



Unite response to BEIS Consultation: Exclusivity clauses in contracts of employment

To: Rebecca.Lowe@beis.gov.uk

Due by 26 February 2021

Introductory remarks

1. This submission is made by Unite, the UK and Ireland's largest trade union with over 1 million members working across all sectors of the economy including manufacturing, financial services, transport, food and agriculture, construction, energy and utilities, information technology, service industries, health, local government and the not for profit sector. Unite also organises in the community enabling those who are not in employment to be part of our union.
2. In principle all working people should have the opportunity to have the hours of work they want and need and be paid at least a living wage.
3. The consultation document talks of zero hour contracts as having been banned since 2015, but making clauses legally unenforceable is not the same thing at all. Employers do not have to take out and can still insert exclusivity clauses and also emphasise their existence verbally. Many working people would not be aware that such clauses are actually unenforceable and if they do may be afraid to challenge their employer.
4. The consultation document also refers to a "right not to be unfairly dismissed" in relation to zero hours contracts, but this is incorrect too. Employers can still dismiss and then employees (but not "workers") can try to bring an unfair dismissal case before a tribunal, where success is far from

guaranteed and when the employer may seek to establish that there was another reason for the dismissal.

5. It follows that providing similar rights in relation to an extension of the unenforceability of such clauses to the low paid generally will be inadequate. Further, any extension must cover more than those earning less than the NI Lower Earnings Limit (LEL). Indeed any ban or restriction in the use of exclusivity clauses should not be limited by the concept of level of pay, as set out below.

Consultation Questions

Questions on the ban extension

1. 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. 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?

No. Extending the existing unenforceability provisions in relation to zero hours contracts to cover those with a guaranteed income below the LEL is nowhere near good enough.

There is an obvious power imbalance in relation to contracts applying to working people. Exclusivity clauses can make it harder for workers to find enough work, limiting pay, resulting in real hardship. This reduces taxes and increases reliance on benefits, such as Universal Credit (UC).

Further, in an attempt to obtain or maintain UC, anyone earning less than 35 hours work at the minimum wage is mandated to look for work, in breach of their exclusivity clause.

Any extension must cover more than those earning less than the NI Lower Earnings Limit (LEL). Indeed any ban or restriction in the use of exclusivity clauses should not be limited by the concept of level of pay. There should be a ban on exclusivity clauses generally by default. Any exceptions, say for those doing genuinely commercially sensitive work and (in that context inevitably earning high pay) should be limited.

The approach of the EU, for example, is that:

“1. Member States shall ensure that an employer neither prohibits a worker from taking up employment with other employers, outside the work schedule established with that employer, nor subjects a worker to adverse treatment for doing so.

“2. Member States may lay down conditions for the use of incompatibility restrictions by employers, on the basis of objective grounds, such as health and safety, the protection of business confidentiality, the integrity of the public service or the avoidance of conflicts of interests.”

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

Yes. Please see reply to question 1 above.

3. 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.

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

No. Please see the answer to question 1 above. This is the same question.

Questions on redress rights

4. 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.

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, of course. Rights to claim unfair dismissal and not to suffer detriment, including harassment, must always accompany such provisions such as in relation to the unenforceability of clauses. They should apply to all workers, including employees.

Enforcement must be bolstered by adequate resourcing of the state enforcement bodies including the Gangmasters and Labour Abuse Authority and HM Revenue & Customs. Further, trade unions should be allowed access to workplaces and will encourage enforcement of this and other rights and entitlements.¹

Questions on an hourly wage cap

5. 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.

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. As we set out in our answer to question three, we believe any exemptions should be based on the objectively justified need for such a clause, not wage levels.

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

- **£20 (top 25% of earners)**
- **£22 (top 20% of earners)**
- **£29 (top 10% of earners)**
- **Other (please specify)**
- **I'm not sure**

This approach is fundamentally flawed. See above, in particular in answer to question 1. It follows that if government is to take this route the cap should be set at £29 an hour or above.

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

¹ As they are permitted in, for example, New Zealand since 2000.

The alternative method that should be adopted is set out above, in particular in answer to question 1.

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?

Very likely. Or rather certain.

There is much data available already. The Institute for Employment Studies briefing last month reported seeing “...marked increases in voluntary temporary and part-time work in today’s data.”²

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?

Certain. There is strong evidence that many workers have had their hours cut (see previous question).

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.

Very helpful. Having the opportunity to take additional work with another employer will inevitably be taken. However, for reasons set out above exclusivity clauses need to be effectively removed in most instances.

² <https://www.employment-studies.co.uk/system/files/resources/files/IES%20briefing%20-%20Labour%20Market%20Statistics%20January%202021%20%28002%29.pdf>

11. 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.

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, even more so if it one of the only options. A government purporting to support working people and businesses for reskilling in the workforce would ensure much greater access to high quality training.

The remaining questions are said to be specifically for employers.

For further information please contact:



Howard Beckett

Assistant General Secretary for Politics and Legal Affairs

Unite the Union, 128 Theobald's Road, London WC1X 8TN

Direct Line: 0207 611 2597

Howard.Beckett@unitetheunion.org