

EXPLANATORY MEMORANDUM TO
THE EMPLOYMENT RIGHTS (AMENDMENT) (EU EXIT) (NO. 2)
REGULATIONS 2018

2018 No. XXXX

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 The Employment Rights (Amendment) (EU Exit) (No. 2) Regulations 2018 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. In this event, a number of elements of retained EU law may not operate effectively. The technical amendments ensure the legislation is clear by removing or amending language that is no longer appropriate once the UK has exited the EU. These SIs do not make any amendments to existing policy.

What did any relevant EU law do before exit day?

- 2.2 The GB SI amends the following legislation:
 - **Section 38 of the Employment Relations Act 1999** provides a power to the Secretary of State to make regulations in certain circumstances where EU obligations relating to the treatment of employees on the transfer of all or part of an undertaking or business do not apply. Section 38 has so far been relied upon to make legislation in two key areas: firstly, to provide Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) equivalent protection to certain groups of workers who are not covered by the TUPE Regulations 2006; secondly, to expand the scope of the TUPE Regulations 2006 to cover service provision change (in circumstances other than those to which the Directive applies).
 - **Section 13 of the Work and Families Act 2006** contains a range of powers enabling the Secretary of State to make regulations relating to annual leave. Subsections 2(g) and 4(b) which are to be repealed by this SI, contain specific powers which are defined by reference to EU obligations.
 - **Regulations 27A of the Conduct of Employment Agencies and Employment Businesses Regulations 2003** makes provision for requirements on employment agencies and employment businesses if advertising certain jobs in other European Economic Area (EEA) countries.

Why is it being changed?

- 2.3 These SIs 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 EEA.

2.4 The amendments to the GB legislation listed under paragraph 2.2 are being made for the following reasons:

- **Section 38 of the Employment Relations Act 1999** is being amended to remove terminology that is no longer appropriate once the UK has exited the EU. The intention behind the revised wording is to maintain the current scope of the power. For example, where section 38 has been relied upon to make secondary legislation pre-exit, similar provisions could be made post-exit. As set out in paragraph 4 of the Schedule to the SI, these amendments, including the amendment to section 38, do not affect the validity of any regulations that came into force before exit day and made under any of the Acts amended by this SI.
- **Section 13 of the Work and Families Act 2006**, subsections 2(g) and 4(b) are no longer appropriate once the UK has exited the EU as the powers in these subsections are defined by reference to EU obligations that will no longer apply. The remaining powers in section 13 are unaffected by this SI, and the Secretary of State will continue to be able to make provision for annual leave for workers under section 13.
- **Regulation 27A of the Conduct of Employment Agencies and Employment Businesses Regulations 2003** is being amended to reflect the fact that the UK will no longer be a member of the EEA, following our exit from the EU.

What will it now do?

2.5 These amendments are intended to ensure that the existing statutory framework continues to operate effectively. The amendments remove provisions which are no longer appropriate or relevant if the UK leaves the EU without a Withdrawal Agreement. The SI does not change the operation of these aspects of employment law in other ways.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 To note that as explained above at sections 2.4 and 2.5, section 38 of the Employment Relations Act 1999 are being amended to remove terminology that is no longer appropriate once the UK has exited the EU. The intention behind the revised wording is to maintain the current scope of the powers, whilst removing references to “section 2(2) of the European Communities Act 1972” which are no longer appropriate once the UK leaves the EU without a Withdrawal Agreement. The Government’s view is that it is more appropriate to use the words “the main part of the TUPE Regulations” instead, which were made under section 2(2) of the European Communities Act 1972, and which implement the relevant existing EU obligations and which will themselves form part of retained EU law. The policy intention is for this power to be unaffected by the UK’s exit from the EU. This amendment falls within section 2(2)(d) of the European Union Withdrawal Act 2018, relating otherwise to the EU or the EEA. The scope of the current powers in section 38 of the Employment Relations Act 1999 are defined by reference to EU (or Community) obligations – and so relates to the EU. In addition, that section is “retained EU law” by virtue of section 2(2)(c) of the European Union (Withdrawal) Act 2018. The TUPE Regs 2006 are retained EU law by virtue of being made under section 2(2) of European Communities Act 1972 (see section

2(2)(a) of European Union (Withdrawal) Act 2018. Section 38 of the Employment Relations Act 1999 relates to the TUPE Regs. Therefore, the amendment falls within scope of section 8(1) of the European Union (Withdrawal) Act 2018.

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)

3.2 The territorial application of the GB SI is England, Wales and Scotland.

4. Extent and Territorial Application

4.1 The territorial extent of the Employment Rights (Amendment) (EU Exit) (No. 2) Regulations 2018 is England, Wales and Scotland. Employment rights are transferred to Northern Ireland.

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5. European Convention on Human Rights

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

“In my view the provisions of the Employment Rights (Amendment) (EU Exit) (No. 2) Regulations 2018 is compatible with the Convention rights.”

6. Legislative Context

6.1 This instrument is being made to amend current legislation relating to EU retained employment law, to ensure continuity and legal certainty in the case of a no deal scenario between the UK and the EU. This instrument is made using the power in section 8 of the European Union (Withdrawal) Act 2018. The Employment Rights (Amendment) (EU Exit) (No. 2) Regulations 2018 is also made using the power in section 5 of the Employment Agencies Act 1973 (in relation to the amendment to the Conduct of Employment Agencies and Employment Businesses Regulations 2003).

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, the Employment Rights (Amendment) (EU Exit) (No. 2) Regulations 2018 makes technical amendments to a range of legislation including the Employment Relations Act 1999 and the Work and Families Act 2006, to ensure certain powers of the Secretary of State to make regulations will continue, or are repealed if no longer appropriate.

7.3 Amendments are also made by the Employment Rights (Amendment) (EU Exit) (No. 2) Regulations 2018 to the Conduct of Employment Agencies and Employment

Business Regulations 2003, to amend the current references to the UK as an EEA state.

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 Alongside the EU (Withdrawal) Act 2018 powers the Employment Rights (Amendment) (EU Exit) (No. 2) Regulations 2018 is also being made using powers in the Employment Agencies Act 1973.

9. Consolidation

- 9.1 Consolidation is not required for these amendments.

10. Consultation outcome

- 10.1 In December 2017 we published the Employment Rights (Amendment) (EU Exit) (No. 2) Regulations 2018 in draft and notified stakeholders. There was also a statutory obligation to consult such bodies as appear to the Secretary of State to be representative of the interests concerned in relation to the amendments made by Part 2 of the SI, to the Conduct of Employment Agencies and Employment Businesses Regulations 2003. A number of organisations were contacted and provided with 4 weeks to respond. We received two responses, neither of which raised concerns with the drafting of Part 2 of the SI.

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 these instruments.

12. Impact

- 12.1 The impact on business, 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 An Impact Assessment has been prepared and has been approved as de minimis 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 materially change the impact or operation of the

regulations that are being amended. The amendments will provide continuity and legal clarity in UK law.

14. Monitoring & review

- 14.1 The approach to monitoring 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 policy and law covered by these SIs.
- 14.2 To the extent these instruments are 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: 020 7215 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 Labour Markets at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Kelly Tolhurst, the Minister for Small Business, Consumers and Corporate Responsibility 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. Sifting statement(s)

- 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) (EU Exit) Regulations 2018 should be subject to annulment in pursuance of a resolution of either House of Parliament (i.e. the negative procedure)”.

- 1.2 This is the case because: This SI will come into force in the case of a no deal scenario to ensure legal clarity and certainty. Amendments are being made to existing legislation to remove any reference to the UK’s membership in the European Union

2. Appropriateness statement

- 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 The Employment Rights (Amendment) (EU Exit) Regulations 2018 does no more than is appropriate”.

- 2.2 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.

3. Good reasons

- 3.1 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”.

- 3.2 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.

4. Equalities

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

“The [draft] 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.”

5. Explanations

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