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**Response to Department of Business, Energy &
Industrial Strategy Consultation on measures to extend
the ban on exclusivity clauses in contracts of
employment**

February 2021

Response of the Employment Law Committee of the Birmingham Law Society to the Consultation on measures to extend the ban on exclusivity clauses in contracts of employment

This response has been prepared by the Employment Law Committee of the Birmingham Law Society. The Society is the largest local law society with some 5,000 members. The response represents the collective view of its members who are specialist lawyers practising in all aspects of the employment law and from all branches of the legal profession.

Consultation questions - Questions on the ban extension

The Government is proposing extending the ban on exclusivity clauses to make them unenforceable in contracts where the guaranteed weekly income is below the Lower Earnings Limit, currently £120 a week and equivalent to 13.76 hours worked at the National Living Wage.

1. Do you agree the ban of exclusivity clauses should be extended to low-income workers where the guaranteed weekly income is below the Lower Earnings Limit?

- Yes

2. Do you think the ban of exclusivity clauses should be extended to other workers?

Please expand on why.

- No, limiting it to those below the LEI strikes a reasonable balance.

The Government is proposing to set the income threshold at the Lower Earnings Limit, as used for National Insurance. This is currently £120 a week and equivalent to 13.76 hours worked at the National Living Wage. Using the Lower Earnings Limit as a threshold will ensure the threshold remains relevant as it is set each tax year by the Government.

3. Do you agree the Lower Earnings Limit is an appropriate threshold?

- Yes

Questions on redress rights

The existing ban on exclusivity clauses gives zero hours employees the right not to be unfairly dismissed and workers the right not to be subjected to a detriment for failing to comply with an exclusivity clause, and to claim compensation.

4. Should these rights also be extended to employees/workers where the guaranteed weekly income is below the Lower Earnings Limit? Please expand on why.

- Yes – it would otherwise negate the value/effectiveness if no similar redress

Questions on an hourly wage cap

The Government is proposing an exemption to the ban on exclusivity clauses for contracts which pay individuals a high hourly rate for a short number of hours a week.

5. Do you think a cap on hourly wages should be set to ensure individuals who are paid a high hourly rate for a short number of hours a week are exempted from a ban on exclusivity clauses?

- No – it would potentially still leave a loophole where weekly earnings remain below the LEL despite high hourly rate or a minimal amount of guaranteed hours are given to make it a 'non-zero' contract. Furthermore, such an exemption would go against the aim to allow for greater flexibility/multi-skilling in the labour market.

6. What level do you think the hourly wage cap should be set at?

See above

7. If you have any alternative methods to provide a similar exemption, please expand on these below.

None to suggest

Questions on the impact of the Covid-19 pandemic

8. How likely do you think it is that the impact of the Covid-19 pandemic will lead to greater numbers of workers having the guaranteed hours in their contracts reduced?

- Likely

9. How likely do you think it is that greater numbers of workers will be looking for additional work to boost their income as an impact of the Covid-19 pandemic?

- Very likely

Questions about individual workers

10. How helpful do you think extending the ban on exclusivity clauses would be for workers earning under the Lower Earnings limit? Please explain your answer.

- Helpful – it would close the loophole

Allow more flexibility for workers

Ensuring workers can take on additional work where desired could also create opportunities for reskilling as they would be able to take on additional work in a different sector to their current job. This could help workers make a smoother transition between different sectors and provide people with the tools they need to get better jobs.

11. How likely do you think workers are to use the ability to take on additional work to reskill and move between sectors? Please explain your answer.

- Likely – workers on multiple zero/low income contracts are likely to seek work across multiple sectors

In the current climate government are offering more training incentives which are focused on upskilling workers with limited skills whose work has previously been focused in one sector for example the hospitality sector which is significantly affected by the pandemic.

Questions specifically for employers

12. Do you think extending the ban on exclusivity clauses to workers under the Lower Earnings Limit could benefit your business/organisation? Please explain your answer.

Not especially, for workers engaged on this basis a ban on exclusivity may narrow the option of calling in extra resource at short notice as and when required.

When planning scheduling of workers required on a week-by-week basis any hours offered would have to be sufficient to anticipate requirements which would mean that staff costs could be higher

13. Do you think extending the ban on exclusivity clauses to workers under the Lower Earnings Limit would have negative consequences for your business.

Please explain your answer.

It may result in lack of flexibility when requiring workers at short notice who are unavailable due to engagement with other businesses.

There would also need to be more strategic and longer-term planning for the requirement of workers over a given period of time i.e. in removing exclusivity of workers would allow workers flexibility to work in a range of roles and may not be available at short notice.

14. What would be the impact on your business be/how would your business respond, if the Government introduced an hourly wage cap to provide an exemption to the proposed ban for individuals on high hourly rate contracts?

There would be a marginal staff cost increase. However, the benefit to the workers outweighs the marginal increase in cost.