EXPLANATORY MEMORANDUM TO

THE SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992 (APPLICATION OF PARTS 12ZA, 12ZB AND 12ZC TO PARENTAL ORDER CASES) REGULATIONS 2014

2014 No. 2866

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.

2. Purpose of the instrument

2.1 The Social Security Contributions and Benefits Act 1992 (Application of Parts 12ZA, 12ZB and 12ZC to Parental Order Cases) Regulations 2014 make the necessary modifications to the requirements in the Social Security Contributions and Benefits Act 1992, to provide that an employee who has a baby with the help of a surrogate and is a parental order parent, may be entitled to statutory adoption pay, statutory paternity pay or shared parental pay if they meet the eligibility requirements. 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 modifications provide different triggers and qualification points to recognise that the statutory pay relates to the birth of a child and not an adoption (the powers which these Regulations modify deal with adoption situations).

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

3.1 None.

4. Legislative context

4.1 Part 12ZA (statutory paternity pay) and Part 12ZB (statutory adoption pay) were inserted into the Social Security Contributions and Benefits Act 1992 by sections 2 and 4 of the Employment Act 2002. Part 12ZC (statutory shared parental pay) was inserted into the Social Security Contributions and Benefits Act 1992 by section 119 of the Children and Families Act 2014.

4.2 The Children and Families Act 2014 contained powers to modify the powers in Parts 12ZA, 12ZB and 12ZC in order for them to have effect in relation to cases concerning applications for a parental order. These Regulations modify the powers in Parts 12ZA, 12ZB and 12ZC to allow the Government to make Regulations to provide an entitlement to statutory paternity pay, statutory adoption pay, and statutory shared parental pay in parental order cases. The Statutory Shared Parental Pay (Parental Order

Cases) Regulations 2014, which were laid in draft before Parliament on 13 October, will be made using those modified powers and give parental order parents the entitlement to statutory shared parental pa. A further statutory instrument, which is subject to the negative resolution procedure and provides for statutory paternity pay and statutory adoption pay in parental order cases, will be made shortly.

5. Territorial extent and application

5.1 This instrument applies to Great Britain.

6. European Convention on Human Rights

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

7. Policy background

7.1 In November 2012, the Government Response to the flexible parental leave part of the 2011 Modern Workplaces consultation set out 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 reflect timescales, events and documentation related to a birth rather than an adoption placement because this is more appropriate. 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. These Regulations are part of the legislative package required to extend rights to statutory adoption pay, paternity pay and shared parental pay to parental order parents if they meet the eligibility requirements.

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 pay is to have normal weekly earnings of not less than the lower earnings limit in force in an eight week period running up to the relevant week. For intended

parents the relevant 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.

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 changes as a whole and is 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

Debra MacLeod at the Department of Business, Innovation and Skills
Tel: 020 7215 0973
Email: debra.macleod@bis.gsi.gov.uk.