

EMPLOYMENT RIGHTS BILL

SUPPLEMENTARY MEMORANDUM FROM THE DEPARTMENT OF BUSINESS AND TRADE TO THE DELEGATED POWERS AND REGULATORY REFORM COMMITTEE

| | |
|---|----|
| A. INTRODUCTION..... | 3 |
| B. AMENDMENTS TO DELEGATED POWERS | 3 |
| Amendments to Clause 18: Bereavement leave - Section 80EA Employment Rights Act 1996 - Bereavement leave – Power to extend Parental Bereavement Leave to include pregnancy loss before 24 weeks | 3 |
| Amendment to insert new Clause 22A: Contractual duties of confidentiality relating to harassment and discrimination – New section 202A(3) Employment Rights Act 1996: Power to specify conditions for excepted agreements | 4 |
| Amendment to insert new Clause 22A: Contractual duties of confidentiality relating to harassment and discrimination – New section 202A(4) Employment Rights Act 1996: Power to specify provisions in an excepted agreement which will be void..... | 5 |
| Amendment to insert new Clause 22A: Contractual duties of confidentiality relating to harassment and discrimination – New section 202A(5) Employment Rights Act 1996: Power to provide that references to “worker” in new section 202A have effect as if they included other specified individuals | 6 |
| Amendment to Clause 26(3): Dismissal for failing to agree to variation of contract, etc, - New section 104I(3B)(e) Employment Rights Act 1996: Power to set conditions for variations to the duration or timing of a shift for the purposes of the list of restricted variations for which a dismissal would be automatically unfair Power conferred on: Secretary of State | 7 |
| Amendments to Clause 26(3): Dismissal for failing to agree to variation of contract, etc, - New section 104I(3B)(g) Employment Rights Act 1996: Power to add to list of restricted variations for which a dismissal resulting from those variations would be automatically unfair | 8 |
| Amendments to Clause 26(3): Dismissal for failing to agree to variation of contract, etc, - New section 104I(3C) Employment Rights Act 1996: Power to exclude certain types of expenses or benefits in kind from the scope of 104I(3B)(a) | 9 |
| Amendments to Clause 26(5): Dismissal for failing to agree to variation of contract, etc, - New section 104J(5)(f) Employment Rights Act 1996: Power to specify factors to be considered when determining fairness of a dismissal for variation of a non-restricted term in a contract of employment..... | 11 |
| Amendments to Clause 26(5): Dismissal for failing to agree to variation of contract, etc, - New section 104K(6)(d) Employment Rights Act 1996: Power to specify factors to be considered when determining fairness of a dismissal for replacement of an employee with a non-employee | 12 |
| Amendments to Clause 35, schedule 4, paragraph 1, new section 148M Education Act 2002: Effect of regulations ratifying an agreement and new section 148N Education Act 2002: Effect of regulations making provision | |

| | |
|--|----|
| otherwise than in terms of agreement - amendments to prevent terms and conditions being altered to an employee's detriment and allow employers to offer more favourable terms than those provided for in regulations..... | 13 |
| Amendments to Clause 44: Effect of regulations ratifying agreement and clause 43: Power to ratify agreements and clause 45: Power of appropriate authority to deal with matters - amendments to prevent terms and conditions being altered to a worker's detriment | 14 |

A. INTRODUCTION

1. This supplementary memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Employment Rights Bill (“the Bill”). The Bill was introduced in the House of Commons on the 10 October 2024 and transferred to the House of Lords on 13 March 2025.
2. This memorandum identifies the provisions of the proposed Government amendments for Lords Report Stage 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. AMENDMENTS TO DELEGATED POWERS

Amendments to Clause 18: Bereavement leave - Section 80EA Employment Rights Act 1996 - Bereavement leave – Power to extend Parental Bereavement Leave to include pregnancy loss before 24 weeks

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Draft affirmative

Context and Purpose of the amendment

3. Clause 18 amends section 80EA of the “Employment Rights Act 1996 (“the ERA”), which currently provides for parental bereavement leave, to place a duty on the Secretary of State to make regulations entitling an employee who is bereaved to be absent from work on leave. These amendments to clause 18 extend the duty on the Secretary of State to also require the making of regulations entitling an employee who is a bereaved person in relation to a pregnancy loss of a specified kind to be absent from work on leave.
4. The amended section 80EA will require the regulations to specify who is a bereaved person for these purposes, which could be: an employee who has suffered a pregnancy loss of a specified kind; or an employee who satisfies specified conditions as to relationship with a person who has suffered a pregnancy loss, or with a child who had been expected to be born had a pregnancy loss not occurred. For these purposes, “pregnancy loss” is defined as the ending of a pregnancy after less than twenty-four weeks in any way except by a live birth, or the failure of an embryo to become implanted following a transfer carried out in the course of providing treatment services within the meaning of the Human Fertilisation and Embryology Act 1990.
5. As with the original Bill provisions at clause 18, it will also require that regulations set out how long the bereavement leave is for (which must be at least one week), as well as when it can be taken. The regulations must establish the period in which the leave must be taken, which should be at least 56 days from a date specified in the regulations. Provision can also be made for preserving the employee’s rights during and after taking the leave, to make special provision for redundancy and dismissal, and supplemental provisions.

Justification for taking the power

6. Taking powers to set out the details of the leave entitlement through secondary legislation is consistent with the existing family leave framework, including the leave entitlements provided for in Part 8 of the ERA.
7. This approach enables the Government to consult with those that may use and are impacted by the new leave entitlement before it comes into force, ensuring a wide range of views are considered in its development. It also enables the Government to update the leave entitlement over time as other legislation and society changes.
8. Whilst there is one specific delegated power to introduce bereavement leave, the clause also necessarily amends other delegated powers in the ERA to provide for them to cover the extended bereavement leave (subsections (4) and (10)), to provide protection for employees who take their leave entitlement. For example, the clause amends section 47C of the ERA so that regulations may provide that when the entitlement is in force, those who take it do not suffer detriment (i.e. unfavourable treatment) from their employer, as a result of taking bereavement leave for pregnancy loss.

Justification for the procedure

9. Regulations made under this section will be subject to the affirmative resolution procedure. The Government considers that this is appropriate due to the need to ensure consistency with the existing approach for delegated powers for introducing family leave entitlements.
10. The affirmative resolution procedure will ensure that both Houses of Parliament have the opportunity to debate the extent of the new leave entitlement as set out in the regulations.

Amendment to insert new Clause 22A: Contractual duties of confidentiality relating to harassment and discrimination – New section 202A(3) Employment Rights Act 1996: Power to specify conditions for excepted agreements

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Draft affirmative

Context and Purpose

11. New section 202A(1) will void any provision in an agreement between a worker and their employer (such as a contract of employment or settlement agreement) insofar as it seeks to prevent a worker from disclosing allegations of, or information relating to, relevant harassment or discrimination. This includes harassment or discrimination the worker has suffered, and or harassment or discrimination suffered by another worker of the employer. The purpose of this new section is to address the misuse of confidentiality agreements by employers seeking to prevent workers from speaking up about this misconduct.
12. New section 202A(3) empowers the Secretary of State to set out in regulations the specific conditions for an “excepted agreement”. New section 202A(1) will not

apply to an excepted agreement. The purpose of this power is to ensure that confidentiality clauses can still be used for legitimate purposes, for example where the worker has requested this clause in order to help provide closure following a distressing incident.

Justification for taking the power

13. Given the novelty of the provision and that there may be a range of instances where a worker wishes to enter into an excepted agreement, the Government intends to consult with employers and stakeholders before exercising this power. The consultation will help to ensure that the specific conditions for excepted agreements adequately protect workers from the misuse of confidentiality clauses while providing the flexibility for workers to choose what suits them best. It may be that the conditions for an excepted agreement need to be amended over time to reflect updates in best practice; close any loopholes where it appears these agreements are misused; and ensure the conditions operate effectively alongside the conditions in place for other agreements that workers may be entering into at the same time, such as settlement agreements.

Justification for the procedure

14. The Government considers that the affirmative procedure is appropriate because the regulations will be setting out conditions that will enable an agreement not to be subject to new section 202A(1). As section 202A(1) is set out in primary legislation it is important the Parliament has the opportunity to scrutinise the exceptions that are made to it in regulations.

Amendment to insert new Clause 22A: Contractual duties of confidentiality relating to harassment and discrimination – New section 202A(4) Employment Rights Act 1996: Power to specify provisions in an excepted agreement which will be void

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Draft affirmative

Context and Purpose

15. The context for the power is as set out in paragraphs 11 and 12 above. New section 202A(4) enables the Secretary of State to make regulations providing that a provision in an excepted agreement is still void in respect of the particular disclosures specified in the regulations. These might be disclosures to a specified type of person for a specified purpose, for example to a lawyer for the purpose of seeking legal advice or to a medical professional for treatment, or to another professional in circumstances where a duty of confidentiality arises. The purpose of this power is to ensure that even when the worker has entered into an excepted agreement, certain disclosures, such as those that enable a worker to seek support, could still be permitted.

Justification for taking the power

16. As in relation to the power at section 202A(3), given the novelty of the provision and that there may be a range of instances where a worker wishes to enter into

an excepted agreement, the Government intends to consult with employers and stakeholders before exercising this power.

17. This will help to ensure that any permitted disclosures strike the right balance between upholding the confidentiality intended by the parties, whilst still allowing the worker to make disclosures for discrete but important purposes. The power will also enable the regulations to be updated with any changes to how particular regulated professionals are to be described in legislation. Section 17(4)(a) of the Victims and Prisoners Act 2024 enables regulations to add, remove or modify the description of “permitted disclosures” and has already been exercised to make two additions to the list to ensure section 17 achieves the policy aim when commenced.

Justification for the procedure

18. The Government considers that the affirmative procedure is appropriate because the regulations will be setting out conditions that will enable an agreement not to be subject to new section 202A(1). As section 202A(1) is set out in primary legislation it is important Parliament has the opportunity to scrutinise the exceptions that are made to it in regulations. Similarly, any regulations specifying disclosures that can be made under an excepted agreement will be subject to the draft affirmative procedure. This is in line with section 17(4)(a) of the Victims and Prisoners Act 2024, which is also subject to the draft affirmative procedure.

Amendment to insert new Clause 22A: Contractual duties of confidentiality relating to harassment and discrimination – New section 202A(5) Employment Rights Act 1996: Power to provide that references to “worker” in new section 202A have effect as if they included other specified individuals

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Draft affirmative

Context and Purpose

19. New section 202A(5) empowers the Secretary of State to set out in regulations that new section 202A is to have effect in respect of specified descriptions of individuals who do not meet the definition of “worker” in section 230(3) Employment Rights Act 1996. The purpose of this power is to ensure that individuals in other types of employment relationships can also benefit from the provision made in section 202A. The regulations can also make provision about who is to be regarded as the “employer” of these individuals.

Justification for taking the power

20. The Government would like to consult on the types of individuals that could be included in any broader definition of “worker”. For example, this may include agency workers in respect of the hirer, trainees and those provided with work experience, and certain types of self-employed individuals. The power will also allow the Secretary of State to make regulations to respond to novel and unusual working arrangements.

Justification for the procedure

21. The Government considers that the affirmative procedure is appropriate because it will enable Parliament to scrutinise the different working arrangements that are effectively brought into the scope of new section 202A.

Amendment to Clause 26(3): Dismissal for failing to agree to variation of contract, etc, - New section 104I(3B)(e) Employment Rights Act 1996: Power to set conditions for variations to the duration or timing of a shift for the purposes of the list of restricted variations for which a dismissal would be automatically unfair

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Draft affirmative

Context and Purpose

22. Employers may sometimes need to consider proposing changes to employees' contracts of employment. If employees do not agree to some or all of the contractual changes proposed by the employer, the employer may dismiss employees, before either offering to re-engage them, or offering to engage other employees, in substantively the same roles, in order to effect the changes. This is referred to as "fire and rehire".
23. This clause will restrict employers' ability to use fire and rehire. It will do this by amending the law on unfair dismissal so that, where an employer dismisses an employee for failing to agree to certain changes to their employment contract ("restricted variations") or to replace or re-engage them on varied contractual terms which includes a restricted variation, those dismissals will be treated as automatically unfair unless the employer can show they fall within a narrow exception for financial difficulties. Dismissals for failing to agree an unrestricted variation are given separate protections under the clause.
24. The clause sets out that the restricted variations are reductions to pay, changes to targets related to pay, changes to pensions, changes to the number of hours required to be worked, specified changes to the duration or timing of a shift, reductions in the amount of time off to which an employee is entitled, and the inclusion of variation clauses that would allow the employer to vary any of the former restricted terms without the agreement of the employee. These variations should be protected because it is clear that these will have a significant impact on employees if they are changed without agreement. It also gives the Secretary of State the power to make regulations adding additional restricted variations.
25. Changes to the timing or duration of a shift which are specified in regulations will be a restricted variation because certain changes to shifts may have significant consequences for employees which could affect their ability to continue in the role.

Justification for taking the power

26. The clause confers a power on the Secretary of State to make regulations to specify the changes to the timing or duration of a shift which will be “restricted variations”. This is more appropriate for secondary legislation, as it may be necessary to set out detailed provision as to which descriptions of shift changes are protected. It will allow the government to react more quickly to changing business practices in the use of fire and rehire relating to shift patterns, to ensure that protections for employees are adequate. Providing for this in secondary legislation also means that the government can set appropriate conditions for this restricted term with the benefit of evidence from a wide range of stakeholders.
27. Changes to shift patterns can have a significant impact on an employee, for example they may affect the employee’s ability to meet their other commitments, or they may lead directly to significant extra costs to travel. Employers need flexibility to make certain operational decisions related to their business. The Government intends to consult before making regulations under this power to ensure that impacts on employers and employees are understood.

Justification for the procedure

28. Regulations made will be subject to the affirmative resolution procedure. The Government considers that this is appropriate due to the impact the regulations will have, in that they will specify conditions for variations to the duration or timing of a shift which will make dismissals resulting from these variations automatically unfair. The affirmative resolution procedure will ensure that both Houses of Parliament have the opportunity to debate these matters.

Amendments to Clause 26(3): Dismissal for failing to agree to variation of contract, etc, - New section 104I(3B)(g) Employment Rights Act 1996: Power to add to list of restricted variations for which a dismissal resulting from those variations would be automatically unfair

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Draft affirmative

Context and Purpose

29. This clause will restrict employers’ ability to use fire and rehire. It will do this by amending the law on unfair dismissal so that, where an employer dismisses an employee for failing to agree to certain changes to their employment contract (“restricted variations”) or where an employer dismisses an employee to replace or re-engage them on varied contractual terms which includes a restricted variation, those dismissals will be treated as automatically unfair unless the employer can show they fall within a narrow exception for financial difficulties.
30. The clause sets out that the restricted variations are reductions to pay, changes to targets related to pay, changes to pensions, changes to the number of hours required to be worked, specified changes to the duration of timing of a shift, reductions in the amount of time off to which an employee is entitled, and the inclusion of variation clauses that would allow the employer to vary any of the former restricted variations without the agreement of the employee. These variations should be protected because it is clear that these will have a

significant impact on employees if they are changed without agreement. It also gives the Secretary of State the power to make regulations adding additional restricted variations to the clause.

31. Dismissals to effect contractual variations outside of these restricted variations will not be automatically unfair, and will be subject to subsection 104J of the Employment Rights Act 1996, which is inserted by the clause. Section 104J also gives increased protections to employees dismissed by fire and rehire or fire and replace, by requiring employment tribunals to have regard to specific considerations when determining whether a dismissal was fair or unfair under ordinary unfair dismissal rules.

Justification for taking the power

32. The clause confers a power on the Secretary of State to make regulations which specify other variations as restricted variations that would attract automatic unfair dismissal protections. This will allow the Secretary of State to respond to developments in business practices and contractual entitlements, to ensure the provision is up to date with modern practices and is effective to protect employees from unscrupulous fire and rehire. This power only allows for the list of restricted variations to be added to, so this power cannot be used to remove employee protections. The Government intends to consult before making regulations under this power to ensure that impacts on employers and employees are understood.

Justification for the procedure

33. Regulations made will be subject to the affirmative resolution procedure. The Government considers that this is appropriate due to the impact the regulations will have, in that they will make dismissals to effect variations of contracts specified in those regulations automatically unfair. The affirmative resolution procedure will ensure that both Houses of Parliament have the opportunity to debate these matters.

Amendments to Clause 26(3): Dismissal for failing to agree to variation of contract, etc, - New section 104I(3C) Employment Rights Act 1996: Power to exclude certain types of expenses or benefits in kind from the scope of 104I(3B)(a)

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Draft affirmative

Context and Purpose

34. This clause will restrict employers' ability to use fire and rehire. It will do this by amending the law on unfair dismissal so that, where an employer dismisses an employee for failing to agree to certain changes to their employment contract ("restricted variations") or where an employer dismisses an employee to replace or re-engage them on varied contractual terms which includes a restricted variation, those dismissals will be treated as automatically unfair unless the employer can show they fall within a narrow exception for financial difficulties.

35. The clause sets out that the restricted variations are reductions to pay, changes to targets relating to pay, changes to pensions, changes to the number of hours required to be worked, specified changes to the duration of timing of a shift, reductions in the amount of time off to which an employee is entitled, and the inclusion of variation clauses that would allow the employer to vary any of the former restricted variations without the agreement of the employee. These variations should be protected because it is clear that these will have a significant impact on employees if they are changed without agreement. It also gives the Secretary of State the power to make regulations adding additional restricted variations to the clause.
36. Dismissals to effect contractual variations outside of these restricted variations will not be automatically unfair, and will be subject to subsection 104J of the Employment Rights Act 1996, which is inserted by the clause. Section 104J also gives increased protections to employees dismissed by fire and rehire or fire and replace, by requiring employment tribunals to have regard to specific considerations when determining whether a dismissal was fair or unfair under ordinary unfair dismissal rules.
37. Reductions to pay are protected because, as set out above, such reductions would have a significant impact on employees if they were made without the employee's agreement. However, there may be some types of expenses or benefits in kind that may need to be changed to give effect to normal operational changes or improvements within a business and which should not therefore be in scope of the restricted variation.

Justification for taking the power

38. The clause confers a power on the Secretary of State to make regulations which exclude certain expenses and benefits in kind from the scope of the restricted term of sums payable at 104I(3B)(a). This may involve detailed provision as to which expenses and benefits in kind are excluded or included and descriptions of these payments. This detail will be more appropriate for secondary legislation. The power will also allow the Government to respond to changing business practices in how benefits are provided or described. The Government intends to consult before making regulations under this power to ensure that impacts on employers and employees are understood.

Justification for the procedure

39. Regulations made will be subject to the affirmative resolution procedure. The Government considers that this is appropriate due to the impact the regulations will have, in that they could put certain aspects of a restricted variation out of scope of automatic unfair dismissal protections. The affirmative resolution procedure will ensure that both Houses of Parliament have the opportunity to debate these matters.

Amendments to Clause 26(5): Dismissal for failing to agree to variation of contract, etc, - New section 104J(5)(f) Employment Rights Act 1996: Power to specify factors to be considered when determining fairness of a dismissal for variation of a non-restricted term in a contract of employment

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Draft affirmative

Context and Purpose

40. This clause will restrict employers' ability to use fire and rehire. It will do this by amending the law on unfair dismissal so that, where an employer dismisses an employee for failing to agree to certain changes to their employment contract ("restricted variations") or to replace or re-engage them on varied contractual terms which includes a restricted variation, those dismissals will be treated as automatically unfair unless the employer can show they fall within a narrow exception for financial difficulties. Dismissals for failing to agree an unrestricted variation are given separate protections under the clause.
41. Dismissals to effect contractual variations outside of these restricted variations will not be automatically unfair, and will be subject to subsection 104J of the Employment Rights Act 1996, which is inserted by the clause. Section 104J also gives increased protections to employees dismissed by fire and rehire or fire and replace, by requiring employment tribunals to have regard to specific considerations when determining whether a dismissal was fair or unfair under ordinary unfair dismissal rules.
42. By requiring employment tribunals to have regard to specific considerations, the clause ensures that, when determining whether a dismissal is fair under ordinary unfair dismissal rules, due regard is given to certain factors listed including: the reason for making the variation; whether consultation was carried out with the employee about the variation to their contract; whether a recognised trade union or other appropriate representative was consulted; and anything offered by the employer in return for agreeing the variation.

Justification for taking the power

43. The clause confers a power on the Secretary of State to make regulations which add additional factors that must be considered when assessing whether a dismissal is fair in these circumstances. A similar power is conferred on the Secretary of State in relation to the corresponding list of considerations for tribunals in section 104I(5)(e) of the Employment Rights Act 1996, inserted by the clause.
44. Taking a power for the Secretary of State to make regulations which add additional factors which must be considered when assessing whether a dismissal is fair will provide flexibility to add further factors in response to changing employer practices in fire and rehire or following case law. The Government intends to consult before making regulations under this power.

Justification for the procedure

45. Regulations made will be subject to the affirmative resolution procedure. The Government considers that this is appropriate due to the level of detail that may be set out in the regulations and the impact this will have on the considerations of an employment tribunal in a fire and re-hire case. The affirmative resolution procedure will ensure that both Houses of Parliament have the opportunity to debate these matters.

Amendments to Clause 26(5): Dismissal for failing to agree to variation of contract, etc, - New section 104K(6)(d) Employment Rights Act 1996: Power to specify factors to be considered when determining fairness of a dismissal for replacement of an employee with a non-employee

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Draft affirmative

Context and Purpose

46. This clause inserts a new s104I into the Employment Rights Act 1996 which will restrict employers' ability to use fire and rehire. It will do this by amending the law on unfair dismissal so that, where an employer dismisses an employee for failing to agree to certain changes to their employment contract ("restricted variations") or to replace or re-engage them on varied contractual terms which includes a restricted variation, those dismissals will be treated as automatically unfair unless the employer can show they fall within a narrow exception for financial difficulties.
47. The clause also inserts a new s104K into the Employment Rights Act 1996, which provides that where an employee is dismissed to enable the employer to replace them with a non-employee to do substantially the same work, and the employee's dismissal is not due to there being a reduction in the need for that work, the dismissal will be treated as automatically unfair unless the employer can show they fall within a narrow exception for financial difficulties.
48. If an employer can demonstrate that it meets the narrow financial difficulties exception, the dismissal will not be automatically unfair, but an employment tribunal will still have to assess whether the dismissal was fair in all the circumstances. The clause provides that, when an employment tribunal is determining if the dismissal is fair or unfair, they must consider the factors which are set out within section 104K(6). The clause gives the Secretary of State the power to make regulations adding additional factors that an employment tribunal must consider.

Justification for taking the power

49. The clause confers a power on the Secretary of State to make regulations which add additional factors that must be considered by an employment tribunal when assessing whether a dismissal is fair in these circumstances. A similar power is conferred on the Secretary of state in relation to the corresponding list of considerations for tribunals in section 104I(5)(e) of the Employment Rights

Act 1996, inserted by the clause.

50. Taking a power for the Secretary of State to make regulations which add additional factors which must be considered when assessing whether a dismissal is fair will provide flexibility to add further factors in response to changing employer practices in fire and rehire or following case law. The Government intends to consult before making regulations under this power.

Justification for the procedure

51. Regulations made will be subject to the affirmative resolution procedure. The Government considers that this is appropriate due to the level of detail that may be set out in the regulations and the impact this will have on the considerations of an employment tribunal in a fire and re-hire case. The affirmative resolution procedure will ensure that both Houses of Parliament have the opportunity to debate these matters.

Amendments to Clause 35, schedule 4, paragraph 1, new section 148M Education Act 2002: Effect of regulations ratifying an agreement and new section 148N Education Act 2002: Effect of regulations making provision otherwise than in terms of agreement - amendments to prevent terms and conditions being altered to an employee's detriment and allow employers to offer more favourable terms than those provided for in regulations.

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative

Context and purpose of the amendment

52. The amendments to new sections 148M and 148N Education Act 2002 (relating to regulations made under new sections 148H(2)(a), 148J(2)(a), 148J(2)(d), 148K(2)(b) and 148K(4)(b)) have two purposes:
- a. They prevent a member of school support staff's terms and conditions of employment being altered by regulations made under new sections 148H, 148J or 148K to the employee's detriment. This means that where regulations under these clauses relate to remuneration, they will not have the effect of reducing an employee's remuneration, and where regulations relate to other terms and conditions, these will only take effect in the employee's contract where they are more favourable than the existing terms and conditions in that employee's contract.
 - b. They ensure that a member of school support staff can be employed on terms and conditions that are more favourable to them than any applicable terms and conditions that would otherwise have effect under regulations made under new sections 148H, 148J or 148K.
53. These amendments respond to calls for protection for school support staff from the imposition of less favourable pay or other terms and conditions through the School Support Staff Negotiating Body (SSSNB) process and freedom for

employers to be able to offer more favourable terms than those imposed through that process.

Justification for taking the power

54. As set out in the original delegated powers memorandum, the powers of the Secretary of State set out in new sections 148H, 148J and 148K are required to implement changes to support staff terms and conditions: (i) as and when they are agreed by the SSSNB; or (ii) in the absence of such agreement where there is an urgent need to do so. Similar powers were contained in the Apprenticeships, Skills, Children and Learning Act 2009 and the Education Act 2002. It is expected that one or other of these powers will be used on a regular basis.

55. The amendments limit the effect of regulations made under new sections 148H, 148J or 148K. These limitations provide a guarantee that school support staff will only see improvements to their pay and terms and conditions as a result of regulations made through the SSSNB process. They also ensure that school support staff employers, through collective bargaining at the local level or otherwise, can offer even better pay and terms and conditions to reward their employees and attract new recruits. These improvements will in turn help to encourage innovation and tackle the recruitment and retention crisis in relation to school support staff.

Justification for the procedure

56. As set out in the original delegated powers memorandum, regulations made using these powers will make detailed technical provision and their content will have been subject to detailed negotiation or consideration prior to being laid before Parliament. It is therefore considered appropriate that they adopt the negative procedure. The similar powers in the Apprenticeship, Skills, Children and Learning Act 2009 and Education Act 2002 were and are also subject to the negative procedure.

Amendments to Clause 44: Effect of regulations ratifying agreement and clause 43: Power to ratify agreements and clause 45: Power of appropriate authority to deal with matters - amendments to prevent terms and conditions being altered to a worker's detriment

Power conferred on: Appropriate authority

Power exercised by: Regulations made by Statutory Instrument

Parliamentary procedure: negative (clause 43), draft affirmative (clause 45)

Context and purpose of the amendment

57. The amendments to clause 44 (relating to regulations made under clause 43) and 45 have two purposes:

- a) They prevent a social care worker's terms and conditions being altered by regulations made under clause 43 or 45 to the worker's detriment. This means that where regulations under these clauses relate to remuneration, they will not have the effect of reducing a worker's remuneration, and where regulations relate to other terms and conditions, these will only take effect in the worker's

contract where they are more favourable than the existing terms and conditions in that worker's contract.

b) They ensure that a social care worker can be employed on terms and conditions that are more favourable to the worker than any applicable terms and conditions that would otherwise have effect under clause 43 or 45 regulations.

58. These amendments will mean social care workers are protected from the imposition of less favourable pay or other terms and conditions as a result of the Negotiating Body's agreements or any regulations made by the appropriate authority in the event the Body fails to reach an agreement.

Justification for taking the power

59. As set out on the original delegated powers memorandum at paragraphs 814 – 815 and 817 – 818, those powers are necessary to allow the appropriate authority to give effect to each agreement reached, and to allow it to take action where a negotiating body has failed to come to an agreement in circumstances specified in legislation. The amendments limit the effect of regulations made under clauses 43 and 45. These limitations provide a guarantee that social care workers will only see improvements to their pay and terms and conditions as a result of the fair pay agreement process established under this chapter of the Bill. They also ensure that employers, through collective bargaining at the local level or otherwise, can offer even better pay and terms and conditions to reward their workers and attract new recruits. These improvements will in turn help to tackle the recruitment and retention crisis in the social care sector.

Justification for the procedure

60. As set out in the original delegated powers memorandum at paragraphs 816 and 819, regulations made under clause 43 will be subject to the negative procedure, as any agreement being given effect to will have been the subject of detailed negotiation, while regulations made under clause 45 will be subject to the draft affirmative procedure. The amendments do not affect this position.

Department Name: Department for Business and Trade

Date: 7 July 2025