

EMPLOYMENT (ALLOCATION OF TIPS) BILL

Memorandum from the Department for Business, Energy and Industrial Strategy to the Delegated Powers and Regulatory Reform Committee

A. INTRODUCTION

This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee by the Department for Business, Energy and Industrial Strategy, to assist with its scrutiny of the draft Employment (Allocation of Tips) Bill (“the Bill”). The Memorandum has the consent of Dean Russell, the sponsoring member. This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation. It explains in each case why the power has been taken and explains the nature of, and the reason for, the procedure selected.

B. PURPOSE AND EFFECT OF THE BILL

The overall purpose of the Bill is to promote fairness for workers by ending the unfair retention and/or distribution of tips, gratuities and service charges (hereafter “tips”) by employers. The Bill seeks to amend the Employment Rights Act 1996 (the “ERA 1996”).

To this end, the Bill imposes a legal obligation on employers to allocate tips to workers in a fair and transparent way, where the employer either receives the tips or exercises control or significant influence over their allocation.

In terms of transparency, the Bill gives workers the right to make a request for information on how much tips, over the preceding three years, the worker has had allocated to them and how much in total the employer has received or exercised control or significant influence over. Accordingly, the employer is also obliged to keep records of this information.

In terms of enforcement, the Bill gives the worker the right to present a complaint to an employment tribunal if the employer fails to comply with their obligations under the Bill. The Bill lists remedies that are available to an employment tribunal in these circumstances.

Finally, the Bill permits the Secretary of State to issue a code of practice for the purpose of promoting fairness and transparency in the distribution of tips. The Bill renders this code admissible in employment tribunal proceedings, so that (where relevant) the tribunal will take it into account when determining a complaint.

C. DELEGATED POWERS

The Bill contains six powers to make delegated legislation, one of which is a Henry VIII power.

The Henry VIII power is included to allow the Secretary of State to align the definition in the Bill of an ‘independent tronc operator’ (a person who operates an organised pay arrangement sometimes used to distribute tips) to any future changes to similar

provisions relevant to troncs in the Social Security (Contributions) Regulations 2001¹, or other social security regulations.

Four of the delegated powers enable the Secretary of State to issue, revise and revoke a code of practice, as well as set the date on which the code comes into effect.

The remaining delegated power enables the Secretary of State to determine when stipulated sections of the Bill come into force, and to make transitional or saving provision in connection with the coming into force of any provision of the Bill.

The Government considers that all the delegated powers in the draft Bill are necessary for the provision of these rights and protections.

Subsection 27F(9) ERA 1996, inserted by clause 3 – Power to amend the definition of independent tronc (Henry VIII power)

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Affirmative resolution

Context and purpose

For a person to qualify as an “independent tronc operator” under the Bill, subsection 27F(6) requires that all payments made to workers through the tronc must, amongst other things, meet the requirements of paragraph 5(1) of Part 10 of Schedule 3 to the Social Security (Contributions) Regulations 2001 (“the Regulations”). Part 10 of Schedule 3 to the Regulations sets out the requirements that a payment of a gratuity or offering must meet in order to be disregarded in the calculation of earnings for national insurance contribution purposes.

The power in subsection 27F(8) allows the Secretary of State to amend the definition of an ‘independent tronc operator’ in consequence of the making of “social security contributions regulations” (defined as regulations making provision related to social security contributions of employers or workers – subsection 27F(9)) and to make any consequential amendments to the rest of Part 2B (the Part of the ERA 1996 where relevant parts of this Bill are planned to be inserted).

Amounts allocated by an independent tronc operator are treated as having been fairly allocated to the workers within the tronc for the purpose of the employer’s obligations under the Bill relating to the fair allocation of tips (see subsections 27F(2) and (3)).

The definition of an “independent tronc operator” in the Bill derives from the Regulations in order to aid consistency and to make it easier for employers to be satisfied that arrangements relating to distributions of tips from a tronc will both meet the conditions for disregarding earnings under the Regulations and be treated as fair for the purposes of the Bill.

Justification for taking the power

As the Bill includes a reference to the Regulations when defining an ‘independent tronc operator’, it is the Government’s view that it is necessary for the Secretary of State to have a power to amend the definition in the Bill in the event that the Regulations change in such a way that means the definition of “an independent tronc operator” in the Bill no longer works as intended. Given that this would be essentially

¹ <http://www.legislation.gov.uk/ukxi/2001/1004/contents/made>

a consequential change, for the purposes of maintaining the consistency referred to above following a change in secondary legislation, it would be disproportionate to require primary legislation to achieve this.

Justification for the procedure

As this power is a Henry VIII power, it is the Government's view that it is appropriate to use the affirmative procedure so that Parliament can ensure that it is exercised for the purpose of updating the definition of an "independent tronc operator" in line with amendments of or other changes to the Regulations. Clause 12 paragraph (2)(e)(ii) of the Bill inserts section 27F into section 236(3) of the ERA 1996, with the effect that the power to revise the definition of an independent tronc operator is subject to the affirmative resolution procedure.

Clause 9 – Code of practice about tips etc

Section 27P ERA 1996 – Issue and revision of code of practice

Power conferred on: Secretary of State

Power exercisable by: Issuing a code of practice

Parliamentary procedure: Approval by each House (subsection 27Q(2))

Context and purpose

Subsection 27P(1) confers a power on the Secretary of State to issue a code of practice for the purpose of promoting fairness and transparency in the distribution of tips. Subsection 27P(2) confers a power on the Secretary of State to revise the whole or any part of a code of practice and issue that revised code.

Justification for taking the power

The Bill requires employers to allocate tips fairly and transparently amongst workers, where the employer either receives these tips or exercises control or significant influence over them. The Government believes it would not be practical to be more specific in the Bill about fairness because there are too many different circumstances that could be considered fair or unfair to be able to provide for them expressly and in detail in the Bill. Setting out what fairness requires in the Bill would also make it difficult to adapt to changing circumstances in the future.

Justification for the procedure

Before issuing a code, including a revised code, the Secretary of State is required to consult Acas, publish a draft and consider representations on the draft (subsection 27Q(1)). The draft code is then laid before Parliament and requires the approval of each House (subsection 27Q(2)). The Government believes that an affirmative resolution procedure is appropriate to enable Parliament to properly scrutinise a document which affects the interpretation of a core statutory obligation in the Bill. Section 27T provides that the code of practice is admissible in evidence in proceedings before an employment tribunal.

A precedent for the power to issue a code of practice can be found in subsection 203(1) Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA"). A precedent for the power to revise the whole or any part of the issued code of practice can be found at subsection 203(2) TULRCA. The Government considers that this is a relevant precedent because the provisions of the Bill and their precedent provisions

in TULRCA are similar, save for the purposes for which a code of practice can be issued.

By virtue of subsection 204(2) TULRCA, any issue of a code of practice or a revision of a code is subject to a similar affirmative resolution procedure.

Subsection 27Q(3) ERA 1996 – Procedure for coming into effect of code of practice

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Negative resolution

Context and purpose

This section confers the power on the Secretary of State to make regulations to establish the day on which the code of practice or any revisions to the code of practice take effect.

Justification for taking the power

Without this power there would not be a mechanism by which the code of practice could take effect. Further, the Government is of the view that the power provides certainty for stakeholders, who, knowing what date the code of practice or revisions to it will take effect, can adequately prepare.

Justification for the procedure

As Parliament would have already approved the code of practice through affirmative procedure under subsection 27Q(2), the Government believes it would not be a good use of Parliamentary time to debate the day on which the code of practice or revisions to it are to take effect. The negative procedure would therefore be more appropriate. This power would be subject to the negative procedure by virtue of sections 236(2) of the ERA 1996, which sets out the general rule that statutory instruments made under any power conferred by the ERA 1996 are subject to the negative resolution procedure.

A precedent for this power whereby the Secretary of State can by (in that instance) order set the date that the code of practice comes into force can be found in subsection 204(3) TULRCA. Statutory instruments made pursuant to that power are also subject to the negative resolution procedure (section 204(4)).

Section 27R(1) ERA 1996 – Consequential revision of code of practice

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Not applicable to date of effect, but negative procedure for revisions

Context and purpose

This section confers the power on the Secretary of State to revise the code of practice to bring it into conformity with statutory provisions coming into force subsequent to the issue of the code of practice, by the making of consequential amendments and the omission of obsolete passages (subsection 27R(1)). It also provides for the Secretary of State to make Regulations to bring the revised code into effect.

Justification for taking the power

The code will include statutory references, including to provisions of this Bill following its enactment. The Government believes that this power is necessary so that subsequent changes to legislation, occurring after the issuing of the code of practice, can be reflected in the code to ensure that it is accurate, relevant and up-to-date.

Justification for the procedure

Subsections 27R(3) to (6) provide that the Secretary of State must lay a draft of the revised code of practice before both Houses of Parliament, and that if no resolution is made against the code in either of the two Houses within 40 days of its laying, then the Secretary of State must issue the code in the form of the draft. The draft code will then come into effect on a day that the Secretary of State appoints via Regulations.

Clause 12 paragraph (2)(e)(i) of the Bill inserts new subsection (2)(aa) into section 236 of the ERA 1996, with the effect that Regulations made under section 27R are excepted from the general rule that statutory instruments made under the ERA 1996 are subject to the negative resolution procedure. This means that the power to make Regulations under section 27R(6) is not subject to any parliamentary procedure.

The Government is of the view that this procedure is appropriate since the power is limited so that it can only be exercised to bring it into conformity with subsequent statutory provisions. The exercise of this power will not result in other substantive changes affecting the obligation to distribute tips fairly (the power at section 27P would deal with that).

A precedent for this power can be found at subsection 205(1) TULRCA, under which the Secretary of State can revise an issued code of practice in order to bring it into conformity with subsequent statutory provisions. A precedent for this procedure can be found within subsections 205(2) to (4) of TULRCA.

Section 27S ERA 1996 – Revocation of code of practice

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Affirmative resolution

Context and purpose

This section confers the power on the Secretary of State to revoke the code of practice.

Justification for taking the power

The Government believes that this power is necessary because it would enable the Secretary of State to revoke the code of practice where necessary, for example where it had proved ineffective, had led to unintended consequences, or was no longer relevant.

Justification for the procedure

The Government is of the view that the affirmative resolution procedure is appropriate to enable Parliament to properly scrutinise Regulations which affect the interpretation of a statutory obligation, through the revocation of the code.

Clause 12 paragraph (2)(e)(ii) of the Bill inserts section 27S into section 236(3) of the ERA 1996, with the effect that the power to revoke the code of practice is subject to the affirmative resolution procedure.

A precedent for this power can be found at subsection 206(1) TULRCA, under which the Secretary of State can revoke an issued code of practice. Statutory instruments made pursuant to that provision are also subject to the affirmative resolution procedure.

Clause 14 – Commencement of specified sections

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Not applicable

Context and purpose

Clause 14(2) confers the power on the Secretary of State to determine when clauses 1-12 of the Bill come into force (clauses 13-15 coming into force the day the Bill is passed), and clause 14(4) allows the Secretary of State to make transitional or saving provision in connection with the coming into force of any provision of the Bill. The latter power includes the power to make different provisions for different purposes, (clause 14(5)).

Clauses 1-12 generally detail the obligations and rights under the Bill, how those rights and obligations are to operate in practice, and the necessary amendments to other Acts of Parliament in order for the Bill to operate as anticipated. Clauses 13-15 deal with the extent of the Bill, when it is to commence and its short title.

Justification for taking the power

This power ensures that the Secretary of State can bring into force the provisions detailing the rights and obligations conferred by the Bill, or appropriate parts of the provisions, at a time when employers have had time to prepare for its commencement, including by becoming familiar with the Bill and the accompanying code of practice.

Justification for the procedure

The commencement regulations will not need to be laid before Parliament.

This is in line with the common approach for commencement regulations.

Department: Business, Energy and Industrial Strategy

Date: