

*This draft Statutory Instrument supersedes the draft of the same title which was laid before Parliament on the 1st March 2021 and published on 2nd March 2021 (ISBN 978-0-348-22063-6). It is being issued free of charge to all known recipients of that draft Statutory Instrument.*

*Draft Order to be laid before Parliament under section 42(2) of the Employment Relations Act 1999, for approval by resolution of each House of Parliament.*

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## DRAFT STATUTORY INSTRUMENTS

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**2021 No.**

## **EMPLOYMENT**

### **The Employment Rights Act 1996 (Protection from Detriment in Health and Safety Cases) (Amendment) Order 2021**

*Made* - - - - *\*\*\**  
*Coming into force* - - *31st May 2021*

The Secretary of State, in exercise of the powers conferred by section 23(2), (4)(c) and (d) and (5A) of the Employment Relations Act 1999<sup>(1)</sup>, makes the following Order.

In accordance with section 42(2) of that Act, a draft of this Order has been laid before, and approved by a resolution of, each House of Parliament.

#### **Citation and Commencement**

1. This Order may be cited as the Employment Rights Act 1996 (Protection from Detriment in Health and Safety Cases) (Amendment) Order 2021 and comes into force on 31st May 2021.

#### **Amendments to the Employment Rights Act 1996**

2. The Employment Rights Act 1996<sup>(2)</sup> is amended as follows.

#### **Amendment of Section 44**

3. In Section 44 (health and safety cases)—
- (a) in subsection (1), omit paragraphs (d) and (e);
  - (b) after subsection (1) insert—

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(1) 1999 c. 26 Section 23 was amended by sections 41 and 53 of, and paragraph 54 of Schedule 7 to, the Employment Act 2002 (c. 22) and sections 39 and 57 of, and Schedule 2 to, the Employment Relations Act 2004 (c. 24).  
(2) 1996 c. 18.

“(1A) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his or her employer done on the ground that—

- (a) in circumstances of danger which the worker reasonably believed to be serious and imminent and which he or she could not reasonably have been expected to avert, he or she left (or proposed to leave) or (while the danger persisted) refused to return to his or her place of work or any dangerous part of his or her place of work, or
- (b) in circumstances of danger which the worker reasonably believed to be serious and imminent, he or she took (or proposed to take) appropriate steps to protect himself or herself or other persons from the danger.”;
- (c) in subsection (2)—
  - (i) for “(1)(e)” substitute “(1A)(b)”;
  - (ii) for “an employee” substitute “a worker”;
- (d) in subsection (3)—
  - (i) for “An employee” substitute “A worker”;
  - (ii) for “(1)(e)” substitute “(1A)(b)”;
  - (iii) for “the employee” substitute “the worker”;
- (e) in subsection (4) after “does not apply where the” insert “worker is an employee and the”.

#### **Amendment of Section 48**

- 4. In Section 48 (complaints to employment tribunals)—
  - (a) in subsection (1), for “44” substitute “44(1)”;
  - (b) after subsection (1) insert—
 

“(1XA) A worker may present a complaint to an employment tribunal that the worker has been subjected to a detriment in contravention of section 44(1A).”;
  - (c) in subsection (2), after “subsection (1),” insert “(1XA).”.

#### **Amendment of Section 49**

- 5. In Section 49 (remedies)—
  - (a) in subsection (1), after “section 48(1),” insert “(1XA).”;
  - (b) in subsection (2), after “Subject to subsections” insert “(5ZA).”;
  - (c) after subsection (5) insert—
 

“(5ZA) Where—

    - (a) the complaint is made under section 48(1XA),
    - (b) the detriment to which the worker is subjected is the termination of his or her contract, and
    - (c) that contract is not a contract of employment,

any compensation must not exceed the compensation that would be payable under Chapter II of Part X if the worker had been an employee and had been dismissed for the reason specified in section 100.”.

#### **Amendment of Section 205**

- 6. In Section 205 (remedy for infringement of certain rights) after subsection (1) insert—

“(1YA) In relation to the right conferred by section 44(1A), the reference in subsection (1) to an employee has effect as a reference to a worker.”.

### **Transitional and Saving Provision**

7.—(1) A worker is not to be regarded as having been subjected to a detriment in contravention of section 44(1A) of the Employment Rights Act 1996 if the date of the relevant act or failure to act, or the last of a series of similar relevant acts or failures to act, occurred before commencement day.

(2) If the date of the last of a series of similar relevant acts or failures to act occurs on or after commencement day, the fact that a relevant act or failure to act in that series occurred before commencement day does not prevent it from being taken into account in determining whether the worker has been subjected to a detriment in contravention of section 44(1A) of the Employment Rights Act 1996.

(3) The repeal by this Order of section 44(1)(d) and (e) does not prevent a complaint under section 48 that an employee has been subjected to detriment in contravention of section 44(1)(d) or (e) from being presented or continued on or after commencement day if the date of the relevant act or failure to act, or the last of a series of similar relevant acts or failures to act, occurred before commencement day.

(4) In this paragraph—

“commencement day” means the day on which this Order comes into force;

“relevant act or failure to act” means—

- (a) in relation to section 44(1) of the Employment Rights Act 1996, an act, or deliberate failure to act, by an employer done on the ground set out in section 44(1)(d) or (e) of that Act;
- (b) in relation to section 44(1A) of the Employment Rights Act 1996, an act, or deliberate failure to act, by an employer done on the ground set out in section 44(1A)(a) or (b) of that Act.

(5) Section 48(4) of the Employment Rights Act 1996 applies to paragraphs (1), (2) and (3) as it applies to section 48(3) of that Act.

Date

*Name*  
Parliamentary Under Secretary of State  
Department for Business, Energy & Industrial  
Strategy

## EXPLANATORY NOTE

*(This note is not part of the Order)*

This Order amends Section 44 of the Employment Rights Act 1996 (“the Act”) to extend the rights conferred previously under section 44(1)(d) and (e) not to be subjected to a detriment in health and safety cases to workers, as defined in section 230(3) of the Act. Those rights were previously conferred only upon employees, as defined in section 230(1) of the Act.

The rights conferred are for a worker to not be subjected to a detriment by his or her employer for leaving or refusing to return to his or her workplace or for taking steps to protect himself or herself in circumstances of danger which the worker reasonably believes to be serious and imminent.

Article 4 makes corresponding amendments to enforcement provisions and Article 5 makes corresponding amendments to remedies provisions in the Act.

Article 7 is a transitional and saving provision in respect of the repeal of section 44(1)(d) and (e) and the insertion of the new section 44(1A).