

DRAFT STATUTORY INSTRUMENTS TO ILLUSTRATE THE USE OF POWERS UNDER THE EUROPEAN UNION (WITHDRAWAL) BILL

BEIS Note on the draft Statutory Instruments: The Employment Rights (Amendment) (EU Exit) Regulations 2018; and The Employment Rights (Amendment) (EU Exit) (No. 2) Regulations 2018

Context and overview

The Government intends to use the powers under clause 7 of the European Union (Withdrawal) Bill ('the Bill') to make amendments to employment legislation.

The Government's approach to workers' rights is clear – the Government has firmly committed to protect workers' rights, and to seek out opportunities to enhance protections when that is the right choice for UK workers.

The Bill itself will ensure that EU-derived employment rights will continue to be available in domestic law after the UK has left the EU. However, in addition, some technical amendments to existing legislation are required to ensure the existing legal framework that provides for employment rights continues to operate effectively, for example removing EU references that are no longer appropriate. The proposed amendments are contained in two statutory instruments (SIs), which the Government has made available in draft form.

The policy aim underpinning these amendments is to ensure that the existing statutory framework continues to operate effectively in its current form when the UK withdraws from the EU. To note that the statutory framework that applies to European Works Councils (EWCs) would require a reciprocal agreement from the EU for them to continue to function in their present form within the UK. A placeholder has been included in the draft Regulations. Across the piece, the final set of Regulations may change depending on the outcome of negotiations with the EU.

These two draft SIs are being shared as *illustrative* samples to show how the powers in the Bill may be used to correct retained law relating to employment rights. They should not be taken as the final version.

Detail

These two draft SIs will rely on powers in Clause 7/Schedule 7 of the Bill. One SI also relies on powers in the Employment Agencies Act 1973. The SIs make amendments to employment legislation (for which the Secretary of State for Business, Energy and Industrial Strategy is responsible).

The Employment Rights (Amendment) (EU Exit) Regulations 2018 – subject to the negative procedure

This SI would be subject to the negative resolution procedure (which means that it becomes law when it is made - it can come into force on a later date - and remains law unless there is an objection from either House of Parliament). It makes technical

amendments to a range of legislation, including the repeal of the following existing powers to make secondary legislation:

- *Section 79(3), Employment Rights Act 1996, (concerning parental leave).*
- *Section 19(4), Employment Relations Act 1999 (concerning part-time workers)*
- *Section 45(4), Employment Act 2002, (concerning fixed-term work)*
- *Section 42(5), Employment Relations Act 2004, (concerning information and consultation)*

The powers above relate to the implementation of certain Directives, and matters arising out of the UK's obligations under those Directives. These EU Directives have already been implemented, and the relevant implementing legislation will be converted to retained EU law by the Bill. Once the UK has withdrawn from the EU these powers will have no practical application.

In addition, amendments would be made to the following pieces of legislation to remove/amend references that are no longer appropriate once the UK exits the EU:

- *Schedule 2, paragraph 10, of the Employment Rights Act 1996*

This provision currently ensures that various provisions relating to employees' representatives are treated as if they were made under section 2(2) of the European Communities Act 1972, and the amendment is designed to ensure that the legal position is clear and the validity of those provisions continues post exit.

- *Working Time Regulations 1998*

The amendment to Regulation 18 is necessary as the current references in that Regulation to certain Directives applying to workers will no longer be appropriate when the UK exits the EU. The amendment simply states that reference to a Directive be read as a reference to the EU-derived domestic legislation that was made for the purpose of implementing that Directive. In this way, the current EU derived law is retained.

- *Posted Workers (Enforcement of Employment Rights) Regulations 2016*

These Regulations include provisions relating to posted workers in the construction sector and subcontracting liability. This concerns arrangements where the posted worker's employer is the direct subcontractor of a contractor and currently the provisions refer to "member state". In addition, these Regulations provide for cross-border enforcement of financial administrative penalties and fines. For example, other Member States can request that the United Kingdom authorities enforce financial administrative penalties and fines against service providers established in the United Kingdom. The amendments reflect the fact that the UK will no longer be a Member State, and ensure that the Regulations continue to operate in the same way post exit.

- *Transnational Information and Consultation of Employees Regulations 1999*

The attached draft SI will also amend the *Transnational Information and Consultation of Employees Regulations 1999 (TICE)*. Currently these Regulations 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. They cannot stay the same as the UK will no

longer be a Member State, and therefore will no longer be a statutory part of the EWC framework. The future of EWCs may be subject to discussions with the EU and any required amendments to *TICE* will be inserted before the SI is laid in Parliament.

The Employment Rights (Amendment) (EU Exit) (No. 2) Regulations 2018 – subject to the affirmative procedure

This SI would be subject to the draft affirmative procedure in accordance with the provisions set out in a) Schedule 7 to the Bill (as this SI makes provision to amend a power to legislate); and b) section 12(5) of the Employment Agencies Act 1973. This procedure means that the instruments cannot be made unless a draft has been laid before and approved by both Houses of Parliament.

Section 38 (transfer of undertakings) of the Employment Relations Act 1999 is amended, as the current wording will no longer be appropriate once the UK has exited the EU. Section 38 currently provides a power to the Secretary of State to make regulations in circumstances other than those where EU obligations apply. These regulations can make the same or similar provision as provided for in regulations implementing certain EU obligations, which have been implemented domestically by the Transfer of Undertakings (Protection of Employment) Regulations 2006. The amendments ensure that this power continues to be available to the Secretary of State following the UK's withdrawal from the EU.

Section 13 of the Work and Families Act 2006 (concerning annual leave) is amended. Section 13 contains a range of powers enabling the Secretary of State to make regulations relating to annual leave. Subsections 2(g) and 4(b) contain specific powers which are defined by reference to EU obligations. This SI deletes these subsections because once the UK has withdrawn from the EU these powers will have no practical application.

The provisions to the Employment Relations Act 1999 and Work and Families Act 2006 described above amend powers to legislate and are, therefore, subject to the affirmative procedure.

In addition, this SI amends Regulation 27A of the Conduct of Employment Agencies and Employment Businesses Regulations 2003, to amend references to the UK as an EEA state.

We will be writing to and discussing these draft SIs with the Scottish and Welsh Governments for information, and with the Northern Ireland Executive. We will be discussing these draft SIs with stakeholders at a future date.