

EXPLANATORY MEMORANDUM TO
THE DEDUCTION FROM WAGES (LIMITATION) REGULATIONS 2014

2014 No. 3322

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 purpose of the instrument is to establish a 2 year limitation on how far back in time workers' employment tribunal claims for deduction from wages can go. The changes will apply to those claims presented to an employment tribunal on or after 1 July 2015, following a transitional period. The instrument also makes an amendment to the Working Time Regulations 1998 (SI 1998/1833) to make it clear that those Regulations do not provide any additional rights under the worker's contract; they are separate.

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

3.1 None.

4. Legislative Background

4.1 Every UK worker is entitled to 5.6 weeks' paid annual leave each year under the Working Time Regulations (with a maximum of 28 days). 4 of these weeks derive from the UK's implementation of the EU Working Time Directive (93/104/EC since consolidated as Directive 2003/88/EC) in the Working Time Regulations 1998. The UK has then also legislated to provide for an additional annual leave entitlement. For each week of their holiday entitlement, workers are entitled to be paid a week's pay. This is called their holiday pay.

4.2 The remedy for underpayment of holiday pay guaranteed by the Working Time Regulations is to bring a claim in an employment tribunal. Workers can currently bring claims for underpayment of holiday pay directly under the Working Time Regulations 1998 or under the protection of wages provisions of the Employment Rights Act 1996. Under the Working Time Regulations 1998 those claims are limited to deductions which occurred within the 3 months prior to the claim being presented to an employment tribunal. Where there is a series of unauthorised deductions then under section 23 of the Employment Rights Act 1996 the worker can claim for the whole series of deductions provided that they bring their claim within 3 months of the last deduction in any such series.

4.3 Other claims for unauthorised deductions of wages can also be brought under section 23 of the 1996 Act. They allow claims to be brought, for example, in respect of workers

being paid less than the National Minimum Wage or the amount to which they are entitled to under their contract.

4.4 Section 9 of the Limitation Act 1980 provides for a six year limitation on actions for sums recoverable under statute, including claims for deduction from wages under the 1996 Act (see comments in *Alabaster v Woolwich BC* [2005] ICR 1246). However some commentators have suggested that the Limitation Act 1980 may not apply because of section 39 of that Act which provides that section 9 does not apply where another period of limitation is set out in legislation (in this case the 3 month period for bringing a claim under the 1996 Act). If the 1980 Act were not to apply, it is possible that claims could run back as far as 1998 when the Working Time Regulations came into force.

4.5 The 2 year limitation period introduced by the Regulations applies in respect of cases brought under section 23 of the 1996 Act by workers for deductions from wages. To the extent that the deductions result from the employer failing to pay appropriate levels of holiday pay in accordance in the Working Time Regulations 1998 (which implement UK obligations under the Working Time Directive), these changes adjust our implementation of the existing EU obligation to make provision for claims brought in respect of rights deriving from this Directive. They are made in exercise of the powers in section 2(2) of the European Communities Act 1972.

4.6 In addition, in order to avoid the creation of unnecessary parallel regimes, the new limitation period of 2 years will apply to all similar claims under section 23 of the 1996 Act for deduction from wages that are payable to a worker and fall under section 27(1)(a) of the 1996 Act, i.e. “any fee, bonus, commission, holiday pay or other emolument referable to his employment whether payable under his contract or otherwise”. This is done in exercise of the power in section 2(2)(b) of the 1972 Act, as it relates to the EU obligations described above. The new limitation period of 2 years will come into force following a 6-month transitional period. These changes will apply in relation to claims presented to an employment tribunal on or after 1st July 2015.

4.7 The Working Time Regulations provide workers with rights to annual leave and for pay for that annual leave. Those rights are statutory rather than contractual in nature; regulation 16(4) provides that they do not affect a worker’s right to remuneration under their contract. This is in contrast to other areas of employment legislation where contractual rights are expressly provided (such as section 66(1) of the Equality Act 2010 and section 17(1) of the National Minimum Wage Act 1998). A remedy for a breach of the right to pay for annual leave is provided for in legislation in the form of a claim to an Employment Tribunal either under regulation 30 of the Regulations or section 23 of the 1996 Act. As these Regulations make provision in relation to the remedies available to enforce the right to holiday pay under the Working Time Regulations, we are taking this opportunity to make clear on the face of the Regulations that they confer no contractual right which might give rise to any other remedies. There is no transitional period for this amendment, as it makes no substantive change to the law.

5. Territorial Extent and Application

5.1 This instrument applies to England, Scotland and Wales

6. European Convention on Human Rights

6.1 The Parliamentary Under Secretary of State for Employment Relations and Consumer Affairs, Jo Swinson MP, has made the following statement regarding Human Rights:

In my view the provisions of the Deduction from Wages (Limitation) Regulations are compatible with the Convention rights.

7. Policy Background

- **What is being done and why**

7.1 This instrument limits the period of time that an employment tribunal can consider when determining claims for unauthorised deductions from wages to the 2 year period prior to the claim being presented. Deductions made before that time will therefore not be considered. The reason for this change is that the Government is concerned about the significant costs for employers resulting from the recent UK and European court cases. A number of commentators have suggested that the judgment of the Employment Appeal Tribunal that holiday pay should reflect non-guaranteed overtime may lead to an increase in claims for holiday pay (combined appeals of *Bear Scotland Ltd v Fulton and another UKEATS/0047/13*, *Hertel (UK) Ltd v Woods and others UKEAT/0160/14* and *AMEC Group Ltd v Law and others UKEAT/0161/14*). The Government believes that substantial backdated pay claims could have a serious financial impact on many key UK businesses. If we had taken no action, we estimate that business would have faced extra costs of around £750m. Our actions will reduce this bill by an estimated £400m.

7.2 The Government is introducing the limitation period following a transition period of 6 months, during which workers can submit claims under the existing arrangements. This represents the best possible balance between reducing the costs on business, while permitting workers to make claims for the holiday pay to which they are entitled.

- Consolidation

7.3 There are no immediate plans to consolidate the Employment Rights Act or the Working Time Regulations.

8. Consultation

8.1 There is no statutory requirement for consultation on these Regulations, although the Government would usually consult before making changes to employment legislation. In this instance, the Government considers it is essential to act swiftly to limit potential costs to business, and so a formal consultation has not been conducted. However,

Government Ministers and officials have discussed the proposals in detail with a number of representative organisations. As part of this process, a business taskforce was established and has met several times.

9. Guidance

9.1 The Government is considering the most effective way to provide guidance on these changes. We will circulate initial information to a wide range of representative bodies. We will also work with these organisations to establish whether it would be useful for Government to offer more detailed guidance in time for 1 July 2015, when the changes take effect.

9.2. The Government is working with ACAS on ensuring these changes can be reflected in advice given to workers or employers.

10. Impact

10.1 The Government's regulatory changes will reduce the anticipated costs for employers resulting from recent court cases. If no action had been taken, we estimate that business would have faced extra costs of around £750m. The introduction of the 2 year backstop will reduce this bill by an estimated £400m. The cost to charities or voluntary bodies is likely to be minimal.

10.2 Around 20% of the employers' costs would fall to public sector employers.

10.3 An Impact Assessment is attached to this memorandum and will be published alongside the Explanatory Memorandum on the legislation.gov.uk website.

11. Regulating small business

11.1 The legislation applies to small business.

11.2 To minimise the impact of the requirements on small firms employing up to 20 people, the Government is working with representative organisations, to ensure small business have detailed information about what measures they will need to take

12. Monitoring & review

12.1 There are significant financial implications for employers following recent case law on holiday pay. To understand these impacts and find solutions to mitigate the burden on business, the Government set up a Taskforce. These proposals and our contextual analysis in the accompanying Impact Assessment (IA) have been informed by discussions with the taskforce. The IA does not assess the impacts of the case law but considers the impact of the targeted intervention of these Regulations. There is uncertainty associated with the extent to which the estimated impacts will be realised in reality and we will monitor these

impacts as a part of our wider on going evaluation of the impact of the Working Time Regulations.

13. Contact

13.1 Amy Newland at the Department for Business Innovation and Skills can answer any queries regarding the instrument. She can be contacted on 020 7215 6714 or amy.newland@bis.gsi.gov.uk