EXPLANATORY MEMORANDUM TO

THE EMPLOYMENT RIGHTS (EMPLOYMENT PARTICULARS AND PAID ANNUAL LEAVE) (AMENDMENT) REGULATIONS 2018

2018 No. 1378

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 existing legislation, as follows:

2.2 sections 1 to 7B of Part I of the Employment Rights Act 1996. The amendments have the effect of making the right to a written statement of employment particulars a 'day 1' right for all workers and adding additional contents to the written statement;

2.3 regulation 16 of the Working Time Regulations 1998. The amendments have the effect of changing the reference period for calculating annual leave pay from 12 to 52 weeks. The reference period applies for workers whose pay varies because either they have no normal working hours, or they have normal working hours but the amount of work or days or times they work each week varies.

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 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

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

4.2 The territorial application of this instrument is Great Britain.

5. European Convention on Human Rights

5.1 The Minister for Small Business, Consumers and Corporate Responsibility, Kelly Tolhurst has made the following statement regarding Human Rights:

"In my view the provisions of The Employment Rights (Employment Particulars and Paid Annual Leave) (Amendment) Regulations 2018 are compatible with the Convention rights."

6. Legislative Context

6.1 The legislative context of this instrument covers three amendments. 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 **Amendments to sections 1 to 7B of Part I of the Employment Rights Act 1996 -** Sections 1 to 7B of Part I of the Employment Rights Act 1996 ("the 1996 Act") entitles 'employees' to a written statement of employment particulars.

6.3 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.

6.4 This instrument amends the 1996 Act to make the written statement a 'day 1' right for all individuals who are entitled to a written statement. This means firstly that they will be entitled to receive the 'principal statement' of the written statement no later than the first day of their new job, where at present the employer has a period of two months in which to provide the statement. Secondly, there will be no qualifying period of employment. At present employees are entitled to a written statement only if their employment has continued for at least one month. Under this instrument, that minimum period is abolished.

6.5 A separate instrument prepared in parallel, The Employment Rights (Miscellaneous Amendments) Regulations 2019, extends the right to all 'workers' rather than just 'employees'. Taken together, the two instruments provide that the right to a written statement applies to all 'workers' from day 1.

6.6 In addition, we will be expanding the information that employers are required to provide as mandatory content in a written statement from day one (including any additional information provided e.g. through staff handbooks on sick leave and pay or other types of paid leave). The additional information to be included in the principal statement includes both new information and information which employers are already required to provide but can provide separately: in a staff handbook for example. The additional information is as follows:

- How long a job is expected to last, or the end date of a fixed-term contract
- How much notice an employer and worker are required to give to terminate the agreement
- Details of eligibility for sick leave and pay.
- Details of other types of paid leave e.g. maternity leave and paternity leave.
- The duration and conditions of any probationary period
- All remuneration (not just pay) - contributions in cash or kind e.g. vouchers and lunch
- Which specific days and times workers are required to work.

6.7 All of the above is in addition to the current mandatory information that must be provided in a written statement. All the information in a principal statement will need to be provided on the first day that a worker starts their job.

6.8 **Amendment to regulation 16 of the Working Time Regulations 1998** - Regulation 13 of the Working Time Regulations 1998 creates an entitlement to 4 weeks annual leave, as required by the EU Working Time Directive. Regulation 13A creates an additional entitlement (not required by the EU Working Time Directive) to 1.6 weeks annual leave.

6.9 Regulation 15A provides that the entitlement to accrue annual leave starts with the commencement of employment. Whilst there may be limitations on when leave can be taken, there is no qualifying period for leave to be accrued.

6.10 Regulation 16 makes provision for payment when on annual leave, as provided for in Regulation 13 and 13A. Regulation 16(1) "payment in respect of leave" states that workers must be paid for leave to which they are entitled "at the rate of a week's pay in respect of each week of leave". Regulation 16(2) provides that a week's pay is to be calculated by applying sections 221-224 of the Employment Rights Act 1996, but with certain modifications set out at regulation 16(3). These sections, with the modifications, provide that where a worker's remuneration varies:

- with the amount of work done;
- according to the time of work; or
- because the worker has no normal working hours;

then a week's pay is the average weekly remuneration in the period of twelve weeks preceding the start of the leave. This is known as the 'holiday pay reference period'.

6.11 These twelve weeks do not take account of "a week in which no remuneration was payable by the employer to the employee". In this case, "remuneration in earlier weeks shall be brought in" when calculating twelve weeks.

6.12 This statutory instrument amends modifications of sections 221-224 set out in regulation 16(3). It inserts a new modification which increases the reference period from twelve weeks to fifty two weeks. This means that payment in respect of annual leave for workers with variable remuneration will be based on their average weekly remuneration over a period of fifty two weeks. An exception to this is that where the worker has been employed for less than fifty two weeks, the reference period is reduced to the number of weeks of employment.

6.13 Sections 221-224 provide that weeks in the reference period in which no remuneration was payable should be ignored. In this case earlier weeks in which remuneration was payable are taken into account. This instrument adds a modification to regulation 16(3) which provides that weeks preceding the period of one hundred and four weeks before the beginning of the leave shall not be taken into account. Where this gives less than 52 weeks to take into account, the reference period is reduced to the number of weeks which can be taken into account, i.e. in which remuneration was payable.

6.14 This statutory instrument adds a further provision that where applying sections 221-224 gives no weeks to take into account (either because the worker is at the beginning of their employment, or because they have no weeks in the reference period in which remuneration was payable) a week's pay is not to be calculated by applying those sections. Instead a week's pay is the amount which fairly represents a week's pay, having regard to the considerations specified at section 228(3) (which include, for example, the remuneration received by other persons engaged in relevant comparable employment with the same employer).

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 instrument implements three of those recommendations.

7.2 **Amendments to sections 1 to 7B of Part I of the Employment Rights Act 1996** - The Taylor review 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. The Taylor review also recommended that Government should make it a statutory requirement for employees and 'dependent contractors' to receive the written statement on day 1 of their job.

7.5 **Amendment to regulation 16 of the Working Time Regulations 1998 -** The Taylor review recommended that 'Government should increase the holiday pay reference period to 52 weeks to take account of seasonal variations'.

7.6 In the review Matthew Taylor found widespread acknowledgement from stakeholders that the 12 week reference period does not work for everyone and leads to differences in incentives between employers and workers regarding the timing of annual leave. This is particularly the case in sectors with significant seasonal variations in working hours.

7.7 For example, for many retailers there is a peak at Christmas. Workers may have received extra hours of work or paid overtime during that period. The workers would therefore have an increased incentive to take their leave soon after the end of that peak period to benefit from the higher holiday pay, but may be dissuaded from doing so by the employer due to the extra cost of their holiday pay. These incentives are potentially distortive and could lead to disharmony in the workplace.

[1] The review recommended that 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

7.8 The Government therefore agreed that the holiday pay reference period should be increased to 52 weeks to provide a fairer reflection of workers' remuneration (as it would not be affected by seasonal variations) and to reduce the likelihood of workplace conflicts.

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 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 23 May 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 this instrument. This instrument was covered by a consultation entitled 'Increasing Transparency'.

10.2 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. The Government's commitment to legislate, following consideration of the consultation responses, is included in the Good Work Plan, which has been published on gov.uk. The consultation responses are also published on gov.uk, alongside a summary of their content.

10.3 **Amendments to sections 1 to 7B of Part I of the Employment Rights Act 1996** – The increasing transparency consultation included several proposed changes to the entitlement to written statements. These proposals included making written statements a 'day 1' right and updating the contents of the principal statement.

10.4 The consultation 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.

10.5 Most respondents to the consultations 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. Those that agreed were only slightly concerned with balancing the administrative burdens of having to deliver a statement within a short timescale.

10.6 The majority of respondents agreed strongly that the principal written statement should be provided on (or before) the individual's start date.

10.7 **Amendment to regulation 16 of the Working Time Regulations 1998** - The increasing transparency consultation included the proposals on changing the holiday pay reference period to 52 weeks.

10.8 The consultation asked whether the Government should set a fixed 52 week reference period, introduce a default 52 week reference period but allow employees and other workers to agree a shorter reference period, or set a different reference period altogether.

10.9 Most respondents to the consultation supported the change from a 12 to a 52 week reference period, agreeing that ironing out the seasonal fluctuations in holiday pay was a positive outcome. Some respondents (particularly Trade Unions) asked that the legislation should allow for workers and their representatives to negotiate bespoke reference periods between 12 and 52 weeks. Some respondents (particularly employer representatives) asked for greater flexibility between employers and workers to agree an appropriate reference period depending on the industry-specific context.

10.10 The Government has moved forward with the increase to a 52 week reference period as it represents a more straightforward arrangement and provides balance between the needs of employers and workers. The requests for greater flexibility or individual negotiation on each worker's reference period has the potential to increase workplace conflicts around annual leave, which the change in the reference period was designed to reduce.

10.11 The Government responded to this consultation, covering all three changes covered by this instrument on 17 December 2018. The Government response is published on gov.uk.

11. Guidance

11.1 The Department will work with Acas to update online guidance when the changes come into force and is preparing new guidance on holiday pay. The Department will also consider how best to raise awareness of the legal requirement to provide a written statement to workers and employees and how best to raise awareness of the change to the holiday pay reference period.

12. Impact

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

12.2 **Part 2: Amendments to sections 1 to 7B of Part I of the Employment Rights Act 1996 –** This instrument makes the entitlement to a written statement of employment particulars a 'day 1' right. This means that the right will apply to workers regardless of their length of service, whereas currently there is a one-month qualifying period. Workers will be entitled to receive their written statements on (or before) the day they start work. This instrument also amends the mandatory information to be included in the written statement.

12.3 This instrument is related to a further instrument, titled "The Employment Rights (Miscellaneous Amendments) Regulations 2019", which will extend the entitlement to a written statement of employment particulars to all 'workers'.

12.4 A full impact assessment covering all three regulations relating to written statements is published alongside the Explanatory Memorandum covering The Employment Rights (Miscellaneous Amendments) Regulations 2019 (affirmative) on the legislation.gov.uk website.

12.5 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 additional contents to be added to written statements. Making the requirements a 'day 1' right is assessed as having a negligible impact.

12.6 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.

12.7 **Part 3: Amendment to regulation 16 of the Working Time Regulations 1998 -** This instrument changes the reference period for calculating paid annual leave from 12 to 52 weeks.

12.8 The impact on employers (including businesses, charities or voluntary bodies) is assessed as being £2.1 million per annum (equivalent annual net direct cost to business). This includes familiarisation and implementation costs. The instrument will help ensure greater workplace harmony by reducing conflict around annual leave and pay. Government is unable to monetise these impacts, but we note that, in Net Present Value terms, the net impact is likely to be zero.

12.9 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.

12.10 A full Impact Assessment has not been prepared due to the low level of impact. A proportionate internal analysis has been conducted.

13. Regulating small business

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

13.2 No specific action is proposed to minimise regulatory burdens on small businesses.

13.3 **Amendments to sections 1 to 7B of Part I of the Employment Rights Act 1996 –** An Impact Assessment has been produced for this instrument. It is submitted with this memorandum and published alongside the Explanatory Memorandum on the legislation.gov.uk website.

13.4 **Amendment to regulation 16 of the Working Time Regulations 1998** - Small and micro businesses make up the majority of employing businesses. However, the costs associated with this measure do not accrue to these businesses disproportionately. Familiarisation costs are fixed at 30 minutes of a manager's time. However, as micro businesses in particular are more likely to use free payroll software, they will not incur any implementation costs beyond familiarisation.

13.5 We also have no evidence to suggest that small or micro businesses are more likely to use workers with a non-fixed working pattern.

14. Monitoring & review

14.1 The Minister for Small Business, Consumers and Corporate Responsibility, Kelly Tolhurst has made the following statement:

"Having had regard to sections 28 to 32 of the Small Business, Enterprise and Employment Act 2015 and the 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. Part 2 of the instrument is concerned solely with the amendment of primary legislation and as such falls outside the scope of the government's policy objectives regarding provision for review. Part 3 of the instrument also modifies the application of primary legislation, and in addition a review would be disproportionate when taking into account the economic impact of the regulatory provision on the qualifying activity."

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.