

# **Extending the exclusivity clause ban**

**TUC response to BEIS consultation  
paper, February 2021**

## Introduction

The Trades Union Congress (TUC) exists to make the working world a better place for everyone. We bring together more than 5.5 million working people who make up our 48 member unions.

We have long been concerned about the prevalence of insecure work, including the practice of giving workers zero-hours or short-hours contracts. Our analysis shows that ahead of the coronavirus pandemic, there were 3.6 million workers in insecure work.<sup>1</sup>

Those with no or few guaranteed hours are often offered work at the whim of their employer, facing irregular hours and therefore irregular income, as well as last minute shift cancellations. Rather than pick and choose their hours, many workers feel compelled to work whenever asked. If shifts are turned down, there's an implicit threat that they could lose future work. So flexibility exists for the employer, but not the worker.

This makes it nearly impossible for workers to plan their finances or time. The latter is a particular issue for parents who must arrange (often expensive) childcare or those with other caring responsibilities. Such workers are also extremely vulnerable when there is an economic shock because it is often easy for employers to reduce their hours or even stop them completely.

There is clear evidence that the Covid pandemic has been particularly hard on low-paid workers.

Those in often low-paid roles, such as delivery drivers, shop assistants and care workers have been central to keeping the country going through lockdowns. This is reflected in high numbers of Covid-related deaths among low-paid workers.<sup>2</sup>

Meanwhile, low-paid workers have borne the brunt of job losses thanks to their concentration in industries such as hospitality and retail which were both notorious for poor wages and insecure conditions and were particularly affected by lockdowns.<sup>3</sup>

Others have had their hours cut. Hours worked are down 7 per cent on a year ago.<sup>4</sup> And across every sector in the economy, low-paid workers have been more likely to have been put on furlough or had their hours cut. Meanwhile, many workers on short-time, zero-hours

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<sup>1</sup> TUC (2020). *Insecure work*, TUC <https://www.tuc.org.uk/research-analysis/reports/insecure-work-0>

<sup>2</sup> ONS (25 January 2021), *Coronavirus (COVID-19) related deaths by occupation, England and Wales* *Coronavirus (COVID-19) related deaths by occupation, England and Wales: deaths registered between 9 March and 28 December 2020*, ONS [www.ons.gov.uk/peoplepopulationandcommunity/healthandsocialcare/causesofdeath/bulletins/coronaviruscovid19relateddeathsbyoccupationenglandandwales/deathsregisteredbetween9marchand28december2020](http://www.ons.gov.uk/peoplepopulationandcommunity/healthandsocialcare/causesofdeath/bulletins/coronaviruscovid19relateddeathsbyoccupationenglandandwales/deathsregisteredbetween9marchand28december2020)

<sup>3</sup> Baska, M. (14 July 2020), "Low-paid workers bearing the brunt of Covid fall in employment, study finds", *People Management* [www.peoplemanagement.co.uk/news/articles/low-paid-workers-bearing-the-brunt-of-covid-fall-in-employment](http://www.peoplemanagement.co.uk/news/articles/low-paid-workers-bearing-the-brunt-of-covid-fall-in-employment)

<sup>4</sup> Tily, G. (26 January 2021), "Time for certainty on worker protection as unemployment rises fast", TUC [/www.tuc.org.uk/blogs/time-certainty-worker-protection-unemployment-rises-fast](https://www.tuc.org.uk/blogs/time-certainty-worker-protection-unemployment-rises-fast)

or agency contracts have reported that they were denied furlough and instead saw their hours cut or disappear entirely.<sup>5</sup>

This cut in hours has resulted in rising numbers of involuntary part-time workers of whom there are now approaching one million. This puts involuntary part-time employment at its highest rate since 2016.<sup>6</sup>

The TUC agrees that the government should seek ways of ensuring that workers have the greatest chance of securing the hours of work they want and need.

On this specific proposal, we agree that the ban on exclusivity clauses should be extended to short-hours contracts.

However, we disagree with the proposal that the Lower Earnings Limit (LEL) be used as a threshold for such a ban.

The LEL is particularly problematic because those earning this level are still at high risk of poverty and potentially social security sanctions.

But more generally, we think seeking an earnings-based threshold is mistaken. Any choice of measurement – whether LEL, minimum wage or real living wage – is somewhat arbitrary. And it risks creating distortions in company practice, by incentivising, for instance, shift patterns that take individuals just over the LEL.

We believe that a far better approach would be to consider the purpose and necessity of an exclusivity clause. This would permit exclusivity clauses justified by legitimate reasons such as the protection of business secrets or avoidance of conflicts of interest.

But we must also be clear that we believe action on exclusivity clauses alone would be utterly inadequate in assisting low-paid and insecure workers.

This requires robust action to crack down on one-sided flexibility that primarily only in the interests of employers and to ensure that workers receive decent wages.

Therefore, the government should bring forward its proposed Employment Bill as quickly as possible. This should include:

- the right to a contract reflecting a worker's normal hours of work
- robust rules governing notice of shifts and compensation for cancelled shifts
- provisions to ensure continuity of service continues even if an individual does not work during any given week, to assist with qualification for key rights.

This must be coupled with strenuous efforts to boost pay rates for low earners. The TUC has been calling for the minimum wage to be increased to £10 per hour to ensure that everyone is paid enough to get by. Currently, millions of workers earn less than this including 38 per cent of key workers.

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<sup>5</sup> Institute of Employment Studies (January 2021), *Labour Market Statistics January 2021*, Institute of Employment Studies [www.employment-studies.co.uk/resource/labour-market-statistics-january-2021](http://www.employment-studies.co.uk/resource/labour-market-statistics-january-2021)

<sup>6</sup> Institute of Employment Studies (January 2021), *Labour Market Statistics January 2021*, Institute of Employment Studies p. 7 [www.employment-studies.co.uk/resource/labour-market-statistics-january-2021](http://www.employment-studies.co.uk/resource/labour-market-statistics-january-2021)

## 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 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***

We agree that the ban on exclusivity clauses should be extended to those on short-hours contracts. Such contracts are commonplace in sectors such as retail and hospitality.

Exclusivity clauses make it extremely hard for workers to find enough work. This has a severe impact on their income.

The clauses exacerbate the power imbalance in the workplace by leaving workers reliant on a single employer. This makes it less likely that a worker will seek to enforce their employment and health and safety rights due to the fear of losing future work.

Finally, as set out in more detail below, the use of exclusivity clauses in the contracts of short-hours workers could lead to workers facing social security sanctions.

- 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***

- 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**

No. The Lower Earnings Limit is an inappropriate threshold.

There is a great risk that imposing the threshold at such a low level – just £120 a week – would leave workers at high risk of poverty.

It would also leave workers at risk of social security sanctions.

Under the in-work conditionality provisions for Universal Credit, claimants will be mandated into jobseeking if they earn less than the equivalent of 35 hours of work at the minimum wage.

In some sectors, for instance hospitality, workers on short-hours contracts therefore risk sanctions by the Department for Work and Pensions because their contracts forbid them working elsewhere in the sector making it extremely hard to piece together enough work.

But opting for any earnings-based threshold, whether LEL, minimum wage or real living wage, would be a mistake.

This approach risks creating distortions in company practice, by incentivising, for instance, shift patterns that take individuals just over the LEL.

A better approach would be to follow the approach taken by the European Union's Directive on Transparent and Predictable Working.

Although the Directive has not been implemented in the UK, we believe that the focus of Article 9 on "parallel employment" on the purpose and necessity of any exclusivity clause, better reflects both employer needs and the interests of affected workers. However, it would have to be coupled with requirements for businesses to justify those purposes.

The Directive states:

"1. Member States shall ensure that an employer neither prohibits a worker from taking up employment with other employers, outside the work schedule established with that employer, nor subjects a worker to adverse treatment for doing so.

"2. Member States may lay down conditions for the use of incompatibility restrictions by employers, on the basis of objective grounds, such as health and safety, the protection of business confidentiality, the integrity of the public service or the avoidance of conflicts of interests."

Therefore, rather than seek to identify an appropriate level of wages at which the ban would operate, the government should instead set out the objective grounds, such as those above, for which an exclusivity clause would be permitted.

## 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. Redress rights for short-hours workers should reflect those of zero-hours workers in relation to exclusivity clauses.

Unions report to us that workers, particularly those on insecure contracts such as zero-hours contracts, struggle to enforce their rights especially when there is not a strong union presence in a workplace.

Therefore, the government must address the lack of resources that is causing a huge backlog in the tribunal system, while ensuring that there is no reintroduction of fees to deter claimants.<sup>7</sup>

It must ensure proper resourcing of the state enforcement bodies including the Gangmasters and Labour Abuse Authority and HM Revenue & Customs.<sup>8</sup>

And it must allow trade unions access to workplaces to explain what benefits a trade union can offer them.<sup>9</sup>

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<sup>7</sup> Sharp, T. (21 September 2020). "Employment tribunals need resources, not a sticking plaster", TUC [www.tuc.org.uk/blogs/employment-tribunals-need-resources-not-sticking-plaster](http://www.tuc.org.uk/blogs/employment-tribunals-need-resources-not-sticking-plaster)

<sup>8</sup> Creagh, M. (23 July 2020). "10 takeaways from the Labour Market Enforcement Strategy 2019/20" [www.tuc.org.uk/blogs/10-takeaways-labour-market-enforcement-strategy-20192020](http://www.tuc.org.uk/blogs/10-takeaways-labour-market-enforcement-strategy-20192020)

<sup>9</sup> TUC (2019). *A stronger voice for workers* pp16-26 [www.tuc.org.uk/research-analysis/reports/stronger-voice-workers](http://www.tuc.org.uk/research-analysis/reports/stronger-voice-workers)

## 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 (please expand on why)*
- *I don't know*

No. As we set out in our answer to question three, we believe any exemptions should be based on the need for such a clause, not wage levels.

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.*

We do not believe that an hourly wage cap is necessary where there is an income threshold. If the government is to pursue this course, we believe the cap should be set at £29 an hour or above.

## Questions on the impact of the Covid-19 pandemic

**7. 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**

Very likely. Official data shows that hours worked are down 7 per cent on a year ago.<sup>10</sup>

TUC polling has also found that large numbers of workers have had their terms and conditions reduced.<sup>11</sup> Unions report to us that in some sectors, notably hospitality, this has resulted in workers moving from full-time contracts to contracts with low guaranteed hours.

And across every sector in the economy, low-paid workers were more likely to have been put on furlough or had their hours cut. Often cuts in hours were made in place of the use of the Coronavirus Job Guarantee Scheme.<sup>12</sup>

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<sup>10</sup> Tily, G. (26 January 2021), "Time for certainty on worker protection as unemployment rises fast", TUC [www.tuc.org.uk/blogs/time-certainty-worker-protection-unemployment-rises-fast](http://www.tuc.org.uk/blogs/time-certainty-worker-protection-unemployment-rises-fast)

<sup>11</sup> Sharp, T. (25 January 2021). "Fire and hire tactics are levelling down pay", TUC [www.tuc.org.uk/blogs/fire-and-rehire-tactics-are-levelling-down-pay](http://www.tuc.org.uk/blogs/fire-and-rehire-tactics-are-levelling-down-pay)

<sup>12</sup> Institute of Employment Studies (January 2021), Labour Market Statistics January 2021, Institute of Employment Rights [www.employment-studies.co.uk/resource/labour-market-statistics-january-2021](http://www.employment-studies.co.uk/resource/labour-market-statistics-january-2021)

**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**
- **Unlikely**
- **Very unlikely**
- **I'm not sure**

Very likely. There is strong evidence that many workers have had their hours cut (see previous question).

The number of involuntary part-time workers is now approaching one million. This puts involuntary part-time employment at its highest rate since 2016.<sup>13</sup>

Taking action to make it easier to find additional work would be positive.

But the government should also do more to safeguard good quality jobs by supporting hard-hit sectors such as hospitality and retail and facilitating the creation of jobs in sectors such as green energy.

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<sup>13</sup> Institute of Employment Studies (January 2021), *Labour Market Statistics January 2021*, Institute of Employment Rights p. 7 [www.employment-studies.co.uk/resource/labour-market-statistics-january-2021](http://www.employment-studies.co.uk/resource/labour-market-statistics-january-2021)

## 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**

Helpful by removing one barrier to work. However, we need more far-reaching action to tackle the problems caused by insecure work. This must include the right to a contract reflecting a worker's normal hours of work.

**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. If the government is serious about supporting workers' reskilling, it needs to ensure that it provides access to high quality training.

Workers building portfolios of insecure, relatively low-skilled work will frequently have few opportunities to undertake training and development. There is extensive research on the

range of barriers facing workers who are in need of reskilling and this consistently shows that workers in precarious and low-paid employment are least likely to be given training by their employer.

The TUC is calling for a number of measures to tackle this, including a new right to retrain for adults, backed up by personal lifelong learning accounts and a significant increase to the government's adult skills budget.

We also need related policy reforms to boost opportunities for reskilling, including a new right to paid time off for training for workers and much improved careers guidance for adults.

The government should also reconsider its puzzling decision to cut the grant for the Union Learning Fund in spite of the independent evidence showing its significant impact in boosting access to learning and skills, especially for disadvantaged groups.