

**EXPLANATORY MEMORANDUM TO
THE HEALTH AND SAFETY AT WORK ETC. ACT 1974 (GENERAL DUTIES OF
SELF-EMPLOYED PERSONS) (PRESCRIBED UNDERTAKINGS)
REGULATIONS 2015**

2015 No. 1583

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

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. **Purpose of the instrument**

Section 1 of the Deregulation Act 2015 (c. 20) amended section 3(2) of the Health and Safety at Work etc. Act 1974 (c. 37) (“HSWA”) so that it shall be the duty of every self-employed person who conducts an undertaking of a prescribed description to conduct the undertaking in such a way as to ensure, so far as is reasonably practicable, that the self-employed person and other persons (not being their employees) who may be affected are not exposed to risks to their health and safety. These Regulations prescribe undertakings for the purposes of section 3(2). Those self-employed persons who conduct an activity set out in the Schedule to these Regulations or who otherwise carry out an activity that may pose a risk to the health and safety of another person (which is not either themselves or an employee of that self-employed person) will fall within scope of section 3(2).

A self-employed person who is an employer will continue to be bound by section 3(1) of HSWA (the duty of every employer to conduct their undertaking in such a way as to ensure, so far as reasonably practicable, that persons not in their employment who may be affected are not exposed to risks to their health and safety) and section 2 (general duties of employers to their employees).

A self-employed person who does not conduct an undertaking prescribed in these Regulations and who is not an employer will have no duties under HSWA in relation to themselves or other persons in how they conduct their undertaking.

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

- 3.1 The Regulations are subject to the affirmative procedure.
- 3.2 Under section 14A of the Interpretation Act 1978 (c.30) these Regulations include (at regulation 3) a requirement that the Secretary of State review these Regulations and publish a report of the conclusions every five years.

4. Legislative Context

- 4.1 Currently, section 3(2) HSWA imposes a general duty on all self-employed persons to protect themselves and others from risks to their health and safety, regardless of the type of activity they are undertaking and the risks that they are creating.
- 4.2 Following a review of health and safety legislation conducted by Professor Löfstedt, he recommended that those self-employed people whose work activities pose no potential risk to others should be exempted from health and safety law.
- 4.3 Section 1 of the Deregulation Act 2015 confers powers by an amendment to section 3(2) HSWA for the Secretary of State to make these Regulations which set out the way in which undertakings are prescribed. This prescription extends to:
- (a) a short list of high risk activities where there should clearly be no exemption from section 3(2) HSWA; and
 - (b) a “catch-all” provision to ensure that those self-employed persons who may pose a risk to others are not exempt from section 3(2) HSWA.

5. Territorial Extent and Application

- 5.1 This instrument applies to Great Britain.
- 5.2 Northern Ireland have decided, at this stage, not to seek an Legislative Consent Memorandum (LCM) for corresponding changes to their National legislation.

6. European Convention on Human Rights

6.1 The Minister for Disabled People, Justin Tomlinson MP believes that its proposal to exempt self-employed persons whose work activities pose no risk of harm to others, does not give rise to any unlawful interference with regard to ECHR rights under Article 2(1).

The low-risk nature of work undertaken by those who may fall exempt from section 3(2) ensures that HSWA remains compliant with Article 2(1).

In our view the provisions of The Health and Safety at Work etc. Act 1974 (General Duties of Self-Employed Persons) (Prescribed Undertakings) Regulations 2015 are compatible with the Convention rights.

7. Policy background

- **What is being done and why**

- 7.1 One of the key recommendations made by Professor Löfstedt in his report “Reclaiming health and safety for all: An independent review of health and safety regulation,” was to exempt from health and safety law those self-employed people whose work activities pose no potential risk of harm to others. In response to Professor Löfstedt’s recommendations the Government asked HSE to draw up proposals for changing the law “to remove health and safety burdens from the self-employed in low risk occupations, whose activities represent no risk to other people. This will bring Britain into line with other European countries, who have taken a more proportionate approach when applying health and safety law to the self-employed and will free around one million people from red tape without impacting on health and safety outcomes.”
- 7.2 Section 1 of the Deregulation Act 2015 amended section 3 of HSWA which applies to self-employed persons. The amended section 3(2) and the new sub-section (2A) of HSWA provide the basis on which activities by self-employed persons are prescribed in order for those persons to continue to be subject to the duty in section 3(2). This follows from Professor Löfstedt’s recommendations and the response received from the public consultation requiring that those self-employed persons undertaking high risk activities should not be exempt from duties under section 3(2) of HSWA.

- **Consolidation**

- 7.3 The Department currently has no plans to consolidate the legislation, as the instrument is the first such instrument.

8. Consultation outcome

- 8.1 HSE undertook a 12 - week public consultation on options to implement Professor Löfstedt’s recommendation in August 2012. After considering the responses to the public consultation, HSE made recommendations to the Secretary of State (SoS) for Work and Pensions on a preferred option, which was to exempt from health and safety law those self-employed whose work activities pose no potential risk of harm to others, with the addition of a list prescribed by the SoS comprising high hazard / high risk activities where no exemption would operate.
- 8.2 The proposed change to section 3(2) of HSWA was included in the draft Deregulation Bill at clause 1. Evidence was presented to the Pre-Legislative Scrutiny Committee that there was potential for self-employed persons to incorrectly assess whether the exemption applied to them because of the way the clause was drafted. Although no recommendation was made, the Government took note of these concerns and the clause was amended to limit the scope of the general duty under section 3(2) so that all self-employed persons would be exempt unless they conducted an “undertaking of a prescribed description.”

- 8.3 The clarity of definitions in the list of prescribed undertakings to which the self-employed would still have duties under section 3(2) HSWA was the subject of an 8- week public consultation in July 2014. Respondents to the consultation highlighted gaps, anomalies and confusion in the way the prescribed undertakings had been drafted and stated that the proposals went further than Professor Löfstedt's recommendation.
- 8.4 The Government gave careful consideration to the consultation responses and subsequently amended the vires of the clause to allow for a "catch-all" provision to be prescribed in the Regulations i.e. to ensure those self-employed persons who may pose a risk to others are not exempt from health and safety law. A shorter and simpler list of activities where there would be no exemption from section 3(2) was also prepared. In the House of Lords Third Reading debate, where the final amendments were tabled, the Government explained the full effect of these provisions to Parliament, but also gave explicit assurances that the Regulations would include the "catch-all" provision. This latter statement was made to give reassurance to Lord McKenzie of Luton who had sought to have the provision included on the face of the Bill.
- 8.5 Lord Wallace of Saltaire stated " I can provide the noble Lord, Lord McKenzie, with the assurance now that the Government intend to produce a set of regulations that will retain a duty on all self-employed persons who may pose a risk to the health and safety of others under Section 3(2) of the Act. I understand what the noble Lord wants to achieve with his amendment." Further information regarding this debate is available in Hansard.
<http://www.publications.parliament.uk/pa/ld201415/ldhansrd/text/150304-0001.htm#15030469000036>
- 8.6 An analysis of both consultations is available on the HSE website, under consultative documents CD242 and CD273.
<http://www.hse.gov.uk/consult/2014.htm>
<http://www.hse.gov.uk/consult/2012.htm>

9. Guidance

- 9.1 HSE's website will be updated to reflect the change, which will include a new self-employed section on our website, sign-posted from the home page. The guidance will provide the self-employed with information on factors to take into account when making the judgement about whether or not their work activities may pose a risk to the health and safety of others. The guidance will be available 12 weeks prior to the change coming into effect.

10. Impact

- 10.1 The impact on business and civil society is to remove the requirements of health and safety law on those self-employed whose work activities pose no risk of harm to others. In the first year, there would be an estimated one-off familiarisation costs of £3.4 million to those self-employed who would spend time understanding the change to the Act and deciding what actions to take as a result.

- 10.2 There will also be on-going cost savings to the self-employed of around £930 thousand per year, arising because those who are exempt and would otherwise have spent time keeping up-to-date with their health and safety duties will no longer be required to do so.
- 10.3 This results in net savings to the self-employed of £4.7 million over the 10 year appraisal period, discounted at 3.5% per annum. This is equivalent to Equivalent Annual Net Costs to Business (expressed in 2009 prices) of -£0.41 million (i.e. savings), based on the methodology for described in the Better Regulation Framework Manual.¹
- 10.4 The impact on the public sector is minimal as the regulations do not change current enforcement responsibilities for those self-employed who may pose harm to the health and safety of other persons.
- 10.5 An Impact Assessment is attached to this memorandum and will be published alongside the Explanatory Memorandum on www.legislation.gov.uk.

11. Regulating small business

- 11.1 The legislation applies to self-employed persons and small businesses.
- 11.2 To minimise the impact of the requirements on small business, HSE will produce clear guidance for the self-employed to explain the change.
- 11.3 As a “fast track” measure, a Small and Medium Business Assessment has not been undertaken, as per Section 1.6.4 of the Better Regulation Framework Manual (March 2015).
- 11.4 The change to Section 3(2) has been subject to public consultation and SBTAf and other trade associations representing small businesses have been consulted.

12. Monitoring & review

- 12.1 Regulation 3 requires the Secretary of State to review the operation and effect of these Regulations and publish a report within 5 years after they come into force and within every five years after that. Following a review, it will fall to the Secretary of State to consider whether the Regulations should remain as they are, or be revoked or amended.

13. Contact

Sarah Wadham at the Health and Safety Executive (Tel: 0151 951 3005 or email: sarah.wadham@hse.gsi.gov.uk) can answer any queries regarding the instrument.

¹ See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/421078/bis-13-1038-Better-regulation-framework-manual.pdf