

EMPLOYMENT AND SUPPORT ALLOWANCE UNDERPAYMENTS FAQ

Incapacity Benefit Reassessment: Potential Underpayments of ESA Premiums

Employment and Support Allowance (ESA) was introduced in 2008. From March 2011, the Department began reassessing people on incapacity benefits for eligibility for ESA.

The Department is currently correcting some historic underpayments of ESA, which arose while reassessing incapacity benefit claims.

Initially the Department believed that we were legally restricted to paying arrears of benefit from 21 October 2014 due to a statutory rule (section 27 of the Social Security Act (S27 SSA) 1998) which governs the position with regard to payment of arrears when a court or tribunal finds that the Department has made an error on a point of law.

Concerns raised in the National Audit Office (NAO) report and the action brought by the Child Poverty Action Group (CPAG) raised new points for us to consider.

The Secretary of State therefore asked officials to look again at all the relevant evidence and the Department analysed the relationship between “official error” and S27 SSA 1998 in regulating how and to what extent arrears can be paid. As a result of the conclusions of this analysis, we now understand that S27 SSA does not apply to these cases and we will be paying arrears to those affected back to their date of conversion to ESA.

A special team is taking this work forward, reviewing cases, contacting claimants and correcting claims. All cases that have already been actioned will be reviewed and any additional arrears of benefit that are due prior to 21/10/2014 calculated and paid.

Once an individual is contacted, and the relevant information gathered, they can expect to receive appropriate payment within 12 weeks. Following initial contact all those who may be affected will be given a dedicated Freephone number so they can keep in touch with the Department.

Those cases identified as part of the initial activity will be completed by April 2019, as previously stated. The additional cases will be completed throughout the course of 2019, utilising the growing specialist teams the Department has put in place.

Written Statements were tabled on Thursday 14th December 2017¹, Thursday 15th March 2018², Wednesday 18th July 2018³ and Wednesday 17th October 2018⁴

¹ [WS 14/12/17](#)

² [WS 15/03/18](#)

³ [WS 18/07/18](#)

⁴ [WS 17/10/18](#)

How many people have been underpaid and in what areas/ constituencies?

- The Department initially estimated that we would need to review 300,000 cases - this covered those who were receiving contributory ESA only at 21 October 2014. We estimated that around 70,000 of those cases may have been underpaid.
- Having undertaken further testing we now expect to review around 320,000 cases, of which around 105,000 are likely to be due arrears.
- We are committed to ensuring all of those affected are supported. So in addition we now think we need to look at around a further 250,000 cases that may have been affected before 21 October 2014, of which we estimate around 75,000 could be due arrears.
- We are not able to make robust estimates of the numbers of cases likely to be due arrears at a regional level. All estimates are national only.
- We are focusing our efforts on contacting all potentially affected individuals to ensure they are paid as quickly as possible.
- The preferred approach remains unchanged - to prioritise ESA claims from individuals that we know from our systems to be terminally ill, followed by those cases assumed most likely to be in error.

When will this be rectified?

- The Written Statement on ESA made on 18th July, which advised that we would be paying all cases back to the point of conversion, has widened the scale of the existing exercise and we will be reviewing an additional 250,000 cases.
- Those cases identified as part of the initial activity, will be completed by April 2019, with the exception of deceased customer cases where the time it takes to identify next of kin means it may take until the end of 2019.
- The additional cases will be completed between January and December 2019, utilising the growing specialist teams the Department has put in place.
- It is right that the Department looks to balance this important activity alongside the need to ensure that we continue to deliver an excellent service to all ESA claimants. The Department continues to monitor closely how this exercise is progressing. Our aim is for all claimants to receive the benefit they are due as quickly as possible.

How many DWP staff are working on putting these cases right?

- We are monitoring closely how this exercise is progressing to ensure we are doing everything to complete this complex work at pace.
- We now have a team of over 400 staff working through these cases, with a further 400 due to join the team through October and November, and will be assigning more staff to review the additional 250,000 cases.
- It is right that the Department looks to balance this important activity alongside the need to ensure that we continue to deliver an excellent service to all ESA claimants.

How will you be contacting those who may have been underpaid?

- We will contact claimants who may have been affected using a number of different methods, including letters, phone calls, texts and home visits when necessary.

Why didn't you pay people further back than 2014 straightaway?

- Initially the Department believed that we were legally restricted to calculating repayments from 2014 due to a statutory rule (section 27 of the Social Security Act 1998) which governs the payment of arrears when a court or tribunal finds that the Department has made an error on a point of law.
- Following a thorough investigation of the legal position we have updated that interpretation and we will therefore be paying arrears to those affected back to the date of conversion to ESA.
- We are being open and honest and saying we made a mistake which we are now putting right.

The Department was made aware in 2013, why was no action taken then?

- The Department was told about individual cases in 2013 and these were dealt with at the time.
- From 2014 additional guidance was put in place to ensure all claims transitioning from that point forward were paid the correct Income-Related ESA.
- As highlighted in the NAO report it wasn't until 2014, when a combination of the fraud and error statistics and activity in the Upper Tribunal led the Department to recognise that its operational approach to IBR was not sufficiently robust. This tribunal case was important in clarifying the law and the correct procedures.

In 2014 the Department changed the processes going forwards, why at this point did you not look back at historic cases?

- Prior to 2014 we had been correcting individual cases as and when they arose and then in 2014 a fix was put in place.
- At the time officials did not identify the need to explore the potential impact of the earlier error.

How can you guarantee that the Department's Fraud and Error statistics are fit for purpose if they didn't spot this fundamental issue?

- It is in fact through the work of the Fraud and Error team that the scale of this issue became apparent. Fraud and Error statistics are a valuable tool for identifying these kinds of issues.
- The Department publishes statistics on the levels of fraud and error in the benefits system twice each year. The data includes estimates of the proportion of claims with overpayments and underpayments.
- The Department ran a consultation exercise on the frequency and breakdown of the information for publication, alongside asking stakeholders how they use the statistics. This closed in September 2018 and, once we have considered all of the responses, we will publish a response at the same time as the next publication of these statistics in November 2018. We

will include a summary of the responses, what our plans are going forward and an explanation of our choices.

Why has it taken since February 2017 to inform people?

- We wanted to make sure we got this right so we took the time to fully understand the complexity of the issue and the best process to repay individuals and train staff sufficiently – this involved reviewing a sample of 1,000 claimants to learn lessons and develop a robust process.
- Now we have the right process in place – s which has been examined and supported by a number of stakeholders and charities agree with us about.

Will payments of arrears be disregarded for the life of the award?

- Arrears of benefit under £5,000 are disregarded as capital for 52 weeks from the date they are paid.
- Payments of £5,000 or more will be disregarded for 52 weeks or until the termination of the benefit award, whichever is longer.
- We have also introduced the same capital disregard in Universal Credit (UC) in respect of arrears relating to legacy income-related benefit entitlement which begins before migration to UC is complete.

What will you do about the people who have died and never received the money they were owed.

- We will attempt to identify and contact the appropriate representative/next of kin of anyone deceased who is potentially affected. This will help us obtain the relevant information to enable us to review the case and pay any arrears of past payments that are due.

How can customers complain if they're not happy?

- The Department has a clearly defined complaints process.
- Further information is available on the Gov.uk website via the following link:
<https://www.gov.uk/government/organisations/department-for-work-pensions/about/complaints-procedure>