

EXPLANATORY MEMORANDUM TO
THE HEALTH AND SAFETY AT WORK ETC. ACT 1974 (CIVIL
LIABILITY) (EXCEPTIONS) REGULATIONS 2013

2013 No. 1667

1. This explanatory memorandum has been prepared by the Health and Safety Executive (HSE) on behalf of the Department of Work and Pensions and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 These regulations create exceptions for workers who are pregnant, have recently given birth or are breastfeeding (“new or expectant mothers”) from section 47(2) of the Health and Safety at Work etc. Act 1974 (“the 1974 Act”) which, as amended by section 69 of the Enterprise and Regulatory Reform Act 2013 (“the 2013 Act”), excludes the right to bring a claim for breach of statutory duty in relation to breaches of certain health and safety legislation. The exceptions created in this instrument are limited to rights derived from the Pregnant Workers Directive (92/85/EEC as amended) and the Temporary Agency Work Directive (2008/104/EC) (“the Agency Workers Directive”) and are necessary to ensure the ongoing correct transposition of those Directives.

2.2 This instrument is one of two which implement the provisions of section 69 of the 2013 Act. The other is the Enterprise and Regulatory Reform Act 2013 (Health and Safety) (Consequential Amendments) Order 2013 (SI 2013/1666).

3. Matters of special interest to the Joint Committee on Statutory Instruments

None.

4. Legislative Context

4.1 The 2013 Act received Royal Assent on 25th April 2013. Section 69 of that Act amends section 47 of the 1974 Act and is to be brought into force on 1st October 2013. Previously, section 47(2) of the 1974 Act provided a right of action for breach of a duty contained in a health and safety regulation (a regulation made under section 15 of the 1974 Act) if that breach caused damage. In addition, section 47(1)(b) provided that nothing in Part 1 of the 1974 Act affected the extent to which breach of a duty in one of the “existing statutory provisions”¹ gave rise to a right of action.

4.2 As amended section 47 provides that there is no right of action for breach of statutory duty in relation to either a health and safety regulation or one of the existing

¹ The “existing statutory provisions” are statutes listed in Schedule 1 to the 1974 Act that existed before the Act came into force (for example the Factories Act 1961) and secondary legislation made under those statutes. The effect of this was that if a right of action for breach of statutory duty existed (or had been excluded) under one of these statutes the position was not altered after the 1974 Act was enacted.

statutory provisions, except to the extent that regulations made under section 47 make provision for this. Section 47(2B)(b) provides that any such regulations can also include a provision that makes void any agreement that tries to exclude liability for a breach of the relevant duty.

4.3 This instrument makes exceptions to section 47(2), as amended, for new or expectant mothers in respect of relevant rights derived from the Pregnant Workers Directive. Article 12 of the Directive requires Member States to make provisions that enable workers who believe² they have been wronged by a failure to comply with the duties in the Directive to enforce their rights by judicial process³. The exceptions in this instrument are, therefore, necessary to ensure that, as now, a new or expectant mother continues to have the right to claim for breach of statutory duty in relation to breaches of her specific rights under the Directive, in addition to any other right of action she may have.

4.4 The Agency Workers Directive requires that the basic working and employment conditions of temporary agency workers during their assignment are at least those that would apply to a permanent worker. The Directive allows for a qualifying period before this equal treatment is applicable on the basis of an agreement between social partners at national level: in the UK the qualifying period is 12 weeks. Article 5(1)(a) requires that the rules in an undertaking relating to the protection of new or expectant mothers, as established in national legislation and other national legal provisions are complied with. The exceptions in this instrument therefore also cover provisions of the Management of Health and Safety at Work Regulations 1999 (as amended) (“the 1999 Regulations”) which relate to agency workers, to ensure that they do not suffer unfavourable treatment compared to permanent workers.

4.5 HSE is responsible for the enforcement of the rights in the above Directives which relate to health and safety. The duties which transpose relevant obligations of the Directives are contained in section 72 of the Employment Rights Act 1996 (“the 1996 Act”)⁴ and regulations 16 to 17A of the 1999 Regulations. Details are set out in the Transposition Note at Annex 1.

4.6 These regulations apply to section 72 of the 1996 Act by virtue of section 72(4) which provides that “...any provision of or made under the [1974] Act shall apply in relation to the prohibition under subsection (1) as if it were imposed in a health and safety regulation made under section 15 of that Act.”. Therefore section 47 as amended⁵ applies to the prohibition in section 72(1) of the 1996 Act as if a contravention of the prohibition were a breach of a duty in a health and safety regulation. Without the exception created by these regulations, there would be no

² The Directive states “...workers who should themselves wronged...”. However, it is clear from a comparison of the wording in this Directive with other language versions and similar wording in other Directives that this should be taken to mean “considers” or “believes” herself to be wronged.

³ The Directive provides that provision could include recourse to other competent authorities, but this is not relevant to implementation in Great Britain as there is no other competent authority to which a woman could bring her claim.

⁴ Section 72(1) provides that “An employer shall not permit an employee to who satisfies prescribed conditions to work during a compulsory maternity leave period.” This implements article 8(2) of the Directive.

⁵ By virtue of section 20(2) of the Interpretation Act 1978.

civil right of action for a breach of this prohibition once the amendments were in force.

4.7 Regulation 22 of the 1999 Regulations makes provision in relation to civil liability for breaches of duties contained in those Regulations. When first enacted, regulation 22 excluded any civil liability for breach of the duties in those Regulations.

Regulation 22 was amended in 2003 so that the exclusion only applied to claims against employers from non-employees (i.e. enabling employees to bring claims against their employers). It was amended again in 2006 to exclude third parties from bringing claims against both employers and employees for breach of duties imposed on either of them by the 1999 Regulations.

- Scrutiny history

4.8 Checks for information on the scrutiny history of the Pregnant Workers Directive have been made with the Department for Business, Innovation and Skills. We are advised that this information is unavailable

4.9 In relation to the Agency Workers Directive the then DTI submitted EM 15098/02 on 6 January 2003 on the European Commission's amended proposal for a Directive. The Commons European Scrutiny Committee gave clearance by letter on 21 May 2003 (report 22, Item no. 240661, session 02/03). Following further letters from BERR Ministers providing updates on the latest position in relation to the Directive, and European Parliament agreement on the Directive on 22 October 2008, the House of Lords Select Committee on the EU released the proposal from scrutiny on 12 December 2008.

5. Territorial Extent and Application

This instrument applies to Great Britain.

6. European Convention on Human Rights

As the instrument is subject to the negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

- *What is being done and why*

7.1 In his independent report '*Reclaiming health and safety for all: An independent review of health and safety legislation*', published in November 2011, Professor Löfstedt identified the potential unfairness that arises, in his view, where health and safety at work regulations impose a strict liability on employers, making them legally responsible to pay compensation despite having done all that was reasonable to protect their employees. Professor Löfstedt recommended that regulatory provisions which impose strict liability should be reviewed.

7.2 In its response to the report, the Government confirmed its recognition of this potential unfairness and committed to look at ways to redress the balance, in particular by preventing civil liability from attaching to a breach of such provisions.

7.3 Section 69 of the 2013 Act fulfils this commitment by amending section 47 of the 1974 Act with the effect that there will be no right to bring a claim for breach of statutory duty in relation to a breach of a duty contained in health and safety regulations or the existing statutory provisions. This approach is intended to address the potential unfairness identified by Professor Löfstedt, as in future claimants will only be able to bring claims under the common law (principally in negligence). This means that a duty holder, usually an employer, will have the opportunity to defend themselves on the basis of having taken reasonable steps to avoid, or reduce, the risk of accidents.

7.4 As explained in paragraph 4.3, the exceptions to this policy are required to ensure compliance with the Pregnant Workers Directive and the Agency Workers Directive.

• Consolidation

7.5 The instrument revokes the Management of Health and Safety at Work (Amendment) Regulations 2006 (S.I.2006/438). There are no current plans to consolidate the relevant legislation further.

8. Consultation outcome

8.1 Consultation, necessary to meet the statutory requirement to consult under the 1974 Act, was conducted from 6th to 20th June. A short consultation was considered appropriate as the exception is legally required, does not change the agreed overarching policy, and simply reinstates the current legal position to ensure continuing compliance with the Pregnant Workers Directive.

8.2 Three responses to the consultation were received, and all supported the proposal to make the exception for pregnant workers and new mothers.

9. Guidance

As the making of the exceptions maintains the current position for new and expectant mothers in respect of civil liability, no new guidance is proposed.

10. Impact

10.1 An impact assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies, and simply reinstates the current legal position.

10.2 The impact on the public sector is none.

11. Regulating small business

11.1 The legislation applies to small business.

11.2 To minimise the impact of the requirements on firms employing up to 20 people, the approach taken is to maintain the existing position in respect of civil liability for new and expectant mothers.

12. Monitoring & review

A review clause is included in the statutory instrument.

13. Contact

Sarah Mallagh at the Health and Safety Executive (tel: 0152 951 4560 or email: sarah.mallagh@hse.gsi.gov.uk) can answer any queries regarding the instrument.

Annex 1

Transposition Note

This note sets out the provisions of the 1996 Act and the 1999 Regulations that transpose relevant articles of the Pregnant Workers Directive (PWD in table 1) and the Temporary Agency Work Directive (2008/104/EC) (AWD in table 2) that are enforced through the 1974 Act, including through section 47 of that Act.

Table 1 – transposition of the Pregnant Workers Directive

Article	Objective	Implementation	Responsibility
Article 4 PWD	Risk Assessment in respect of new and expectant mothers	Reg 16(1)	Secretary of State
Article 5(1) and 5(2) PWD	Temporary adjustment of working conditions in respect of new or expectant mothers	Reg 16(2) and 16(3)	Secretary of State
Article 5(3) PWD	Granting of leave where suitable alteration of working conditions in respect of new or expectant mothers cannot be made	Reg 16(3)	Secretary of State
Article 6 and Annex II PWD	Cases in which exposure of new and expectant mothers, including agency workers may be prohibited	Reg 16 (4) and Reg 16A(3)	Secretary of State
Article 7 PWD	Certificate from registered medical practitioner excluding night work in respect of new or expectant mothers	Reg 17	Secretary of State
Article 8 (2)PWD	Requires compulsory maternity leave of at least 2 weeks before and/or after confinement	Section 72 ERA	Secretary of State
Article 12 PWD	Right to pursue claims when wronged by failure	Reg 22 and Section 72 ERA	Secretary of State

Article	Objective	Implementation	Responsibility
	to comply with Directive's obligations		

Table 2 – transposition of the Temporary Agency Workers Directive

Article 5(1) and 5(2) and Article 5(1)(a) AWD	Temporary adjustment of working conditions in respect of new or expectant mothers, including agency workers	Reg 16(2) and Reg 16A(1)	Secretary of State
Article 5(1) and Article 5(1)(a) and 5(3) AWD	Notification to temporary work agency that suitable alteration of working conditions not possible (agency workers)	Reg 16A(2)	Secretary of State
Article 5(1)(a) AWD	Cases in which exposure of new and expectant mothers may be prohibited	Reg 16A(3)	Secretary of State
Article 5(3) Council Directive 2008/104/EC AWD	Certificate from registered medical practitioner excluding night work in respect of new or expectant mothers, including agency workers	Reg 17 and Reg 17A	Secretary of State