EXPLANATORY MEMORANDUM TO

THE MATERNITY ALLOWANCE AND STATUTORY MATERNITY PAY, (NORMAL WEEKLY EARNINGS ETC.) (CORONAVIRUS) (AMENDMENT) REGULATIONS (NORTHERN IRELAND) 2020

S.R. 2020 NO. 69

1. Introduction

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

1.2 The Statutory Rule is made under sections 35A(5)(a), 167(6) and 171 (1),(3) and (4) of the Social Security Contributions and Benefits (Northern Ireland) Act 1992 with the concurrence of the Commissioners of Inland Revenue, in so far as such concurrence is required and is subject to the negative resolution procedure.

2. Purpose

2.1 The purpose of the Rule is to prevent an employee from experiencing disadvantage in relation to Statutory Maternity Pay and Maternity Allowance as a result of their being 'furloughed' under the Coronavirus Job Retention Scheme ("the CJRS"). It modifies the way in which Normal Weekly Earnings (NWE) are calculated in cases where an employee has been on furlough for all or part of the relevant assessment period.

2.2 The amendments ensure that an employee's eligibility for their earnings related rate of Statutory Maternity Pay (SMP) and Maternity Allowance (MA) remains the same as it would have been had they never been furloughed.

3. Background

3.1 As part of the response to the Coronavirus crisis, the Government implemented the Coronavirus Job Retention Scheme (CJRS). This is a temporary scheme designed to support employers whose operations have been severely affected by the Coronavirus crisis to retain their employees. Under the CJRS, an employee can be 'furloughed' and their employer can apply for a Government grant that covers 80% of their wages, up to a maximum of £2500 a month. Whilst some employers will continue to pay furloughed employees their normal wages in full ('100%'), it is expected that many employers will pay employees at a reduced rate (matching the 80% figure that they can claim back through the CJRS).

3.2 Provisions within Statutory Maternity Pay and Maternity Allowance legislation depend upon the calculation of a person's NWE during a relevant, eight-week "assessment period". If an employee is furloughed during the "assessment period" applicable to the particular statutory payment (and therefore potentially only being paid 80% of their usual earnings for that period), this might accordingly reduce the calculation of their NWE. This could lead to disadvantage for employees in two ways:

- The employee's NWE for the assessment period could fall below the Lower Earnings Limit (£120 per week for 2020/21), meaning that they may become ineligible for the statutory payment altogether; or

- The employee's NWE for the assessment period may be lower than they would have been had the employee never been furloughed, which will accordingly reduce the earnings-related rate for the first six weeks of Statutory Maternity Pay.

3.3 Entitlement to Maternity Allowance, and the rate payable, for employed women is determined in part by an earnings test that takes place during a 13-week test period (the 13 weeks do not need to be consecutive and women are able to choose the best 13 weeks for her within a 66-week period – maximising the amount of MA she can receive). To pass the earnings test under MA, a woman has to earn £30 a week averaged over the 13-week period. Receiving furloughed wages may impact on an employed woman's future rate of MA if she only has 12 weeks or less out of 66 weeks where she was not receiving furloughed wages. This means she would have to choose a 13-week assessment period that incorporates at least some of the week's where she would have received furloughed wages. This could decrease the rate at which she would be paid MA for the entire 39-week Maternity Allowance period as MA is paid at the lower rate of either a weekly rate equivalent to 90% of the woman's average weekly earnings or £151.20.

3.4 The aim of the amendments to Regulations made in this Statutory Rule is to prevent these disadvantages to ensure that an employee receives what they would have received, had they never been furloughed. The calculation of NWE should, therefore, take into account 100% of the employee's usual earnings, not the 80% figure that they may be receiving whilst on furlough.

3.5 The Statutory Rule operation achieves this aim by modifying how NWE are calculated for an employee who has been furloughed under the CJRS for any part of the assessment period so that their earnings in a week of furlough are taken to be the higher of:

a) What they actually receive from their employer; or
b) What they would have received from their employer had they not been on furlough.

4. Equality Impact

4.1 Due to the need for a rapid response to the coronavirus crisis, no formal consultation has been undertaken.

5. Regulatory Impact

5.1 The legislation applies to activities which are undertaken by small businesses and owing to the urgent nature of the requirement for this legislation it is not appropriate to carry out a Regulatory Impact Assessment.

6. Section 24 of the Northern Ireland Act 1998

6.1 The Department has considered section 24 of the Northern Ireland Act 1998 and is satisfied that the Rule –

(a) is not incompatible with any of the Convention rights;

(b) is not incompatible with Community law;

(c) does not discriminate against a person or class of person on the grounds of religious belief or political opinion; and

(d) does not modify an enactment in breach of section 7 of the Northern Ireland Act 1998.

7. EU Implications

7.1 Not applicable.

8. Parity or Replicatory Measure

8.1 These Regulations are equivalent to the provisions within the Maternity Allowance, Statutory Maternity Pay, Adoption Pay, Statutory Paternity Pay, Statutory Shared Parental Pay and Statutory Parental Bereavement Pay (Normal Weekly Earnings etc.) (Coronavirus) (Amendment) Regulations 2020 Regulations 2020 (SI 2020/450) relating to Maternity Allowance and Statutory Maternity Pay, which were made in Great Britain on 23rd April 2020 and came into force on 25th April 2020.

8.2 These are emergency regulations in relation to the response to coronavirus. The Regulations have been prepared as soon as it became clear that there was a need for the measures they contain. The measures are required as a matter of urgency as part of the response to the developing situation. These Regulations will therefore come into operation on the day after they are laid meaning that the usual period of 21 days between laying and coming into operation will not apply.

9. Additional Information

9.1 Using legislation to achieve this is the only way to guarantee that the desired policy effect is realised. If the amendments in this Statutory Rule were not made, the respective Regulations, as they currently stand, would force an employer to calculate an employee's NWE based on what they actually earned during the assessment period, which could be as low as 80% of usual earnings for an employee who had been furloughed during any part of the assessment period.

9.2 These Regulations make in relation to Northern Ireland only provision corresponding to provision contained in Regulations made by the Secretary of State for Work and Pensions in relation to Great Britain and accordingly, by virtue of section 149(3) of, and paragraph 10 of Schedule 5 to, the Social Security Administration (Northern Ireland) Act 1992 (c. 8), are not subject to the requirement of section 149(2) of that Act for prior reference to the Social Security Advisory Committee.

10. Guidance

10.1 The Department will ensure the changes are reflected in guidance on the CJRS as soon as practicable after they come into operation on 25th April 2020.