EXPLANATORY MEMORANDUM TO

THE EMPLOYMENT RIGHTS ACT 1996 (APPLICATION OF SECTIONS 75A, 75B, 75G, 75H, 80A AND 80B TO PARENTAL ORDER CASES) REGULATIONS 2014
No. 3095

THE PATERNITY, ADOPTION AND SHARED PARENTAL LEAVE (PARENTAL ORDER CASES) REGULATIONS 2014
No. 3096

AND

THE STATUTORY SHARED PARENTAL PAY (PARENTAL ORDER CASES) REGULATIONS 2014
No. 3097

1. This explanatory memorandum has been prepared by the Department for Business, Innovation and Skills and is laid before Parliament by Command of Her Majesty.

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

2. Purpose of the instrument

2.1 The Employment Rights Act 1996 (Application of Sections 75A, 75B, 75G, 75H, 80A and 80B to Parental Order Cases) Regulations 2014 ("the ERA Parental Order Regulations") apply and modify existing powers in the Employment Rights Act 1996 ("ERA") to allow the Government to make regulations which will give an employee that meets the eligibility criteria entitlement to statutory adoption leave, paternity leave and shared parental leave if that employee has a child born with the help of a surrogate and the employee is a parental order parent. A parental order parent is someone who on the day of the child's birth intends to apply for a parental order under section 54 of the Human Fertilisation and Embryology Act 2008 ("parental order") with another person in respect of the child and they expect the court to make such an order or someone who obtains such an order. The Paternity, Adoption and Shared Parental Leave (Parental Order Cases) Regulations 2014 ("the Parental Order Parent Leave Regulations") are to be made using these applied and modified powers.

2.2 The Parental Order Parent Leave Regulations make the necessary amendments to the Paternity and Adoption Leave Regulations 2002 ("the 2002 Regulations"), the Maternity and Adoption Leave (Curtailment of Statutory Rights to Leave) Regulations 2014 ("Curtailment Regulations") and the Shared Parental Leave Regulations 2014 ("the SPL Regulations") to provide an entitlement to adoption, paternity and shared parental leave to qualifying parental order parents. The amendments provide different triggers and qualification points to recognise that the leave relates to the birth of a child born with the help of a surrogate and not an adoption.

2.3 The Statutory Shared Parental Pay (Parental Order Cases) Regulations 2014 ("the ShPP Parental Order Regulations") apply with modifications the Statutory Shared Parental Pay (General) Regulations 2014 in cases where a person has applied for a parental order to provide an entitlement to shared parental pay (adoption) . The modifications again provide different triggers and qualification points to recognise that the statutory pay relates to the birth of a child and not an adoption.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative context

4.1 Section 122(1), (2) and (4) of the Children and Families Act 2014 ("the CFA") enable the modification of the powers in sections 75A (ordinary adoption leave), 75B (additional adoption leave) and 80B (paternity leave: adoption) of the ERA so that they can have effect in relation to employees who are parental order parents. These powers together with section 236(5) of the ERA enable the modification of section 80A (paternity leave: birth). The ERA Parental Order Regulations apply sections 75A and 75B to parental order parents and apply sections 80A and 80B to parental order parents with the modifications set out in Schedule 2 to those Regulations.

4.2 Sections 117 - 120 of the CFA provides powers to make secondary legislation to introduce a new system of shared parental leave and pay for qualifying working parents. Sections 75G to 75K were inserted into the Employment Rights Act 1996 by section 117 of the CFA and provide for shared parental leave. Section 75H contains powers for the Secretary of State to make regulations to allow regulations which provide for shared parental leave to have effect in relation to parental order parents. The ERA Parental Order Regulations are also made using these powers; they apply sections 75G and 75H to parental order parents with the modifications set out in Schedule 1 to those Regulations.

4.3 The Parental Order Parent Leave Regulations apply the 2002 Regulations, the Curtailment Regulations and the SPL Regulations with modifications to extend entitlement to paternity leave, adoption leave and shared parental leave to intended qualifying parental order parents.

4.4 Part 12ZC was inserted into the Social Security Contributions and Benefits Act 1992 by section 119 of the CFA. Section 171ZV in this Part provides the power to make regulations which provide entitlement of an employee who is adopting a child under the law of any part of the United Kingdom, or the partner of such an adopter, to statutory shared parental pay. The Statutory Shared Parental Pay (General) Regulations 2014 ("General Regulations) which are to be made under powers which includes those in section 171ZV provide for such an entitlement . Section 171ZZ5(2) contains a power to modify Part 12ZC in order for it to have effect in relation to cases concerning applications for a parental order. Regulations to be made under this power will modify the powers in

section 171ZV. The ShPP Parental Order Regulations will be made using those modified powers.

4.5 The ShPP Parental Order Regulations apply the General Regulations to certain cases which involve a person who has applied for a parental order with modifications to ensure that the General Regulations work in the context of such cases, thus enabling access to shared parental pay.

5. Territorial extent and application

5.1 This instrument applies to Great Britain.

6. European Convention on Human Rights

The Minister for Employment Relations and Consumer Affairs has made the following statement regarding Human Rights:

In my view the provisions of the Employment Rights Act (Application of Sections 75G, 75H, 80A and 80B to Parental Order Cases) Regulations 2014, The Paternity, Adoption and Shared Parental Leave (Parental Order Cases) Regulations 2014, and The Statutory Shared Parental Pay (Parental Order Cases) Regulations 2014 are compatible with the Convention rights.

7. Policy background

7.1 In November 2012, the Government declared in the Government Response to the flexible parental leave part of the Modern Workplaces consultation in 2011 its intention to extend adoption leave and pay to qualifying intended parents in surrogacy arrangements. This is in response to representations to Government (including in relation to the Surrogate Parents (Leave, Pay and Allowance) Private Members Bill and the Adoption (Leave, Pay and Allowance Arrangements) Private Members Bill in 2012) that there should be provisions for leave and pay for parents whose children are born with the help of a surrogate which are equivalent to those of birth parents. Adoption leave and pay is the appropriate mechanism, rather than an extension to maternity rights as they are fundamentally different – maternity leave and pay are only available to eligible women who are pregnant or give birth and reflect the need to provide time to recover from childbirth. The modifications made through these regulations include qualification triggers and entitlement conditions that, as is entirely appropriate, reflect timescales, events and documentation related to a birth rather than an adoption placement, providing a strong level of equivalence in rights. The provision of rights to parental order parents does not impact on the rights of a qualifying surrogate mother to maternity leave and pay.

7.2 The November 2012 announcement also included plans to introduce a system of shared parental leave and pay for qualifying parental order parents. The policy objective is to create choice for families in how they look after their children, and to create more equity in the workplace and reduce the gender penalty resulting from women taking long periods of time out of the workplace on maternity leave. It is also designed to encourage

shared parenting as evidence has shown that where fathers are involved in parenting at any early stage they are more likely to stay involved with their children in later years, leading to a basket of positive outcomes for children.

7.3 On 21 July 2014, the Government laid before Parliament in draft the three sets of regulations which will, subject to parliamentary process, create the framework for shared parental leave and pay for eligible birth parents and adoptive parents who are matched with a child for adoption. The Parental Order Parent Leave Regulations extend rights to statutory adoption leave and paternity leave to parental order parents if they meet the eligibility requirements. They also allow these parents to access the new system shared parental leave if they are eligible. If the parental order parent also meets the eligibility criteria they will be able to access shared parental pay through virtue of the ShPP Parental Order Regulations.

8. Consultation outcome

8.1 The Modern Workplaces Consultation was published on the 16 May 2011 and ran for 12 weeks. It sought views on a radical new system whereby maternity leave would be reduced to 18 weeks and then 34 weeks of leave and 21 weeks of statutory pay to be available for the parents to share on a flexible basis allowing the parents to be absent from work at the same time, with some leave being reserved for the exclusive use of each parent on a "use it or lose it", non-transferable basis. The consultation document can be found at: https://www.gov.uk/government/consultations/consultation-on-modern-workplaces.

8.2 In light of consultation responses, the Government announced a revised proposal for shared parental leave and pay in November 2012. The Government response is available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/82969/12-1267-modern-workplaces-response-flexible-parental-leave.pdf. It sets out the proposal for new statutory rights to shared parental leave and pay for employees with a partner who is working, or has recently been working (whether employed or self-employed). The new system would allow a woman to curtail her maternity leave period or reduce her maternity pay/maternity allowance period to create an entitlement to shared parental leave and/or pay that could be shared with her partner. Adopters would curtail their adoption leave/adoption pay period to create shared parental leave and /or pay. Eligible employees would be able to share up to 50 weeks of shared parental leave and up to 37 weeks of statutory shared parental pay.

8.3 The Government response also announced at that point that adoption leave and pay would be available to qualifying intended parents in surrogacy arrangements who intended to apply and considered they met the requirements to obtain a parental order.

8.4 A further consultation on *the administrative elements of the system was launched on in February 2013 and the Government response was published in November 2013.* The consultation document and full Government response can be accessed at:

https://www.gov.uk/government/consultations/consultation-on-the-administration-of-shared-parental-leave-and-pay.

8.5 The consultations did not ask specific questions about how adoption leave and pay or shared parental leave and pay should apply to intended parents. However, in order to provide as equivalent provision as possible, many of the triggers and requirements that have been included in the provisions for an intended parent to access adoption leave or paternity leave, or shared parental leave mirror equivalent provisions for birth parents rather than for adopters. So for example, one of the requirements of an entitlement to shared parental leave is to have 26 weeks service with the employer by the qualifying week. For intended parents the qualifying week is the 14th week before the expected week of birth (the same as it is for birth parents) rather than the week in which the individual was notified of having been matched with a child as is the case for adopters.

9. Guidance

9.1 The changes brought about by these Regulations and the other elements of the package will be publicised widely so that all who may be affected may be made aware of their effects. The Department will use appropriate communication channels and press avenues to publicise the changes. Information materials aimed at parental order parents, will be published in advance of the Parental Order Parents Leave Regulations and ShPP Parental Order Regulations coming into effect on 1st December 2014.

10. Impact

10.1 These Regulations are part of a package of legislative measures required to implement the Government's policy on shared parental leave and pay, and other changes to statutory family related leave and pay. A single Impact Assessment was prepared for these as a whole and is attached to this memorandum. It is also available online at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/110692/13-651-modern-workplaces-shared-parental-leave-and-pay-impact-assessment2.pdf. Parental order parents were included under the heading of adopters as the numbers were so small, rather than being treated as a separate category of "parent".

10.2 The equivalent annual net cost to business was revised in March 2014 to reflect the Better Regulation Executive's updated inflation assumptions and is available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/290066/bis-14-657-modern-workplaces-shared-parental-leave-impact-assessment.pdf

10.3 We estimate the numbers of employees likely to be affected by these regulations to be very small. In 2013, 185 parental orders were granted. Of those who apply or intend to apply for a parental order (regardless of whether they subsequently obtain one), only a proportion will meet the eligibility requirements to be entitled to adoption leave and pay, paternity leave and pay or to be able to opt into shared parental leave and pay.

11. Regulating small business

11.1 The legislation applies to small business.

11.2 No special measures apply to small businesses.

12. Monitoring & review

12.1 The Government has committed to a review of shared parental leave and pay. This review will take place after 2018 to allow time for the policy to bed in and to collect data on the impact of these changes on employers and parents.

13. Contact

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