EXPLANATORY MEMORANDUM TO

THE CHILDCARE (EARLY YEARS PROVISION FREE OF CHARGE) (EXTENDED ENTITLEMENT) (AMENDMENT) (No.2) REGULATIONS 2021

2021 No. 1168

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Education and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This instrument ensures that EEA and Swiss nationals who have a pending application for leave to enter or remain in the UK under the EU Settlement Scheme (EUSS) after the 1 July 2021 or who have an outstanding appeal or applied late, are still eligible to apply for 30 hours free childcare.

2.2 Amendments were made to the Childcare (Early Years Provision Free of Charge) (Extended Entitlement) Regulations 2016 ("the 2016 Regulations") by The Childcare (Early Years Provision Free of Charge) (Extended Entitlement) (Amendment) Regulations 2021 (SI 2021/674) which came into force on 1 July 2021. The amendments excluded this cohort from eligibility. This instrument ensures EUSS applicants, and those appealing against the refusal of their EUSS application, are eligible.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is England and Wales.

4.2 The territorial application of this instrument is England.

5. European Convention on Human Rights

5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation no statement is required.

6. Legislative Context

6.1 The Childcare Act 2016 (the "2016 Act") places a duty on the Secretary of State to ensure that 30 hours free childcare is available for three and four year old children of eligible working parents. The 2016 Act also allows the Secretary of State to delegate this duty to local authorities (see section 2(2)(a)).

6.2 The 2016 Regulations, made under The 2016 Act, set out details about who is a 'qualifying child' of working parents, conditions of eligibility, declarations that are needed from a working parent to confirm eligibility (importantly, see regulation 11, that the parent with whom the young child normally lives makes the declaration and regulation 12, that the parent is treated as being in the UK), mechanisms for reviews

and appeals, and the requirements on local authorities to secure the free early years provision.

7. Policy background

What is being done and why?

7.1 Since September 2010, all three and four year olds have been entitled to 570 hours of free early education over no fewer than 38 weeks of the year (which equates to 15 hours a week for 38 weeks of the year).

7.2 Since September 2017, all three and four year olds whose parents meet the eligibility criteria set out in the 2016 Regulations have been entitled to 30 hours free childcare (the equivalent of 1140 hours of free early education over no fewer than 38 weeks of the year). This enables parents to move into work or work more hours. This was extended to foster parents in September 2018.

7.3 Parents can apply for 30 hours free childcare through Her Majesty's Revenue and Customs (HMRC) owned online application – the Childcare Service. The 2016 Act gives Commissioners of HMRC the power to determine whether parents meet the eligibility criteria for the scheme. The eligibility criteria for 30 hours free childcare are set out in the 2016 Regulations.

7.4 Regulation 11 of the 2016 Regulations sets out the conditions to be met by the parent making the 30 hours declaration (i.e., making the application for 30 hours free childcare). These include at Regulation 11(b) that the parent must be in the UK. Regulation 12(1) sets out the categories of people who are treated as being in the UK for the purpose of Regulation 11(b). Regulation 12(1)(a) provides that a person who is "ordinarily resident in the United Kingdom" is treated as being in the United Kingdom for the purpose of regulation 11(b). Regulation 12(2) sets out the categories of people who are not treated as being in the UK. A person who is not a resident in an EEA state who is in paid work in the UK or a person who is subject to immigration controls are treated as not being in the UK and so are ineligible for 30 hours childcare.

Explanations

What did any law do before the changes to be made by this instrument?

7.5 Amendments were made to the 2016 Regulations by The Childcare (Early Years Provision Free of Charge) (Extended Entitlement) (Amendment) Regulations 2021 (SI 2021/674) which came into force on 1 July 2021. These inserted Regulation 12(2)(c) which had the effect of excluding those with an application pending for EUSS leave after 30 June 2021, or those who are appealing against refusal of EUSS leave.

Why is it being changed?

7.6 This amendment to the 2016 regulations is being made to ensure these regulations align with rights conferred on EEA and Swiss nationals, and their family members as a consequence of the recent government interpretation of the Withdrawal Agreement. Following the announcement by Home Office on 6 August it was confirmed that EEA and Swiss citizens and their family members who apply late to the EU Settlement Scheme will have their rights protected as the Home Office continues to support those wanting to stay in the UK. This now means that anyone with a pending application to the EU Settlement Scheme, or an appeal against a refusal of an application, enjoys the

temporary protections of the Withdrawal Agreement and is capable of being "ordinarily resident in the UK".

What will it now do?

7.7 This amendment removes regulation 12(2)(c) from The Childcare (Early Years Provision Free of Charge) (Extended Entitlement) Regulations 2016 and will enable those who have an application for EUSS leave, or an outstanding appeal pending against a refusal of such leave, to access 30 hours free childcare if they meet the other eligibility criteria.

8. European Union Withdrawal and Future Relationship

8.1 This instrument is not being made under the European Union (Withdrawal) Act but relates to the withdrawal of the United Kingdom from the European Union because eligibility for 30 hours free childcare will be available to EEA and Swiss nationals, and their family members, who have an application for EUSS leave or an outstanding appeal pending with the Home Office.

9. Consolidation

9.1 There are no plans for consolidating regulations at present.

10. Consultation outcome

10.1 The eligibility criteria for 30 hours free childcare were extensively debated during the passage of the 2016 Act through Parliament, and the 2016 Regulations were subject to the affirmative procedure and received approval by resolution from both Houses of Parliament.

10.2 There is no statutory requirement to consult on changes to the 2016 Regulations however there is a past practice to consult on significant changes. The amendment to the eligibility of EEA and Swiss nationals for 30 hours free childcare is being made to ensure that the regulations align with the rights conferred on EEA and Swiss nationals in the Withdrawal Agreement. We consider this to be a technical change and so no consultation was considered necessary. Parents continue to be updated as stated in paragraph 11.2 below.

11. Guidance

11.1 There is already statutory guidance for local authorities on early education and childcare which came into effect on 1st September 2018 and sets out how local authorities should discharge their duty to secure 30 hours free childcare for working parents of three and four year olds. The Department does not intend to revise the guidance as the amendments relate to the eligibility criteria for 30 hours free childcare which is determined through the application process managed by HMRC.

11.2 Parents were advised from 1st July 2021 that EEA or Swiss applicants, other than Irish applicants, needed EU settled or pre-settled status and also, through a banner, that those that applied by 30th June 2021 and were still awaiting a decision should state that they have that status. On 26th July 2021 the banners were updated to advise parents that applied after 30th June 2021 and with a pending application for EU settled or pre-settled status that they should state that they have that status. HMRC are able to check whether pending applications exist and have treated such applicants as being

resident in the UK and therefore eligible for 30 hours free childcare, providing they meet the other criteria.

12. Impact

12.1 There is no, or no significant impact on business, charities, or voluntary bodies.

12.2 There is no, or no significant, impact on the public sector.

12.3 EEA and Swiss nationals who have a pending application for leave to enter or remain in the UK under the EU Settlement Scheme (EUSS) after the 1 July 2021, or those who have an outstanding appeal against refusal under the Eu will be able to apply for or reconfirm their eligibility for 30 hours free childcare at their childcare provider.

12.4 An Impact Assessment has not been prepared for this instrument because the amendment to the eligibility for EEA and Swiss nationals for 30 hours free childcare is being made to bring the 2016 regulations in line with the EU Withdrawal Agreement.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses including childcare providers as the instrument makes a change to the eligibility criteria of the 30 hours free childcare entitlement for working parents of three- and four-year-olds.

14. Monitoring & review

14.1 The amendment to the eligibility criteria for EEA and Swiss nationals for 30 hours free childcare does not include a statutory review clause as the amendment is as a result of the UK leaving the EU. It will be reviewed if the Government makes any further changes to the immigration rules for EEA and Swiss nationals.

15. Contact

15.1 Natalie Watson at the Department for Education Telephone 024 7666 0593 or email: Natalie.Watson@education.gov.uk can be contacted with queries regarding changes in the instrument.

15.2 Joanna Mackie, Deputy Director for Early Years Sufficiency and Entitlements at the Department for Education can confirm that this Explanatory Memorandum meets the required standard.

15.3 Minister Will Quince, Parliamentary Under Secretary of State for Children and Families at the Department for Education, can confirm that this Explanatory Memorandum meets the required standard.