EXPLANATORY MEMORANDUM TO

THE EMPLOYMENT RIGHTS ACT 1996 (PROTECTION FROM DETRIMENT IN HEALTH AND SAFETY CASES) (AMENDMENT) ORDER 2021

2021 No. XXXX

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Business Energy and Industrial Strategy (BEIS) and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This instrument will amend section 44 of the Employment Rights Act 1996 ("the Act") to extend the rights conferred previously in section 44(1)(d) and (e) of the Act to limb (b) workers (referred to as limb (b) as they fall within the definition of "worker" in section 230(3)(b) of the Act) as well as employees. Section 44(1)(d) and (e) currently gives employees the right not to be subjected to a detriment by their employer for leaving or refusing to return to their workplace or for taking steps to protect themselves in circumstances of danger which they reasonably believe to be serious and imminent. This amendment will repeal section 44 (1)(d) and (e) and insert a new provision at section 44 (1A) which will provide both employees and limb (b) workers will have the right not to be subjected to detriment in health and safety cases.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 The territorial application of this instrument applies to England, Wales and Scotland. Employment Law is devolved in Northern Ireland.

4. Extent and Territorial Application

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

4.2 The territorial application of this instrument is England, Scotland and Wales.

5. European Convention on Human Rights

5.1 The Minister for Small Business, Consumers and Labour Markets has made the following statement regarding Human Rights:

"In my view the provisions of The Employment Rights Act 1996 (Protection from Detriment in Health and Safety Cases) (Amendment) Order 2021 are compatible with the Convention rights."

6. Legislative Context

6.1 Following the judicial review brought by the Independent Workers' Union for Great Britain[11] against the Secretaries of State for the Department for Business, Energy and Industrial Strategy and the Department for Work and Pensions, this order is being introduced in response to the High Court's judgment.

6.2 The High Court found that the UK had failed to fully implement two EU Directives, the Health and Safety Framework Directive (89/391/EEC) and the Personal Protective Equipment Directive (89/656/EEC), in domestic law, as protections were only applied to employees, whilst the court held, they should also extend to limb (b) workers. Limb (b) workers tend to have a more casual employment relationship and are entitled to a basic set of rights e.g. minimum wage and holiday pay.

6.3 The changes made by this instrument are as a result of the judgment and will amend section 44 of the Act to extend the rights conferred previously in section 44(1)(d) and (e) of the Act to limb (b) workers. The instrument also makes corresponding amendments to remedies and enforcement provisions in the Act along with transitional and savings provision in respect of the repeal of section 44(1)(d) and (e) and the insertion of the new section 44(1A). Work is also underway to consult and extend The Personal Protective Equipment at Work Regulations 1992/2966 to all workers through an additional statutory instrument due to be laid later this year.

7. Policy background

7.1 The Employment Rights Act 1996 sets out many of the employment rights of limb (b) workers and employees, including the right to protection from detriment in health and safety cases. The legislation as currently drafted limits protections from detriment in health and safety cases to 'employees' only, which does not align with the High Court's judgment.

7.2 Limb (b) workers will gain the right to protection from detriment if they are in circumstances of danger which they reasonably believe to be serious and imminent and they leave or refuse to return to their place of work.

7.3 The Order will give additional clarity to both workers and businesses following the judgment. It will also protect workers' rights and support workers through the challenges created by the Covid-19 pandemic.

7.4 The amendments are not expected to have a disproportionate cost or impact on any of the regions. Given limb (b) workers represent a small share of the workforce, the direct cost to business of the policy change is expected to be below the de minimis £5m threshold.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act

9. Consolidation

9.1 There is no plan to consolidate the legislation amended by these Regulations.

[1] [2020] EWHC 3050 (Admin)

10. Consultation outcome

10.1 As a result of the High Court judgment in relation to section 44(1)(d) and (e) of the Employment Rights Act 1996 a consultation has not been carried out. The Government is committed to updating the legislation as quickly to ensure clarity as to the extent of limb (b) worker's rights.

11. Guidance

11.1 The Government will engage directly with key trade unions, business representative organisations and with ACAS and the Citizens Advice Bureau in preparation for employers and workers contacting their organisations.

12. Impact

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

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

12.3 An Impact Assessment has not been prepared for this instrument because direct cost to business of the policy change is expected to be below the de minimis £5m threshold.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 The regulation does not include a statutory review clause [and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015] the Minister for Small Business, Consumers and Labour Markets has made the following statement:

"I have decided that it is not appropriate to make provision for review in this instrument. A review would also be disproportionate when taking into account the economic impact of the regulatory provision on the qualifying activity."

15. Contact

15.1 Lydia Green at the Department for Business, Energy and Industrial Strategy Telephone: 07900286559 or email: lydia.green@beis.gov.uk can be contacted with any queries regarding the instrument.

15.2 Laura Robinson at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.

15.3 Minister for Small Business, Consumers and Labour Markets at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.