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Please find attached the STUC response to the above consultation

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Scottish Trades Union Congress
Response to the Department for Business Innovation and Skills
Consultation on Implementing Employee Ownership Status

Introduction

The STUC is Scotland's trade union centre. Its purpose is to co-ordinate, develop and articulate the views and policies of the trade union movement in Scotland; reflecting the aspirations of trade unionists as workers and citizens.

The STUC represents over 632,000 working people and their families throughout Scotland. It speaks for trade union members in and out of work, in the community and in the workplace. Our affiliated organisations have interests in all sectors of the economy and our representative structures are constructed to take account of the specific views of women members, young members, Black/minority ethnic members, LGBT members, and members with a disability, as well as retired and unemployed workers.

We are concerned at the arrangements being put in place for this consultation and we feel that the consultation process does not follow the principles laid down by the current Coalition Government on how it engages with stakeholders when developing public policy. Furthermore, these principles seriously undermine the opportunity for representative organisations to seek the views of their members following the scrapping of the guidance issued by the previous Government that said in normal circumstances consultations should last for at least 12 weeks.

The principles state that engagement should begin early in policy development when policy is still under consideration and views can genuinely be taken into account. The STUC is deeply concerned that this is the first engagement with the trade union movement in Scotland and this engagement is about process and not about the policy of employee ownership.

We feel that it is wrong, in any circumstance, to carry out a 21 day consultation, especially when it concerns an issue as fundamental as the dissolution of someone's employment rights.

Furthermore, we are astonished that the Government is progressing legislation to make provision for changes to employment law to allow for greater employee ownership before the consultation process has been completed and the views of those expressing an interest and taking the time to respond can be taken into account. The actions of the Department of Business Innovation and Skills in this regard undermine the public consultation process and, we would argue, do not display a degree of openness and transparency demanded under the Coalition Government's principles for consultation.

Justin King CEO of Sainsbury's shared the view of the STUC that increasing employee ownership, and said on these issues, in an address to the IGD Food and Grocers' Conference, "the population at large don't trust business. What do you think the population at large will think of businesses that want to trade employment rights for money?" [1]

Additionally, Iain Hasdell, Chief Executive of the Employee Ownership Association, said following the announcement that, "whilst growing employee ownership should be part of the UK's Industrial Policy, such growth does not require a dilution of the rights and working conditions of employees – indeed employee ownership often enhances them". [2]

Our views on the legislative process being started before the public consultation has been completed are shared by the Employee Ownership Association and they raise further concerns that none of the recommendations suggested to the Government should dissolve employment rights for workers in employee owned companies.

The STUC feels that the Government is working on the misplaced and mistaken assumption that a growth in employee owned companies will be a universal panacea in respect of industrial relations and, as a result, we will witness economic growth. The consultation presents no evidence to support this position, indeed work carried out by the OECD[3] would suggest that there is absolutely no correlation between regulation and the success or otherwise of economies. Of the twenty seven countries where greater burdens are placed on employers regarding employment protection examples can be found where economies, such

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[1] http://www.guardian.co.uk/business/2012/oct/09/sainsbury-justin-king-george-osborne-shares-rights
[2] http://www.employeeownership.co.uk/news/press/workers-rights/
[3] Danielle Venn (2009), "Legislation, collective bargaining and enforcement: Updating the OECD Employment Protection Indicators, http://www.oecd.org/employment/employmentpoliciesanddata/43116624.pdf

as China are growing to the extent efforts are being made to slow down the rate of growth, others where their economies have grown at a steady pace outstripping that of the United Kingdom and others, such as Ireland, Portugal and Spain where the dire state of their economies are well documented.

Their research shows that out of the 30 OECD countries, the United Kingdom was the 3rd least regulated, behind the United States and Canada in relation to employment protection.

The reality is somewhat different and, while the STUC would accept that some employee owned companies strive to deliver genuine employee ownership, many operate as normal with employee owners having little say in strategic decisions including workforce engagement. In such companies, industrial relations tensions remain, senior management and their actions are not trusted and the workers, whether partners or not, still require the protection of the law and the mechanisms to defend these rights. Therefore, further deregulation of employment rights for new employee owners will not necessarily lead to economic growth as the Government is suggesting.

Question 1

How can the Government help business get the most out of the flexibility offered and the different types of employment status?

The STUC is concerned that the business already gets tremendous amounts of flexibility offered by the existing two employment statuses, employed and self-employed. In particular, the latter is open to abuse, as employers force workers into self-employment when, in reality, an employment relationship exists that is, in all aspects other than their tax arrangements, that of an employed person.

While this arrangement has been condoned for a number of years in the construction industry, it is becoming more common in other areas, such as hairdressing, agriculture and aviation.

Individuals working in these sectors have no control over their working hours as a genuinely self-employed person would. They do not get holiday pay, they have to make their own arrangements for pension provision and they are not covered by company grievance or disciplinary procedures, nor do they have access to trade union representation, or other employment protection.

However, in most cases, they will be provided with the work and the resources, tools and sometimes even transport to work, in order to provide their labour for a business owner or company.

The benefit to the employer is that they do not need to meet National Insurance contributions and the Government misses out on revenues of approximately £350 million per year.

Employers enjoy the benefits of a flexible labour market when employing people. Increasingly, larger organisations are employing people on flexible or zero hour contracts. Again our concern would be that there are opportunities for exploitation, with companies employing workers through employment agencies on flexible contracts and not delivering the hours promised. The STUC is aware of a situation where a large internet retailer is demanding a flexible workforce, offering anticipated working hours of 40 to 48 hours per week where previous history shows workers receive far less.

The Government should recognise the detrimental impact that flexible working practices have on workers, especially in communities where there are few employment opportunities. Workers, especially those who have been unemployed for some time, need to be able to meet their living costs and budget accordingly. Zero hour contracts and the associated risk of reduced hours when demand is low provides little or no security in such circumstances.

The STUC believes that the Government should address the inherent unfairness in the existing employment statuses before introducing a third.

Question 2

Do businesses feel able to use all three employment statuses? If not, what restricts the use of different statuses?

The STUC is concerned that employers have been allowed, in the absence of any meaningful regulation, to abuse self-employed status and, as stated in our response to the last question, create a culture of false self-employment, where the employer retains control over the individual's working hours and conditions, while passing the responsibility for meeting tax and national insurance contributions to the worker.

We would also argue that employers are becoming increasing guilty of abusing the employed status, using flexible contracts and self-employment to their advantage with little regard to the livelihood or welfare of the person they employ. Many large organisations no longer have a human resource function, such services being outsourced and they employ through agencies. Therefore, the employment relationship has been weakened and such companies, while perhaps getting the advantage of flexibility, although this is arguable, do not get the long term benefits delivered by an established, directly employed workforce, not least their commitment to a successful organisation, where their employment rights are respected.

In respect of employee owned companies, the STUC is aware of organisations where there is a long history of employee ownership and, in most cases, this has arisen through succession planning where founders, for altruistic reasons, have seen this as the best future for the organisation when they come to retire.

However, the STUC is under no illusion that the proposals being suggested by the Government are not built on altruism, but on denying individuals employment protection in exchange for company shares. Without proper regulation and enforcement of any new generation of employee owned companies, our fear would be that workers surrender their rights for shares that turn out to be worthless and this will only become a reality after they have been dismissed, made redundant or left of their own accord.

Question 3

What restrictions, if any, do you think should be attached to the issues of shares or types of shares?

The STUC would wish to repeat our opposition to this proposal.
However, it is clear from the Government's action to legislate to make provision to increase employee ownership that these proposals will be implemented.

Therefore, the STUC would see it as being important that the Government ensure that companies wishing to offer shares in exchange for employment rights should demonstrate that their company finances are sound and their record on employment rights should also be taken into account record.

Companies with a record of successful employment tribunal cases or health and safety prosecutions should be disbarred from offering employee ownership until such time that any regulator is satisfied that the employees investment is not likely to be jeopardised by adverse employment tribunal decisions, health and safety prosecutions and any subsequent reputational damage.

Question 4

When an employer buys back forfeit shares, should this be at full market value or some other level (e.g. a fraction of market value) should some other level be allowed in certain circumstances?

The STUC is of the view that the forfeit shares should always be bought back at least at full market value. It would simply be unacceptable to the STUC that, having given up employment protection to take a share in the success or otherwise in the company that any consideration should be given to allowing employers to reduce any employee owners investment, regardless of the reason for termination of employment.

We would accept that, in some circumstances, such as where criminal acts are committed against the employer, it should be possible for that employer to recover any loss against the value of the shares by taking appropriate legal action. Any deduction from the full market value should, under no circumstances, be decided by the employer and should be decided by the court or some other form of arbitration.

Question 5

How should a company go about carrying out an evaluation of shares? What would the administrative and cost impact be for a company of an independent valuation was required?

Any evaluation of shares should be carried out independently and by qualified individuals with the competence to analyse financial information supplied by the company and the legal authority to pursue employers, where false information has been supplied in attempt to deliberately undervalue the company. The STUC believes that the Inland Revenue should carry out this function under the existing functions of the HMRC Share and Assets Valuation Branch.

Question 6

The Government would welcome views on the levels of advice and guidance that individuals and businesses might need to be fully aware of taking on employee owned status?

The STUC believes that the Government has a moral, if not legal, obligation to ensure that individuals who wish to give up employment rights and participate in the proposed employee ownership schemes are provided with access to legal and financial advice to allow employees to make the decision that is right for them after full consideration of the advice received. We believe that there should be a legal obligation on employers wishing to introduce such scheme to provide this advice and penalties applicable when they fail to do so.

Question 7

What impact will allowing individuals' limited unfair dismissal protection have on employers' appetite for recruiting?

The STUC does not believe that there is any credible evidence to support the Government's position that an even more lightly regulated labour market, in respect of employment protection, will encourage employers to recruit and, as a result, fuel economic growth. Analysis of the report by the OECD Directorate of Employment Labour and Social Affairs referred to in the introduction clearly shows that there is no evidence to show that reducing employment protection will fuel the appetite for recruitment. This is clearly the view of the Employee Owners Association who have concerns in relation to the Government proposals and question why someone wishing to participate in employee ownership should have to surrender any aspect of their employment rights.

The Government has provided no further evidence, other than submissions made to the Red Tape Challenge website to suggest that current levels of employment protection are having an adverse impact on recruitment by companies. We have made our views on the quality and quantity of evidence submitted to that website and we do not believe that the Government should progressing public policy decisions on such flimsy evidence.

The STUC believes that employers are not recruiting due to a lack of confidence in the economy and no indication of there being any indication of a sustained recovery. The Government has to create economic growth and move away from austerity and provide confidence that employers should invest in recruitment. If employers wish to adopt the employee ownership model as part of any future recruitment strategy, then that should not be at the expense of sacrificing employment rights.

Question 8

What benefits do you think introducing the employee owner status with limited unfair dismissal rights will have for companies?

The STUC can see no significant benefit for employers as a result of introducing the new employee owner status, as the proposal to remove employment rights in exchange for shares does not stand up to scrutiny. Our concern is that employers may force workers to accept employee ownership in order to remove their employment protection without having any intention of promoting genuine employee ownership. The STUC remains unconvinced that these proposals will provide employee owners with a meaningful role in the future of the organisation. On the other hand, all the benefits appear to be in favour of the employer who will be able to fire individuals, buy back their shares knowing full well that the employee will probably not be able to afford to seek redress at an employment tribunal, given the Government's intention to introduce fees for raising claims next year.

Question 9

Do you think benefits will be greater for larger, smaller or start-up businesses?

The STUC does not believe that big business will see any great benefit in promoting employee ownership using the model being proposed. At the moment, there are larger companies operating successfully, all of whom operate under existing employment legislation and recognise the benefits of doing so. We would have concerns if this position was to change and employers operating under existing employee owned status felt empowered to dilute the employment rights of their existing employees and seek to operate the new less favourable model.

The STUC would see the benefit of this proposal for smaller organisations, as this appear to be the population within the business community that appear to have a problem with meeting their obligations to their workers, not just under health and safety

Question 10

What impact, if any, do you think the employee owned status will have on employment tribunal claims, e.g. for discrimination?

We believe that the proposals will result in an increase in employment tribunals, although we would suggest that applications are more likely to come from individuals submitting claims following dismissal and seeking to demonstrate that their dismissal fell within the category of those judged to be automatically unfair. In the case of redundancy, the redundant employee owner may seek to assert that their selection for redundancy arose as a result of activity that would have been classed as automatically unfair in a dismissal situation, such as their trade union membership, trade union activity or blacklisting.

The STUC also considers that there may well be an increase in discrimination cases, as it becomes difficult for this policy to work in practice. We are particularly concerned about employees who agree to take on 'employee owner' status at a certain point in their career and then find that their situation changes. In our view, it is not conducive to good employment relations to have staff doing similar work, but who are unable to access the same rights and protections as their colleagues. It is also not clear from the proposals, what rights these staff members will have, if any, to revisit their decision.

We are also concerned that these proposals could have an effect on discrimination claims, particularly if employers encourage certain types of people to become 'employee owners' and others to simply become employees. It is, therefore, possible for this status to be abused by employers and it, therefore, opens the door to higher levels of discrimination in workplaces across the UK.

While 'employee owners' will still be able to take cases of unfair dismissal when they relate to a protected characteristic, if successful they will no longer receive a compensation element related to the dismissal itself, for example, with regard to redundancy pay or loss of earnings.

The STUC is concerned that this effective lowering of the compensation associated with unfair dismissal on the grounds of a protected characteristic would decrease the incentives on employers not to discriminate and, therefore, this policy may produce negative results with regard to equality.

Question 11

What impact do you think introducing the employee owner status with no statutory redundancy pay will have for businesses, in particular smaller businesses and start-up businesses? What negative impacts do you anticipate and how might these be mitigated?

Question 12

What impact will this change to maternity notice period have on employers?

The consultation document states that *"In May 2010, the Government committed to review employment laws for "employers and employees, to ensure they maximise flexibility for both parties while protecting fairness and providing the competitive environment required for enterprise to thrive"*. The STUC is unclear, however, why the Government feels that this 16 week bar achieves this aim. Allowing employees on maternity leave to give 8 weeks' notice of their return date seems to strike a good balance between flexibility for the woman on maternity leave, and the ability to forward plan for businesses. It also allows for two months' notice to be given to any maternity cover that has been recruited to fill the post of the woman on maternity leave. This seems a reasonable notice period and would be in line with the majority of employers' policies.

It is our understanding that these provisions work well in the labour market at present and that most women on maternity leave aim to give as much notice as possible to their employers and usually give more than the 8 weeks' minimum. Having flexibility in the system does, however, allow women on maternity leave to better plan for their own circumstances and supports women to balance their own situations more easily.

The STUC is unsure of where the benefit comes to employers or employees if this is extended to 16 weeks.

Question 13

What, in your view, would employers do if employees wish to return early without giving 16 weeks' notice?

It is difficult to anticipate what employers would do in this situation, but the STUC is aware of cases where employers have agreed to employees returning to work after giving a shorter notice period than 8 weeks. These sort of arrangements are often facilitated by trade unions in unionised workplaces, where systems are in place to allow bargaining between employees and employers and where working relations are often, as a result, more positive. We do, therefore, anticipate instances where employees will be able to return to work without giving the full 16 weeks' notice.

We are concerned, however, that this relies heavily on an element of goodwill on the employer and does not take into account the role that the law is supposed to play in this area. It is our view that statutory minimums should be in place to protect workers and to ensure that they receive certain minimum protections. It should not be the case that the law requires 16 weeks' notice, but employers routinely accept shorter notice period. Rather, the law should keep pace with the practice of most employers. Equally, it should not be the case that the system is rigid and inflexible for the employees trying to return from maternity leave. It should be remembered that household situations can change and that the woman making this request could be doing so because her partner has lost his job and the women is now required to return to work to support the household. Requiring a 4 month notice period in this situation seems particularly punitive and may be something that the family simply cannot sustain and the woman concerned may have no option but to seek new employment, rather than return to her previous employer. It is our view that this would be an extremely negative outcome and would increase the difficulty for employers in running a successful maternity system, while increasing the stress which the system places on employees.

Question 14

How will these changes impact on a company's payroll provisions?

The STUC has no response to make regards this question.

Question 15

What effect will a compulsory 16 weeks' early return notice period have on the length of maternity leave that mothers take or adoption leave that parents take?

It is difficult to anticipate this. It is unlikely, however, to discourage a woman who wishes to take her whole entitlement of maternity leave, as most women decide their maternity period before going on maternity leave based on their current circumstances. The employees affected most by this change are those that wish to take a shorter maternity leave, for example, 3 months. Under the previous system, employees wishing to take only 3 months' maternity leave could confirm their return date with their employer after the baby was born and once they felt more settled in their situation. Under the new proposals, these employees would have to have firm arrangements in place before they go on maternity leave, in order to meet the 16 weeks' minimum.

The most likely effect of this policy, therefore, is that it encourages employees to take at least 16 weeks off and discourages shorter maternity arrangements.

Question 16

Do you think that 4 weeks is the right period? If not, why not? What would be the impact of a shorter or longer period?

The STUC does not support any limitation of the period for requesting flexible working on return from paternal leave, by restricting this to four weeks, returning workers will be pressurised into making decisions on their future working arrangements without having had sufficient time to fully appreciate the impact that their existing working arrangements have on their child caring responsibilities. The STUC does not believe that any reasonable employer wishing to promote themselves as a family friendly employer would support this measure.

Question 17

What impact do you think this proposal would have on the ability of employee owners to access support for training?

Our concern with this proposal is that the Government is sending the wrong message to employers in that it supports employers who do not wish to invest in staff development. The whole ethos about employee ownership is about creating a work environment where the employee has a vested interest in the success of the company and we would see staff development as being central to that success. The Government's proposal in respect to time off for training will allow unscrupulous employers to deny staff training. This would undoubtedly lead to a demoralised, demotivated and poorly trained workforce that appear contradictory to some of the existing examples of employee owned companies that the Government is keen to promote.

Question 18

Do you have any comments on the Government's intention not to amend Company Law to implement the employee owner proposal?

The STUC has no response to make regards this question.

Question19

The Government welcomes views on particular safeguards that would need to be applied, in order to minimise opportunities for abuse?

The STUC is strongly of the view that there has to be an acceptance by the Government that any regulations put in place in an attempt to increase employee ownership should be properly enforced to ensure that individuals are not being coerced into signing away employment rights. Companies, particularly new starts, should not be allowed to enter into employee ownership schemes until financial safeguards that would require to be set by the Government have been met. The Government should ensure that periodic audits of employee owned companies are carried out, in order to protect the employees' investment, and any indication of attempts to undervalue the shares should result in prosecution.

The employer should fund access to independent legal and financial advice for employees considering participating in employee ownership. The Government should also provide information and guidance in addition to legal protection and regulatory enforcement; this should also make clear the difference between established employee ownership schemes and those being proposed under the new arrangements with less favourable employment rights.

Question 20

The Government welcomes views on whether the existing tax rules which apply for share-for-share exchanges (such as might happen when a company is taken over) and schemes of reconstruction should apply where shares are issued in return for taking up the new status involved?

The STUC has no response to make regards this question.

Question 21

What impact do you think the proposal will have on labour market flexibility, that is in relation to hiring and letting people go?

Please see our response to Question 7. We do not believe that a more lightly regulated labour market will have much impact on employers' decisions to hire and fire workers. This assumption is based on the comments of a minority of employers who responded to the red tape challenge.

Our concern would be that employee owners will be seen as a flexible resource, as this is the message the Government is giving. As unscrupulous employers will be able to off load employee owners when share prices dictate it is economically beneficial to do so. There appears to be neither any acknowledgement by the Government that removing rights to statutory redundancy protection opens up this possibility, nor any suggestion that legal protections will be put in place to prevent this eventuality.

Question 22

What would the impact be on your business?

The STUC has no response to this question.

Question 23

What are your views on the take-up of this policy by:

a) **Companies**

The STUC does not believe that these proposals will deliver any great increase in employee ownership, as the Government has failed to understand the real reason that employers are not recruiting. We feel that it is unlikely that smaller employers, especially start up businesses and those involving innovative products, will want to surrender any level of control over their organisation, or a financial investment in the product they are developing. We would also question how much of the organisations share capital they would be willing to give over to employee owners and whether this shared between all the participants is beneficial to the employee shareholders. Where these proposals may have an impact is in organisations that want to exploit the Government's approach to employee ownership, where that ownership comes at a cost to their employment rights, namely the right not to be unfairly dismissed, the right to request flexible working and less favourable maternity leave arrangements.

b) **Individuals**

If the Government intends to go ahead with this proposal, they will have to ensure that this new generation of employee owners are protected from exploitation and their "investment" is protected. They have to be given legal advice regarding the implications of surrendering their employment rights in return for a stake in their company, an investment that, certainly in the case of start-up companies, could be extremely risky for employee owners not provided with adequate investment advice. We are of the view that individuals will be extremely cautious regarding investing in any prospective employers business and we would be fearful that some employers may place undue influence on individuals to whom they offer employment to accept the employee ownership option or face losing the offer of employment.

This new breed of employee owners have to be protected and the employee -owned companies have to be properly regulated, including being subject to enforcement, to ensure compliance with the law and prosecution where employers breach the regulations.

Question 24

What are your views on the equality impact assessment? Are there other equality and wider considerations that need to be considered?

The rationale behind the proposal contained in the equality impact assessment makes assumptions in support of the proposals that are vague and no evidence is provided to support these assumptions. In the second paragraph, reference is made to the risk of being taken to employment tribunals and the costs of providing some rights creating barriers to hiring employees, no evidence is provided and would suggest that removing employment rights from workers will not overcome these risks in a way that is fair to employees. Again, no evidence is given to justify why this is deemed fair, when existing employee owned companies actually appreciate the benefits of protecting the rights of their workforce.

The STUC does not share the optimism of the Government that employee owners will potentially have a greater attachment to the company, because of the stake they own. Our view is that this will be a high risk stake where the employers retains control of the company, its finances and the strategic direction of the organisation. The employee, on the other hand, is still at risk of being made redundant without being entitled to statutory redundancy pay, being dismissed and having to prove their dismissal was automatically unfair, being restricted in the time they have to request flexible working and having to give longer notice of intent to return to work after maternity leave, regardless of any particular family circumstances that may make this difficult for the returning employee owner with the only option being to resign.

In any of these eventualities, the employee owner will lose the financial investment they have in the organisation. The STUC does not agree with the assumption that there are no significant equality issues imposed during dismissal. Our view would be that lower paid employee owners, women, disabled, younger and BME workers would be less likely to have the financial resources to go to an employment tribunal to prove any dismissal was automatic.

Our fear would be that company decision makers would be willing to take a risk and identify individuals from any of these groups when seeking to downsize their workforce, either through redundancy or some less transparent method, such as capability procedures. The impact assessments state that one in five of unfair dismissal claims relate to long term illness or disability. We would suggest that this is a significant amount and an indication on how workers with long term health conditions and disabilities are treated under the existing employment statuses. We are extremely concerned that removing employment rights not to be unfairly dismissed will only place this group at greater risk. At the same time, we also believe proposals to introduce fees for lodging claims at employment tribunals will also have an adverse and potentially discriminatory impact on vulnerable workers and will act as a deterrent to seeking justice.

The equality impact assessment also suggests that there is no evidence to suggest any of protected groups will be adversely affected by the potential to undervalue their employment rights. We do not believe this to be the case and would suggest that there is a danger for any group that might not have complete work histories, or experience in the world of work, to undervalue their employment rights, particularly in workplaces where there is no representation.

The STUC is also concerned that the proposals fail to provide enough information to fully assess the impact that these proposals will have on working carers. While the statistics provided show little difference in the percentages of men and women participating in flexible working arrangements, the STUC is extremely concerned that these statistics are limited, given that they relate only to full time work. In our experience, the majority of flexible working requests relate to workers moving from full time contracts onto a form of reduced hours working that would classify the employee as part time. It is, therefore, odd not to consider part time employees in the data, when determining which employees currently rely on flexible working. While both men and women take advantage of flexible working requirements, women are more likely to do so while working part time and are more likely to be forced to leave employment, in order to meet caring commitments if this flexible working is unavailable.

Therefore, we believe that giving up rights, regarding flexible working would have an adverse impact on women compared to men and this effect is currently being masked by the statistics provided.

STUC
November 2012

Consultation on implementing employee owner status
- response form

A copy of the **Consultation on implementing employee owner status:** can be found at: http://www.bis.gov.uk/Consultations/consultation-on-implementing-employee-owner-status?cat=open

You can complete your response online through SurveyMonkey : (https://www.surveymonkey.com/s/5QJQ935)

Alternatively, you can email, post or fax this completed response form to: **Email:** implementing.employee@bis.gsi.gov.uk

Postal address:

Paula Lovitt MBE

Department for Business, Innovation and Skills (BIS) 3 Floor Abbey 1

1 Victoria Street

London SW1H 0ET **Fax:** 0207-215 6414 The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses. The closing date for this consultation is: **8 November 2012**

Question 1: How can the government help businesses get most out of the flexibility offered and the different types of employment statuses?
Comments:

Flexibility is important to business, especially small and medium sized businesses ('SMEs') but simplicity and certainty is also vital. There is already confusion and complexity for SMEs around the differences between employee, worker and self-employed contractor and this proposed employee owner contract potentially creates a further category amongst staff demographics which might add to complexity and uncertainty.

Question 2: Do businesses feel able to use all three employment statuses? If not, what restricts the use of different statuses?
Comments:

The consultation paper does not set out exactly how to determine the difference between the three categories but this category might be particularly helpful for founder shareholder/directors or non-executive directors who are normally treated as employees for all tax purposes though displaying characteristics of non-employees.

Question 3: What restrictions, if any, do you think should be attached to the issue of shares or types of shares?
Comments:

There should be freedom and flexibility for the employer to choose the type of shares to be used (i.e. the employer chooses whether shares carry restrictions or not and if so to what extent shares are restricted in terms of rights compared with other classes of shares in the company) as previous evidence (submitted to the Office of Tax Simplification earlier this year as part of the review of approved share plans) has already shown that plans such as Company Share Option Plan ('CSOP') that have prescriptive measures in place in this regard create barriers to smaller private companies operating employee equity incentives.

In our experience the flexibility of the Enterprise Management Incentive Plan in terms of the type of share to be used for that plan is very much a valued feature that allows SMEs to offer shares to employees whereas they might not otherwise do so. Should the same provisions be mirrored for these proposals then that would be welcomed and the redeemable share prohibition might also be acceptable.

Additionally, this should not be limited to new issues of shares so that transfers from existing shareholders would be permitted within these proposals. Limits on the classes or restrictions on shares would only impose compliance burdens in terms of professional costs and the time taken to ensure the legislative requirements are met.

Note here that the value range starting at £2,000 might prohibit participation by start-up companies where the value of the shares at the outset is likely to be below this minimum. Presumably there would also be a fast-tracked advance valuation process with HMRC Shares and Assets Valuation along the lines of that in place for Enterprise Management Incentives ('EMI').

From a tax perspective, whether there are restrictions or not, Part 7 of ITEPA will pick up tax on manipulations in rights and restrictions or conversion rights. Any residual risk might be covered by a general anti-abuse provision applying to these proposals.

Question 4: When an employer buys back forfeit shares, should this be at full market value or some other level (eg. a fraction of market value) should some other level be allowed in certain circumstances?
Comments:

For commercial reasons small private companies should have transfer restrictions requiring equity forfeiture or transfer for nil or nominal sums for 'bad leavers' (usually anyone leaving voluntarily or for misconduct) and may sometimes offer more generous market value pricing for 'good leavers' (typically encompassing those leaving due to death, retirement, ill health, etc). To impose specific requirements as to market value related buy backs could prohibit the Company from funding the buy back if it could not raise sufficient finance, thus leaving a small company with an awkward minority shareholder. Further, the costs of valuation, both for the Company and HMRC, and the time involved agreeing the value, would be a disincentive to taking up the proposed shares in the first place. Pre-transaction valuations would be essential.

If market value were a requirement, would this be on the basis of actual market value or unrestricted market value and would there be the usual assumption of a willing buyer and willing seller even though it was a forced sale or purchase? Also we would suggest that it would be important for discounts to be applied to reflect minority interests.

Finally, if a purchaser in fact paid more than the market value (inadvertently, perhaps needing to purchase quickly as an employee owner left and before the values could be agreed with HMRC) would there be any additional income tax or other liability arising for the employee owner?

Question 5: How should a company go about carrying out a valuation of the shares? What would the administrative and cost impact be for a company if an independent valuation was required?
Comments:

See comments above. The professional costs for valuation vary but might typical be between £1,000 and £3,500 + VAT the risk of a company not seeking professional advice is that the shares might be over-valued at the time of acquisition by the employee owner thus increasing any up-front tax charge and reducing potential for exempt gain. This valuation would need to be undertaken by private companies at each instance of award and therefore a recommendation might be that the valuation was agreed by HMRC SAV for a six month period (excepting material changes in circumstances) as for a Share Incentive Plan rather than the 60 days currently for EMI.

Question 6: The Government would welcome views on the level of advice and guidance that individuals and businesses might need to be fully aware of the implications of taking on employee owner status.
Comments:

The situation proposed perhaps seems comparable to the requirements for a departing employee to be independently advised in the context of a compromise agreement. The employee owner/ investor would need advice on the reduction in legal rights, the tax and national insurance implications and also, perhaps, independent financial advice on the proposed investment. This is not advice the company could offer. Would the costs of providing this, if borne by the employing company, be a taxable benefit for the employee or a corporation tax deductible expense for the company? The cost and inconvenience might be a deterrent.

Note, would the provision of this advice fall to be investment business under FSMA 2000 and would this award fall within the employee share scheme exemption of FSMA 2000? Whilst there are exemptions for employees' share schemes as defined in section 1166 of Companies Act 2006 an arrangement for a single person who is not categorised as an employee would not appear to fall within the definition of an employees' share scheme: discussed further below.

Perhaps there might be some form of warning and self-certification exemption provided in the contractual agreement whereby the employee owner acknowledges the investment risk and the rights waived and that they have been advised to take independent advice and are not relying on advice provided by any officer or employee of the company?

Question 7: What impact will allowing individuals limited unfair dismissal protection and equity shares have on employers' appetite for recruiting? Comments:

We suspect there will be little impact. The responses above highlight areas where such proposals are likely to bring with them increased cost and compliance and there is not necessarily a quid pro quo saving. It is not possible to ask employee owners to waive rights re discrimination claims and that is where the greatest financial exposure lies for employers. The legislation relating to unfair dismissal has already been changed recently in employers' favour meaning that a two years' continuous service is now required rather than the previous one. Arguably a wider extension of NIC employer relief would be a more attractive and effective incentive to boost recruitment. In particular employers should not, contrary to the proposal, be able to offer this as the only model of employment for new recruits and more needs to be done to encourage employers to offer enhanced employee owner contract terms.

Would a company be required to include details in any advertisement for a job or job specification that the position will be as an employee owner?

Question 8: What benefits do you think introducing the employee owner status in with limited unfair dismissal rights will have for companies? Comments:

Perhaps the benefit is limited as companies do not engage employees expecting to dismiss them. In any event, would the company remain at risk for breach of contract or wrongful dismissal claims on a dismissal.

Will there be any corporation tax relief for the dilution cost suffered by other shareholders? Such relief is available in certain circumstances under approved share schemes.

Question 9: Do you think these benefits will be greater for larger, smaller or start-up businesses?
Comments:

As noted earlier the £2,000 de minimis level may preclude embryonic start-ups as the appropriate (in terms of share capital percentage) level of equity awards may not yet have sufficient value to meet that entry level award value.

An individual already has a £10,600 CGT exemption and is sometimes permitted to transfer some of their shares to a spouse or civil partner and then their personal CGT exemption can be used also. Furthermore, except in the case of a sale of the business, shares can be divested over a period of time, thus an employee might choose to sell shares in tranches to make regular use of the annual CGT exemption to ensure no tax charge arises.

There therefore needs to be some significant share growth and/or a cliff sale event if the gains realised by employees owning shares are ever to be liable to capital gains tax. This might well explain why the employee-owner contracts have been promoted as being particularly relevant to smaller, fast growth, entrepreneurial businesses, albeit all businesses will be able to use the new contract model.

We have also observed that the employee-owner share awards are not exempt from income tax or national insurance and therefore an up-front tax charge may arise where shares are acquired for less than market value. This is a very real problem and likely to be the biggest deterrent unless there is a hold-over election mechanism in place to defer collection until any future gain is realised.

Clearly share valuation is a relevant consideration here and the attraction of these new employee owner shares may largely depend on the share value growth potential.

Entrepreneurial companies tend to aim to grow share value significantly over a short time frame. Their offering may be very much of the moment and there may be just a very short window of opportunity to maximise first mover advantage, generate market leader revenues and then negotiate a trade sale to a strategic acquirer. Employees who are recruited whilst such ventures are in their formative early years can acquire equity whilst there is little entrenched value and then reap significant gains when the ultimate exit materialises. Their tax charges can be minimised but a very large exit value can still land them with a hefty CGT bill. The lure of a total CGT exemption might therefore appeal to this demographic but will such employees be happy to sacrifice employment law rights in exchange? If rare highly skilled talent is the target recruit then surely they have their pick of employers and other employers or non UK jurisdictions may offer more attractive worker rights for them as an employee.

More established businesses will have a potentially significant share value already and therefore employees acquiring equity in those employer companies will be keen to ensure discounts can be agreed with HMRC to negotiate a market value

acquisition price that is affordable and to ensure that any upfront income tax charge arising in respect of free or discounted share awards is minimised. If the business is quoted on a stock market then the market has established the pricing and discounting factors available to private companies will not apply.

Such businesses owners may not have any ambition to sell. They may wish to preserve the trading of the business as an independent business that is owned in perpetuity by its employees or any sale plans are so distant as to have no impact on employee behaviour. The business may have already passed its peak growth stage and is experiencing stable performance with slight growth forecast. With no cliff exit event (so sale of shares in tranches within existing annual CGT allowances is possible) and lesser share value growth potential and an upfront tax charge, employees of these businesses may feel no compulsion to seek further CGT relief and instead find that their tax position can be sufficiently protected by receiving their awards within existing approved share plan frameworks e.g. free shares under a Share Incentive Plan, indeed it is surprising that an uplift in the SIP plan limits has not been proposed as this would probably have been welcomed more warmly.

The application of employee owner status may be appropriate for non-executive directors of larger quoted companies where the UK Corporate Governance Code or investor guidelines recommends the holding of shares by non-executive directors during the office and for at least one year thereafter, aligning such director's interests with shareholders.

Question 10: What impact, if any, do you think the employee owner status will have on employment tribunal claims, e.g. for discrimination?
Comments:

As noted above there is no ability to waive rights for discrimination claims and therefore significant employment tribunal exposure remains.

Question 11: What impact do you think introducing the employee owner status with no statutory redundancy pay will have for businesses, in particular, smaller businesses and start up businesses? What negative impacts do you anticipate and how might these be mitigated?
Comments:

Would there be scope for an employing company to be liable for some sort of wrongful dismissal claim even if statutory redundancy did not apply? The redundancy exposure is financially more relevant re longer serving employees and there is an option and not obligation to move existing employees to the new model contract.

Question 12: What impact will this change to maternity notice period have on employers?

We have not responded to this question as others will be better qualified to assess impact on this matter.

Comments:

Question 13: What, in your view, would employers do if employees wish to return early without giving 16 weeks' notice?
Comments:
We have not responded to this question as others will be better qualified to assess impact on this matter.

Question 14: How will these changes impact on a company's payroll provisions?
Comments:

Where shares are Readily Convertible Assets the upfront tax charge on acquisition of the shares will need to be collected under PAYE and this is likely to be burdensome for payroll.

Question 15: What effect will a compulsory 16 weeks' early return notice period have on the length of maternity leave that mothers take or adoption leave that parents take?
Comments:

Would women who do not intend (or cannot afford) to have a long maternity leave find themselves needing to give notice immediately before or shortly after birth?

Question 16: Do you think 4 weeks is the right period? If not, why not? What would be the impact of a shorter or longer period?

Comments: We have not responded to this question as others will be better qualified to assess impact on this matter.

Question 17: What impact do you think this proposal would have on the ability of employee owners to access support for training?
Comments:
We have not responded to this question as others will be better qualified to assess impact on this matter.

Question 18: Do you have any comments on the Government's intention not to amend Company Law to implement the employee owner proposal?
Comments:

See comments for Question 6 and the doubt expressed whether an arrangement for a single employee owner could ever fall within the section 1166 Companies Act definition of employees' share scheme. Some change would be required. Note that this definition is used for other subsidiary legislation, e.g. the FSMA 2000 (Financial Promotions) Order 2005. We would therefore suggest that the definition should be extended to include a single 'person'.

The comments in the Nuttall Review pointing out the difficulties for a company seeking to buy back shares are endorsed. Change would be needed to avoid this being a deterrent to participation.

Question 19: The Government welcomes views on particular safeguards that would need to be applied, in order to minimise opportunities for abuse.
Comments:

Under this arrangement an employee owner might receive shares on which significant tax is paid at the outset. A change of ownership of the majority of the shares might then cause him/her to be ousted unfairly and the shares either become worthless due to market conditions or due to the share transfer rights and having no right to compensation for loss of office and no right to the repayment of the tax (and possibly national insurance) paid on acquisition of the shares. This might not be abuse of the provisions but there is scope for the employee owner getting a very bad deal.

Further, there is very little incentive for an employee or prospective employee to take this route. Many companies would be able to offer qualifying EMI options that would provide a CGT basis of taxing the growth in value of the shares without an upfront tax charge and restricted employment rights. If that were not possible (e.g. the employee owner was interested in more than 30% of the relevant share capital) then the employee owner might acquire restricted shares and by entering into a section 431 election ignore the valuation impact of the restrictions, possibly creating an immediate tax liability for any undervalue but securing capital gains tax treatment for future growth.

Question 20: The Government welcomes views on whether the existing tax rules which apply to share-for-share exchanges (such as might happen when a company is taken over) and schemes of reconstruction should apply where shares issued in return for taking up the new status are involved
Comments:

There would need to be legislation to permit the tax treatment to pass to new shares acquired by virtue of the original holding. This is currently a problem for restricted shares where there has been a section 431 election and there would be a similar issue for employee owner shares. In particular, while the employee owner remained a director or employee of some description section 421B(3) would deem all new shares acquired as employment related securities and subject to Part 7 and by section 421D shareholdings derived from a previous holding fall to be employment related securities.

Question 21: What impact do you think the proposal will have on labour market flexibility – that is, in relation to hiring and letting people go?
Comments:
We have not responded to this question as others will be better qualified to assess impact on this matter.

Question 22: Would you be likely to take up the new status? What would the impact of the status be on your business?
Comments:

There would be no advantage since future gains for our employees are structured as capital gains currently and exempt if held for 5 years under the Share Incentive Plan without the loss of employment rights and without an initial tax liability.

Question 23: What are your views on the take-up of this policy by:
a) companies?
b) individuals?
Comments:

A) Companies: exploitative employers might seek to operate this new contract model as the only method under which new hires will be recruited and if this practice became prevalent then it might only serve to drive an increasingly globally mobile workforce out of the UK to jurisdictions offering better employment rights.

As share scheme advisers we have already received expressions of interests from companies interested to learn more about this new opportunity so there is some level of interest and appeal to employers but that is often because they have taken the press comments at face value and when the associated matters of share valuation, buy-backs, up front-tax charges and alternative existing equity plan arrangements (HMRC approved and unapproved) are explained, together with the matters outlined in response to Q 9 above, more often than not their objectives can be met using existing plans. We have not yet received an expression of interest where the overarching ambition was to eliminate risk of employment tribunal claims and the driver for enquiry is usually a request to know if this proposal is a better and easier way to provide shares to employees.

B) Individuals: The press attention has already stirred up concern amongst some employees to whom approved share plans are currently being launched and we have had to issue reassurance that the plans being implemented by their employers do not require any sacrifice of employment rights. The appeal or lack of appeal to individuals in relation to the employee owner contract model is already covered in the response comment to Q 9 above.

Question 24: What are your views on the equality impact assessment? Are there other equality and wider considerations that need to be considered?
Comments:
As we do not advise on equality issues we are not commenting on the equality impact assessment.

Question 25: Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

Please acknowledge this reply by email to lh@rm2.co.uk

Question 26 : At BIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were

to contact you again from time to time either for research or to send through consultation documents?
Yes

Please contact:

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BIS | Department for Business Innovation & Skills

Consultation on implementing employee owner status - response form

A copy of the **Consultation on implementing employee owner status:** can be found at:

http://www.bis.gov.uk/Consultations/consultation-on-implementing-employee-owner-status?cat=open

You can complete your response online through SurveyMonkey : (https://www.surveymonkey.com/s/5QJQ935)

Alternatively, you can email, post or fax this completed response form to:

Email:

implementing.employee@bis.gsi.gov.uk

Postal address:

Paula Lovitt MBE
Department for Business, Innovation and Skills (BIS)
3 Floor Abbey 1
1 Victoria Street
London SW1H 0ET

Fax: 0207-215 6414

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

The closing date for this consultation is: **8 November 2012**

Your details

Name: Travers Smith Llp (Ref: Mrv/Kah)

Organisation (if applicable):

Address.

Telephone

Fax:

Please tick the boxes below that best describe you as a respondent to this:

- ☐ Business representative organisation/trade body
- ☐ Central government
- ☐ Charity or social enterprise
- ☐ Individual
- ☐ Large business (over 250 staff)
- ☒ Legal representative
- ☐ Local government
- ☐ Medium business (50 to 250 staff)
- ☐ Micro business (up to 9 staff)
- ☐ Small business (10 to 49 staff)
- ☐ Trade union or staff association
- ☐ Other (please describe)

Question 1: How can the government help businesses get most out of the flexibility offered and the different types of employment statuses?

Comments:

It may assist businesses if there were more detailed Government guidance on the different types of employment status and the employment rights which attach to each. In particular, it would be helpful to make it clear that it is possible for employers to employ some individuals as employee owners and others on standard employment contracts, as this may not be readily appreciated.

Question 2: Do businesses feel able to use all three employment statuses? If not, what restricts the use of different statuses?

Comments:

We are aware, from our clients and contacts, that many organisations are concerned about the additional regulation and cost associated with agency workers, since the Agency Worker Regulations came into force in 2011, and this has restricted their use of agency workers.

Question 3: What restrictions, if any, do you think should be attached to the issue of shares or types of shares?

Comments:

It is our view that companies should have flexibility over the restrictions they attach to employee owner shares and should not be limited to specific restrictions. Concerns over whether employee owners are aware of such restrictions can be dealt with by ensuring that adquate information is provided to them.

Where employees hold shares in a company, it is usual for these to be subject to restrictions. In a private company, these will usually be set out in its articles of association. Listed companies will impose restrictions by contract, often under the terms of a share ownership plan.

Summarised below are the most common forms of restriction attached to employee shares and an explanation of why they are considered to be commercially desirable.

Leaver Provisions: These require employee shareholders to transfer their shares when their employment ends. The price paid for these shares is pre-determined and usually depends upon whether they are "good" or "bad" leavers. Whereas "good leavers" are normally entitled to receive "fair value", "bad leavers" will generally receive the lower of issue price and fair value. The terms "good" and "bad" leaver and "fair value" will be as defined in the articles and can vary from company to company. A "good leaver" is usually someone who leaves by reason of death, injury, disability, redundancy or on a sale of the company or business for which he works. Everyone else (including those who resign) will usually be classified as a bad leaver. Leaver provisions are desirable because it is impractical for companies

to have to deal with large numbers of minority shareholders who are no longer employed by them.

Transfer Restrictons: employee shareholders are usually only permitted to transfer their shares to a limited class of persons such as certain relatives and trusts. The shares held by permitted transferees are usually subject to leaver provisions when the employee from whom they were acquired leaves. Transfer restrictions ensure that shares in the company are owned by a limited group of individuals and, as with leaver provisions, avoids the practical problems that can arise when dealing with a large minority shareholder base.

Drag along: These require employee shareholders to sell their shares in the event that a majority of the company's other shareholders choose to sell. This ensures that a purchaser of the company can acquire its entire issued share capital.

Voting rights: Employee shares might have no voting rights at all or have only restricted voting rights. Sometimes employee shareholders are required to exercise their votes in the same way as a specific shareholder.

Dividend rights: In private companies, it is common for employee shares to carry no or limited dividend rights. This is because profits are usually allocated to other investor shareholders with preferred dividend rights.

As a general principle, we do not consider it appropriate to set a limit on the restrictions attachable to employee owner shares. Our experience in helping companies establish HM Revenue & Customs (HMRC) approved schemes (such as Company Share Ownership Plans), has shown us that the prescriptive rules on share restrictions prevent many private companies from introducing them. As part of our response to its consultation on tax advantaged employee share schemes, we have requested that the Government reconsiders the need for such stringent rules on restrictions.

Although the legislation governing Enterprise Management Incentives (EMI) offers more flexibility over the shares that can be used, the conditions relating to "control" mean that many private equity investee companies are unable to offer EMI, simply as a result of how the investment is structured. As a result, these incentives are denied to the "high growth" companies at which they were originally aimed.

Question 4: When an employer buys back forfeit shares, should this be at full market value or some other level (eg. a fraction of market value) should some other level be allowed in certain circumstances?

Comments:

The Government's proposals state that employers will be permitted to buy back shares from departing owner employees at a "reasonable value". Employers should not be required to buy back shares as there may be circumstances in which a company does not have sufficient funds or cannot find a third party purchaser for them. As stated in our response to question 3, it is our view that there should be

flexibility over what constitutes a "reasonable value" so that it is able to reflect market practice in terms of leavers.

Nevertheless, we recognise that employee owners will have given up valuable employee rights in consideration for their shares and should not be left in a position where their shares could be forfeit for no payment if they leave.

We therefore suggest that the price at which shares can be "bought back" or transferred under leaver provisions is set at a statutory minimum although companies can choose to offer more than this. To recognise the rights given up by owner employees, we suggest that this minimum price is defined as:-

the lower of (i) the market value of the shares at the time of transfer; and
(ii) the market value of the shares on acquisition (increased by RPI or a similar suitable index).

Companies would be able to choose to pay good leavers more than this (for example, they could receive fair value, as is usual in private company articles) but could not pay less than this minimum. Although we are not in favour of drawing a statutory distinction between "good" and "bad" leavers, provision could be made so that those who leave by reason of gross misconduct receive a lower amount (perhaps the lower of (i), (ii) above and (iii) the price they paid for their shares which could be nil.)

We note that the Treasury is to consult separately on tax matters but we would like to raise a concern over whether capital gains tax treatment will be retained for employee owners where a company chooses to buy back the shares. Under existing law, such buy backs will be treated as a distribution and give rise to income tax in the hands of the employee.

Question 5: How should a company go about carrying out a valuation of the shares? What would the administrative and cost impact be for a company if an independent valuation was required?

Comments:

The costs of obtaining an independent valuation of shares for a private company can be considerable. Smaller, "boutique" valuation firms can be used where a valuation is straigtforward (for example because the shares have a nominal value) and might charge £5,000 or less. By contrast, where the valuation is complex and requires the expertise of one of the larger accountancy firms, costs can escalate to £30,000. Given the minimum of £2,000 worth of shares that must be awarded to employee owners, more complex and expensive valuations are likely.

If a company has to obtain an independent valuation, which it may need to do frequently if large numbers of employees are arriving and leaving (as is often the case in a fast growing start up), then this may end up being more expensive for the

employer than it would have been to employ them as ordinary employees and defend or settle any unfair dismissal claims that might be brought.

Under the proposals, a share valuation will be required at a number of stages. Companies will need to value the shares when working out whether the £2,000 and £50,000 limits have been met/exceeded and in deciding how much to pay a leaver. Some companies might choose to keep their employee owners regularly informed of share values.

It would therefore be preferable if companies were able to agree a valuation of their employee owner shares with HMRC's Share Valuation Division that lasts for a period of time (for example a year) to avoid the need for repeated and costly valuations.

We have concerns over the £2,000 de minimis. A number of small, high growth companies will have shares with very low market values to begin with. As a result, it will be difficult if not impossible for them to offer employee owner shares for some years. The Government will see from the information it has on EMI that many companies grant awards over shares with a very low market value. We question the policy reason behind the need for a de minimis. At first sight, it seems to be a way of ensuring that indviduals do not trade in their employment rights too "cheaply". Having said this, the consultation document does not distinguish between rights that can be given away for £2,000 and those that can be exchanged for £50,000 worth of shares. We would suggest that it is for individual employees to decide whether the trade-off between reduced employment rights and shares in the company is worthwhile.

We understand that the proposals are for employee owners to be gifted shares. If they have to accept the de minimis of £2,000 worth of shares and assuming the shares are readily convertible assets, this would give a higher rate taxpayer an immediate combined tax and National Insurance Contribution liability of £840.

Question 6: The Government would welcome views on the level of advice and guidance that individuals and businesses might need to be fully aware of the implications of taking on employee owner status.

Comments:

We have considerable experience in advising companies making share offers to large numbers of employees. As part of that process, it is usual for individuals to be given information about the shares they are to acquire including a summary of the articles of association of the company as they apply to their shares (with particular attention drawn to the restrictions attaching to such shares and any leaver provisions), a summary of the general tax position and sometimes financial information to support the share valuation. Individuals are also urged to seek their own independent advice on such matters as their personal circumstances might be relevant.

In addition, since becoming an employee owner entails giving up potentially valuable rights, it is our view that employees should be given prescribed

information, using prescribed wording about the precise rights that they will be giving up if they become an employee owner and what claims can still be brought (e.g. discrimination, whistleblowing). They should be allowed a set period of time (e.g. 14 days) to consider the information and, if necessary, take advice (although there should be no requirement to take legal advice).

Question 7: What impact will allowing individuals limited unfair dismissal protection and equity shares have on employers' appetite for recruiting?

Comments:

We do not consider that giving employee owners limited unfair dismissal protection will have a significant impact on recruitment. There are employee relations issues associated with asking individuals to sign away their employment rights which may make employee owner status unattractive to some employers and employees. In addition, the costs associated with valuing and buying back shares for individuals who are dismissed may end up being more expensive than defending or settling unfair dismissal claims. Indeed, dismissing an employee owner with less than two years' service will be more expensive than dismissing an ordinary employee in these circumstances, as the employee owner's shares would have to be valued and bought back at a reasonable value but an ordinary employee would have no right to claim unfair dismissal.

Question 8: What benefits do you think introducing the employee owner status in with limited unfair dismissal rights will have for companies?

Comments:

The key benefit for employers is that the new status will give them the flexibilty to choose this type of status where it is more appropriate for the particular employee in the circumstances. However, for the reasons outlined in this response, we do not believe the status will be appropriate for many employers or employees.

Question 9: Do you think these benefits will be greater for larger, smaller or start-up businesses?

Comments:

The costs associated with valuing shares mean that the benefits of employee owner status are likely to be greater for larger companies, who have greater resources available to them to absorb these costs, as well as publicly listed companies who will not need to have their shares independently valued.

Question 10: What impact, if any, do you think the employee owner status will have on employment tribunal claims, e.g. for discrimination?

Comments:

As employee owners will have limited unfair dismissal protection, they are more likely to bring claims of discrimination and whistleblowing. These types of claims are, therefore, like to increase in number, particularly when coupled with the fact that employees with less than two years' service are also now more likely to bring such claims.

Question 11: What impact do you think introducing the employee owner status with no statutory redundancy pay will have for businesses, in particular, smaller businesses and start up businesses? What negative impacts do you anticipate and how might these be mitigated?

Comments:

The removal of the entitlement to statutory redundancy pay for employee owners is unlikely to have a significant impact for businesses. The cost to the employer of paying statutory redundancy pay, particularly for shorter serving employees, is likely to be far less than the cost of valuing and buying back shares which, when granted, must have been worth at least £2,000. In addition, employers are now able to make employees with less than two years' service redundant without facing unfair dismissal claims or having to pay statutory redundancy pay. In contrast, if an employer makes an employee owner with less than two years' service redundant, the employer would face the cost of having to value the shares and buying them back at a reasonable value.

Question 12: What impact will this change to maternity notice period have on employers?

Comments:

The change in the notice required to return early from maternity leave is unlikely to have a significant impact on employers. In our experience, if an employee wants to return early from maternity leave they will usually give as much notice to the employer as possible. Shorter notice tends to be given in emergency situations or where there are other extenuating circumstances, and employers rarely insist on employees observing the statutory notice period.

Question 13: What, in your view, would employers do if employees wish to return early without giving 16 weeks' notice?

Comments:

In our experience, employers usually allow employees to return early even if they have not given the full statutory 8 weeks' notice and we believe this would be the same for employee owners who fail to give the full 16 weeks' notice.

Question 14: How will these changes impact on a company's payroll provisions?

Comments:

No comment

Question 15: What effect will a compulsory 16 weeks' early return notice period have on the length of maternity leave that mothers take or adoption leave that parents take?

Comments:

We do not think the 16 weeks' notice of early return will have any effect on the length of maternity/adoption leave that parents take.

Question 16: Do you think 4 weeks is the right period? If not, why not? What would be the impact of a shorter or longer period?

Yes ☒ No ☐

Comments:

One potential loophole with allowing employee owners to request flexible working on return from parental leave is that a parent could take one week of parental leave in order to be able to make a flexible working request on their return. Moreover, due to the risk of discrimination claims associated with rejecting flexible working requests, most employers will have to consider seriously any flexible working request from an employee owner, even if there is no positive statutory obligation to do so.

Question 17: What impact do you think this proposal would have on the ability of employee owners to access support for training?

Comments:

The removal of the right to request training for employee owners is unlikely to have any impact on their ability to access support for training. In our experience, the right to request training is used rarely in practice and employers will afford the same access to support for training, whether there is a formal statutory right to request it or not.

Question 18: Do you have any comments on the Government's intention not to amend Company Law to implement the employee owner proposal?

Comments:

We do not believe that Company Law needs to be changed to implement the

proposals however it will be difficult for companies to give "free" shares to employee owners. Under existing law, companies cannot gift shares as such and therefore at least nominal value will need to be paid (or distributable reserves used). Free shares can be awarded by employee benefit trusts but not every company has these. If it is the intention that shares are to be paid up by way of the rights given up then this creates valuation issues. For example, what rights would be worth £50,000 as opposed to £2,000? We note the proposals of BIS to facilitate share buy backs and the holding of treasury shares for private companies however we believe that the practical issues of gifting employee owner shares need to be considered.

Question 19: The Government welcomes views on particular safeguards that would need to be applied, in order to minimise opportunities for abuse.

Comments:

We are not certain as to how the Government considers the rules would be abused. Steps might need to be taken to prevent an individual from leaving a company then rejoining within a short period of time from acquiring further employee owner shares where this is done solely for the purpose of avoiding tax.

Although it is not entirely clear from the draft legislation, we assume that an employee of a group company will be eligible for employee owner status if the shares acquired are in the holding company of his employer.

Question 20: The Government welcomes views on whether the existing tax rules which apply to share-for-share exchanges (such as might happen when a company is taken over) and schemes of reconstruction should apply where shares issued in return for taking up the new status are involved

Comments:

We believe that capital gains tax rollover should be available for employee owner shares. Consideration needs to be given as to how the relief will apply in respect of different corporate events. For example, what would the situation be where an individual who has received the maximum number of shares has his employment transferred under TUPE? Would he be eligible for further shares in the new owner or would he be treated as having received the maximum under that particular employment?

Question 21: What impact do you think the proposal will have on labour market flexibility – that is, in relation to hiring and letting people go?

Comments:

As discussed above at question 7, we think the proposal is unlikely to have a significant impact on labour market flexibility. The introduction of employee owner status is unlikely to give employers the confidence to recruit in circumstances when they would otherwise have been reluctant to do so. Similarly, the cost of valuing and buying back shares, and the potential for disputes about the value of shares,

means it is unlikely to be significantly easier to let employee owners go. The benefit for employers will be having the flexibility to choose this type of arrangement for certain employees in appropriate circumstances.

Question 22: Would you be likely to take up the new status? What would the impact of the status be on your business?

Comments:

Not applicable

Question 23: What are your views on the take-up of this policy by:

a) companies?
b) individuals?

Comments:

The proposals would be attractive to all companies with an interest in using share ownership to reward, recruit and retain employees. One point we should like to make is that the Growth and Infrastructure Bill refers in clause 23 to consideration for employee owner status to be the "issue" or "allotment" of share. We would suggest that this is extended to include "transfer" as many companies use existing shareholders such as employee benefit trusts to source their employee shares.

We believe that the proposals would appeal mainly to higher level employees who do not feel the need to be fully protected in terms of employment rights (perhaps due to the relationship they have with their employer or because they are unlikely to want to make an unfair dismissal claim) to whom the prospect of a tax efficient shareholding in their employer is appealing. We are not certain that it would be attractive to the general workforce. The proposals might influence whether a business entity is structured as a company rather than, say, a partnership.

Question 24: What are your views on the equality impact assessment? Are there other equality and wider considerations that need to be considered?

Comments:

We do not have any particular views on the equality impact assessment although we do question the statement that the employers that should be able to access the new status are companies "established under the Companies Act 2006". Presumably it is the intention that UK employees of foreign companies will also be able to be employee owners?

Question 25: Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

☒ **Please acknowledge this reply**

Question 26 : At BIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents?

Yes ☒ No ☐

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BIS | Department for Business Innovation & Skills

Consultation on implementing employee owner status - response form

A copy of the **Consultation on implementing employee owner status:** can be found at:

http://www.bis.gov.uk/Consultations/consultation-on-implementing-employee-owner-status?cat=open

You can complete your response online through SurveyMonkey : (https://www.surveymonkey.com/s/5QJQ935)

Alternatively, you can email, post or fax this completed response form to:

Email:

implementing.employee@bis.gsi.gov.uk

Postal address:

Paula Lovitt MBE
Department for Business, Innovation and Skills (BIS)
3 Floor Abbey 1
1 Victoria Street
London SW1H 0ET

Fax: 0207-215 6414

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

The closing date for this consultation is: **8 November 2012**

Your details

Name: Carolina Gottardo

Organisation (if applicable): Latin American Women's Rights Servi

Address: Tindlemano.,

Telephone: .

Fax. .

Please tick the boxes below that best describe you as a respondent to this:

- ☐ Business representative organisation/trade body
- ☐ Central government
- ☒ Charity or social enterprise
- ☐ Individual
- ☐ Large business (over 250 staff)
- ☐ Legal representative
- ☐ Local government
- ☐ Medium business (50 to 250 staff)
- ☐ Micro business (up to 9 staff)
- ☐ Small business (10 to 49 staff)
- ☐ Trade union or staff association
- ☐ Other (please describe)

Question 1: How can the government help businesses get most out of the flexibility offered and the different types of employment statuses?

Comments:

We are concerned about the introduction of the Employee Owner contracts. Fundamental employment rights should not be reduced in any employment contract. We are particularly concerned about the reduction in rights for parents through increasing the notice requirement for early return from maternity leave, and restricting the right to request flexible working. This will have a disproportionate impact on women. We are also concerned about the loss of important unfair dismissal rights, statutory redundancy pay and training rights.
The Employee Ownership Organisation, which represents employee owned businesses, commented 'there is no need to dilute the rights of workers in order to grow employee ownership and no data to suggest that doing so would significantly boost the number of employee owners.' (New Statesman 30.10.2012)
Justin King, CEO of Sainsbury's, also criticised the scheme, 'I would not wish to trade good employment practice for greater share ownership...This is not something for our business...The population at large don't trust business. What do you think the population at large will think of businesses that want to trade employment rights for money?' (Guardian 09.10.2012)
It seems unlikely that ethical employers will use a scheme which undermines fundamental employment rights. If the Government wished to promote greater use of Employee Owner arrangements, they should retain all fundamental employment rights in the proposed Employee Owner contracts.

Question 2: Do businesses feel able to use all three employment statuses? If not, what restricts the use of different statuses?

Comments:

NA

Question 3: What restrictions, if any, do you think should be attached to the issue of shares or types of shares?

Comments:

NA

Question 4: When an employer buys back forfeit shares, should this be at full market value or some other level (eg. a fraction of market value) should some other level be allowed in certain circumstances?

Comments:

NA

Question 5: How should a company go about carrying out a valuation of the shares? What would the administrative and cost impact be for a company if an independent valuation was required?

Comments:

NA

Question 6: The Government would welcome views on the level of advice and guidance that individuals and businesses might need to be fully aware of the implications of taking on employee owner status.

Comments:

It is essential that all employees or potential employees are informed about the loss of employment rights under the Employee Owner contracts. It is particularly important that pregnant women and new mothers are informed about the reduction of rights in relation to notice for early return from maternity leave and requesting flexible working. This information should be available online, by telephone and in community languages.
Many pregnant women and new mothers are not aware of their rights at work. The 2005 Equal Opportunities Commission inquiry found that half of all women in the workplace experienced some form of pregnancy discrimination and 30 000 women each year lost their jobs as a result of pregnancy discrimination. 45% of women who took no action, did so because they were unaware of their rights.

Question 7: What impact will allowing individuals limited unfair dismissal protection and equity shares have on employers' appetite for recruiting?

Comments:

Unfair dismissal protections are a fundamental employment right. These should not be reduced in any employment contract. It seems unlikely that the new contracts will be used by ethical employers.

Question 8: What benefits do you think introducing the employee owner status in with limited unfair dismissal rights will have for companies?

Comments:

It is unlikely that the new contracts will be used by ethical employers.

Question 9: Do you think these benefits will be greater for larger, smaller or start-up businesses?

Comments:

It is unlikely that the new contracts will be used by ethical employers, irrespective of their size.

Question 10: What impact, if any, do you think the employee owner status will have on employment tribunal claims, e.g. for discrimination?

Comments:

The Employee Owner contracts prevent employees taking action for unfair dismissal. These rights should not be reduced in any employment contract or under any circumstances.
Individuals on Employee-Owner contracts will retain the right to take a discrimination claim to the employment tribunal. These claims are time consuming and difficult to pursue and are not a satisfactory alternative to an unfair dismissal claim. The Government is planning to introduce substantial fees to take a pregnancy discrimination case to the employment tribunal.
Individuals on Employee Owner contracts will have substantially reduced access to the employment tribunal to remedy unfair treatment from their employer.

Question 11: What impact do you think introducing the employee owner status with no statutory redundancy pay will have for businesses, in particular, smaller businesses and start up businesses? What negative impacts do you anticipate and how might these be mitigated?

Comments:

Statutory Redundancy Pay is a fundamental employment right. This should not be reduced in any employment contract. It is unlikely that the new contracts will be used by ethical employers.

Question 12: What impact will this change to maternity notice period have on employers?

Comments:

Doubling the notice period for early return from maternity leave is reducing a fundamental employment right. This should not be reduced in any employment contract. It is unlikely that the new contracts will be used by ethical employers. Increasing the notice period for early return from maternity leave will increase the pressure on women at a time when they should be able to focus on their new baby and on their own recovery from the birth. Many women will find it difficult to plan their arrangements for return to work 16 weeks in advance, as they will need to finalise childcare and resolve flexible working arrangements. This unnecessary pressure is likely to result in more women resigning their jobs during maternity leave. This will reduce women's labour market participation and increase the gender pay gap. This mesaure will disproportionately affect women/

Question 13: What, in your view, would employers do if employees wish to return early without giving 16 weeks' notice?

Comments:

NA

Question 14: How will these changes impact on a company's payroll provisions?

Comments:

NA

Question 15: What effect will a compulsory 16 weeks' early return notice period have on the length of maternity leave that mothers take or adoption leave that parents take?

Comments:

Increasing the notice period for early return from maternity leave will increase the pressure on women at a time when they should be able to focus on their new baby and on their own recovery from the birth. Many women will find it difficult to plan their arrangements for return to work 16 weeks in advance, as they will need to finalise childcare and resolve flexible working arrangements. This unnecessary pressure is likely to result in more women resigning their jobs during maternity leave.

Question 16: Do you think 4 weeks is the right period? If not, why not? What would be the impact of a shorter or longer period?

Yes ☐ No ☒

Comments:

Flexible working arrangements are a fundamental employment right. These should not be reduced in any employment contract. It is unlikely that the new contracts will be used by ethical employers.

Question 17: What impact do you think this proposal would have on the ability of employee owners to access support for training?

Comments:

Access to training is a fundamental employment right. This should not be reduced in any employment contract. It is unlikely that the new contracts will be used by ethical employers.

Question 18: Do you have any comments on the Government's intention not to amend Company Law to implement the employee owner proposal?

Comments:

No answer

Question 19: The Government welcomes views on particular safeguards that would need to be applied, in order to minimise opportunities for abuse.

Comments:

No answer

Question 20: The Government welcomes views on whether the existing tax rules which apply to share-for-share exchanges (such as might happen when a company is taken over) and schemes of reconstruction should apply where shares issued in return for taking up the new status are involved

Comments:

No answer

Question 21: What impact do you think the proposal will have on labour market flexibility – that is, in relation to hiring and letting people go?

Comments:

The Employee Owner contract will have negative impacts on labour market flexibility for women. The Employee-Owner contracts substantially reduce fundamental employment rights, including increasing notice periods for notifying early return from maternity leave and restricting the right to request flexible working. These are rights of particular importance to new mothers. The Employee Owner contract will result in an increased proportion of women exiting the labour market during pregnancy and maternity leave.

Question 22: Would you be likely to take up the new status? What would the impact of the status be on your business?

Comments:

No answer

Question 23: What are your views on the take-up of this policy by:

a) companies?

b) individuals?

Comments:

The Employee Owner contracts involve a loss of fundamental employment rights. These should not be reduced in any employment contract. It seems unlikely that the new contracts will be used by ethical employers.
The contracts will seriously disadvantage individual employees and are likely to be taken up only by those who are unable to find an alternative job.

Question 24: What are your views on the equality impact assessment? Are there other equality and wider considerations that need to be considered?

Comments:

Pregnancy and maternity: The equality impact assessment notes that the doubling of the notice period for early return from maternity leave will impact on pregnant women and new mothers. It states that this is a procedural change and concludes that there is no disproportionate equality impact on this group. We do not agree. By doubling the notice period for notice of early return from maternity leave, women face significant barriers to returning from maternity leave. 84% of women taking maternity leave return before 52 weeks and will be required to give notice of early return (DWP 2011). Many women will find it difficult to plan their arrangements for return to work 16 weeks in advance, as they will need to finalise childcare and resolve flexible working arrangements. This unnecessary pressure is likely to result in more women resigning their jobs during maternity leave.
Gender: The equality impact assessment stated that broadly similar numbers of men and women access flexible working. This is incomplete data. A significantly greater proportion of women than men request flexible working (28% compared to 17% - BIS 2012) so restricting the right to request flexible working will impact disproportionately on women.

Question 25: Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

☒ **Please acknowledge this reply**

Question 26 : At BIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents?

Yes ☐ No ☐

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'Trading rights for shares'

UNISON response to BIS consultation on 'employee owner status'

November 2012

Introduction

UNISON is the UK's largest public service trade union with 1.3 million members. Our members are people working in the public services, for private contractors providing public services and in the essential utilities. They include frontline staff and managers working full or part time in local authorities, the NHS, the police service, colleges and schools, the electricity, gas and water industries, transport and the voluntary sector.

UNISON is fundamentally opposed to the government's proposals permitting employers to trade key employment rights for shares in a company. In our opinion, these proposals represent an unjustified attack on employment rights.

The government argues these measures will provide increased flexibility for businesses and give 'employee owners' an increased stake in their company. In practice, the proposals will strip employees of basic workplace rights. Employee will lose out on protection from unfair dismissal and the rights to redundancy pay, making it easier and cheaper for employers to sack them. The government's proposals will also substantially weaken family friendly rights for 'employee owners', by limiting the right to request to work flexibly and imposing longer notice periods for women returning from maternity leave. In return, individuals will receive shares valued at between £2,000 and £50,000. However, they will not be guaranteed the same voting rights or dividends enjoyed by other shareholders. There is also no guarantee that the shares will increase or even hold their value.

The proposals also confuse the situation where there are already employee share ownership schemes in operation and risk confusion with the Nuttall Review of employee involvement and their drive to encourage mutual organisations.

Trading company shares for employment rights

Government publicity has presented its proposals as creating a new form of employment status – that of 'employee owner'. Yet Clause 23 of the Growth and Infrastructure Bill simply removes key employment rights from employees who receive company shares valued at between £2,000 and £50,000.

These provisions flout the basic principle that it should not be possible to contract out of basic statutory rights, even in return for money.

Loss of unfair dismissal protection

The government's proposals give full effect to the Beecroft report by removing basic unfair dismissal protection from so-called 'employee owners'.

As a result, employers will be free to sack employees for arbitrary reasons and would not need to follow a fair procedure when doing so. Employers will only need to take

steps to avoid dismissing individuals for discriminatory reasons or for an automatically unfair reason.

Unlike under earlier proposals for no fault dismissal, 'employee owners' will not be guaranteed a reasonable level of compensation when they are dismissed.

Loss of the right to statutory redundancy pay

The removal of the right to statutory redundancy pay will mean that many individuals and families will be substantially worse off where businesses decide to lay off staff. For example, an employee on average earnings who is 41 years of age or older and has worked for a company for 10 years would be entitled to £6450 in statutory redundancy pay. If the same individual had received £2,000 worth of shares, they would need to see the value of their shares increase by over 300 per cent over 10 years before they would receive equivalent compensation under the employee owner proposals.

The government has stated that the proposals are targeted at smaller businesses and new start up companies. However the ONS's most recent statistics show that business failures are currently at record levels across the UK, and that on average less than half of new businesses (44.4%) have a survival rate of over five years.[1]

Where businesses go to the wall, an employee's shares will have very limited value or more likely they will be worthless. However, unlike other employees, 'employee owners' will not be entitled to recover any redundancy payments from the Redundancy Payments Office (RPO), meaning they will not receive any compensation for the loss of their employment.

Limiting family friendly rights

The extension of the maternity notice period to 16 weeks will not benefit employers, instead it is more likely that women will end up taking longer leave than they otherwise would and fewer women will return from maternity leave if their return is made more difficult.

New mothers who are employee-owners would face further barriers to their return and remaining in work if excluded from the right to request flexible working. The BIS Work-Life Balance Survey found that women were twice as likely as men to request flexible working and to say that it was "very important" to them in deciding whether to take a job.

The proposed exclusion of employee-owners from the right to request flexible working also goes against the government's argument for creating a universal right to enable flexible working to reach "all parts of society and the economy" so that businesses can reap an estimated £52.4m a year in associated benefits.

Impact on employee share ownership

[1] ONS Business Demography statistics 2010

In July, the Deputy Prime Minister launched a review of Employee Ownership conducted by Graham Nuttall at a successful Employee Ownership Summit. Since then, the government has conducted a consultation on implementing proposals from the Nuttall Review. There was no mention of trading rights for shares in the Deputy Prime Minister's initial speech announcing the Review, nor in any of the contributions to the July Summit, nor in the Nuttall Review itself, nor in the Government's consultation on implementing the Nuttall Review.

The proposal for employees to give up employment rights in exchange for shares flies in the face of the evidence about how employee ownership can achieve benefits for both employers and employees. The Nuttall Review, which was whole-heartedly endorsed by the government, argued that "*The key condition under which employee ownership is recognised to succeed best is when it allows employee owners to exercise their voice internally. It is this combination of share ownership and employee engagement that drives higher performance.*"[2] Asking employees to trade key employment rights for shares will not create the conditions for the sort of employee engagement that the evidence clearly shows is a necessary condition for employee ownership to lead to improved business outcomes.

The proposal for employees to trade rights for shares risks creating confusion among both employers and employees about employee share ownership schemes more broadly. It will undermine existing schemes and the government's policies to promote wider take-up of employee ownership by giving all employee share schemes a bad name. Employees will rightly be wary of an initiative that seeks to strip them of their rights in exchange for shares, and may assume that all employee ownership schemes work in this way. The proposal contradicts the government's wider policies and support for employee ownership and reveals tension at the heart of government over the direction of its policies on employee ownership.

The CEO of the Employee Ownership Association Iain Hasdell has made the following comment on the proposals:

> "*There is absolutely no need to dilute the rights of workers in order to grow employee ownership and no data to suggest that doing so would significantly boost employee ownership.*

Indeed all of the evidence is that employee ownership in the UK is growing and the businesses concerned thriving, because they enhance not dilute the working conditions and entitlements of the workforce."[3]

If this proposal goes ahead, it will be essential to ensure that a clear distinction is made between employee owner contracts and existing share ownership schemes and the creation of public service mutual organisations.

Share values

UNISON is extremely concerned that this proposal could see employees trading valuable protections at work for shares that could turn out to be almost worthless.

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[2] Sharing Success The Nuttall Review of Employee Ownership July 2012

[3] http://www.employeeownership.co.uk/news/press/bis-consult-3/

The Treasury press release setting out the Chancellor's announcement of this initiative states that it is principally intended for fast growing small and medium sized companies and that new start-ups can choose to offer only this new type of contract to new recruits. Small, fast growing companies and start-ups can find their fortunes going down as well as up very quickly, and there is a significant risk that employees who traded their rights for shares in these and other companies could find that their shares had become worth very little over time.

Existing companies will have to pay lawyers to change their share structures and create a pool of second class shares for employees, which will have to be valued every time an 'employee owner' joins to check they are over £2,000 in value. Also, the accuracy and independence of the valuation is unclear.

Tax advantage or disadvantage?

The government is proposing that shares allocated to an 'employee owner' would be subject to income tax and national insurance, but that gains would not incur capital gains tax (CGT). However, for an individual, gains of up to £10,600 per year are exempt from CGT anyway.

There are existing employee share schemes, however, which allow employees to gain shares without paying income tax or national insurance on the shares. Most employee owners' allocated low levels of shares would almost certainly be better off receiving their shares through an existing HMRC approved share ownership plan.

Lack of consultation, evidence and support

UNISON questions why the government is rushing these proposals through just weeks after plans for no fault dismissal were dropped due to lack of support and the lack of evidence that weakening employment protections will help to generate growth.

It was also deeply disconcerting that the government decided to legislate on employee owner proposals, by including detailed provisions in Clause 23 of the Growth and Infrastructure Bill, before consultation has taken place. This Bill was laid before Parliament on the same day as the public consultation was launched.

Furthermore the government has failed to examine the implications of the proposals for employees, employers or the wider economy before deciding to legislate. Whilst the BIS consultation document is accompanied by a short but inadequate equality impact assessment, no wider impact assessment has been undertaken. The government appears intent on driving these proposals through without adequately evaluating their implications for employees, business performance and the wider economy.

The proposals have attracted criticism from the business community. For example:

> Justin King, chief executive of J Sainsbury speaking at a recent retail conference said that trading employment rights for company shares is *"not what we should be doing"*. He also asked *"What do you think the population at large will think of businesses that want to trade employment rights for money?"*

In the light of such concerns, UNISON calls on the government not to proceed with its proposals on 'trading shares for rights'.

Responses to consultation questions

Employment status

UNISON contests the government's assertion that its proposals create a new employment status. There are numerous Employment Tribunal and Employment Appeal Tribunal decisions which confirm that individuals who hold share options within businesses in most cases will be legally classified as employees. Employment tribunals have also found that directors should be classified as employees and are protected by employment protection legislation, depending on level of control which they exercise over the company concerned. The consultation document also confirms that the individuals concerned will still be classified as employees for all other statutory employment rights.

UNISON therefore does not accept that the government's proposals would create a new form of employment status. Rather the proposals are simply designed to enable employers to contract out of basic employment protections in return for potentially worthless shares.

It is also notable that the only rights which have been removed from 'employee owners' are those which are not protected by European Union law. In other words, the government is removing these rights *simply because they can* but without giving consideration to the effects on employees, employers or the wider economy.

Questions 1 & 2:

How can the government help businesses get the most out of the flexibility offered and the different types of employment status?

Do businesses feel able to use all three employment statuses? If not, what restricts the use of different statuses?

The UK labour market is characterised by the extensive use, and often misuse, of flexible forms of employment relationship, including self-employment, casual work and agency working. For example, during the recession:

- There has been a sharp increase in the use of zero hours contracts. According the LFS the number of zero hours contracts has risen from 75,000 in 2005 to 146,000 in 2011. This we believe is an underestimate. The increase in casualised employment has been particularly marked amongst female workers, rising from 32,000 in 2005 to 85,000 in 2011.
- A large amount of growth of zero hours contracts has been in health and social care and a UNISON survey in the summer of 2102 recently found that over 40% of home care staff responding were on zero hours contracts.

Casual workers and those who are falsely self-employed are also deprived of basic employment rights, including protection from unfair dismissal, the right to redundancy pay and family friendly rights.

Rather than promoting the use of more insecure employment, UNISON believes the government should work to prevent the mistreatment of vulnerable workers. Rather than concentrating on the expansion of more casualised employment, the

government's should seek to encourage the creation of good quality employment which benefit working people and contribute to the development of high trust, high productivity workplaces.

"Trading rights for shares"

Question 3:

What restrictions, if any, do you think should be attached to the issue of shares or types of shares?

The consultation suggests that shares given to employee owners may not carry rights to dividends or voting rights or rights to a share in the company's assets if it is wound up. UNISON does not understand the justification for this. It leaves the government's argument that this proposal will give employees a stake in their company looking meaningless. Without voting rights or the right to dividends and with no guarantee of realising the full market value of their shares on leaving the company, what is it that employees are actually being given under this proposal? With these restrictions, it is misleading to call them 'shares'.

Question 4:

When an employer buys back forfeit shares, should this be at full market value or should some other level (e.g. fraction of market value) be allowed in certain circumstances?

The consultation document suggests that it could be permissible for an employer to buy back shares at the point when the staff member is leaving the company for less than their market value. UNISON is appalled that the government is proposing a scheme whereby employees are not entitled to the full value of what under the proposals' own terms is surely theirs in its entirety. This aspect of the proposal illustrates starkly the unbalanced approach behind the initiative: workers may give up valuable rights in exchange for shares - but then on leaving the company may be required to sell back their shares for only a fraction of their market value. This, and the lack of clarity about how shares will be valued, will create a significant potential for disputes between employers and employee owners that are likely to end in court.

Question 5:

How should a company go about carrying out a valuation of the shares? What would the administrative and cost impact be for a company if an independent valuation was required?

UNISON is firmly opposed to the government's proposals permitting employers to 'trade rights for shares'. However if the plans are to proceed, it is essential that the government guarantees that an accurate and independent valuation of shares takes place at the point when an individuals are offered an 'employee owner' contract and at the end of the employment relationship. There are a variety of share valuation methods the company accountant could choose and the one chosen may be the least advantageous to the employee at that stage in the company's development. It would also be costly for an employee to pay for alternative valuation as this something they are unlikely to be able to embark on themselves. Furthermore, the valuation may be rushed if it is part of negotiations on a compromise agreement mutually terminating the employment after a dispute.

It is useful to note that setting up a proper employee share ownership scheme under existing rules costs on average £15,000 to £20,000 in fees and administration. This will be a large cost for small employees.

Consequences for employees

Question 6:

The government would welcome views on the level of advice and guidance that individuals and businesses might need to be fully aware of the implications of taking on employee owner status?

The implications for an employee who agreed to an 'employee owner' contract are likely to be very significant.

Individuals will be asked to forego basic statutory rights in return for shares which have very limited value or even be worthless. Employees will be particularly financially disadvantaged where the company decides to lay off staff or becomes insolvent. There is a serious risk that employees will be forced to leave an organisation with little or no compensation.

Employees will also lose out on protection from arbitrary dismissal and on rights to request to work flexible or to request time to train. The loss of such rights may be difficult to quantify in financial terms, but is likely to have significant implications for the quality of the individual's working life and on their career prospects and future livelihoods.

It will also be very complex for an employee to forecast the prospects for the company and the potential future value of any share options.

UNISON is firmly opposed to the proposals on employee owner contracts. However, if the Government decides to proceed, it is essential that employees or new recruits are provided with independent legal and specialist financial advice before being asked to sign an employee owner contract. Measures akin to compromise agreements should apply to employee owner contracts. The proposed exclusion from statutory employment rights should not be effective if the employee has not received independent legal and financial advice before signing it. The employer should also be required to cover the costs of the advice, although the employee should be free to determine the source of the advice.

UNISON is seriously concerned that employees will have no genuine choice over whether to sign up for fewer rights at work if their employer decides to adopt employee owner contracts.

- Employers will be free to decide to employ all *new recruits* on employee owner contracts. Individuals would have no choice but to contract out of their basic employment rights if they want the job. This discriminates against those who want to keep their employment rights.
- There is also nothing to prevent employers from threatening *existing employees* that they will only retain their jobs if they agree to sign a new employee owner contract. Existing employees could therefore be pressurised into agreeing to

move on to an employee owner contract.

If existing employees refuse to agree to new contracts, the employer could decide to dismiss them and offer them reinstatement on new employee owner contracts. If the employee refuses, it could be difficult to convince an employment tribunal that they had been unfair dismissed. In any event they would have lost their job and their livelihood.

Employees with more than two years' continuous employment with the same employer will have accrued rights to unfair dismissal protection and statutory redundancy pay. Such accrued rights are likely to be considered as property rights for the purposes of the European Convention on Human Rights. The government is under a clear obligation to ensure that employees make an informed choice to forego such rights.

UNISON therefore believes it is incumbent on the government to ensure that employees are not pressurised into agreeing to an employee owner contract and that they do not face the threat of dismissal or victimisation if they decline the offer. To this end the government should amend the law to state that:

- It is automatically unfair for an employer to dismiss an employee on grounds that they have chosen not to take up employee owner contracts.
- It is unlawful for an employer to subject an employee to any form of detriment because they refuse to sign an employee owner contract.

Loss of unfair dismissal protection

Question 7:

What impact will allowing individuals limited unfair dismissal protection and equity shares have on employer's appetite for recruiting?

The government's recent call for evidence on proposals for no fault compensated dismissal highlighted that there is no evidence that the removal of unfair dismissal will encourage employers to recruit more staff.

As the government's own research reveals, unfair dismissal rights do not even figure in the list of top ten regulations discouraging them from recruiting staff.[4]

The government's response to the call for evidence on compensated no fault dismissal also confirmed that:

> *'Of the 40% of [the respondents to the BIS commissioned survey] who agreed that employment protection put them off from hiring new employees, only 1 % identified dismissal / disciplinary action regulation as the primary regulation, which translates to 0.4% of respondents overall.'*[5]

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[4] http://www.bis.gov.uk/assets/biscore/employment-matters/docs/d/12-626-dismissal-for-micro-businesses-call.pdf p. 29

[5] BIS Dealing with dismissal and 'no fault compensated dismissal' for micro businesses: Government Response http://www.bis.gov.uk/assets/biscore/employment-matters/docs/d/12-1143-dismissal-for-micro-businesses-response.pdf , September 2012 p 10.

These findings are not surprising given that the UK has the third lowest level of employment protection legislation out of 36 countries.[6]

There is a risk of abuse with employers making share offers at the 23 month point to avoid the employee acquiring unfair dismissal and redundancy pay rights.

Question 8:

What benefits do you think introducing the employee owner status with limited unfair dismissal rights will have for companies?

UNISON does not agree that the use of employee owner contracts will have benefits for businesses.

The removal of unfair dismissal rights for so called employee owners is likely promote bad practices amongst managers and to generate a hire and fire culture in companies.

The proposals will substantially increase levels of job insecurity which in turn will damage morale and productivity amongst the remaining workforce. As Mike Emmott, employee relations adviser at the CIPD said:[7]

> *"it is highly doubtful whether inviting employees to sign away basic employment rights will deliver the motivated, driven, high performing workforce that small firms need. Existing, highly successful mutually owned firms do not thrive on employee ownership alone, but on the high trust, high engagement, all-pulling-in-the-same-direction cultures they have. Employee ownership works best where it is accompanied by great management, rather than enhanced job insecurity."*

Question 9:

Do you think these benefits will be greater for larger, smaller or start-up businesses?

UNISON does not agree that the use of employee owner contracts will have benefits for businesses of any size.

Question 10:

What impact, if any, do you think the employee owner status will have on employment tribunal claims, e.g. for discrimination?

Some employers' organisations have lobbied for the removal of unfair dismissal rights, arguing that this will reduce the risk of employment tribunal claims being brought against them. In practice, the government's proposals are likely to lead to an increase in discrimination claims, claims for automatic unfair dismissal and breach of contract claims. Such claims are usually more complicated and time-

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[6] OECD Employment data 2008.

[7] http://www.cipd.co.uk/pressoffice/press-releases/share-ownership-no-substitute-employment-rights good-people-management-081012.aspx

consuming for employers to defend and more costly for employment tribunals to determine.

The government's proposals are also likely to generate increased litigation over the value of employee owner shares in the court system.

Loss of statutory redundancy pay

Question 11:

What impact do you think introducing the employee owner status, with no statutory redundancy pay will have for businesses, in particular smaller businesses and start-up businesses? What negative impacts do you anticipate and how might these be mitigated?

Few employees are likely to be attracted to the option of trading basic statutory rights in return for shares which may have very limited value. The absence of rights to statutory redundancy pay and other key entitlements will mean that it will be difficult for small and starter businesses using employee owner contracts to attract and recruit quality staff.

As noted above, a majority of new starter firms do not survive for more than 5 years. Under the government's proposals, 'employee owners' working for such businesses will receive little or no compensation when the businesses fail. This will leave them and their families in a financially precarious position and increasingly dependent on welfare benefits.

As mentioned earlier a small firm will need to pay for a share capital re-organisiation and for a valuation each time someone joins or leaves and the share buy-back option is exercised. Employers could offer shares as a way of reducing redundancy rights in hard times, not only for individuals but for the purposes of collective redundancy consultations.

Extension of maternity leave notice periods

Question 12:

What impact will this change to maternity notice period have on employers?

UNISON believes employers will gain little from this proposal. Instead, women will potentially take longer leave than they otherwise would and employers could see the rate of return from maternity leave drop.

The long notice requirement together with the proposed exclusion of employee-owners from the right to request flexible working will make it more difficult for mothers to plan for their return to work. It takes time, particularly for first-time parents, to get confirmation of childcare places and to make requests of their employers to vary working hours to accommodate childcare arrangements.

If an employer ignores a request for flexible working because they believe they do not need to consider it from an employee-owner, or fails to respond in good time as

they are not bound by the deadlines in the statutory procedure or guidance, then a woman will struggle to meet the 16-week notice requirement for her preferred return date. Her return will be delayed and if she perceives the employer is treating her unfairly and making life unnecessarily difficult for her, she may decide not to return at all. An EOC survey in 2005 of over 1,000 women who had recently taken maternity leave found that those who thought they had been treated unfairly during their pregnancy or maternity leave were six times more likely to never return to work. And of those who did not return to their pre-birth employer, most suffered a significant drop in pay and status in their subsequent job.

In reality, most women give an indication of their return date prior to taking leave as this enables planning for all parties. The existing 8-week statutory notice period of the actual return date is sufficient for employers to plan and prepare for the return, while giving women and their families time to put in place childcare and other arrangements so they can confirm that date.

Question 13:

What, in your view, would employers do if employees wish to return early without giving 16 weeks' notice?

It is difficult to see what benefit an employer would gain from not allowing the employee to return early without giving 16 weeks' notice. Most cover arrangements will not require 16 weeks' notice to bring to an end, the standard 8 weeks' notice is sufficient.

Suspending a woman on unpaid leave until they fulfil the 16-week notice requirement is likely to sour the relationship between employer and employee-owner and could result in the woman not returning at all.

Question 14:

How will these changes impact on a company's payroll provisions?

UNISON do not foresee any impact on a company's payroll provision but there may be an issue of how the value of the shares, if taxable, are passed to HMRC under monthly PAYE Real Time Information systems being bought in ahead of Universal Credit. It will be important however for the government to close any loopholes in the legislation which would enable the use of scams where employees are offered shares in, and employed by, a payroll company, or an 'umbrella company' and then placed to work on a regular basis for a larger and more profitable company.

Question 15:

What effect will a compulsory 16 weeks' early return notice period have on the length of maternity leave that mothers take or adoption leave that parents take?

It is likely to mean that mothers or adopters take longer leave as they and their partners will have less time to plan for their actual return date prior to having to give notice. For example, a woman who might want to take 26 weeks' maternity leave would have to give notice of her actual return date when the baby was just six weeks' old if she had taken four weeks' leave prior to the birth (which is quite common). This is very early in a baby's life and parents are unlikely to feel ready or

able to decide upon the best childcare arrangements at this stage and confirm the actual return date.

Loss of the right to request flexible working

Question 16:

Do you think 4 weeks is the right period? If not, why not? What would be the impact of a shorter or longer period?

The proposal to exclude employee-owners from the right to request flexible working is completely at odds with the government's commitment to create a universal right to request to encourage greater take-up of flexible working.

The government's consultation on Modern Workplaces in May 2011 stated that:

"The existing right to request has been a success... But we want to go further. We think that by extending the right to request flexible working to all employees, we can spread the benefits flexible working brings to all parts of society and the economy." It went on to state that it estimated this would benefit business by an average of £52.4m per year.

The right to request has been effective in increasing the availability of flexible work options and access to flexible working in a wider range of jobs.[8] It is far from being an onerous procedure for employers. It simply requires an employer to discuss a request with an employee, to respond in writing and to give the employee a chance to appeal a negative decision before making a final decision.

UNISON believes that excluding employee-owners from this right is likely to reduce the availability and range of flexible work options to this group of workers.

It would also create the impression that a request for flexible working from an employee-owner never has to be properly considered. However, an employer could find themselves facing an indirect sex discrimination claim if they do not consider a request from an employee-owner returning to work after maternity leave. While ignoring a request from a disabled employee-owner could result in an unlawful failure to make a reasonable adjustment.

The granting of the right to request only to those employee-owners returning from parental leave will further confuse employers.

Loss of the right to request time to train

Question 17:

What impact do you think this proposal would have on the ability of employee owners to access support for training?

The consultation document states that 'skills and training are important to driving a business forward.' UNISON shares this view. In our opinion, access to training is central to encouraging innovation and increased productivity. It is therefore surprising that the government has decided remove the right to request time to train from employee owners.

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[8] http://www.equalityhumanrights.com/uploaded_files/research/16_flexibleworking.pdf

Removing this right would mean that an individual's access to training would depend solely on an employer's own policies and practices. UNISON questions the government's confidence that companies who choose to have employee owners will fully integrate training" and "accessing appropriate training will be easier for employee owners". The UK Employer Skills Survey 2011 showed that 41% of UK employers say they did not train any of their staff and 46% of UK employees (around 13 million) did not receive any training. The removal of rights to request time to train for employee owners is unlikely to buck this trend.

UNISON also notes that the right to request time to train currently only applies to employers with 250 or more employees. The removal of this right appears inconsistent with the government's assertion that employee owner proposals are principally aimed at small and medium sized but fast growing businesses. Rather it suggests that the government anticipates that employee owner contracts schemes will be adopted more widely by larger firms.

Implications for company law

Question 18:

Do you have comments on the Government's intention not to amend Company Law to implement the employee owner proposal?

No comment.

Tax and anti-avoidance

Question 19:

The Government welcomes views on particular safeguards that would need to be applied, in order to minimise opportunities for abuse.

UNISON believe it will not be possible to safeguard against abuse, as these proposals effectively open a new tax avoidance loophole which will allow employers to provide employees who currently receive shares as part of their remuneration package with an opportunity to reduce the amount of Capital Gains Tax (CGT) they pay on these shares if they sell them. The only way to fully guard against this outcome is to withdraw the proposals. The impact could be mitigated by introducing a cap on the level of gain not subject to CGT, although this would also disadvantage employee owners who could then receive a lower value on their shares than they would otherwise be entitled to.

We also believe there is a significant risk that owners/founders/directors of new small companies will classify themselves as 'employee owners', meaning that they could then wholly exempt all gains they might make in the future from tax altogether, irrespective of capital gains tax entrepreneur's relief. Again, we can see no way to fully mitigate this risk. The legislation could specify that 'employee owner' status should not be available to owners/founders and directors, but even if such provisions were introduced it is hard to see how they could be enforced. Alternatively, Government could legislate to prevent any one individual owning more than a certain proportion of shares (for example 5%) at the point at which they became an employee owner. But again, this could serve to unfairly limit the total value of shares that genuine employee owners were provided with.

Question 20:

The Government welcomes views on whether the existing tax rules which apply to share-for- share exchanges (such as when a company is taken over) and schemes of reconstruction should apply where shares issued in return for taking up the new status are involved.

If the Government moves ahead with this scheme UNISON believes that existing tax rules (whereby employees in companies being taken over are offered the chance to exchange their shares for shares in the new company, with the shares they are offered valued at the takeover price (rather than having to sell their existing shares and therefore incur tax)) should remain in place. These rules should apply regardless of whether the takeover means that employee owners are provided with the chance to regain their employment rights as part of the takeover process.

General questions

Question 21:

What impact do you think the proposals will have on labour market flexibility – that is in relation to hiring and letting people go?

Business lobbyists have argued that weakening unfair dismissal rights would help to boost recruitment. However, this claim is not substantiated by the evidence.

The UK already has one of the most lightly regulated labour markets in the industrialised world. OECD research reveals that among the world's 36 most prosperous countries, only workers in the USA and Canada have weaker employment protection than UK employees.[9] The World Economic Forum's latest Global Competitiveness report ranked the UK 5th out of 144 countries for 'labor market efficiency' (based on a survey of business executives).[10]

Academic studies have repeatedly found that employment protection legislation, including unfair dismissal rights, does not have a detrimental impact on unemployment or employment levels.[11] However, the adoption of deregulatory policies is likely to lead to increased inequality and in-work poverty.[12] The removal of unfair dismissal rights and the ensuing job insecurity is likely to damage consumer

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[9] OECD Employment Data.

[10] http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2012-13.pdf

[11] See Howard Reed (2010) *'Flexible with the Truth? Exploring the Relationship between Labour Market Flexibility and Labour Market Performance'* for a detailed review of recent research.

[12] Wilkinson, Richard and Pickett, Kate (2009) *The Spirit Level: why equality is better for everyone*, Allen Lane. See also Howard Reed (2010) *'Flexible with the Truth? Exploring the Relationship between Labour Market Flexibility and Labour Market Performance'* TUC, London.

confidence, suppress demand and make it more difficult for employees to access mortgages.[13]

As highlighted in the responses to questions 7&8, the government's own research also confirms that most employers do not perceive the current level of regulation as a major constraint on growth.[14] Unfair dismissal regulations do not even feature in the list of top ten regulations which employers cite as a deterrent to growth.

Labour market analysis also does not support the argument that weaker dismissal rights will lead to increased employment and lower unemployment levels. Rather it suggests that employment protection legislation (EPL) tends to discourage employers from hiring during periods of growth but it also discourages layoffs during periods of recession. Over the economic cycle as a whole, the effect on employment levels tends to be neutral. This point was illustrated in recent comments by John Philpott, the Chief Economist at the CIPD:

> *'The vast weight of evidence on the effects of employment protection legislation suggests that while less job protection encourages increased hiring during economic recoveries it also results in increased firing during downturns.* ***The overall effect is thus simply to make employment less stable over the economic cycle, with little significant impact one way or the other on structural rates of employment or unemployment. (emphasis added)'***[15]

In its response to the recent BIS call for evidence on compensated no fault dismissal (NFD) the government concluded:

> 'that there is insufficient support and evidence that NFD would have a positive impact on the UK labour market ... The Government has therefore decided it will not take forward proposals for NFD.'

This analysis applies equally to the proposals on employee owners. UNISON therefore calls on the government to drop the proposals on trading rights for shares.

Questions 22 & 23:

Would you be likely to take up the new status? What would the impact of the status be on your business?

Question 23:

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[13][13] See the TUC response to the BIS consultation on Dealing with dismissal and 'no fault compensated dismissal' for micro businesses: http://www.tuc.org.uk/tucfiles/346/NoFaultdismissal.pdf ; Also see the Government Response to this call for evidence http://www.bis.gov.uk/assets/biscore/employment-matters/docs/d/12-1143-dismissal-for-micro-businesses-response.pdf , September 2012.

[14] BIS Small Business Barometer August 2011, published in October 2011: http://www.bis.gov.uk/assets/biscore/enterprise/docs/s/11-p75c-sme-business-barometer-august-2011

[15] http://www.cipd.co.uk/pressoffice/press-releases/questionable-merit-watering.aspx

What are your views on the take-up of this policy by:

a) **Companies?**

b) **Individuals?**

UNISON expects that there will be limited take up of this policy amongst good practice employers. Many employers recognise that it would be bad practice and bad business to seek to trade employees key employment rights in return for shares. Such policies will make it more difficult for companies to recruit quality staff who will perceive few advantages in trading basic protections for potentially worthless shares. The policy will also have a damaging impact on workforce morale and productivity. It is also likely to damage the reputation of businesses with their customers and the wider public. It will also be complex and costly for businesses to set up and administer this policy. We suspect therefore than most good practice employers will be deterred from using the policy.

UNISON is, however, seriously concerned that less scrupulous employers will seek to exploit the policy as a means of avoiding employment rights obligations and treating their staff fairly. There is a serious risk that the proposals will help to generate a hire and fire culture in some businesses and will lead to staff being mistreated at work.

UNISON expects, that with the exception of some high paid individuals who wish to take advantage of the tax loopholes, this policy would prove highly unattractive to the vast majority of employees. UNISON however is extremely concerned that many employees will not be given a choice over whether to sign an employee owner contract and thereby lose out on key workplace rights.

Equality impact assessment

Question 24:

What are your views on the equality impact assessment? Are there other equality and wider considerations that need to be considered?

The Equality Impact Assessment is not adequate. It fails to properly consider the differential impact on particular groups of excluding employee-owners from the right to request flexible working. Tables are presented on the proportion of people by protect characteristic who work full-time and work flexibly. But by only focusing on full-time workers it completely misses out a major group of flexible workers from the analysis – those who work part-time where there are significant differences between groups, particularly between men and women. It also ignores numerous responses to questions in the same BIS survey from which it has taken the data on full-timers, which show a significant differences between protected characteristic. For example, 28 per cent of women had made requests for flexible working in the past two years, compared to 17 per cent of men and 33 per cent of women said flexible working was "very important" to them in deciding whether to take a job compared to just 14 per cent of men.

The EIA concludes that there are no gender impacts or consequences related to pregnancy and maternity from the proposal to extend the notice period for return from maternity leave to 18 weeks. It suggests it is merely a procedural change with no consequences for new mothers. However, as stated in response to Qs.12-15

above, this procedural change, particularly in conjunction with the exclusion of employee-owners from the right to request flexible working is likely to lead to women taking longer leave than they would have otherwise intended and possibly to more women not returning from leave.

It is also a matter of serious concern to UNISON that the government has decided to introduce legislation on this proposal before full consultation has been completed and before a full impact assessment has been undertaken. The government appears intent on driving the policy through regardless of its impact on employees, employers and the wider economy, particularly as they have provided no evidence for their contention that this measure stimulates growth.

For more information contact Sampson Low, Policy Officer, UNISON, 130 Euston Road, London NW1 2AY.

From:	* on behalf of David Poole
Sent:	08 November 2012 16:00
To:	Employee Owner Status Consultation
Subject:	TRIM: ESOP Centre employee owner response
Follow Up Flag:	Follow up
Flag Status:	Completed
Attachments:	ESOP Centre Employee-owner response.doc
TRIM Dataset:	M1
TRIM Record Number:	D12/1381679
TRIM Record URI:	13444093

Dear sirs

I have attached the ESOP Centre's response to the consultation on implementing employee owner status.

Please could you confirm receipt.

yours

David Poole

--
David Poole | ESOP Centre

This email was received from the INTERNET.

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ESOP centre

The ESOP Centre thanks the Department for Business Innovation and Skills for the opportunity to submit its members' view on the proposed new employee-owner status.

The purpose of the ESOP Centre is to spread the wages of capital, to promote a happier and more productive society by bringing capital wealth within the range of all employees.

To achieve that aim the Centre informs, researches and lobbies, in the UK, the EU and round the world by means of conferences, publications and initiatives. Our members are drawn from companies which have employee share plans, professional advisers in the area, academics, politicians and other interested parties.

The ESOP Centre welcomes new thinking in delivering shares to employees. The scheme has great merit in that it may deliver capital wealth into the hands of employees where no other opportunity would have existed. However, the proposal as it stands may not work.

Though we appreciate that the government views this proposal as an employment contract rather than an employee share scheme, the fact that shares will be transferred into employees' ownership means that the expertise of our members in the technicalities of doing so will be of relevance.

We envisage that SMEs especially will in future weigh up whether to use a share incentives, such as EMI or CSOP, or the new employee-owner contract to deliver shares to employees so that they can share in the future growth of the company.

The ESOP Centre agrees with the government's proposal to allow businesses as much flexibility as possible. In doing so the proposal must ensure that unscrupulous businesses cannot abuse the new employee-owner status.

To retain as much flexibility as possible for business owners, the ESOP Centre agrees that restrictions on shares should be permissible. For example many companies will make use of a restriction on the period within which the shares can be sold so that they do not provide valuable shares to employees which are sold immediately and then the employee leaves the company.

However, allowing for any type of restriction would mean that companies could make provisions so that all other shares except those of employee-owners would benefit disproportionately from growth in value rendering the holdings of the employees worthless. Looking at this the other way round

companies could offer flowering/growth shares to certain employees and benefit from disproportionate growth with full CGT relief.

By allowing for restrictions to be negotiated case by case, the odds are stacked against employees, since companies have legal teams' expertise and most employees are unlikely to take legal advice. Therefore employees may not understand the full consequences of complicated restrictions placed on their shares which have been value at UMV, but because of the restrictions are worth much less.

These contracts will have to be beneficial for employees as well as businesses, otherwise employees will avoid this type of contract and the scheme will be unused. Given the initial media reception of the idea, it can be expected that cases of abuse or employee detriment will be highlighted by the press.

It could be the case, for example, that companies place restrictions on the shares being sold while the employee is an employee-owner. This would mean that the only circumstance the shares could be sold would be on retirement or redundancy. In the latter case the company may not be performing successfully and the employee would have not had a chance to benefit from his foregone redundancy rights.

There would need to be an extensive educational and promotional campaign in tandem with the introduction of the new type of contract. Research conducted by the Centre as part of a recent financial education seminar showed that shares themselves are poorly understood by the majority of employees. It is therefore unlikely that many would understand the subtleties of the aforementioned restrictions which could be placed upon the shares received as part of the new contract.

The ESOP Centre notes that there will be a separate consultation on the taxation of the employee-owner contracts. However, as part of the wider educational work needed, the government will need to explain that income tax will be due (and possibly NICs if RCAs) on the value of the shares.

The value of this tax charge may prove prohibitive for many prospective employees therefore providing a barrier to accepting this type of contract for employees without cash reserves. It may be possible in some cases for employees to immediately sell sufficient shares to cover the income tax charge, however, as mentioned above in some cases companies will want to place restrictions on the sale of shares within a certain period to protect themselves from employees selling all the shares and then leaving the business.

ESOP centre

Joint ownership alternative?

In order to avoid the problems with income tax outlined above, ESOP Centre members have suggested that a joint share ownership scheme could be used. Under such a scheme employees would forego employment rights in exchange for the opportunity to benefit from the future growth in value of shares worth between £2,000 and £50,000. The joint ownership means that the initial benefit is not taxable as this value is not acquired by the employee, but growth in value is, as CGT.

JSOPs or Joint Share Ownership Plans would provide the mechanism for such a structure. The employee acquires an interest in the future growth in value, not in any initial accrued value. When the shares are sold the proceeds are divided between the joint owners – the employee receiving the value of growth in market value since time of acquisition and the company receiving initial value of the shares.

BIS | Department for Business Innovation & Skills

Consultation on implementing employee owner status - response form

A copy of the **Consultation on implementing employee owner status:** can be found at:

http://www.bis.gov.uk/Consultations/consultation-on-implementing-employee-owner-status?cat=open

You can complete your response online through SurveyMonkey : (https://www.surveymonkey.com/s/5QJQ935)

Alternatively, you can email, post or fax this completed response form to:

Email:

implementing.employee@bis.gsi.gov.uk

Postal address:

Paula Lovitt MBE
Department for Business, Innovation and Skills (BIS)
3 Floor Abbey 1
1 Victoria Street
London SW1H 0ET

Fax: 0207-215 6414

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

The closing date for this consultation is: **8 November 2012**

Your details

Name: David Sillitoe

Organisation (if applicable): Lyons Davidson Solicitors

Address: Victoria House, 51 Victoria Street, Bristol, BS1 6AD

Telephone:

Fax:

Please tick the boxes below that best describe you as a respondent to this:

- ☐ Business representative organisation/trade body
- ☐ Central government
- ☐ Charity or social enterprise
- ☐ Individual
- ☐ Large business (over 250 staff)
- ☒ Legal representative
- ☐ Local government
- ☐ Medium business (50 to 250 staff)
- ☐ Micro business (up to 9 staff)
- ☐ Small business (10 to 49 staff)
- ☐ Trade union or staff association
- ☐ Other (please describe)

Question 1: How can the government help businesses get most out of the flexibility offered and the different types of employment statuses?

Comments:

The Government could assist by providing clear guidance to businesses, particularly small and start up business, on the different types of employment status and the rights that they carry. Smaller businesses without HR functions may not be clear on what rights certain individuals have or how to ensure that the status they assign to someone (e.g. a worker) is in fact the correct status.

For businesses to fully utilise the option of employee-owner status, they would need to feel confident about the provisions in place if the relationship were to come to an end. If a business believes that there could be lengthy arguments over the value of shares or has concerns over how immediately the business must pay the employee-owner for their shares, they may be reluctant to use this option.

Question 2: Do businesses feel able to use all three employment statuses? If not, what restricts the use of different statuses?

Comments:

In our experience, our employer clients have an understanding of the different possible ways in which workers can be engaged and tend to try to utilise the way that they feel most benefits their business.

However, we have often found that, without advice, the owners of a business find it difficult to ensure that they understand the difference between the various statuses; e.g. they may believe that someone is self-employed when in reality they are an employee.

Question 3: What restrictions, if any, do you think should be attached to the issue of shares or types of shares?

Comments:

If the new status is to genuinely allow for employees to benefit as "owners" of the business, it would seem counter-intuitive to place any restrictions on the shares.

Having said that, we would agree that a limit should be placed on the minimum value of the shares. A clear effect of this inititiative is that employers will effectively be able to "buy off" certain rights of their employees, including the fundamental rights to claim unfair dismissal and receive a redundancy payment.

We are of the view that £2,000 is too low a sum to provide proper protection for employees when balanced against the loss of the aforementioned rights. The average award in an unfair dismissal claim is approximately £6,000; perhaps this would be a better starting point as a minimum for the value of the employee-owner's

shares? That said, any increase in the minimum value of shares under this status may well discourage businesses from using it.

Question 4: When an employer buys back forfeit shares, should this be at full market value or some other level (eg. a fraction of market value) should some other level be allowed in certain circumstances?

Comments:

In order to be fair to employee-owners and to treat them as fully entitled "owners" of the business - as seems to be envisaged by the proposal - shares should be bought back at full market value. We see no reasonable basis for treating an employee-owner differently to any other shareholder in any situation.

Question 5: How should a company go about carrying out a valuation of the shares? What would the administrative and cost impact be for a company if an independent valuation was required?

Comments:

This response is submitted from an Employment Law perspective, so we have no comments on this question.

Question 6: The Government would welcome views on the level of advice and guidance that individuals and businesses might need to be fully aware of the implications of taking on employee owner status.

Comments:

The government seems to envisage this being a scheme that will be of greater benefit to small start-up businesses. However, reference is made to this scheme being relatively easy to implement for companies that already have employee share schemes. Small start-up businesses are unlikely to have such schemes.

Therefore, we would suggest that an extremely high level of advice from both a Company Law and an Employment Law perspective would be needed for those companies to whom it is envisaged that the scheme will be most attractive. The necessity of high levels of advice could be costly and may well render the scheme unattractive to businesses. It could be difficult for the government to provide suitable advice for businesses in that such advice would probably need to be bespoke.

From the employee's perspective, it will be also be essential that they understand the implications of accepting employee-owner status on their employment law rights. They will also need to understand what rights holding shares provides. This information could be provided by the employer at the time of offering employee-owner status to the employee, although this would need to be strictly regulated to esnure full information was provided.

We believe that serious consideration should be given to a requirement for employees entering into an employee-owner agreement to be legally advised as to the relinquishment of those rights they will be forfeiting, as is a requirement at present for compromise agreements. A qualified independent adviser should be required to sign to say that they have given relevant independent advice to ensure vulnerable employees are not persuaded to contract out of rights when it is not in their interest to do so.

Question 7: What impact will allowing individuals limited unfair dismissal protection and equity shares have on employers' appetite for recruiting?

Comments:

It is noted that the terminology used in this consultation paper refers to "the costs of providing some rights [being] perceived by some as creating a barrier to hiring employees." We are not aware of any evidence that business are prevented from taking employees on as a result of the existence of employment protection rights and the government's language now refers more to a "perception" of this than a reality.

Further, unfair dismissal protection does not currently arise until someone has been employed for 2 years. At the point of recruitment, it therefore has little relevance to an employer.

Therefore, we do not feel that allowing individuals limited unfair dismissal protection is likely to improve employers' appetite for recruiting.

Converseley, the employer clients to whom we have spoken about this are not attracted to the idea of allowing ownership of their business to a new employee whose capabilities are not known.

Employers who strive to treat their employees fairly may not be as attracted to this new status as less reasonable employers, given that they will be less fearful of employment tribunal litigation.

In our view, the perception of this status amongst employees is likely to be that it simply allows an employer to "buy off" some of their rights. Consequently, we would foresee the best employees refusing to accept employment based on employee-owner status.

In summary, we do not foresee employee-owner status as stimulating employment.

Further, introducing a new employment status would seem to run contrary to the government's stated aim of simplifying employment law for businesses.

Question 8: What benefits do you think introducing the employee owner status in with limited unfair dismissal rights will have for companies?

Comments:

It is self-evident that companies will have fewer risks when terminating the employment of workers with employee-owner status.

However, see our response to Question 10 below.

Question 9: Do you think these benefits will be greater for larger, smaller or start-up businesses?

Comments:

The benefits will be the same for all businesses. However, the impact of paying out for a set amount of shares is likely to be less for larger companies.

Question 10: What impact, if any, do you think the employee owner status will have on employment tribunal claims, e.g. for discrimination?

Comments:

It is possible that depriving people of the right to claim unfair dismissal will cause them to consider bringing claims for discrimination and automatic unfair dismissal. However, whilst this consequence is commonly considered likely by employment lawyers, we are not aware of any evidence that this would happen and it has to be said that we would envisage such claims being weak if they are brought speculatively in lieu of an unfair dismissal claim. Nevertheless, such claims, if brought, would add to the cost and administrative burden on Employment Tribunals as well as on employers.

Question 11: What impact do you think introducing the employee owner status with no statutory redundancy pay will have for businesses, in particular, smaller businesses and start up businesses? What negative impacts do you anticipate and how might these be mitigated?

Comments:

Businesses will be freer to make redundancies without incurring costs where that money might otherwise go towards payment of debts or investment in the business.

The government refers to greater engagement in the business as a result of employee-owners holding shares. However, we consider there to be a large risk that employee-owners will feel less engaged than normal employees, as they will feel that they are readily-dispensable for (most likely) the relatively low sum of £2,000. They may feel less inclined to remain with the company for more than 2 years, given that they will not accrue additional rights after this time. If so, those employees are likely to look for alternative employment (as a normal employee), potentially to the detriment of their dedication to their current employer, as well as causing increased recruitment costs when they leave.

That said, there is an argument that employee-owners would try harder to avoid a redundancy situation and to make the company work, knowing that if they don't they may lose their job and their shares may be of lower value.

Question 12: What impact will this change to maternity notice period have on employers?

Comments:

We do not feel that there will be any significant practical difference other than that employers will be able to give employees brought in as maternity cover greater notice of termination.

Question 13: What, in your view, would employers do if employees wish to return early without giving 16 weeks' notice?

Comments:

In our experience, most employers will plan for maternity leave and, having brought in cover, will not have the flexibility to allow someone to return earlier than planned.

However, some employers may have the demand to justify someone returning earlier than planned and, in those circumstances, we would envisage the employee being permitted to return as early as practically possible.

Question 14: How will these changes impact on a company's payroll provisions?

Comments:

This response is submitted from an Employment Law perspective, so we have no comments on this question.

Question 15: What effect will a compulsory 16 weeks' early return notice period have on the length of maternity leave that mothers take or adoption leave that parents take?

Comments:

Employee-owners who know that, should they wish to return early, they will have to wait for 16 weeks, may well initially notify their employer that they want to take shorter maternity periods in order to protect their position.

We consider that 8 weeks is sufficient for an employer to plan for the early return of an employee and are not aware of this being a significant issue for employers. We

do not believe that there has been any real justification for this measure put forward by the government and feel that it is contrary to the aim of protecting pregnant women and new mothers in the workplace.

Given the lack of apparent justification, such a measure may well be subject to a judicial review challenge.

Question 16: Do you think 4 weeks is the right period? If not, why not? What would be the impact of a shorter or longer period?

Yes ☐ No ☒

Comments:

We do not consider that there is any justification for removing the right to request flexible working from employee-owners. Given the view expressed that flexible working is beneficial for employers and employees, we see no great advantage to businesses by removing this right and it can only be harmful to employee-owners who wish to work flexibly but will lack the means to require their employer to consider a request.

We do not accept the proposition that employee-owners will find it easier to discuss (and presumably agree) working patterns with their employer; this seems to us to be rather utopian in outlook and does not acknowledge the reality that the employer will remain the party with the power.

Of course, employers have the right to refuse a flexible working request on specified grounds; the right to work flexibly is not automatic.

This proposal seems to fly in the face of any commitment the government may have to making life easier for working families.

Question 17: What impact do you think this proposal would have on the ability of employee owners to access support for training?

Comments:

It can only diminish employee-owners' access to support for training; this is self-evident, given that the right was introduced to improve employees' acccess to support for training.

We would again make the point that the government's vision of employee-owners having improved access to support for training compared with ordinary employees seems utopian and is unlikely to reflect the reality of most employee-owner / employer relationships.

Question 18: Do you have any comments on the Government's intention not to amend Company Law to implement the employee owner proposal?

Comments:

This response is submitted from an Employment Law perspective, so we have no comments on this question.

Question 19: The Government welcomes views on particular safeguards that would need to be applied, in order to minimise opportunities for abuse.

Comments:

This response is submitted from an Employment Law perspective, so we have no comments on this question.

Question 20: The Government welcomes views on whether the existing tax rules which apply to share-for-share exchanges (such as might happen when a company is taken over) and schemes of reconstruction should apply where shares issued in return for taking up the new status are involved

Comments:

This response is submitted from an Employment Law perspective, so we have no comments on this question.

Question 21: What impact do you think the proposal will have on labour market flexibility – that is, in relation to hiring and letting people go?

Comments:

We do not consider that the proposal will increase companies' willingness to hire people. We do not consider that there is any evidence that the rights to claim unfair dismissal and receive a redundancy payment, as well as the other rights which will be reduced for employee-owners, are barriers to recruitment. Please see our response to Question 7 above.

It will in theory be easier for an employer to terminate the employment of an employee-owner once they have attained 2 years' service. However, up until that point there will be no difference in rights on termination. All recruitment decisions have a short-term element in that employers will not normally recruit unless there is a present need. Companies looking for flexibility will be more inclined to make short-term recruitment decisions. They may therefore be attracted to employee-owner status but in reality it may not be of much benefit to them; instead it would incur an increased cost and potentially make it more difficult to run the company, given that the employee-owner will have shares in the business.

Question 22: Would you be likely to take up the new status? What would the impact of the status be on your business?

Comments:

This response is submitted as a Firm from an Employment Law perspective and not that of an employer, so we have no comments on this question.

Question 23: What are your views on the take-up of this policy by:
a) companies?
b) individuals?

Comments:

Please see our responses to Questions 6, 7 and 21 above.

Question 24: What are your views on the equality impact assessment? Are there other equality and wider considerations that need to be considered?

Comments:

We are in general agreement with the points made in the Equality Impact Assessment.

There has been no suggestion that employers will offer employee ownership for the sole purpose of being able to unfairly dismiss employees or avoiding allowing employees to work flexibly. Similarly, there is no suggestion that employers will only offer employee ownership and therefore individuals may have the choice of whether to accept a traditional employment contract or become an employee owner.

We are not aware of any further equality or wider implications that need to be considered.

Question 25: Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

☐ **Please acknowledge this reply**

Question 26 : At BIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents?

Yes ☒ No ☐

This publication is also available on our website at www.bis.gov.uk
Any enquiries regarding this publication should be sent to:

Department for Business, Innovation and Skills
1 Victoria Street
London SW1H 0ET
Tel: 020 7215 5000

If you require this publication in an alternative format, email enquiries@bis.gsi.gov.uk, or call 020 7215 5000.

URN 12/1215RF

BIS | Department for Business Innovation & Skills

Consultation on implementing employee owner status - response form

A copy of the **Consultation on implementing employee owner status:** can be found at:

http://www.bis.gov.uk/Consultations/consultation-on-implementing-employee-owner-status?cat=open

You can complete your response online through SurveyMonkey : (https://www.surveymonkey.com/s/5QJQ935)

Alternatively, you can email, post or fax this completed response form to:

Email:

implementing.employee@bis.gsi.gov.uk

Postal address:

Paula Lovitt MBE
Department for Business, Innovation and Skills (BIS)
3 Floor Abbey 1
1 Victoria Street
London SW1H 0ET

Fax: 0207-215 6414

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

The closing date for this consultation is: **8 November 2012**

Your details

Name: Lawrence Green

Organisation (if applicable): Squire Sanders (UK) LLP

Address:

Telephone:

Fax:

Please tick the boxes below that best describe you as a respondent to this:

- ☐ Business representative organisation/trade body
- ☐ Central government
- ☐ Charity or social enterprise
- ☐ Individual
- ☐ Large business (over 250 staff)
- ☒ Legal representative
- ☐ Local government
- ☐ Medium business (50 to 250 staff)
- ☐ Micro business (up to 9 staff)
- ☐ Small business (10 to 49 staff)
- ☐ Trade union or staff association
- ☐ Other (please describe)

Question 1: How can the government help businesses get most out of the flexibility offered and the different types of employment statuses?

Comments:

Question 2: Do businesses feel able to use all three employment statuses? If not, what restricts the use of different statuses?

Comments:

Question 3: What restrictions, if any, do you think should be attached to the issue of shares or types of shares?

Comments:

Here it is necessary to draw a distinction between the employment law and tax consequences - it is not necessary to apply the same test to both aspects. We believe that in respect of employment law aspects there is a clear case for flexibility through allowing any type of shares to be given to the employee owners, provided they are of sufficient value. To the extent that the Government wishes to impose restrictions on the types of share to be used in order to prevent abuse of the tax relief in respect of the shares then those restrictions should be tied solely to the availablity of the tax relief (see detailed comments below).

The draft amendments to the Employment Rights Act 1996 specify that the shares must be issued or allotted. This implies that it will not be possible to source the shares from existing shareholders or an employee benefit trust. This will present practical difficulties in many cases, which will restrict the use of employee ownership contracts.

The draft amendments also specify that the shares must be shares in the employing company - this effectively excludes companies within a group structure. The draft legislation should be amended to allow employing companies in a group to give shares in the holding company to their employees.

Question 4: When an employer buys back forfeit shares, should this be at full market value or some other level (eg. a fraction of market value) should some other level be allowed in certain circumstances?

Comments:

This is particularly relevant when an employee leaves and there are two aspects that need to be considered:
- the reason for leaving; and

- when the employee leaves.

In respect of the reason for leaving, it would appear unfair if an employee were to receive the shares for no consideration (other than waiving employment rights) and then be able to insist on receiving full value for the shares on cessation of employment even if the reason for leaving is that, for example, the employee has completely betrayed the trust of the employer by stealing company property. Consideration should be given to allowing the shares to be forfeited for no value if the employee owner has committed acts justifying dismissal without notice. Please note that this test should not be applied to the reason for the cessation of employment alone - that would not cover the situation where a theft is only discovered after an employee has left.

In respect of the timing, employers will be concerned about giving valuable shares under an Employee Ownership Contract if the employee owner can resign immediately afterwards and still keep the full value of the shares.

It would encourage companies to offer employee ownership contracts if they were able to specify a period of time after which an employee would be entitled to receive the full value of the shares on leaving. There is no clear indicator for how long this period should be, given that the employment rights given up would have accrued at times varying from commencement of employment to two years after that date. The permitted period would need to be at least six months and should not be over two years (one year might be an appropriate compromise) and the percentage of the value to which the employee owner is entitled on leaving could increase on a proportionate basis up to that date.

If this were to be allowed, it would also be beneficial to have a short period after the commencement of an employee ownership contract during which leavers would get nothing for their shares on leaving. This might be set at a level broadly equivalent to normal probationary periods (e.g. three months), which would limit the adminstrative burden of acquiring small numbers of shares from early leavers.

To enforce these leaver provisions, companies would also need to be able to impose a period of time during which the employee owner would not be able to sell the shares freely.

It is also necessary to allow companies to structure the rights attaching to shares to include a right of first refusal so that they can arrange a repurchase of the shares (either by the company, the existing shareholders or an employee benefit trust) when an employee owner wishes to sell the shares. This would enable private companies to prevent third parties becoming shareholders. In the absence of this right most private companies would simply not be prepared to offer shares to employees.

Question 5: How should a company go about carrying out a valuation of the shares? What would the administrative and cost impact be for a company if an independent valuation was required?

Comments:

The draft amendments to the Employment Rights Act 1996 imply that if the employee owner can prove that the shares given when the employee owner contract was entered into were worth less than £2,000 then the removal of employment rights will have been invalid. This could easily give rise to a new type of expensive and unhelpful litigation by former employees - the risk of which could restrict the number of private companies using employee ownership contracts. It would help if employers who have made a genuine attempt to estimate the value of the shares could be protected from this risk. There are a number of ways in which this might be done - for example, using the type of "best estimate" test that applies when employers have to calculate PAYE liabilities in respect of unquoted shares.

A requirement for an independent valuation at any stage would be potentially very expensive and would significantly reduce the use of employee ownership contracts by employers. In our experience good, quality valaution advice is very expensive - it is possible to get this advice cheaply but the quality can then be extremely poor.

There is no easy solution to the valuation problem but we consider that there is action that HMRC could take which would help. This would involve either or both of the following:
- allowing the value of the shares to be agreed with HMRC in advance (i.e. on a similar expedited basis to that before EMI options are granted); and/or
- publication of detailed guidance on the models that should be used to determine the value of the shares.
Such guidance would assist companies in dealing with issues such as minority dscounts. We assume that for this purpose it is intended that repurchases from employee owners would take into account minority discounts, which might result in dissatisfaction on the part of the employee owner if the repurchase takes place shortly before a sale of the company when shares are sold without a minority discount.

Question 6: The Government would welcome views on the level of advice and guidance that individuals and businesses might need to be fully aware of the implications of taking on employee owner status.

Comments:

Question 7: What impact will allowing individuals limited unfair dismissal protection and equity shares have on employers' appetite for recruiting?

Comments:

Question 8: What benefits do you think introducing the employee owner status in with limited unfair dismissal rights will have for companies?

Comments:

Question 9: Do you think these benefits will be greater for larger, smaller or start-up businesses?

Comments:

Question 10: What impact, if any, do you think the employee owner status will have on employment tribunal claims, e.g. for discrimination?

Comments:

Question 11: What impact do you think introducing the employee owner status with no statutory redundancy pay will have for businesses, in particular, smaller businesses and start up businesses? What negative impacts do you anticipate and how might these be mitigated?

Comments:

Question 12: What impact will this change to maternity notice period have on employers?

Comments:

Question 13: What, in your view, would employers do if employees wish to return early without giving 16 weeks' notice?

Comments:

Question 14: How will these changes impact on a company's payroll provisions?

Comments:

Question 15: What effect will a compulsory 16 weeks' early return notice period have on the length of maternity leave that mothers take or adoption leave that parents take?

Comments:

Question 16: Do you think 4 weeks is the right period? If not, why not? What would be the impact of a shorter or longer period?

Yes ☐ No ☐

Comments:

Question 17: What impact do you think this proposal would have on the ability of employee owners to access support for training?

Comments:

Question 18: Do you have any comments on the Government's intention not to amend Company Law to implement the employee owner proposal?

Comments:

The draft amendments to the Employment Rights Act 1996 specify that employee owner shares must be issued or allotted to employees. The consultation document states that the shares will be "given" to employees, which presumably means at no cost, other than having to pay income tax and National Insurance contributions on the value of the shares. Under s580 of the Companies Act 2006, it is unlawful for a company to issue shares at less than nominal value. Therefore if shares are to be issued free to employee owners, this provision will need to be relaxed (while it may be possible for private companies to pay up nominal value on the basis of services received, this is certainly not possible for public companies). Alternatively, provision will need to be made to allow existing shares to be transferred to employees.

The complexity of UK tax laws relating to the buy-back of shares by companies and the operation of employee benefit trusts results in many companies having to use off-shore employee benefit trusts to recycle shares that are bought back from

departing employees. Allowing private companies to use treasury shares would eliminate this complexity for them, although quoted companies would still need a reform of the UK tax laws for employee benefit trusts before they could repatriate their trusts.

Question 19: The Government welcomes views on particular safeguards that would need to be applied, in order to minimise opportunities for abuse.

Comments:

Companies do not normally simply give away equity to their employees - they normally ensure that any offer of shares to employees is structured in a way that will further their business objectives. Given that it will not be possible to make the award of employee ownership contract shares conditional on business or personal performance, some companies may decide to offer employee owners shares the rights attaching to which depend on the future performance of the company ("Performance Shares").

Performance Shares typically have a low up-front value (based on the hope that the performance targets will be met) and become completely worthless if the company does not perform well, but will become much more valuable if the performance targets are met.

The use of Performance Shares in this context would be driven by commercial considerations. However, it is known that HMRC are not always happy with the way that the UMV of Performance Shares is calculated where the performance targets are inherent in the rights of the shares rather than imposed as "restrictions" on the shares. The Government needs to decide whether the commerical objectives of companies in using Performance Shares are to be encouraged in this context or if it wishes to restrict the availability of CGT relief on employee ownership shares in these circumstances. In particular, the simple insertion of a tax-avoidance test in the legislation will not necessarily restrict the CGT relief in these cirumstances due to the underlying motive being commerical.

The problem with trying to limit the use of Performance Shares in this context is that their use is fully consistent with the provisions of Part 7 ITEPA, so it is difficult to specifically target these shares without unintended consequences (which is presumably why HMRC has not sought changes to Part 7 to change the existing tax treatment of Performance Shares). For example, attempting to restrict the types of shares that are eligible for the CGT relief might exclude any private company with a complex share capital structure (such as companies backed by private equity investments) from offering employee ownership contracts.

If the Government decides that is it is necessary to enact conditions to prevent abuse of the new rules, the condtions should solely be placed on the availibility of CGT relief rather than on the classes of shares that can be offered to employees - it would not be helpful if employees were given an incentive to litigate on the basis of legislation designed to limit tax avoidance in order to argue that the surrender of their employment rights had been invalid.

It should be remembered that CGT tax relief will not encourage employers and lower-paid employees to enter into employee ownership contracts. Those employees are likely to be offered little more than the minimum £2,000 value of shares meaning that, with the current level of annual CGT exemption, they are most unlikely to pay CGT on their shares in any case.

Question 20: The Government welcomes views on whether the existing tax rules which apply to share-for-share exchanges (such as might happen when a company is taken over) and schemes of reconstruction should apply where shares issued in return for taking up the new status are involved

Comments:

We are puzzled by this question - why should the rules on share-for-share exchanges not equally apply to employee-owner shares?

Question 21: What impact do you think the proposal will have on labour market flexibility – that is, in relation to hiring and letting people go?

Comments:

Question 22: Would you be likely to take up the new status? What would the impact of the status be on your business?

Comments:

Question 23: What are your views on the take-up of this policy by:

a) companies?
b) individuals?

Comments:

Question 24: What are your views on the equality impact assessment? Are there other equality and wider considerations that need to be considered?

Comments:

Question 25: Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

☒ **Please acknowledge this reply**

Question 26 : At BIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents?

Yes ☒ No ☐

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URN 12/1215RF

From: Jayne Phillips
Sent: 08 November 2012 15:07
To: Employee Owner Status Consultation
Subject: TRIM: ATL response to consultation
Attachments: Employee owner contracts.doc
TRIM Dataset: M1
TRIM Record Number: D12/1381650
TRIM Record URI: 13444084

Please find attached ATL's response to the consultation on implementing employee-owner status.

Jayne Phillips
Senior Legal Advocate
ATL

Consultation on implementing employee owner status.

BIS Consultation: ATL Response

The Association of Teachers and Lecturers is a trade union affiliated to the Trades Union Congress (TUC). ATL currently represents 160,000 members across England, Northern Ireland, Scotland and Wales.

Our members are teachers, supply teachers, heads, lecturers, managers and support staff in maintained and independent sector schools and colleges.

The government repeatedly states that it is fear of being taken to an employment tribunal that stops businesses recruiting. The solution is not to curtail individual rights but rather encourage businesses to use all resources available to them. In particular, to work with trade unions to resolve disputes quickly and internally. If that is unsuccessful trade union members will have access to legal advice and so will understand if they have a complaint that does or does not have merit. They will therefore be less likely to issue unmeritorious claims in the employment tribunal.

ATL is concerned that these proposals are being rushed through just weeks after plans for no fault dismissals were dropped. Of further concern is that detailed provisions on these proposals were added to the Growth and Infrastructure Bill before consultation had even taken place.

ATL believes that these proposals will benefit no one and are ill thought out. A proper evaluation would show that these proposals will damage individuals, businesses and ultimately the wider economy.

Consultation Response

Question 1: How can the government help businesses get most out of the flexibility offered and the different types of employee status?

Businesses can already tailor the recruitment of different types of workers to suit the needs of their business. ATL has grave concerns about the proposal to introduce a new category of worker, especially when it is unlikely to add anything to the labour market. Given that the government have already extended the qualifying period for unfair dismissal protection to two years, an employer now has ample to time to ensure a new employee is suitable for the job they have been recruited to do. The introduction of employee-owner contracts will simply allow unreasonable employers to dispose of employees regardless of the length of service they have or the dedication they may have shown to that the company. Under these proposals such employee-owners may well find that despite working hard for their employer they leave with a miniscule amount of money. An employer, with insider knowledge, could pick the most opportune moment to dismiss an employee-owner i.e. when the shares have little value. ATL fails to see how this will encourage a stable labour market. It is also entirely unclear what reason such employee-owners will give for their employment terminating. Such a label is crucial if they are going to be able secure further employment.

No employee is entitled to a statutory redundancy payment until they have at least two years service. ATL cannot see any benefit to individuals to sign away their rights to a redundancy payment in exchange for shares. By and large redundancies happen because a business is in financial difficulty. There is a considerable risk that, no matter how long their length of service, an employee-owner could lose their job, and as the business collapses find themselves with shares that are without any financial value. Plainly, this will add to the burden on the state as people are forced to claim benefits because they have no other source of income.

Question 2: Do businesses feel able to use all three employment statuses? If not, what restricts the use of different statuses?

In ATL's experience businesses use whichever of the three existing employment statuses best fits their needs. Problems only occur when businesses seek to fudge the position. There has been significant case law on employment status that has, in the main, been caused by businesses trying to fit a situation, which actually requires an employee, into one of the other statuses. ATL believes that rather encouraging another form of insecure employment the government should encourage the creation of good quality, stable employment. It is stable employment that creates high productivity and will aid the economic recovery.

Question 3: What restrictions, if any, do you think should be attached to the issue of shares or types of shares?

ATL is fundamentally opposed to the proposal to issue shares in return for employees surrendering important legal rights. The consultation suggests that shares given to employees may not carry rights to dividends or voting rights. It is difficult to understand what true benefit an employee derives from such "shares" in return for giving up fundamental rights. It is also difficult to understand how ownership of such "shares" will give employees a stake in the business they work for. They will have no additional voice without voting rights. Essentially all they receive are a number of shares that could ultimately prove to be utterly worthless.

Questions 4: When an employer buys back forfeit shares, should this be at full market value or some other level (e.g. a fraction of market value) should some other level be allowed in certain circumstances?

If the government insists on pursuing this proposal an employer must have to buy back shares at the market value. If an employer insists on an employee forfeiting significant legal rights then there should be no opportunity for them to pay any less than the market value of the shares. If nothing else, to introduce some type of reduction will simply lead to legal proceedings as employees and employers dispute the correct fraction of the market value due. Essentially, it is conceivable that such legal

arguments are essentially unfair dismissal claims, (as it is assumed that the suggestion will be that employees guilty of some form of misconduct or poor performance would not be entitled to the full market value); hence it is difficult to see what anyone gains from this proposal.

Question 5: How should a company go about carrying out a valuation of the shares? What would the administrative and cost impact be for a company if an independent valuation was required?

ATL is completely opposed to this proposal. However, if the plans proceed the only equitable way for shares to be valued is through the use of an independent valuer. It is likely that this will have a significant impact on a company both administratively and financially. ATL are of the view that such expenses would clearly be better directed elsewhere to secure the future and help build up the business in question.

Question 6: The Government would welcome views on the level of advice and guidance that individuals and businesses might need to be fully aware of the implications of taking on employee owner status.

Both employers and employees would need significant advice and guidance. Indeed ATL is of the view that employees would need to have access to independent legal advice and specialist financial advice, the cost of which should be met by the employer. It is a fundamental principle of UK employment law that an individual cannot sign away statutory rights. Therefore, an agreement akin to a compromise agreement must be entered into if an employee is considering entering into this type of agreement.

It is clear that this proposal will for many reasons simply add to the financial burden on businesses and do nothing to assist the economic growth of the UK.

ATL is also concerned that employers may place pressure on existing employees to enter into employee-owner contracts. They can, of course, seek to dismiss and re-employ them on new contracts. An employee-owner contract is a complete change in the relationship between

employee and employer. An existing employee must be free to choose, after having had independent legal and financial advice, whether or not they wish to accept the offer. Employees must not be pressurised into accepting such new contracts where important rights are waived. Therefore, the law must be amended to state that it is automatically unfair for an employer to dismiss an employee on grounds that they have refused to sign an employee-owner contract and that it is unlawful for an employee to be subjected to a detriment for the same reason.

Question 7: What impact will allowing individuals limited unfair dismissal protection and equity shares have on employers' appetite for recruiting?

The government has still not provided any statistical evidence that fear of unfair dismissal claims is an obstacle to growth. Indeed, in the government's call for evidence on proposals for no fault compensated dismissals there is the following summary of research:-

> *"The survey also suggested that 40 per cent of employers agree or strongly agree that the demands of employment regulation put them off employing staff. Of the 40 per cent who agreed that employment regulation puts them off employing staff, only 1 per cent say that dismissal/disciplinary action is the regulation that most puts them off employing staff.*[1]

ATL is not clear why the government remains determined to undermine employment protection that has been in place since the 1970s.

Question 8: What benefits do you think introducing the employee owner status in with limited unfair dismissal rights will have for companies?

ATL cannot see any benefit to the proposals. The proposals are likely to increase levels of job insecurity, which will in turn damage morale and productivity amongst the remaining workforce.

[1] Page 29 BIS Dealing with dismissal and "compensated no fault dismissal" for micro businesses. Call for evidence March 2012.

Question 9: Do you think these benefits will be greater for larger, smaller or start-up businesses?

ATL does not believe that the proposal can be described as beneficial to anyone either individual or business.

ATL suspect that start-up businesses are most likely to see these proposals as beneficial. Some businesses already have share schemes that do not require the employee to surrender important legal rights in return. This is because most employers recognise the importance of their employees and do not automatically assume that each new employee will ultimately end up having their employment terminated because of misconduct, poor performance, redundancy etc.

Surrendering employment rights can only be beneficial if the shares increase in value. For start-up businesses there is always a threat of failure. If the business fails the employee-owner will have no statutory redundancy and, to make the situation even more difficult, shares that are completely worthless. Once potential employees are aware of the pitfalls of these proposals any business seeking to use them are likely to find it difficult to recruit quality staff.

Question 10: What impact, if any, do you think the employee owner status will have on employment tribunal claims, e.g. for discrimination?

There is a significant risk that preventing an individual from claiming unfair dismissal will lead to more discrimination claims being issued in employment tribunals.

As stated in response to question 4 it is also likely that there will be an increase in court actions in relation to disputes over the value of shares.

Question 11: What impact do you think introducing the employee owner status with no statutory redundancy pay will have for businesses, in particular, smaller businesses and start-up businesses? What negative impacts do you anticipate and how might these be mitigated?

The negative impact is plainly on an employee-owner having neither redundancy pay nor shares of any value. ATL is completely opposed to the introduction of this new level of employment status. If the government

insist on their introduction they are urged to remove the right to redundancy pay as one of the employment rights forfeited.

In addition, there may be costs involved for the business when an employee resigns voluntarily. Ordinarily, such a situation would involve no cost to the employer. Under these proposals the business will need to find the money to pay the employee for their shares.

Question 12: What impact will this change to maternity notice period have on employers?

ATL does not see how this proposal is beneficial to an employer. ATL is of the view that it will lead to women taken longer periods of leave than they may otherwise have done; and fewer employees returning to work after maternity leave. In particular, it can take some time to sort out childcare arrangements. If an employer ignores a flexible working request then a woman will struggle to meet the 16-week notice requirement. Her return will be delayed and if she feels she is being treated unfairly she may not return at all.

Question 13: What, in your view, would employers do if employees wish to return early without giving 16 weeks' notice?

It is difficult to see how it would benefit an employer not to enable a woman to return early without giving 16 weeks' notice. To prevent her from doing so would simply sour the relationship between the two parties.

Question 14: How will these change impact on a company's payroll provisions?

ATL does not foresee any impact on a company's payroll but the government must ensure that a company does not issue shares for an umbrella company whilst the employee is placed to work in a profitable company for which they do not hold shares.

Question 15: What effect will a compulsory 16 weeks' early return notice period have on the length of maternity leave that mothers take or adoption leave that parents take?

Extending the notice is more likely to result in mothers and adopters taking a longer period of leave. If a mother has taken four weeks' leave before the birth (which is common) changes to the notice requirements would mean that she would have to give notice when her baby was 6 weeks old if she intended to take 26 weeks' leave. Many new parents would find this to early to make a decision or make childcare arrangements and so are likely to decide to take longer off.

Questions 16: Do you think 4 weeks is the right period? If not, why not? What would be the impact of a shorter or longer period?

In May 2011 in the government's consultation on Modern Workplaces it committed itself to extending flexible working to all employees. This was in recognition of the success of the exiting right. It therefore makes no sense to exclude employee-owners from a right has is recognised as a success.

Failing to consider a request for flexible working from a mother returning from maternity leave could lead to a claim for indirect sex discrimination and a failure to consider a request from a disabled employee could be a failure to make reasonable adjustments. Hence, there is a significant risk that the proposals expose employers to more tribunal claims.

Question 17: What impact do you think this proposal would have on the ability of employee owners to access support for training?

As the government recognises, "skills and training are important to driving a business forward". It is therefore surprising that the government has decided to remove the right to request time to train from employee-owners.

By removing this right, employee-owners will no longer have the legal right to at least one meeting a year with their employer to discuss their training needs. They will also lose the right to request financial support or propose flexible working patterns to accommodate their training needs.

Question 18: Do you have any comments on the Government's intention not to amend Company Law to implement the employee owner proposal?

No.

Question 19: The Government welcomes views on particular safeguards that would need to be applied, in order to minimise opportunities for abuse.

The most significant opportunity for abuse is owners/directors of companies classifying themselves as employee-owners thus making themselves wholly exempt from future tax on all gains that they may make. ATL cannot see what safeguards could be used to protect against this. It is a clear illustration of why these proposals will not work.

Question 20: The Government welcomes views on whether the existing tax rules which apply to share-for-share exchanges (such as might happen when a company is taken over) and schemes for reconstruction should apply where shares issued in return for taking up the new status are involved.

It the government insists on moving ahead with these proposals, ATL believes that existing tax rules should remain in place.

Question 21: What impact do you think the proposal will have on labour market flexibility – that is, in relation to hiring and letting people go?

Claims by business lobbyists that weakening unfair dismissal rights will boost recruitment are wholly unsubstantiated by evidence. As highlighted above the governments own research confirms that most employers do not perceive the current level of regulation as a major constraint on growth.

In the recent response to the BIS call for evidence on compensated no fault dismissal (NFD) the government concluded:-

> *"that there is insufficient support and evidence that NFD would have a positive impact on the UK labour market..The Government has therefore decided it will not take forward proposals for NFD".*

This analysis also applies to the proposal that is the subject of this consultation and it should also be dropped.

Question 22: Would you be likely to take up the new status? What would the impact of the status be on your business?

Question 23: What are your views on the take-up of this policy by:

a) companies?

b) individuals?

ATL doubts that good practice employers will take up this policy. If employers offer employee-owner contracts they are unlikely to recruit good quality staff. There is a risk that it will damage their reputation commercially, with customers and the wider public. It will also prove costly to set up and administer. It will be less scrupulous employers who will use it to avoid treating staff fairly and exploit a "hire and fire" culture that could ultimately damage the business itself.

ATL also believes that most, properly informed, individuals would not take up the offer of an employee-owner contract. The danger is that people are either misinformed or compelled to accept the offer as it is the only option available to them.

Question 24: What are your views on the equality impact assessment? Are there other equality and wider considerations that need to be considered?

The Equality Impact Assessment falls short. There is no analysis of part-time workers who make up a large part of the flexible working group. Amongst those that work part-time there is a significant difference between groups, particularly between men and women. There is clear evidence available to show that more women than men request to work flexibly and that an ability to do so is significantly more important to women than men.

The EIA concludes that there is no gender impact or consequences related to pregnancy and maternity from the proposal to extend the notice period for returning after maternity leave. However, as stated in the responses above, it is plain that it is likely to lead to women taking longer leave than they might have otherwise intended and possibly more women not returning from maternity leave.

Consultation on implementing employee owner status

BioIndustry Association (BIA) response

About the BIA

Established in 1989, the BioIndustry Association (BIA) exists to encourage and promote a financially sound and thriving bioscience sector within the UK economy and concentrates its efforts on emerging enterprise and the related interests of companies with whom such enterprises trade. The BIA represents innovative healthcare-focused bioscience companies, including over ninety per cent of biotech medicines currently in clinical development in the UK. BIA members are at the forefront of innovative scientific developments targeting areas of unmet medical need and this innovation will lead to better outcomes for patients, to the development of the knowledge economy, and economic growth.

The BIA has engaged with its membership to gain their views on the proposals contained within this consultation. We are not in a position to provide detailed answers to a number of the questions and so will limit our response to overarching comments as they relate to the bioscience sector.

For additional information, or clarification, on any of the points raised in this response, please contact Antonis Papasolomontos, Head of Public Affairs and Policy, at apapasolomontos@bioindustry.org or 020 7630 2188.

Summary

The BIA welcomes this consultation on the proposed employer-owner status and recognises the large amount of work currently being taken forward to implement it. In particular, the BIA welcomes the sentiment behind the proposals and is encouraged at the Government's focus in this area. The current proposals move the debate forward and the BIA agrees with efforts to support the ability of small and high-growth companies, particularly in research intensive innovative sectors, to incentivise and reward employees in a flexible manner.

There are, however, some uncertainties regarding the proposals which could undermine its attractiveness to both employer and employee. These are discussed in more detail below. In particular, the BIA has serious concerns that the requirement to pay income tax on shares which may, or may not, provide future gain would act as a serious disincentive to an employee considering this scheme. There are also concerns as to the practicality of, and costs associated with, valuing the shares each time an employee may wish to enter this scheme and upon their leaving it.

As such, the BIA believe that a more practical way forward which is of greater immediate benefit is by amending the existing Enterprise Management Incentives (EMI) scheme to allow shares acquired through EMI options to be subject to Entrepreneurs Relief at 10% Capital Gains Tax. The EMI is widely used and although we are aware that this change is currently being implemented the requirement that the shares must be held for twelve months prior to selling significantly reduces its impact.

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The BIA response

The bioscience sector

Bioscience companies, as part of the wider life sciences sector, have been recognised as one of the key pillars for future UK growth and biopharmaceutical companies invest more in research and development than any other sector in the UK[1]. The Strategy for UK Life Sciences, launched by the Prime Minister in December 2011, clearly articulated the government's vision for supporting long term growth in this innovative sector[2].

A large number of BIA members are, or were once, small or emerging companies that are research intensive and operating at the translation interface between academia and industry. Such companies are often pre-revenue in nature as they develop their product(s) and technologies to treat areas of unmet medical need.

Medical research and development is a high risk scientific field and it takes on average ten to fifteen years and over $1 billion to develop a drug for patients. As such it requires long term commitment, investment and an entrepreneurial culture that allows companies to address the inherent risk in R&D.

Government interventions that can tip the risk/reward ratio in the entrepreneurs and employees favour are welcome and the BIA has a keen interest in exploring policies that afford a bioscience company greater flexibility in attracting and rewarding skilled staff members. The offering of share options through the EMI scheme, which does not require upfront cash commitment or tax cost, provides one such example.

The BIA believes bioscience companies represent the kind of smaller, high-growth businesses that the government seek to benefit with these proposals. It is within this context that the BIA makes comments on the proposals below.

The proposed employee-owner status and bioscience companies

The BIA welcomes the proposals for introducing a new employee-owner status. It is encouraging that government is exploring opportunities to increase flexibility in the workplace recognising that for some companies the offering of share options or other incentives beyond basic remuneration is appropriate.

The proposals contained within the consultation move the debate forward and in particular the waiving of capital gains tax on any profits realised on qualifying shares represents a progressive approach to employee incentivisation.

However, it is apparent from speaking to BIA member companies that the proposals as they currently stand give rise to uncertainties which could impact upon the success of the initiative. These are discussed below:

1. Payment of income tax: On page 18 of the consultation document, paragraph 56, it is stated that employees taking up the new status will be required to pay income tax and NICS on the shares they receive. This will act as a serious disincentive to employees to take up the scheme. It imposes a tax charge upfront for only the possibility of a tax free gain at a later point. This would leave the employee out of pocket as compared to not entering the scheme. There will also be a need to consider the highly complex

[1] http://www.bis.gov.uk/assets/biscore/innovation/docs/s/11-p90-strength-and-opportunity-2011-medical-technology-sectors
[2] http://www.bis.gov.uk/assets/biscore/innovation/docs/s/11-1429-strategy-for-uk-life-sciences

and subjective "readily convertible assets" rules in order to determine if the income tax is to be collected through self-assessment or PAYE and if National Insurance applies.

2. Valuation of shares: BIA members have concerns as to how practical it will be for shares to be valued appropriately, particularly in small unquoted companies. The consultation document makes reference to this problem in paragraphs 19 and 20 stating the Government is *"keen to ensure that this new employment status does not impose any valuation requirements beyond those that already exist when valuing companies for other tax purposes"*.

   For smaller companies in particular the valuation of shares upon an employee joining and then again upon leaving and exiting the scheme will require additional work. At present, EMI option grants are typically made at the time of a funding round or on an annual basis, not every time that staff join or leave. There are also complex legal and accounting implications that may well detract from the ease of running the scheme, e.g. the need to have distributable reserves in order to carry out a share buyback, or to establish an employee benefit trust. It will also be important to understand what steps would be taken where there is a disagreement over the share valuation.

Other questions as to the practical operation of the scheme should also be considered. For example, what happens if a company does not have the available cash or distributable reserves to reacquire shares issued to employees under the scheme? Moreover, will the company be required to obtain investor consent before shares are acquired by employees in this way?

Notwithstanding these concerns, the BIA believes the sentiment behind the Government's plans are welcome and offer a positive direction of travel. Many of the aims behind these proposals, primarily the need to provide flexibility to companies operating in a cash constrained environment, can be achieved in other ways.

The BIA would propose adjusting the concept of allowing shares acquired through EMI options to be subject to Entrepreneurs Relief at a 10% Capital Gains Tax rate instead of the usual 18 % or 28%. The BIA is aware that changes are being made to implement this but as it is currently proposed the minimum holding period of twelve months before exercise is maintained making this of limited benefit to bioscience companies seeking to encourage and incentvise employee involvement.

This is because in most biotech situations EMI options are only ever exercised upon exit, when a sale or other transaction takes place, so the reduced Capital Gains Tax rate is not achievable. The BIA has spoken to Treasury officials about this issue and are aware that other organisations have made similar representations. The BIA also made this point in our recent submission to the consultation on extending the EMI scheme to academics.

Amending the EMI scheme in this way would be particularly beneficial to high growth, pre-revenue innovative companies as it encourages and rewards those individuals wiling to commit and invest their expertise and time in riskier enterprises. The EMI scheme is well used within the bioscience sector and enables companies to attract and retain scientific talent through the issuing of share options providing the individual with an opportunity to share in the future success of the company. This delivers upon many of the aims behind the current employer-owner consultation and should be considered alongside it.

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Consultation on implementing employee owner status - response form

A copy of the **Consultation on implementing employee owner status:** can be found at:

http://www.bis.gov.uk/Consultations/consultation-on-implementing-employee-owner-status?cat=open

You can complete your response online through SurveyMonkey : (https://www.surveymonkey.com/s/5QJQ935)

Alternatively, you can email, post or fax this completed response form to:

Email:

implementing.employee@bis.gsi.gov.uk

Postal address:

Paula Lovitt MBE
Department for Business, Innovation and Skills (BIS)
3 Floor Abbey 1
1 Victoria Street
London SW1H 0ET

Fax: 0207-215 6414

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

The closing date for this consultation is: **8 November 2012**

Your details

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Fax:

Please tick the boxes below that best describe you as a respondent to this:

- ☒ Business representative organisation/trade body
- ☐ Central government
- ☐ Charity or social enterprise
- ☐ Individual
- ☐ Large business (over 250 staff)
- ☐ Legal representative
- ☐ Local government
- ☐ Medium business (50 to 250 staff)
- ☐ Micro business (up to 9 staff)
- ☐ Small business (10 to 49 staff)
- ☐ Trade union or staff association
- ☐ Other (please describe)

Question 1: How can the government help businesses get most out of the flexibility offered and the different types of employment statuses?

Comments:

See seperate attached submission.

Question 2: Do businesses feel able to use all three employment statuses? If not, what restricts the use of different statuses?

Comments:

Question 3: What restrictions, if any, do you think should be attached to the issue of shares or types of shares?

Comments:

Question 4: When an employer buys back forfeit shares, should this be at full market value or some other level (eg. a fraction of market value) should some other level be allowed in certain circumstances?

Comments:

Question 5: How should a company go about carrying out a valuation of the shares? What would the administrative and cost impact be for a company if an independent valuation was required?

Comments:

Question 6: The Government would welcome views on the level of advice and guidance that individuals and businesses might need to be fully aware of the implications of taking on employee owner status.

Comments:

Question 7: What impact will allowing individuals limited unfair dismissal protection and equity shares have on employers' appetite for recruiting?

Comments:

Question 8: What benefits do you think introducing the employee owner status in with limited unfair dismissal rights will have for companies?

Comments:

Question 9: Do you think these benefits will be greater for larger, smaller or start-up businesses?

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Question 10: What impact, if any, do you think the employee owner status will have on employment tribunal claims, e.g. for discrimination?

Comments:

Question 11: What impact do you think introducing the employee owner status with no statutory redundancy pay will have for businesses, in particular, smaller businesses and start up businesses? What negative impacts do you anticipate and how might these be mitigated?

Comments:

Question 12: What impact will this change to maternity notice period have on employers?

Comments:

Question 13: What, in your view, would employers do if employees wish to return early without giving 16 weeks' notice?

Comments:

Question 14: How will these changes impact on a company's payroll provisions?

Comments:

Question 15: What effect will a compulsory 16 weeks' early return notice period have on the length of maternity leave that mothers take or adoption leave that parents take?

Comments:

Question 16: Do you think 4 weeks is the right period? If not, why not? What would be the impact of a shorter or longer period?

Yes ☐ No ☐

Comments:

Question 17: What impact do you think this proposal would have on the ability of employee owners to access support for training?

Comments:

Question 18: Do you have any comments on the Government's intention not to amend Company Law to implement the employee owner proposal?

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Question 22: Would you be likely to take up the new status? What would the impact of the status be on your business?

Comments:

Question 23: What are your views on the take-up of this policy by:

a) companies?
b) individuals?

Comments:

Question 24: What are your views on the equality impact assessment? Are there other equality and wider considerations that need to be considered?

Comments:

Question 25: Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

☐ **Please acknowledge this reply**

Question 26 : At BIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents?

Yes ☐ No ☒

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Any enquiries regarding this publication should be sent to:

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1 Victoria Street
London SW1H 0ET

Fax: 0207-215 6414

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

The closing date for this consultation is: **8 November 2012**

Your details

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Telephone:

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Please tick the boxes below that best describe you as a respondent to this:

- ☐ Business representative organisation/trade body
- ☐ Central government
- ☐ Charity or social enterprise
- ☐ Individual
- ☐ Large business (over 250 staff)
- ☐ Legal representative
- ☐ Local government
- ☐ Medium business (50 to 250 staff)
- ☐ Micro business (up to 9 staff)
- ☐ Small business (10 to 49 staff)
- ☐ Trade union or staff association
- ☒ Other (please describe) Indcependent think tank

Question 1: How can the government help businesses get most out of the flexibility offered and the different types of employment statuses?

Comments:

Question 2: Do businesses feel able to use all three employment statuses? If not, what restricts the use of different statuses?

Comments:

At present, three different employment statuses (employee, worker, or independent contractor) are generally available in English law, with certain additional categories in areas such as anti-discrimination. While this broadly tri-partite setup may not sound too difficult, there is clear evidence that it provides a significant obstacle to companies who are already confused by the existing scheme and by the growing number of 'employee' or 'worker' contract typologies. A recent study by the CBI pointed out that, allegedly as a consequence of the introduction of the Agency Workers Regulations , businesses have chosen to hire a large number of workers through self-employed contracts. According to this report, this was not necessarily due to the rising costs of hiring better protected agency workers, 'but more importantly due [to] the considerable compliance burden and vastly increased risk of tribunal claims' (Facing the Future, 2012, p. 35).
Even before the implementation of the proposed reforms, businesses and workers are therefore facing a considerable degree of uncertainty, and as a direct result, considerable fears about potential litigation: many an employment tribunal claim needs to go through a complete round of hearings (including appeals) simply in order to determine the preliminary question as to the claimant's status before the tribunal can turn to the merits of the claim. The introduction of a new, fourth category, will add considerable confusion; not just by virtue of having an additional category but also because it is difficult to see how the proposed employee-owner regime would map onto the current system of common-law based categories which serve as gateways to an array of statutory rights. In addition to this it is foreseeable that employee owners whose contracts were terminated would engage in strategic litigation by alleging discriminatory dismissal in order to gain access to justice.
The recent decision by the Supreme Court in Autoclenz v Belcher [2011] UKSC 41 will exacerbate these problems dramatically: in that case, the court held that in determining a worker's employment status, the relevant evidence was not necessarily limited to the written contractual agreement between the parties. While the case was decided in a slightly different context, its arguments could easily be translated across into the employee-owner scenario: if the individual continues to behave and be treated as an employee on a daily basis, with weak or no evidence of ownership (e.g. because of the low value his or her shares, or a lack of voting rights attached to them), the courts are likely to disregard the employee-owner contract in favour of more traditional classifications. This would be the case especially if the transition to employee-owner contracts (or their being offered to new joiners) becomes an automatic standard practice, along the lines of the now near-universal opt-out employees are asked to sign in order to waive their rights under the provisions of the Working Time Regulations 1998.

The proposals are also premised on the assumption that the labour rights and entitlements that will be denied to 'employee owners' are outside the scope and competence of EU law, and within the exclusive competence of domestic law. This assumption is premised, first, on the belief that 'employee owners' would be missing out exclusively on rights that are not protected by EU labour law Directives, and, second, on the assumption that even where they exists, EU labour law directives tend not to engage robustly with the personal scope question. We strongly disagree with both assumptions. As we suggest below, a number of these rights are directly or indirectly covered by EU law. Moreover, in recent years EU law has moved beyond its initial deferent approach in respect of the national definitions of 'worker' and the personal scope of application of EU labour law instruments. In our view, the Court of Justice would be reluctant to accept that the UK status of 'employee owner' is genuinely separate from the EU notion of 'worker' (as developed in its equal pay, health and safety, and pregnancy case law) when the alleged distinctive features are merely notional and simply disguise an employment relationship within the 'worker' meaning.

The proposals, finally, are very unclear as regards their application in the collective dimension, most importantly workers' rights to organise, bargain collectively and consult with their employers on certain topics. None of the relevant provisions are listed in the indicative table of employment rights in the consultation document. Should this be interpreted as an assumption that the rights will be available to employee-owners? Or is the opposite the case? Without specific legislative amendments to key statutes such as TULRCA 1992, it is difficult to see how the proposed scheme could operate within the current tripartite classification, thus leaving employee-owners outside the scope of collective rights. Such an exclusion would open the entire scheme to challenge under the Human Rights Act 1998, given the European Court of Human Right's recent emphasis on strengthening Article 11 of the European Convention of Humarn Rights (freedom of association): in Demir v Turkey [2008] ECHR 1345 the court explicitly recognized workers' fundamental right to collective bargaining and industrial action.

Overall, therefore, businesses and indeed the government itself would face significant uncertainty and the threat both of long classification arguments in employment tribunals, even where an explicit employee-owner contract has been signed, and larger challenges both in domestic courts and international law.

Question 3: What restrictions, if any, do you think should be attached to the issue of shares or types of shares?

Comments:

Regulations on share issues would need to ensure that worker's entitlements reflect the fundamentals of the legal and economic position of company owners, most importantly by including both control (voting) rights and an entitlement (however residual) to the company's economic surplus. If the regulations were to allow issues structured in a way that denies some of these features (for example, by restricting voting rights, or classifying employees as a distinct group of shareholders), additional safeguards need to be put in place to ensure that other aspects (e.g. preference shares with guaranteed dividends) are sufficient compensation. This would likely involve external valuation and the resulting complications, however (see further our answer to Q5).

Question 4: When an employer buys back forfeit shares, should this be at full market value or some other level (eg. a fraction of market value) should some other level be allowed in certain circumstances?

Comments:

The idea of share forfeiture sits very uneasily with the overall employee-owner scheme. Generally speaking, companies have no powers to force shareholders into buy-backs without further agreements (e.g. a specifically designed option); so it is likely that any such provision would be used in demonstrating to an employment tribunal that there is little genuine about the 'ownership' aspect of the status (see further answer to Q2).

Should the forfeiture scheme go ahead regardless, it would raise several serious concerns: by definition, the buyback of an employee-owner's shares following termination of the employment relationship will happen at the very moment the worker will be at his or her most vulnerable, and in need of financial support. If valuation were at market value, or even below that (with a 'fractional' amount) this raises an additional problem: structurally, most layoffs will happen in periods of depressed company performance, and thus reduced valuations. The danger is that employees would receive very little, if any, meaningful value in return for their loss of employment rights. The only way to avoid this would be to set a minimum strike price for the employer's repurchase option at the original issue value; leaving employees to capture any potential economic upside, but not exposing them to the risk of serious drops in the stock-market. This approach would also have the benefit for company's treasuries of facilitating the valuation of outstanding liabilities.

Question 5: How should a company go about carrying out a valuation of the shares? What would the administrative and cost impact be for a company if an independent valuation was required?

Comments:

The biggest problem in valuation would be raised by non-traded employers generally, and dynamic, fast-growing companies in particular. Whilst fairly sophisticated models have been developed by private-market (pre-IPO) funds dealing in shares of non-listed companies, the administration of such schemes could easily become very complex (for example as regards dilution of previously-issued shares). Overall, the effect would be considerably off-putting to most companies: external third-party valuation will be intrusive and expensive, but without it, employers would open themselves up to the full range of claims and challenges that the employee ownership is not genuine, as discussed in our answer to Question 2.

Question 6: The Government would welcome views on the level of advice and guidance that individuals and businesses might need to be fully aware of the implications of taking on employee owner status.

Comments:

We suggest that individuals and businesses would in practice need a very high level of advice and guidance about the implications of taking on employee-owner status, so much so as to render the taking on of this status a seriously risky and potentially costly decision on the part both of individuals and businesses.

There are many kinds of difficulty and uncertainty involved, but they can usefully be reduced to two main types:-

a) uncertainties about the application of statutory provisions, and
b) uncertainties about employee-owner status as a common-law contract type.

We comment on these in turn.

a) Uncertainties about the application of statutory provisions.

The main focus of the proposals is upon the positioning of the proposed employee-owner status in relation to the principal statutory employment protections which are currently applicable to 'employees', and, to a lesser degree, to 'workers', the basic idea being to limit some of those protections for 'employee-owners' on the footing that they will enjoy a compensating set of advantages deriving from their ownership of shares in the employing company.

However, although the proposals purport comprehensively to have clarified the position of employee-owners in this respect, we think that serious uncertainties would still arise. Arguments might for example arise as to whether a given individual had genuinely been accorded 'employee-owner' status, the mere assertion of that on the face of the contract not in itself being decisive if the individual could show that he or she had not properly understood what was involved.

Moreover, we think that rather elaborate advice-taking would be needed to enable both individuals and businesses to decide whether contracting on the 'employee-owner' footing was really to the benefit of the respective parties to the arrangement. So the transaction costs of entering into such contracts could be very considerably greater than for conventional contracts of employment or even for 'worker' contracts.

b) Uncertainties about 'employee-owner status' as a common-law contract type

We think that the above-mentioned uncertainties are enormously multiplied by an even greater set of difficulties, to which the proposals do not refer, about how the 'employee-owner status' would operate as a common-law contract type. The crucial question here is whether and how far the common law of the contract of employment would apply to it, and if so with what if any modifications.
Individuals and businesses would need to know from the outset and during the continuance and upon the termination of such contracts whether the central implied terms of the contract of employment, such as that obligation of mutual trust and confidence, applied to 'employee-owner' contracts, and whether the doctrines prescribing the remedies for breach and wrongful termination of the contract of employment applied equally or differently to these contracts. This is a matter of the utmost consequence which the proposals do not seem to address.

Question 7: What impact will allowing individuals limited unfair dismissal protection and equity shares have on employers' appetite for recruiting?

Comments:

Question 8: What benefits do you think introducing the employee owner status in with limited unfair dismissal rights will have for companies?

Comments:

Question 9: Do you think these benefits will be greater for larger, smaller or start-up businesses?

Comments:

Question 10: What impact, if any, do you think the employee owner status will have on employment tribunal claims, e.g. for discrimination?

Comments:

Question 11: What impact do you think introducing the employee owner status with no statutory redundancy pay will have for businesses, in particular, smaller businesses and start up businesses? What negative impacts do you anticipate and how might these be mitigated?

Comments:

Question 12: What impact will this change to maternity notice period have on employers?

Comments:

This response covers questions 12, 13, 14 & 15: The Consultation Document takes

the view that maternity leave notice periods for 'employee owners' could be increased above the equivalent notice periods presently required from employees. The underlying assumption is that EU law does not cover these matters, and therefore domestic law is free to discriminate between the parental and maternity entitlements of 'employees' and those of other workers.

We suggest that this is a risky if not altogether wrong assumption. Parental Leave in general is of course covered by EU secondary legislation (Directive 2010/18). EU law does not systematically defer to domestic law when it comes to defining the personal scope of application of the rights contained in EU labour and equality directives. Some of the areas in which the ECJ has forcefully asserted that the concept of 'worker' to which these rights apply must have an autonomous and EU-wide definition are the areas of equal pay, pregnancy rights, and health and safety legislation (broadly understood). While the Court has not yet had an opportunity to pronounce itself in respect of the personal scope of application of the Parental Leave Directive, it is plausible to assume that, should it be asked to decide whether it is possible for Member States to attribute different sets of rights to groups of employees that fall within the EU concept of 'worker', it would take a very critical view of any national measure seeking to do that. It is our firm belief that both 'employees' and 'employee-owners' would be seen as falling within the EU concept of 'worker' as developed by the Court of Justice of the EU in its more recent jurisprudence since the case of Allonby. As a consequence, provisions such as those suggested in Part 3 of the Consultation document would be found to be in breach of EU law, in spite of the fact that the EU Parental Leave Directive does not explicitly cover notice periods.

Question 13: What, in your view, would employers do if employees wish to return early without giving 16 weeks' notice?

Comments:

see above

Question 14: How will these changes impact on a company's payroll provisions?

Comments:

see above

Question 15: What effect will a compulsory 16 weeks' early return notice period have on the length of maternity leave that mothers take or adoption leave that parents take?

Comments:

see above

Question 16: Do you think 4 weeks is the right period? If not, why not? What would be the impact of a shorter or longer period?

Yes ☐ No ☒

Comments:

We would like to start by reiterating the point made above. Even where a specific right or entitlement is not expressly covered by EU Law (e.g. notice periods or the right to request flexible working), and as long as that right is strictly connected with the enjoyment of a right provided or protected by an EU instrument (as in the case of parental leave), EU law may not allow Member States to create two tiers of rights and entitlements for different (national) categories of employees that the ECJ would see as falling within the broad and autonomous EU notion of 'worker'.
We therefore believe that that the Consultation paper may be mistaken in suggesting that the 'only' EU right at stake is paid parental leave (para 41). Other rights and matters that may trigger EU/ECJ competence in respect of the right to request flexible work range from pregnancy to disability discrimination, including discrimination by association. In all these cases EU law would most likely prohibit the attribution of lesser rights to 'employee-owners' if the latter were to be seen as falling within the EU/ECJ notion of 'worker'.
We also note that as presently drafted the proposals contained in paragraphs 42-44 may fall short of the right to fair trial, which is clearly protected under both EU law and the European Convention on Human Rights.

Question 17: What impact do you think this proposal would have on the ability of employee owners to access support for training?

Comments:

Question 18: Do you have any comments on the Government's intention not to amend Company Law to implement the employee owner proposal?

Comments:

The employee-owner scheme can probably be accommodated under the current company law regime strictly speaking. Employee's share ownership would however throw open a series of unanswered questions in closely related fields. Would shareholders under the scheme have to comply with securities market regulation, for example when a trade union co-ordinates its members' vote and therefore acquires control over a substantial block of shares in a publicly listed company? Would employee-owners in the previous example be subject to competition law and related provisions?

A further issue not addressed in the proposal is that of complex corporate structures, such as corporate groups, holding companies, and companies that are

held by outside investors such as Private Equity firms. In which entity would employee-owners be given shares? If shares will always be held in the immediate contractual counterparty, this raises a problematic issue: in a corporate group, for example, it could become very difficult to value the shares of a subsidiary given the group's freedom to continuously readjust assets and liabilities within its structure to match evolving business needs.

Question 19: The Government welcomes views on particular safeguards that would need to be applied, in order to minimise opportunities for abuse.

Comments:

Any 'automatic' or boilerplate employee-owner terms need to be automatically invalidated under the statutory regime. Where employees do not have free choice in negotiating the arrangement, the very point of the scheme is threatened: the acquisition of ownership in a company is, after all, a voluntary act which usually happens at arms-length between parties of reasonably equal bargaining power.

The second main area of concern is in the valuation of shares at issue, and in the provisions surrounding buy-back. Strong safeguards would be necessary to ensure that the employee-ownership scheme would stand up to judicial scrutiny; if an employee can demonstrate that at the moment of termination he or she had none of the benefits of ownership, it is likely that the courts would classify the relationship under one of the existing categories (see our answer to Question 2).

Preliminary analyses suggest, finally, that the scheme could open up a serious loophole in the existing tax structure. Senior management in particular could easily opt to become employee-owners, receive the maximum amount of tax-free equity in return, and then contract back into the full range of employment rights (and indeed contract out of the buy-back regime to ensure a truly golden, completely tax-free, parachute).

Question 20: The Government welcomes views on whether the existing tax rules which apply to share-for-share exchanges (such as might happen when a company is taken over) and schemes of reconstruction should apply where shares issued in return for taking up the new status are involved

Comments:

Question 21: What impact do you think the proposal will have on labour market flexibility – that is, in relation to hiring and letting people go?

Comments:

Our view is that the economic evidence of the effects that deregulation may have over hiring and firing decisions by businesses is scant and contradictory. The

OECD has noted in its Employment Outlook of 2010 that '...theory predicts that strict employment protection should reduce worker flows ... although it is not always clear to what extent estimated effects are general and robust' (see pages 181-182 of the report; emphasis supplied), and that 'the evidence presented in the chapter also suggests that reforms involving the relaxation of regulatory provisions on individual and collective dismissals are likely to increase the number of workers who are affected by labour mobility at the initiative of the employer' (page 200).

In a way, one could therefore only answer this question on the basis of theoretical and ideological arguments and/or hypothetical speculation. What is certain, on the other hand, is that the introduction of a fourth (and less protected) employment status would further segment the British labour market (going against the clear advice of both the OECD and the European Commission), and have a disproportionate effect on the most vulnerable sectors of the labour market and society, and in particular younger workers and women.

Question 22: Would you be likely to take up the new status? What would the impact of the status be on your business?

Comments:

See comments to question 2 above

Question 23: What are your views on the take-up of this policy by:

a) companies?
b) individuals?

Comments:

Overall, it is unlikely that this scheme would see enthusiastic take-up. Whilst the lack of employment rights, notably as regards unfair dismissal, might be superficially attractive from a company's perspective, the inherent uncertainty and resulting threat of litigation as outlined in our response to earlier questions will significantly distract from any perceived benefits of the scheme. From the individual worker's perspective, the policy constitutes a dangerous risk-reallocation, where cyclical business risk is shifted onto the worker who is arguably least able to bear that risk. It is therefore likely that the most significant impact of the proposed scheme will in the end be on HM Treasury, further stretching decreasing public resources to provide basic social support for redundant employee-owners.

Question 24: What are your views on the equality impact assessment? Are there other equality and wider considerations that need to be considered?

Comments:

Question 25: Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

☒ **Please acknowledge this reply**

Question 26 : At BIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents?

Yes ☒ No ☐

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Consultation Response on Implementing Employee-Owner Status

November 2012

(Claire McCann, Rachel Crasnow, Sian McKinley & Chris Milsom, Cloisters 7th November 2012)

Q1. to Q7.

Not answered.

Q8.

What benefits do you think introducing the employee owner status in with limited unfair dismissal rights will have for companies?

In general terms, we do not consider that the proposal offers any obvious advantages. We can well understand that an employee who feels part of the daily running of his or her employer's activities may be more productive. We struggle to see, however, that the 'employee owner' scheme would contribute towards this objective. The employment relationship is unlike any other. Firstly, there is rarely equality of bargaining power. The best candidates may be suspicious of the scheme and accept employment elsewhere. Those left with the ultimatum of an ill-considered share scheme or no employment at all are unlikely to be the strongest candidates and, upon employment, unlikely to feel entirely comfortable or confident in their role. Secondly, an employment relationship is organic and, one would hope, long-lasting. An OECD survey of 2011 suggests that the average UK citizen of working age spends 1,647 hours at work each year. Any ostensible advantages of the scheme would be undermined by the difficulties an organisation would face when undertaking two different and sometimes conflicting functions – ie, the corporate and the employment. In addition:-

i. As the Consultation paper rightly recognises at the outset "The UK has one of the most lightly regulated labour markets in the developed world and is performing well...". There is no evidence that employment legislation prohibits recruitment. In the absence of any demonstrable data that such 'light regulation' is impairing growth or recruitment we cannot see the benefits of removing the employment protection currently enjoyed by UK employees;

ii. An employee whose job security is in doubt due to relinquishing his or her unfair dismissal rights is unlikely to be a productive worker or a confident consumer;

iii. Restricting the right to request flexible working is likely to be a false economy. Evidence suggests that employers benefit significantly from flexible working: permitting such requests broadens the talent pool and a more productive workforce leads to increased confidence and flexibility[1];

iv. This is likely to be an inordinately complex scheme to initiate for those businesses who are not already involved in valuing shares. Such complexities are likely to outweigh any short-term advantages;

v. There are real concerns as to the division the scheme may cause amongst the workforce which are far from conducive to a flourishing workplace. Consider the following problematic scenarios:-

   a. It is understood that these proposals would not impair an employee's right to a protective award pursuant to TULR(C)A 1992. Notwithstanding this, however, 'employee ownership' status would invite differential treatment which would be problematic in practical terms. In a collective redundancy process, is it the case that those employees who are employee owners, who have no right to claim unfair dismissal, are excluded from a consultation and selection process whilst others have the full rights to make representations as to why they should be retained? If so, why not dismiss employee owners before all others in such circumstances?

   b. Are employee owners permitted to attend meetings about the performance of the business from which others will be excluded? Will this not, in turn, lead to a situation in which some colleagues are better informed than others?

   c. What of current employees who have not had the benefit of the share scheme at an earlier stage of employment and who may have benefited from an increase in revenue over the course of their employment? If the scheme is offered, grievances will doubtless follow that such shareholding rights should be granted to take account of retrospective benefits;

vi. We understand 'employee owner' status to be akin to a collateral contract i.e. the provision of shares acts as consideration for the forfeiture of certain statutory rights. In all other respects, the employee owner is in an identical position as that of the ordinary employee. It is not clear, at present, what consequences would follow for an employee who voluntarily surrendered his or her shares – whether at a value or otherwise - during the course of employment. Plainly, once shares are surrendered, there is no consideration for the forfeiture of statutory rights and, as such, those rights may well be restored. If an employee owner can adopt this course at a time when dismissal is likely, any short-term advantage that the scheme may have would be circumvented at the opportune moment.

vii. Employers will doubtless feel uneasy about sharing confidential business information with employees and yet any differential treatment between shareholders dependent on whether they

[1] "Flexible Working: working for families, working for business" (A report by the Family Friendly Working Hours Taskforce," 15 March 2010)

are employed or not will fuel nuanced and occasionally well-founded grievances. The workplace risks descending into a daily shareholders' dispute.

Such negligible advantages to an employer must also be placed in the context of the demonstrable disadvantages to an employee. In addition to losing rights which have formed the cornerstone of employment protection for some decades, consider the unfortunate scenario of a company entering administration. It seems that employees in such circumstances would be left with worthless shares and no right to seek statutory payments from the RPO.

We also consider that the withdrawal of any EU derived rights may be open to legal challenge. This would have the effect of creating satellite litigation about the legality of the "employee ownership" scheme.

We conclude that a good employer/employee relationship will not be fostered by this scheme. A sense of fair-play and consideration of an employee's requests to, by way of example, work flexibly, are far more likely to achieve this objective. As such, we regard this proposal as ill-considered and counter-intuitive.

Q9.

Not answered.

Q10.

What impact, if any, do you think the employee owner status will have on employment tribunal claims e.g. for discrimination

The proposal is very much in its infancy and, as such, ambiguities are inevitable. As stated in our response to question 8, the conflicts between the corporate and the employment relationship will most likely create fertile ground for suspicion between employer and employee. This, combined with a sense of insecurity by forfeiture of the right not to be unfairly dismissed, will make litigation more rather than less likely. Moreover, such litigation will invariably be of a more complex – and costly – nature. Unfair dismissal claims will be relabelled as discrimination or whistle-blowing claims, so increasing the breadth of issues to be considered and the costs incurred in the litigation. In addition, we can foresee a new sphere of commercial litigation in the costs-bearing civil jurisdiction. This is particularly so since those employees who take advantage of the share scheme on the basis of informed and genuine consent – especially for the higher values in shares - are more likely to be sophisticated individuals with the means and ability of pursuing county court and high court claims.

The proposals contained in this Consultation paper do not amount to a means of avoiding litigation so much as a starting-point for increasingly complex claims.

Q11.

What impact do you think introducing the employee owner status with no statutory redundancy pay will have for businesses, in particular, smaller businesses and start-up businesses? What negative impacts do you anticipate and how might these be mitigated?

Would an employer be able to bypass all the procedural steps prior to redundancy dismissals such as consultation (collective and individual) and considering alternative employment? It would have to ensure that all employees it deprived of these steps were "employee owners" or it would face unfair dismissal claims as well as claims for redundancy payments. Removing the consultation stage would, we feel, deprive employers of the opportunity of keeping those employees who were best to retain in the business going forward. Often errors in the selection process are only brought to the attention of business as part of the consultation dialogue. Moreover, a business which has no incentive to apply proper selection criteria (in the knowledge that the affected employees have no legal come-back with unfair dismissal or redundancy payment claims) is more likely to select on non-transparent, subjective grounds, which may be open to challenge on grounds of discrimination, hence avoiding the "flexibility" which was the objective of reducing the level of protection. Of course, discrimination compensation is uncapped, so such an outcome may be no cheaper for the employer (and there would be the additional legal costs of the discrimination litigation).

Would the giving of the shares be a fair trade-off for redundant employees? In a business considering redundancies, there will often be a perception that the shares are not worth what they would be, were there no need for redundancies. Hence disputes about the "market value" of the shares will arise particularly where the dismissed employee believes the shares are worth substantial sums. The Consultation suggests: *"However, to ensure that employees are also protected, the Government will require that if shares are surrendered, the employer would have to buy back the employee's shares at a reasonable value."* What is reasonable? We foresee conflicts arising over the differences between the "unrestricted market value at the time that [shares] are **awarded**" and the time they were **surrendered**. Disputes on value, often at High Court level, will not add to the flexibility enjoyed by the business and may take up more time and resources than the redundancy selection consultation process would, had it be conducted according to ACAS guidelines.

So, we see various negative impacts if such measures are introduced. Grievances are particularly likely to arise with long-standing employees who would ordinarily receive sizable redundancy payments, but the value of whose shares have been downgraded.

Current solutions are already in place to mitigate such problems. Any employer is free to offer an employee it wishes to make redundant a termination payment along with a compromise agreement (and a reference if it wishes to make the offer attractive). Of course the employee can refuse and insist on the employer pursuing with the statutory redundancy procedure. But the Government's suggested ways of making redundancies a more flexible process ignore the fact that the greater the degree of unfairness perceived by employees, the more keen they will be to litigate their grievances under some kind of legal challenge: even if the obvious ones of unfair dismissal or a claim for a redundancy payment are not available to them.

In summary, these proposed measures will not reduce the risk of litigation.

Q12.

What impact will this change to maternity notice period have on employers?

The stated aim behind the proposal to introduce "employee owners" as a new status of employee is "to provide additional flexibility to employers, in particular fast growing innovative companies who require adaptable workforces".

In the Consultation document, at paragraph 38, it is stated that "planning for maternity periods is often cited as a concern for employers."

It should be recalled that the requirement on a woman to give notice of her return from maternity leave was increased, in any event, fairly recently (ie, October 2006) from 4 to 8 weeks. The proposals now suggest that, for "employee owners", the requirement to give notice of a return to work should be further increased to 16 weeks. For a woman planning on taking less than the 52 weeks' full maternity leave entitlement, this notice requirement could potentially oblige her to give notice of her intention to return to work very early in her maternity leave (for example, when her baby is just 3 months old and she intends to return to work when the baby is 7 months old). It can be very difficult for a woman to have much sense of when will be appropriate to return to work when her baby is still so young. Where an employee fails to give the requisite notice of her return to work before the end of the AML period, then her employer is entitled to postpone her return to such a date as will ensure that it has had the requisite notice of her return. During this period of postponement, the employer is under no contractual obligation to pay any remuneration (ie, until the date to which the employee's return was postponed). Consequently, by extending the notification requirement, a woman may be left without remuneration at a very vulnerable time.

It is not at all apparent to us that the early notification proposal would greatly assist employers by providing "additional flexibility" or by encouraging them to take on additional staff. Any maternity cover resource will either be arranged amongst existing employees or by way of a temporary hire. Where existing employees are deployed to cover the maternity leaver's duties, it will make little (if any) difference to an employer whether it has 8 or 16 weeks' notice of a woman's return to work following maternity leave. Where a temporary hire is used to cover the woman's duties, that person will typically have a far shorter contractual notice period for termination of employment than 8 weeks in any event (and only one week's minimum statutory notice). Therefore, an employer already has adequate flexibility to make provision (within the current 8 weeks) for a woman's return to work following maternity leave.

Whilst we are aware that employers often cite planning for maternity leave as a concern, this is in respect of a woman taking maternity leave in the first place (and not the notification process for her return to work).

We envisage very little (if any) helpful impact in relation to the proposed increase to the notification requirements. An additional 8 weeks' notice of a woman's return to work will not encourage employers to employ more staff (or more female staff).

Conversely, whilst on maternity leave, a woman is disadvantaged (ie, vulnerable) in the labour market. Particularly in a recession, she needs the greatest flexibility in relation to her ability to return to work. For example, if her partner/spouse is made redundant, this may require a woman to return to work sooner than envisaged. By requiring her to give 16 weeks' notice of her intention to return to work (rather than 8 weeks), she will be denied the comfort of knowing that she can return to her fully paid employment within a relatively short period of notifying her employer of such an

intention. We consider that such a proposal is to be deplored as it further undermines the security for a woman when she is, in any event, financially insecure. We also note that the early notification proposal does nothing to reduce so-called "red tape".

Q13.

What, in your view, would employers do if employees wish to return early without giving 16 weeks' notice?

As with most requests from employees where there is no legal requirement to consider or accede to the request, we envisage that it will largely depend on the good will of the employer towards the employee concerned. If the maternity leaver is well-valued by the employer then, no doubt, the employer will allow her to return early from maternity leave, even without the 16 weeks' notice. If, however, an employee is less valued by her employer, then a request to return early from her additional maternity leave without having given the requisite 16 weeks' notice may be viewed less generously.

Q.14

Not answered.

Q15.

What effect will a compulsory 16 weeks' early return notice period have on the length of maternity leave that mothers take or adoption leave that parents take?

If applied rigorously by an employer and the employee envisaged taking less than 52 weeks' leave, then the 16 week notification requirement may have the effect of extending the length of that employee's leave (as it brings forward the date on which the employee has to notify her employer of her intention to return to work). In other words, it may extend the length of maternity leave by up to 8 weeks.

Q16.

Do you think 4 weeks is the right period? If not, why not? What would be the impact of a shorter or longer period?

In the Consultation document, it is stated that the Government is committed to encouraging employers and employees to take up flexible working and has committed to extend the current right to request flexible working to all employees during this Parliament. It is also stated that "flexible working is beneficial for employees and employers: employees benefit from the ability to manage their work and personal responsibilities more effectively and employers benefit from increased productivity, and staff retention as well as reduced staff absence". Given these statements, it is surprising and concerning that the "employee owner" proposals restrict the right to request flexible working to the EU minimum (ie, only when returning from parental leave). Furthermore, it is proposed that the request should be made within 4 weeks of a return to work after parental leave.

We fail to see how the proposal chimes with the Government's stated aim to extend the right to request flexible working to <u>all</u> employees. By restricting the right to request flexible working for

"employee owners", in fact, the Government is proposing to reduce the general entitlement to request to work flexibly.

The proposal is likely to impact adversely and disproportionately part-time employees and, especially, women. It will also be likely to adversely impact certain age groups who have more onerous caring responsibilities (eg, those with children under 18 years old). In its Impact Assessment, the Government states that the estimated proportion of people that utilise flexible working is "broadly similar across men and women". However, the Government has only provided statistics for flexible working amongst the full-time working population. This is short-sighted and regrettable as it is well-established that many flexible working arrangements are implemented in respect of part-timers.

The Consultation document states that the change "only removes access to an employment tribunal case for those employees who think their request has not been properly considered according to the statutory provisions". This fails to acknowledge that, by having a statutory process requiring an employer properly to consider a flexible working request, this encourages flexible working. No doubt that is why the Government has so clearly expressed its desire to extend the right to request flexible working to all employees. Furthermore, whilst the removal of the right to request flexible working will also remove the right to make a tribunal claim for an alleged failure by an employer properly to consider a flexible working request, it will not remove access to an employment tribunal for a discrimination claim (eg, by a woman or an employee in a particular age group who has been denied a flexible working request).

Generally, therefore, we deplore the proposal to remove the right to request flexible working from "employee owners" (except in respect of those employee-owners returning from parental leave).

In relation to the proposed 4 week period within which a request must be made by those returning from parental leave, we consider that this is too short. Furthermore, there is nothing in the consultation about a right to repeat a request within, say, the first 12 months after a return from parental leave.

We consider that, when an employee returns from parental leave, it is often not clear to that individual how s/he will balance her/his previous working arrangements with new childcare responsibilities. By only allowing a 4 week period to undertake that assessment, this greatly reduces the ability of an employee properly to evaluate what working arrangements would suit both her/him and the business. A longer period would, therefore, enable an employee to consider what working arrangements would accommodate both her/his childcare duties and the needs of the business. We also consider that the legislation should provide for a right to make a further request within the first 12 months after a return from parental leave. This is because an employee may return from parental leave but his/her partner or spouse may still be taking a period of parental leave so there is no need, at this stage, for the employee to work flexibly. However, once the other parent returns from his or her parental leave, the employee may well need to request flexible working. If such a request can only be made in the first four weeks after the employee's return from parental leave, this will significantly reduce the advantage of the entitlement to request flexible working.

Q17.

What impact do you think this proposal would have on the ability of employee owners to access support for training?

How widely does this right apply?

This right only applies to employees of businesses with over 250 employees.

As of the start of 2012[2], small and medium-sized enterprises (SMEs), defined as having between 0-249 employees, accounted for 99.9% of all enterprises in the UK. SMEs employed 59.1% of the private sector employment (14.1 million people of the 23.9 million people employed by enterprises in the UK).

A tribunal claim for a failure to consider a request for time off for training can only be brought by the 9.8 million people employed by large enterprises.

The government states that "it is envisaged that the employers that might be most likely to employ employee owners would be fast growing companies with a requirement for a flexible workforce." We consider that the government is not expecting that large companies are the "fast growing companies" that the government envisages taking up this policy.

How many claims were brought last year for a failure to consider a request for training?

There are no precise figures but we know that in 2011/2012 there were 321,800 claims brought and of those claims 5,000 fell within the bracket "Other"[3]. Claims which fall under "Other" will include claims for failure to consider a request for time off for training but must also include claims for failure to consider request for flexible working, claims for less favourable treatment on grounds of being a fixed-term worker or a part time employee. Even if we assume that all 5,000 claims falling within "Other" are claims for failure to consider a request for training, this amounts to 1.55% of all claims, though it is likely to be far less than this.

Summary

This scheme is designed to assist fast growing companies which are more likely to be small and medium-sized enterprises. These enterprises are unaffected by the right to request time off for training.

The rarity of these claims makes it unlikely that businesses are put off from hiring people because they are concerned about being brought before a tribunal for a failure to consider a request for time off for training.

To the extent that large enterprises would be put off hiring employees by the perceived risk of being taken to an employment tribunal for a failure to consider a request for time off for training, this could be resolved by better education as to the obligations on a large employer.

[2] www.fsb.org.uk/stats

[3] Employment Tribunals and EAT Statistics 2011 - 12, Ministry of Justice, produced 20 September 2011

This would reduce the impact on employee owners of large companies who will be unable to request time off for training unless their employer decides to consider such requests outside of the statutory scheme.

Q18.

Not answered.

Q19.

The Government welcomes views on particular safeguards what would need to be applied, in order to minimize opportunities for abuse.

We consider that abuse could occur in two scenarios:

1. Employees had this scheme forced upon them (e.g. through a system of dismissal and re-engagement);
2. Employees within the scheme did not receive the true value of the shares upon surrendering them (e.g. when dismissed or resignation).

To avoid abuse, we suggest the following safeguards:

- Employees can only give up their rights and take up employee-owner status once they have taken independent legal advice, similar to the requirements under section 203 of the Employment Rights Act 1996 when compromising rights.
- Shares can only be valued by independent valuations so that the results cannot be skewed or manipulated, or to ensure that the employees have confidence in the valuation of their shares.

The issue with both of these safeguards is that either the employee or the employer (or potentially both) could incur a cost.

Q20.

Not answered.

Q21.

What impact do you think the proposal will have on labour market flexibility – that is, in relation to hiring and letting people go?

The objective of the suggested new status is to make it easier to terminate contracts of employment on two bases: if procedures are not followed business will save time. If there is no legal challenge for a dismissal business will save time and costs.

We think this is short-sighted for two reasons. Firstly, the procedures adopted in legislation which guide employers along the paths of fair dismissal and redundancy procedures are not only workable and straightforward (as well as very familiar to HR professionals) but also have a positive impact upon the entire workforce going forward. Bypassing long-standing procedures which the workforce

has faith in, harms company loyalty and increases suspicion and distrust in the workplace. This in turn has a negative impact upon teamwork and managerial structures.

Secondly, it is ill-advised to believe that removing protection reduces litigation or the threat of litigation. Where an employee has a grievance they wish to take further, where they have lost their job and are uncertain of finding a suitable replacement, they will take the nearest legal challenge to the one they have surrendered upon being issued their shares. There may be fewer unfair dismissal claims, but there will be more whistleblowing and discrimination claims. The end result is business being disgruntled upon facing possibly unmeritorious claims and employees wanting a more just solution than the employer's value of their shares at the time they were awarded.

The current system whereby a compromise agreement accompanied by acceptable payment ends an employment relationship with no risk of litigation works extremely well for all concerned, across the UK and has done for many years.

We do not understand how rights which have a qualifying period of two years attached to them in any event could act as a barrier to hiring employees. Neither have we seen any evidence that "employee owners will potentially have greater attachment to the success of their employer by virtue of the stake that they own in the company, creating a more engaged workforce." The most that such employees would gain, would be a removal of some of their most important legal rights, along with a squabble when they were dismissed, on procedurally unfair grounds, about the value of the shares they now had to surrender.

Q22.

Not answered.

Q23.

What are your views on the take-up of this policy by:

a) Companies?

This scheme is based on the premise that companies want to avoid tribunal claims and are willing to give shares in the business to achieve that objective.

However, not all companies operate the same. Companies have different aims and objectives for issuing shares and have different numbers of shareholders. This means that the impact on each company will be different and will affect how likely that company is to take up this policy.

1. Private limited companies

According to the Equality Impact Assessment, there are around 2.3 million private companies of the 2.8 million businesses in the UK.

In general, limited companies sell shares to raise cash and denote ownership. Those who hold shares own a percentage of the company and, depending on that percentage, may control or contribute to decisions. Shareholders tend to be senior figures within the organisation, founders or outside interests.

In order to be able to give shares to employees to enter into this scheme, those private limited companies may need to change their share capital structure. They will have to undertake a valuation of the company and of those shares (which is less likely to be done than in a public listed company) and those pre-existing shareholders will have to agree to give up, or at least dilute, part of their stake.

This scheme is designed for fast growing and new businesses. We are not convinced that fast growing and new private companies would want to incur those costs.

Furthermore, we consider that fast growing and new businesses may well not wish to give up ownership of their company, and particularly not to employees. It is not uncommon that the interests of shareholders and the interests of employees differ. Giving voting rights to employees may make businesses more restricted in the action they can take, rather than more flexible as envisaged.

Even if employee owners do not have voting rights (for example, if they are preferential shareholders), existing shareholders may have concerns that the dividend pool will be diluted. Furthermore, as shareholders, employee owners would, at the very least, be entitled to General Meeting Minutes and to receive copies of the annual accounts. They also, for example, have rights to apply to the court for a remedy where they consider that the company's affairs are being conducted in a way which is unfairly prejudicial to its members. This may enable them to have access to commercially sensitive data which the employer would ordinarily be reluctant to share with employees.

2. Publicly listed companies

Publicly listed companies will either have to buy back shares from existing shareholders or they will have to issue new shares. Both scenarios will require the publicly listed companies to incur a cost.

Again, for publicly listed companies, there will clearly be times when the interests of shareholders and the interests of employee shareholders differ. For example, there may be circumstances where it is in the best interests of the business to make redundancies. There may be uncertainty that employee shareholders will vote for what pre-existing shareholders would perceive to be the best interests of the company or a perception on the part of pre-existing shareholders that this might be the case.

Publicly listed companies will have the additional issue of the reaction of institutional investors and whether they will be willing to take the risk.

b) Individuals?

We consider that the type of employee who would opt for the status of employee-owner is one for whom the value of the rights to be surrendered is less than the value of the shares.

The take up might be greatest among senior employees. This is because these employees are more likely already to own shares and will understand the benefits which can be gained. These employees are also likely to earn significant amounts so that the cap on ordinary unfair dismissal claims would make claims in the employment tribunal less attractive.

However, new (and, possibly, junior) employees may well also wish to accept an offer of an "employee owner" contract because they would have two years from the start of employment, in any event, before they qualify for entitlements to redundancy pay and/or to claim for unfair dismissal. These employees – as new starters – have no track record with the company. So we consider that there is little attraction from a business perspective to offering such employees "employee-owner" contracts. Fast-growing and innovative businesses (who these proposals are aimed at, according to the Consultation document) are not slow to dismiss under-performing employees and, of course, have a free hand (absent discrimination and whistle-blowing protection) to dismiss during the two-year qualifying period. Therefore, it is unlikely that a start-up business would risk giving shares to new employees with no track record whom they may wish to dismiss a few months down the line.

The policy envisages that "employee-owners will potentially have greater attachment to the success of their employer by virtue of the stake that they own in the company". However, there is a reference in the equality impact assessment that "shares will be valued according to their unrestricted market value at the time that they are awarded". This implies that there will be no potential for making a profit when shares are surrendered if the value of the company increases. The only benefit for individuals would be the dividends paid out by the company.

Therefore whether employees will opt for the policy will depend on the dividend policy of the company. In large established companies, (e.g. a FTSE 100 company) there will be a benefit in owning shares because there is a reliable payout of dividends every year. In smaller companies which want to grow, it may be more likely that the pre-existing shareholders want to reinvest any dividends back into the company. This would be less attractive for any employees.

There is another type of employee who might take up the status of employee-owner. That is the employee who does not understand the value of their rights. Whilst such an employee would be protected if there was a requirement for independent legal advice, we still consider that such an employee would be vulnerable.

Q24.

What are your views on the equality impact assessment? Are there other equality and wider considerations that need to be considered?

Maternity and Pregnancy

The equality impact assessment has considered that "the maternity element of the policy only impacts on women as clearly only a woman can return from maternity leave. In this case however, a woman retains her right to maternity leave or pay; she is only being asked to agree to a procedural change in the exercise of the leave right. It is important to note that all other rights related to maternity would be the same as those held by an employee."

We consider that this equality impact assessment does not take account of the impact on women in respect of the flexible working proposals, as set out in our answer to Question 16 and below.

Gender

The equality impact assessment concludes that there is no gender discrimination directly imposed by the adoption element because "the change to adoption leave is gender neutral is it applies to either a man or a woman who takes adoption leave". There is, however, no statistical analysis of whether men or women will be disproportionately affected by the change to adoption leave. We consider that it is often women who take adoption leave and, therefore, the adoption element is likely to affect greater numbers of women than men.

Full-time statistics

When assessing the impact of the flexible working proposal, only full-time employees were considered. This leaves out of the assessment a large part of the working population who benefit from flexible working arrangements – ie, part-time employees. As many women are part-time, it would seem to us that the flexible working proposal is very likely to disproportionately and adversely affect more women than men and this should clearly be considered before the proposals are adopted.

7th November 2012

Cloisters

1 Pump Court, Temple, London EC4Y 7AA

Your details

Name: Philip Kershaw

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Address:

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Fax:

Please tick the boxes below that best describe you as a respondent to this:

- ☐ Business representative organisation/trade body
- ☐ Central government
- ☐ Charity or social enterprise
- ☐ Individual
- ☒ Large business (over 250 staff)
- ☐ Legal representative
- ☐ Local government
- ☐ Medium business (50 to 250 staff)
- ☐ Micro business (up to 9 staff)
- ☐ Small business (10 to 49 staff)
- ☐ Trade union or staff association
- ☒ Other (please describe) Share Plan Administrator

BIS | Department for Business Innovation & Skills

Consultation on implementing employee owner status - response form

A copy of the **Consultation on implementing employee owner status:** can be found at:

http://www.bis.gov.uk/Consultations/consultation-on-implementing-employee-owner-status?cat=open

You can complete your response online through SurveyMonkey : (https://www.surveymonkey.com/s/5QJQ935)

Alternatively, you can email, post or fax this completed response form to:

Email:

implementing.employee@bis.gsi.gov.uk

Postal address:

Paula Lovitt MBE
Department for Business, Innovation and Skills (BIS)
3 Floor Abbey 1
1 Victoria Street
London SW1H 0ET

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The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

The closing date for this consultation is: **8 November 2012**

Question 1: How can the government help businesses get most out of the flexibility offered and the different types of employment statuses?

Comments:

The clarity around the different and new employment statuses is welcomed. However, in terms of employee/employer needs and the uptake and administration of share plans, there are current differences of definition and application that present employees and employers with challenges in making these sorts of initiatives work effectively. If these differences were addressed it would go some way to assist everyone to make the most of these initiatives for businesses and individuals alike. For example, there are several definitions of retirement across SIP, SAYE, and CSOP share schemes. The differences, especially the references to different minimum ages across across the schemes, are unfair and difficult for participants to understand and unnecessarily burdensome for businesses to operate and communicate.

There are significant challenges for employees and employers in understanding the impacts of giving up employment rights and how they transfer to share value. One of the key areas that needs to be addressed is financial education about the potential impacts of accepting this type of employment contract for individuals and employers and how this would impact both groups in the longer term - for employees this might be what the ultimate benefit might be compared to giving up redundancy payment rights and for employers how the financial impact of changing values might impact at the "buy-back" time. Involving the share schemes valuation unit at HMRC would reassure employees and companies alike that the values arrived at, both at the outset of such an arrangement and at the "exit point" were defensible from a tax and legal standpoint. Additional resources may need to be allocated within HMRC to support their involvement.

Question 2: Do businesses feel able to use all three employment statuses? If not, what restricts the use of different statuses?

Comments:

Where current employees accept a new employee owner contract there needs to be some clarity about how this will impact on other, existing, share schemes where rights to shares on leaving and the tax treatment of those shares is dependent on a "good" or "bad" leaver classification. Redundancy, in most share schemes, would be classified as a "good" leaver reason and would therefore trigger specific share award and tax treatments. Leavers under the proposed contract would receive the specific contract share award value but how would they be treated in respect of other share schemes they may have joined with the same employer?

Question 3: What restrictions, if any, do you think should be attached to the issue of shares or types of shares?

Comments:

Whilst the consultation seems to suggest that employers will be free to design share arrangements based on existing models and plans, most companies will want to impose a holding period restriction if the aligning of employee/employer motivations and aspirations is to be achieved. There might be a desire to only allow share disposals when an employee leaves or retires but this then impacts on the overall value of shares to employees, which may have an impact on the valuation for tax purposes and on the timing of the associated tax charge(s). If the minimum or recommended holding period can be set out in any guidance on the design of the share scheme or similar structure i.e. special purpose nominee, it might increase the attractiveness of the proposal if employees have an opportunity to take advantage of a disposal at a time of their choosing as long as it is outside of the holding period. This "framework" would also help companies visualise how these share awards might work in practice and encourage greater take-up and confidence in this initiative. If this holding period differs from company to company, then consideration may need to be given to any tax implications and whether this should be standardised across all of these share plans.

It is also worth noting that the £2,000 "floor" value for the share award may make it unattractive, or even impossible, for some smaller, equity-constrained businesses to operate this initiative. The floor value may represent too high a percentage of their overall equity and they may be reluctant to enter into such agreements where a significant proportion of their overall equity is distributed to employees until such time as employees have demonstrated their commitment and value to the business.

Question 4: When an employer buys back forfeit shares, should this be at full market value or some other level (eg. a fraction of market value) should some other level be allowed in certain circumstances?

Comments:

Full market value would seem to be the most appropriate and transparent way of approaching this. There are risks on both sides. Clearly, rising values will leave the company having to find additional funds. However, where market value has decreased since the shares were originally awarded, can there be any way of maintaining that otherwise eroded value in order that the employee is adequately compensated for the rights that have been foregone? Also, there are implications for the tax and NIC amounts paid upfront when the shares were awarded perhaps at a higher value than at the time of the share buy-back. If there is to be no possibility of the employee being able to claim back the tax and employee national insurance contributions (or the employer being able to claim back their national insurance contributions) on the difference in value, this may cause both parties to think twice on whether to participate in this type of arrangement in the first place. The risk appetite of both parties plays a key part here and will have a direct impact on support for this initiative.

Question 5: How should a company go about carrying out a valuation of the shares? What would the administrative and cost impact be for a company if an independent valuation was required?

Comments:

The costs and administration in this area could be significant. For employees joining a company or switching to a new contract, the overall value of the shares to be awarded will differ depending on many factors including their individual circumstances and age. An employee contract with reduced rights but some share linked payment may be more attractive to those people perhaps with less extensive financial commitments and with a different view of the need for job security. Any valuation of the shares when they "mature" or are forfeit needs to be robust, transparent and probably independent therefore an element of cost is almost inevitable. Sharing the valuation cost will mean less value for the employee and more cost for the employer. As mentioned in our answer to Question 1, the valuation itself and the method by which it's arrived at must be transparent, independent and defensible in tax and legal terms. This is particularly important for valuations at the "exit point" of these arrangements, from the point of view of the departing employee (in terms of fairness) and from the point of view of the employer (who will not want to risk a later legal challenge from ex-employees seeking to increase the exit value).

It is also worth noting that share valuations need to be consistent across different share schemes in order that costs to industry can be reduced.

Question 6: The Government would welcome views on the level of advice and guidance that individuals and businesses might need to be fully aware of the implications of taking on employee owner status.

Comments:

All parties need to be sure that they are getting a fair deal that they understand. It would be impossible for the employer and their human resources staff to give impartial advice on both signing up to such a contract and the valuation of shares at the beginning and end of the process. Market value assessments would provide some transparency but there may be a need for HMRC to be involved or perhaps independent share plan trustees. In addition there may be a role here for the Citizens Advice Bureau or the Money Advice Service. If employees are compelled to seek their own independent financial advice (funded themselves) then this further restricts the attractiveness of this initiative and concentrates it in the hands of the already financially secure.

Question 7: What impact will allowing individuals limited unfair dismissal protection and equity shares have on employers' appetite for recruiting?

Comments:

Employer decision making around recruitment is complex but it is more likely to be driven by market needs and the response the business has to make than a strict assessment of the possible cost and administrative reductions made by the limit to unfair dismissal protection. Even if it was based on this change then there would need to be a corresponding assessment of the likely impacts of introducing a share

vehicle or structure and all the attendant ancillary changes required e.g. to companies' Articles of Association as envisaged. Overall the likely impact on the overall business community will be small. In our view, businesses both large and small are more concerned about the direct costs of employment, i.e. employers' national insurance contributions.

Question 8: What benefits do you think introducing the employee owner status in with limited unfair dismissal rights will have for companies?

Comments:

The employee owner status may provide a benefit for those companies where volatility in their business activity needs to be matched to flexibility in staffing changes without the downside of potential unfair dismissal claims when staffing changes are made.

Question 9: Do you think these benefits will be greater for larger, smaller or start-up businesses?

Comments:

Businesses of all sizes might be able to benefit because the changes suit the dynamic of the way their business operates. Businesses operating in volatile markets with changing needs and volumes would benefit from the employee/owner contracts and they could be large, small and start ups. But it should be remembered that, whilst the contract offers some flexibility and freedom from unfair dismissal issues that might be attractive to small or start up companies, these companies will have to operate fair and transparent share holding vehicles to receive the contract benefit. There will be costs in providing the share award, share valuations and in administering the share plan either internally or via an external share plan administrator.

Question 10: What impact, if any, do you think the employee owner status will have on employment tribunal claims, e.g. for discrimination?

Comments:

In theory the impact should be very limited. However, employees exiting a company and looking to realise the value of their share allocation may feel under some pressure not to pursue discrimination claims for fear of jeopardising the valuation and payout from their employer, particularly if this valuation is not confirmed by an independent party such as the share schemes valuation unit at HMRC. This should not be the case but some employees may feel restricted by their dependance on the actions of their employer to receive their share related payment and makes the issue of independent valuations even more important to this proposal. If employees were able to dispose of the shares on the open market (if the company was a listed entity) this might remove this barrier to ensuring discrimination is challenged appropriately.

Question 11: What impact do you think introducing the employee owner status with no statutory redundancy pay will have for businesses, in particular, smaller businesses and start up businesses? What negative impacts do you anticipate and how might these be mitigated?

Comments:

See the answer to question 7 above. Similar considerations apply here. The employer, especially smaller and start-ups would be free of some downside costs as their businesses change and therefore might be more likely to take risks of entering markets and employing staff if they do not have to meet redundancy payments if the markets change against them. However, they will have the costs of the share arrangement to meet including the cost of buying back any forfeited shares not disposed of an the open market.

Employees considering accepting the contracts might want to negotiate higher upfront share values for giving up their employment rights if the chances of having to leave without the financial security of redundancy payments are high. Alternatively, potential employees with the skills required may, having made an assessment of the risk/reward issues, be dissuaded from joining an organisation who do not offer redundancy rights. The less risk averse individuals and companies (perhaps "start-ups") may be comfortable with the employee/owner contract proposal but others will not.

Question 12: What impact will this change to maternity notice period have on employers?

Comments:

In terms of operational planning, employers might be able to plan staff changes that are impacted by maternity absences more effectively because they have more notice and time with a clear knowledge of a maternity returners plans in which to take action. However, in practice, whilst the additional time might be welcome if they are having to make a new appointment because the maternity leaver is not returning, the overall impact here will be small.

The greater unintended consequence and impact might result from staff absent on maternity leave not being able to make a decision 16 weeks prior to returning (either because the baby is not ready - feeding and weaning issues - or because it is not possible to confirm childcare arrangements) and choosing not to return at all. In effect the change might force valuable and skilled workers to make a decision to exit the employment market (temporarily or permanently) and this might harm the employer. It would also have a disproportionate direct impact on women and an indirect impact on their partners.

Question 13: What, in your view, would employers do if employees wish to return early without giving 16 weeks' notice?

Comments:

The employer reaction to this would be partly dependant on the maternity cover arrangements that have been put in place and how an early returner would be accommodated. In most instances an early return would be welcomed but if there were cost implications for the employer of arrangements already made (if cover had been arranged for a specific period) then the employer might wish to limit or resist an early return. The potential returnee may then need to look for other work earlier, with another employer.

Question 14: How will these changes impact on a company's payroll provisions?

Comments:

Small impact on administrative system changes. However, there may be challenges around how to monitor what type of contract has been issued to which employees and what rights have been given up.

Question 15: What effect will a compulsory 16 weeks' early return notice period have on the length of maternity leave that mothers take or adoption leave that parents take?

Comments:

It is likely that maternity and adoption leave would lengthen and chances are more employees would leave and seek employment elsewhere.

Question 16: Do you think 4 weeks is the right period? If not, why not? What would be the impact of a shorter or longer period?

Yes ☒ No ☐

Comments:

On balance the employer having some certainty around restricting the right to request flexible working to a four week period will be beneficial in that they may avoid some references to tribunals. The ability to make informal arrangements is not removed but they will be dependent on the agreement of both parties. This will put some parents at a distinct disadvantage, more so when their dependent children's needs are severe and/or long term in their nature.

Question 17: What impact do you think this proposal would have on the ability of employee owners to access support for training?

Comments:

Although the changes suggested do not prevent employers from offering training, the signal being given by the new contract might be interpreted, particularly by some people, as reflecting an employer unwilling and unsupportive of training for its employees. Potential employees may look for alternative employers offering more standard contractural arrangements.

Question 18: Do you have any comments on the Government's intention not to amend Company Law to implement the employee owner proposal?

Comments:

In many ways, not changing Company Law and allowing the use of existing share scheme structures is beneficial as it allows tried and test arrangements to be utilised. However, in practice this will mean the use of various share schemes and other vehicles to facilitate the employee/owner contracts. We recognise the Government's unwillingness to be overly prescriptive in this regard but this may not be helpful for employees moving from company to company and trying to understand the schemes/arrangements or to small companies and start-ups who may struggle to introduce and administer schemes if they have no track record of doing so previously, without any framework or guidance to refer to. Is there an argument for creating a "bespoke" arrangement/vehicle or nominating an existing plan arrangement to be the vehicle in this instance and to which all employers would have to subscribe if they wished to have these types of contracts? It is not clear how the Government proposes to help companies overcome the hurdle of existing shareholders' statutory pre-emption rights on offers of shares, without making use of the existing shares schemes exemption. It is also worth noting that the EU Securities Law Regulation is expected in 2013 and any impact it may cause needs to be taken into account.

Capita believes that a special purpose nominee structure might work best in these circumstances, provided it can be navigated through the share schemes exemption in the Companies Act. This would provide a way of transferring beneficial ownership of the shares to employees from the start, especially with a s.431 election – important, under current tax legislation, to crystallise the tax charge in order to qualify for any new associated exemption, and then place the shares firmly within the CGT regime, to benefit from the associated CGT exemption. The nominee structure could be used to establish a holding period and would maintain the visibility of the shares for the company – enabling clear PDMR and insiders reporting of transactions to the Stock Exchange re the Listing Rules (important for listed companies). Linked dealing and 'exit' services could be set up to aid the processes around leavers, valuation, transfers and sales on "maturity" after any holding period.

Question 19: The Government welcomes views on particular safeguards that would need to be applied, in order to minimise opportunities for abuse.

Comments:

No comment.

Question 20: The Government welcomes views on whether the existing tax rules which apply to share-for-share exchanges (such as might happen when a company is taken over) and schemes of reconstruction should apply where shares issued in return for taking up the new status are involved

Comments:

The issues around share valuation and holding periods and how those impact on taxation are more important in the context of this proposal. However, it makes sense for employee-owners' share awards to benefit from any proposed corporate transaction on the same or very similar terms to ordinary shareholders and employees participating in pre-existing share schemes.

Question 21: What impact do you think the proposal will have on labour market flexibility – that is, in relation to hiring and letting people go?

Comments:

In terms of employing people the proposal will be attractive to some employers and some individuals. Employers would welcome the potential to be more responsive to the needs of the business and market needs without being exposed to risks associated with some employee rights. However, the quid pro quo for employers is the additional administration involved in a share scheme and the valuation of shares and buy-back procedures, and the potential for valuations and arrangements to be legally challenged by ex-employees unhappy with the valuation or the method by which it was arrived at.

Question 22: Would you be likely to take up the new status? What would the impact of the status be on your business?

Comments:

No comment. We are responding as a Share Plan Administrator rather than as an employer.

Question 23: What are your views on the take-up of this policy by:

a) companies?
b) individuals?

Comments:

a) It is possible that take-up of this policy will be small with some specific niche usages of the contract in businesses with specific needs and trying to respond to specific conditions. Lack of clarity on the more technical aspects of this initiative will put companies off as they may not be willing to invest their time, money and resource, if a formal steer or guidance on key potential issues is not given at the outset by the Givernment and associated parties.

b) Risk takers and young employees may be attracted by the opportunity to receive an additional share payment and share in the potential growth of a "young" enterprise. There may be others who are sceptical or daunted by the prospect of having to negotiate a contract or valuation and hoping for more financial certainty and security than the new contract offers. Maternity returners may not be able to comply with the 16 week rules and may leave their employer or the employment market more permanently than may otherwise be the case currently.

Question 24: What are your views on the equality impact assessment? Are there other equality and wider considerations that need to be considered?

Comments:

There are sex and age discrimination impacts in the nature of the proposals that are more significant for women and older workers which need to be considered in detail and mitigated if possible.

Question 25: Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

☒ **Please acknowledge this reply**

Question 26 : At BIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents?

Yes ☒ No ☐

This publication is also available on our website at www.bis.gov.uk
Any enquiries regarding this publication should be sent to:

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Tel: 020 7215 5000

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URN 12/1215RF

1 November 2012

Peter Lovitt MBE
Labour Market Directorate
Department for Business, Innovation and Skills
1 Victoria Street
SW1H 0ET

Dear Mr Lovitt,

Implementing employee owner status: Consultation

With reference to the consultation process on *Implementing employee owner status*, the North East Chamber of Commerce (NECC) is pleased to respond to the latest round of consultation.

NECC is the North East's leading business membership organisation and the only regional chamber of commerce in the country. We represent more than 4,000 businesses located in Northumberland, Tyne and Wear, Durham and Tees Valley, covering both local enterprise partnership areas in the North East. Our members are drawn from all sizes of business across all sectors and employ about 30% of the region's workforce.

The direction of these changes is to introduce a new employment contract; employee owner, which would offer employees' shares in the company, in return for waiving some of their employment rights in an attempt to provide small businesses with the flexibility and freedom they need to grow and take on staff. NECC is broadly supportive of the Secretary of State's proposal to introduce this new type of employment contract.

We are keen for businesses to implement employee owner status as it will encourage them to take on more staff and grow their business by removing the regulatory burden of employment rights. However, there are a complex set of issues that needs to be considered before implementing it: whether it is more cost-effective to offer shares in their companies to employees over the real cost of unfair dismissal; and whether having two sets of employees (those with rights and those without) could cause in-house disputes. Employers must also ensure employees fully understand the scheme and the implications before adopting the scheme, otherwise employers could find themselves facing even more claims, specifically related to the new status. Therefore, despite the benefits, many employers may choose not to implement this new status.

NECC recognises that employee owner contracts could remove the main barriers to recruiting new staff stated by NECC members: risk of being taken to employment tribunal over employment rights and costs of providing some rights. Waiving unfair dismissal rights could give businesses, especially small businesses, the confidence to take on new staff in the knowledge that they can easily terminate their employment if the relationship breaks down. Employment tribunals currently cost businesses a huge amount of time and money. Under the new proposal, employers would be able to concentrate their time and money on growing their business.

Exempting firms from paying redundancy to employees will also encourage businesses, particularly small ones, to take on more staff in times of growth knowing that they will not have to pay them statutory redundancy pay if the circumstances change. We believe this is of particular importance to give businesses the confidence to grow, given the current economic climate. Paralleled with the move out of recession, we hope it will encourage business to take on more staff in an attempt to grow and expand, knowing that if economic circumstances change they can dismiss staff more easily. Requiring employees to give more

notice of their return to work after maternity leave could also help companies to grow by giving them more certainty in recruiting staff to cover staff absence, so that they can continue to operate their business and plan for the future.

NECC is supportive of the proposal to give employees shares in a company. We believe that if employees have a vested interest in a company they will be more productive and motivated. They will have a greater attachment to the success of the business, which will in turn help the business to grow.

In conclusion NECC are supportive of the proposal to implement employee owner status. We believe it will encourage businesses to take on more staff without the fear of employment tribunals or large redundancy pay-outs. We hope the new proposal will give businesses the confidence to take on more staff and concentrate on growing their business. In terms of the employee we believe giving them a vested interest in a company will make them more productive and motivated, which in turn will help the business grow. However, careful consideration is needed to ensure employees understand the loss of employment rights that accompany this scheme and to determine the real cost benefit of employee owner status.

If you require any further information on these issues, please contact me, on

Yours sincerely

Amy Michie
Policy Adviser
NECC