

## EXPLANATORY MEMORANDUM TO

### THE EMPLOYMENT RIGHTS ACT 1996 (CORONAVIRUS, CALCULATION OF A WEEK'S PAY) (AMENDMENT) (NO.2) REGULATIONS 2021

2021 No. 487

#### 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 and the Secondary Legislation Scrutiny Committee.

#### 2. Purpose of the instrument

- 2.1 This instrument amends regulations 2, 3 and 8 of the Employment Rights Act 1996 (Coronavirus, Calculation of a Week's Pay) Regulations 2020 ("the principal regulations"). This instrument makes amendments to the principal regulations consequent on the extension of the Coronavirus Job Retention Scheme (CJRS) until 30 September 2021.
- 2.2 The principal regulations assumed, when made on 29 July 2020, that the CJRS would end on 31 October 2020 as was then envisaged. The Treasury subsequently issued further directions on 12 November 2020 and 25 January 2021, to extend the scheme until 31 March 2021 and then until 30 April 2021. Two amending instruments, the Employment Rights Act 1996 (Coronavirus, Calculation of a Week's Pay) (Amendment) Regulations 2020 and the Employment Rights Act 1996 (Coronavirus, Calculation of a Week's Pay) (Amendment) Regulations 2021, were made to extend the effect of the principal regulations accordingly.
- 2.3 On 15 April 2021, the Treasury issued the seventh direction for the CJRS, extending the scheme until 30 September 2021.
- 2.4 This instrument ensures that, for periods of furlough up to 30 September 2021, and consistently with the principal regulations as originally made, various statutory entitlements based on a week's pay and connected with termination of employment, are not reduced as a result of an employee being furloughed under the CJRS. The entitlements are:
  - redundancy pay;
  - notice pay;
  - compensation for unfair dismissal;
  - a payment resulting from a failure to provide a written statement of reasons for dismissal;
  - a payment resulting from a failure to comply with an order for reinstatement or re-engagement; and
  - remuneration for time off to look for employment or arrange training.

- 2.5 The instrument also extends the effect of the principal regulations regarding how a week's pay is to be calculated for the purpose of deciding whether an employee is taken to be on short-time for statutory purposes.
- 2.6 This instrument also makes a small technical amendment to the principal regulations regarding the definition of the scheme cap (which is referred to in relation to employees with no normal working hours, in regulation 8 of the principal regulations). This ensures the principal regulations remain aligned with the scheme (that is, the CJRS), as the seventh direction adds an alternative cap of £576.92 per employee per week, in addition to the existing cap of £2,500 per employee per month (in relation to the costs of employment in respect of which an employer may make a claim under the scheme).

### **3. Matters of special interest to Parliament**

#### *Matters of special interest to the Joint Committee on Statutory Instruments and the Secondary Legislation Scrutiny Committee*

- 3.1 This instrument comes into force on 30 April 2021, 9 days after it is laid on 21 April 2021, breaching the convention that an instrument should not come into force until a minimum of 21 calendar days after laying. The Department appreciates the importance of Parliamentary scrutiny and that Parliamentary Committees should normally have sufficient time to consider an instrument before it comes into force. It has not taken its decision on the commencement date for this instrument lightly. However, it considers that there are a number of competing considerations which, in its view and on balance, justify the commencement date in this case.
- 3.2 When the principal regulations were made, it was envisaged that the CJRS would extend until 31 October 2020. This end point was subsequently extended. Most recently, on 3 March 2021, the Government announced that the CJRS would be extended until 30 September 2021, and on 15 April 2021 the Treasury gave a further, seventh direction under section 76 of the Coronavirus Act 2020 to achieve this. Further explanation about the seventh direction and the way that it is addressed in the instrument is contained at section 7 of this Memorandum.
- 3.3 In the short time since the 3 March announcement and that direction, the Department has considered the need and means to extend the protections of the principal regulations for employees for the duration of the extended CJRS (i.e. to cover the period from 1 May to 30 September 2021).
- 3.4 The seventh direction has also made a number of technical changes to ensure that the scheme continues to operate effectively. These include extending the statutory leave disregard that exists for the average hours calculation to the variable pay averaging calculation for claim periods from 1 May 2021; some modifications (and consequential changes) to the definitions of the cap on the grants payable under the scheme; creating a provision to require new employers of transferred employees to take into account amounts earned working for their immediately prior employer (before the transfer) for claim periods from 1 May 2021; and an amendment to the publication of employer claim details.
- 3.5 The Department has considered the implications of changes to the CJRS made by the 15 April 2021 direction, as this instrument and the principal regulations rely on certain definitions or concepts within the CJRS. It identified that most of these technical changes do not affect the drafting of this instrument.

- 3.6 The Department considered making this instrument without waiting for the final text of the seventh direction made on 15 April 2021, and instead relying on earlier drafts of the direction shared within government. This might have avoided a breach of the convention on 21 calendar days. However, as this instrument and the principal regulations are so closely tied to the specific wording of the directions, this would have risked the principal regulations ceasing to operate as intended. It is likely that the Department would then have needed to urgently make a further amending instrument to remedy any flaws, once the final text of the direction was available upon its publication, and before the earlier instrument came into force on 30 April 2021. This would have been unsatisfactory from a number of perspectives, including confusion for stakeholders and that the remedial instrument would itself have involved a breach of the 21-day convention.
- 3.7 Unless this instrument is made and commenced on or before 30 April 2021, there is a gap in the protections provided for employees under the principal regulations. A number of concepts in the principal regulations (as amended prior to this instrument being made), such as the meaning of a “furloughed employee”, were defined by reference to the CJRS as previously constituted, and which was intended to end on 30 April 2021. Furthermore, regulation 3(2)(a) of the principal regulations (as amended prior to this instrument being made) provided that the regulations did not apply, in the case of an employee with normal working hours and whose remuneration does not vary with the amount of work done, where the calculation date (as defined in sections 225 and 226 of the Employment Rights Act 1996) was after 30 April 2021. Also, if the principal regulations were not amended to reflect the new alternative weekly scheme cap of £576.92, there is a risk that they would have failed to offer the intended protection for some employees with no normal working hours.
- 3.8 It is necessary to avoid these gaps in protection by bringing this instrument into force by 30 April 2021. If there were a gap of 21 days or more between laying and commencement, some employers could be incentivised to bring forward redundancies on potentially less generous terms following 30 April 2021 and prior to commencement of this instrument. This would undermine the policy intent by potentially reducing the number of employees who are protected by the instrument and by the principal regulations to the extent intended by the policy.

*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)*

- 3.9 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 England and Wales and Scotland.
- 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 Chapter 2 of Part 14 of the Employment Rights Act 1996 (the Act) deals with the calculation of “a week’s pay” for the purposes of the Act. This calculation is relevant to a number of statutory entitlements for employees, including redundancy pay and notice pay. The entitlements to which this instrument is relevant are referred to in section 2 above.

6.2 The calculation of a week’s pay under Chapter 2 of Part 14 differs for different categories of employees, including whether the employee has normal working hours (as to which, see section 234 of the Act). There are four categories of employee and the position may be summarised briefly as follows:

- In the case of employees with normal working hours whose remuneration does not vary with the amount of work done, the amount of a week’s pay is the amount payable by the employer under the contract of employment in force at the calculation date if the employee works throughout their normal working hours in a week (section 221(2) of the Act).
- In the case of employees with normal working hours whose remuneration does vary with the amount of work done (for example a piece or output worker), the amount of a week’s pay is the remuneration for the normal working hours in a week calculated (broadly speaking) at the average hourly rate of remuneration payable by the employer in respect of the twelve weeks ending with the calculation date. Where there are weeks when no remuneration was payable, those weeks are left out of account and earlier weeks are brought in to bring the total to twelve (sections 221(3) and 223 of the Act).
- In the case of employees whose normal working hours differ from week to week or over a longer period (for example a rota worker), the amount of a week’s pay is the remuneration for the average number of weekly normal working hours at the average hourly rate of remuneration payable by the employer. In each case the average is calculated (broadly speaking) in respect of the twelve weeks ending with the calculation date. Where there are weeks when no remuneration was payable, those weeks are left out of account and earlier weeks are brought in to bring the total to twelve (sections 222 and 223 of the Act).
- In the case of employees without normal working hours, the amount of a week’s pay is the average weekly remuneration in respect of the twelve weeks ending (broadly speaking) with the calculation date. Where there are weeks when no remuneration was payable, those weeks are left out of account and earlier weeks are brought in to bring the total to twelve (section 224 of the Act).

- 6.3 The calculation date differs according to which of the various statutory entitlements is under consideration (sections 225 and 226 of the Act). This instrument does not make different provision for the calculation date.
- 6.4 Each of sections 221, 222 and 224 is subject to sections 227 and 228 of the Act.
- 6.5 Section 227 provides for a maximum amount of a week's pay for certain of the statutory entitlements.
- 6.6 Section 228(4) allows the Secretary of State by regulations to provide that in prescribed cases a week's pay is to be calculated in such manner as may be so prescribed. The principal regulations were the first occasion on which regulations had been made under this power.
- 6.7 Section 236(5) of the Act provides an additional power to make incidental, supplementary, or transitional provisions.
- 6.8 The principal regulations set out how a week's pay is to be calculated in the case of an employee who had been furloughed under the CJRS, for the purposes of calculating:
- a) any statutory remuneration for time off to look for employment or arrange training;
  - b) any statutory notice payment;
  - c) any statutory sum resulting from a failure to provide a written statement of reasons for dismissal;
  - d) any statutory sum resulting from a failure to comply with an order for reinstatement or re-engagement;
  - e) any statutory compensation for unfair dismissal; and
  - f) any statutory redundancy payment,
- to which in each case they are entitled. They also set out how a week's pay is to be calculated for the purpose of deciding whether an employee is taken to be on short-time for statutory purposes.

## **7. Policy background**

### *What is being done and why?*

- 7.1 The principal regulations ensured that various statutory entitlements based on a week's pay and connected with termination of employment were not reduced as a result of an employee being furloughed under the CJRS. As explained in section 2 above, at the time the principal regulations were made, it was envisaged that the CJRS would end on 31 October 2020. When the Government extended the CJRS until 31 March and subsequently to 30 April 2021, the Employment Rights Act 1996 (Coronavirus, Calculation of a Week's Pay) (Amendment) Regulations 2020 and the Employment Rights Act 1996 (Coronavirus, Calculation of a Week's Pay) (Amendment) Regulations 2021 respectively amended the principal regulations, so that they protected furloughed employees in relation to all periods of furlough until 31 March 2021 and subsequently 30 April 2021.

- 7.2 On 15 April 2021, the Treasury issued a new direction in relation to the CJRS. This extends the period of the scheme further until 30 September 2021. Unless this instrument is made and commenced, the protection for employees provided by the principal regulations would not apply for periods of furlough between 1 May and 30 September 2021. This new direction also permitted the use of an alternative scheme cap of £576.92 per employee per week, as well as the existing cap of £2,500 per employee per month (in relation to the costs of employment in respect of which an employer may make a claim under the scheme).
- 7.3 This instrument addresses that position by amending the definition of the CJRS (in regulation 2 of the principal regulations), for “30th April” substituting “30<sup>th</sup> September”. Similarly, the instrument amends regulation 3(2)(a) (calculation of a week’s pay in relation to furloughed employees), for “30<sup>th</sup> April” substituting “30<sup>th</sup> September”. The intention of the instrument is therefore to amend the principal regulations so that they protect furloughed employees in relation to all periods of furlough until 30 September 2021.
- 7.4 This instrument also amends the effect of the principal regulations regarding the specification of the scheme cap in regulation 8(4)(b) (calculation of a week’s pay in relation to employee with no normal working hours), to include the applicable amount of £2,500 per month (or the appropriate pro-rata), or £576.92 per week. This reflects the inclusion of a weekly cap in the seventh direction, as referred to in paragraph 7.2 above.
- 7.5 For convenience, the following paragraphs of this section 7 explain the policy background to the principal regulations in substantially the same way as the explanation given in the Explanatory Memorandum to the principal regulations.
- 7.6 The statutory scheme for the calculation of a week’s pay in the Act is complex and did not anticipate a furlough scheme such as the CJRS. Were the Act to apply without the principal regulations, there is some uncertainty as to how a week’s pay should be calculated in the case of employees who have been furloughed (in full or in part) under the CJRS and whose employment is subsequently terminated. In some cases, their statutory entitlements might be reduced by having received lower remuneration while furloughed than if they had been working normally in the period leading up to termination.
- 7.7 The principal regulations do not affect any entitlements of employees who have not been furloughed under the CJRS. The broad policy objectives of the principal regulations are to provide greater certainty in the calculation of a week’s pay and to ensure that furloughed employees do not lose out (as regards certain statutory entitlements which relate to termination of employment) by having been furloughed if their employment is terminated while, or shortly after having been, furloughed under the CJRS. Those statutory entitlements all arise under the Act and are related to termination of employment (see regulation 3(1) of the principal regulations). The policy objectives are consistent with the intent of the Act, which consolidates earlier enactments conferring employment rights on employees and other workers.
- 7.8 As of 15 March 2021, 11.4 million jobs have been furloughed, with 1.3 million employers furloughing. In total, £57.7 billion has been claimed through the CJRS up to that date. Some employees who have been furloughed are at risk of having their employment terminated. There has been significant public and media interest in the CJRS, with a particular focus on redundancies. There have been calls on the

Government to provide clarity for employers and employees in respect of how to calculate statutory redundancy and notice pay for employees who have been furloughed.

- 7.9 The principal regulations make different provision for each of the four categories of employee referred to in paragraph 6.2. They are summarised as follows:
- entitlement pursuant to section 53 or 54 of the Act to be paid remuneration for a period of absence to look for employment or arrange training having been given notice of dismissal;
  - entitlement to payment pursuant to section 88 or 89 of the Act as a result of a notice to terminate employment;
  - entitlement pursuant to section 93 of the Act to be paid a sum as a result of a failure by the employer relating to the obligation to provide a written statement giving particulars of the reasons for dismissal;
  - entitlement pursuant to section 117 of the Act to be paid an additional award of compensation as a result of a failure by the employer to comply with an order for reinstatement or re-engagement;
  - entitlement to an award of compensation for unfair dismissal calculated in accordance with sections 118 to 126 of the Act;
  - entitlement to a redundancy payment under Part 11 of the Act; and
  - potential eligibility for a redundancy payment in accordance with section 148 of the Act by reason of being laid off or kept on short-time.
- 7.10 For the purposes of the entitlements summarised in paragraph 7.9 above, the principal regulations create a special scheme for the calculation of a week's pay in the case of employees who are or have been furloughed under the CJRS. The scheme's effect is temporary and will cease to apply when the relevant statutory entitlements are no longer affected by an employee being or having been furloughed (see regulation 3(2) of the principal regulations, as amended by this instrument).
- 7.11 Regulations 4(1), 5(1), 6(1) and 8(1) of the principal regulations address which of those four categories employees fall into for the purposes of the regulations. That categorisation is, as a starting point, based on the period immediately before the employee was first furloughed, in order to clarify that categorisation is not affected merely by the employee being furloughed. However, an exception is made where the employer and employee have agreed a more permanent contractual change in working hours, intended to endure beyond the employee's furlough arrangements. In that case, categorisation is tested at the calculation date (under sections 225 and 226 of the Act).
- 7.12 The first three categories of employee, all of whom have normal working hours, are addressed respectively in regulations 4, 5 and 6 of the principal regulations, which are informed respectively and in particular by sections 221(2), 221(3) and 222 of the Act. Regulation 7 is supplementary to regulations 5 and 6 and is informed by section 223 of the Act. The overall objectives of these regulations are that, for the calculation of a week's pay, the employee's furloughed hours are treated as if they were normal working hours and the remuneration related to those furloughed hours is treated as if they had been worked, ignoring any reduction which was made because the employee was furloughed. For example, if in a particular week an employer had agreed to pay a

fully furloughed employee at 80 per cent of their normal remuneration (which would be in accordance with the CJRS), it would be necessary to increase that remuneration by 25 per cent for the purpose of the calculation of a week's pay under these regulations, to bring that remuneration back to 100 per cent of the norm for that employee.

- 7.13 The fourth category of employee is addressed in regulation 8 of the principal regulations, which is informed by section 224 of the Act. Here a slightly different approach is taken (though with a similar overall objective) because there are no normal working hours which can be treated as if they had been worked. The remuneration which the employee receives in relation to any period when they were furloughed is calculated based on the reference salary which is used under the CJRS to calculate the employee's remuneration (and which, under the rules of the CJRS, is in turn informed by the employee's earlier remuneration during a specified period). For the purposes of regulation 8, the full reference salary is to be used, rather than any reduced amount (for example, 80 per cent) which the employer may have agreed to pay the employee in accordance with the CJRS. Further, if the applicable cap under the CJRS of £2,500 per month (or, following the amendments made by this instrument, £576.92 per week) limited the employee's remuneration in accordance with the CJRS, then this is disapplied for the purposes of regulation 8. The overall objective is that employee's remuneration for a particular week is, for the calculation of a week's pay, similar to the remuneration that the employee would have received if working and not furloughed.
- 7.14 In the case of each category of employee, remuneration for "actual" work is treated in the normal way.
- 7.15 Overall, therefore, the principal regulations seek to ensure, for the benefit of furloughed employees whose employment is terminated, that the calculation of statutory entitlements relating to termination is based on their normal pay, rather than their furlough pay. The Government has encouraged employers to both retain employees where possible, and to not take advantage of the CJRS to reduce, for example, redundancy payments. The principal regulations and this instrument are consistent with that encouragement. Absent the principal regulations, there is no clear obligation for employers to do so, which could well result in poorer outcomes for some employees, undermining the policy intent of the Act.

## **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 This instrument amends the principal regulations. However, the Department does not consider consolidation to be necessary at this stage.

## **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. We will work with stakeholders to promote this legislative change.



## **11. Guidance**

- 11.1 The Government published guidance in relation to the principal regulations which is still relevant to this instrument.

## **12. Impact**

- 12.1 The legislation aims to ensure relevant payments are not at risk of reducing through an employee receiving lower pay on furlough under the CJRS. Therefore, businesses will generally be facing similar costs relating to termination that they face in relation to employees who are not furloughed under the CJRS. Any cost on business, charities or voluntary bodies will be dependent on the number of redundancies (of relevant furloughed employees) that occur. While the Office for Budget Responsibility estimate that between 10% to 20% of furloughed workers could be made redundant, the exact amount is currently unknown and there is considerable uncertainty with any estimate. There will be small familiarisation costs incurred by employers, with implementation costs estimated to be in the low hundreds of millions covering the period when the CJRS was introduced to its extension until 30 September 2021. Any implementation costs will arise from businesses having to pay redundancy pay and notice pay based on full pay rather than the lower pay received while on furlough.
- 12.2 There is no impact on the public sector as the vast majority of the public sector are not expected to use the CJRS. Where an employer becomes insolvent, employees may seek to recover redundancy related payments via the Redundancy Payments Service, which will make payments in adherence to this instrument.
- 12.3 An Impact Assessment has not been prepared for this instrument as this is urgent legislation. The number of potential redundancies that may arise from employees currently furloughed is highly uncertain, with the mechanisms for costs to arise described in 12.1.

## **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. The Government published guidance in relation to the principal regulations which still also apply to this instrument. Businesses can also get support from the Advisory, Conciliation and Arbitration Service.
- 13.3 We do not expect a disproportionate impact on small businesses based on the available evidence. Employees from small and micro employers are proportionately more likely to have received funding from the CJRS than medium and large businesses. However, we do not hold evidence that would suggest that small and micro employers are more likely to pay their employees relevant redundancy related payments based on lower furlough pay, and thus would face a disproportionate cost from this legislation.

## **14. Monitoring & review**

- 14.1 The approach to monitoring of this legislation is that a review clause is not necessary, because the principal regulations only concern the treatment of a week's pay for employees who are furloughed under a time limited scheme.
- 14.2 Neither the principal regulations nor this instrument include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment

Act 2015 the Parliamentary Undersecretary of State at the Department for Business, Energy and Industrial Strategy 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 employees furloughed under the CJRS 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 Sara Wallin at the Department for Business, Energy and Industrial Strategy Telephone: 020 7215 5552 or email: [sara.wallin@beis.gov.uk](mailto:sara.wallin@beis.gov.uk) can be contacted with any queries regarding the instrument.
- 15.2 Joanna Warner/Helen Martin, Deputy Directors for Individual Rights and Migration, at the Department of Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Paul Scully, Parliamentary Under Secretary of State at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.