EXPLANATORY MEMORANDUM TO

THE MATERNITY ALLOWANCE, STATUTORY MATERNITY PAY, STATUTORY ADOPTION PAY, STATUTORY PATERNITY PAY, STATUTORY SHARED PARENTAL PAY AND STATUTORY PARENTAL BEREAVEMENT PAY (NORMAL WEEKLY EARNINGS ETC.) (CORONAVIRUS) (AMENDMENT) REGULATIONS 2020

2020 No. 450

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Work and Pensions and is laid before Parliament by Command of Her Majesty.

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 This instrument amends Regulations for the following family-related payments and benefit:

- Statutory Maternity Pay;
- Statutory Adoption Pay;
- Statutory Paternity Pay;
- Statutory Shared Parental Pay;
- Statutory Parental Bereavement Pay; and
- Maternity Allowance.

2.2 The purpose of the instrument is to prevent an employee from experiencing disadvantage in relation to the above family-related statutory payments and Maternity Allowance as a result of their being placed on temporary leave under the Coronavirus Job Retention Scheme ("the CJRS").

2.3 The amendments ensure that an employee's eligibility for family-related statutory pay and their earnings-related rate of Statutory Maternity Pay, Maternity Allowance or Statutory Adoption Pay is the same as it would have been had they not been furloughed.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 These are emergency regulations made in relation to the Government's response to COVID-19. These regulations will be made without first submitting a draft to the Social Security Advisory Committee.

3.2 The instrument comes into force the day after it is laid, breaching the convention that negative procedure statutory instruments should not come into force until a minimum of 21 calendar days after laying. The regulations were prepared as soon as it became clear that they are necessary to ensure that the maximum number of people are brought within the scope of these provisions, therefore minimising disadvantage as a result of their being furloughed.

3.3 It is important to note that employees may have commenced temporary leave ("furlough") as early as 1 March 2020 and any delay to the instrument coming into force will increase the number of women who fall out of scope of the change, and whose Normal Weekly Earnings (NEW) would be assessed on the basis of the 80% figure they were paid under the Coronavirus Job Retention Scheme (CJRS). This would make them ineligible for the family-related payment, or reduce their earnings-related rate of Statutory Maternity Pay, Maternity Allowance or Statutory Adoption Pay.

3.4 For these reasons, observing the 21-day convention would have undermined the instrument's effectiveness in preventing the further disadvantage to furloughed employees.

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)

3.5 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 and Wales, and Scotland.

4.2 The territorial application of this instrument is Great Britain.

5. European Convention on Human Rights

5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

6.1 The instrument is being made to amend existing Regulations in response to the Government's Coronavirus Job Retention Scheme, which has been introduced to mitigate the impact of the coronavirus crisis on the economy.

6.2 This is not the first exercise of the relevant powers in the Social Security Contributions and Benefits Act 1992 ("the SSCBA"). This instrument modifies the way that Normal Weekly Earnings are calculated in cases where an employee has been on temporary leave ("furlough") for all or part of the relevant assessment period.

This modification affects the calculation methods set out in the following regulations:

- Regulation 21 of the Statutory Maternity Pay (General) Regulations 1986;
- Regulation 6 of the Social Security (Maternity Allowance) (Earnings) Regulations 2000;
- Regulation 40 of the Statutory Paternity Pay and Statutory Adoption Pay (General) Regulations 2002;
- Regulation 32 of the Statutory Shared Parental Pay (General) Regulations 2014; and
- Regulation 19 of the Statutory Parental Bereavement Pay (General) Regulations 2020.

The effect of these Regulations is to ensure that Normal Weekly Earnings (NWE) (or, in the case of Maternity Allowance, average weekly amount (AWA)) are calculated

based on the average earnings which a person receives during the relevant assessment period. The only change to this method which is being made by this instrument is to ensure that these calculations take into account the sums which a person would have earned had they not been on furlough during the relevant period.

7. Policy background

What is being done and why?

7.1 As part of its 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. The scheme started on 1 March 2020 and is expected to run to the end of June 2020, although may be extended if necessary. Under the CJRS, an employee can be placed on temporary leave ("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%'), we expect that many employers will pay employees at a reduced rate (matching the 80% figure that they can claim back through the CJRS).

7.2 Provisions within family-related pay legislation depend upon the calculation of a person's Normal Weekly Earnings (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 seeking to take family-related pay 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 ineligibile for the family-related 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 or Statutory Adoption Pay.

7.3 Entitlement to Maternity Allowance, and the rate payable, for employed women is also 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 Maternity Allowance she can receive). To pass the earnings test under Maternity Allowance, 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 Maternity Allowance 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 Maternity Allowance for the entire 39-week Maternity Allowance period as Maternity Allowance is paid at the lower rate of either a weekly rate equivalent to 90% of the woman's average weekly earnings or £151.20.

7.4 The aim of the amendments made to the Regulations specified in paragraph 6.2 above is to help prevent these disadvantages to ensure that an employee receives what they would have received had they not been furloughed. The calculation of Normal Weekly Earnings (NWE) and average weekly amount (AWA) for Maternity Allowance should, therefore, take into account what the employee would have earned had they not been on furlough, rather than the 80% figure that they may be receiving whilst on furlough.

7.5 The instrument achieves this aim by modifying how NWE and AWA for Maternity Allowance are calculated for an employee who has been furloughed under the Coronavirus Job Retention Scheme (CJRS) for any part of the assessment period so that their earnings in that part of the assessment period 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 furloughed.

7.6 This amendment is made to Regulations specified in paragraph 6.2 above dealing with Statutory Maternity Pay, Maternity Allowance, Statutory Adoption Pay, Statutory Paternity Pay, Statutory Shared Parental Pay and Statutory Parental Bereavement Pay to ensure that the treatment of furloughed employees is consistent across all family-related payments.

7.7 Using legislation is the only way to guarantee that the desired policy effect is realised. If the amendments in this instrument 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.

7.8 The Welsh and Scottish Governments have been consulted on the policy.

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.

9. Consolidation

9.1 Informal consolidated text of instruments is available to the public free of charge via 'the National Archive' website legislation.gov.uk. This measure is to be put in place for the duration of the coronovirus pandemic.

10. Consultation outcome

10.1 Due to the need for Government to respond rapidly to the coronavirus crisis, no formal consultation has been undertaken. The Government will work with stakeholders to promote this legislative change.

11. Guidance

11.1 The Government will ensure guidance for employers is available as soon as practicable after it comes into force on 25 April 2020 and that the changes are reflected in guidance on the Coronavirus Job Retention Scheme (CJRS).

12. Impact

12.1 The impact on business, charities or the voluntary sector is negligible. We expect there to be a negligible impact on employers as a result of the variation in how Normal Weekly Earnings (NWE) should be calculated for an employee who has been furloughed during the assessment period. Currently, employers are able to recover 92% of the cost of family-related statutory pay (103% if they are a small employer). This is unchanged by these Regulations, meaning that employers will continue to be able to recover costs in the usual way. There will be no additional costs to employers as the amendments do not change what employers would have paid to employees and subsequently recovered had the CJRS not been implemented. Instead, these Regulations will cause employers to lose a saving that they would otherwise have made had the amendments not been made to protect employees' eligibility and entitlement.

12.2 There is no significant additional impact on the public sector.

12.3 A Regulatory Impact Assessment has not been published for this instrument because it is an emergency measure in response to the coronavirus outbreak, and applies in circumstances which are directly related to the pandemic. This measure and its impact is excluded from the definition of a regulatory provision in the Small Business, Enterprise and Employment Act 2015. Therefore, it does not need to be reported on or verified under the Business Impact Target reporting requirements.

12.4 For employees, the effect of the amendments is to ensure that eligibility for family-related pay is protected, and that earnings-related rates of Statutory Maternity Pay and Statutory Adoption Pay are not negatively impacted by any reduction in wages under the CJRS. We therefore expect the Regulations to avoid a negative consequence, as opposed to creating a benefit for employees. The effect of the amendments on the entitlement and rate payable for Maternity Allowance is to ensure that that this is not negatively impacted by any reduction in wages under the CJRS as Maternity Allowance is paid at the lower rate of either a weekly rate equivalent to 90% of the woman's average weekly earnings or £151.20.

13. Regulating small business

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

13.2 No special measures are proposed to minimise additional burdens on small business.

13.3 We do not expect a disproportionate impact on small businesses based on the available evidence.

14. Monitoring & review

14.1 The approach to monitoring of this legislation is that a review clause is not necessary because it makes specific provisions in relation to the CJRS, which itself is a temporary scheme.

14.2 In line with the requirements of the Small Business, Enterprise and Employment Act 2015, as this is not a regulatory measure a provision for a review in this instrument is not required. The instrument makes very specific amendments in relation to the current coronavirus crisis, and so by its nature is time limited.

15. Contact

15.1 Sidonie Edey at the Department for Work and Pensions, telephone: 07741 687 942 or email: Sidonie.S.Edey@dwp.gov.uk can be contacted with any queries regarding the instrument.

15.2 Lucy Birt at the Department for Business, Energy and Industrial Strategy. Telephone: 020 7215 3070 or email: Lucy.Birt@beis.gov.uk can be contacted with any queries regarding the instrument.

15.3 Helen Walker at the Department for Work and Pensions, telephone: 07796 610 709 or email: Helen.Walker8@dwp.gov.uk can confirm that this Explanatory Memorandum meets the required standard.

15.4 Minister for Lords, Baroness Stedman-Scott, at the Department for Work and Pensions can confirm that this Explanatory Memorandum meets the required standard.