

EXPLANATORY MEMORANDUM TO
THE EMPLOYMENT RIGHTS (AMENDMENT) (NORTHERN IRELAND) (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) (Northern Ireland) (EU Exit) (No. 2) Regulations 2018 make 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. This SI does not make any amendments to existing policy.

What did any relevant EU law do before exit day?

- 2.2 The NI SI amends the following legislation:

- **Article 37 of the Employment Relations (Northern Ireland) Order 1999** provides a power to the Department for the Economy 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. Article 37 has so far been relied upon to make the Service Provision Change (Protection of Employment) Regulations (Northern Ireland) 2006 as the service provision element of the TUPE Regulations 2006 does not extend to Northern Ireland.
- **Article 15 of the Work and Families (Northern Ireland) Order 2006** contains a range of powers enabling the Department for the Economy to make regulations relating to annual leave. Paragraphs 2(g) and 4(b), which are to be repealed by this SI, contain specific powers which are defined by reference to EU obligations.

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 NI legislation listed under paragraph 2.3 are being made for the following reasons:
- **Article 37 of the Employment Relations (Northern Ireland) Order 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 Article 37 has been relied upon to make secondary legislation pre-exit, similar provisions could be made post-exit. As set out in paragraph 3 of the Schedule to the SI, these amendments, including the amendment to Article 37, do not affect the validity of any regulations that came into force before exit day and made under either of the Orders amended by this SI.

- **Article 15 of the Work and Families (Northern Ireland) Order 2006**, paragraphs 2(g) and 4(b) are no longer appropriate once the UK has exited the EU as the powers in these paragraphs are defined by reference to EU obligations that will no longer apply. The remaining powers in Article 15 are unaffected by this SI, and the Department for the Economy will continue to be able to make provision for annual leave for workers under Article 15.

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, Article 37 of the Employment Relations (Northern Ireland) Order 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”, and “EU obligations” (“Community obligations” in respect of the Employment Relations (Northern Ireland) Order 1999) 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 and Article 37 of the Employment Relations (Northern Ireland) Order 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 and Article 37 of the Employment Relations (Northern Ireland) Order 1999 relate 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 NI SI is Northern Ireland.

4. Extent and Territorial Application

4.1 The territorial extent of the Employment Rights (Amendment) (Northern Ireland) (EU Exit) (No. 2) Regulations 2018 is Northern Ireland.

4.2 The territorial application of the Employment Rights (Amendment) (Northern Ireland) (EU Exit) (No. 2) Regulations 2018 is Northern Ireland.

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) (Northern Ireland) (EU Exit) (No. 2) Regulations 2018 are 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) (Northern Ireland) (EU Exit) (No. 2) Regulations 2018 makes amendments to a range of legislation including technical amendments in respect of the Employment Relations (Northern Ireland) Order 1999 and the Work and Families (Northern Ireland) Order 2006.

7.3 The Employment Rights (Amendment) (Northern Ireland) (EU Exit) (No. 2) Regulations 2018 applies to employment rights which are a transferred matter for Northern Ireland within the meaning of section 4(1) of 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 These instruments are 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.

9. Consolidation

9.1 Consolidation is not required for these amendments.

10. Consultation outcome

10.1 No consultation was carried out for Employment Rights (Amendment) (Northern Ireland) (EU Exit) (No. 2) Regulations 2018.

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, at the Department for Business, Energy and Industrial Strategy can confirm 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. |

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|-------------------------------------------------------------------|--------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| | | 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) (Northern Ireland) (EU Exit)(No.2)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: These SIs 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) (Northern Ireland) (EU Exit)(No.2) 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 these instruments, 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:

“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) (No. 2) Regulations 2018 extend only to Northern Ireland, I have given equivalent due regard to the impacts in Northern Ireland”

5. Explanations

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