EXPLANATORY MEMORANDUM TO

THE NATIONAL MINIMUM WAGE (AMENDMENT) (NO. 2) REGULATIONS 2023

[2023] No. [XXXX]

1. Introduction

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

2. Purpose of the instrument

2.1 This instrument amends the National Minimum Wage Regulations 2015 ('the 2015 Regulations').

2.2 This instrument removes paragraph 57(3) from the 2015 Regulations. This paragraph provides that work done by a worker residing in the employer's home and treated as a member of the family is not 'work' for the purposes of the 2015 Regulations, and therefore those workers are not entitled to the National Minimum Wage (NMW). The effect of this instrument is that these workers will be performing 'work' for the purposes of the 2015 Regulations and be entitled to the NMW/National Living Wage ('NLW') for time spent doing work which previously did not attract the NMW or NLW. We refer to removing paragraph 57(3) as removing the 'live-in domestic worker exemption'.

2.3 This instrument will commence on 1 April 2024, subject to Parliamentary approval.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Extent and Territorial Application

4.1 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is the United Kingdom

4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is the United Kingdom

5. European Convention on Human Rights

5.1 The Minister for Enterprise and Markets and Small Business, Kevin Hollinrake MP, has made the following statement regarding Human Rights:

"In my view the provisions of the National Minimum Wage (Amendment) (No. 2) Regulations 2023 are compatible with the Convention rights."

6. Legislative Context

6.1 The live-in domestic worker exemption was introduced as part of the National Minimum Wage Regulations 1999 (Regulation 2(2)(a)) and came into force on 1 April 1999. The 1999 Regulations were then consolidated into the 2015 Regulations and this exemption appears in the 2015 Regulations at paragraph 57(3).

6.2 Section 6 of the National Minimum Wage Act 1998 ('the 1998 Act') allows the Secretary of State to refer matters relating to the 1998 Act to the Low Pay Commission ("LPC"). In March 2021 the Secretary of State commissioned the LPC to review the exemption as part of its 2021 remit.

6.3 The LPC is an independent body which makes recommendations about the scope of the NMW and NLW and the rates of the NMW and NLW.

6.4 The LPC reported in 2021 and recommended that that exemption be removed. The LPC's report with this recommendation has been laid in both Houses and can be viewed at https://www.gov.uk/government/publications/low-pay-commission-report-2021.

6.5 This instrument implements this recommendation. Once this instrument is in force, work which would have met the paragraph 57(3) criteria will be considered 'work' and attract the requirement to pay NMW/NLW.

6.6 On 10 March 2022, during a debate[1] on the National Minimum Wage (Amendment) Regulations 2022, the Minister for Small Business, Consumers and Labour Markets announced in the House of Commons that the 'live-in domestic worker exemption' would be removed from the 2015 Regulations when parliamentary time allows.

6.7 In (1) Mr Santosh Alexander Thukalil (2) Mrs Riya Goerge Thukalil v (1) Ms Kamalammal Poonnamamnal Kattuvila Puthenveettil (2) Secretary of State for Business, Energy and Industrial Strategy [2023] EAT 47, the Employment Appeal Tribunal found that the live-in domestic worker exemption was indirectly discriminatory and should be disapplied.

7. Policy background

What is being done and why?

7.1 The NMW was introduced on 1 April 1999 by the 1998 Act and creates a minimum pay threshold. The objective of the UK NMW is to maximise the wages of low paid workers without damaging their employment prospects. The NLW was introduced on 1 April 2016 and created an additional minimum pay level which applies to the oldest group of workers.

Explanations

What did any law do before the changes to be made by this instrument?

7.2 The 1999 Regulations accompanying the 1998 Act introduced an exemption from the minimum wage for live-in domestic workers. The exemption was introduced to facilitate au pair relationships and supported by associated immigration provisions which were in place at the time. In au pair arrangements, a young person stays with a host family abroad and helps with childcare and light housework while being treated as a member of the family.

[1] HC Deb 10 March 2022 vol 710 cc 4-5. Available at https://hansard.parliament.uk/Commons/2022-03-10/debates/bb8249f8-3123-46aa-9536-c27452ff5cea/DraftNationalMinimumWage(Amendment)Regulations2022

Why is it being changed?

7.3 The LPC's 2021 report found that the live-in domestic worker exemption is indirectly discriminatory and enables exploitation. The report found that most people working under the exemption are migrant women undertaking other domestic work.

7.4 The differences between au pairs and migrant workers in domestic settings are not legally defined. The exemption has been shown to enable some exploitation as some employers do not genuinely treat workers as a member of the family, but this is difficult for workers to prove. The exemption can therefore provide a loophole for employers, allowing them to require live-in domestic workers such as housekeepers and cleaners to work long hours for low pay without any intention of cultural exchange.

What will it now do?

7.5 The effect of this instrument is that these workers will be performing 'work' for the purposes of the 2015 Regulations and be entitled to the NMW/NLW for time spent doing work which previously did not attract the NMW or NLW.

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union or trigger the statement requirements under the European Union (Withdrawal) Act 2018.

9. Consolidation

9.1 There are no plans to further consolidate the 2015 Regulations.

10. Consultation outcome

10.1 The Government commissioned the LPC to carry out a wide-ranging consultation and fact-finding exercise, including taking written and oral evidence and making a series of visits throughout the UK. Details of how the LPC conducted its review are included in its 2021 report, referenced above.

11. Guidance

11.1 Information about the NMW regulations, requirements and penalties can be found on the gov.uk website. Guidance will be amended on the gov.uk website to reflect the impact of this instrument.

12. Impact

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

12.2 There is no, or no significant, impact on the public sector. We will continue to work with the Department for Levelling Up, Housing and Communities, and the Department of Health and Social Care, to assess the financial impact on local authorities, who support individuals in their care costs.

12.3 A full Impact Assessment has not been prepared for this instrument because the workers covered by the exemption are overwhelmingly live-in domestic support, with limited evidence of use elsewhere. Neither of these groups are hired by businesses as they are employed directly by families.

12.4 As a result, the impact on business will be limited to the cost of the c.5 au pair agencies, operating in the UK, familiarising themselves with the change. This cost is expected to be negligible.

12.5 The benefit of this policy will be to prevent the misuse of the exemption to exploit workers (particularly migrant women).

12.6 The LPC's 2021 report also provides commentary on the implications of the removal in chapter 8.

13. Regulating small business

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

14. Monitoring & review

14.1 The approach to monitoring of this legislation is the Minister for Enterprise, Markets and Small Business has made the following statement regarding the duty to review regulatory provisions in secondary legislation:

"It is not appropriate in the circumstances to make provision for review by the Secretary of State in the National Minimum Wage (Amendment) (No. 2) Regulations 2023. The changes made by the instrument make it easier for workers to fall within the NMW rules. As such review would be disproportionate when taking into account the economic impact of the regulatory provision on the qualifying activity."

15. Contact

15.1 Lucy Allatt at the Department for Business and Trade (telephone: 07392286571 or email: (Lucy.Allatt@businessandtrade.gov.uk) can be contacted with any queries regarding the instrument.

15.2 Anthony Morris, Deputy Director for Analysis and Wages in Labour Markets Directorate, at the Department for Business and Trade can confirm that this Explanatory Memorandum meets the required standard.

15.3 Kevin Hollinrake, Minister for Enterprise, Markets and Small Business at the Department for Business and Trade can confirm that this Explanatory Memorandum meets the required standard.