulations 2009, reg 4(3) & (6)

Appendix 2

Lower earnings limit

From	Amount
6.4.89	£43
6.4.90	£46
6.4.91	£52
6.4.92	£54
6.4.93	£56
6.4.94	£57
6.4.95	£58
6.4.96	£61
6.4.97	£62
6.4.98	£64
6.4.99	£66
6.4.00	£67
6.4.01	£72
6.4.02	£75
6.4.03	£77
6.4.04	£79
6.4.05	£82
6.4.06	£84
6.4.07	£87
6.4.08	£90
6.4.09	£95
6.4.10	£97
6.4.11	£102

Appendix 3

Recognized customary or other holiday

Recognized or customary holiday

- 1 Recognized or customary holidays¹ are days which employers and employees have agreed shall be non working days. They become a normal and recurring event in the employment and are an implied term of a contract of service. They can only be changed by further agreement². This does not mean that every agreed non working day is a recognized or customary holiday³. There may be other reasons for employees not having to work.

1 R(SB) 7/84; 2 R(U) 11/53; 3 R(U) 8/64; R(SB) 7/84

- 2 Agreements about recognized or customary holidays may be express or implied. They can be changed or replaced by further agreement. This may be either permanently or for once only¹. There may be more than one agreement involved. For example, an express agreement may provide for certain holidays. An implied agreement may then provide for extra holidays.

1 R(U) 3/53

Express agreement

- 3 An express agreement can be written or oral. It may cover all details or may leave some to be settled for each holiday, for example, the precise dates of the holiday.

Implied agreement

- 4 If there is no express agreement for the days being considered, consider whether there is an implied agreement. An implied agreement is where the employer and employees have come to recognize and accept the days as being days of holiday.

Period of observance

- 5 A day may have been observed as a non working holiday for many years. The effect is that there is an implied agreement that it is a day of recognized or customary holiday. That inference stands unless there is evidence to disprove it. The period of observance may also be short. For example, a holiday may be of very recent origin. Even so, the recognition of it as a holiday may be proved. A long period of observance makes it easier to establish that a day has been recognized. But it does not in itself create a recognized or customary holiday¹.

1 R(SB) 7/84 (App)

Example 1

A factory closes for two weeks in August. The first week is a holiday with pay covered by express agreement. The second week is not. The factory have been doing this for the past five years.

The 2nd week is recognized as a holiday by the employer and employees. There is no evidence to the contrary. The employees are on recognized or customary holiday for the full two weeks. They are still in employment for that period.

Example 2

A mill closes for Easter Monday and Tuesday. These are paid holidays by express agreement. It also closes on Good Friday, but this is not covered by the agreement and is not paid. This has happened for the past five years.

Employees who have to work on holidays get paid time and a half. Those working on Good Friday only get ordinary time. There is no pressure for pay at the rate for working on a holiday. Good Friday is not a holiday in the district generally. It is not a day of recognized or customary holiday.

Example 3

A pottery is closed on Easter Monday, which is a paid holiday by express agreement. It is also closed on Good Friday and Saturday. These are not covered by the agreement and are not paid. The pottery has closed on these days for the past 30 years.

It is the practice for the employees to ask for these days off each year. This request has always been granted by the employer.

Good Friday and Saturday are days of recognized or customary holiday.

Example 4

Rhona works for four hours each evening, Monday to Friday. For several years her employer has closed down at 5pm on the Friday before the August Bank Holiday. Rhona is on a recognized or customary holiday on that day.

Example 5

Ivor's standard working week is Monday to Friday, with some liability to work on Saturday. He has not worked on a Saturday for 18 months but other employees have.

It has been the custom and practice for many years to close the factory on the Saturday of the week before the annual summer holidays. That Saturday is a recognized day of holiday.

Practice within the establishment concerned

- 6 There may be an agreement or practice observed at the claimant's place of employment. The DM should always take this into account when determining whether there is a holiday.
- 7 As well as considering a claimant's own position, consider the arrangements for the
1. establishment as a whole **and**
 2. various departments and grades of workers involved.
- 8 A day may be said to be a general holiday. But a lot of employees may carry on their ordinary work at ordinary pay. Such a day cannot be a general holiday. It could be that employees take their holidays at different times. This may be as individuals or in groups. It may be under a rota system or by individual arrangement. A holiday taken in these circumstances is a recognized or customary holiday for the employees concerned.
- 9 Employees who are not working may not be on holiday. For example, they may have been laid off due to shortage of work. Other employees may have to work, even during a general holiday, for example, maintenance and repair workers. This does not stop it being a day of recognized or customary holiday for those who are not working. Those employees who have to work may get extra pay, or time off in lieu, for working. The effect is that the day is a holiday for those not working. But there may be another reason for the extra pay. For example, it may be payment for doing different work or for doing extra work.
- 10 There may be no extra pay. That does not necessarily mean that the day is not a recognized or customary holiday. But it is important if the employees are normally entitled to extra pay for work during holidays. Without evidence to the contrary, the inference would be that the day is not a holiday¹.

1 R(U) 11/53; R(SB) 7/84 (App)

Comparison with practice at other establishments

- 11 There may be no agreement or practice observed at the claimant's place of employment. Or there could be some doubt about the position. It may then be helpful to consider the practice in other firms in the district. It might also be helpful to consider the practice within the same industry. The practice might be more definite at other firms. That practice can then be regarded as a sign of what might be expected at the claimant's place of employment. If there is little or no evidence about where the claimant works the question may have to be decided by looking at what happens elsewhere.

Example 1

A factory closes for 2 weeks in August. The first week is a holiday with pay covered by an agreement. The second week is not. The second week is recognized as a holiday by the employer and employees.

The practice is the same elsewhere in the industry but the position is no more definite. The practice elsewhere is of no help in this case.

Example 2

A mill closes for Easter Monday and Tuesday. These are paid holidays by express agreement. It also closes on Good Friday, but this is not covered by the agreement and is not paid.

Good Friday is not a holiday in the district generally. That is a sign that Good Friday is not a day of recognized or customary holiday.

Dissension among employees

- 12 All employees may take the same period of holiday, determined by agreement between the employer and the majority of the employees. Any revision of such an agreement must also be between the employer and the majority of the employees. A minority of the employees cannot make such an agreement or alter it. They are bound by the terms of any agreement made by the majority¹. This applies even if days of holiday agreed by the majority are not wanted by an employee.

1 R(U) 3/53

- 13 An agreement, or reviewed agreement, may be made between the employer and the employees' representatives. For example, between the employer and a trade union. The representatives are assumed to have the backing of the majority of the employees. A recognized or customary holiday may be waived by an agreement between the employer and employees. They may agree that some days are to be worked and not taken as holiday.

- 14 If the majority of the employees still take the holiday the agreement to work is ineffective. The days stay days of recognized or customary holiday for
1. those who want the holiday **and**
 2. those who want to work but do not because the other employees are away.

Holiday during closure

- 15 A day of recognized or customary holiday may fall when no work would be available because of short time working¹. Such days are still days of holiday.

1 R(U) 12/54; R(U) 16/54; R(U) 2/64

16 Employees are on holiday where a period of shortage of work is part of a holiday¹

1. arranged **or**
2. extended **or**
3. altered

by agreement between the employer and employees.

1 R(U) 3/53

17 Employers may lay employees off or extend an existing holiday for economic reasons. They may refer to the period of lay off or extension as being a holiday. There is no express or implied agreement by which the days are days of recognized or customary holiday¹. But they may be regarded as other holidays.

1 R(U) 11/53; R(SB) 7/84

18 The practice may be continued for a number of years. The days might then become days of recognized or customary holiday. This could be as a result of an express agreement to that effect. It could also be by implied agreement based on the actions of those involved¹.

1 R(U) 11/53; R(SB) 7/84

Dates of holiday

19 The exact dates of a holiday may be in doubt. If so consider the terms of the express or implied agreement covering it.

20 An agreement may refer to a public or religious holiday whose date changes from year to year, for example Easter or the August bank holiday. Such a reference usually recognizes that these holidays will fall on different dates in different years.

21 The Boxing Day bank holiday is the first week day after Christmas Day. It may fall on 26 December or, when Christmas Day is a Saturday, on 27 December. An agreement may say that the holiday is 25 and 26 December, rather than Christmas Day and the bank holiday. When Boxing Day falls on 27 December it is not a holiday under such an agreement.

22 A public or religious holiday may fall at a weekend or other non working day. Another day may then be substituted as the day of holiday. In such a case the substituted day is the day of holiday. The original day is not a day of holiday¹ (except where it becomes a holiday by implied agreement).

1 R(U) 16/55

23 A substitution can only be made by agreement between employer and employees. It may be covered by a standing agreement or agreed as and when necessary. The employer cannot substitute one day for another without agreement.

- 24 An agreement about annual holidays may
1. state the dates of the holiday **or**
 2. authorize the employer alone to decide the dates each year **or**
 3. allow for the dates to be decided each year by negotiation and agreement.
- 25 No matter how the dates are fixed, they can be changed later by further agreement¹.

1 R(U) 3/53

Shift workers

- 26 Shift workers may be off work for different lengths of time when their employer closes for holidays. Even so, they are on holiday for the whole of the holiday period¹.

1 R(U) 20/52

Example

A holiday in a steel works lasts from Monday evening until Thursday morning. Day shift workers are on holiday for two shifts, Tuesday and Wednesday. Night shift workers are on holiday for three shifts, Monday, Tuesday and Wednesday nights.

The night shift is from 10pm to 6am. A night shift worker starts work again at 10pm on Thursday. He is on holiday on Tuesday, Wednesday and Thursday.

Claimant with two employments

- 27 A day of recognized or customary holiday must be in connection with the claimant's employment as a whole. A claimant may sometimes have two jobs. Benefit may then be claimed for a day which is a holiday in only one job. The DM should
1. take account of both employments **and**
 2. consider whether either job represents a substantial part of the claimant's whole employment.

- 28 If the job without the holiday represents a substantial part, the claimant is not on holiday. This is so even though the day is a holiday in the other employment. If one employment is not a substantial part of the whole, there may be a day of recognized or customary holiday in the other¹.

1 R(U) 7/63

Seeking other employment during holiday

- 29 A person may be free to look for other work during holidays. This does not prevent the days in question being days of recognized or customary holiday¹.

Other holidays

- 30 The term other holiday is not defined. So it has to be given its ordinary everyday meaning. The word holiday is also not defined. But for many years it has been used and considered in the term recognized or customary holiday. It has gained a specific meaning by doing so.
- 31 The specific meaning is a day which is a non working day by agreement between employers and workers. Such a day is a holiday no matter what use workers make of it. How they actually spend the time they have at their disposal is not normally relevant. An exception is where the employee is absent from work with good cause. See DMG 41443 et seq for guidance on absence with good cause.
- 32 A holiday can include a person's individual holidays as well as time off as annual leave. It may be with pay or without pay. Other holidays are often without pay.

Example 1

Heidi works at a factory that closes for Easter Monday and Tuesday. These are paid holidays by express agreement and are recognized or customary holidays. Good Friday is not a holiday in the district generally. The factory does not close on Good Friday. Employees working on Good Friday are paid at ordinary time.

Heidi has problems arranging a childminder for Good Friday. She asks her employer if she can take it as a day off. the employer agrees but says that it will be without pay. Good Friday is an "other" holiday for Heidi.

Example 2

Arnold works at a pottery that closes for two weeks in July every year. Both weeks are holidays with pay covered by an express agreement. they are both recognized or customary holidays.

At the end of the first week, the management and workforce agree that for economic reasons, the holiday should be extended to three weeks. the third week is without pay and is an "other" holiday for Arnold.

Example 3

Stephen works at a firm of accountants. He has taken all his holiday entitlement and will not be due to any more until the New Year. In early December, Stephen wins an all expenses paid two week holiday, which must be taken before the end of the year. His employer agrees to let him have time off, without pay, to take the holiday. The time he is allowed off is an "other" holiday for Stephen.

Appendix 4

Common courses of study

BTECs

BTEC First Certificates and Diplomas

This is normally a one year programme and is considered equivalent to several GCSEs - the Certificate is usually studied P/T and the Diploma full-time.

BTEC National Certificates and Diplomas

This is normally a two year course and is considered equivalent to 2 or 3 A levels - the Certificate is usually studied P/T and the Diploma full-time.

BTEC Higher National Certificates and Diplomas

This is normally a two year course and is considered equivalent to a degree - the Certificate is usually studied P/T and the Diploma full-time.

GNVQs and NVQs

These are work-related qualifications introduced in 1993. They are gradually replacing existing BTEC qualifications in selected subjects. BTEC Firsts will be replaced by BTEC Intermediate, GNVQs and BTEC Nationals by BTEC Advanced GNVQs. NVQs/SVQs relate to existing qualifications as shown below

SVQ/NVQ level 2 = Intermediate GNVQ, BTEC and GCSEs

SVQ/NVQ level 3 = Advanced GNVQ, BTEC Nationals and A levels

SVQ/NVQ level 4 = BTEC Higher Nationals and Degrees.

Appendix 5

National Minimum Wage rates

Date	Hourly rate
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

The content of the examples in this document (including use of imagery) is for illustrative purposes only