EXPLANATORY MEMORANDUM TO

COLLECTIVE REDUNDANCIES (AMENDMENT) REGULATIONS 2006

2006 No. 2387

1. This explanatory memorandum has been prepared by the Department of Trade and Industry and is laid before Parliament by Command of Her Majesty.

2. Description

2.1 These Regulations amend the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act").

2.2 The Regulations provide that employers will have to notify the Secretary of State of proposed collective redundancies before notices of dismissal have been issued to employees.

2.3 The Regulations will achieve this by amending s193 of the 1992 Act. At present, s193 requires employers to notify the Secretary of State of proposed collective redundancies either 30 days or 90 days before those redundancies take effect (depending on the scale of the exercise). This Regulation will add an existing requirement to the section, namely that employers will be required to notify the secretary of state of redundancies *before* any notices of dismissal have been issued.

2.4 These Regulations are due to come into force on 1 October 2006. A copy of the Regulations can be found at http://www.opsi.gov.uk/stat.htm

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

3.1 None.

4. Legislative Background

4.1 Section 2(2)(a) of the European Communities Act 1972 contains a power to implement European legislation by Regualtion.

4.2 The 1992 Act implements, amongst other things, Articles 3 and 4 of the Collective Redundancies Directive (98/59/EC) (the "Directive"). Articles 3 and 4 of the Directive require employers to notify the competent public authority and set a minimum period that those redundancies should be so notified (30 days before the redundancies take effect). Section 193 of the 1992 Act currently requires employers to notify the Secretary of State of proposed redundancies either 30 or 90 days *before* those dismissals takes effect (depending on the scale of the exercise).

4.3 The European Court of Justice judgment in the Case C-188/03, Junk v Kühnel held that Articles 3 and 4 of the Directive, allow an employer to carry out collective redundancies after the notification of the projected collective redundancies to the competent public authority.

4.3 The modification in these Regulations will ensure that UK law is consistent with the European Court of Justice's interpretation of the Collective Redundancies Directive.

5. Extent

5.1 These Regulations apply to Great Britain.

6. European Convention on Human Rights

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

> In my view the provisions of the Collective Redundancies (Amendment) Regulations 2006 are compatible with the Convention rights.

7. Policy background

7.1 Following the European Court of Justice decision in Junk v Kühnel in 2005, the Government considered whether existing law was compliant with the Collective Redundancies Directive.

7.2 The Department of Trade and Industry began consulting on 20 March 2006. The consultation received 23 responses. The vast majority of responses were supportive of the specific amendment.

8. Impact

8.1 An assessment of the compliance costs to business of the measures arising from the Regulations, has been placed in the libraries of both Houses of Parliament. Copies may be obtained from the Department of Trade and Industry, Regulatory Impact Unit, 4th Floor, 1 Victoria Street, London, SW1H 0EN. This is also available at:

http://www.dti.gov.uk/consultations/ria/index.html

8.2 This measure is intended to ensure that UK law is consistent with the European Court of Justice's interpretation of the Collective Redundancies Directive. It will require some employers to notify the Secretary of State of proposed redundancies at a slightly earlier stage in the consultation process than they would have done before. The administrative process of notifying the Secretary of State slightly earlier, in a small number of cases will have a negligible impact on business.

9. Contact

Steven Greenwell at the Department of Trade and Industry, tel: 020 7215 5056 or email: steven.greenwell@dti.gsi.gov.uk can answer any queries regarding this instrument.

Full Regulatory Impact Assessment

Employment Relations Directorate

Collective Redundancies – Employer's Duty to Notify the Secretary of State

September 2006

http://www.dti.gov.uk/employment

Purpose and intended effect of measure

Objective

1. That notification of a projected collective redundancy is made to the relevant competent authority before notice of a redundancy is issued to an employee.

Background

2. The statutory provisions for an employer proposing to make collective redundancies are provided in Chapter II, Part IV of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C) A 1992).[1] A collective redundancy situation arises where 20 or more employees are to be made redundant within a period of ninety days at one establishment. Employers must undertake a period of consultation with appropriate representatives of affected employees before any notices of dismissal are issued.

3. In addition, employers have a statutory duty to notify the Secretary of State for Trade and Industry. Notification to the Secretary of State (SoS) must be made a specified minimum time before the first dismissal takes effect. The date of notification is the date on which it is received by the Department of Trade and Industry. Employers notify the Secretary of State using a standard, 2 page HR1 form.[2]

4. The minimum times are:

    - If between 20 and 99 employees may be made redundant, notification to the SoS must be made **at least 30 days before the first dismissal takes effect;**

[1] http://www.opsi.gov.uk/acts/acts1992/Ukpga_19920052_en_1.htm.

[2] http://www.dti.gov.uk/er/redundancy/hr1.pdf The form is also available from the Redundancy Payments Office.

- If 100 or more employees may be redundant, notification must be made **at least 90 days before the first dismissal takes effect.**

5. The purpose of the HR1 form is to notify the competent state authority of any *projected* redundancies. The policy rationale for notification is so that government and agencies and the Jobcentre Plus Rapid Response Service can be alerted and prepared to take any appropriate measures to assist or retrain the employees in question.

6. In addition, if following consultation with the appropriate representatives of affected employees an employer actually decides to take forward *definite* redundancies, they are required to give notice to that individual. The length of this notice period is primarily a matter of contract, but there are minimum notice periods implied into contracts by s.86 of the Employment Rights Act 1996 (subject to waiver of either party).

7. The Act requires that a person who has been continuously employed for one month or more is provided with:

   - Not less than one week notice if his period of continuous employment is less than two years;
   - Not less than one week's notice for each year of continuous employment if his period of continuous employment is two years or more but less than 12 years;
   - Is not less than twelve weeks notice if his period of continuous employment is 12 years or more.

8. Current UK law makes no stipulation as to when the notification to the Secretary of State should take place with regard to notice to employees, only that it must take place at least 30/90 days before the **redundancies take effect.**

9. However, this RIA explores the costs and benefits of requiring that employers must notify the Secretary of State before redundancy notices are issued to the employee.

10. The rationale for government intervention is outlined below. It follows from a recent judgement by the European Court of Justice, [3] interpreting Council Directive 98/59/EC. The Court held that when notification to the competent authority had takes place *after* notice has been served to employees; notification cannot then be of *proposed* redundancies, since redundancies are no longer 'proposed' if notices have already been served to employees.

11. Therefore, the UK is required to amend the relevant legislation to ensure our domestic law complies with the Directive as interpreted by the ECJ, or risks infraction proceedings.

Rationale for Government Intervention

12. The requirement to notify the Secretary of State is so that government departments, agencies and the Jobcentre Plus Rapid Response Service can be

[3] ECJ Case C-188/03 *Irmtraund Junk v Wolfgang Kuhnel*.

alerted and prepared to take any appropriate measures to assist or retrain the employees in question.

13. However, under UK law the Secretary of State could, in theory, be notified after redundancy notices are issued.

14. Therefore, it is necessary that the UK amends the law to provide that notification must be made to the SoS *before* notification is served to employees. Although the current legislative requirements do **not** prevent employers from doing this already, it does not stipulate that the employer must inform the SoS before notices are served.

15. For example, say that an employer is thinking of making 20 people redundant. In accordance with the length of service of the employees and their contracts, the employer must give 5 weeks notice before the redundancies take effect. 5 weeks = 35 days. Under the current legislation, the employer may serve notice on day 35 to the employees, and then wait until day 30 to inform the SoS. This is in inconsistent with the ECJ's ruling in the case of *Junk*.

16. However, it is equally plausible that the employer, who is required by law to consult with employees *before* serving notices, notified the SoS during the consultation period and *before* notices were served to employees.

17. It is difficult to estimate how many employers are already notifying the SoS before the notices are served, and how many are not. Table 1, below, shows the number of HR1 forms received by the Redundancy Payments office since 2001.

Table 1. Number of HR1 forms received*

2001	2002	2003	2004	2005
4509	5930	4968	4452	5156

Source: Redundancy Payments Office. *Indicates number of employers proposing to make a collective redundancy.

18. In the calendar year 2005, the Redundancy Payments office received 5,156 HR1 forms. Employers are required to indicate on the HR1 form the proposed date on which the **first** dismissal will take effect, which must be at least 30 days after notification is received if 20 – 99 people may be made redundant, or 90 days if it is to be more than 100.

19. However, without precise knowledge of the when notice was served to employees in each separate case, it is not possible to reasonably estimate how many employers currently (and would continue to) serve notice to employees *before* notifying the SoS.

20. There has been little research into the length of notice periods. One business survey conducted in 2000 found that 35% of employees outside the public sector were entitled to at least 4 weeks notice.[4]

21. According to the Autumn 2005 Labour Force Survey, the median number of years that permanent employees reported having been in continuous employment is 4.6.[5] Applying the statutory minimum notice periods would

[4] http://www.dti.gov.uk/er/emar/noticeperiods.pdf

[5] The right to statutory notice only applies to permanent employees who have been continuously employed by the same employer for at least one month. The median is a preferred measure in this case as it is less sensitive to extreme scores than the mean.

therefore imply a median notice period of 4 weeks, or approximately 28 days. On this basis, it would be reasonable to assume that most employers are notifying the SoS (which must, in any case, take place *at least 30 days* before redundancy takes effect) before serving notice to employees.

22. However, this is assuming that employers are waiting up to the latest point to notify employees, and satisfying their obligations in respect of notice periods. Also, job tenure varies widely in the labour market, as Table 2 below, shows. Applying the statutory minimum implies that approximately 24 per cent of permanent employees are entitled to at least 12 weeks notice of termination.

Table 2. Job tenure, permanent employees*

Length of time with current employer	% of permanent employees**
More than 1mth, less than 2 yrs	27%
More than 2yrs, less than 3	9%
More than 3yrs, less than 4	8%
More than 4yrs, less than 5	7%
More than 5yrs, less than 6	6%
More than 6yrs, less than 7	4%
More than 7yrs, less than 8	3%
More than 8yrs, less than 9	3%
More than 9yrs, less than 10yrs	3%
More than 11yrs, less than 12	3%
12 yrs or more	24%

Source: Autumn 2005 Labour Force Survey, ONS. *Excludes self employed. **Excludes those who did not know, or refused to answer

23. Furthermore, in practice notice periods can vary contractually and may be more generous than the statutory minimum. On this basis, it is possible that many employers are notifying the SoS after notice has been served to employees, or in other words 'late'.

24. Table 3 below estimates the number of employers who will be 'late' in notifying the SoS, each year to 2016. The assumptions are that the number of employers making collective redundancies grows by 5 per cent each year after 2005,[6] and 50, 75 and 100 per cent of employers notify the SoS after serving notice to employees.

Table 3. Projected number of 'late' notifications to SoS, 2005-2016

	Percentage of employers who notify SoS after giving notice to employees		
Year	50%	75%	100%
2005	2578	3867	5156
2006	2707	4060	5414
2007	2842	4263	5684
2008	2984	4477	5969
2009	3134	4700	6267
2010	3290	4935	6581
2011	3455	5182	6910

[6] It is difficult to predict with accuracy the future number of collective redundancies, as data shows it can vary year on year. It can depend upon a variety of factors, most importantly on the economic climate, with a recession causing the number to increase quite significantly. In this analysis, a small increase each year will reflect growth in employees and business enterprises, whilst fluctuations will be expected to even out over the economic cycle.

2012	3628	5441	7255
2013	3809	5713	7618
2014	3999	5999	7999
2015	4199	6299	8399

Source: DTI estimates

25. Even under the assumption that *all* of employers are notifying the SoS 'late', the number of affected employers remains tiny, around 0.01 per cent of business enterprises in 2005.[7]

Consultation

26. The Government amended its guidance in August of 2005 to make it clear that it was considering making this change. In addition, it has consulted key stakeholders about this amendment on an informal basis.

27. The DTI held a 12-week public consultation exercise on the draft Regulations between 20th March 2006 and the 9th June 2006. Annex A contains a list of those who responded. The majority agreed that the impact of the new requirements would be negligible.

Options

28. The partial RIA explored two options:

- **Option 1: Do nothing**. Make no amendment to the current UK law on the requirement to notify the Secretary of State of proposed collective redundancies. The risks associated with this option are outlined in the rationale for government intervention detailed in Table 3 above. Furthermore, doing nothing will risk infraction proceedings.
- **Option 2: Require that employers must notify the Secretary of State before redundancy notices are issued.** This will be in line with the ECJ Judgment on Council Directive 98/59/EC. It is anticipated that this option will not introduce significant additional administrative burdens for employers, who will not be required to complete any additional information over and above that already required. The amendment merely clarifies the timing of the administrative requirement, and as discussed above some employers will be doing this already.

Costs and Benefits

Sectors and Groups affected

29. Around 5,000 employers notify the Secretary of State of proposed collective redundancies each year. In the analysis below, it is assumed that the number of affected employers will grow by 5 per cent each year from 2005 (see table 2, above). Any policy and implementation costs associated with option 2 will be borne by the employers only.

[7] Assuming the 4.3 million business enterprises in 2004 grows by 5 per cent over the year. SME Statistics 2004, Small Business Service.

http://www.sbs.gov.uk/SBS_Gov_files/researchandstats/SMEStats2004.pdf

30. In 2004 and 2005, employers notified the SoS of proposing to make approximately 309,602 and 344,000 employees redundant respectively. This was approximately 1.3 and 1.4% of all employees in the labour force that year. Such employees will not bear any costs associated with option 2, but they will benefit in that earlier notification to the relevant state authority will increase the efficiency and timeliness of government intervention on their behalf.

31. Sole traders and micro-firms (e.g. those employing 0-9 people) will **not** be affected by the legislation. According to the Redundancy Payments office, the majority of collective redundancy notifications come from medium sized employers, e.g. those employing 50-249 people.

32. The Redundancy Payment Office as an agency of the DTI will continue to receive and monitor notification of collective redundancies, and in the event of option 2 being pursued will, in some cases, receive notification earlier than might of otherwise have been the case.

33. The legislation will affect persons of all racial groups equally, therefore a race equality impact assessment is not required.

Analysis of Costs

Option 1: Do nothing.

34. In doing nothing, the risk is that notification to the SoS will continue to occur 'late', to the magnitude estimated in Table 3, above.

35. There are two important costs associated with this option. One is that notification the SoS in these cases is not that of *proposed* redundancies, and therefore the relevant competent authority is then unable to act sufficiently in response. This would be both to the detriment of employers, who may miss out on some very useful advice and assistance; and employees, who also benefit from the advice and assistance of the authorities when it is deemed necessary.

36. Secondly, failure to amend the timing of notification to the SoS will be inconsistent with the ECJ judgement in the case of *Junk*, where the Court held that notification to the relevant competent authority must occur *before* notice is served to employees. The UK is required to implement the Directive fully and failure to do so could put the UK at risk of infraction proceedings from the European Commission.

Option 2. Require that employers must notify the Secretary of State before redundancy notices are issued.

37. The exact costs of this option will depend on the number of employers proposing to make collective redundancies, and of those, the proportion who notify the SoS after serving notice to employees.

38. It is not possible to accurately estimate how many employers are already (and will continue to) propose a collective redundancy 'late'. Evidence from the Redundancy Payments Office suggests that, in general, HR1 forms are received in the same month as consultation with employees, which in any case will take place *before* notice to terminate is issued. Many firms complete the HR1 form so it is ready to give to the recognised Trade Union or elected representatives when consultation starts.

39. Therefore, for clarity it is assumed that **although not all firms will be notifying the SoS 'late', all firms proposing to make collective redundancies will nonetheless spend some additional time reading the amended guidance and understanding the requirements.**

40. Table 4 below gives a range of cost estimates.[8] Firms will not be required to send in any additional information, but merely be aware that they must notify the SoS before serving notice to employees

Table 4. Annual aggregate administrative costs

	Time spent by senior manager	
Year	15 minutes	30 minutes
2006	£33,000	£66,000
2007	£36,000	£72,000
2008	£39,000	£78,000
2009	£43,000	£85,000
2010	£46,000	£93,000
2011	£50,000	£101,000
2012	£55,000	£109,000
2013	£59,000	£119,000
2014	£65,000	£129,000
2015	£70,000	£141,000

Source: DTI estimates.

41. There will be no policy costs associated with the amendment.

Costs for a Typical Business

42. In the first year of the legislation (2006), it will cost approximately £5 to £10 for a firm proposing to make a collective redundancy to read and understand the timing requirement, based on the average wage of a senior manager spending 15-30 minutes.[9]

Analysis of Benefits

Option 1. Do nothing

43. There will be no additional benefits associated with this option, other than firms will not incur the costs detailed in Table 4, above. However, these costs are very small and amount to no more than £5 to £10 per affected employer, in the first year of implementation.

44. Furthermore, the avoidance of these costs must be offset by the cost and inconvenience of infraction proceedings, which would be possible if the UK did not amend the legislation.

[8] Costs are calculated on the basis that it will take approximately 15-30 minutes of a senior managers time to read the guidance and understand the timing requirement of notification. Costs are calculated on a 'need to know' basis, i.e. only firms who propose to make collective redundancies will spend the time familiarising themselves with the legislation (see paragraph 29, above). According to the Annual Survey of Hours and Earnings (ONS), hourly pay for a senior manager in 2005 was £19.83, inflated by approximately 3.5% each year to take account of earnings inflation, and multiplied by 1.3 to take account of non-wage labour costs.

[9] Average hourly pay of senior manager in 2005 = £19.53*3.5% to take account of earnings inflation*(0.25-0.5).

Option 2. Require that employers must notify the Secretary of State before redundancy notices are issued.

45. This option will ensure notification to the SoS is of *proposed* redundancies; therefore the relevant competent authority is more able to act sufficiently in response.

46. Although many employers may be complying with the Option 2 already, it is likely that some employers will submit notification to the SoS a little earlier than otherwise would have been the case.

47. This would be both beneficial to the employers, and employees, who benefit from the advice and assistance of the authorities when it is deemed necessary.

Summary of Costs and Benefits

48. A summary of the qualitative and quantitative costs and benefits are described below.

Table 5. Summary of costs and benefits

	Do nothing	Option 2.
Costs	Some employers may continue to notify the SoS of collective redundancies 'late'. Notification in these cases is not of *proposed* redundancies, authorities may be unable to intervene appropriately. Risk of infraction proceedings by EC.	Small administrative cost of £5 to £10 per affected employer. Net present value of administrative costs over ten years: £128,000-£257,000 depending on 15-30 minutes spent familiarising with timing requirement
Benefits	No additional benefits, other than avoidance of small admin costs for employers.	Notification to the SoS in some cases will occur earlier than otherwise would have been the case. Increased ability of appropriate intervention of the authorities. No risk of costly infraction proceedings.

Source: DTI estimates.

Small Firms Impact Test

49. Evidence from the Redundancy Payments office suggests that the majority of notifications come from medium sized firms with 50-250 employees. The legislation will *not* affect sole traders or micro firms with fewer than 20 employees.

50. Unlike larger firms, small firms will not have dedicated HR sections to keep up to date with employment legislation, therefore will bear a disproportionate administrative cost. However, in this case the administrative costs are extremely small, and no more than £5 to £10 per affected firm. Furthermore the legislation will affect a small number of firms, approximately 0.01% of all business enterprises. Therefore a small firms impact test is not required.

Competition Assessment

51. The legislation is minimal in its impact, affecting a very small number of firms each year. No adverse competition affects have been detected.

Enforcement, Sanctions and monitoring

52. This amendment expands on existing requirements for employers to notify the Secretary of State. There is no evidence to suggest that employers do not comply with current notification requirements.

53. Section194 of the TULR(C) Act 1992 makes it a criminal offence to file the form out of time. There is no evidence to suggest that this sanction is not effective and the Government does not propose to make any alterations in respect of it.

Implementation and delivery plan

54. The change has arisen as a result of an ECJ judgment concerning the correct interpretation of a European Directive. , The proposed amendment to UK legislation to give effect to that judgment will come into force on the 1 October 2006 (in line with the Government's common commencement date policy). DTI guidance was amended in August 2005 to alert business and the public that the Government was considering making this change and we will further amend the Guidance shortly following discussions with key stakeholders.

Post-implementation review

55. There is no evidence to suggest that employers will find it difficult to comply with the new requirements. Employers already fully comply with the requirement to notify the Secretary of State in the event of collective redundancy. Therefore there are no specific plans to review the legislation, but the DTI will continue to monitor compliance and review the legislation if necessary.

Summary and Recommendation

56. This RIA recommends option 2. A summary of the costs and benefits is provided in paragraph 48. It concludes that the potential benefits of option 2 will be earlier notification and the increased ability of intervention for the relevant authorities. Option 2 also brings UK legislation in line with European law and therefore brings clarity and consistency, as well as avoiding costly infraction proceedings. In addition, the costs are expected to be negligible.

Ministerial Declaration

'I have read the Regulatory Impact Assessment and I am satisfied that the benefits justify the costs'

Jim Fitzpatrick

Parliamentary Under Secretary of State for Employment Relations

31st August 2006

Any enquiries relating to this Regulatory Impact Assessment should be addressed to:

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Annex A: List of respondents

Bar Council
Employment Lawyer's Association
GMB
The Professional Trades Union for Prison, Correctional and Secure Psychiatric Workers
North Western Local Authorities Employment Sector
Forum of Private Business
Public and Commercial Services Union
Thompsons Solicitors
Eversheds LLP
European Studies Group
Confederation of British Industry
Trades Union Congress
The Newspaper Society
Amicus
National Union of Rail, Maritime and Transport Workers
Prospect
National Association of Schoolmasters Union of Women Teachers
Heating and Ventilating Contractors' Association
Insolvency Service
John Thurgood
Lorenta Green
Law Society