



Department
for Business
Innovation & Skills

Zero Hours Employment Contracts

**Banning Exclusivity Clauses:
Tackling Avoidance**

AUGUST 2014

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Foreword from the Secretary of State

The Government is committed to achieving a labour market that is flexible, effective and fair for both business and individuals. Our policy is to give employers the confidence to hire and create new jobs, and to provide individuals with a framework that allows them to not only find work, but to find work that suits them and their individual circumstances.

The evidence collected over the past year with regard to zero hours contracts, suggests that contracts have generally been used responsibly in a range of sectors for many years. It has also shown that these contracts can support business flexibility, and provide individuals with more choice to combine work with other commitments. Nevertheless, evidence suggests that some abuse does take place.

I am grateful to all those who took the time to respond and engage with the earlier consultation and am pleased that we are now taking action by banning the use of exclusivity clauses in contracts that do not guarantee any hours. Our next challenge is to ensure that any potential loopholes that could be used to avoid that ban are closed. Therefore, this consultation seeks views on a range of potential actions Government could take to tackle potential avoidance as well as considering routes for redress.

The views submitted to this consultation will help to inform the implementation of the Small Business, Enterprise and Employment Bill with regard to zero hours contracts and subsequent regulations. I encourage you to engage in this consultation to help Government to get this right.

VINCE CABLE MP

1. Executive Summary

The Government's overarching aim is to achieve a labour market that is flexible, effective and fair. Last summer the Government conducted an informal information gathering exercise on zero hours contracts in response to concerns about abuse of this type of contract by a small number of employers.

Following that review, the Government launched a public consultation seeking views on:

- The merit of banning exclusivity clauses in zero hours contracts;
- Whether a code of practice should be introduced covering the fair use of these contracts generally; and
- How useful people found existing information, advice and guidance.

That consultation received 654 formal responses plus over 36,000 emails to government from individuals via the campaign group '38 degrees'. The key findings were:

- 83% supported a ban on exclusivity clauses in zero hours contracts;
- 71% felt that such a ban would not discourage employers from creating jobs; and
- More should be done with regard to improving existing information, advice and guidance as only 14% found existing information 'very helpful', and 42% found existing information 'not helpful'. In addition, some respondents believed that sector-specific codes of practice, developed by business groups and staff bodies, could benefit some sectors.

As a result, the Small Business, Enterprise and Employment Bill has introduced a provision that will ban the use of exclusivity clauses in contracts which do not guarantee any hours. However, stakeholders have raised concerns, stating that employers could potentially sidestep the exclusivity ban, for example by offering contracts that guarantee just one hour of work. Clearly that is not right.

Therefore, this consultation seeks views on the best mechanism to tackle avoidance of the exclusivity ban in contracts that do not guarantee any hours and possible routes of redress for the individual. Any additional mechanism would be implemented via regulations made under the powers set out in the Bill.

Specifically, the Government is seeking views on:

- What the likelihood of employers avoiding a ban on exclusivity clauses might be and how that might be achieved;
- Whether the Government should do more to deal with potential avoidance, how might that be best achieved, and whether to do this alongside the ban or wait for evidence of whether such avoidance is taking place;

- How potential avoidance could be dealt with;
- Whether there should be consequences for an employer if they circumvent a ban on exclusivity clauses and, if so, what those consequences should be; and
- Whether there are any potentially negative or unintended consequences as a result of the wording of the legislation.

In terms of information, advice and guidance, business representatives and unions should consider working together, with the support of Government, to develop industry-led, industry-owned, sector-specific codes of practice on the fair use of zero hours contracts as the reality of the situation is likely to be different in each sector. The Government will also review existing guidance with a view to improving the information available to individuals and employers on using these contracts.

This consultation will be of interest to employers and individuals, legal representatives and other intermediaries who advise employers and trade unions. Details on how to respond are provided in the next section.

After considering the responses, the Government will use the views submitted to help inform the implementation of the zero hours contracts provisions in the Small Business, Enterprise and Employment Bill.

2. Definition of Terms

This section outlines the meaning of the terms ‘zero hours contracts’ and ‘exclusivity’ used in this document. It also considers what factors help determine an individual’s employment status whilst on a zero hours contract and when that employment status might apply.

What is meant by a zero hours contract

There is currently no legal definition of a zero hours contract in domestic law, and no particular model that it is based on. This will be the case until the implementation of the Small Business, Enterprise and Employment Bill (see the Next Steps and Action Underway section for more detail). Nevertheless, a zero hours contract is broadly understood as a contract in which the employer does not guarantee the individual any work.

The following is an example of a clause in a zero hours contract which does not guarantee a fixed number of hours work per week:

“The Company is under no obligation to provide work to you at any time and you are under no obligation to accept any work offered by the Company at any time.”

Zero hours contracts are not unlawful. If they are freely entered into, a zero hours contract is a legitimate form of contract between individual and employer. Individuals on zero hours contracts work in sectors across the economy, and in occupations throughout the pay range.

The employment rights an individual has will depend on their employment status. Where a contract exists, there are broadly three categories of employment status: (i) employee (and employee shareholder), (ii) worker and (iii) self-employed. Table 1, overleaf, demonstrates some of the employment rights associated with each employment status. There is no one single test to determine an individual’s employment status. The individual’s contract is the starting point, but a court will also consider:

- Mutuality of obligation – the employer is obliged to provide work which the individual is required to undertake for a wage;
- Personal service – the individual must provide a personal service (i.e. not send a substitute to work in their place);
- Control – the employer exercises a degree of control over the individual and the way in which that individual undertakes their work.

A court will also consider the facts of each employment arrangement in determining the relevant employment status for persons working on a zero hours contract.

Table 1: Employment Rights				
Employment right associated with each status	Employment status (as per employment contract)			
	Employee (incl. full/ part time & fixed term contracts)	Employee shareholder (incl. full/ part time & fixed term contracts)	Worker (incl. agency workers, contractors, freelancers)	Self- employed (incl. freelancers, consultants, contractors)
National Minimum Wage	✓	✓	✓	
Protection from unlawful deductions from wages	✓	✓	✓	
Paid annual leave	✓	✓	✓	
Maternity, Paternity, Adoption leave and pay	✓	✓		
Part-time status (no less favourable treatment)	✓	✓	✓	
Fixed-term status (no less favourable treatment)	✓	✓		
Rest breaks	✓	✓	✓	
Right to request flexible working	✓			
Right to request time to train (companies over 250 employees)	✓			
Protection from discrimination	✓	✓	✓	✓
Minimum notice periods	✓	✓		
Collective redundancy consultation	✓	✓		
Statutory redundancy pay	✓			
Protection from unfair dismissal (gained after 2 years in continuous employment)	✓			
Protection from unfair dismissal (automatically unfair)	✓	✓		
TUPE	✓	✓		

What is meant by ‘exclusivity’

An exclusivity clause in a zero hours contract is when the employer prevents the individual from working for someone else, even though he himself does not guarantee any hours of work. Currently employers are not prohibited from seeking exclusivity from an individual as this is a contractual matter between the employer and individual.

There is existing common law regarding contractual clauses that place a restriction on the individual (“restrictive covenants”). Under the common law, it is expected that a restriction of this type, for instance stopping the individual from working for someone else, will only be upheld by the courts as long as it is no more than is adequate to protect the employer’s legitimate interests in the circumstances. An employer will need a good reason to justify an exclusivity clause in any contract of employment as it could be deemed an unreasonable restraint on the individual’s freedom to work.

It is possible that in some limited circumstances, it might be justifiable to ensure individuals who may, for example, be entrusted with confidential commercial information do not pass that information to competitors or work for a competitor at the same time due to a conflict of interest. However, the law already allows contractual clauses protecting confidential information to be enforced.

A CIPD survey found that 9% of individuals on zero hours contracts are never allowed to work for another employer when their primary employer has no work available for them¹. BIS estimates that there are about 17,000 people on zero hours contracts that include exclusivity clauses, although this could be as high as 125,000 according to CIPD.

The Government believes that using exclusivity clauses in zero hours contracts when work is not guaranteed is wrong as it means that when individuals have not been offered any work, they are prevented from looking for work elsewhere to help boost their income if they so wish. Such clauses undermine the choice and flexibility for the individuals concerned.

¹ CIPD, Zero Hours Contracts: Myth and reality, November 2013.

3. Estimates of Numbers on Zero Hours Contracts

There have been a number of surveys and datasets on the numbers of individuals on zero hours contracts. As there is no legal definition there has been confusion and conflicting data. In addition the Office for National Statistics (ONS) has revised how it collects data. Therefore, this section gives the most recent estimates of those on zero hours contracts and what those numbers mean.

Numbers on Zero Hours Contracts – Clarification and what the numbers mean

The ONS provisionally estimated that there were 1.4 million contracts that did not guarantee a minimum number of hours which provided work in January 2014². This estimate will include some contracts which relate to individuals' additional jobs, and in some circumstances this may be where individuals have more than one no-guaranteed hours contract. It may also include some temporary agency workers.

The ONS also estimated that there were 583,000 individuals on a zero hours contract in their main job in the fourth quarter of 2013³. This was a step-change upwards from the ONS estimate of 250,000 individuals on zero hours contracts in the main job in the 4th quarter of 2012, from the same source, which ONS report was largely due to greater awareness of zero hours contracts among individuals due to the media coverage in 2013. There was limited evidence from these data that there was much of an increase in the year in individuals on zero hours contracts⁴.

The different estimates resulting from these two surveys reflect their different methodologies and the different definitions used.

There is some evidence that use of zero hours contracts increased from the middle of the last decade. The Workplace Employment Relations Study (WERS) found that 8 per cent of workplaces used zero hours contracts in 2011, compared to just 4 per cent in 2004. The study showed that the largest increase in the proportion of workplaces using zero hours contracts was in the hotel and restaurant sector⁵. Other relatively large increases were in the education sector and the health sector. Also, figures from the Labour Force Survey (LFS) between 2000 and 2012 prior to the apparent step-change in 2013 suggest that the prevalence of individuals on zero hours contracts in their main job as a proportion of those in employment rose from a low of 0.4% in 2004 to 0.8% in 2012.

² ONS, Analysis of employee contracts that do not guarantee a minimum number of hours, April 2014. The information on no-guaranteed hours contracts came from a survey of 5,000 businesses which took place in the two weeks from 20th January. The ONS is conducting further research on the data collected, including research into a further 1.3 million no-guaranteed hours contracts reported which had not provided work in the reference period, to assess whether they can improve on their initial estimate.

³ ONS, Zero Hours Analysis, February 2014 <http://www.ons.gov.uk/ons/about-ons/business-transparency/freedom-of-information/what-can-i-request/published-ad-hoc-data/labour/february-2014/zero-hours-analysis.xls>

⁴ ONS, Analysis of employee contracts that do not guarantee a minimum number of hours, April 2014, p6.

⁵ Workplace Employment Relations Study 2011, first findings: underlying data - part 1, Department for Business Innovation and Skills, 23 January 2013.

The available evidence suggests that zero hours contracts are used by individuals throughout the income distribution. For example the LFS suggests that slightly under a third of those on zero hours contracts in Q4 2013 worked in elementary occupations (for example construction or cleaning) and around 16% worked in professional or associate professional or technical occupations.

The available research suggests that zero hours contracts are used by employers of all sizes, but with a greater concentration among larger employers. The ONS survey of businesses suggested that 47% of larger employers (with 250 employees or more) made use of no guaranteed hours contracts (zero hours contracts), compared to 28% of employers with between 20 and 249 employees and 12% of those with between 1 and 19 employees. Close to half of businesses in the accommodation and food sector made use of no guaranteed hours contracts, along with over one-in-five employers in the health and social work sector⁶. The CIPD research indicated that 42 per cent of not-for-profit employers used zero hours contracts, compared to 28 per cent of public sector employers and 19 per cent of private sector employers⁷.

Individuals on zero hours contracts work across the economy, with a particular focus upon public services (notably health and social work), and in distribution, accommodation and food services industries. (Source: BIS estimates based on Labour Force Survey)

In terms of the usual hours worked by those on zero hours contracts, the LFS data shows that a very low proportion of those on zero hours contracts in their main job usually work zero hours in a week, with the distribution of usual weekly hours worked fairly wide ranging. The median 'usual weekly hours' worked under zero hours contracts where it is the individual's main job is 23 hours.

The LFS⁸ found that only around 40% of individuals on zero hours contracts in their main job worked their usual hours in a particular reference week. Close to 40% experienced variation in hours of up to 10 hours. However more individuals experienced a reduction compared to their usual hours than an increase because of variation in working hours under zero hours contracts. A CIPD survey of individuals, conducted in autumn 2013⁹, indicates that 70% of individuals on zero hours contracts have either some or a lot of choice over the number of hours they work. However, over a third would like to work more hours than they typically do in an average week.

⁶ ONS, Analysis of employee contracts that do not guarantee a minimum number of hours, April 2014, p 9 to 11.

⁷ CIPD, Zero Hours Contracts: Myth and reality, November 2013

⁸ BIS estimates from the 4th quarter 2013 Labour Force Survey dataset.

⁹ CIPD, Zero Hours Contracts: Myth and reality, November 2013.

4. Government Response to the Zero Hours Employment Contracts Consultation

This section outlines the outcomes of the Zero Hours Employment Contracts consultation that took place between 19 December 2013 and 13 March 2014, and which sought views on exclusivity and transparency.

Background

In summary, the consultation sought views on the merit of banning exclusivity clauses in zero hours contracts, whether a code of practice should be introduced covering the fair use of exclusivity clauses in zero hours contracts and/or these contracts generally, and how useful respondents found existing information, advice and guidance.

Consultation Proposals

Based on the material collected during the information gathering exercise, the consultation sought views on addressing exclusivity clauses in zero hours contracts and specifically on:

- Legislating to ban the use of exclusivity clauses in contracts that offer no guarantee of work;
- Government issuing guidance on the fair use of exclusivity clauses;
- Encouraging the production of an employer led Code of Practice on the fair use of exclusivity clauses, with an additional option to seek Government sponsorship of that Code; and
- Whether individuals should continue to rely on existing common law redress to challenge exclusivity clauses.

In addition, views were sought with regard to improving the transparency of zero hours contracts, specifically on:

- Improving the content and accessibility of information, advice and guidance;
- Encouraging a broader employer led Code of Practice which covers the fair use of zero hours contracts generally; and
- Whether and how Government could produce model clauses for zero hours contracts.

Numbers of Responses Submitted and by Whom

A total of **654** responses were submitted in answer to the questions put forward in the consultation.

68% of these responses were submitted from individuals.

The remaining 32% were responses submitted from large, medium, small and micro businesses (9%, 3%, 3.5%, 3.5% respectively); trade union or staff associations (7%); local and central government (4% and 1%); business representative organisation/trade bodies (1%). A list of the organisations who responded is set out at Annex 1.

It is important to note the contribution made to the debate by the campaign group '38 degrees'. They stimulated the debate by organising a campaign, whereby approximately 36,000 individuals submitted emails to the Government regarding zero hours contracts during the consultation period. Although these emails did not respond to the consultation questions (and are therefore not directly reflected in the figures detailed in this document), we have considered the messages as part of the wider consultation.

To be clear on the campaign issues, BIS officials met with 38 Degrees representatives who raised the following points they wished Government to note:

- Stem the growing number of people who are being employed on zero hours contracts - Zero hours contracts should be the exception, not the rule.
- Equality - Zero hours contracts flexibility should be equal between staff and employer and not able to be used as a discipline tool.
- Rarity - Zero hours contracts should be the exception not the norm for staff. They are only suitable in some circumstances and should not be used as a way of denying staff rights that they would otherwise be entitled to.
- Exclusivity - Employees on zero hours contracts should not be tied to only working for one company - especially if they are not being given enough hours.
- Clarity - it should be made clear in job adverts and on contracts that people are signing up to zero hours contracts.
- Notice - Give employees better notice of when they are working.
- No one knows exactly how many people are currently working on zero hours contracts.

Note – with reference to the percentages in the section below - not every respondent answered every question as part of their consultation response. Therefore, some figures do not add up to 100%.

Responses to Questions on Exclusivity Clauses

Q: Do you think Government should seek to ban the use of exclusivity clauses in employment contracts with no guarantee of work?

- Yes – 83%
- No – 9%
- Not sure – 8%

The consensus was that exclusivity clauses were used to the detriment of individuals, that they are unacceptable, and that there are other ways to deal with jobs where confidentiality might be an issue.

Q: Are there circumstances in which it is justifiable to include an exclusivity clause in a zero hours contract? If so, please describe the circumstances that justify such a clause.

- Yes – 8%
- No – 82%
- Not sure – 10%

The 8% who thought exclusivity clauses might be justifiable gave the following reasons, though did not provide any specific examples or circumstances:

- Helps ensure confidentiality
- Where there is a conflict of interest
- Prevents people from working with competitors.

Other comments were of a general nature stating that exclusivity clauses were not acceptable or necessary.

Q: Would a ban on exclusivity clauses in zero hours contracts discourage employers from creating more jobs?

- Yes – 13%
- No – 71%
- Not sure – 16%

The consensus was that employers use exclusivity clauses spuriously, and that by banning them it would lead to better quality jobs, be fairer to individuals, and ultimately help to boost the economy. It was also noted that some employers might seek to avoid the ban.

Responses to Questions on improving the transparency of Zero Hours Contracts

Q: Do you think existing guidance and common law provision are sufficient to allow individuals to challenge exclusivity clauses and therefore no specific action from Government is required?

- Yes – 4%
- No – 78%
- Not sure – 18%

Q: Has existing information, advice and guidance on zero hours contracts been helpful to you in terms of explaining your position?

- Not helpful – 38%
- Helpful – 21%
- Very helpful – 9%

Q: Would additional information, advice and guidance help individuals and business understand their rights and obligations?

- Yes – 36%
- No – 22%
- Not sure – 42%

Q: Would a broader employer led Code of Practice covering all best practice on zero hours contracts encourage more transparency?

- Yes – 17%
- Yes, only with Government sponsorship – 35%
- No – 36%

Q: Do you think that existing employment law, combined with greater transparency over the terms of zero hours contracts, is the best way of ensuring individuals on zero hours contracts are making informed choices about the right contract for them to be on?

- Yes – 29%
- No – 57%
- Not sure – 14%

5. Next Steps and Action Underway

Banning Exclusivity Clauses in Zero Hours Contracts

Having considered the consultation, Government will ban exclusivity clauses in zero hours contracts – a decision supported by 83% of respondents to the consultation. This will be achieved by a provision in the Small Business, Enterprise and Employment Bill.

The Small Business, Enterprise and Employment Bill

The Small Business, Enterprise and Employment Bill was introduced to Parliament on 25 June 2014 and will be scrutinised by both the Houses of Commons and Lords over the coming months.

Clause 139 of the Bill, as introduced, inserts a new section 27A into the Employment Rights Act 1996 rendering exclusivity clauses in zero hours contracts unenforceable.

Zero hours contracts are defined in the Bill as:

- A contract of employment or a worker's contract under which the undertaking to do or perform work or services is an undertaking to do so conditionally on the employer making the work or services available to the worker; and
- Where there is no certainty that any such work or services will be made available to the worker.

The order making power tackling avoidance of the exclusivity ban

However, discussions with stakeholders have indicated that any such ban would be straightforward for employers to circumvent. As a result, clause 139 of the Bill inserts a new section 27B into the Employment Rights Acts 1996. Section 27B provides the Secretary of State with an order making power that will allow for avoidance of the ban to be dealt with via secondary legislation.

This consultation is seeking views on whether, how and when the power in Section 27B should be used – the best mechanism for tackling avoidance of the exclusivity ban if felt necessary - as well as routes of redress. More detail on this is included in the next section.

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

Code of Practice

The consultation demonstrated appetite from business representatives, unions and employees for improved information, advice and guidance with regard to zero hours contracts. There was a general sense that existing guidance could better address the issues that have been identified for both employers and individuals.

Business representatives and unions should consider working together, with the support of Government, to develop industry-led, industry-owned, sector-specific codes of practice on the

fair use of zero hours contracts. These could reflect sector specific issues and be tailored to be of most use to employers and individuals.

Although it would be for business representatives and unions to agree the content of such a code of practice, issues to cover could include:

- When it is appropriate to use a zero hours contract;
- When it is not appropriate to use a zero hours contract;
- Whether and how to promote clarity, for example, job adverts and contracts stating the type of contract up front;
- Rights and responsibilities of the individual and the employer and how to calculate accrued benefits such as annual leave where appropriate;
- Best practice in allocating work; and

Recommended practice around notice of hours of work or cancellation of work.

The Government will also review existing guidance with a view to improving the information available to individuals and employers on using these contracts.

6. Purpose of this Consultation

This section outlines the meaning of the order making power included in the Small Business, Enterprise and Employment Bill (new Section 27B) and explains the detail behind the consultation questions. This section should be considered alongside the consultation questions.

It has been suggested that it would be relatively simple for an employer to avoid an exclusivity ban. This could be done, for example, by offering contracts that guarantee just one hour of work. This consultation is seeking views on the best mechanism for tackling avoidance of the exclusivity ban, as well as possible routes of redress.

Determining the kinds of contracts that could be included in the exclusivity ban

In order to ensure an employer could not easily circumvent the exclusivity ban, there is a provision in Section 27B of the Bill for the Secretary of State to further determine what other factors should be included as part of the ban. The provision in the Bill itself states that this might include income, rate of pay, or working hours:

“The workers; contracts may be specified by virtue of subsection (2)(c) are those in relation to which the Secretary of State considers it appropriate for provision made by the regulations to apply, having regard, in particular, to provision made by the workers’ contracts as to income, rate of pay or working hours”

This consultation is seeking views on whether government should take further action to guard against the possibility of employers avoiding the ban on exclusivity clauses; if so what mechanism(s) should be used; and whether to take action now or wait to see if there is evidence of the ban being avoided and action being needed.

Redress

Section 27B also allows for additional rights to be granted to an individual on a zero hours contract if they are treated detrimentally by their employer as a result of, for instance, taking another job against the wishes of their employer. As the Bill states this could include:

*“imposing financial penalties on employers;
employers to pay compensation to zero hours workers;
conferring jurisdiction on employment tribunals;
conferring rights on zero hours workers”*

This consultation is asking you to consider the possible routes for employers to get around the ban on exclusivity clauses, for example, by simply not offering work, and what routes of redress might be appropriate for the individual

7. List of consultation questions

The questions in this section should be considered alongside the section 'Purpose of this Consultation'. Please see Annex 2 for ways in which you can respond to the questions below.

Likelihood of avoidance

Question 1

In your opinion, how likely or unlikely is it that employers would seek to avoid a ban on exclusivity clauses in zero hours contracts?

- Very Likely
- Likely
- Not Likely
- Not sure

Question 2

If you answered 'very likely' or 'likely' to question 1, how do you think employers would avoid a ban on exclusivity clauses?

- By offering a minimal number of guaranteed hours, for instance 1 hour a week
- By restricting the work opportunities of the individual because they have not made themselves available in the past or have taken on an additional job
- Don't know
- Other

Comments: (a space for comments is provided in the response form attached to this document)

Should the Government do more?

Question 3

Should the Government seek to do more to deal with potential avoidance by employers of a ban on exclusivity clauses?

- Yes
- No
- Not sure

Question 4

If you answered 'yes' to question 3, should the Government seek to do more now, or should it wait to see if there is evidence of employers avoiding the ban in practice to see whether further action is needed?

- Do more now
- Wait to see if it is necessary
- Not sure

Question 5

If you answered 'yes' to question 3, what would be the best way for the Government to deal with a potential avoidance of a ban on exclusivity clauses?

- A non-statutory code of practice, sharing best practice
- Through legislation
- Other (please provide details)

Comments: (a space for comments is provided in the response form attached to this document)

Link to income

Question 6

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

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

Question 7

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

- Yes
- No
- Not sure

Redress

Question 8

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

Should there be consequences for employers who restrict work opportunities to individuals simply because they have taken work elsewhere?

- Yes
- No
- Not sure

Question 9

If you answered yes to question 8, what should these sanctions be?

- Criminal penalties, which might include a fine or other criminal penalty
- Civil penalties, which would not incur a criminal record

Redress to Employment Tribunals, allowing individuals to make a complaint regarding detrimental treatment

Not sure

Unintended consequences

Question 10

The Government is legislating to render the use of exclusivity clauses unenforceable in zero hours contracts. This is covered in Section 27A of clause 139. Are there any negative consequences as a result of the wording used?

Yes

No

Not sure

Question 11

If you answered yes to question 10, are the negative consequences for the employer or the individual?

Employer

Individual

Both

Comments: (a space for comments is provided in the response form attached to this document)

Confidentiality and disclosure of response

Question 12

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses. If you wish your response to remain confidential you must provide a reason. Do you agree for your response to be published or disclosed if requested?

Yes

No

If no, you must give a reason

Comments: (a space for comments is provided in the response form attached to this document)

Annex 1: List of organisations who submitted response to the consultation questions

Aberystwyth University
ACAS
Adult Careers Service
Adur and Worthing Councils Communities Team
Age UK Oldham
Alcrest Ltd
Alex J. Wood and Dr Brendan J. Burchell
Allied Healthcare
Anchor Trust
Andy Sawford MP
ASLEF
Association of Colleges
Association of Convenience Stores
Association of Licensed Multiple Retailers
Association of School and College Leaders
Association of Teachers and Lecturers
Barlow Electrical
BECTU
Big Issue Invest
Birmingham Law Society
Bond Dickinson
Boredom Busters Dog & Puppy Services
Borough of Oldham
British Airline Pilots Association
British Association of Leisure Parks, Piers and Attractions
British Heart Foundation
British Hospitality Association
British Retail Consortium
Business Innovate
Camarthenshire County Council
Carillion
CBI
Certitude
Chairman, Freelance Division, MCIJ
Chartered Institute of Physiotherapy
Chester-le-Street and District CVS
CIPD

Citizens Advice Scotland
City College Coventry
City College Peterborough
City of Durham Constituency Labour Party
Clackmannanshire Works, Clackmannanshire Council
Clifton upon Teme Nursery Ltd
coleg cambria
Communication Workers Union
Confederation of Passenger Transport
Consultant Manufacturing, Education Transport Health Care
Copper Horse Solutions Ltd
Coventry Benefits Advice Line
Croft Care Group
Crossroads Care - Worcestershire
Crossroads Care Enfield
CWU (Edinburgh, Dundee and Borders Branch)
DAC Beachcroft LLP
Dauntsey's School
Derbyshire County Council
Dr Brendan J. Burchell and Alex J. Wood
Dream Team UK
Durham University
Eastside Family Support Project
Edinburgh Trade Council
Ely Soham & District Community Transport
Employment Lawyers Association
Engineering Employers Federation
Evans
Exemplas Holdings Ltd
Federation of Small Business
Food and Drink Federation
Forum of Private businesses
Fraser Bay Ltd
G4S UK
Gainford Inventories
Girling Mayes Ltd
GMB
Grafton Childcare
Hackney Community College
Helphire Group
Hertfordshire County Council
Home Care Company
Home Instead Senior Care Cannock
Institute of Directors

Institute of Economic Affairs
InterContinental Hotels Group
ISS UK
James Graven
JD Wetherspoon Plc
Leigh Day
Lewis Silkin LLP
Linkage Community Trust
Liverpool John Moore's University
Local Government Association
Lochgorm Ltd
Lochgorm Ltd
London Borough of Bromley
London Chamber of Commerce and Industry
LondonMet
Lonsdale and Gayton Swimming Pools
Manpower
Medical Research Network Ltd
Middlesex University
Minstead Training Trust
MITIR Group PLC
MMU
NASUWT
National Association of Head Teachers
National Council for Voluntary Organisations
National Union of Journalists
National Union of Journalists
National Union of Teachers
NCHA
Network Rail Infrastructure Ltd
NHS Employers
Northumbria University
Oil and Gas UK
Oldham foodbank
Omer Care Ltd
Oxford Brookes University
Oxfordshire Green Party
PCG
PCS
Pell and Bales Ltd.
Peninsula Business Services Ltd
Pestalozzi International Village Trust
Place UK Ltd
Planet Numbers Ltd

Prospect
PwC
RadioCentre Limited
Ragley Estate
Randstad UK
Reading Borough Council
Realise Futures CIC
Rethink Mental Illness
RKK Ltd
RMT Union
Rose Hill Nursing Home Dorking
Royal Mail
Salford City Council
School of Law, Aberdeen University
Scottish Trade Union Council
Scottish TUC
Sense
Sentimental Care Ltd
Sheffield Hallam University
Shout Out UK
Social care (domiciliary care)
Society of London Theatres
Society of Personnel and Development Scotland
South Derbyshire District Council
Southampton Solent University
Southside Rehab LTD
Spirit Pub Company
St Helens & Knowsley Teaching Hospitals NHS Trust
Storm Recruitment
Support Staffordshire
tcell.org.uk
Tempo (UK) Ltd
Th Baker LTD
The Accord Group
The Big Issue Company Ltd
The Big Issue Cymru
The Big Issue Foundation
The Big Issue In Scotland
The Business Services Association
The Chartered Institute of Payroll Professionals
The Concern Group
The Intergenerational Foundation
The Law Society
The Law Society of Scotland

The London School of Economics and Political Science
The Market Research Society
The National Autistic Society
The National Trust
The Princethorpe Foundation
The Production House
The Recruitment & Employment Confederation
The Royal College of Nursing
The Royal Star & Garter Homes
The Salvation Army
The University of Sussex Students' Union
The Wilverley Association
The Work Foundation
Thompsons Solicitors
Translav - Independent Social Research
TRL Limited
Trowers and Hamlins
TUC
TUI Travel UK&I
Turning Point
Two Saints Ltd
UCATT
UCU
UCU Hackney Community College
Ugam
UNISON
UNISON Norfolk County Branch
UNISON Nottinghamshire Healthcare NHS Trust
UNITE
Unite@SCC
Universities and Colleges Employers Association
University (Russell Group)
University College London
University of Aberdeen
University of Edinburgh
University of Exeter
University of Glasgow
University of Newcastle
University of Portsmouth
University of Sussex, Student Union
USSU Trading Ltd
Victarailfreight Ltd
Waldron Office Furniture Ltd.
Warwickshire Employment Rights Service

Weightmans LLP
West London Crossroads carer services
Westminster Kingsway College, UCU
Wilson James Ltd
York College
Zumpy Technology Ltd

Annex 2: How to respond to this consultation

We invite views on all the issues discussed in this consultation document. We particularly welcome responses to the specific questions which are raised in each section. It is not necessary to respond to all the questions; you are welcome to provide answers only to those issues of most interest or relevance to you.

This consultation will run for 10 weeks and the closing date for responses is 3 November 2014

When responding please state whether you are responding as an individual or representing the views of an organisation. If you are responding on behalf of an organisation, please make it clear who the organisation represents by selecting the appropriate interest group on the consultation form and, where applicable, how the views of members were assembled.

You can reply to this consultation online at <https://bisgovuk.citizenspace.com/lm/banning-exclusivity-clauses-avoidance>. The consultation response form is available electronically on the consultation page: <https://www.gov.uk/government/consultations/zero-hours-employment-contracts-exclusivity-clause-ban-avoidance> (until the consultation closes). The form can be submitted online/by email or by letter to:

Tony Thomas
Labour Market Directorate
Department of Business, Innovation and Skills
1 Victoria Street
London
SW1H 0ET
Tel: 020 7215 3405
Email: Tony.Thomas@bis.gsi.gov.uk

A list of those organisations and individuals consulted is in Annex 1. We would welcome suggestions of others who may wish to be involved in this consultation process. [Other versions of the document in Braille, other languages or audio-cassette are available on request.]

Help with queries

Questions about the consultation process and the issues raised in the document can be addressed to:

Tony Thomas
Labour Market Directorate
Department of Business, Innovation and Skills
1 Victoria Street
London
SW1H 0ET
Tel: 020 7215 3405

Annex 3: Further information about the consultation

Data protection and confidentiality

Information provided in response to this consultation, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004. If you want information, including personal data that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.

In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

Principles of consultation

The principles that Government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the consultation principles.

<http://www.cabinetoffice.gov.uk/sites/default/files/resources/Consultation-Principles.pdf>

Comments or complaints on the conduct of this consultation

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to:

John Conway,
BIS Consultation Co-ordinator,
1 Victoria Street,
London
SW1H 0ET

Telephone John on 020 7215 6402
or e-mail to: john.conway@bis.gsi.gov.uk

Annex 4: Consultation Response form

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 03/11/2104

Name:

Organisation (if applicable):

Address:

Please return completed forms to:
1 Victoria Street,
London
SW1H 0ET

Please tick the box below that best describes you as a respondent to this consultation

<input type="checkbox"/>	Business representative organisation/trade body
<input type="checkbox"/>	Central government
<input type="checkbox"/>	Charity or social enterprise
<input type="checkbox"/>	Individual
<input type="checkbox"/>	Large business (over 250 staff)
<input type="checkbox"/>	Legal representative
<input type="checkbox"/>	Local Government
<input type="checkbox"/>	Medium business (50 to 250 staff)
<input type="checkbox"/>	Micro business (up to 9 staff)
<input type="checkbox"/>	Small business (10 to 49 staff)
<input type="checkbox"/>	Trade union or staff association
<input type="checkbox"/>	Other (please describe)

Likelihood of avoidance

Question 1

In your opinion, how likely or unlikely is it that employers would seek to avoid a ban on exclusivity clauses in zero hours contracts?

- Very Likely
- Likely
- Not Likely
- Not sure

Question 2

If you answered 'very likely' or 'likely' to question 1, how do you think employers would avoid a ban on exclusivity clauses?

- By offering a minimal number of guaranteed hours, for instance 1 hour a week
- By restricting the work opportunities of the individual because they have not made themselves available in the past or have taken on an additional job
- Don't know
- Other

Comments:

Should the Government do more?

Question 3

Should the Government seek to do more to deal with potential avoidance by employers of a ban on exclusivity clauses?

- Yes
- No
- Not sure

Question 4

If you answered 'yes' to question 3, should the Government seek to do more now, or should it wait to see if there is evidence of employers avoiding the ban in practice to see whether further action is needed?

- Do more now
- Wait to see if it is necessary
- Not sure

Question 5

If you answered 'yes' to question 3, what would be the best way for the Government to deal with a potential avoidance of a ban on exclusivity clauses?

- A non-statutory code of practice, sharing best practice
- Through legislation
- Other (please provide details)

Comments:

Link to income

Question 6

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

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

Question 7

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

- Yes
- No
- Not sure

Redress**Question 8**

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

Should there be consequences for employers who restrict work opportunities to individuals simply because they have taken work elsewhere?

- Yes
- No
- Not sure

Question 9

If you answered yes to question 8, what should these sanctions be?

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

Unintended consequences

Question 10

The Government is legislating to render the use of exclusivity clauses unenforceable in zero hours contracts. This is covered in Section 27A of clause 139. Are there any negative consequences as a result of the wording used?

- Yes
- No
- Not sure

Question 11

If you answered yes to question 10, are the negative consequences for the employer or the individual?

- Employer
- Individual
- Both

Comments:

Confidentiality and disclosure of response

Question 12

The Government is legislating to render the use of exclusivity clauses unenforceable in zero hours contracts. This is covered in Section 27A of clause 139. Are there any negative consequences as a result of the wording used?

- Yes
- No
- Not sure

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

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:

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.

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