EXPLANATORY MEMORANDUM TO

THE SHARED PARENTAL LEAVE REGULATIONS 2014

2014 No. XXXX

THE STATUTORY SHARED PARENTAL PAY (GENERAL) REGULATIONS 2014

2014 No. XXXX

AND

THE MATERNITY AND ADOPTION LEAVE (CURTAILMENT OF STATUTORY RIGHTS TO LEAVE) REGULATIONS 2014

2014 No. XXXX

1. This explanatory memorandum has been prepared by the Department for Business, Innovation and Skills and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instruments

2.1 The Shared Parental Leave Regulations 2014 ("the Leave Regulations") and the Statutory Shared Parental Pay (General) Regulations 2014 ("the Pay Regulations") provide an entitlement for a mother/adopter and a child's father/adoptive parent or a mother's or adopter's partner to take shared parental leave and pay. The right to shared parental leave and statutory shared parental pay are new statutory rights for employees with a partner who is working, or has recently been working (whether employed or self-employed). Eligible employees will be able to share up to 50 weeks of shared parental leave and up to 37 weeks of statutory shared parental pay.

2.2 These Regulations set out the qualifying requirements that must be satisfied by an employee, and also by their partner, for the employee to qualify for shared parental leave and pay. They also set out the notice and evidence requirements which must be met for the employee to qualify for shared parental leave, and for employees and agency workers to qualify for statutory shared parental pay. Shared parental leave and pay can be taken at any time between the birth of a child, or the placement of a child for adoption or with prospective adopters, and must be taken before the child's first birthday or the first anniversary of the placement.

2.3 Shared parental leave and pay arises from untaken maternity leave and statutory maternity pay or maternity allowance, or untaken adoption leave and statutory adoption pay. An eligible mother or adopter must curtail her maternity or adoption leave in order for shared parental leave to arise. She or he may do this, as now, by simply returning to work. Or she or he may do it giving notice to curtail their maternity or adoption leave at a specified future date.

2.4 The Maternity and Adoption Leave (Curtailment of Statutory Rights to Leave) Regulations 2014 ("the Curtailment Regulations") enable an expectant mother or a mother on maternity leave, or an adopter or a prospective adopter to give notice to end her maternity leave or his or her adoption leave on a specific future date. Where maternity or adoption leave has been curtailed under the Curtailment Regulations, the balance of the untaken leave may be taken as shared parental leave if the parents satisfy entitlement and notification criteria. The benefit of curtailing leave, rather than the mother or adopter simply returning to work, is that it enables the number of weeks of maternity or adoption leave that will be untaken at that date to be known in advance and allows the child's father or the mother's or adopter's partner to start taking shared parental leave whilst the mother or adopter remains on maternity or adoption leave. This enables both parents to be at home together with the child from the earliest stages following birth or placement for adoption.

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

3.1 None.

4. Legislative context

4.1 Part 7 of the Children and Families Act 2014 ("the 2014 Act") inserts a new Chapter 1B into Part 8 of the Employment Rights Act 1996, giving the Secretary of State the power to make regulations to create an entitlement to shared parental leave. Part 7 of the 2014 Act also inserts a new Part 12ZC into the Social Security Contributions and Benefits Act 1992 giving the Secretary of State the power to make regulations to create an entitlement to statutory shared parental pay.

4.2 The Leave Regulations, the Pay Regulations and the Curtailment Regulations are the first use of the new regulation making powers on shared parental leave and pay set out in Part 7 of the 2014 Act.

4.3 As the Curtailment Regulations provide for the curtailment of maternity and adoption leave periods, the Government will shortly make regulations to provide for the curtailment of statutory maternity pay, statutory adoption pay, and maternity allowance pay periods. Those Regulations will enable an expectant mother or a mother or an adopter or prospective adopter to reduce the number of weeks of statutory maternity or adoption pay or maternity allowance below the 39 weeks to which they are entitled. The outstanding weeks of pay or allowance (up to a maximum of 37 weeks) would become available as statutory shared parental pay which the child's father or the mother's or adopter's partner may start taking whilst the mother or adopter is still claiming statutory maternity or adoption pay, or maternity allowance. In some cases, the reduction of statutory maternity or adoption *pay* or maternity allowance may also give rise to an entitlement to shared parental *leave* for the other parent, as well as statutory shared parental pay.

4.4 The Leave Regulations, the Pay Regulations and the Curtailment Regulations, along with the forthcoming regulations on the curtailment of statutory maternity pay, statutory adoption pay, and maternity allowance pay periods, are part of a package of statutory instruments that will give effect the Government's Modern Workplaces agenda, as set out in the Government Responses published in November 2012 and November 2013 to the Modern Workplaces consultation (published in February 2011) and the consultation on the administration of shared parental leave and pay (published in February 2013). The Paternity and Adoption Leave (Amendment) Regulations 2014, recently laid before both Houses of Parliament under the affirmative resolution procedure, are also part of this package and there will be a number of other statutory instruments brought forward to give effect to adoption leave for intended parents in surrogacy and prospective adopters, shared parental leave and pay for these groups and for adoptions from overseas, as well as changes to the nature of statutory adoption pay and an increase in the age of a child from 5 to 18 years for the parent to be entitled to unpaid parental leave.

5. Territorial extent and application

5.1 These instruments apply to Great Britain.

5.2 Primary legislation is currently before the Northern Ireland Assembly to enable similar regulations to be made in Northern Ireland.

6. European Convention on Human Rights

Jo Swinson, the Parliamentary Under Secretary of State for Employment Relations and Consumer Affairs, has made the following statement regarding Human Rights:

In my view the provisions of the Maternity and Adoption Leave (Curtailment of Statutory Rights to Leave) Regulations 2014, the Shared Parental Leave Regulations 2014 and the Statutory Shared Parental Pay (General) Regulations 2014 are compatible with the Convention rights.

7. Policy background

7.1 The 2014 Act and these Regulations give effect to the Coalition Government's commitment to "encourage shared parenting from the earliest stages of pregnancy – including the promotion of a system of flexible parental leave". The policy objective is to create choice for families in how they look after their children, and to create more equity in the workplace and reduce the gender penalty resulting from women taking long periods of time out of the workplace on maternity leave. This legislation is also designed to encourage shared parenting as evidence has shown that where fathers are involved in parenting at any early stage they are more likely to stay involved with their children in later years, leading to a range of positive outcomes for children.

7.2 The Leave Regulations and the Pay Regulations create the new statutory entitlement to shared parental leave and statutory shared parental pay, in the year

following the birth or adoption of a child, if both parents individually meet specified qualifying requirements. Those Regulations set out the requirements to end maternity or adoption leave and prescribe the qualifying requirements that each parent in a working couple would need to meet to enable them to take shared parental leave and pay.

7.3 Unlike any current entitlement to leave and pay, shared parental leave and statutory shared parental pay can be a joint entitlement that both parents are entitled to share if they both meet the qualifying requirements. Shared parental leave and statutory shared parental pay can be taken by both parents at the same time, allowing the family to be at home together if they wish. In addition, the leave and pay can be taken discontinuously in minimum periods of one week, with the employee returning to work between periods of leave, thereby enabling parents to juggle work and home commitments in the first year. A statutory cap on the number of notices to book shared parental leave will mean that an employee may take no more than three periods of leave, unless an employer agrees to allow more periods of leave or to accept more than 3 notices to book leave.

7.4 In 2010 there were 782,000 births in England, Scotland Wales and the Modern Workplaces: shared parental leave and pay administration consultation - impact assessment (February 2013) estimates that 285,000 couples would be eligible to take shared parental leave and pay. (There has been an upward trend in the birth rate in England and Wales (with a decrease in Scotland) and the latest figures indicate some 777,400 births in period between April 2012 and March 2013 (the latest period for which figures are available).

7.5 These three sets of Regulations:

- make provision for the mother to give notice to curtail her maternity leave period (or the adopter to give notice to curtail his or her adoption leave period) in order to give rise to shared parental leave; and the circumstances in which notice may be revoked;
- set out qualifying requirements (including a continuity of employment test and employment and earnings test) for the mother/adopter and the child's father or the mother's or the adopter's partner in order for an entitlement to shared parental leave and statutory shared parental pay to arise;
- require an employee who wishes to take shared parental leave or receive statutory shared parental pay to notify their employer of their entitlement to the leave/pay and their intention to take it;
- make provision for notifying specific periods of leave and pay or variations to previously notified periods of leave of pay;
- set out what happens if an employer refuses a discontinuous period of leave in a notice;
- modifies the notice requirements where a child is born early;
- set out what may happen where an employee is no longer entitled to take shared parental leave;
- outline restrictions on taking shared parental leave;

- provide for up to 20 shared parental leave in-touch days per employee on shared parental leave to enable some work to be untaken during a period of shared parental leave or to facilitate shared parental leave to be taken on a part-time basis for some weeks or to facilitate a phased return to full-time working at the end of a period of shared parental leave;
- apply all an employee's terms and conditions during shared parental leave, save remuneration;
- set out arrangements for redundancy whilst an employee is absent on a period of shared parental leave;
- set out the right to return, and the nature of the right to return, after a period of shared parental leave;
- provide protection for an employee from detriment and unfair dismissal in connection with entitlement to shared parental leave;
- cover contractual rights to shared parental leave;
- make special arrangements for leave and pay in the circumstances of death of the mother, father, adopter, or mother's or adopter's partner or the child;
- make special arrangements in the event of the child being born very early;
- set out the arrangements governing the interaction of statutory shared parental pay and contractual pay;
- set out the time when statutory shared parental pay is to be paid;
- set out the liability of the Commissioners to pay statutory shared parental pay in specified circumstances.

8. Consultation outcome

8.1 The *Modern Workplaces* consultation document was published on the 16 May 2011 and ran for 12 weeks until 11 August 2011. The flexible parental leave section of that consultation sought views on flexible parental leave, the forerunner proposal to the new shared parental leave and pay system. We consulted on a radical new system whereby maternity leave would be reduced to 18 weeks and then 34 weeks of leave and 21 weeks of statutory pay to be available for the parents to share on a flexible basis allowing the parents to be absent from work at the same time, with some leave being reserved for the exclusive use of each parent on a "use it or lose it", non-transferable basis. The consultation document can be found at: https://www.gov.uk/government/consultations/consultation-on-modern-workplaces

8.2 The Department received 273 responses to the consultation document from a broad spectrum of interested parties. Of the responses, 22% of responses were from large, medium, small and micro businesses (4% of all responses came from business with fewer than 50 employees) and from business representative groups, and nearly half (48%) were from individuals. The Government response was published in November 2012 and is available at: https://www.gov.uk/government/consultations/consultation-on-modern-workplaces

8.3 61% of respondents disagreed with our proposal to reserve 18 weeks of maternity leave exclusively for mothers. Of these, nearly half (49%) thought that the period of

maternity leave reserved exclusively for women should be shorter (49%); 20% of respondents thought that no period should be reserved at all, and that all of the leave should be available to parents to choose how to share it. 39% of respondents agreed that 18 weeks of maternity leave should be reserved for mothers' exclusive use. Business respondents were slightly more in favour of the 18 weeks' reserved period, with 57% of businesses and business representative bodies who answered this question agreeing with the proposal.

8.4 27% of respondents to the question of reserved leave for both parents (outside the maternity leave period) felt that reserved periods would encourage shared parenting and may boost fathers' uptake. However 16% of respondents felt that parents should have as much flexibility as possible in determining leave allocation.

8.5 Business respondents were less in favour of flexibility than non-business respondents. 65% of business respondents agreed with the proposals to facilitate greater flexibility in the taking of parental leave, compared to 85% of non-business respondents. Of those who explained their answer the most common response (cited by 48% of respondents) was that greater flexibility would be beneficial for parents – providing choice, and promoting shared parenting. The most common concern (18%) was that greater flexibility will increase business burdens and cost.

8.6 The Consultation also sought views on extending employment protections available during the maternity leave period to flexible parental leave. 66% of business respondents agreed and 34% disagreed with the proposed extension of employment rights during absence from work on maternity, paternity or parental leave in the first year of the child's life. 88% of non-business respondents agreed, and 12% disagreed.

8.7 When the Government Response to the Modern Workplaces consultation was published on 13 November 2012, the proposed system built upon the proposals in the Modern Workplaces consultation in 2011 and had taken into account the responses received. The Government Response announced that there would be no reduction in the amount of maternity leave and the default position was that all employed women would remain entitled, on the same basis, to 52 weeks of maternity leave and 39 weeks of statutory maternity pay or maternity allowance. A new entitlement to shared parental leave and statutory shared parental pay would arise for eligible working couples or parents, once the mother had decided to curtail her maternity leave period or reduce her maternity pay period or maternity allowance period.

8.8 On 25 February 2013, the same day that the Children and Families Bill was introduced into the House of Commons, the Government launched a consultation on the administration arrangements for the new system of shared parental leave and pay. The administration consultation document can be found at: https://www.gov.uk/government/consultations/consultation-on-the-administration-of-shared-parental-leave-and-pay

8.9 This asked questions about the period in which it should be possible to take shared parental leave, the notification arrangements and how the right to return to the same job should apply when shared parental leave could be taken discontinuously.

8.10 The administration consultation closed on 17 May 2013. 87 responses to the administration consultation were received from a broad spectrum of interested stakeholders. Of those responses, 44% represented employers including business representation groups, small and medium sized business and local government; and 56% were from non-employers such as family groups, trade unions/staff associations, legal representatives, individuals and others.

8.11 On 29 November 2013, the Government published the Government Response to the consultation on the administration of shared parental leave and pay. The document can be found at:
https://www.gov.uk/government/consultations/consultation-on-the-administration-of-shared-parental-leave-and-pay

8.12 This announced that:

- shared parental leave and pay could be taken in the 52 weeks following the birth;
- there would be a cap of 3 notices to take a period of shared parental leave, thus limiting the number of discontinuous periods of leave that an employee could take;
- the right to return to the same job would apply to an employee taking any combination of maternity, paternity, adoption and shared parental leave up to a total of 26 weeks in aggregate and that thereafter there would be a right to return to the same job or, if that was not reasonably practicable, to a similar job.

9. Guidance

9.1 The changes brought about by these Regulations will be publicised widely so that all who may be affected may be made aware of their effects. The Department will use appropriate communication channels and press avenues to publicise the changes. In addition, the Department will be using existing means to communicate with employers through HMRC bulletins and business representative groups to make employers aware of the new statutory entitlement. There will be online guidance on GOV.UK for employers and employees on shared parental leave and statutory shared parental pay; how it arises; the eligibility criteria; how it is administered and statutory payments reclaimed; notice and evidence requirements for an employee to take shared parental leave and statutory shared parental pay. In addition, Acas will be providing guidance to employers and employees on operating the shared parental leave and pay system in the workplace.

10. Impact

10.1 The take-up assumptions for shared parental leave and pay are based on 782,000 births a year, with 285,000 couples (or sets of parents) eligible to take shared parental leave and statutory shared parental pay. (Separate costing was not carried out on adoptive parents, as it was such a small number – around 4,000 adoptions a years). Cost assumptions were based on a low take-up of 2% of eligible parents to 8% of eligible parents and the annual recurring costs on employers (including employer costs for absence, employer contribution to statutory shared parental pay, employer personnel time) is estimated to be between £0.1million and £4.8 million. The one-off costs to employers are estimated at £7.6 million - £7.9 million.

10.2 The impact on the public sector is an estimated £1.3m for the highest level of take up predicted. These costs represent exchequer costs for statutory payments (netting off the savings from statutory maternity pay and maternity allowance). The one-off exchequer set up costs is £6.9 million.

10.3 An Impact Assessment was prepared for the Children and Families Act 2014 and the relevant extract is attached to the Explanatory Memorandum. The full Impact Assessment is available online at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/110692/13-651-modern-workplaces-shared-parental-leave-and-pay-impact-assessment2.pdf and a revised Equivalent Annual Net Cost to Business is available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/290066/bis-14-657-modern-workplaces-shared-parental-leave-impact-assessment.pdf

11. Regulating small business

11.1 The legislation applies to small business.

11.2 No special measures apply to small businesses.

11.3 Shared parental leave and statutory shared parental pay are statutory rights for all employees who meet predetermined criteria, irrespective of the size of employer. Creating a two-tier system of maternity and parental leave by exempting micro-businesses and new companies would deny these employers the ability to be more flexible and to negotiate with their employees on when leave is taken or to split the burden of absence where the mother or adopter works for a small employer.

12. Monitoring & review

12.1 The success criteria for these instruments is that mothers and adopters will curtail their maternity and adoption leave to opt in to the new shared parental leave and pay system with their child's father or the mother's or adopter's partner. The take up by

fathers in the year following birth will be of particular interest.

12.2 The Department for Business, Innovation and Skills will conduct an internal review the implementation and take up of shared parental leave and statutory shared parental leave no earlier than 2018.

13. Contact

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