

EXPLANATORY MEMORANDUM TO

The Working Time (Amendment) Regulations (Northern Ireland) 2023

SR 2023 No. 223

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 11(1) and (6) and 20(1) of the Retained EU Law (Revocation and Reform) Act 2023 and is subject to the negative resolution procedure.

2. Purpose

- 2.1. The Retained EU Law (Revocation and Reform) Act 2023 (“the 2023 Act”) amends the substance and underpinning rules of the body of law that is retained EU law established by the European Union (Withdrawal) Act 2018. The 2023 Act removes the interpretive effects of EU law on the UK statute book and includes powers to reform, restate and revoke legislation.
- 2.2. The Statutory Rule restates certain principles of employment law to ensure employment rights in those areas are maintained notwithstanding the changes to retained EU law that are provided for in the 2023 Act.
- 2.3. The 2023 Act removes the special EU law features that apply to retained EU law; the principle of supremacy of EU law, directly effective EU rights, and the general principles of EU law, so that legislation on the UK statute book is interpreted and applied without reference to these features with effect from the end of 2023. The 2023 Act also facilitates domestic courts departing from retained case law.
- 2.4. The 2023 Act provides "restatement" powers that enable legislation to be restated to produce an effect that is equivalent to the current effect that arises by virtue of being retained EU law and the application of those special EU law features.
- 2.5. The Department for the Economy considers it appropriate to restate the principles outlined in paragraphs 2.7 and 2.8 to ensure that these employment rights are maintained; and that the law has the same effect in practice as it did prior to those special EU law features being removed.
- 2.6. These Regulations make provision relating to employment matters under the 2023 Act by way of amendments to the Working Time Regulations (Northern Ireland) 2016 ("the 2016 Regulations").
- 2.7. Regulation 2 amends regulation 15 and regulation 16 of the 2016 Regulations to include express provision about the rights of workers, in certain circumstances, to carry forward annual leave into subsequent leave years.

- 2.8. Regulation 20 of the 2016 Regulations is also amended to include express provision about the calculation of holiday pay in relation to annual leave taken under regulation 15, which is often referred to as “normal pay”.

3. Background

- 3.1. This statutory rule makes amendments to domestic secondary legislation originally made and brought into force in part as a result of the United Kingdom's obligations as a member of the European Union. The 2016 Regulations are domestic regulations which are made using powers that include section 2(2) of the European Communities Act 1972 ("the 1972 Act") to implement provisions set out in various EU directives and related matters. The EU (Withdrawal) Act 2018 revoked the 1972 Act and retained certain types of EU law (known as "retained EU law").
- 3.2. The 2023 Act makes provision for reform, restatement and revocation of retained EU law as considered appropriate, and in accordance with the other relevant requirements and restrictions that apply to the exercise of the powers to make regulations in the 2023 Act. The 2023 Act also ends the special EU law features that apply to retained EU law, including the principle of supremacy of EU law.
- 3.3. Section 11 of the 2023 Act provides the power to restate any secondary retained EU law, as defined in the 2023 Act. A restatement may, where the national authority considers it appropriate, produce an effect equivalent to the effect produced by virtue of those special law features referred to in paragraph 2.3 above.
- 3.4. Section 20(1) of the 2023 Act states that "a power to make regulations under this Act" includes a power to make different provision for different purposes or areas and also includes the power to make "supplementary, incidental, consequential, transitional, transitory or saving provision".
- 3.5. Workers are entitled to 5.6 weeks of paid statutory annual leave. This is comprised of 4 weeks leave provided in regulation 15 (also known as EU-derived leave) and 1.6 weeks provided in regulation 16 (domestic leave). Different rules govern these two separate forms of annual leave, due mostly to the abundance of retained EU case law. This case law provides that the regulation 15 leave should be paid at the worker's "normal remuneration", but it does not definitively define normal remuneration though it is generally understood to include certain types of bonuses and commission. In contrast, the 1.6 weeks of regulation 16 is only required to be paid at the worker's "basic remuneration" and this is generally held not to include bonuses and commission. The 2023 Act removes the interpretative effects, creating a risk that the case law defining what should be included in "normal remuneration" would fall away.
- 3.6. This Statutory Rule amends regulation 20 of the 2016 Regulations to incorporate certain principles from EU case law to specify the types of payments employers must include when calculating a week's holiday pay. The aim is, as far as possible, to ensure that workers' enjoyment of the right to paid annual leave is maintained following 31 December 2023 and that workers will continue to receive 4 weeks of annual leave at their "normal remuneration" and 1.6 weeks at their basic remuneration. As the

particular principles from EU case law only applied to the 20 days leave provided for in regulation 15, the amendments in regulation 20 only apply to the leave provided for in regulation 15. The law on how to calculate pay for the 1.6 weeks leave provided for in regulation 16 is unaffected.

- 3.7. The regulations also restate principles from European case law by making amendments to the 2016 regulations to preserve workers' right to carry over annual leave which they have not taken due to being on statutory sick leave, maternity leave or parental leave, and to carry over annual leave that they have not taken because their employer did not inform them of their right or provide them with an opportunity to take it.
- 3.8. As stated in the Explanatory Memorandum to The Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023, the UK Government considered it appropriate to mitigate risks that the removal of interpretative effects on employment law could lead to a reduction in workers' rights, by using the 2023 Act's restatement powers to maintain existing policy effects which are specifically produced by the application of retained EU-derived principles of interpretation. The Department of Business and Trade assessed that the rights outlined above are largely or wholly dependent on the special features of EU law that are removed by the 2023 Act. Given the similarities in GB and Northern Ireland law in this regard, it is possible that there may be a similar risk to these principles in Northern Ireland legislation.
- 3.9. Therefore the statutory rule will restate these principles in Northern Ireland before the end of 2023 to ensure these employment rights continue, notwithstanding the removal of the special features of EU law by the 2023 Act.
- 3.10. Firstly, the statutory rule will restate the right to carry over holiday entitlement where a worker has been unable to take it due to being on sick leave or on a period of statutory maternity or parental leave.
- 3.11. Secondly, the statutory rule will restate the right to carry over holiday entitlement where the employer has failed to inform the worker of their right to paid annual leave or enable them to take it
- 3.12. Thirdly, the statutory rule will restate the pay rate for leave entitlement accrued under regulation 15 of the 2016 Regulations.
- 3.13. The effect of the law currently provides the three employment rights outlined above.

4. Consultation

- 4.1. The Department has not conducted a consultation for this Statutory Rule as its purpose is to maintain current employment rights from 1st January 2024.

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 Impact Assessment has not been prepared for this Statutory Rule, as its purpose is to maintain current employment rights from 1st January 2024.

6. Regulatory Impact

- 6.1. An Impact Assessment has not been prepared for this Statutory Rule as it does not create, remove or impose any additional regulatory obligations on the private, public or voluntary sectors.
- 6.2. The purpose of the Statutory Rule is to maintain current employment rights from 1st January 2024.

7. Financial Implications

- 7.1. None.

8. Section 24 of the Northern Ireland Act 1998

- 8.1. This Statutory Rule complies with section 24 of the Northern Ireland Act 1998.

9. EU Implications

- 9.1. This instrument is not being made under the European Union (Withdrawal) Act 2018 but relates to the withdrawal of the United Kingdom from the European Union because it details the restatement of retained EU Law under the provisions of the Retained EU Law (Revocation and Reform) Act 2023 which are mentioned above.

10. Parity or Replicatory Measure

- 10.1. This Statutory Rule replicates some of the provisions within the Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023 that provide for restatement of certain employment rights that are specifically produced by the application of retained EU-derived principles of interpretation.

11. Additional Information

- 11.1. As the 2023 Act comes into operation on 1 January 2024, it is desirable to have the restatement provisions within this Statutory Rule come into operation on the same date to provide legal clarity. It is therefore necessary to breach the 21 day rule.