

EXPLANATORY MEMORANDUM TO

THE EMPLOYMENT RIGHTS (AMENDMENT) (EU EXIT) REGULATIONS 2019

2019 No. 535

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 This statutory instrument (SI) 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. The amendments ensure the legislation is clear by removing or amending language that is no longer appropriate once the UK has exited the EU.

Explanations

What did any relevant EU law do before exit day?

- 2.2 The relevant legislation in Great Britain is:

Section 79(3), Employment Rights Act 1996 provides a power for the Secretary of State to make regulations to implement Council Directive 96/34/EC which provides the framework on parental leave, and matters arising out of the UK's obligations under that Directive.

Section 19(4), Employment Relations Act 1999 provides a power for the Secretary of State to make regulations to implement Council Directive 97/81/EC on the framework agreement on part-time work in its application to terms and conditions of employment, and matters arising out of the UK's obligations under that Directive.

Section 45(4), Employment Act 2002 provides a power for the Secretary of State to make regulations to implement Council Directive 99/70/EC which provides the framework agreements on fixed-term work in its application to terms and conditions of employment, and matters arising out of the UK's obligations under that Directive.

Section 42(5), Employment Relations Act 2004 provides a power for the Secretary of State to make regulations to implement Directive 2002/14/EC establishing a framework for informing and consulting employees of the European Community, and matters arising out of the UK's obligations under that Directive.

Schedule 2, paragraph 10, Employment Rights Act 1996 currently ensures that various provisions relating to employee representatives can be treated as if they were made under section 2(2) of the European Communities Act 1972, to ensure the validity of those provisions.

Working Time Regulations 1998 implements the EU Working Time Directive which relates to the organisation of working time, and the employment of children and young persons. Regulations 18 and 28 contain cross-references to EU legislation.

Posted Workers (Enforcement of Employment Rights) Regulations 2016 include provisions for posted workers in the construction sector and subcontracting liability. It also provides for cross border enforcement of financial administrative penalties and fines.

The **Transnational Information and Consultation of Employees Regulations 1999 (TICE)** provide for the establishment of European Works Councils (EWCs) in Community-scale undertakings or Community-scale groups of undertakings for the purposes of informing and consulting employees.

Why is it being changed?

- 2.3 This SI 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 European Economic Area (EEA).
- 2.4 The following powers to make secondary legislation are repealed.
- Section 79(3), Employment Rights Act 1996
 - Section 19(4), Employment Relations Act 1999
 - Section 45(4), Employment Act 2002
 - Section 42(5), Employment Relations Act 2004
- 2.5 The following pieces of legislation are being amended to amend references that are no longer appropriate once the UK leaves the EU. These amendments are designed to ensure that the legal positions are clear, and the validity of these provisions continues post exit.

In GB the relevant legislation is:

- Schedule 2, paragraph 10, Employment Rights Act 1996
- Working Time Regulations 1998
- The Statutory Paternity Pay and Statutory Adoption Pay (Persons Abroad and Mariners) Regulations 2002
- Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013
- The Statutory Shared Parental Pay (Persons Abroad and Mariners) Regulations 2014
- Posted Workers (Enforcement of Employment Rights) Regulations 2016
- Transnational Information and Consultation of Employees Regulations 1999 (which extend to the UK)

What will it now do?

- 2.6 These amendments to the legislation listed at 2.5 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. This SI does not change the operation of these aspects of employment law in other ways. However, the statutory framework that applies to EWCs requires reciprocal arrangements with the EU to allow EWCs to continue to operate in their present form. Therefore, the SI makes changes to this statutory framework to address a no deal exit.

3. Matters of special interest to Parliament

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

- 3.1 This SI was laid as a negative procedure instrument on 31st October 2019. The Commons and the Lords sifting committees recommended the SI change from the negative to the affirmative procedure. The Lords sifting committee based their recommendation on advice from the Trades Union Congress (TUC). The Commons sifting committee were concerned about the potential implications of repealing the powers contained in and the amendments to employment legislation, including the Transnational Information and Consultation of Employees Regulations 1999 and the impact on European Works Councils.
- 3.2 The Minister agrees with the committees' recommendations, and accordingly this SI is now subject to the affirmative procedure.

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)

- 3.3 The territorial application of this instrument is limited to England, Wales and Scotland, except in relation to Schedule 2, which amends the TICE Regulations 1999, which applies to the United Kingdom.
- 3.4 The powers under which this instrument is made cover the entire United Kingdom. The territorial application of this instrument is not limited by the Acts, but is limited by the instrument to Great Britain, except in relation to Schedule 2 which is not so limited.

4. Extent and Territorial Application

- 4.1 The territorial extent of the Employment Rights (Amendment) (EU Exit) Regulations 2019 is England, Wales and Scotland, except in relation to the changes to the TICE Regulations 1999, which extend to the whole of the United Kingdom. Employment rights are transferred to Northern Ireland.
- 4.2 The territorial application of the Employment Rights (Amendment) (EU Exit) Regulations 2019 is England, Wales and Scotland, except in relation to the changes to the TICE Regulations 1999, which apply to the whole of the United Kingdom. Employment rights are transferred to Northern Ireland.

5. European Convention on Human Rights

- 5.1 The Minister for Small Business, Consumers and Corporate Responsibility, Kelly Tolhurst has made the following statement regarding Human Rights:
- “In my view the provisions of the Employment Rights (Amendment) (Northern Ireland) (EU Exit) Regulations 2019 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 This instrument is being made to amend current legislation relating to EU derived employment law, to ensure continuity and legal certainty in the case of a no deal between the UK and the EU. This instrument is made using the power in section 8 of the European Union (Withdrawal) Act 2018. The powers in section 2(2) of and paragraph 1A of Schedule 2 to the European Communities Act 1972 are being used to

amend certain references to EU legislation that are currently out of date, as the deficiency does not arise from the withdrawal of the UK from the EU.

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, this SI makes technical amendments to a range of legislation including the repeal of existing powers to make secondary legislation relating to the UK's obligations under various Directives. It is no longer appropriate to refer to the obligations of the UK under those Directives. Those powers are no longer required, as the relevant Directives have already been implemented in UK law, and that implementing legislation is unaffected by these amendments.
- 7.3 Amendments will also be made to existing legislation to reflect the UK's withdrawal from the EU. This legislation is listed at Section 2.2 and 2.3 above. Again, this is to ensure continuity and legal certainty.
- 7.4 A no deal exit would mean that after exit the UK is no longer included within EU rules on European Works Councils. As such changes are required to the legislative framework set out in the TICE Regulations 1999 to address this. In a 'no deal' scenario, the government will ensure the enforcement framework, rights and protections for employee representatives in the UK European Works Councils continue to be available, as far as possible.
- 7.5 Provisions relevant to existing European Works Councils, which can continue to operate, are maintained. These include:
- the enforcement framework, for example where there is a dispute about the operation of an existing European Works Council;
 - the employee representative rights and protections, such as the rights to training and time off, and the protections from suffering detriment or unfair dismissal; and
 - the protection for confidential information shared with the European Works Council or through the information and consultation procedure.
- 7.6 However, the SI amends the TICE Regulations 1999 so that no new requests to set up a European Works Council or information and consultation procedure can be made. This removes the provisions covering:
- requests for information on employee numbers;
 - the right to request that a European Works Council or information and consultation procedure is set up;
 - the negotiation process for establishing a European Works Council or information and consultation procedure, including setting up a special negotiating body; and
 - the content of new European Works Council or information and consultation procedure agreements.

- 7.7 Where a request for information, a negotiation to establish a European Works Council or information and consultation procedure or enforcement proceedings are in progress on exit day, the existing provisions are saved so that the process can reach completion.
- 7.8 Certain technical changes are also made to ensure the Regulations continue to operate effectively, in particular so that employees in the UK continue to count for the purposes of the threshold for an organisation to fall within the scope of the TICE Regulations 1999.
- 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 In addition out of date cross references to certain EU Regulations are updated, and these technical amendments are made using the power in section 2(2) and paragraph 1A of Schedule 2 to the European Communities Act 1972.
- 9. Consolidation**
- 9.1 Consolidation is not required for these amendments.
- 10. Consultation outcome**
- 10.1 An earlier draft of the SI was published on gov.uk alongside an explanatory note, in the context of information on the then Withdrawal Bill in December 2017.
- 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 this instrument.
- 12. Impact**
- 12.1 The impact on the businesses, charities or voluntary bodies is minimal. All amendments have been made to ensure continuity and legal clarity on employment rights. However, the subsequent effects of withdrawal from the EU mean the statutory framework that applies to European Works Councils would require a reciprocal arrangement with the EU to allow European Works Councils to continue to operate in their present form. Organisations with existing European Works Councils will need to consider the terms of their European Works Council agreement to consider whether it needs amendment in light of exit.
- 12.2 There is no, or no significant impact on the public sector.
- 12.3 A full Impact Assessment has not been prepared for this instrument. A de minimis Impact Assessment was prepared 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 change current policy or rules. The amendments will provide continuity in UK law. Small businesses were not consulted on amendments to TICE Regulations 1999 and the establishment of European Works Councils as they are not applicable to small businesses.

14. Monitoring & review

- 14.1 The approach to monitoring of 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.
- 14.2 To the extent this instrument is 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: 0207 215 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 Europe and Strategy 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 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. Appropriateness statement

- 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 2019 does no more than is appropriate”.

- 1.2 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.

2. Good reasons

- 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 there are good reasons for the provisions in these instruments, and I have concluded they are a reasonable course of action”.

- 2.2 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. In relation to European Works Councils (EWCs), a no deal exit would mean that after exit the UK is no longer included within EU rules on EWCs. As such changes are required to the legislative framework set out in TICE Regulations 1999 to address this.

3. Equalities

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

“The instruments do 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.”

Explanations

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