

EXPLANATORY MEMORANDUM TO

THE WORKING TIME (CORONAVIRUS) (AMENDMENT) REGULATIONS 2020

2020 No. 365

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 Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 This instrument amends regulation 13 of the Working Time Regulations 1998 (WTR) to ensure that workers for whom it is not reasonably practicable to take holiday due to the coronavirus situation can carry their holiday into the following two leave years. This will protect workers by ensuring they do not risk losing their holiday entitlement, whilst ensuring that businesses have the flexibility and the staff needed to respond to the coronavirus situation.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 This instrument comes into force immediately after being made, breaching the convention that negative procedure statutory instruments should not come into force until a minimum of 21 calendar days after laying. This was necessary to ensure that workers whose leave year expires inside the 21-day period do not lose holiday that they did not take due to the coronavirus situation. Without legislation, workers whose leave year expires with untaken holiday would be likely to lose that entitlement if they did not take it.
- 3.2 This is particularly important because the end of the financial year, 31 March, falls inside the 21-day period (and is only a few days after the instrument comes into force). Many employers align their workers' leave years to the financial year. Any workers of these employers who have untaken leave that they cannot take due to coronavirus would be likely to lose this entitlement if the instrument followed the 21-day convention.
- 3.3 Failure to act urgently would require businesses who have their leave years ending inside the 21-day period to decide to either risk failing to comply with the law by refusing to allow their workers to take holiday, or to risk compromising their response to the coronavirus situation as their workers were on leave and so unavailable to work. By allowing these workers to carry their holiday into the following two leave years, employers have the required flexibility to respond to the situation where needed.
- 3.4 The instrument is made under section 2(2) of the European Communities Act 1972 (as saved by section 1A of the European Union (Withdrawal) Act 2018). There is an alternative power available under section 13 of the Work and Families Act 2006,

which we consider could have been used to make this instrument. The decision to use section 2(2) was made because section 13 of the 2006 Act requires use of the affirmative procedure. This would have significantly delayed the coming into force of the instrument, with the consequences discussed in paragraphs 3.1 to 3.3 above. We also considered that in the present coronavirus context there was good reason to limit where possible and proportionate the need for both Houses of Parliament to meet to debate a draft instrument.

- 3.5 The Government has been forced to lay this instrument during Parliamentary recess, due to the unexpected, short notice early rising date on 25 March 2020. Parliament is not currently scheduled to sit again until at least 21 April 2020. Waiting for Parliament to sit again before laying this instrument would incur the detrimental consequences discussed in paragraphs 3.1 to 3.3 above.
- 3.6 For the reasons laid out above, observing the 21-day convention would have undermined a significant part of the effectiveness of the instrument in terms of the benefit to employers and workers during the coronavirus crisis.

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)

- 3.7 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is Great Britain.
- 4.2 The territorial application of this instrument is Great Britain.

5. European Convention on Human Rights

- 5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

- 6.1 The legislative context of this instrument covers carrying forward of holiday between leave years, where as a result of the effects of coronavirus it has not been reasonably practicable for a worker to take all or some of their leave.
- 6.2 The WTR generally implement in UK law the Working Time Directive 2003/88/EC. Regulations 13 and 13A of the WTR set out workers' annual holiday entitlement (the leave provided for in regulation 13A exceeds that required under article 7 of the Directive). Holiday entitlement is granted in reference to leave years. The start date for a worker's leave year may be agreed between the worker and the employer by binding written agreement.
- 6.3 Regulation 13 of the WTR provides workers with 4 weeks of holiday per year. Regulation 13(9) provides that these 4 weeks' leave may not, if untaken, be carried forward into the following leave year (apart from in certain circumstances found by the courts, such as maternity leave and long-term sick leave). As such, the employer must facilitate the worker taking the 4 weeks' leave within the relevant leave year.

- 6.4 Regulation 13A of the WTR provides an additional entitlement to 1.6 weeks of holiday. Unlike the entitlement under regulation 13, this holiday may, if untaken, be carried forward into the following leave year (but no further) where provided for in a binding written agreement between the worker and the employer. The leave provided for under regulation 13A is not within the scope of this instrument.
- 6.5 The WTR provides certain exemptions in relation to other entitlements, such as daily rest breaks, for example where it is not possible for the employer to provide breaks due to unforeseeable events, or the consequences of foreseeable events which the employer could not have avoided (regulation 21). To use these exemptions employers must provide workers with an equivalent period of compensatory rest where possible.
- 6.6 Under this instrument, any holiday carried forward would be subject to an additional protection to help ensure that workers are able to take the holiday when they wish. Generally, employers can control when a worker is able to take holiday by refusing requests and/or requiring workers to take holiday on particular dates (providing they give sufficient notice in accordance with regulation 15). Where leave is carried forward under the exception provided by this instrument, an additional requirement is imposed on the employer. The employer may not refuse to allow a worker to take carried forward holiday on particular dates without good reason.
- 6.7 Regulation 14 WTR stipulates that if a worker's employment terminates and on the termination date the worker has untaken holiday, the employer must pay the worker in lieu for that untaken holiday entitlement. This instrument provides for a payment in lieu for holiday carried forward under the coronavirus exception that is untaken on the termination date.

7. Policy background

What is being done and why?

- 7.1 The original policy objective of the WTR (and the Working Time Directive) in relation to holiday was to ensure that workers receive time off work to rest and recover and enjoy leisure activities. This instrument preserves this right without compromising businesses' response to the coronavirus situation.
- 7.2 Currently, legislation means that workers who do not take holiday in the leave year would be likely to lose that entitlement. The Government considers that intervention is required to ensure that businesses can respond to the coronavirus situation without unfair detriment to their workers.
- 7.3 Many businesses are face increasing demand due to the coronavirus situation. Businesses also have reduced workforces as staff fall ill, are required to self-isolate or need to provide care for dependents who are ill or self-isolating. These businesses may be forced to either deny their healthy staff holiday or ask them not to take it, or risk compromising their operations. In this situation, the exemption will ensure that businesses are able to continue operations at a crucial time, without either breaching the WTR or their staff risking losing their holiday. Staff who have carried forward their holiday into the next leave year will then be able to take the holiday once it is viable for them to do so.
- 7.4 This instrument is comes into effect immediately after being made on 26 March 2020, to ensure that workers whose leave year expires at the end of March and who have been unable to take their holiday due to coronavirus do not risk losing their

entitlement. Whilst the Government would usually follow the 21-day convention between laying an instrument and it taking effect, it is not able to do so in this case and still fully realise the urgent policy objectives behind the legislation (see paragraphs 3.1 to 3.3 above).

7.5 As the restriction against carrying forward leave under regulation 13 is written into the WTR, legislation is the only option to alter the position. The approach taken is to increase the time in which the worker can take holiday – the total amount of holiday that the worker is entitled to is unchanged.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union.

9. Consolidation

9.1 The Department for Business, Energy and Industrial Strategy does not intend to produce consolidated versions of the instrument amended.

10. Consultation outcome

10.1 Due to the need for Government to respond rapidly to the coronavirus situation, there has not been a formal consultation. The Government will work with stakeholders to promote this legislative change and to produce guidance on this measure as soon as practicable.

11. Guidance

11.1 The Government will publish guidance to raise awareness of this measure as soon as practicable after it comes into force in March 2020.

12. Impact

12.1 There is no significant impact on business, charities or voluntary bodies.

12.2 There is no significant impact on the public sector.

12.3 An Impact Assessment has not been prepared for this instrument and is not required for Better Regulation purposes as this instrument is a temporary, emergency measure in response to the coronavirus outbreak.

12.4 We expect the instrument to impact a limited number of employers and enable them to respond effectively to the challenges posed by the coronavirus outbreak. The instrument creates flexibility for these employers so that their workers can carry forward their holiday into the following two leave years where needed and does not increase the total entitlement to holiday over the whole period in which this instrument has effect. We have provided an overview of the expected impacts in 12.5 to 12.9.

12.5 We expect benefits for the limited number of businesses and public sector organisations that take-up the exemption. We expect that take-up will primarily be focused in businesses and public sector organisations that have experienced a significant increase in short-term demand as a result of the coronavirus outbreak and the resulting restrictions on public life including, but not limited to, sectors such as the manufacturing of essential goods, food retail, healthcare, and transport, and their

respective supply chains. There may be some take-up for businesses and the public sector where short-term demand has remained the same or fallen, but the services are essential to society's response to the coronavirus outbreak, such as the education sector. The scale of the benefits for the limited number of businesses and public sector organisations that take-up the exemption will depend on the extent to which this facilitates their response to the short-term impact to their normal activities caused by coronavirus.

- 12.6 We expect benefits for the limited number of workers covered by the exemption that would prefer to take their holiday in the following two leave years rather than this leave year. This includes workers that do not take their holiday this leave year as a result of the coronavirus outbreak, as they will be entitled to use these days of holiday in the following two years or receive payment in lieu if their employment is terminated. It also includes workers who would prefer to take leave in the following two years but, under Regulation 13 prior to the amendment made by this instrument, would have taken holiday in the current leave year.
- 12.7 We expect costs for the limited number of workers who would have otherwise preferred and planned to take a holiday during this leave year, which may include the cost of organising alternative arrangements to care for dependents, given the restrictions on public life as a result of the coronavirus outbreak, as well as the potential impact on health and wellbeing of a continuous period of work without holiday.
- 12.8 We expect benefits to businesses, the public sector and workers due to the improvements to entitlements to carry forward holiday in a context of significant short-term disruption due to the coronavirus outbreak and the resulting challenging conditions faced by employers.
- 12.9 We expect wider indirect benefits to society due to an increase in capacity for employers to supply essential goods and services during the coronavirus outbreak including, but not limited to, the supply and delivery of food.

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 We do not expect a disproportionate impact on small businesses based on the available evidence.

14. Monitoring & review

- 14.1 The approach to monitoring of this legislation is that a review clause is not necessary, due to the temporary nature of the legislation, discussed in the paragraph below.
- 14.2 The regulation does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015 the Minister for Small Business, Consumers and Labour Markets has made the following statement: "Having had regard to sections 28 to 32 of the Small Business, Enterprise and Employment Act 2015 and Statutory Review Guidance for Departments published under section 31 (3) of that Act, I have decided that it is not appropriate to make provision for review in this instrument. The instrument only concerns the

current coronavirus crisis, and so by its nature is time limited. As such it falls outside the scope of the Government's policy objectives regarding provision for review.

15. Contact

- 15.1 Heather Humphreys or Peter Collins at the Department for Business, Energy and Industrial Strategy Telephone: 0300 068 2989 or 020 7215 3328 or email: heather.humphreys@beis.gov.uk or peter.collins@beis.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Laura Robinson, Deputy Director of Strategy and International, Labour Market Directorate at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Paul Scully MP, Minister for Small Business, Consumers & Labour Markets at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.