



GMB

RESPONSE TO BEIS CONSULTATION

EXCLUSIVITY CLAUSES

**CONSULTATION ON MEASURES TO EXTEND THE BAN ON
EXCLUSIVITY CLAUSES IN CONTRACTS OF
EMPLOYMENT**

DECEMBER 2020

What organisation do you represent (if any)?

GMB

If you are representing an organisation, what type of organisation is it?

Trade Union

Are you happy for your response to be published?

Yes

Would you like to be contacted when the consultation response is published?

Yes

Introduction

GMB, Britain's general union, represents over 620,000 members throughout the UK in both the private and the public sectors. We have members working in the following areas of:

Financial, commercial and professional services

Clothing and textiles

Construction

Furniture Manufacturing

Energy and Utilities

Engineering

Food and Leisure

Process Industries

Public Services

Voluntary and Community/Third Sector

GMB welcomes the opportunity to respond to the consultation. GMB is a TUC affiliated union and draws attention to the evidence and information provided by the TUC. GMB, like other trade unions, is a not-for-profit organisation, and exists to protect and support its members. GMB prefers to resolve matters through collective bargaining and internal workplace procedures but will support litigation to enforce members' rights if this is necessary.

GMB agrees that the ban on exclusivity clauses should be extended to "short-hours" contracts but disagrees with the proposal to set this based on a threshold of the Lower Earnings Limit. The use of an earnings-based threshold is arbitrary, and likely to encourage employers to adopt working patterns that take workers just above the threshold. GMB believes that the approach taken in the European Union Directive on Transparent and Predictable working provides a more appropriate process for

considering such clauses based on the purpose and necessity of any such clause. GMB believes this would provide greater protection to workers.

GMB has responded to the specific questions in the consultation but believes a far greater series of measures is required to support low-paid and insecure workers. GMB calls on the Government to tackle the one-sided “flexibility” that characterises insecure work in the UK. In this respect GMB refers to submissions made to BEIS in 2018 to the Taylor Review of Modern Working Practices. The recent ruling of the Supreme Court in the GMB case of UBER is extremely welcome, and GMB believes that the Government should step in to make significant reforms to strengthen and uphold employment rights including those on employment status.

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 that the ban on 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

GMB agrees that the ban should be extended to those on short hour contracts. Exclusivity clauses make it difficult for workers to find sufficient work, which then affects their level of income. These clauses increase the imbalance of power in the workplace by leaving those workers dependant on that single employer. This makes it far less likely that workers will seek to enforce their employment and health and safety rights, which is of particular concern in the present pandemic. Such clauses may also have a negative impact on social security entitlements.

2.

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

Yes (please specify who to)

No

I don't know

Please see our answer to Question 3 below.

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 that 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

No. GMB does not agree that the Lower Earnings Limit is an appropriate threshold. This level will expose many workers to income restrictions and social security benefit sanctions. The use of an earnings-based threshold will lead to employers introducing patterns of work that take workers just over the threshold to avoid the ban. GMB believes that the fairer approach would be to apply objective grounds which would permit the use of an exclusivity clause such as on health and safety grounds, the protection of business confidentiality, public interest, or conflicts of interests. This is the approach taken in the European Union Directive on Transparent and Predictable Working. Whilst the UK has not implemented the Directive it provides a means by which business would need to justify the use of such clauses and better protect the interests of workers affected by them.

As GMB understands it Universal Credit requires job seeking to take place if the claimant earns less than the equivalent of 35 hours of work at the minimum wage. Workers on short hours contracts risk benefit sanctions because their contract does not permit them to work elsewhere making it extremely difficult for them to maintain their income.

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

No

I don't know

Yes. GMB believes that there should be similar rights for short-hours workers. Workers in insecure employment generally are often afraid to enforce their rights, particularly where there is no trade union in the workplace. GMB believes that unions must be given a right of access to workplaces. GMB also believes that the Government must place sufficient resources into the employment tribunal system to overcome delays and not re-introduce fees. Both are factors that deter workers from enforcing their employment rights. Further adequate resources need to be allocated to the various enforcement bodies such as the Gangmasters and Labour Abuse Authority and HMRC in respect of minimum wage for example.

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?

Yes

No

I don't know

No. GMB does not believe that exemptions should be based on the level of wages but should be based on the need for such a clause. In this respect, please see our answer to Question 3 above.

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

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

GMB does not believe that an hourly wage cap is where there is also an income threshold as proposed. If the Government intends to pursue this then the cap should be set at the highest level that is £29 an hour or above.

Questions on the impact of the Covid-19 Pandemic

7.

How likely is it 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

Very unlikely

I'm not sure

GMB believes it is very likely. Official data shows that the number of hours worked overall is down 7% compared to a year ago. The February 2021 Labour Market Overview Statistics show that the total actual weekly hours October – December 2020 was 979 million compared with October – December 2019 which was 1,050 million.

As the TUC has reported, large numbers of workers have had their terms and conditions reduced, and as a result this has led to workers moving from full-time contracts to those with low guaranteed hours. This has been a particular issue in the hospitality sector. In general, across all areas of the economy, those who are already low paid are more likely to have been placed on furlough or have had cuts in their hours as an alternative to being on furlough.

8.

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

Very unlikely

I'm not sure

GMB believes it is very likely. Many workers have had their hours cut. As the TUC has reported the number of “involuntary” part-time workers is now approaching one million. GMB calls on the Government to take action to make it easier for those workers to find additional work, and to put safeguards in place to protect high quality jobs across the economy and particularly on those areas that have been hardest hit such as the hospitality and retail sectors. The development of jobs in new areas should be encouraged.

Questions about individual workers

9.

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

GMB believes it is helpful in removing a barrier to finding work. But much more is needed to address the problem of insecure work, including the right to a contract reflecting the normal hours of work of a worker. In our responses to the Taylor Review in 2018 we put forward wide-ranging proposals on tackling insecure work and would welcome the opportunity to raise these again with Government. These are particularly relevant in the light of the recent decision of the Supreme Court in the GMB case of UBER.

10.

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

Unlikely. GMB believes workers need access to high quality training. This is important for those in insecure employment generally as they face the greatest barriers to training and are least likely to receive training from their employer. There needs to be a right to retrain, a lifelong learning system, and an increase in resources to develop skills. There need to be rights to paid time off and greater guidance for workers through their careers. GMB calls on the Government to reinstate the grant for the Union Learning Fund and to support this work in developing access to learning and skills, particularly for disadvantaged groups.

Questions 12 – 14

These questions are directed specifically to employers, so we have not responded to them,

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