**EXPLANATORY MEMORANDUM TO**

**EMPLOYMENT TRIBUNALS ACT 1996 (APPLICATION OF CONCILIATION PROVISIONS) ORDER 2022**

**2022 No. 1181**

## 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 His Majesty.

## 2. Purpose of the instrument

2.1 This Order amends section 18(1) of the Employment Tribunals Act 1996 to add proceedings under regulation 8 of the 2022 Regulations the list of relevant proceedings subject to Early Conciliation.

2.2 This Order amends the Exclusivity Terms for Zero Hours Workers (Unenforceability and Redress) Regulations 2022 ('the 2022 Regulations') to require that before making a complaint to an employment tribunal under the 2022 Regulations, the worker concerned must have recourse to Early Conciliation before the institution of proceedings. The amendments also extend the limitation period which applies for bringing a claim to an employment tribunal in respect of the Early Conciliation process.

## 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 Parliamentary Under Secretary of State has made the following statement regarding Human Rights:

"In my view the provisions of the Employment Tribunals Act 1996 (Application of Conciliation Provisions) Order 2022 are compatible with the Convention rights."

## 6. Legislative Context

6.1 This Order amends section 18(1) of the Employment Tribunals Act 1996 and makes amendments to the Exclusivity Terms for Zero Hours Workers (Unenforceability and Redress) Regulations 2022.

6.2 Section 18(1) of the Employment Tribunal Act 1996 is a list of "relevant proceedings" for the purposes of Early Conciliation. 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 before presenting a claim to an employment tribunal. This gives ACAS the chance to encourage the parties to resolve their differences through conciliation without the need for an employment tribunal claim to be made. Whilst notifying ACAS of a potential employment tribunal claim is mandatory, participating in conciliation is entirely voluntary.

6.3 This Order also makes amendments to the Exclusivity Terms for Zero Hours Workers (Unenforceability and Redress) Regulations 2022. The 2022 Regulations are amended to require that before making a complaint to an employment tribunal under these regulations, the worker concerned must have recourse to Early Conciliation before the institution of proceedings. The 2022 Regulations are also amended to extend the limitation period which applies for bringing a claim to an employment tribunal for the proceedings that are added to section 18(1) of the Employment Tribunals Act 1996.

6.4 This Order has been laid in Parliament after the 2022 Regulations have been made because the new detriment proceedings created in the 2022 Regulations have to be enacted in law before this Order can add those proceedings to the list of 'relevant proceedings' in section 18(1) of the Employment Tribunals Act 1996 which are subject to Early Conciliation.

## 7. Policy background

***What is being done and why?***

7.1 Exclusivity clauses in employment contracts restrict workers' ability to take on additional work with other employers. This statutory instrument adds exclusivity clause disputes to relevant proceedings for Early Conciliation. The statutory instrument also extends the time limit for bringing an Employment Tribunal claim on exclusivity clauses to factor these proceedings in.

7.2 It is the Government's ambition to resolve as many employment disputes as possible without the need for an employment tribunal. Early Conciliation is a key part of achieving this aim.

***Explanations***

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

7.3 Before, the law and 2022 Regulations made certain exclusivity clauses unenforceable, but the 2022 Regulations do not yet provide for the Early Conciliation procedure in relation to detriment proceedings.

*Why is it being changed?*

7.4 The 2022 Regulations needed to be made before the Employment Tribunals Act 1996 could be amended to include detriment proceedings made under the 2022 Regulations in the list of "relevant proceedings" in section 18(1) of the Employment Tribunals Act 1996, and for the time period for detriment proceedings under the 2022 Regulations to account for Early Conciliation.

*What will it now do?*

7.5 This separate statutory instrument regarding Early Conciliation is made so that proceedings related to exclusivity clauses in the 2022 Regulations will be included to the list of "relevant proceedings" under s. 18(1) of the Employment Tribunals Act 1996.

7.6 The Order also extends the time limit to bring a claim to account for Early Conciliation.

7.7 The amendments made by this Order mean that all prospective claimants seeking to bring cases under the 2022 Regulations must first contact ACAS about their dispute and consider conciliation before they can proceed to present a claim at an employment tribunal.

## 8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union or trigger the statement requirements under the European Union (Withdrawal) Act 2018.

## 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, 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, or no significant, impact on business, charities or voluntary bodies.

12.2 There is no significant, impact on the public sector.

12.3 An Impact Assessment has not been prepared for this instrument as the net impact on business from the corresponding affirmative SI (the 2022 Regulations) is expected to be below the de minimis £5m threshold.

## 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 2022 Regulations, which will be subject to an internal review by the Department for Business, Energy and Industrial Strategy within 5 years of their 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 and Richard Kelly, Deputy Directors 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 Kevin Hollinrake MP, Parliamentary Under Secretary of State at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.