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**Exclusivity Clauses - Consultation on measures to extend the ban on  
exclusivity clauses in contracts of employment**

**Response from the Employment Lawyers Association**

**26 February 2021**

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#### **INTRODUCTION**

1. The Employment Lawyers Association (ELA) is an unaffiliated and non-political group of specialists in the field of employment law. We are made up of about 6,000 lawyers who practice in the field of employment law. We include those who represent Claimants and Respondents/Defendants in the Courts and Employment Tribunals and who advise both employees and employers. ELA's role is not to comment on the political merits or otherwise of proposed legislation or calls for evidence. We make observations from a legal standpoint. ELA's Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes, including to consider and respond to proposed new legislation and regulation or calls for evidence.
2. A Working Party, co-chaired by Stephen Ratcliffe and Eleanor Mannion was set up by the Legislative and Policy Committee of ELA to respond to the Department for Business, Energy and Industrial Strategy. Members of the Working Party are listed at the end of this paper.
3. References in this paper to the views of ELA are intended to be inclusive of the views of the minority as well as the majority of ELA members. Whilst not exhaustive of every possible viewpoint of every ELA member on the matters dealt with in this paper, the members of the Working Party have striven to reflect in a proportionate manner the diverse views of the ELA membership.

#### **EXECUTIVE SUMMARY**

4. This response considers the proposed extension of the ban on exclusivity clauses, which is currently in place for those engaged on a zero-hours contract and in particular the types of contracts/workers who might benefit from this proposal. While in general we agree with the proposed extension, we do not agree that the income threshold of the Lower Earnings Limit is the correct one and believe that the National Living Wage is preferable. While not commenting on the underlying policy reasons for the proposals, we are also of the view that introducing a cap on hourly wages so that the extended ban does not include highly paid individuals is merited.

## **QUESTION 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?**

- **Yes**
  - **No (please expand on why)**
  - **I don't know**
5. We agree that the ban on exclusivity clauses should be extended to low-income workers. We comment below on the appropriate threshold. We recognise that access to confidential information and trade secrets is the reason frequently put forward as the justification for exclusivity clauses. There are, however, also other ways of protecting such information, such as confidentiality clauses. With lower paid workers exclusivity clauses will be more difficult to justify and their access to confidential information is likely to be limited.
6. We suggest that such any extension should be simple, clear and aim to be simple to interpret. It must also deal with the following technical issues when drafted, including but not limited to the following:
- 6.1. What elements of pay are counted towards the guaranteed pay threshold, such as amounts under salary sacrifice or employee pension contributions? In principle, it should not be the case that an employee's own personal decision as to what to do with their pay (e.g. by making additional pension contributions) determines whether this protection applies.
  - 6.2. What is the reference period by which the guaranteed weekly income is calculated? For example, if an annual reference period is used for those who only work a few weeks per year, their average weekly guaranteed pay may fall below the cap despite the fact they may be paid a weekly amount materially above the cap whilst actually working.

## **QUESTION 2**

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

- **Yes (please specify who to)**
  - **No**
  - **I don't know**
7. Yes. As outlined in the response to Question 3 the Lower Earnings Limit is an arbitrary choice, which bears little relation to the key question of the period of potentially unworked time which the employee is committing to their employer. We would suggest that use of the National Living Wage rate would be a more appropriate reference point.

## **QUESTION 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?**

- **Yes**
  - **No (please specify why and what alternative threshold you think is appropriate)**
  - **I don't know**
8. As an apolitical organisation, we do not comment on the policy that lies behind this threshold. However, if the policy rationale is, as we understand it to be, to allow workers the ability to utilise available time to earn sufficient income to support themselves, the Lower Earnings Limit does not appear to be the most appropriate tool by which to do this, since it reflects merely a single overall weekly figure regardless of time worked. Moreover, it guarantees work for only a small proportion of a working week for employees who are paid at National Living Wage rates. If the policy aim is, as we understand it to be, the Government may wish to use a multiple of National Living Wage rates that more fully utilises a working week. We suggest using the Office of National Statistics figures of the average working week for full time employees, currently 37 hours, as the multiple ensuring that any increase in that figure in coming years will be captured by the legislation. Whilst not all employees are capable of or

wish to work 37 hours per week, it is those who do wish to work longer hours (up to full-time) but are not provided with the opportunity to do so who are most significantly impacted by exclusivity provisions.

9. If the purpose of the extension of the cap is to remedy any avoidance of the ban on exclusivity clauses for zero-hour contracts by employers guaranteeing their workers a minimal number of hours of work, then it would appear to follow from that principle that those on the lowest rates of pay wishing to work up to full time should not be restricted from doing so.

#### **QUESTION 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**
  - **No**
  - **I don't know**
10. Yes. It is appropriate that there is an effective mechanism for redress, and we consider that the application of these rights by the Employment Tribunals is the most appropriate existing framework. In the alternative, consideration could also be given to enforcement by way of an inspectorate (such as HMRC) with the power to issue fines for non-compliance, which would support in combatting intentional avoidance. However, such enforcement activity would have to be targeted at the most serious offenders.

#### **QUESTION 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?**

- **Yes**
- **No (please expand on why)**
- **I don't know**

11. We do not comment on the policy rationale behind this proposal, but we agree that such an exemption would appear to be consistent with the policy aim of protecting those with the least bargaining power, whilst recognising the freedom of those with greater bargaining power to contract as they wish. We would note that consideration should be given to the means by which hourly rates can be calculated in the case of those earning 'day rates' or fluctuating rates from a particular employer, e.g. by averaging over a 12-month period.

### **QUESTION 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**

12. This is a policy decision on which we are unable to comment.

### **QUESTION 7**

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

13. We do not.

### **QUESTION 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**
  - **Likely**
  - **Neither likely or unlikely**
  - **Unlikely**
  - **Very unlikely**
  - **I'm not sure**
14. It is possible that the pandemic, and the perceived resulting desire to maximise flexibility, will result in some workers having their guaranteed hours reduced.

### **QUESTION 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**
- **Likely**
- **Neither likely or unlikely**
- **Unlikely**
- **Very unlikely**
- **I'm not sure**

15. We consider that it is likely that a greater number of workers will look for additional work to boost their income, particularly in cases where staff have been furloughed on reduced pay.

### **QUESTION 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**
- **Helpful**
- **Neither helpful or unhelpful**
- **Unhelpful**
- **Very unhelpful**
- **I'm not sure**

16. As a membership organisation for employment lawyers, we are not in a position to answer this question.

### **QUESTION 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.**

- **Very likely**

- **Likely**
- **Neither likely or unlikely**
- **Unlikely**
- **Very unlikely**
- **I'm not sure**

17. As a membership organisation for employment lawyers, we are not in a position to answer this question.

### **QUESTION 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.**

- **Yes**
- **No**
- **I don't know**

18. As a membership organisation for employment lawyers, we are not in a position to answer this question.

### **QUESTION 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.**

- **Yes**
- **No**
- **I don't know**

19. As a membership organisation for employment lawyers, we are not in a position to answer this question.

### **QUESTION 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?**

20. As a membership organisation for employment lawyers, we are not in a position to answer this question.



**Members of ELA Working Party**

Eleanor	Mannion	MacRoberts LLP	Co-Chair
Stephen	Ratcliffe	Baker McKenzie	Co-Chair
Caitlin	Farrar	Farrer & Co	
Mark	Noblet	Sky UK	