



The Bar Council

Bar Council response to the Department for Business, Energy & Industrial Strategy consultation on Exclusivity Clauses

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Department for Business, Energy & Industrial Strategy (BEIS) consultation paper on “Exclusivity Clauses, Consultation on measures to extend the ban on exclusivity clauses in contracts of employment”.¹
2. The Bar Council represents approximately 17,000 barristers in England and Wales. It promotes the Bar’s high-quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB).

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/941088/exclusivity-clause-consultation-document.pdf

Question 1: 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?

4. Yes

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

5. It is unclear from the consultation what is meant by 'other workers'. If the proposal is to include both workers and employees as defined in the Employment Rights Act 1996 then we would support that.

6. We do not consider that a restrictive approach is necessary. It should apply to all workers with specific exemptions being identified if their inclusion would cause particular practical problems.

Question 3: Do you agree the Lower Earnings Limit is an appropriate threshold?

7. Our answer to this question is a qualified 'no'. We agree that setting it at the LEL has the benefit of being definable in law and that it will also rise as the economy develops. It is better that it is in place than it not being in place.

8. However, using the LEL as a threshold does appear to be somewhat unambitious. It will provide a theoretical protection to a small proportion of the workforce. The policy reasons which support a ban on exclusivity clauses for this element of the workforce also readily apply to other low paid workers.

9. Essentially, where is the policy benefit in preventing workers earning less than £15,000 per annum from the same employment from having alternative employment? These workers, particularly if they are in less secure forms of work, would benefit from being able to obtain work from more than one source just as much as someone earning £6,240 p/a (based on govt figure of £120 per week).

10. If the employer has a legitimate interest to protect, then they should be permitted to do so through appropriate restraint clauses, confidentiality clauses and conflict of interest clauses rather than a blanket prohibition.

Question 4: Should these rights also be extended to employees/workers where the guaranteed weekly income is below the Lower Earnings Limit? Please expand on why.

11. Yes. In order to have any value, a form of redress is necessary.

12. We would note that redress need not only come in the form of an individual taking matters to an Employment Tribunal. When dealing with forms of low paid employment, a statutory body with the power to enforce these rights or to refer matters to an Employment Tribunal if needs be can also be an alternative form of enforcement.

13. For example, if the statutory body spot-checked or became aware of an unlawful term, it should be able to take escalating enforcement action rather than the onus being on an individual employee to stand up to their employer.

14. The government already recognises this in another aspect of low-paid work. HMRC has extensive powers in respect of National Minimum Wage enforcement.

Question 5: 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?

15. Yes. These individuals are more likely to be in a different bargaining position and the normal rules of contract should apply.

16. Careful thought should be given to what is meant by a 'high hourly rate' in light of our suggestions in question 3 as to the use of the LEL as an appropriate measure. We consider that a 'high hourly rate' should be one in which the market gives the individual sufficient bargaining power to meaningfully negotiate their terms.

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

17. We consider that other groups are better placed to respond to this question.

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

18. Consideration should be given to a more nuanced approach. Employers should be permitted to include 'conflict of interest' clauses which prohibit alternative employment if it conflicts with the present employment. Such conflicts should be restricted to matters of legitimate commercial interest. These conflict of interest

clauses would be more targeted than wholesale exclusivity clauses which are more difficult to justify.

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?

19. We consider it likely that a reduction in hours will occur as a result of any downturn in the economy.

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?

20. We consider that other groups are better placed to respond to this question.

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.

21. These clauses do not regularly feature in Employment Tribunal litigation. That isn't to say that there isn't a problem. It is conceivable that when dealing with enforcement of individual rights for low paid workers, the nature of the disputes are such that they are less likely to reach the stage of Tribunal litigation.

22. If the government was minded to, a short statutory code could assist. The Code could provide that any exclusivity clause should be entered into with the individual before work is commenced. It could also provide that any amendment to the contract to include or amend an exclusivity clause could only be done on 30 days notice.

Question 11: 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.

23. We consider that other groups are better placed to answer this question.

Questions 12-14 are for employers only.

Bar Council²

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For further information please contact

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² Prepared by the Law Reform Committee