EXPLANATORY MEMORANDUM TO

THE EARLY YEARS FOUNDATION STAGE (WELFARE REQUIREMENTS) (AMENDMENT) REGULATIONS 2022

2022 No. 1133

AND

THE CHILDCARE (FREE OF CHARGE FOR WORKING PARENTS) (ENGLAND) REGULATIONS 2022

2022 No. 1134

1. Introduction

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

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 This memorandum outlines two instruments.

2.2 The first instrument (the "2012-related Instrument") makes a minor drafting amendment to regulation 3(2A) of the Early Years Foundation Stage (Welfare Requirements) Regulations 2012 (S.I. 2012/938) ("the 2012 Regulations") to correct some incorrect paragraph numbers that refer to Section 3 of the Early Years Foundation Stage Framework Document ("the Document").

2.3 The procedure for free issue of will be applied and the 2012-related Instrument will be issued free of charge to all known recipients of the Early Years Foundation Stage (Miscellaneous Amendments) and Childcare Fees (Amendment) Regulations 2021 (S.I. 2021/432) (the "2021 Regulations").

2.4 The second instrument mentioned in this memorandum (the "2016-related Instrument") makes minor technical changes to the Childcare (Early Years Provision Free of Charge) (Extended Entitlement) Regulations 2016 (the "2016 Regulations") governing 30 hours free childcare ("30 hours") for working parents of three- and four-year-olds. These changes relate to the 'competing declarations' process where more than one parent applies for 30 hours, settling appeals by agreement, self-assessments and IR35 matters, and the inclusion of Scottish Carers Assistance in the list of work-replacement benefits for 30 hours free childcare. The changes will improve the operational delivery of 30 hours free childcare by making small but effective technical improvements to the online Childcare Service.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments.

3.1 The 2012-related Instrument amends the 2012 Regulations. These currently refer to incorrect paragraph numbers in regulation 3(2A), and the 2012-related Instrument will

insert the correct paragraph references. The Department is taking this opportunity to correct the instrument now the error has come to our attention.

4. Extent and Territorial Application

4.1 The extent of these instruments (that is, the jurisdiction(s) which the instruments form part of the law of) is England and Wales.

4.2 The territorial application of these instruments (that is, where the instruments produce a practical effect) is England.

5. European Convention on Human Rights

5.1 As both instruments are subject to negative resolution procedure and do not amend primary legislation, no statement is required for either instrument.

6. Legislative Context

The 2012-related Instrument: drafting changes to the 2012 Regulations

6.1 Section 39(1)(b) of the Childcare Act 2006 ("the 2006 Act") provides that the Secretary of State must specify welfare requirements (in accordance with section 43 of that Act), as he considers appropriate, that early years providers must comply with.

6.2 The 2012 Regulations set out further detail about those welfare requirements. Regulation 3(1) specifies that regulations 7 to 9 are welfare requirements. Regulation 3(2) states that "obligatory provisions" of the Document have effect as welfare requirements. Regulation 3(2A) defines "obligatory provisions" as those provisions which use the word "must" except certain paragraphs which overlap with regulations 7 to 9. Regulation 3(3) states that providers must have regard to the matters in the "relevant provisions" of the Document. These are defined in regulation 2 as the provisions in Section 3 of the Document that use the word "should".

The 2016-related Instrument: changes to the 2016 Regulations

6.3 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 working parents. The 2016 Act also allows the Secretary of State to delegate this duty to local authorities (see section 2(2)(a)).

6.4 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 working parents to confirm eligibility (regulation 11 specifies that the parent with whom the young child normally lives makes the declaration), mechanisms for reviews and appeals (regulations 21 and 23), and the requirements on local authorities to secure the free early years provision (regulation 36).

6.5 HMRC has made similar technical changes to their regulations to maintain consistency between 30 hours and Tax-Free Childcare.[1]

[1] Information on Tax-Free Childcare, including eligibility criteria, is publicly available online on Gov.uk.

7. Policy background

The 2012-related Instrument

Introduction

7.1 Section 39(1)(b) of the 2006 Act sets out that the Secretary of State must specify welfare requirements that early years providers must comply with (in accordance with section 43 of that Act) as he considers appropriate. These requirements are set out in the Document. The welfare requirements are given legal force by the 2012 Regulations.

7.2 Regulation 3(2A) in the 2012 Regulations sets out that providers "must" follow the requirements outlined in Section 3 of the Document, except for those contained in paragraphs 3.16, 3.17, 3.18, 3.52, 3.53, 3.77 and 3.78. These paragraphs were correct in 2017 when the Document was revised at that time.

7.3 The Document was revised again in September 2021 by virtue of the2021 Regulations. Some of the paragraph numbers mentioned in regulation 3(2A) were re-numbered in the Document in September 2021. Unfortunately, regulation 3(2A) was not amended to keep up with this re-numbering.

Legislative solution

7.4 We are now updating these to ensure the 2012 Regulations refer to the correct paragraphs: 3.16, 3.17, 3.18, 3.53, 3.54, 3.78 and 3.79.

The 2016-related Instrument

Introduction

7.5 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 childcare over no fewer than 38 weeks of the year). This is intended to help parents into work, or increase their hours, which includes those in self-employment or who are employed on zero-hours contracts. This was extended to foster parents in September 2018.

7.6 The Childcare Payments Act 2014 enacted Tax-Free Childcare (TFC), a scheme designed to provide financial support to help working parents with the costs of childcare.

7.7 Parents can apply for either 30 hours, TFC, or both, through the Childcare Service. HMRC determine whether parents meet the eligibility criteria for either or both schemes, and provide parents with a code used to arrange the free childcare. The eligibility criteria for 30 hours set out in the 2016 Regulations broadly aligns with TFC policy and legislation.

Competing declarations in applications for 30 hours

7.8 Applications for 30 hours codes can only be made by one parent, and the parent that holds the code controls the times and settings for which the code is used. There is currently no mechanism for a parent to challenge for a 30 hours code where two parents are separated and both believe they have a valid claim. There are occasions where both parents can reasonably claim to be the parent with whom the child normally lives and where the parents are unable to agree who applies for the code.

7.9 Where both parents have made a declaration for 30 hours, this becomes known as a "competing declaration". If one parent already has a valid code, the other is unable to access the system to seek a code for the same child. HMRC estimates under 100 families a year are impacted by this situation.

7.10 In a case where both a TFC account and a 30 hours code are held, then the TFC competing declarations process can be followed. The 2016 Regulations set out that, where one parent (Parent A) holds a TFC account for a child, only that parent can make a valid declaration of eligibility for 30 hours. So if the other parent (Parent B) wants to gain control of the 30 hours code, Parent B must go through the TFC competing declarations process.

Current 'competing declarations' process for TFC only and for TFC and 30 hours joint accounts

7.11 In TFC, as in 30 hours, Parent B cannot make a valid declaration whilst Parent A has an effective declaration in place. To stop Parent B being frozen out, even if Parent B has the better claim, HMRC undertakes the following:

- Puts the declaration from Parent B 'on hold' pending enquiries. No immediate decision is given as to its validity.
- Asks both parents whether they can agree a satisfactory arrangement. If the parents can reach agreement, HMRC will implement that. If parents cannot agree, HMRC undertakes the following:
    - Asks both parents to provide relevant evidence to determine which parent the child 'normally' lives with (for example, custody arrangements).
    - Assesses which parent should have the account.
    - If HMRC decides Parent A keeps the code, HMRC refuses to suspend their childcare account, thus preventing Parent B from making a declaration.
    - If HMRC deems Parent B is the parent with whom the child 'normally' lives, HMRC first suspends the existing account held by Parent A and then (as no longer prevented by an existing active account) finds Parent B's declaration valid.

Legislative solution

7.12 These regulations amend the 2016 Regulations so that they align with the full "competing declarations" process for TFC. This creates a clearer process for parents applying for 30 hours or both 30 hours and TFC, given that the eligibility criteria are near identical for both schemes.

7.13 We are introducing "competing declarations" rules to deal with 30 hours cases whether the parents want 30 hours only or 30 hours alongside TFC.

7.14 HMRC continues to encourage parents to agree the best way forward in the best interests of the child, but if they cannot agree, the changes to the 2016 Regulations allow HMRC to arbitrate between them.

7.15 The changes to the 2016 Regulations allow HMRC to suspend the 30 hours code for parent A, allowing parent B to obtain the 30 hours code instead. As this could happen very close to the deadline to reconfirm eligibility, we want to ensure that the child can continue to access childcare while the code is suspended, as the eligibility of the

parents is not disputed, simply which parent controls the code. Existing 'grace period' rules in statutory guidance[2] for local authorities achieve this.

7.16 The changes allow either parent to be able to appeal HMRC's competing declarations decision, in line with the approach which has always been taken for TFC.

7.17 Foster parents are out of scope of these changes as 30 hours childcare eligibility for foster children is not determined by HMRC. 30 hours applications made by foster parents are assessed by the local authority where the foster carer lives.

Settling 30 hours free childcare appeals by agreement

Current operational process for settling appeals

7.18 If a parent has applied for a 30 hours code, and has been found ineligible by HMRC, the parent can request a Mandatory Review (MR) of HMRC's decision that their declaration was not valid. If this MR confirms the parent's ineligibility, the parent can appeal that decision reached by HMRC.

7.19 30 hours appeals are heard by the first-tier tribunal in the Social Entitlements Chamber. Prior to these changes all appeals needed to be heard at such a tribunal, even if HMRC did not wish to contest the appeal, as there was no mechanism for the appeals to be settled by agreement between the parties. HMRC estimates between 30 to 35 families per year have been previously affected by this need go to a Tribunal.

7.20 By contrast, powers within the Childcare Payments Act 2014 allow HMRC to agree how cases relating to TFC should be disposed, including by agreement, without the need to be heard by a tribunal.

Legislative solution

7.21 These regulations replicate the case settlement powers in section 54 of the Tax Management Act in the 2016 Regulations. In doing so, 30 hours appeals will be placed on the same legal footing as TFC appeals, which will reduce the time to settle cases and the cost and resources involved in parents needing to wait for a tribunal to formally grant an appeal which HMRC is not looking to contest.

Treatment of workers contracted under 'IR35' rules as employees for the purposes of 30 hours eligibility

Rules for IR35

7.22 IR35 is an anti-avoidance tax rule. It affects individuals who work consistently for one business, similarly to an employee, but are not otherwise treated as an employee for the purposes of paying tax (sometimes known as "off-payroll working").

7.23 IR35 is in place to ensure that workers, who would normally be considered as employees if they were providing their services directly, will pay broadly the same tax and National Insurance as employees.

7.24 Previously, it was unclear whether parents who were assessed as employees under IR35 rules would be eligible for 30 hours.

[2] Early education and childcare (publishing.service.gov.uk) – see page 11 which refers to the 'grace period' rules.

Legislative solution

7.25 This instrument puts beyond doubt that payments to parents who are assessed and taxed as employees under IR35 via PAYE is normal "income" for the purposes of 30 hours eligibility. This helps to ensure parity of eligibility for parents who have been hired as contracted workers and want to apply for a 30 hours code.

Assessment of self-employed income in the absence of self-assessment tax returns

Current process in assessing self-employed income

7.26 To remain eligible for 30 hours and/or TFC, parents must confirm via the Childcare Service that they meet the eligibility criteria every three months. If they do not reconfirm, they will no longer be eligible.

7.27 Where more information is needed before a decision is made on eligibility, Childcare Service agents may need to conduct additional income checks to confirm whether a parent is still in qualifying work, or has dropped out due to not meeting the minimum income threshold (or exceeding the maximum income threshold).

7.28 HMRC has faced difficulties in accurately assessing the minimum income test for 30 hours where self-employed parents have failed to submit self-assessment tax returns to HMRC in time, as required by tax law. Whilst there are wider penalties in HMRC relating to the completion of these returns, HMRC cannot compel parents to submit these returns for the sole purpose of assessing 30 hours eligibility. There is therefore a risk that self-employed parents can continue to receive this entitlement despite not being eligible.

Legislative solution

7.29 These regulations give HMRC the discretion to disregard any self-employment for the purposes of assessing whether a parent is in paid work where two or more self-assessment tax returns have not been submitted. HMRC can accept alternative evidence of self-employment instead of self-assessment returns when this is persuasive, for example if business records are produced showing substantial trading.

Inclusion of Scottish Carer's Assistance ("SCA")

Introduction of SCA

7.30 Carer's Allowance is a benefit available across the United Kingdom, which the Scottish Government will replace with the new SCA. SCA will have similar eligibility criteria to Carer's Allowance.

7.31 In a two-parent household, it is possible for parents to be eligible for 30 hours where one parent meets the income test and the other does not work but is in receipt of certain qualifying benefits, which includes Carer's Allowance.

7.32 However, these qualifying benefits have not been updated to include SCA.

Legislative solution

7.33 SCA will be added to the list of benefits in the 2016 Regulations so parents previously in receipt of Carer's Allowance, who have migrated to SCA, will remain eligible for 30 hours.

8. European Union Withdrawal and Future Relationship

8.1 Neither the 2012-related Instrument nor the 2016-related Instrument relate to withdrawal from the European Union.

9. Consolidation

9.1 The 2012 Regulations are not being consolidated.

9.2 The 2016 Regulations are being consolidated, as there is an opportunity to do so while we make the technical amendments within this 2016-related Instrument. The instrument also provides a table of corresponding provisions. This table sets out where regulatory provisions of the 2016 Regulations may be found in the 2016-related instrument.

10. Consultation outcome

10.1 DfE have consulted on the 2012-related Instrument in accordance with section 43(2) of the 2006 Act with Ofsted.

10.2 The Department for Education has not formally consulted on the 2016-related Instrument as they are technical in nature. They are uncontroversial as they improve working parents' journey through the Childcare Service by reducing the time taken by HMRC in assessing income eligibility, helping parents to settle appeals by agreement, as well as resolving instances of competing declarations.

11. Guidance

11.1 Following the laying of the 2012-related Instrument, the Department will issue communications to relevant stakeholders to ensure they are aware of the updating of paragraph numbers in the 2012 Regulations.

11.2 Regarding the 2016-related Instrument, there is already statutory guidance for local authorities on early education and childcare which came into effect on 1 September 2018 and sets out how local authorities should discharge their duty to secure 30 hours. The Department does not intend to revise the guidance as the amendments relate to the eligibility criteria for 30 hours which is determined through the application process managed by HMRC.

11.3 The Childcare Service online application system will update its operational guidance on new processes to include the technical changes made within the 2016-related Instrument.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies as a result of either the 2012-related Instrument or the 2016-related Instrument.

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

12.3 A full Impact Assessment has not been prepared for the 2012-related Instrument because the updating of the paragraph numbers in the 2012 Regulations will not have a significant impact on childcare providers.

12.4 The amendments to the 2016 Regulations relate to minor technical improvements to existing 30 hours free childcare application processes, therefore the 2016-related Instrument will have a limited impact on childcare providers.

13. Regulating small business

13.1 While the 2012 Regulations apply to activities that are undertaken by small businesses, we do not anticipate any impact as a result of the proposed amendments as the aim of the 2012-related Instrument is not to change any requirements, but to update an error in the 2012Regulations.

13.2 The 2016-related Instrument does not apply to activities that are undertaken by small businesses. The 2016-Related Instrument makes technical changes to the Childcare Service application system administered by HMRC and will not affect childcare providers who deliver the 30 hours free childcare.

14. Monitoring & review

14.1 The 2012-related Instrument will be reviewed if further changes are needed to the Document.

14.2 The 2016-related Instrument does not include a statutory review clause as the amendments are technical in nature and do not change eligibility for 30 hours. It will be reviewed if the Department for Education or HMRC make any further changes to the Childcare Service application system.

15. Contact

15.1 Rachael Gregory at the Department for Education email: rachael.gregory@education.gov.uk can be contacted with any queries regarding the 30 hours free childcare changes.

15.2 Sarah Pinder at the Department for Education email: sarah.pinder@education.gov.uk can be contacted with any queries regarding the updating of the paragraph numbers in the 2012 Regulations.

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

15.4 Claire Coutinho, Parliamentary Under Secretary for State at the Department for Education can confirm that this Explanatory Memorandum meets the required standard.