EXPLANATORY MEMORANDUM TO

The Employment Rights (Northern Ireland) Order 1996 (Protection from Detriment in Health and Safety Cases) (Amendment) Order (Northern Ireland) 2021

2021 No. 103

1. Introduction

1.1. This Explanatory Memorandum has been prepared by the Department for the Economy to accompany the Statutory Rule (details above) which is laid before the Northern Ireland Assembly.

1.2. The Statutory Rule is made under Articles 24(2), 24(4)(c) and (d), 24(5) and Article 39(3) of the Employment Relations (Northern Ireland) Order 1999 and is subject to the confirmatory resolution procedure.

2. Purpose

2.1. This Statutory Rule will amend Article 44 of the Employment Rights (Northern Ireland) Order 1996 ("the Principal Regulations") to extend the rights conferred previously in Article 68(1)(d) and (e) of the Principal Regulations to limb (b) workers (referred to as limb (b) as they fall within the definition of "worker" in Article 3(3)(b) of the Principal Regulations) as well as employees.

2.2. Article 68(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.

2.3. This amendment will repeal Articles 68 (1)(d) and (e) and insert a new provision at Article 68 (1A) which will provide that both employees and limb (b) workers will have the right not to be subjected to detriment in health and safety cases.

3. Background

3.1. In October 2020, the High Court in London heard a Judicial Review brought by the Independent Workers Union of Great Britain (IWUGB) against the Secretary of State for Work and Pensions and the Health and Safety Executive in Great Britain .

3.2. The IWUGB claimed that the United Kingdom failed properly to implement in domestic law certain provisions of two EU health and safety directives: Directive 89/391/EC (known as "the Framework Directive") and Directive 89/656/EC (which relates to the use of personal protective equipment and is known as "the PPE Directive").

3.3. The central complaint was that the Directives require Member States to confer certain protections on "workers", whereas UK domestic legislation protects only "employees". These health and safety protections relate to the right not to be suffer detriment in relation to any action an individual

may take to protect themselves or others where they reasonably believe there is serious and imminent danger.

3.4. Many of the IWUGB's members are not employees but "limb (b) workers" as defined in s.230(3)(b) of the Employment Rights Act 1996 ("the ERA").

3.5. The Court found the Health and Safety Framework Directive and the PPE Directive apply to a wider group of workers, not just employees. Therefore, the domestic implementation in relation to the PPE Regulations and sections 44(d) and (e) of the ERA (protection from detriment) should have been implemented for workers, not just employees.

3.6. The equivalent legislative provisions in Northern Ireland are found in Articles 68(1)(d) and (e) of the Employment Rights (Northern Ireland) Order 1996 ("the Principal Regulations") and also offer the same protection against detriment in relation to health and safety concerns only to employees.

3.7. As a result of this Statutory Rule, 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.

3.8. 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.

3.9. Finally, Article 3(3)(b) of the ERO also includes the same definition of a worker as its GB counterpart. As a result, this Statutory Rule has been introduced to amend the Principal Regulations in line with the decision in the IWUGB case.

4. Consultation

4.1. A limited consultation has taken place with key sectoral stakeholders. One comment was received from the Department of Agriculture, Environment and Rural Affairs, which confirmed it had no comments to make, save to confirm that it will comply with any Regulations introduced.

5. Equality Impact

5.1. It is not anticipated that there will be any equality implications. It is intended as a targeted piece of legislation aimed at ensuring the extension of employment rights to a wider group of workers.

6. Regulatory Impact

6.1. An Impact Assessment has not been prepared for this statutory rule as this is urgent legislation to ensure clarity as to the extent of limb (b) worker's rights.

7. Financial Implications

7.1. It is not envisaged that there will be any significant, impact on business, charities, public sector or voluntary bodies.

8. Section 24 of the Northern Ireland Act 1998

8.1. This statutory rule complies with the provisions of section 24 of the Northern Ireland Act 1998.

9. EU Implications

9.1. Not applicable.

10. Parity or Replicatory Measure

10.1. This Statutory Rule replicates The Employment Rights Act 1996 (Protection from Detriment in Health and Safety Cases) (Amendment) Order 2021 which apply to England, Scotland and Wales.

11. Additional Information

11.1. None