



Department
for Business
Innovation & Skills

Zero Hours Employment Contracts

**Banning Exclusivity Clauses:
Tackling Avoidance**

Response Form

AUGUST 2014

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: **3 November 2014**

Please return completed forms to:

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

	Business representative organisation/trade body
	Central government
X	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)

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:

Citizens advice bureaux in Scotland have advised clients in both these scenarios. In these cases, it is not clear that a written exclusivity clause was inserted in their contract. However in practice, they suffered detrimental treatment because they were not constantly available to work for the employer.

- A West of Scotland CAB reports of a client who was working on a zero hours contract. She was offered a full-time contract with another company, but when she told her current employer they insisted she must give them 28 days' notice or they would give her a bad reference. The client has also not been paid the appropriate level of the National Minimum Wage for the last six months.
- An East of Scotland CAB reports of a client who worked as a care worker on a zero hours contract. She had been offered another job which offered minimum hours and turned down a 13 hour shift as she would not have been paid for travel time or costs and would have only made £5 net from working it. As she had refused to work the shift, her employer said "I hope you are not planning to work in care again", threatened to report her to the Scottish Social Services Council and told her new employer they would not provide her with a good reference.

In practice, individuals employed on a zero hours contract may find the amount of work given to them by an employer cut because of a lack of availability, which may be likely to continue following a ban on formal exclusivity clauses. An Employment Tribunal may decide that an employer treating an employee badly, or restricting the work allocated to them due to them working for another employer constitutes an exclusivity clause even if there is nothing specifically written into the contract, based on custom and practice. However, this may not end misuse in this area.

In this situation, in order to enforce their rights a worker would need to be aware that: exclusivity clauses in zero hours contracts were illegal; be aware that this may be the case based on what happens in practice, even if it is not explicitly stated in the written contract; be prepared to take the case to an Employment Tribunal; be able to afford a fee of up to £1,200 to bring a claim to an Employment Tribunal; go through a lengthy process to determine the facts of the case; and risk further detriment for doing so. Given this, it is far from a remote possibility that an employer may take the view that the risks posed to them by deterring zero hours workers from taking on a second job by cutting their hours are small, and exclusivity will remain in practice despite not specifically stated in the contract.

CAS therefore believes that banning exclusivity clauses is only part of the solution to tackle issues of zero hour contract misuse, which are detailed in our comments in response to question 5.

Citizens advice bureaux in Scotland have already seen some isolated examples of one hour contracts, with particular problems existing around holiday pay. It is unclear whether the reasons for employers issuing these unusual contracts is related to exclusivity.

- An East of Scotland CAB reports of a client who has a one hour per-week contract working in a coffee shop. She has worked there for 19 months, normally for 20-30 hours per week. She has not been given any information about holiday pay or sick pay by her employer and wondered whether she would only be paid for one hour.
- A West of Scotland CAB reports of a client whose daughter works for a chain of newsagents on a one hour per week contract, although she normally works on average 16-25 hours per week. When she takes a week's holiday she only gets paid for one hour. The client's daughter's shifts for the following week are allocated at the end of each working week and in the last two weeks she has worked 70 hours. The client wanted to know whether her daughter should be entitled to more than one hour's holiday pay per week.

It should also be noted that a number of CAB clients who seek advice on an employment issue have never been issued with a written contract or statement of terms and conditions.

- A North of Scotland CAB reports of a client who was employed as a private carer for just over two years. She has never been given a written contract. She used to work around 22 hours per week, but her employer reduced her hours to 12. She found another part-time job to supplement her income, but was then dismissed from her carer job as she was not available to work on Saturdays and Sundays.
- An East of Scotland CAB reports of a client who is employed on what she believes to be a zero hours basis, but has never been given a written contract. She has been called to a disciplinary meeting and was unsure of what her rights were. She has also complained about her hours being cut recently.

In the case of zero hours workers, this may complicate matters in determining whether their contract would contain an illegal exclusivity clause. This underscores the importance of considering the practice alongside the terms of any written contract, which should be covered in the regulations.

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:

Whilst Citizens Advice Scotland welcomes the proposed ban on exclusivity clauses, this is far from the biggest act of misuse reported by CAB clients on zero hours contracts. The following serious situations would not be tackled by the exclusivity ban:

- A lack of work provided by employers in particular weeks or for an extended period causing destitution including referrals to food banks.
- Serious debt and budgeting difficulties due to a fluctuating income
- Difficulty accessing in-work support from the benefits and tax credit system due to an unpredictable working pattern

- A lack of entitlement to certain employment rights and confusion over whether an individual on a zero hours contract has the status of a 'worker' or an 'employee' in employment law
- Individuals on zero hours contracts being deterred from enforcing basic employment rights, due to a fear of being effectively dismissed by their employer giving them no work.

In addition to the ban on exclusivity clauses, CAS believes a suite of measures are necessary to clamp down on misuse of zero hours contracts. The Government's recently announced wide-ranging employment review to clarify and potentially strengthen the employment status of workers, in light of the evidence presented on zero hours contract misuse¹, is welcome. CAS awaits the outcome with interest and hopes that the proximity of the publication of final recommendations (March 2015) to the General Election will not act as barrier to action being taken on them.

Unfortunately no single option would entirely prevent misuse, but some reforms may help to protect workers from some of the situations outlined in this briefing. CAS would recommend the following options be considered for inclusion in legislation.

Give workers on a zero hours contract a statutory 'right to request' a contract that guarantees hours, without suffering dismissal or detriment.

One of the reasons that misuse of zero hours contracts occurs is because they are issued in situations for which they are not suitable – for instance, where a worker requires regular full-time or part-time work. One possible remedy to this would be to give workers the right to request their contract be altered to a stable one that is more suitable, with a legal protection from being dismissed or suffering detriment for making the request. There would be no obligation on the employer to grant the request, but by giving reasons for declining it would encourage them to consider the implications of the contract on the worker, whether it is appropriate and alert them to the worker's desire for a more stable working pattern. It is envisaged this would operate in a similar manner to the right to request flexible working currently afforded to employees.

Legislate to ensure that where mutuality of obligation for the employee to undertake work provided by the employer is present, an individual is classed as an employee rather than a worker even if their contract states zero hours

Employment Tribunals generally operate on this basis at present, if a case comes before them. However, ensuring that this was put on a statutory footing has the potential to provide clarity for employers and individuals prior to a case being brought to Tribunal. It may dissuade employers from issuing zero hours contracts in unsuitable situations based on the mistaken belief that the contract prevents an individual being classed as an employee, even if they are expected to undertake work on a frequent basis.

Extend protection from unfair dismissal to workers as well as employees

This option would strengthen the rights of workers on zero hours contracts by giving them some redress in situations where the amount of work provided is dramatically cut in an apparent attempt to 'get rid of them'. This would represent a significant change in employment law and the impact would need to be carefully considered as it would extend to other workers including those

¹ Employment review launched to improve clarity and status of British workforce – Department for Business, Innovation and Skills, October 2014 <https://www.gov.uk/government/news/employment-review-launched-to-improve-clarity-and-status-of-british-workforce>

on appropriate zero hours contracts. However, it may be a necessary measure to protect workers from extremely poor treatment at work.

Extend full rights to parental leave and pay to workers as well as employees

Citizens advice bureaux have reported cases where workers are denied paid maternity leave, including those on zero hours contracts. This reduces the flexibility of the individual engaged on a zero hours basis. One step to address this could be to extend the paternal leave and pay rights currently enjoyed by employees to workers.

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

Comments:

CAB clients who seek advice because of misuse of a zero hours contract by their employer will often be doing so because it has caused a sudden loss of income. This would be therefore be the most effective threshold to tackle avoidance.

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

Comments:

This would be in line with the existing right of part-time workers not to be treated less favourably than full-time workers as regards terms of employment, with a similar channel of redress.

However, as noted in our response to question 2, employees making a claim to an Employment Tribunal would face a number of barriers to justice, most notably the requirement to pay a fee of up to £1,200. CAS would recommend that no fee should be levied for claims against employers who restrict work opportunities to individuals because they have taken work elsewhere. This is also the type of issue that could be considered by a Fair Employment Commission with the legal powers and resources both to secure individual vulnerable workers their rights, and to root out rogue employers.²

² Fair Employment: Why Scotland's workers need a Fair Employment Commission – Citizens Advice Scotland, February 2012 <http://www.cas.org.uk/publications/fair-employment>

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 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

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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