

Title: Providing a route of redress for individuals on zero hours contracts who suffer a detriment due to taking a second job IA No: BISLMD 15/11 Lead department or agency: BIS Other departments or agencies:	Impact Assessment (IA)		
	Date: 16 th October 2015		
	Stage: Final (EANCB validation)		
	Source of intervention: Domestic		
	Type of measure: Secondary legislation		
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Summary: Intervention and Options			RPC Opinion: Validated

Cost of Preferred (or more likely) Option			
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2014 prices)	In scope of One-In, Measure qualifies as One-Out?
£ -1.12 million	£ -0.96 million	£ 0.11 million	Yes

What is the problem under consideration? Why is government intervention necessary?

The Small Business, Enterprise and Employment Act inserted clauses 27A and 27B into the Employment Rights Act 1996 which render unenforceable provisions in zero hours contracts (ZHCs) which prohibit the worker from doing work under any other arrangement (a second job). Evidence from the consultation for this policy, and a consultation on tackling avoidance on the ban showed that stakeholders thought that some unscrupulous employers will not comply with the ban. Government needs to intervene to ensure compliance with the ban, and its intended effect of improving the labour market by tackling undue market power of some employers and the negative effects of asymmetric information and improving equity for employees.

What are the policy objectives and the intended effects?

The policy objective is to tackle potential avoidance on the ban on exclusivity clauses in ZHCs in the most effective and proportionate way, by providing individuals negatively affected by employer non-compliance with the ban with an effective means of redress. This should ensure that the improvement in the functioning of the labour market through the banning of exclusivity clauses in ZHCs is achieved.

What policy options have been considered, including any alternatives to regulation?

The policy option is to introduce secondary legislation to create a route of redress in the employment tribunal for workers who have an exclusivity clause in their ZHC (either express or implied) who suffer a detriment from their employer if they work a second job.

At the consultation stage, we also considered using a non-regulatory code of practice to encourage compliance with the ban. A regulatory approach was considered necessary to ensure that avoidance was effectively tackled.

Will the policy be reviewed? It will be reviewed. If applicable, set review date: 2020					
Does implementation go beyond minimum EU requirements?				N/A	
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.		Micro Yes	< 20 Yes	Small Yes	Medium Yes
What is the CO ₂ equivalent change in greenhouse gas emissions? NA				Traded:	
				Non-traded:	

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading option.

Signed by the responsible Minister: Nick Boles

Date: 28th October 2015

Summary sheets of Costs and Benefits

Summary: Analysis & Evidence

Policy Option 1

Description: Regulations will make provision in relation to the right for individuals on ZHCs with exclusivity clauses (either express or implied) to seek redress through the employment tribunal if they suffer a detriment due to taking a second job

FULL ECONOMIC ASSESSMENT

Price Base Year 2014	PV Base Year 2015	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low:	High:	Best Estimate: -1.12

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	1		
High			
Best Estimate		0	0.1

Description and scale of key monetised costs by 'main affected groups'

Compliant employers face ongoing costs from dealing with cases going through early conciliation (£0.04m), and through the employment tribunal (£0.09m).

Other key non-monetised costs by 'main affected groups'

There are no key non-monetised costs.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	N/A		
High			
Best Estimate		N/A	n/a

Description and scale of key monetised benefits by 'main affected groups'

Other key non-monetised benefits by 'main affected groups'

Key assumptions/sensitivities/risks

Discount rate

3.5

We have assumed that the number of workplace disputes arising from perceived non-compliance with the ban on exclusivity clauses in zero hours contracts, and the number of cases taken through the formal route of redress will be in line with general rates for employment rights problems resulting in cases going to the employment tribunal system

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:	In scope of OITO?	Measure qualifies
Costs: 0.1 Benefits: 0.0 Net: -0.1	yes	Zero in

Evidence Base (for summary sheets)

Strategic overview:

1. The Government has rendered unenforceable provisions in ZHCs (either express or implied) which prohibit the worker from doing work under any other arrangement (a second job). The ban commenced on 26th May 2015, and bans any arrangement in a zero hours contract that:
 - a. Prohibits the worker from doing work or performing services under another contract or under any other arrangement; or
 - b. Prohibits the worker from doing so without the employer's consent.
2. The ban was introduced following consideration of the evidence on how ZHCs were used, which identified the need to address some abuse of the employment relationship underpinned by these contracts. To enhance the evidence base, the Government conducted an informal information gathering exercise on the use of ZHCs, and followed this up with a 12-week consultation between 19th December 2013 and 13th March 2014, which received over 36,000 responses.
3. A ZHC is an employment contract in which the employer doesn't guarantee any hours of work, and the individual on the contract is not obliged to accept any work offered.
4. Evidence gathered through these exercises identified that many organisations use ZHCs responsibly and that these contracts can offer flexibility and opportunities to both the employer and individual. However, there was evidence presented that raised concerns around how some ZHCs were used in practice.
5. The policy to prohibit exclusivity clauses in ZHCs was designed to tackle a block on the flexibility for individuals that ZHCs are expected to offer. It will enable those affected to work additional hours if they wish. Those individuals benefitting will no longer need to be dependent on one employer, who may not be able to provide sufficient hours every week, to earn their wages. At the same time, the policy does not remove the flexibility offered under fairly operated ZHCs to employers and those individuals wanting or requiring it.
6. We estimate that between 61,000 and 133,000 individuals on ZHCs would have been subject to an exclusivity clause in their contract (best estimate 97,000), and thus have been enabled by the legislation to get an additional job¹. Based on existing number of those in work taking up second jobs, a smaller number, between 3,300 and 7,300, are expected to actually take an additional job.

Problem under consideration

7. Although the ban on exclusivity clauses in ZHCs has now come into force, individuals on zero hours contracts have no formal route of redress if their employer does not comply with the ban. For instance, an employer may choose to enforce the exclusivity clause and not allow the worker to take a second job, or not offer the individual any hours because they have taken a second job. This would leave the individual on the zero hours contract with little option but to leave and find work elsewhere.

¹ See methodology set out in Annex A below (it is the same approach used in the Banning Exclusivity Clauses in Zero Hours Contracts final impact assessment published in October 2014).

8. The Government carried out a consultation, between the 25th August and the 3rd November 2014, to see whether a formal route of redress was needed. Close to three quarters of respondents (71%) believed that individuals should have a formal route of redress when the ban on exclusivity clauses is infringed by employers.
9. Avoidance of the ban would mean that certain employers who misused ZHCs would continue to get a benefit from preventing their zero hours contract workers from obtaining additional work. These workers would continue to be restricted from taking additional work to boost their earnings, even if they were not allocated sufficient hours in a week.

Background on ZHC usage

10. ZHCs are a relatively uncommon form of employment contract. According to the Office of National Statistics (ONS) Labour Force Survey (LFS), the individuals on ZHCs in their main job represent around 2 per cent of total employment in the UK (around 744,000 people, including self-employed). BIS estimated from the LFS that around 687,000 of these were employees or workers in their main job. The ONS estimates that the number on non-guaranteed hours contracts (at 1.5 million) represent around 4 per cent of workforce jobs in the UK².
11. BIS estimates from the LFS show that of employees or workers on ZHCs in their main job in the second quarter of 2015:
 - ◆ Around 56% were women (compared to around 49% among employees and workers overall).
 - ◆ They were more likely to be aged 16-24 or aged 60 or over than employees or workers overall, with 22% being full-time students.
 - ◆ They were more likely to be in relatively low paid occupations, such as elementary occupations (35%), caring, leisure and other services (22%), and sales and customer services (9%).
12. The ONS data on no-guaranteed hours contracts where individuals on the contracts had recently worked suggested that over a quarter of the 1.5 million contracts were in administrative and support services, with slightly under a fifth in the accommodation and food industry³. Other industries accounting for substantial proportions of individuals working on no guaranteed hours contracts include health and social work.

Rationale for intervention

13. The legislation included in the SBEE Act bans the use of exclusivity clauses in ZHCs. The rationales for introducing this ban were restricting employers from exerting undue market

² ONS, Analysis of Employee Contracts that do not guarantee a minimum number of Hours, September 2015. This provided an estimate of 744,000 individuals (including those who were self-employed, and 687,000 who were employees/workers) whose main job was on a zero hours contract (LFS) and an estimate of 1.5 million contracts that offered no guaranteed hours where work was carried out in the past two weeks (from a survey of employers). <http://www.ons.gov.uk/ons/rel/lmac/contracts-with-no-guaranteed-hours/employee-contracts-that-do-not-guarantee-a-minimum-number-of-hours--2015-update-/employee-contracts-that-do-not-guarantee-a-minimum-number-of-hours--2015-update.html>

³ ONS, Analysis of Employee Contracts that do not guarantee a minimum number of Hours, September 2015, p8

power, preventing market failures related to incomplete, uncertain or asymmetric information, and providing equity for individuals on ZHCs⁴.

14. However, it was felt that some employers would look to circumvent the ban: In the Autumn 2014 consultation, 83% of respondents thought that some employers would be likely to avoid the ban on exclusivity clauses. This would undermine the benefits of the ban on exclusivity clauses in addressing market failure and equity issues. If employers chose to circumvent the ban on exclusivity clauses in ZHCs, then the individuals affected would not be able to work additional hours with another employer to earn extra wages. Those individuals would therefore lose out through an avoidance of the ban, as would those employers who would benefit from the additional output generated by these extra hours. The economy as a whole would not benefit from the extra output which would have resulted.
15. By providing a route for workers to seek redress against non-compliant employers, individuals on ZHCs with exclusivity clauses whose employer infringes the ban will be able to seek compensation for this unfair treatment. This also ensures that employers face consequences if they do not comply with the legislation, undermining any potential benefit from non-compliance.

Other policy options considered

16. At the consultation stage, we also considered using a non-regulatory code of practice to tackle potential avoidance. A regulatory approach was considered necessary to ensure that avoidance was effectively tackled. Employers prepared to take action to specifically avoid the legislative ban on exclusivity clauses in ZHCs are unlikely to be constrained by a non-statutory code of practice. Legislation allows individuals to seek redress from non-compliant employers, which will work to reduce non-compliance and enable action to be taken against employers that are non-compliant.

Policy objective

17. The policy objective is to provide individuals on ZHCs negatively affected by employer non-compliance on the ban on exclusivity clauses in ZHCs with an effective route of redress. This means that employers who are non-compliant face some consequences of their actions, in having to respond to the case against them in the employment tribunal system, potentially leading to payment of compensation. This should help to ensure that the improvement in the functioning of the labour market through the banning of exclusivity clauses in ZHCs is achieved.

Policy options

18. The Government will introduce secondary legislation in Parliament to provide a route of redress for eligible individuals on ZHCs. These regulations will enable individuals to seek redress through the Employment Tribunal system from their employers if the employer does not comply with the ban on exclusivity clauses in ZHCs.

Monetised and non-monetised costs and benefits for mechanisms for tackling avoidance

⁴ BIS, Banning exclusivity clauses in zero hours contracts: Final Impact assessment, October 2014, p11-13 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/368501/bis-14-1127-zero-hours-banning-exclusivity-clauses-final-impact-assessment.pdf

19. This section outlines the potential costs and benefits of the proposal to provide a formal route of redress. Where possible, we have monetised the costs and benefits arising. There is limited data available on the use of exclusivity clauses in employment contracts.
20. The costs and benefits of the ban on exclusivity clauses in ZHCs have been monetised in the related impact assessment⁵ which the Regulatory Policy Committee assessed as fit for purpose. These impacts are therefore not considered in this impact assessment, as they have already been taken account of.
21. It is difficult to quantify the impact of the regulation providing workers a route for redress via the employment tribunal system against employers non-compliant with the ban on exclusivity clauses. There is currently no formal route of redress for individuals whose employers have not complied with the ban on exclusivity clauses in ZHCs. There is therefore no quantitative information available about the level of non-compliance.
22. Therefore, we have used data concerned with individual employment rights disputes in general, and data on employment tribunal claims and Early Conciliation cases to provide an estimate of the costs resulting from the introduction of the right to redress for zero hours contract workers who have an exclusivity clause in their contract.
23. In terms of considering the implications of the policy, in line with RPC guidelines, we are concerned with the direct costs on compliant employers⁶.

No change option

24. Option 0 is the no change option. This provides the baseline against which the policy option is compared. Therefore its costs and benefits are not monetised.

Option 1

25. This option involves implementing secondary legislation to provide a route of redress for eligible individuals on ZHCs who suffer a detriment due to their employer's non-compliance with the ban on exclusivity clauses in ZHCs.

Enforcement: redress through the employment tribunal system

26. Option 1 involves introducing secondary legislation to enable individuals whose employers have not been compliant with the ban on exclusivity clauses to use the employment tribunal (ET) system to seek redress.
27. The employment tribunal system starts with early conciliation, which was introduced in April 2014. Individuals must complete an intention to claim form and submit to Acas within a certain time (normally three months) following the workplace problem. Acas will then offer all claimants the option of early conciliation. If they take this up, the employer is asked if they will take part. If both parties are interested, then early conciliation will take place over a 6 week period. If a settlement is agreed through Acas, then a settlement form is signed, and the parties are legally obliged to abide by the terms of the settlement.
28. If early conciliation doesn't result in an agreed settlement, or is rejected by one of the parties, the claimant can proceed to make an ET claim, as long as the deadline hasn't expired (during early conciliation, progress towards the deadline is halted). To issue a claim, the claimant will have to pay a fee (ET fees were introduced in July 2013). If the

⁵ BIS, *Final Impact Assessment: Banning exclusivity clauses in zero hours contracts*, October 2014.

⁶ RPC, *Impact Assessment Case Histories*, p16.

claim then requires an ET hearing, then a further fee is required. Individuals with a low income, or low capital assets, may be entitled to fee remission.

Transitional costs to employers

29. We have costed employers becoming familiar with the ban on exclusivity clauses in ZHCs in the impact assessment on banning exclusivity clauses in ZHCs⁷. We assume that most employers and individuals rarely go through the employment tribunal system, and have to familiarise themselves with the process as a case arises. Therefore, any familiarisation costs for employers and workers are counted in with the ongoing costs of individual cases: the unit costs of a case will include any familiarisation with processes.

Ongoing costs to employers

30. We estimate that there are 97,000 individuals on ZHCs that have an express or implied exclusivity clause. This is based on the methodology used in the impact assessment on banning exclusivity clauses in ZHCs⁷, which takes the average of the estimates derived from the Labour Force Survey and the ONS business survey on no guaranteed hour contracts. The method is described in Annex A.
31. Currently, as there is no formal system of redress, we do not know how many cases will arise of individuals seeking redress via the ET system due to non-compliance with the ban on exclusivity clauses in ZHCs. Since the introduction of the ban, on 26th May 2015, there is no available evidence from BIS correspondence or elsewhere to suggest a higher rate of employer non-compliance or workplace disputes arising from the ban than from other employment rights regulation.
32. Therefore, we have used general evidence on the proportion of employees who take employment rights problems to the ET system to estimate how many cases may occur on an annual basis. Figures from the Fair Treatment at Work Survey 2008⁸ show that 24% of employees had a workplace problem relating to employment rights in the previous two years, of which 3% had taken their most serious problem to the employment tribunal.
33. If we apply these figures to the number of individuals enabled by the ban on exclusivity clauses in ZHCs⁹, we estimate that around 11,700 had a workplace dispute relating to employment rights each year, of which 349 would go through the employment tribunal process¹⁰. The split between private and public sector is based upon BIS analysis of the data from the Q2 2015 LFS, which shows that 83% of individuals on ZHCs in their main job work in the private sector.

⁷ BIS, *Final Impact Assessment: Banning exclusivity clauses in zero hours contracts*, October 2014. Annex A.

⁸ BIS, *Fair treatment at work report: findings from the 2008 survey*, September 2009, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/192191/09-P85-fair-treatment-at-work-report-2008-survey-errs-103.pdf

⁹ We use this estimate rather than the number estimated to take a second job as non-compliant employers may prevent workers with exclusivity clauses in their ZHCs from taking a second job, so individuals from the wider group may wish to seek redress.

¹⁰ This calculation takes the estimated number who would have had exclusivity clauses, 97,000, multiplying by 24%/2 to get the number with a dispute each year, then multiplying by 3% to get the number going to the ET system. A slightly lower figure is obtained by dividing an annual estimate of the number of cases received by Acas for early conciliation by estimated employee numbers for 2014.

Table 1: Estimated annual numbers of cases going through the ET system in relation to non-compliance with the ban on exclusivity clauses

	<u>Total</u>	<u>Private sector</u>	<u>Public sector</u>
Enabled individuals who would have had an exclusivity clause in their ZHC (nearest 1,000)	97,000	85,000	12,000
Those who have a workplace dispute relating to the ban (nearest 100)	11,700	10,200	1,400
Number of cases taken to the ET system	349	306	43

34.

35. Recent figures from Acas¹¹ show that between April and December 2014, 15% of early conciliation cases were settled through early conciliation, 63% were not settled but did not proceed to an ET claim, and 22% proceeded to an ET claim. Also, in around 21% of early conciliation notifications in 2014-15, individuals or employers rejected the offer of early conciliation.

36. Using these data, we estimate that of the 349 cases:

- ◆ 52 will be settled by early conciliation,
- ◆ 220 will not be settled through early conciliation, but not go on to the ET, and
- ◆ 77 cases will go on to become ET claims.
- ◆ Also, of the 349 cases, 74 will not go through early conciliation, of which some may go on to be ET claims.

Estimating compliance

37. The estimated EANCB figure only covers the costs to businesses who are compliant with employment law, in this case the ban on exclusivity clauses in ZHCs. The costs to business relates to those claims made by individuals on ZHCs working in the private sector.

38. We have followed the approach to estimating the proportion of ET claims that relate to compliant employers that was taken in the final impact assessment relating to the amendment of the merchant shipping regulations on hours of work¹². This assumes that the employer is compliant in all jurisdictional claims where:

- ◆ The claimant is unsuccessful at an ET Hearing ,
- ◆ The case is dismissed at a preliminary hearing, or
- ◆ Struck out (not at a hearing).

¹¹ Acas, Early conciliation update: April 2014 – March 2015, July 2015
<http://www.acas.org.uk/index.aspx?articleid=5352>

¹² Maritime and Coastguard Agency, Final Impact Assessment: Merchant Shipping (Maritime Labour Convention) (Hours of Work) (Amendment) Regulations (“the 2014 Regulations”), October 2013, section 6.10.14 http://www.legislation.gov.uk/ukia/2014/41/pdfs/ukia_20140041_en.pdf

39. In addition, it is estimated that employers are compliant in a proportion of jurisdictional ET claims which were Acas settled or withdrawn (according to the Tribunal statistics – this could include cases that were privately settled). We estimate that around 46% of cases identified as withdrawn were privately settled (based on data from SETA 2013). We then estimate that employers are non-compliant in around 75% of cases: SETA 2013 shows that among claimants who settled, 5% thought they would have lost if the claim had reached an ET Hearing, while among employers who settled, 45% thought the claim would have been unsuccessful at hearing, we take the mid-point, 25% to estimate the proportion of employers who are compliant. For withdrawn cases, SETA 2013 shows that 14% of claimants said they withdrew their claim because they thought they would lose at a hearing. Therefore, we assume that 86% of employers are non-compliant where cases are withdrawn.

40. Based on these assumptions, and using two year averages for jurisdictional claim outcomes from the latest Tribunal Statistics publication¹³, we estimate that around 32% of employers facing an ET claim are compliant.

Table 2: Estimated proportion of employers who are compliant by outcome of jurisdictional claim (3 year average 2011/12 to 2013/14)

	Employer <u>non-compliant</u>	Employer <u>compliant</u>
Acas conciliated settlements	17%	6%
Withdrawn claims	22%	4%
Privately settled	17%	6%
Successful at hearing	9%	
Unsuccessful at hearing		5%
Struck out (not at hearing)		10%
Default judgement	3%	
Dismissed at preliminary hearing		1%
Total	68%	32%

41. Evidence from the Acas evaluation of early conciliation report¹⁴ doesn't allow a clear assessment of whether employers were compliant or non-compliant in cases which did not proceed to tribunal. Therefore, for the Acas cases we have assumed the same proportion of compliance as with the ET claims.

42. By multiplying the figures for estimated number of early conciliation and ET cases by 32% we get the estimated number of cases faced by compliant employers.

¹³ HMCTS, Tribunals and Gender Reassignment Certificate Statistics Quarterly: January to March 2015, June 2015 <https://www.gov.uk/government/statistics/tribunals-and-gender-recognition-certificate-statistics-quarterly-january-to-march-2015> A two year average was used as this was the period covered by fees. For 2014-15, only three of the four quarters were used, as figures for Q3 2014/15 were heavily distorted by a striking out of a large multiple airline case (such that 86% of disposals in that quarter were struck out).

¹⁴ Acas, Evaluation of Acas early conciliation 2015, July 2015, p97 – the table on reasons for not submitting an ET claim only contains four out of 21 options that would enable classification into compliant or non-compliant. These four options suggested that a higher proportion of employers were non-compliant than compliant.

Table 3: Estimated annual numbers of early conciliation and ET cases faced by employers compliant with the ban on exclusivity clauses

	<u>Total</u>	<u>Private sector</u>	<u>Public sector</u>
Number of cases going through early conciliation	89	78	11
Number of ET claims	25	22	3

Ongoing early conciliation costs

43. We have based our estimates for the costs of early conciliation on information available from recent Acas research on early conciliation, and, where required, existing evidence available about pre-claim conciliation. Pre-claim conciliation was a conciliation service Acas offered to selected potential ET claimants prior to the introduction of early conciliation.
44. We estimate that the average unit cost to an employer of going through early conciliation is £454 at 2014 prices. This is based on:
 45. a cost of £312 for employers' median spend on advice and representation in pre-claim conciliation¹⁵, and
 46. the estimated cost of the median time spent by an employer in early conciliation. The 2015 Acas evaluation of early conciliation¹⁶ stated that employers involved spent a median five hours on early conciliation cases. Applying the median hourly wage (excluding overtime) of an HR manager of £23.65 (Acas 2014) uprated by 19.8% to take account of non-wage labour costs¹⁷, we get £142.
47. We assume that employers compliant with the ban on exclusivity clauses in ZHCs will face 89 related cases that go through early conciliation. This produces the following estimated costs for employers.

¹⁵ This uses the figure of £267 used in the BIS, Early Conciliation Final Impact Assessment, February 2014, uprated from 2010 to 2014 prices using the GDP deflator.

¹⁶ Acas, Evaluation of Acas early conciliation 2015, July 2015, p6
<http://www.acas.org.uk/media/pdf/5/4/Evaluation-of-Acas-Early-Conciliation-2015.pdf>

¹⁷ Eurostat, Labour costs per hour in Euros, whole economy excluding agriculture and public administration, 2004-14, April 2015 – BIS estimates from the Eurostat data show that UK non-wage labour costs as a % of wages are 19.8% for 2014. http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Labour_costs_per_hour_in_EUR,_2004-2014_whole_economy_excluding_agriculture_and_public_administration.png

Table 4: Estimated annual costs to employers of going through early conciliation in relation to potential non-compliance with the ban on exclusivity clauses (£000s, 2014 prices)

	<u>Total</u>	<u>Private sector</u>	<u>Public sector</u>
Early conciliation costs	40	35	5

48. The estimated cost to non-compliant employers of dealing with early conciliation cases, based on facing 186 cases going through early conciliation, is £84,000 (£74,000 private sector, £10,000 public sector). These costings don't count towards the net present value or EANCB estimates.

Ongoing employment tribunal costs

49. The estimated unit costs of dealing with employment tribunal claims to employers are based on information collected in the Survey of Employment Tribunal Applications (SETA) 2013¹⁸. The estimated average unit cost of an employer dealing with an ET claim, for all types of ET outcome, is £3,600 at 2014 prices.

50. The £3,600 estimate is calculated as follows. SETA 2013 shows that the median time spent dealing with an ET claim by an employer is 3 days at director level and 2 days for other staff. Assuming a workday of 8 hours, we use data from ASHE 2014 on the median pay for chief executives and senior officials (£38.33) and, for other staff, HR managers (£23.65), uprating both by 19.8% to account for non-wage labour costs, to estimate the median cost of time spent by employers on ET claims. This comes to around £1,600. Evidence from SETA indicates that the median payment by employers for advice and representation, across all outcomes of ET claim, was £2,500 at 2012 prices. This was uprated to £2,605 at 2014 prices using the Consumer Prices Index. However, only 78% of employers paid for advice and representation, so the £2,605 was multiplied by 0.78 to give a median figure of around £2,000 for advice and representation for all employers.

51. We estimate that compliant employers will face 25 ET claims. This produces the following estimated costs for employers.

Table 5: Estimated annual costs to compliant employers of going through employment tribunal claims related to the ban on exclusivity clauses (£000s, 2014 prices)

	<u>Total</u>	<u>Private sector</u>	<u>Public sector</u>
ET costs	90	79	11

52. The estimated cost to non-compliant employers of dealing with ET claims, based on facing claims, is £191,000 (£166,000 private sector, £25,000 public sector). These costings don't count towards the net present value or EANCB estimates.

Total ongoing costs

53. The total estimated annual costs for employers due to dealing with early conciliation cases and ET claims are set out in the table below.

¹⁸ BIS, Findings from the survey of Employment Tribunal Applications 2013, June 2014.

Table 6: Total estimated annual costs to compliant employers of dealing with cases going through the ET system (£000s, 2014 prices)

	<u>Total</u>	<u>Private sector</u>	<u>Public sector</u>
Early conciliation costs	40	35	5
ET costs	90	79	11
Total compliant employer costs	130	115	16

Ongoing benefits

54. The opportunity for workers to seek redress if their employer has breached the ban on exclusivity clauses will enable them to obtain compensation for any negative impact resulting from the breach, such as a loss of earnings. We have not attempted to monetise these potential benefits. The right to seek redress will also act as a deterrent to non-compliance, as if employers breach the ban they potentially face the costs of an ET claim. Therefore the right to seek redress also reduces the likelihood that workers will be faced by a non-compliant employer.

55. Compliant employers will benefit because non-compliant employers will face early conciliation and ET claims, incurring costs and potential awards against them, thus mitigating any competitive advantage gained through non-compliance.

Risks and assumptions

56. There are some risks to the assumptions made in monetising the costs and benefits:

- ◆ There are no available data on the number of workplace disputes about potential non-compliance with the ban on exclusivity clauses in ZHCs, and currently no formal route to redress. We have used general data about workplace employment rights disputes, and the proportion of these that go on to the tribunal system. There is a risk that a higher proportion of potential beneficiaries from the ban may face non-compliance, and a higher proportion may go on to the employment tribunal process. We think that risk is small, for the following reasons:
 - a. According to BIS analysis of the Q2 2015 LFS, over three-quarters of workers on ZHCs in their main job were not looking for a replacement or additional job, with around 60% of zero hours contract workers not looking for or preferring more hours of work.
 - b. According to analysis by CIPD in 2013, around 60% of zero hours contract workers agreed or strongly agreed that they were satisfied with their job, in line with the 59% of workers generally who were satisfied with their job¹⁹. These statistics suggest that most zero hours contract workers are content with their current employment, with the proportion satisfied similar to that for the workforce in general.
 - c. According to BIS analysis, Only 6.5% of workers on ZHCs in their main job had a second job in Q2 2015, while only 4% of workers on ZHCs were looking for an additional job. This suggests that the numbers of

¹⁹ CIPD, zero hours contracts: myth and reality, November 2013, p4.

individuals enabled by the ban who actually take or look for additional work will be low, which indicates that potential incidents of non-compliance with the ban will be correspondingly low.

- d. Acas figures on early conciliation show that there were 83,000 early conciliation cases in 2014/15²⁰. However, early conciliation notification only became compulsory on 5th May. A full year of compulsory early conciliation notification might yield close to 90,000 early conciliation cases. The LFS suggests that on average for 2014-15 there were 26.1 million employees. Dividing the former by the latter suggests that around 0.34% of employees take a case to the employment tribunal system, indicating that use of formal routes to redress remains low.

57. We have conducted some sensitivity analysis around our estimates:

- ◆ If 5% of those with a workplace dispute relating to non-compliance with the ban on exclusivity clauses took a case to the employment tribunal system, then the annual cost to compliant employers would be around £245,000.
- ◆ If 30% of workers enabled by the ban had a workplace dispute relating to non-compliance with the ban, and 3% made use of the formal route of redress, the annual cost to compliant employers would be around £183,000.
- ◆ If enabled individuals' experience of non-compliance dropped to 18%, or the percentage of those experiencing non-compliance who used the formal route of redress fell to 2%, then the annual cost to compliant employers would fall to around £100,000.

Direct costs and benefits to business calculations

58. The monetised estimates of costs and benefits to business of the potential policy options exemplified are:

- ◆ The annual cost to compliant business in dealing with workers claims via the ET system for redress due to non-compliance with the ban on exclusivity clauses is estimated at:
 - i. £0.04 million (at 2014 prices) for cases going through early conciliation (Table 4).
 - ii. £0.09 million (at 2014 prices) for ET claims (Table 5).
- ◆ Overall, the proposed policy option estimates equivalent annual net costs to business (at 2014 prices) of £0.1 million.

²⁰ Acas, Early conciliation update: April 2014 – March 2015, July 2015
<http://www.acas.org.uk/index.aspx?articleid=5352>



Annex A

Estimating the number of individuals on ZHCs who had exclusivity clauses

1. We estimate that there are around 97,000 workers who are on ZHCs which would have had an exclusivity clause. This is based on averaging the estimates for individuals on ZHCs in their main job from the Labour Force Survey (LFS) and the estimated number of contracts that offered no guaranteed hours (NGHCs) which provided recent work, taken from an ONS survey of businesses. This approach was used in the final impact assessment on banning exclusivity clauses in ZHCs²¹. It was taken because:
 - a) the LFS estimate reflects the perception of individuals, so may miss out on some individuals on ZHCs who are unaware that they are on this type of contract, perhaps because it doesn't reflect their working pattern, and
 - b) The NGHC estimate is a measure of contracts rather than individuals, and would count all the 'operational' NGHCs of individuals who had more than one NGHC. It would also count the NGHCs of individuals who had this contract for a second job rather than a primary job²². The survey also includes (some) agency workers (see background information). Therefore, this figure would overestimate the number of individuals on a ZHC in their main job.
2. The averaging provides a best estimate of 1,022,000 workers on ZHCs without a second job, of which 851,000 are in the private sector and 171,000 are in the public sector²³.
3. There is no specific information about the proportion of employers using ZHCs that make use of exclusivity clauses. A major source of information on this is the CIPD *Zero Hours Contracts: Myth and Reality* report, which identifies the proportion of employees on ZHCs who are never allowed to work for another employer even when their primary employer has no work for them²⁴. While not specifically referring to exclusivity clauses, these estimates indicate the extent to which restrictions operate in practice.

Table 1: Proportion of employees (on ZHCs) never allowed by their primary employer to work for another employer, 2013

	<u>Private sector</u>	<u>Public sector</u>	<u>Non-profit sector</u>
Employees never allowed to work for another employer (%)	10	7	13

²¹ BIS, Banning Exclusivity Clauses in zero hours contracts: final impact assessment, October 2014, Annex A.

²² ONS, *Analysis of Employee Contracts that do not guarantee a minimum number of Hours*, 2nd September 2015, p2.

²³ This takes the average of estimates of 642,000 workers on ZHCs without a second job (BIS estimate from LFS 2015 Q2) and 1,403,000 NGHCs (BIS estimate from ONS relating to January 2015), and applies the breakdown from the LFS of the proportions of ZHC workers in the private and public sectors (83% and 17% respectively). New analysis of employee contracts that do not guarantee a minimum number of hours, published by the ONS in September indicated that there were 1.5 million active NGHCs in January 2015, and 744,000 individuals (including self-employed) in ZHCs in their main job in Q2 2015. These figures, following the same approach, suggest an estimated 1,093,000 workers on ZHCs in their main job, of which 910,000 were in the private sector and 183,000 were in the public sector.

²⁴ CIPD, *Zero Hours Contracts, Myth and Reality*, November 2013, p23.

Source: CIPD

4. Applying the CIPD percentages to the estimated figures in paragraph 12, we estimate that there are 97,000 ZHC workers with exclusivity clauses in their contracts, of which 85,000 are in the private sector.

Limitations of the Data

5. Due to the different methods and definitions used in producing ZHCs statistics, there is no definitive measure of the numbers employed on ZHCs. We have therefore taken to average the two ONS measures, reflecting the particular measurement issues of the surveys in relation to ZHCs (the LFS is more likely to be an overestimate, and the ONS business survey figure an overestimate of numbers of workers on ZHCs in their main job). We have also estimated the numbers on ZHCs with exclusivity clauses using the CIPD data, which is an indicator of their use rather than a direct measure.

Annex B

Small and Medium Business Assessment

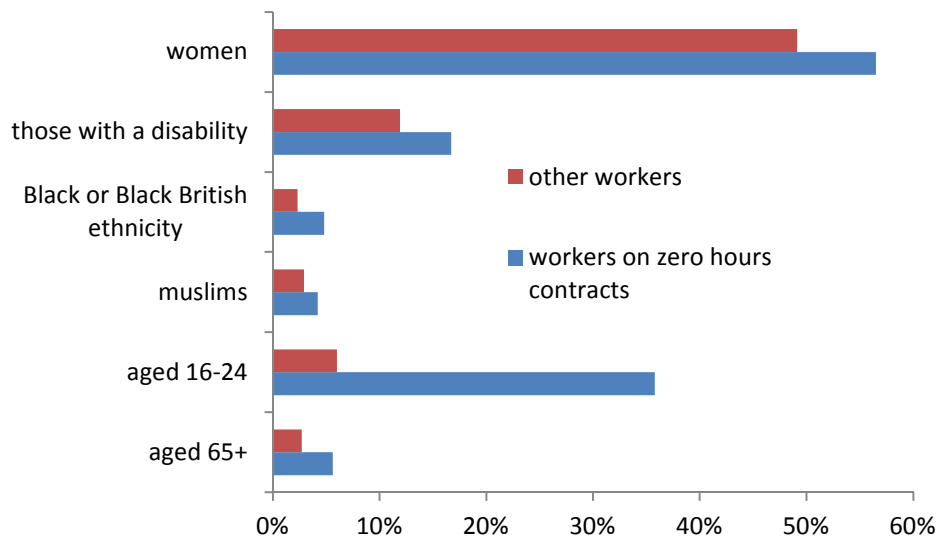
1. The policy option is aimed at enabling individuals affected by employers' non-compliance with the ban on exclusivity clauses to seek redress via the employment tribunal process.
2. The consultation did consider a non-statutory approach of either a voluntary code of practice, or best practice guidance setting out that exclusivity clauses in ZHCs are made legally unenforceable by the amendments to the Employment Rights Act 1996. However, consultation respondents did not consider this likely to be an effective option, as employers attempting to avoid the ban on exclusivity clauses would have had to have actively done so and therefore were likely to consider that the costs of compliance outweighed potential benefits for them. To help ensure individuals enabled by the ban on exclusivity clauses in ZHCs are able to take an additional job if they want to, without suffering adverse consequences, the route to redress must be open to workers on ZHCs with small and micro businesses as well as those with larger businesses.
3. The policy option would have low costs for some compliant employers whose zero hours contract workers perceive are not complying with the ban. Data from the ONS business survey suggested that large employers are more likely to employ workers on ZHCs than small or micro employers: Around 50% of employers with 250 or more employees make use of ZHCs, compared to just 10% of those with 20 or fewer employees²⁵.

Equality Assessment

4. The Department for Business, Innovation and Skills (BIS) is subject to the public sector equality duties set out in the Equality Act 2010. An equality analysis is an important mechanism for ensuring that we gather data to enable us to identify the likely positive and negative impacts that policy proposals may have on certain groups and to estimate whether such impacts disproportionately affect such groups.
5. The policy proposal considered in this IA should benefit those individuals on ZHCs with exclusivity clauses, as the policy objective is to help ensure that employers are compliant with the ban on exclusivity clauses in ZHCs. The policy enables those individuals to seek redress through the employment tribunal system if their employer is not compliant with the ban. The ban on exclusivity clauses in ZHCs will benefit those individuals enabled who wish to work more hours a week than their current job is usually able to provide (or able to provide each week).
6. We have considered the extent to which workers on ZHCs are more likely to be people with a protected characteristic, relative to employees/workers who are not on a zero hours contract. The data from the LFS for the second quarter of 2015 suggests that this is the case for women, individuals aged 16 to 24 and individuals aged 65 or over, those of black or black British ethnicity, people with a disability and Muslims.

Fig 1A: Comparison of employees with some protected characteristics, by type of employment contract

²⁵ ONS, Analysis of employee contracts that do not guarantee a minimum number of hours, September 2015, p6.



Source: LFS

The Family Test

6. We do not expect a cost to families as a result of the implementation of this legislation.

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