EXPLANATORY MEMORANDUM TO

The Working Time (Coronavirus) (Amendment) Regulations (Northern Ireland) 2020

SR 2020 No. 68

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 section 2(2) of the European Communities Act 1972 ("the ECA") and is subject to the negative resolution procedure.

2. Purpose

2.1. The Statutory Rule will make amendments to regulation 15 of the Working Time Regulations (Northern Ireland) 2016 (WTR) to ensure workers for whom it is not practicably possible to take holidays due to the coronavirus situation can carry some of their holiday entitlement into the following two leave years. This will protect workers by ensuring they do not lose their holiday entitlement, whilst ensuring that businesses and public sector bodies have the flexibility and staff needed to respond to the cornonavirus situation. Related amendments are also made to regulations 17 and 18.

3. Background

3.1. The WTR implement the Working Time Directive 2003/88/EC in Northern Ireland. Regulations 15 and 16 of the WTR set out workers' annual holiday entitlement (the leave provided for in regulation 16 exceeds that required under article 7 of the Directive). Holiday entitlement is granted in reference to leave years. The start date for a worker's leave year may be agreed between the worker and the employer by binding written agreement.

3.2. Regulation 15 of the WTR provides workers with 4 weeks of holiday per year. Regulation 15(5) provides that these 4 weeks' leave may not, if untaken, be carried forward into the following leave year (apart from in certain circumstances, such as maternity leave and long-term sick leave). As such, the employer must facilitate the worker taking the 4 weeks' leave within the relevant leave year.

3.3. Regulation 16 of the WTR provides an additional entitlement to 1.6 weeks of holiday. Unlike the entitlement under regulation 15, this holiday entitlement may, if untaken, be carried forward into the following leave year (but no further) where agreed in a binding written agreement between the worker and the employer. The leave provided for under regulation 16 is not within the scope of this Statutory Rule.

3.4. Under this Statutory Rule, any holiday entitlement carried forward is subject to additional protection to help ensure that workers are able to take their holiday leave entitlement when they wish. Generally, employers can

control when a worker is able to take holiday by refusing requests and/or requiring workers to take holiday on particular dates (providing they give sufficient notice in accordance with regulation 18). Where leave is carried forward under this exception, the employer may not refuse to allow a worker to take carried forward holiday entitlement on particular dates without good reason.

3.5. Regulation 17 of the WTR stipulates that, if a worker's employment terminates and on the termination date the worker has untaken holiday entitlement, the employer must pay the worker in lieu for that untaken holiday entitlement. This Statutory Rule provides for a payment in lieu for holiday carried forward under the coronavirus exception that is untaken on the termination date.

3.6. As the restriction against carrying forward leave under regulation 15 is written into the WTR, legislation is the only option to alter the position. The purpose of this Statutory Rule is to increase the time in which the worker can take holiday – the total amount of holiday that the worker is entitled to is unchanged.

3.7. The Department for the Economy will publish guidance to raise awareness of this measure as soon as practicable after it comes into operation in April 2020.

3.8. The Statutory Rule is made under section 2(2) of the European Communities Act 1972 (as saved by section 1A of the European Union (Withdrawal) Act 2018). There is an alternative power available under Article 15 of the Work and Families (Northern Ireland) Order 2006 (the 2006 Order), which could have been used. The decision to use the ECA was made because Article 15 of the 2006 Order requires use of the confirmative procedure. This would have significantly delayed this Statutory Rule from coming into operation and would have increased the risks set out in the above paragraphs.

4. Consultation

4.1. Due to the need to respond rapidly to the coronavirus situation, there has not been a full and formal consultation. The Department has had informal engagement with a small number of key stakeholders.

5. Equality Impact

5.1. The Department considers that this Statutory Rule will not discriminate against any of the categories under Section 75 of the Northern Ireland Act 1998.

5.2. An Equality Impact Assessment has not been prepared for this Statutory Rule as it is a temporary, emergency measure in response to the coronavirus outbreak.

6. Regulatory Impact

6.1. A Regulatory Impact Assessment has not been prepared as this Statutory Rule is a temporary, emergency meaures in response to the coronavirus outbreak. It will affect a limited number of employers and enable them to respond effectively to the challenges posed by the coronavirus outbreak.

6.2. It creates flexibility and benefit for these employers so their workers can carry forward their holiday entitlement into the following two leave years where needed and does not increase the total holiday entitlement over the period in which this Stautory Rule has effect.

6.3. It is aniticipated that take-up will primarily be focused on employers that experience a significant increase in short-term demand as a result of the coronavirus outbreak and the resulting restrictions on public life. This may include but is not limited to: the manufacturing of essential goods, food, retail, healthcare, and transport, and their respective supply chains. There may be some take-up from businesses and the public sector where short-term demand remains the same or fallen, but the services are essential to society's response to the coronavirus outbreak.

6.4. The Statutory Rule provides benefits for workers covered by the exemption who would prefer to take their holiday in the following two leave years but who, under regulation 15 prior to the amendment made by this Statutory Rule, would have had to take holiday entitlement in the current leave year or lose it altogether. Workers who do not take their holiday entitlement this leave year as a result of the coronavirus outbreak will also be able to receive payment in lieu if their employment is terminated.

6.5. Costs for the limited number of workers who would have otherwise taken a holiday during this leave year may include the cost of organising alternative arrangements to care for dependents as well as the potential impact on health and wellbeing of a continuous period of work without holiday.

6.6. Wider indirect benefits to society may include an increase in capacity for employers to supply essential goods and services during the coronavirus outbreak including, but not limited to, the supply and delivery of food.

6.7. The Statutory Rule applies to activities undertaken by small businesses. No specific action is proposed to minimise regulatory burdens on small businesses as we do not expect a disproportionate impact on small businesses based on the available evidence.

7. Financial Implications

7.1. None.

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. The WTR implement elements of European Council Directive No. 2003/88/EC and European Directive 94/33/EC concerning certain aspects of the organisation of working time. The proposed amendments to the WTR are necessary to permit carry over of annual leave in defined circumstances as a response to the Covid-19 pandemic.

10. Parity or Replicatory Measure

10.1. This Statutory Rule replicates the Working Time (Coronavirus)(Amendment) Regulations 2020 which applies to England, Wales and Scotland and came into force on 27 March 2020.

11. Additional Information

11.1. This Statutory Rule comes into operation on the day in which it is made, breaching the convention that rules subject to negative resolution should not come into operation until a minimum of 21 calendar days after laying. This is necessary to ensure that workers whose leave year expires during the 21-day period do not lose holiday entitlement that they cannot take due to the coronavirus situation.

11.2. Failure to act urgently would mean that employers who have their leave years ending inside the 21-day period would have to decide to either fail to comply with the law by refusing to allow their workers to take holiday, or compromise their response to the coronavirus situation as their workers were on leave and unavailable to work.