

# The Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023: reducing the administrative burden of the Working Time Regulations

<b>Lead department</b>	Department for Business and Trade
<b>Summary of proposal</b>	The Government propose to legislate to remove the effect of the 2019 CJEU judgment that employers should 'set up an objective, reliable and accessible system' enabling the recording of working hours.
<b>Submission type</b>	Impact assessment – 20 September 2023
<b>Legislation type</b>	Secondary legislation
<b>Implementation date</b>	2023
<b>Policy stage</b>	Final
<b>RPC reference</b>	RPC-DBT-5275(2)
<b>Opinion type</b>	Formal
<b>Date of issue</b>	11 October 2023

## RPC opinion

<b>Rating<sup>1</sup></b>	<b>RPC opinion</b>
<b>Fit for purpose</b>	Overall, the Department has provided a good impact assessment (IA) for the proposal. It draws on appropriate data sources and evidence to underpin a proportionate assessment, identifying the direct costs on business sufficiently. Sensitivity analyses have been conducted to address any uncertainties in assumptions used. The IA states that a post-implementation review (PIR) will not be produced as the effect of the preferred option means that the CJEU judgment will not be implemented. The IA should, nevertheless, produce a more-detailed monitoring plan as the department intends to continue to monitor working time data, and engage with stakeholders.

<sup>1</sup> The RPC opinion rating is based only on the robustness of the EANDCB and quality of the SaMBA, as set out in the [Better Regulation Framework](#). RPC ratings are fit for purpose or not fit for purpose.

## Business impact target assessment

	Department assessment	RPC validated
<b>Classification</b>	Qualifying provision	Qualifying regulatory provision (OUT)
<b>Equivalent annual net direct cost to business (EANDCB)</b>	-£496.6 million (final IA estimate)	-£496.6 million (2019 prices, 2020 pv)
<b>Business impact target (BIT) score</b>	-£2482.9 million	-£2482.9 million
<b>Business net present value</b>	£4,274.3 million	
<b>Overall net present value</b>	£4,274.3 million	

## RPC summary

Category	Quality <sup>2</sup>	RPC comments
EANDCB	<b>Green</b>	The IA identifies and monetises key areas of impacts and correctly identifies direct impacts on business as costs avoided if a domestic court case finds that the 2019 CJEU judgment applies to all employers. The Department's counterfactual position is that a GB court case occurs mid-way through the appraisal period i.e., after five years, is a reasonable assumption to make given the uncertainty of when this will happen.
Small and micro business assessment (SaMBA)	<b>Green</b>	The IA helpfully disaggregates the estimated costs by business size. The IA identifies that there would be likely to be a disproportionate impact on SMBs if the judgment were not removed as they are likely to find compliance more burdensome and, therefore, should not be exempt from the removal.
Rationale and options	<b>Good</b>	The IA provides a clear, evidence-based rationale for removing the effect of the CJEU judgment. The IA explains that the proposed removal would provide legal clarity on record-keeping requirements and reduce the possible administrative burden on business if, and when, the judgment is brought to a domestic court. The IA could benefit from drawing on existing evidence from EU member states where possible. The IA considers two options: continuation of the <i>status quo</i> and legislating to remove the effect of the

<sup>2</sup> The RPC quality ratings are used to indicate the quality and robustness of the evidence used to support different analytical areas. The definitions of the RPC quality ratings can be accessed [here](#).

Cost-benefit analysis	<b>Good</b>	<p>2019 CJEU judgment. It explains why other options, such as exempting SMBs, are not viable.</p> <p>The IA provides a good level of quantification and monetisation, outlining clearly the data used, methodology, assumptions, and limitations. The IA is transparent about the uncertainties surrounding the assumptions and uses appropriate sensitivity analysis to test them.</p>
Wider impacts	<b>Good</b>	<p>The IA discusses, with sufficient detail, a good range of wider impacts, including competition, innovation and equalities impacts.</p>
Monitoring and evaluation plan	<b>Satisfactory</b>	<p>The IA states that a PIR will not be produced as the effect of the preferred option means that the CJEU judgment will not be implemented. The IA would still benefit from a more-detailed monitoring plan as the Department intends to continue to monitor working time data and engage with stakeholders.</p>

## Summary of proposal

The Working Time Regulations (WTR) have been in force in GB law since 1998 and, along with the EU Working Time Directive (WTD), set the minimum standards for the working environment that employers provide for their employees. In 2019, a judgment of the Court of Justice of the EU (CJEU), ruled that “*Member States must require employers to set up an objective, reliable and accessible system enabling the duration of time worked each day, by each worker, to be measured*”. While the result of this judgment was never formally brought into GB law, as a result of the European Union (Withdrawal) Act 2018, it did become part of retained EU law. Therefore, at present, it is a law in GB, but has not been communicated clearly to employers that they must comply with the precedent set by the CJEU judgment.

The IA discusses two options:

- **Option 0: do nothing.** Assumed to be a continuation of the status quo, i.e. continued uncertainty as to whether GB courts are bound by the judgment.
- **Option 1: preferred option.** The Government legislate to remove the effect of the 2019 CJEU judgment, thus clarifying to employers that they do not have to record daily working hours of their employees.

Under Option 0, the counterfactual assumes that a domestic court case occurs in five years, which results in the judgment being formally brought into GB law. Option 1 removes the risk that businesses would need to comply with the judgment.

Benefits under Option 1 are identified as costs avoided compared to the do nothing counterfactual. These include one-off transition costs: a) familiarisation costs to business to understand the implications of the judgment; b) implementation costs of

setting up new or updating record-keeping systems; and ongoing costs: c) workers submitting working time information; d) employers reviewing and validating records; and e) maintaining systems for recording hours.

The Department estimates a societal and business net present value (NPV) of £4,274.3 million for the preferred option. All costs to business stated above are identified as direct, which results in an EANDCB of -£496.6 million.

## **EANDCB**

### **Identification of impacts**

The identification of impacts covered in the IA focuses on the avoided cost to business of complying with the 2019 judgment. This is described as a cost under Option 0 (do nothing) and a benefit or avoided cost under Option 1 (remove the effect of the judgment). These avoided costs are identified as one-off familiarisation and implementation costs (i.e., setting up or updating record keeping systems), and the ongoing opportunity cost of submitting working time records, verification of the records and maintaining the record keeping systems. The Department has quantified these impacts suitably for inclusion in the EANDCB figure, drawing upon a good range of evidence-based assumptions and setting out clearly the analysis leading to the final estimates.

### **Non-monetised impacts**

The IA states that the one-off implementation costs of requiring all employers to record working hours does not include the time taken for businesses to cascade the information through their organisations (paragraph 86). The Department recognises that not monetising this impact is likely to result in an under-estimation of the one-off implementation costs avoided by removing the effect of the judgment. The IA provides a reasonable justification for not monetising this cost as there is insufficient evidence to do so. The RPC finds this approach to be proportionate.

### **Counterfactual/baseline**

The Department's counterfactual position is that a GB court case occurs mid-way through the appraisal period i.e., after five years. This is a reasonable assumption to make, given it is inherently uncertain and the lack of appropriate evidence to inform accurately when a GB court case might arise. The IA usefully sets out sensitivities on the impact on the NPV if the CJEU judgment is tested in GB courts sooner than assumed, specifically in 2023 (paragraph 118), or later than assumed, specifically 2030 (paragraph 122).

The IA assumes that existing awareness of the judgment is likely to be limited and that it is unlikely that businesses, which are aware, have made any behavioural changes as a direct result (paragraph 53). Whilst the IA states that this view is shared by stakeholders, the IA could benefit from drawing on any available evidence on trends in working time reporting since 2019 to support this assumption.

## SaMBA

The IA provides a good discussion of the likely impact on small and micro businesses from not legislating to remove the effect of the 2019 CJEU judgment. The IA identifies that a disproportionate impact on these businesses would be likely if the judgment were not removed, as they are likely to find compliance more burdensome. This is because they are currently less likely to formally record working hours, and they are also less likely to have sophisticated automated systems for recording working hours. Therefore, small and micro businesses disproportionately benefit from Option 1 and exemption and mitigation are not proposed. These assumptions are supported by evidence from multiple surveys including the YouGov business survey and the stakeholders that the Department consulted. The IA also helpfully disaggregates the estimated costs by business size, illustrating the disproportionate burden on small and micro businesses.

### *Medium-sized business exemption*

The IA also explains that complying with the 2019 CJEU judgment would place a financial burden on medium-sized businesses, especially those that do not currently have working hours reporting systems in place. These businesses would face a greater one-off transition cost, which is avoided under the preferred option.

## Rationale and options

The IA provides a clear, evidence-based, rationale for intervention. The IA explains that the objective of the proposal to remove the effect of the 2019 CJEU judgment is to provide legal clarity on record-keeping requirements and reduce the possible administrative burden on business if, and when, the judgment is brought to a domestic court. Once a case is brought to domestic courts, the IA states that there is a reasonable likelihood that the judgment will be 'read into' domestic law (paragraph 6). The IA could benefit from evidencing this assumption, drawing on legal precedent where possible.

The IA helpfully draws on survey evidence, initial consultation with labour market stakeholders and the Retained EU Employment Law consultation. The consultation found that existing awareness of the judgment is likely to be limited and even businesses that are aware of the judgment are unlikely to have made any behavioural changes as a result. The IA states that stakeholders consulted also shared the view that requiring all employers to record daily working hours would involve a disproportionate investment and that the additional administrative burden could act as an incentive for employers to shift towards treating more of their workforce as self-employed, to avoid this burden.

Overall, the IA presents a good rationale for intervention. The IA could benefit from drawing on existing evidence from EU member states where possible, to demonstrate the impact of the judgment in other countries.

## Cost-benefit analysis

### Evidence and data

The IA makes good use of the available labour force data on the current recording and reporting of working time by employers, by business size, including the type of systems used. The Department uses this, along with evidence collected during consultation, to estimate the additional cost to business in the counterfactual. The IA would benefit from discussing how far evidence from consultation supports the estimates, as well as including analysis of consultation responses.

### Modelling

Throughout the IA, the data and evidence underpinning the modelling is clearly referenced. The IA also helpfully outlines formulas used for calculating costs.

### Uncertainty, risks and assumptions

The IA includes a good consideration of risks and uncertainties. The IA is transparent about the uncertainties surrounding the assumptions and uses appropriate sensitivity analysis to test these assumptions, using reasonable high and low scenarios drawing on available evidence.

## Wider impacts

The IA includes a comprehensive assessment of wider impacts including competition, innovation, sectoral and equalities impacts. The IA is transparent about the inability to monetise the wider impacts due to high levels of uncertainty on whether they would be realised and a lack of robust evidence. In the absence of monetisation, qualitative descriptions have been provided, including an assessment of the likelihood of unintended consequences occurring.

The IA assesses whether the additional regulatory burden could cause employers to move to self-employment and flexible working business models. However, it could also have explored the extent to which there could be a shift toward the informal or gig economy as an alternative means of evading the regulatory requirements.

## Monitoring and evaluation plan

The IA states that a PIR will not be produced for this policy as the effect of the preferred option means that the CJEU judgment will not be implemented. Therefore, the actual costs of complying with the judgment will not be observed to determine if the estimated avoided costs presented in the IA were robust, meaning an economic evaluation of the policy would offer limited insight. Instead, the Department intends to continue to monitor the data on rest break entitlements and limits on working time, and engage stakeholders to understand if the proposal leads to any unintended consequences. The IA would benefit from including a more-detailed discussion on

the metrics the Department intends to monitor, the timeframes for collecting and reporting data, and plans for stakeholder engagement.

## **Regulatory Policy Committee**

For further information, please contact [regulatoryenquiries@rpc.gov.uk](mailto:regulatoryenquiries@rpc.gov.uk). Follow us on Twitter [@RPC\\_Gov\\_UK](https://twitter.com/RPC_Gov_UK), [LinkedIn](#) or consult our website [www.gov.uk/rpc](http://www.gov.uk/rpc). To keep informed and hear our views on live regulatory issues, subscribe to our [blog](#).