EXPLANATORY MEMORANDUM TO

THE EXCLUSIVITY TERMS FOR ZERO HOURS WORKERS (UNENFORCEABILITY AND REDRESS) REGULATIONS 2022

2022 No. XXXX

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Business, Energy and Industrial Strategy (BEIS) and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This instrument makes exclusivity terms unenforceable in contracts which entitle workers to net average weekly wages which do not exceed the Lower Earnings Limit, currently £123 a week. Exclusivity terms are already unenforceable in zero hours contracts and this instrument extends the protection to workers working under contracts where they are guaranteed a net average weekly wage that does not exceed the Lower Earnings Limit, to ensure that they are also not restricted by exclusivity terms. This instrument will give these workers the right to take on additional employment without being subjected to unfair dismissal (for employees), or detriment by their employer or needing to gain their permission in order to seek additional employment. Eligible individuals will be able to bring proceedings in employment tribunals and may be awarded compensation.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is England and Wales and Scotland.

4.2 The territorial application of this instrument is England and Wales and Scotland.

5. European Convention on Human Rights

5.1 The Minister for Small Business, Consumers and Labour Markets has made the following statement regarding Human Rights:

5.2 "In my view the provisions of the Exclusivity Terms for Zero Hours Workers (Unenforceability And Redress) Regulations 2022 are compatible with the Convention rights."

6. Legislative Context

6.1 On 26 May 2015 sections 27A of the Employment Rights Act 1996 Act ("the 1996 Act") came into force rendering unenforceable provisions in zero hours contracts ("ZHCs") which prohibit the worker from doing work under any other contract or arrangement or prohibit the worker from doing so without the employer's consent.

6.2 The Exclusivity Terms in Zero Hours Contracts (Redress) Regulations 2015 (2015/2021) create a route of redress in the employment tribunal for workers who are subject to exclusivity terms in their ZHC, and suffer detriment as a result of breaching the exclusivity term. An employment tribunal may then award compensation to that worker. Those Regulations also provide that where an employee working under a ZHC is dismissed for breach of an exclusivity term, the dismissal will be unfair.

6.3 This instrument replicates the protections in section 27A of the 1996 Act and the rights of redress in S.I 2015/2021 to workers working under contracts which entitle them to a net weekly wage which is no more than the Lower Earnings Limit.

6.4 Once these Regulations have been approved by Parliament and made, a separate statutory instrument, subject to the negative procedure, will be laid in Parliament to make the right to bring a claim under regulation 8(1) subject to Early Conciliation, a requirement set out and described at section 18A of the Employment Tribunal Act 1996. This separate statutory instrument will mean that a prospective claimant wishing to take a case to the employment tribunal must first contact the Advisory, Conciliation and Arbitration Service ("Acas") about their dispute and consider conciliation before presenting a claim to an employment tribunal. This separate statutory instrument will also amend these Regulations to extend the time limit for making a claim in regulation 8(2) to take into account the application of Early Conciliation.

6.5 The separate statutory instrument regarding Early Conciliation will be laid in Parliament after these Regulations are approved and made because the new detriment proceedings have to be enacted in law before they can be added to the list of "relevant proceedings" in the Employment Tribunals Act 1996 (section 18) which are subject to Early Conciliation.

7. Policy background

What is being done and why?

7.1 Exclusivity terms in workers contracts restrict workers' ability to take on additional work with other employers. Extending the range of contracts in which exclusivity clauses are unenforceable will increase workers' ability to boost their income by ensuring they can take on additional work were desired.

Explanations

What did any law do before the changes to be made by this instrument?

7.2 The current provisions of the 1996 Act (section 27A) renders unenforceable exclusivity terms in zero hours contracts.

Why is it being changed?

7.3 The current provisions of the 1996 Act (section 27A) renders unenforceable exclusivity terms in zero hours contracts. It however does not render unenforceable such contracts where only one hour or a limited number of hours are guaranteed, which leaves a number of workers subject to exclusivity terms whilst their weekly income is less or equal to the Lower Earnings Limit.

7.4 The power contained in section 27B enables the Secretary of State to make further provisions to ensure that those individuals who work under workers' contracts of a

kind specified by the regulations are not restricted by any provisions in their contract preventing them from doing any work otherwise than under that contract.

What will it now do?

7.5 Provisions containing exclusivity terms will be unenforceable in workers' contracts where the guaranteed net average weekly wages is no more than the Lower Earnings Limit. This will protect workers from suffering from undue exclusivity terms, allowing them to take on additional work to boost their income should they wish to do so.

7.6 Any amendments to be made by the Treasury in relation to the Lower Earnings Limit is guided by its usual considerations, independent from these Regulations and not by anything relating to this instrument. Under section 141 of the Social Security Administration Act 1992, the Treasury is under an obligation to review yearly the general level of earnings in Great Britain. Since the 2011 Budget, the Treasury has announced that such review will use the Consumer Price Index as the basis of its indexation.

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 There is no plan to consolidate the legislation amended by these Regulations.

10. Consultation outcome

10.1 On 4 December 2020, the Government launched a consultation which sought views on a proposal to extend the range of contracts in which exclusivity clauses are unenforceable to contracts where the workers' guaranteed weekly income is less than the Lower Earnings Limit, £120 a week at the time of consultation and now currently £123 a week. It was open for 12 weeks and closed on 26 February 2021.

10.2 In total there were 30 formal responses to the consultation. The largest number of formal responses to the consultation (30%) came from legal organisations and professionals, with the second largest group (20%) being trade unions. Trade association responses, professional services responses and individual responses each made up 13.3% of responses. The remaining responses (10%) came from academics, local government and equalities groups.

10.3 The responses showed strong support for the proposal to extend the range of contracts in which exclusivity clauses are unenforceable (80% of respondents (24 responses)).

10.4 The Government Response was published on 09/05/2022 and can be found on https://www.gov.uk/government/consultations/measures-to-extend-the-ban-on-exclusivity-clauses-in-contracts-of-employment.

11. Guidance

11.1 Guidance not required.

12. Impact

12.1 There is no significant impact on business, charities or voluntary bodies.

12.2 There is no significant impact on the public sector.

12.3 A full impact assessment has not been produced for this instrument as no, or no significant, impact on the private, voluntary or public sector is foreseen.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 A statutory review clause is included in the instrument which states that the Department for Business, Energy and Industrial Strategy will undertake an internal review of these Regulations within 5 years of implementation.

15. Contact

15.1 Rebecca Lowe at the Department for Business, Energy and Industrial Strategy Telephone: 020 7215 5675 or email: rebecca.lowe@beis.gov.uk can be contacted with any queries regarding the instrument.

15.2 Laura Robinson, Deputy Director for Strategy and International, at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.

15.3 Minister for Small Business, Consumers and Labour Markets at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.