

EXPLANATORY MEMORANDUM TO

THE EMPLOYMENT RIGHTS (AMENDMENT) (NORTHERN IRELAND) (EU EXIT) REGULATIONS 2019

2019 No. 537

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Business, Energy and Industrial Strategy and is laid before Parliament by Act.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 This statutory instrument (SI) makes amendments to employment law to reflect the withdrawal of the UK from the European Union (EU) in the event that there is no deal with the EU. The amendments ensure the legislation is clear by removing or amending language that is no longer appropriate once the UK has exited the EU.

Explanations

What did any relevant EU law do before exit day?

- 2.2 The relevant legislation in Northern Ireland is:
 - **Article 111(3), Employment Rights (Northern Ireland) Order 1996** implements Council Directive 96/34/EC in Northern Ireland which provides the framework on parental leave.
 - **Article 21(4), Employment Relations (Northern Ireland) Order 1999** implements Council Directive 97/81/EC in Northern Ireland on the framework agreement on part-time work in its application to terms and conditions of employment.
 - **Section 46(4), Employment Act 2002** implements in Northern Ireland the framework agreements on fixed-term work in its application to terms and conditions of employment.
 - **Section 43(5), Employment Relations Act 2004** refers to the Department for Employment and Learning's powers of implementing the Directive concerning information and consultation in Northern Ireland. These powers are now vested in the Department for the Economy in Northern Ireland
 - **Working Time Regulations (Northern Ireland) 2016** implements EU Working Time Directives which relate to the organisation of working time, and the protection of young people at work in Northern Ireland.
 - **Posted Workers (Enforcement of Employment Rights) Regulations (Northern Ireland) 2016** includes provisions for posted workers in the construction sector and subcontracting liability. It also provides for cross border enforcement of financial administrative penalties and fines.

- 2.3 Why is it being changed?

This SI will come into force in the event that there is no Withdrawal Agreement between the UK and EU to ensure legal clarity and certainty. Amendments are being made to existing legislation to reflect the UK's withdrawal from the EU and the European Economic Area (EEA).

- 2.4 Technical changes are made to the following legislation relating to Northern Ireland, repealing existing powers to make secondary legislation.
- Article 111(3), Employment Rights (Northern Ireland) Order 1996
 - Article 21(4), Employment Relations (Northern Ireland) Order 1999
 - Section 46(4), Employment Act 2002
 - Section 43(5), Employment Relations Act 2004
- 2.5 The following pieces of legislation are being amended to amend references that are no longer appropriate once the UK leaves the EU. These amendments are designed to ensure that the legal positions are clear, and the validity of these provisions continues post exit.

In Northern Ireland the relevant legislation is:

- The Statutory Paternity Pay and Statutory Adoption Pay (Persons Abroad and Mariners) Regulations (Northern Ireland) 2002
- The Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005
- The Fair Employment Tribunal (Rules of Procedure) Regulations (Northern Ireland) 2005
- The Statutory Shared Parental Pay (Persons Abroad and Mariners) Regulations (Northern Ireland) 2015
- The Working Time Regulations (Northern Ireland) 2016
- The Posted Workers (Enforcement of Employment Rights) Regulations (Northern Ireland) 2016

What will it now do?

- 2.6 The amendments to the legislation listed at Section 2.5 are intended to ensure that the existing statutory framework continues to operate equally effectively after exit. The amendments remove provisions which are no longer appropriate or relevant if the UK leaves the EU without a Withdrawal Agreement. This SI does not change the operation of these aspects of employment law otherwise.

3. Matters of special interest to Parliament

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

- 3.1 This SI was laid as a negative procedure instrument on 31st October 2018. The Commons and the Lords sifting committees recommended the SI change from the negative to the affirmative procedure. The Commons committee referred to the political importance of employment law, and also due to the SI catering for a no-deal scenario.
- 3.2 The Lords sifting committee also agreed that due to the sensitivities surrounding potential implications for employment law, the SI along with the GB counterpart should be debated, and therefore recommended a change to the affirmative procedure.

- 3.3 The Minister agrees with the committees’ recommendations, and accordingly this SI is now subject to the affirmative procedure.

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)

- 3.4 The territorial application of this instrument is limited to Northern Ireland.
- 3.5 The powers under which this instrument is made cover Northern Ireland and the territorial application of this instrument is not limited either by the Act or by the instrument.

4. Extent and Territorial Application

- 4.1 The territorial extent of the Employment Rights (Amendment) (Northern Ireland) (EU Exit) Regulations 2019 is Northern Ireland.
- 4.2 The territorial application of the Employment Rights (Amendment) (Northern Ireland) (EU Exit) Regulations 2019 is Northern Ireland.

5. European Convention on Human Rights

- 5.1 The Minister for Small Business, Consumers and Corporate Responsibility, Kelly Tolhurst has made the following statement regarding Human Rights:

“In my view the provisions of the Employment Rights (Amendment) (Northern Ireland) (EU Exit) Regulations 2019 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 This instrument is being made to amend current legislation relating to EU derived employment law, to ensure continuity and legal certainty in the case of a no deal exit between the UK and the EU. This instrument is made using the power in section 8 of the European Union (Withdrawal) Act 2018. The powers in section 2(2) of and paragraph 1A of Schedule 2 to the European Communities Act 1972 are being used to amend certain references to EU legislation that are currently out of date, as the deficiency does not arise from the withdrawal of the UK from the EU.

7. Policy background

What is being done and why?

- 7.1 The Government’s aim is to ensure a functioning statute book for exit day in the unlikely event that no Withdrawal Agreement with the EU has been reached before the UK leaves the EU. If there is an agreement with the EU, this SI will not be required and could be deferred, revoked or amended through a Bill to give effect to any withdrawal agreement.
- 7.2 To reflect the UK’s withdrawal from the EU, this SI makes technical amendments to a range of legislation including the repeal of existing powers to make secondary legislation relating to the UK’s obligations under various Directives. It is no longer appropriate to refer to the obligations of the UK under those Directives. Those powers are no longer required, as the relevant Directives have already been implemented in UK law, and that implementing legislation is unaffected by these amendments.

- 7.3 Amendments will also be made to existing legislation to reflect the UK's withdrawal from the EU. This legislation is listed at Section 2.2 above. Again, this is to ensure continuity and legal certainty.
- 7.4 The Employment Rights (Amendment) (Northern Ireland) (EU Exit) Regulations 2019 apply to employment law which is a transferred matter for Northern Ireland under the Northern Ireland Act 1998. The UK Government remains committed to restoring devolution in Northern Ireland. This is particularly important in the context of EU Exit where we want devolved Ministers to take the necessary actions to prepare Northern Ireland for exit. We have been considering how to ensure a functioning statute book across the UK including in Northern Ireland for exit day absent a Northern Ireland Executive. With exit day less than one year away, and in the continued absence of a Northern Ireland Executive, the window to prepare Northern Ireland's statute book for exit is narrowing. UK Government Ministers have therefore decided that in the interest of legal certainty in Northern Ireland, the UK Government will take through the necessary secondary legislation at Westminster for Northern Ireland, in close consultation with the Northern Ireland departments. This is one such instrument.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument is being made using the power in section 8 of the European Union (Withdrawal) Act 2018 in order to address failures of retained EU law to operate effectively or other deficiencies arising from the withdrawal of the United Kingdom from the European Union. In accordance with the requirements of that Act the Minister has made the relevant statements as detailed in Part 2 of the Annex to this Explanatory Memorandum.
- 8.2 In addition out of date cross references to certain EU Regulations are updated, and these technical amendments are made using the power in section 2(2) and paragraph 1A of Schedule 2 to the European Communities Act 1972.

9. Consolidation

- 9.1 Consolidation is not required for these amendments.

10. Consultation outcome

- 10.1 No engagement or consultation was carried out for the Employment Rights (Amendment) (Northern Ireland) (EU) (Exit) Regulations 2019 as the amendments contained in the S.I., consequential to the European Union (Withdrawal) Act 2018, are technical in nature and do not entail any change in policy.

11. Guidance

- 11.1 On 23 August 2018 the government published a Technical Notice to provide businesses, citizens and workers with information on our planning in the event that there is no deal with the EU and the amendments to be made through this instrument.

12. Impact

- 12.1 The impact on the businesses, charities or voluntary bodies is minimal. All amendments have been made to ensure continuity and legal clarity on employment rights.

- 12.2 There is no, or no significant impact on the public sector.
- 12.3 A full Impact Assessment has not been prepared for this instrument. A de minimis Impact Assessment was prepared in line with the Better Regulation Framework.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses.
- 13.2 No specific action is proposed to minimise regulatory burdens on small businesses.
- 13.3 The basis for the final decision on what action to take to assist small businesses was taken as these amendments do not change current policy or rules. The amendments will provide continuity in UK law.

14. Monitoring & review

- 14.1 The approach to monitoring of this legislation will be light touch as there are no intended policy changes being made through this instrument. The Government will continue to engage with stakeholders on matters of employment.
- 14.2 To the extent this instrument is made under the EU Withdrawal Act 2018, no review clause is required.

15. Contact

- 15.1 Naomi Munro-Lott at the Department for Business, Energy and Industrial Strategy Telephone: 0207 215 2126 or email: Naomi.Munro-Lott@beis.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Laura Robinson Deputy Director for Europe and Strategy at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Kelly Tolhurst at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.

Annex

Statements under the European Union (Withdrawal) Act 2018

Part 1

Table of Statements under the 2018 Act

This table sets out the statements that may be required under the 2018 Act.

Statement	Where the requirement sits	To whom it applies	What it requires
Sifting	Paragraphs 3(3), 3(7) and 17(3) and 17(7) of Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) to make a Negative SI	Explain why the instrument should be subject to the negative procedure and, if applicable, why they disagree with the recommendation(s) of the SLSC/Sifting Committees
Appropriate-ness	Sub-paragraph (2) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	A statement that the SI does no more than is appropriate.
Good Reasons	Sub-paragraph (3) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain the good reasons for making the instrument and that what is being done is a reasonable course of action.
Equalities	Sub-paragraphs (4) and (5) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain what, if any, amendment, repeals or revocations are being made to the Equalities Acts 2006 and 2010 and legislation made under them. State that the Minister has had due regard to the need to eliminate discrimination and other conduct prohibited under the Equality Act 2010.
Explanations	Sub-paragraph (6) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2 In addition to the statutory obligation the Government has made a political commitment to include these statements alongside all EUWA SIs	Explain the instrument, identify the relevant law before exit day, explain the instrument's effect on retained EU law and give information about the purpose of the instrument, e.g., whether minor or technical changes only are intended to the EU retained law.
Criminal offences	Sub-paragraphs (3) and (7) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9, and	Set out the 'good reasons' for creating a criminal offence, and the penalty attached.

		23(1) or jointly exercising powers in Schedule 2 to create a criminal offence	
Sub-delegation	Paragraph 30, Schedule 7	Ministers of the Crown exercising sections 10(1), 12 and part 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved Authority by Statutory Instrument.	State why it is appropriate to create such a sub-delegated power.
Urgency	Paragraph 34, Schedule 7	Ministers of the Crown using the urgent procedure in paragraphs 4 or 14, Schedule 7.	Statement of the reasons for the Minister's opinion that the SI is urgent.
Explanations where amending regulations under 2(2) ECA 1972	Paragraph 13, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement explaining the good reasons for modifying the instrument made under s. 2(2) ECA, identifying the relevant law before exit day, and explaining the instrument's effect on retained EU law.
Scrutiny statement where amending regulations under 2(2) ECA 1972	Paragraph 16, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement setting out: a) the steps which the relevant authority has taken to make the draft instrument published in accordance with paragraph 16(2), Schedule 8 available to each House of Parliament, b) containing information about the relevant authority's response to— (i) any recommendations made by a committee of either House of Parliament about the published draft instrument, and (ii) any other representations made to the relevant authority about the published draft instrument, and, c) containing any other information that the relevant authority considers appropriate in relation to the scrutiny of the instrument or draft instrument which is to be laid.

Part 2

Statements required when using enabling powers under the European Union (Withdrawal) 2018 Act

1. Appropriateness statement

- 1.1 The Minister for Small Businesses, Consumers and Corporate Responsibility, Kelly Tolhurst has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view the Employment Rights (Amendment) (Northern Ireland) (EU Exit) Regulations 2019 does no more than is appropriate”.

- 1.2 This is the case because amendments are only made to current legislation relating to EU derived employment law, to ensure continuity and legal certainty in the case of no deal being agreed between the UK and the EU at the time UK leave the EU.

2. Good reasons

- 2.1 The Minister for Small Businesses, Consumers and Corporate Responsibility, Kelly Tolhurst has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action”.

- 2.2 These are: amendments to reflect the withdrawal of the UK from the European Union. Changes are made to remove reference to the UK as an EU or EEA member state.

3. Equalities

- 3.1 The Minister for Small Businesses, Consumers and Corporate Responsibility, Kelly Tolhurst has made the following statements:

“The instrument does not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts.”

“I have had due regard to the need to eliminate discrimination and other conduct prohibited under the Equality Act 2010. This Act does not extend to Northern Ireland, and as the Employment Rights (Amendment) (Northern Ireland) (EU Exit) Regulations 2019 extend only to Northern Ireland, I have given equivalent due regard to the impacts in Northern Ireland.”

4. Explanations

- 4.1 The explanations statement has been made in section 2 of the main body of this explanatory memorandum.