

Workers (Predictable Terms and Conditions) Bill

Memorandum from the Department for Business and Trade (DBT) to the Delegated Powers and Regulatory Reform Committee

A. INTRODUCTION

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Workers (Predictable Terms and Conditions) Bill ('the Bill'), as introduced in the House of Commons on 20 June 2022. This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation. It explains why the powers have been taken and explains the nature of, and the reason for, the procedure selected.
2. The Bill contains 14 provisions concerning delegated powers. There are no Henry VIII powers.
3. The Department has considered the use of powers in the Bill as set out below and is satisfied that they are necessary and justified.

B. PURPOSE AND EFFECT OF THE BILL

4. The Workers (Predictable Terms and Conditions) Bill will introduce a new right for workers and employees to request a more predictable working pattern. The right will apply to eligible workers and employees and will operate in a similar way to the existing right to request flexible working.
5. The Bill will introduce this new right and will set out the eligibility criteria for workers, employers' duties when considering requests and the circumstances under which workers can make a complaint to an employment tribunal.

C. DELEGATED POWERS

6. The Bill contains 4 clauses and a schedule. It inserts Chapters 2 to 4 into part 8A of the Employment Rights Act 1996. Chapter 2 introduces the right for employees and other workers to request a more predictable work pattern. Chapter 3 introduces the right to request a more predictable work pattern for agency workers. Chapter 4 sets out restrictions on workers making multiple requests for more predictable work patterns, whether under the existing flexible working provisions in Chapter 1 or the new provisions in Chapters 2 and 3.
7. This memorandum deals with the provisions in the Bill for delegated legislation.

Summary of delegated powers

Reference	Power
80IA (2)(d)	Power for the Secretary of State to specify in regulations additional aspects of a worker's terms and conditions which would make up a work pattern
80IA(5)	Power for the Secretary of State to make regulations about the form of the application and when an application is to be taken to be made
80IB(3)	Power for the Secretary of State to make regulations which specify how long - before making an application - a worker must have been employed by their employer for
80IC(1)(c)(vii) and (5)	Power for the Secretary of State to make regulations specifying other grounds for rejection of request (including, under 80IC(5) a modified version of a specified ground when the worker has ceased to be employed by an employer)
80IE(4)	The Secretary of State can set the maximum number of weeks' pay for compensation in regulations
80IF(3)(d)	The Secretary of State can specify in regulations additional aspects of an agency worker's terms and conditions which would make up a work pattern
80IF(8)	The Secretary of State may make provision about the form of the application and when an application is taken to be made by an agency worker
80IG(1) and 80IG (2)(a)	Power for the Secretary of State to make regulations which specify how long, before making an application, the agency worker must have had a work contract with the temporary work agency for; and power for the Secretary of State to make regulations to specify a period during which an agency worker must have worked for a hirer for at least 12 continuous weeks, before making an application to the hirer
80IH(1)(c)(vii) and 80II(8)	The Secretary of State may specify additional grounds in regulations on which the agency worker's request may be rejected and 80II(8) allows those regulations to provide a modified version of those grounds if the agency worker's work has come to an end.
80IK(4)	The Secretary of State can set the maximum number of weeks' pay for compensation for agency workers in regulations.
Clause 4	The Secretary of State may appoint a coming into force date for the substantive provisions of the Bill.

8. The powers are drawn as narrowly as possible, and we have set out clearly below the purposes for which we anticipate the powers being used by Ministers. The powers are in line with the existing delegated powers included in Section 80F, 80G and 80I of the Employment Rights Act 1996 (flexible working requests).

Chapter 2 Employees and Other Workers

80IA(2)(d) – defining the work pattern

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative resolution

Context and purpose

1. This power allows the Secretary of State to add elements to the definition of what can make up the working pattern of a worker.

Justification for taking the power

2. Taking this power allows the Secretary of State to make changes to how 'working pattern' is currently defined in the draft bill, by adding further aspects of working conditions. This will allow changes to be made to this definition, for example in light of new evidence emerging around atypical contracts and the gig economy, or in light of evolving work practices. This also follows the precedent set by the powers included in the existing Section 80F of the Employment Rights Act 1996 (the right to request flexible working).

Justification for the procedure

3. The Department considers that the negative procedure is appropriate due to the discrete issue covered by these regulations.

80IA(5) – form of the application

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative resolution

Context and purpose

1. This power allows the Secretary of State to make provisions about the form in which an application should be made, and when an application is taken to be made.

Justification for taking the power

2. Taking this power allows the Secretary of State to set out in more detail how an application should be made under the Bill, and allows the Secretary of State to make changes to the form in which a request is made, and the date on which a request is treated as being made, for example if this is required in light of new evidence emerging as to how the right is being exercised. This also follows the precedent set by the powers included in the existing Section 80F of the Employment Rights Act 1996 (the right to request flexible working).

Justification for the procedure

3. The Department considers that the negative procedure is appropriate due to the discrete issue covered by these regulations.

80IB(3)– Power for the Secretary of State to make regulations about how long a worker must have worked for the employer

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative resolution

Context and purpose

1. This power allows the Secretary of State to specify a period of time before an application is made; the Bill then requires that a worker must have been employed by their employer at some point in the month before that period (as well as being employed at the time the application is made).

Justification for taking the power

2. Taking this power allows the Secretary of State to make changes, for example in light of new evidence emerging around atypical contracts and the gig economy, in light of evolving work practices, or if it is determined that the right should accrue at a different time.

Justification for the procedure

3. The Department considers that the negative resolution is appropriate due to the discrete issue covered by these regulations.

80IC(1)(c)(vii) – employers’ duties in relation to an application

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Affirmative procedure

Context and purpose

1. This power allows the Secretary of State to specify additional grounds on which an employer may turn down a worker’s request. This includes, under 80IC(5), a modified version of a specified ground when the worker has ceased to be employed by an employer after they have made an application.

Justification for taking the power

2. Taking this power allows the Secretary of State to make changes to the reasons which an employer may use to turn down a worker’s request. Once the right has been introduced, it may be necessary to add to these reasons to ensure that workers’ requests are granted where appropriate, but that the burden on the employer is mitigated. This follows the precedent set by the powers included in the existing Section 80G of the Employment Rights Act 1996 which allows the Secretary of State to make changes to the grounds on which a flexible working request may be rejected.

Justification for the procedure

3. The Department considers that the affirmative procedure should be used because adding to the grounds which an employer could use to turn a request down could materially affect how many requests are approved by employers and therefore limit the rights of the employee to have their request accepted. This also mirrors the power at Section 80G of the Employment Rights Act 1996 which also requires the affirmative procedure under Section 236(3).

80IE(4) – Remedies

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative resolution

Context and purpose

1. This power allows the Secretary of State to specify the maximum number of weeks' pay which can be awarded by an employment tribunal.

Justification for taking the power

2. Taking this power allows the Secretary of State to specify the maximum number of weeks' pay which can be awarded by an employment tribunal. This will ensure that the right to request a more predictable working pattern remains in line with the awards which can be made in respect of other rights. It also follows the precedent set by the powers included in the existing Section 80I of the Employment Rights Act 1996.

Justification for the procedure

3. The Department considers that the negative procedure is appropriate due to the discrete issue covered by these regulations and to allow the Secretary of State flexibility to ensure that the award remains up to date and in keeping with similar provisions such as that under Section 80I of the Employment Rights Act 1996.

Chapter 3 Agency Workers

80IF(3)(d) – defining the work pattern (agency workers)

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: negative resolution

Context and purpose

1. This power allows the Secretary of State to add elements to the definition of what can make up the working pattern of an agency worker.

Justification for taking the power

2. The justification for the power is as set out above in relation to Chapter 2 Section 80IA(2)(d), as this power would enable the Secretary of State to make changes to how 'working pattern' is currently defined in the draft bill in relation to agency workers, by adding further aspects of working conditions. This will allow changes to be made to this definition, for example in light of new evidence emerging around the workings of this right to request and changes in working practices. This also follows the precedent set by the powers included in the existing Section 80F of the Employment Rights Act 1996 (the right to request flexible working).

Justification for the procedure

3. The Department considers that the negative procedure is appropriate due to the discrete issue covered by these regulations.

80IF(8) - form of the application (agency workers)

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative resolution

Context and purpose

1. This power allows the Secretary of State to make provisions about the form in which an application should be made by an agency worker, and when an application is taken to be made.

Justification for taking the power

4. As set out in relation to clause 80IA(5) above, taking this power allows the Secretary of State to set out in more detail how an application should be made under the Bill, and allows the Secretary of State to make changes to the form in which a request is made, and the date on which a request is treated as being made, for example if this is required in light of new evidence emerging as to how the right is being exercised. This also follows the precedent set by the powers included in the existing Section 80F of the Employment Rights Act 1996 (the right to request flexible working).

Justification for the procedure

2. The Department considers that the negative procedure is appropriate due to the discrete issue covered by these regulations.

80IG(1) and (2)(a) – length of time agency worker must have been engaged (agency workers)

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative resolution

Context and purpose

1. The power in 80IG(1) allows the Secretary of State to specify a period of time ending with the date on which an application is made (with a requirement in the Bill that the agency worker must have worked for the agency in the month immediately before that period), before they are permitted to make a request.
2. The power in 80IG(2)(a) allows the Secretary of State to make regulations to specify the period during which an agency worker must have worked for a hirer for at least 12 continuous weeks, before making an application to the hirer.

Justification for taking the power

3. Taking this power allows the Secretary of State to make changes, for example in light of new evidence emerging around atypical contracts and the gig economy, or in light of evolving work practices, if it is determined that the right should accrue at a different time.

Justification for the procedure

4. The Department considers that the negative procedure is appropriate due to the discrete issue covered by these regulations.

80IH(1)(c)(vii) and 80II(8) - employers' duties in relation to an application (agency workers)

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: affirmative resolution

Context and purpose

1. This power allows the Secretary of State to specify additional grounds on which an employer may turn down an agency worker's request. 80II(8) allows those regulations to provide a modified version of those grounds if the agency worker's work has already come to an end.

Justification for taking the power

2. The justification for this power is as set out above in relation to clause 80IC(1)(c)(vii). It allows the Secretary of State to add to the reasons which an employer may rely on to turn down an agency worker's request. Once the right has been introduced, it may be necessary to make changes to these reasons to ensure that requests are granted where appropriate, but that the burden on the employer is mitigated. This follows the precedent set by the powers included in the existing Section 80G of the Employment Rights Act 1996 which allows the Secretary of State to make changes to the grounds on which a flexible working request may be rejected.

Justification for the procedure

3. The Department considers that the affirmative procedure should be used because adding to the grounds which an employer could rely on to turn a request down could materially affect how many requests are approved by employers and therefore limit the rights of the worker to have their request accepted. This also mirrors the power at Section 80G of the Employment Rights Act 1996 which also requires the affirmative procedure under Section 236(3).

80IK(4) – Remedies

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: negative resolution

Context and purpose

1. This power allows the Secretary of State to specify the maximum number of weeks' pay which can be awarded to an agency worker by an employment tribunal.

Justification for taking the power

2. As set out above in relation to clause 80IE(4), taking this power allows the Secretary of State to amend the maximum number of weeks' pay which can be awarded by an employment tribunal. This will ensure that the right to request a more predictable working pattern remains in line with the awards made in relation to other rights. It also follows the precedent set by the powers included in the existing Section 80I of the Employment Rights Act.

Justification for the procedure

3. The Department considers that the negative procedure is appropriate due to the discrete issue covered by these regulations and to allow the Secretary of State flexibility to ensure that the award remains up to date and in keeping with similar provisions such as that under Section 80I of the Employment Rights Act 1996.

Clause 4 – Coming into force

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: negative resolution

Context and purpose

1. This power allows the Secretary of State to specify a coming into force date for the substantive provisions in the Bill.

Justification for taking the power

2. This is necessary to ensure that the provisions come into force at a suitable time.

Justification for the procedure

3. The Department considers that the negative procedure is appropriate due to the discrete issue covered by these regulations.