

**2011 No. 228**

**SOCIAL SECURITY**

**The Employment and Support Allowance (Limited Capability for Work and Limited Capability for Work-Related Activity) (Amendment) Regulations 2011**

<i>Made</i> - - - -	<i>8th February 2011</i>
<i>Laid before Parliament</i>	<i>16th February 2011</i>
<i>Coming into force</i> -	<i>28th March 2011</i>

The Secretary of State for Work and Pensions makes the following Regulations in exercise of the powers conferred by sections 8(1), 9(1), 24(1)(a) and 25(5) of, and paragraphs 1 and 9 of Schedule 2 to, the Welfare Reform Act 2007(b).

In accordance with section 172(1) of the Social Security Administration Act(c) the Secretary of State referred the proposals for these Regulations to the Social Security Advisory Committee.

**Citation, commencement and interpretation**

**1.—(1)** These Regulations may be cited as the Employment and Support Allowance (Limited Capability for Work and Limited Capability for Work-Related Activity) (Amendment) Regulations 2011 and shall come into force on 28th March 2011.

(2) In these Regulations—

“the ESA Regulations” means the Employment and Support Allowance Regulations 2008(d);

“the Reassessment Regulations” means the Employment and Support Allowance (Transitional Provisions, Housing Benefit and Council Tax Benefit) (Existing Awards) (No. 2) Regulations 2010(e).

**Application**

**2.—(1)** These Regulations apply to:—

- (a) a person who makes a claim for an employment and support allowance on or after 28 March 2011 (including a claim in respect of any period before that date);
- (b) subject to paragraphs (2) and (3), a person who made a claim for an employment and support allowance before 28 March 2011 in respect of whom a determination is made on or after that date as to whether that person has or is to be treated as having limited capability for work under Part 5 of the ESA Regulations or as to whether that person has or is to be treated as having limited capability for work-related activity under Part 6 of those Regulations;

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(a) Section 24(1) is an interpretation provision and is cited because of the meaning it gives to the words “prescribed” and “regulations”.

(b) 2007 c. 5.

(c) 1992 c. 5.

(d) S.I. 2008/794.

(e) S.I. 2010/1907.

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- (c) subject to paragraphs (2) and (3), a person who is entitled to an employment and support allowance immediately before 28 March 2011 in respect of whom, on or after that date—
  - (i) the Secretary of State determines afresh under regulation 19(7) of the ESA Regulations whether the person has or is to be treated as having limited capability for work-related activity;
  - (ii) the Secretary of State determines afresh under regulation 34(4) of the ESA Regulations whether the person has or is to be treated as having limited capability for work-related activity; and
- (d) subject to paragraphs (2) and (3), a notified person as defined by regulation 4 of the Reassessment Regulations<sup>(a)</sup> in respect of whom a determination is made on or after 28 March 2011 as to whether that person has or is to be treated as having limited capability for work under Part 5 of the ESA Regulations<sup>(b)</sup> or as to whether that person has or is to be treated as having limited capability for work-related activity under Part 6 of the ESA Regulations.

(2) Where, before 28 March 2011, a questionnaire relating to the previous version of Schedule 2 to the ESA Regulations was issued to a person in accordance with regulation 21(1)(b) of those Regulations (information required for determining capability for work), regulation 4(1) does not apply to that person for the purposes of making a determination as to limited capability for work under Part 5 of the ESA Regulations;

(3) Where, before 28 March 2011, a questionnaire relating to the previous version of Schedule 3 to the ESA Regulations was issued to a person in accordance with regulation 36(1)(a) of those Regulations (information required for determining capability for work-related activity) regulation 4(2) does not apply to that person for the purposes of making a determination as to limited capability for work-related activity under Part 6 of the ESA Regulations.

(4) In this regulation “the previous version of Schedule 2 to the ESA Regulations” and “the previous version of Schedule 3 to the ESA Regulations” mean those Schedules as they have effect immediately before the date on which these Regulations come into force.

(5) The provisions of paragraphs (2) to (4) do not apply to any determination made on or after 28 September 2011.

[Regulation 3 amends regulations 20, 25 & 35 of S.I. 2008/794.]

**4.—(1)** For the provisions in Schedule 2 to the ESA Regulations (assessment of whether a claimant has limited capability for work) substitute the provisions in Schedule 1.

(2) For the provisions in Schedule 3 to the ESA Regulations (assessment of whether a claimant has limited capability for work-related activity) substitute the provisions in Schedule 2.

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(a) Regulation 4 of the Reassessment Regulations defines a notified person as a person to whom a notice is issued. A notice commences the conversion phase under the Reassessment Regulations for persons who are entitled to an existing award. An existing award is an award of incapacity benefit, severe disablement allowance, or income support on the grounds of incapacity (see paragraph 11 of Schedule 4 to the Welfare Reform Act 2007 (2007 c. 5)).

(b) Regulation 19(1) is applied by virtue of regulation 6 of the Reassessment Regulations (for pre-conversion purposes) and regulation 16 of those regulations (for post conversion purposes).

Signed by authority of the Secretary of State for Work and Pensions.

8th February 2011

*C Grayling*  
Minister of State,  
Department for Work and Pensions

[Schedule 1 substitutes Schedule 2 in S.I. 2008/794.]

[Schedule 2 substitutes Schedule 3 in S.I. 2010/1907.]

### **EXPLANATORY NOTE**

*(This note is not part of the Regulations)*

These Regulations amend the Employment and Support Allowance Regulations 2008. They substitute the descriptors and criteria applied to determine capability for work, or work-related activity, and amend provisions which allow a person to be treated as having limited capability for work, or work-related activity, without an assessment in certain circumstances.

Regulation 2 sets out who the Regulations apply to. It provides that they apply to all persons who claim Employment and Support Allowance on or after the date these Regulations come into force. The Regulations also apply to persons who claim before that date, and persons who have been notified under the re-assessment process (under which those on incapacity benefit, severe disablement allowance or income support on grounds of incapacity are assessed to determine whether they are entitled to Employment and Support Allowance), who have their capability for work or work-related activity determined (including a determination as to whether they are to be treated as capable for work or work-related activity) on or after that date. Finally, the Regulations apply to persons who are re-assessed on or after that date. However, these Regulations do not apply to a person who was sent a questionnaire (as to their capability for work or for work-related activity) before the date on which these Regulations come into force and in respect of whom a determination is made as to that person's capability for work after that date. Instead the determination will be based on the un-amended provisions. This is subject to a six month limit after which all assessments will be made under the amended provisions (regulation 2(5)). A determination made after the date these Regulations come into force as to whether a person is to be treated as being capable for work is subject to the provisions of these Regulations irrespective of when that person was sent the questionnaire.

Regulation 3 amends the provisions in Regulations 20 (certain claimants to be treated as having limited capability for work), 25 (hospital in-patients) and 35 (certain claimants to be treated as having limited capability for work-related activity). Paragraph (2) adds to those who are to be treated as having limited capability for work persons who are likely to receive chemotherapy treatment within 6 months after the date on which the determination is made, and those who meet the eating and drinking descriptors in paragraphs 15 and 16 of Schedule 3. Paragraph (3) makes clear that a person who attends residential rehabilitation for the treatment of drug or alcohol addiction is regarded as receiving treatment within the terms of regulation 25. Paragraph (4) makes similar provision to paragraph (2) for persons likely to receive chemotherapy treatment within 6 months after the date of the determination as to whether the person is to be treated as having limited capability for work-related activity.

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Regulation 4 substitutes Schedules 2 and 3 which, respectively, set out the criteria for the assessment of whether a person has limited capability for work or for work-related activity.

These regulations have no impact on the private sector and civil society organisations. An assessment of the impact of these regulations on the public sector has been made. Copies of this impact assessment are available in the libraries of both Houses of Parliament, and may also be obtained from the Better Regulation Unit of the Department for Work and Pensions, 6B Caxton House, Tothill Street, London SW1H 9NA, or from the DWP website:

<http://www.dwp.gov.uk/resourcecentre/ria.asp>.