



Department
for Business
Innovation & Skills

Zero Hours Employment Contracts

**Government Response to the
'Banning Exclusivity Clauses:
Tackling Avoidance'
Consultation**

MARCH 2015

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Foreword from the Secretary of State

The Government is committed to maintaining a labour market that is flexible, effective and fair for both business and individuals. Our policy is to give employers the confidence to hire and create new jobs whilst also providing a framework that protects individuals in finding work that suits them and their circumstances.

The work Government has undertaken since 2013 has shown that the majority of zero hours contracts have been used responsibly in a range of sectors for many years. Nevertheless, it was clear that on occasion abuse does take place.

Following a full public consultation on the key concern of exclusivity in zero hours contracts, we are taking action to ban such terms in contracts that do not guarantee any hours via the Small Business, Enterprise and Employment Bill. This means people will be free to look for work elsewhere and boost their income if they so wish.

But it is clear that there is potential to side step the exclusivity ban and we have asked you to consider this carefully. I am grateful for those who have responded to the consultation on the order making power in the Bill, and this document represents the Government's response, setting out the outcomes and the next steps.

VINCE CABLE MP

1. Introduction

Background

1. The Government's overarching aim is to achieve a labour market that is flexible, effective and fair. During the summer of 2013, Government conducted an informal information gathering exercise in response to concerns about abuse of this type of contract by a small number of employers.
2. As a result of this exercise, the Government launched a public consultation seeking views on the merit of banning exclusivity clauses in zero hours contracts, as this was the key concern raised. This resulted in a provision in the Small Business, Enterprise and Employment Bill that will ban the use of exclusivity terms in zero hours contracts. That Bill is currently undergoing scrutiny in Parliament.
3. The order making power in relation to banning exclusivity clauses in zero hours contracts in the Bill, allows for regulations to deal with avoidance of the exclusivity ban, widen the scope of who should be protected by the exclusivity ban, and provide routes of redress for the individual.
4. A consultation was undertaken on the order making power from 25 August to 3 November 2014. This document sets out a summary of the consultation responses and outlines the next steps.

Consultation Proposals

5. The 'Banning Exclusivity Clauses: Tackling Avoidance' consultation, sought views on the order making power in the zero hours provision in the Small Business, Enterprise and Employment Bill, specifically on:
 - The likelihood of employers avoiding a ban on exclusivity clauses and how that might be achieved;
 - Whether the Government should do more to deal with potential avoidance, how that might be best achieved, and whether to do this alongside the ban or wait for evidence of whether such avoidance is taking place;
 - How potential avoidance could be dealt with;
 - Whether there should be consequences for an employer if they circumvent a ban on exclusivity clauses and, if so, what those consequences should be; and,
 - Whether there are any potentially negative or unintended consequences as a result of the wording of the legislation.

2. Summary of Responses

Numbers of Responses Submitted and by Whom

6. A total of 74 responses were submitted in answer to the questions put forward in the consultation.
7. Responses were submitted from individuals (27%); large, medium, small and micro businesses (11%, 0%, 3%, and 4% respectively); trade union or staff associations (22%); local government (3%); and business representative organisation/trade bodies (6%).

Note – with reference to the percentages - not every respondent answered every question as part of their consultation response, and in some cases individuals ticked more than one answer. Therefore, some figures do not add up to 100%.

Responses to the Questions

8. In your opinion, how likely or unlikely is it that employers would seek to avoid a ban on exclusivity clauses in zero hours contracts?
 - Very likely – 46%
 - Likely – 37%
 - Not likely – 14%
 - Not sure - 3%
9. If you answered ‘very likely’ or ‘likely’ to the question above, how do you think employers would avoid a ban on exclusivity clauses?
 - Offering a minimal number of guaranteed hours, for instance 1 hour a week? – 75%
 - Restricting the work opportunities of the individual because they have not made themselves available in the past or have taken on an additional job – 66%
 - Don’t know – 3%
 - Other - 22%

Where respondents have ticked ‘other’ they have not indicated what that might be.

10. Should the Government seek to do more to deal with potential avoidance by employers of a ban on exclusivity clauses?
 - Yes – 90%

- No – 2%
- Not sure – 8%

11. If you answered 'yes' to the above question, should the Government seek to do more now, or should it wait to see if there is evidence of employers avoiding the ban in practice to see whether further action is needed?

- Do more now – 74%
- Wait to see if it is necessary – 19%
- Not sure – 3%

12. If you answered yes to 'should the Government do more to deal with potential avoidance by employers of a ban on exclusivity clauses?', what would be the best way for Government to deal a potential avoidance of a ban on exclusivity clauses?

- A non-statutory code of practice, sharing best practice - 26%
- Through legislation - 81%
- Other -21%

Where respondents have ticked 'other' they have not indicated what that might be.

13. One way for employers to get around the ban on exclusivity clauses would be to provide employees with a contract for only a small number of guaranteed hours. The order making power allows the Government to address this by stipulating other parameters. If the Government were to use this power, which of the following do you think would be most effective with dealing with this kind of avoidance?

- Setting an hours threshold, for instance, banning exclusivity clauses where less than a certain number of hours are guaranteed - 81%
- Setting an income threshold, for instance, banning exclusivity clauses where less than a certain level of earnings is guaranteed - 42%
- Setting a pay threshold, for instance, banning exclusivity clauses where less than a certain hourly rate is guaranteed - 35%

14. Stipulating other parameters in this way would mean banning exclusivity clauses in a wider group of contracts, not just zero hours contracts. Would this create inflexibilities for employers or discourage them from creating jobs?

- Yes - 10%
- No - 74%
- Not sure - 16%

15. Employers who use zero hours and other flexible hours contracts can choose which individuals they offer work to (as long as this does not constitute discrimination). Therefore, employers could get round the ban by providing no work (or fewer opportunities), simply because an individual chooses to work for other employers. Should there be consequences for employers who restrict work opportunities to individuals simply because they have taken work elsewhere?

- Yes - 87%
- No - 10%
- Not sure – 3%

16. If you answered yes to the above question, what should these sanctions be?

- Criminal penalties, which might include a fine or other criminal penalty - 34%
- Civil penalties, which would not incur a criminal record - 42%
- Redress to Employment Tribunals, allowing individuals to make a complaint regarding detrimental treatment - 71%
- Not sure - 0%

17. The Government is legislating to render the use of exclusivity clauses unenforceable in zero hours contracts. This is covered in Section 27A of the relevant Clause in the Small Business, Enterprise and Employment Bill. Are there any negative consequences as a result of the wording used?

- Yes - 33%

- No - 33%
- Not sure - 33%

18. If you answered yes to the above question, are the negative consequences for the employer or the individual?

- Employer - 5%
- Individual - 16%
- Both - 16%

Detail of Comments Submitted to the Consultation

Detriment

19. CBI considered that defining 'detriment' would pose a significant challenge, however, others thought that it was achievable.
20. Union responses, including those from Unite, UNISON, USDAW, NUT, CWU, and UCU, have stated that legislation should include a right for all 'workers' not to suffer detriment if they turn down an offer of work beyond their contracted hours. They set out that detriment should be specifically defined to include circumstances where an employer refuses or fails to offer workers future employment. They shared the view that it should be automatically unfair for an employer to dismiss a 'worker' for refusing or failing to be available for work beyond their contracted hours, and those who are dismissed in such circumstances should be treated as having been automatically unfairly dismissed.
21. Lewis Silkin has suggested unlawful detriment claims and civil action as appropriate, and do not believe creating a criminal offence for avoidance would be appropriate or proportionate. Their reasoning is that the employment arena has very few criminal offences and this is not of a similar order to those that do exist (such as serious health and safety offences).
22. ELA also have suggested that avoidance could be dealt with by providing a right to zero hours workers not to be subjected to any detriment for accepting work from another employer whilst engaged on a zero hours contract. They consider the drafting of the Clause as absolute – there is no exception for where exclusivity is justified. Accordingly there could be no defence of objective justification for any detriment – once proved, liability would follow.

Redress

23. The consensus view was that redress to an Employment Tribunal was appropriate. Acas stated that the availability of redress to an Employment Tribunal, allowing individuals to make a complaint regarding detrimental treatment, would provide a level of reassurance to affected individuals.
24. The view of the Unions was that individuals should be entitled to complain to an Employment Tribunal, and, that enforcement agencies, including the HMRC NMW Enforcement Team, the Employment Agencies Standards Inspectorate, and the Gangmasters Licensing Authority should also be responsible for enforcing the new rules.
25. ELA shared the view of the Unions that focusing Government efforts on enforcement of rights, for example, the minimum wage and targeting particular sectors prone to bad practices, could help tackle intentional avoidance. They noted that no inspectorate was currently proposed in respect of zero hours contracts, but – if this function were to be given, for example, to HMRC as with the NMW, that could provide an additional deterrent although the sanctions available to the inspecting agency would need to be addressed.
26. Thompsons Solicitors also recommended bringing non-compliance in line with NMW legislation through introducing a penalty fee for all employers caught avoiding the ban.

Consequences for employers, financial penalties and compensation

27. There was broad agreement on ensuring consequences for employers who side stepped the exclusivity ban were put in place. For example, Lewis Silkin set out a case for employers who restrict work opportunities for individuals on zero hour contracts. Acas felt that introducing compensation for the individual would be an effective way to provide individuals with a sense of protection and reassurance alongside that of being able to make a complaint to an Employment Tribunal.
28. On the same lines, the Business Services Association suggested that ‘tough’ consequences for employers found to be avoiding the ban would act as a significant deterrent for less scrupulous employers. In their view, this would be preferable to introducing new regulatory burdens on employers and could be coupled with model clauses for employers to use in contracts to ensure they are not in breach of the ban unintentionally. This could be useful in areas including conflict of interest and confidentiality matters; routes of redress; availability to work or undertake training and mutuality of obligation; and determination, and implications, of ‘employee’ or ‘worker’.
29. Unions suggest a financial penalty should be paid to the individual affected, rather than to the state. In addition, workers should be entitled to compensation, subject to a minimum payment of three weeks’ pay at a full time equivalent.
30. CIPD also suggest a financial penalty for employers who avoid the ban. Their reasoning is that for an individual to bring a claim before an employment tribunal to remove an exclusivity clause, it would in many cases not be worth their while, since

there is no guarantee that the relationship will be a durable one. It would often be difficult for the individual to prove that the employer was seeking to enforce an exclusivity clause, rather than failing to offer work for reasons related either to his business or the worker's availability or conduct. As a result, CIPDs view is that neither criminal sanctions nor reliance on Employment Tribunal claims would be likely to be particularly effective.

31. ELA believe penalties should be meaningful. They suggest compensation on proof of loss, or a fixed sum similar to breach of the right to representation at disciplinary hearings. They suggest that criminal penalties, whilst stronger in nature (and so having a greater deterrence to avoidance), require different standards of proof which may be difficult to meet where an employer's intention is central to the issue to be decided, often requiring inferences to be drawn from the surrounding facts.

Setting other parameters alongside contracts that do not guarantee work

32. The responses from Unions broadly support the introduction of thresholds for income and pay, but suggest they must be high enough so that those who are affected are not concerned. ELA consider that setting a pay rate threshold would be most effective. This would address the perceived unfairness caused by exclusivity clauses in preventing lower paid workers earning a living wage and would act as a strong indicator that exclusivity clauses in contracts for lower paid workers are considered inappropriate and unnecessary.
33. On the contrary, Lewis Silkin do not believe that setting parameters based on hours, income or pay rate thresholds will be effective in addressing avoidance of an exclusivity ban.
34. There was a general consensus that awareness and guidance were an essential tool for the legislation to work. ELA believe that ensuring employers and workers are aware of employment rights, through the better availability of information and good practice guidance could help address inadvertent avoidance.
35. Weightmans LLP stated there was significant support for a non-statutory Code of Practice. Better education and guidance regarding the fair and proper use of zero hours contracts are important tools to support any ban on exclusivity clauses and seen as essential
36. Citizens Advice Scotland (CAS) provided examples of bad practice that clearly show better awareness is needed for not only the employer, but the individual. As acknowledged by CAS, the Government's recently announced wide-ranging employment status review will go some way to clarify the situation.

3. Next Steps and Action Underway

The Small Business, Enterprise and Employment Bill

37. The Small Business, Enterprise and Employment Bill (the Bill) is currently undergoing scrutiny by Parliament and includes the measure to ban exclusivity terms in zero hours contracts. The relevant Clause (currently numbered 151, but also 145 and 139 in previous versions of the Bill), inserts a new section into the Employment Rights Act 1996 rendering exclusivity clauses in zero hours contracts unenforceable.

38. More information on the Clause itself and the progress of the Bill can be found at: <http://services.parliament.uk/bills/2014-15/smallbusinessenterpriseandemployment.html>

Next steps for the order making power

39. After considering the responses to the consultation, the Government has decided that the following action is most appropriate:

- a) Draft Regulations to tackle avoidance of the exclusivity ban for zero hours contracts, setting out the Government's proposals, will be considered during the passage of the Bill to assist in Parliamentary scrutiny.
- b) These draft Regulations will include the right for zero hours workers to not suffer detriment on the grounds that the worker has done work or performed services under another contract or arrangement. The zero hours worker will be able to make a complaint to an Employment Tribunal if they consider they have suffered such a detriment.
- c) If the individual's complaint is upheld by an Employment Tribunal, they may receive compensation as determined by the Tribunal. Employers could also be subject to civil penalties under the Employment Tribunals Act 1996 in circumstances where the worker's rights have been breached and there are aggravating features.
- d) The draft Regulations will also extend the prohibition on exclusivity clauses beyond zero hours contracts to deal with potential avoidance and ensure a fair deal for the employer and individual. The prohibition will extend to all contracts of employment or worker's contracts under which the individual is not guaranteed a certain level of weekly income. There will be an exception to this if the rate of pay for each hour worked under the contract is at least £20.
- e) The right not to suffer detriment on the grounds that the worker has done work or performed services under another contract or arrangement will also apply to those workers earning below the income threshold as described in paragraph 39(d) above.

40. The consultation responses overwhelmingly supported tackling avoidance of the exclusivity ban via secondary legislation, and that this was necessary now rather than waiting to see what happened once the ban came into force. Respondents made it clear that avoidance would be relatively simple, which in turn means the provision needed strengthening through secondary legislation.
41. The route of redress for an individual via an Employment Tribunal was supported by the majority. This would bring redress for this measure in line with similar employment legislation, and would ensure individuals have a way of dealing with a complaint if they are treated unfairly. We also believe there is merit in enabling Employment Tribunals to issue financial (civil) penalties for employers, so that a deterrent exists for those employers who might consider avoiding the exclusivity ban. There is existing provision in the Employment Tribunals Act for Tribunals to award financial penalties in cases where employment rights are breached and there are aggravating features, which would apply here.
42. Extending the scope of the exclusivity ban beyond zero hours contracts is more complex. A straightforward hours threshold – although the majority view – would not necessarily achieve the desired aim. The key problem lies with setting an appropriate number of hours. We have considered a range of hours, but any number could result in unintended consequences and inadequate protection for the individual. For example, if we set the hours threshold too low, employers could guarantee that bare minimum of hours and effectively lock the individual into a job preventing them from having the choice to increase their income. Conversely, if the hours threshold is set too high, employers could lose the flexibility such contracts provide and may be put off from creating jobs.
43. Having considered a range of hours for a threshold, we believe that simply setting an arbitrary threshold in isolation would not ensure a fair deal for employers and certainly not strengthen protections for individuals.
44. Government has therefore decided it would be appropriate for both an hours and income based threshold. This approach would mean that if an employer cannot guarantee a certain weekly income, they would not be able to prevent that person from seeking additional work and income if they so wish. This level of weekly income, below which an employer could not demand exclusivity, would be set by multiplying the agreed number of hours by the adult national minimum wage (NMW) rate - currently £6.50. This would ensure the threshold stayed relevant as the NMW increased over time.
45. Discussions with stakeholders have highlighted an unintended consequence of the income-based approach set out above, that individuals earning higher hourly rates could inadvertently be captured by the exclusivity ban. For example, an individual may earn a very high hourly rate, but only wishes to commit to one or two hours of work a week. Government believes Regulations should exempt those individuals guaranteed a higher hourly rate. Current thinking suggests this should be set at £20 an hour, so exclusivity clauses will be permitted if the rate of pay for each hour worked under the contract is more than £20. These proposals ensure that the right group of people are protected: all those on zero hours contracts and those on low

incomes are protected from unfair exclusivity clauses and will be able to look for additional work to boost their income if they so wish.

46. Draft Regulations incorporating an outline of the Government's decision for the order making power are at **Annex 1**.

Information, advice and guidance, and codes of practice

47. A universal view has again emerged from this consultation - that it is necessary to improve information, advice and guidance with regard to zero hours contracts. A number of organisations have stated that codes of practice that provide clear information and advice relating to specific sectors including examples, would ensure employers understand their responsibilities.
48. Clear advice and guidance will also provide individuals with the information they need in order to make informed decisions and ensure they are aware of their rights, and empowering them to understand they cannot be prevented from seeking work elsewhere if they are unfairly prevented from doing so.
49. As we stated in the previous Government response, we will encourage business representatives and unions to develop industry-led, industry-owned, sector-specific codes of practice on the fair use of zero hours contracts as the reality of the situation is likely to be different in each sector. The Government will also review existing guidance with a view to improving the information available to individuals and employers on using these contracts.
50. In addition to this, Government has announced a review of employment status. Knowing what rights you are entitled to relies on you (and your employer) knowing what your employment status is. At present this is complicated, with a final decision only available when a case is heard in an Employment Tribunal after everything has gone wrong. The review will consider the entire employment status framework and present options to Ministers this Spring on how the landscape could be clarified, increasing transparency for employers and individuals.

4. Conclusion

51. At the highest level the key outcomes of the consultation are that:

- Government will publish draft Regulations to assist with scrutiny of the Bill in the House of Lords. These draft Regulations outline Government proposals as permitted by the order making power in the Bill to tackle avoidance.
- The draft Regulations propose that exclusivity terms in those contracts where an individual is guaranteed less than a certain level of weekly income will be unenforceable.
- Those individuals who receive a basic pay rate not below £20 for each hour worked under the contract, will be exempted from the prohibition on exclusivity terms.
- Individuals will be able to seek redress through an Employment Tribunal¹, and if their complaint is upheld may receive compensation as determined by the Tribunal, and employers could be subject to civil penalties in circumstances where there are aggravating features related to the breach of the worker's employment rights.

52. Draft Regulations incorporating an outline of the Government's decision for the order making power are set out at **Annex 1**.

53. With regard to information, advice and guidance, the Government will continue to encourage business representatives and unions to develop sectoral codes of practice on the fair use of zero hours contracts. The Government also plans to work with interested parties to review existing guidance and improve information available to individuals and employers on using these contracts. This will be taken forward once the detail of the Bill has been finalised.

54. In addition, the issues raised as part of this consultation will be considered in the review on employment status, which is currently underway, so that the concerns around zero hours contracts can be considered alongside all types of contract.

¹ The Smith Commission proposals, published on 27 November 2014, recommended that "all powers over the management and operation of all reserved tribunals (which includes administrative, judicial and legislative powers) will be devolved to the Scottish Parliament other than the Special Immigration Appeals Commission and the Proscribed Organisations Appeals Commission". This includes employment tribunals, although employment law will remain reserved. Draft clauses were published on 22 January 2015 and a Bill will be presented in the UK Parliament following the UK General Election. In the interim, We are committed to working with the Scottish Government to ensure everything is done to protect workers wherever they live.

Annex 1: Draft Regulations

DRAFT STATUTORY INSTRUMENTS

2015 No. 0000

TERMS AND CONDITIONS OF EMPLOYMENT

[The Draft Zero Hours Workers (Exclusivity Terms) Regulations 2015]

<i>Made</i>	- - - -	***
<i>Coming into force</i>	- -	***

[NOTE: These regulations are an outline of proposals for secondary legislation arising out of clause 151 of the Small Business, Enterprise and Employment Bill ('the Bill'). They have been prepared for the purpose of assisting with scrutiny of the Bill in Parliament.]

The Secretary of State, in exercise of the powers conferred by [section 27B(1), (3) and (5) of the Employment Rights Act 1996(2)], makes the following Regulations.

A draft of these Regulations was laid before Parliament in accordance with section 236(3) of the Employment Rights Act 1996 and approved by a resolution of each House of Parliament.

Citation and commencement

1.—(1) These Regulations may be cited as [the Draft Zero Hours Workers (Exclusivity Terms) Regulations 2015].

(2) These Regulations come into force on [X].

[Regulations can only be laid in Parliament after the Bill receives Royal Assent.]

Income threshold

2.—(1) Any provision of a prescribed contract which—

- (a) prohibits the worker from doing work or performing services under another contract or under any other arrangement, or
- (b) prohibits the worker from doing so without the employer's consent, is unenforceable against the worker.

[The wording in regulation 2(1) replicates the definition of an exclusivity term in new section 27A(3) of Employment Rights Act 1996 which is inserted by clause 151 of the Bill.]

(2) In this regulation, a prescribed contract means—

- (a) a contract of employment or a worker's contract which entitles the worker to be paid no more than £[X] per week in relation to the work which the employer undertakes in the contract to offer to the worker.

(a) 1996 c.18.

(3) This regulation does not apply to a prescribed contract under which the rate of pay for each hour worked under the contract is at least £[20].

Redress

3. An employer must not subject a worker working under a zero hours contract or a prescribed contract to any detriment on the grounds that the worker did work or performed services under another contract or under any other arrangement.

['Detriment' will not be defined in the legislation and will be a matter for an Employment Tribunal to consider. These detriment provisions will apply to zero hours workers i.e. those protected under new section 27A of Employment Rights Act 1996 as inserted by clause 151 of the Bill and those workers working under a prescribed contract as defined in regulation 2(2).]

Jurisdiction

4.—(1) An employment tribunal has jurisdiction to determine a complaint relating to a contravention of regulation 3.

(2) Proceedings on a complaint within regulation 3 may not be brought after the end of—

- (a) the period of 3 months starting with the date of the act to which the complaint relates, or
- (b) such other period as the employment tribunal thinks just and equitable.

[A zero hours worker or worker working under a prescribed contract who believes they have suffered detriment from their employer as a result of seeking work elsewhere can make a complaint to an Employment Tribunal. Further adjustments will be needed to take account of the Early Conciliation process on deadlines for submitting a complaint to an Employment Tribunal.]

Remedies

5.—(1) This regulation applies if an employment tribunal finds that there has been a contravention of regulation 3.

(2) The tribunal may—

- (a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate; and
- (b) order the respondent to pay compensation to the complainant.

(3) The amount of the compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances.

Name
Parliamentary Under Secretary of State for Employment Relations and Consumer Affairs

Date Department for Business, Innovation and Skills



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