EXPLANATORY MEMORANDUM TO

THE EMPLOYMENT RIGHTS (MISCELLANEOUS AMENDMENTS) REGULATIONS 2019

2019 No. XXXX

1. Introduction

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

2. Purpose of the instrument

2.1 This instrument amends three areas of existing legislation, as follows.

2.2 Sections 1 to 12 of Part I of the Employment Rights Act 1996 ("the 1996 Act") are amended to extend the written statement of employment particulars to all categories of "worker", not just "employees".

2.3 Section 12A of The Employment Tribunals Act 1996 ("the Tribunals 1996 Act") is amended to increase the maximum financial penalty available for aggravated breach of a worker's employment rights from £5,000 to £20,000. The current maximum penalty of £5,000 does not always reflect the higher value employment tribunal awards and is lower than the current penalty for non-payment of National Minimum Wage. The increased penalty is intended to act as both a sanction and deterrent to employers breaching employment law in a way that has aggravated features.

2.4 The Information and Consultation of Employees Regulations 2004 (SI 2004 No. 3426 ("the ICE Regulations") are amended to lower the percentage of employees required for a valid request to start negotiating an agreement on informing and consulting employees.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Other matters of interest to the House of Commons

3.2 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)

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

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4. Extent and Territorial Application

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

5. European Convention on Human Rights

5.1 The Minister for Small Business, Consumer and Corporate Responsibility has made the following statement regarding Human Rights: 'In my view the provisions of the Employment Rights (Miscellaneous Amendments) Regulations 2019 are compatible with the Convention rights.'

6. Legislative Context

6.1 The legislative context of this instrument covers amendments in three areas. These are public commitments made as part of the Government's response to the independent Taylor Review of Modern Working Practices where Matthew Taylor made the legislative recommendations covered by this instrument. A number of the measures covered by this instrument were also endorsed by the joint BEIS and DWP Select Committee report on the Taylor Review, entitled "A framework for modern employment".

6.2 Amendment to sections 1 to 12 of Part I of the Employment Rights Act 1996 - Sections 1 to 7B of Part I of the 1996 Act entitle 'employees' to a written statement of employment particulars. The 1996 Act only entitles those who fall within the definition of 'employees' (at section 230 of the 1996 Act) to this written statement of employment particulars. Other types of 'worker' (which is a broader definition at section 230 (3)(b)) have no right to this written statement. This instrument amends the 1996 Act to extend the written statement of employment particulars to all types of 'worker', not just 'employees'. These amendments are intended to come into force on 6 April 2020.

6.3 A further instrument will follow which will make the right to a written statement of employment particulars a 'day 1' right. This means that employees and all workers will be entitled to receive a written statement on the day they start their new job. Further information on this can be found in the explanatory memoranda for that instrument. The same instrument will require additional mandatory contents to be included in the written statement. It is also intended that that instrument will come into force on 6 April 2020.

6.4 Amendment to section 12A of the Employment Tribunals Act 1996 - Where an employment tribunal finds that an employer has breached a worker's employment rights and believes that the breach has one or more aggravating features, section 12A of the Tribunals Act 1996 prescribes the maximum penalty that the employment tribunal may award.

6.5 Section 12A(12)(a) of the Tribunals Act 1996 allows the Secretary of State to amend the maximum penalty available for an aggravated breach. The amendment under this instrument increases the maximum penalty to £20,000. The intent is that alongside illustrative guidance on its use the increase in the maximum will act as a stronger deterrent and sanction against aggravated breaches of employment law. These amendments will come into force on 6 April 2019.

6.6 Amendment to the Information and Consultation of Employees Regulations 2004 - The ICE Regulations transpose the Information and Consultation Directive 2002/14/EC ("the Directive"). The Directive sets a general framework for informing and consulting employees in the European Community.

6.7 The ICE Regulations provide a right for employees to request that their employer, if in scope (i.e. having 50 or more employees), sets up information and consultation

arrangements. For a request to be valid it must be made by at least 10% of the total number of employees employed by the employer. These amendments reduce the 10% requirement to 2% of the employees. This is subject to the existing limits in the Regulations that the threshold can never be fewer than 15 employees or more than 2,500 employees. The 2% threshold only applies to a request that is received on or after the commencement date of 6 April 2020.

7. Policy background

What is being done and why?

7.1 Matthew Taylor was commissioned to conduct an independent review of modern working practices to assess the impact of new employment relationships on the labour market. He made a number of recommendations designed to ensure employment legislation adapts to new and emerging ways of working and that workers' rights remain protected in light of new business models and approaches to work. This Regulation implements three of those recommendations.

7.2 Amendment to sections 1 to 12 of Part I of the Employment Rights Act 1996 - The Taylor Review of Modern Working Practices identified that the emergence of new employment relationships and a rise in atypical working has resulted in some workers not having access to all the information they need to understand their employment terms and conditions sufficiently. The Review therefore recommended that 'Government should build on and improve clarity, certainty and understanding of all working people by extending the right to a written statement to 'dependent contactors'[1] as well as employees'.

7.3 Sections 1 to 7B of the 1996 Act currently require an employer to give employees whose employment has continued for at least one month a written statement of employment particulars. The written statement itself consists of a principal statement in which a certain subset of information must be contained all in one document, and any key additional information, which must be provided but can be contained in various other documents. Employees are entitled to receive a written statement within 2 months of starting work, setting out basic details about the employment relationship.

7.4 The Taylor Review highlighted that whilst written statements must be provided to employees, there is no requirement for other workers to receive them. The Government accepted the recommendation in the Review and agrees that employers should provide basic information about their employment relationship to all workers and employees at the outset. This is an important step in ensuring that workers and employees know what they are signing up for. With this in mind, the Government is extending the right to a written statement of employment particulars to all workers, not just those classified as employees. This entitlement would apply to all new workers from the date this instrument comes into force.

7.5 **Amendment to section 12A of the Employment Tribunals Act 1996** - As part of the Government response to the Taylor Review's recommendation that stronger action

[1] The Review recommended that the Government should retain the current three-tier approach to employment status but rename as 'dependent contractors' the category of people who are eligible for worker rights under section 230(3)(b) of the 1996 Act but are not employees. The renaming recommendation is being considered through the employment status consultation https://www.gov.uk/government/consultations/employment-status

is taken against employers that repeatedly breach employment law, the Government publicly committed to raise the current maximum financial penalty limit for aggravated breach from £5,000 to at least £20,000. The intent is that alongside illustrative guidance on its use, the increase in the maximum will act as stronger deterrent and sanction against aggravated breaches of employment law.

7.6 Since introduction of the penalty for aggravated breach of employment law there have been 31 penalties issued. The limited data we have on both award amounts and penalties shows that the higher penalty would have applied in approximately 40% of the cases where it has been ordered.

7.7 **Amendment to the Information and Consultation of Employees Regulations 2004** The Taylor Review placed emphasis on the importance of employee voice and engagement in the workplace. Matthew Taylor recommended that the ICE Regulations should be made more accessible by lowering the threshold for a request by employees to trigger the negotiation of information and consultation arrangements. This instrument therefore amends the ICE Regulations to reduce the threshold for a request from 10% to 2% of the total number of employees employed by the employer.

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.

9. Consolidation

9.1 The Department for Business, Energy and Industrial Strategy does not intend to produce consolidated versions of the instruments amended.

10. Consultation outcome

10.1 From 7 February to 1 June 2018, the Department for Business, Energy and Industrial Strategy consulted on recommendations made by The Taylor Review of Modern Working Practices, including the policy changes covered by these instruments. These instruments were covered by two consultations – increasing transparency and enforcement. Following this period of consultation the Secretary of State for Business, Energy and Industrial Strategy has committed to make these legislative changes to implement these recommendations from the Review. The Government's commitment to legislate, following consideration of the consultation responses [is included in the Good Work Plan, which will be published on gov.uk on 17 December 2018].

10.2 **Amendment to sections 1 to 12 of Part I of the Employment Rights Act 1996 –** Through the Increasing Transparency consultation[2], the Government asked whether extending the right to a written statement from day one for both workers and employees would improve clarity and understanding and would be beneficial to both parties. Most respondents to the consultation agreed strongly that the right to a written statement should be extended to all workers, including to those with less than one month's service.

10.3 **Amendment to section 12A of the Employment Tribunals Act 1996 -** The Government commitment to increase the maximum penalty awardable for aggravated

[2] https://www.gov.uk/government/consultations/increasing-transparency-in-the-labour-market

breach of employment rights was included as part of the Government response to the Taylor Review and set out in the Enforcement of employment rights recommendations consultation[3]. The consultation did not specifically ask questions around this proposal to raise the maximum, but some stakeholders referred to it in their responses and discussed this as part of roundtable events during the course of the consultation. There was support for a higher limit but some confusion that the increased penalty would be applied at a flat rate rather than being based on the award value.

10.4 **Amendment to the Information and Consultation of Employees Regulations 2004 –** The Government consulted on the Taylor Review proposal to lower the ICE Regulations request threshold from 10% to 2% of employees through the Increasing Transparency consultation[4]. Generally unions were in favour of a substantial reduction in the 10% threshold. Businesses tended to disagree, and on the whole, have a preference for maintaining the current position.

11. Guidance

11.1 **Amendment to sections 1 to 12 of Part I of the Employment Rights Act 1996** – The Department for Business, Energy and Industrial Strategy will work with Acas to update the online guidance when the changes come into force and will consider how best to raise awareness of the legal requirement to provide a written statement to workers and employees before it comes into force in April 2020.

11.2 **Amendment to section 12A of the Employment Tribunals Act 1996** – The increase in the maximum penalty available for aggravated breach will be accompanied by guidance for all users of the employment tribunal system covering the powers tribunals have to act against employment law breaches or conduct. This guidance will help address stakeholder requests for greater clarity over what powers are available and how they have been used in tribunals. The guidance will be published before the amendment comes into force in April 2019.

11.3 **Amendment to the Information and Consultation of Employees Regulations 2004** - The Department for Business, Energy and Industrial Strategy will produce guidance to raise awareness of the reduction in the threshold before it comes into force in April 2020.

12. Impact

12.1 Separate impact assessments have been carried out for each instrument.

[3] https://www.gov.uk/government/consultations/enforcement-of-employment-rights-recommendations
[4] https://www.gov.uk/government/consultations/increasing-transparency-in-the-labour-market

12.2 **Amendment to sections 1 to 12 of Part I of the Employment Rights Act 1996** – This instrument extends the entitlement to a written statement of employment particulars to all 'workers'. A further instrument, provisionally entitled 'the Employment Rights Act 1996 (Employment Particulars) Order 2018, will follow which will make the provision a 'day 1' right, and update the contents of the written statement. Further information on this instrument can be found in that explanatory memorandum.

12.3 Preliminary costings were calculated for both instruments combined. The impact on employers (including businesses, charities or voluntary bodies) is assessed as being £20.4 million per annum (equivalent annual net direct cost to business). This includes familiarisation and implementation costs. Around half of this cost relates to the extension of the entitlement to 'workers'.

12.4 The impact on the public sector is included in the estimate above. The public sector accounts for around 17% of employment, so around 17% of costs could fall to the public sector.

12.5 A full impact assessment covering all three regulations relating to written statements is published alongside this Explanatory Memorandum.

12.6 **Amendment to section 12A of the Employment Tribunals Act 1996** – This instrument will affect businesses taken to an employment tribunal. In the first quarter of 2017/18 HMCTS received 10,996 valid applications for an employment tribunal. An estimated 44,000 business will need to familiarise themselves with the revised policy. The total cost to businesses, charities or voluntary bodies is estimated at £630,000 per annum.

12.7 The impact on public sector employers is included in this estimate. The public sector accounts for around 17% of employment, so around 17% of costs could fall to the public sector.

12.8 As the estimated impact of this penalty falls below the threshold for producing a full impact assessment one has not been submitted.

12.9 **Amendment to the Information and Consultation of Employees Regulations 2004** – The impact on employers (including businesses, charities or voluntary bodies) is assessed as being £2.2 million per annum (equivalent annual net direct cost to business). This includes familiarisation and implementation costs.

12.10 There is no impact on the public sector.

12.11 As the estimated impact of this measure falls below the threshold for producing a full impact assessment one has not been submitted.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses. For some of the measures covered by these instruments the changes being made do not disproportionally impact on small businesses and therefore no specific action is proposed to minimise regulatory burdens on small businesses. Specific action will be taken in relation to the following measures.

13.2 **Amendment to section 12A of the Employment Tribunals Act – 1996 –** To minimise the impact of the requirements on small business the Department for Business, Energy and Industrial Strategy consulted representatives of small business as part of the consultation process when developing the policy, so the needs of small businesses are accounted for. These amendments will be brought into force in April 2019 so that firms have time to familiarise themselves with the new limits and associated guidance on tribunal powers. Guidance will also be made available on gov.uk.

14. Monitoring & review

14.1 **Amendment to sections 1 to 12 of Part I of the Employment Rights Act 1996** – The Minister for Small Business, Consumers and Corporate Responsibility has made the following statement: "Having had regard to sections 28 to 32 of the Small Business, Enterprise and Employment Act 2015 and Statutory Review Guidance for Departments published under section 31 (3) of that Act, I have decided that it is not appropriate to make provision for review in this instrument. The instrument is concerned solely with the amendment of primary legislation and as such fall outside the scope of the Government's policy objectives regarding provision for review."

14.2 **Amendment to section 12A of the Employment Tribunals Act 1996 -** The Minister for Small Business, Consumers and Corporate Responsibility has made the following statement: "Having had regard to sections 28 to 32 of the Small Business, Enterprise and Employment Act 2015 and Statutory Review Guidance for Departments published under section 31 (3) of that Act, I have decided that it is not appropriate to make provision for review in this instrument. The instrument is concerned solely with the amendment of primary legislation and as such fall outside the scope of the Government's policy objectives regarding provision for review."

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15. Contact

15.1 Lydia Roberts at the Department for Business, Energy and Industrial Strategy, telephone 0207 215 3624 or email lydia.roberts@beis.gov.uk, can be contacted with any queries regarding the instrument.

15.2 Laura Robinson, Deputy Director of Europe and Strategy, Labour Market Directorate at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.

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