

SMALL BUSINESS, ENTERPRISE AND EMPLOYMENT ACT 2015

EXPLANATORY NOTES

BACKGROUND AND SUMMARY

Part 11: Employment

Equal pay: Transparency

74. The gender pay gap is an important indicator of a range of gender equality issues, including occupational segregation and lower seniority of women within business. The Government wants to build on the voluntary gender reporting initiatives by using the powers under section 78 of the Equality Act 2010 (gender pay gap information) to require employers with at least 250 employees to have more formal reporting arrangements.
75. [Section 147](#) therefore requires the Secretary of State to make regulations under section 78 of the Equality Act 2010 no later than a year after this Act receives Royal Assent. Employers and others with an interest must be consulted on the proposals.

Whistleblowing

76. During the passage of the Enterprise and Regulatory Reform Act 2013, the Government committed to run a call for evidence on whistleblowing in order to establish if there was a case to make changes to the existing statutory framework. The responses to the call for evidence included comments on the role of regulators and other bodies who are prescribed as recipients of whistleblowing disclosures for the purposes of Part 4A of the Employment Rights Act 1996. The comments indicated a lack of consistency in the approach taken by these “prescribed persons” and a lack of communication by them. Section 148 aims to address these problems by giving the Secretary of State a power to require prescribed persons to report annually on the whistleblowing disclosures they receive.
77. On 11 February 2015, Sir Robert Francis QC published the report of his whistleblowing review (“Freedom to Speak Up”) which considered how to build an open and honest reporting culture in the NHS. The report stated that legal protection should be enhanced and referred specifically to job applicants who faced discrimination by employers (about whom the protected disclosure had not been made) on the basis that they had previously made a protected disclosure. Section 149 aims to address such discrimination and provides the Secretary of State with a power, through regulations, to prohibit defined NHS employers from discriminating against a job applicant because it appears to the NHS employer that the applicant has made a protected disclosure.

Employment Tribunals

78. This Act includes provisions to address two issues that impact upon the operation of the Employment Tribunal system – the problems caused by late notice and multiple

postponements of hearings, and the failure of a number of respondents to pay the awards Tribunals make against them.

79. Unnecessary or short notice postponements can increase the time Employment Tribunals take to reach a decision and lead to additional costs for those involved. To reduce the time and costs associated with postponements the Act will:
- i. allow the Secretary of State, in secondary legislation, to place a limit on the number of successful applications for postponements a party can have in a case, other than in exceptional circumstances; and
 - ii. require the Secretary of State, in secondary legislation, to oblige Employment Tribunals to consider the use of cost orders where a successful late application for postponement is made at short notice before a hearing.
80. Currently only around half of claimants receive any form of payment of their Employment Tribunal award prior to enforcement. This improves for those who pursue their award, but the levels of those receiving no payment remain high.
81. To help address this problem, this Act will allow the imposition of a financial penalty on non-compliant respondents with the aim of encouraging compliance with Employment Tribunal rulings and the prompt payment of awards. The provisions will also cover non-payment of sums owed in settlement agreements reached following ACAS conciliation.

National Minimum Wage

82. The National Minimum Wage Act 1998 (“NMWA”) provides that, subject to some exceptions, a worker who qualifies for the national minimum wage (“NMW”) shall be remunerated by the employer at a rate which is not less than the NMW. Any employer who has underpaid one or more of its workers can be served with a notice of underpayment (“NOU”) which sets out the level of arrears for each worker covered by the NOU and the period to which it relates. Unless the Secretary of State has otherwise directed, the NOU also sets out a fixed penalty calculated by reference to the arrears owed to the workers covered by notice for the period covered by the NOU. This penalty is subject to a maximum figure for the notice; this figure can be amended by secondary legislation and at present is £20,000.
83. On 27 November 2013 the Prime Minister David Cameron announced “We are also clamping down on those who employ people below the minimum wage. They will pay the price with a fine of up to £20,000 for every under-paid employee”. Part 11 of the Act contains measures that amends section 19A of the NMWA so that the maximum penalty will be determined by the amount owed to each worker as stated in the NOU and the limit on the penalty will be on the extent to which the amount owed to each individual worker can be taken into account.

Exclusivity Terms in Zero Hours Contracts

84. Zero hours contracts have no exact definition but can broadly be described as employment contracts that do not guarantee the individual hours of work or income. Following a review in 2013, which involved discussions with trade unions and business groups, the Government decided to consult on the issue of zero hours contracts. In particular, the consultation focused on a lack of transparency about these contracts and the merit of exclusivity terms, which prevent an individual from working for more than one employer. That consultation ran from December 2013 to March 2014, and received over 36,000 responses. The vast majority (83%) of these responses were in favour of banning exclusivity terms in zero hours contracts as they were considered to be unjustifiable.
85. Following that first consultation, the Government decided to render unenforceable exclusivity terms in zero hours contracts. This will allow individuals engaged on a zero

hours contract, whose current employers are unable to offer them enough work, to boost their income by working elsewhere if they so wish.

86. The Small Business, Enterprise and Employment Act 2015 includes an order making power that allows for Regulations to tackle avoidance of the exclusivity ban and provide routes of redress. Following a consultation in 2014 on that order making power, draft proposals for those Regulations were published on 11 March 2015.

Public Sector Redundancy Payments

87. [Sections 154 to 157](#) will give HMT (or, in relation to Scotland, the Scottish Ministers) a power to place obligations on public sector workers that receive exit payments. This will include requiring the repayment of the exit payment where an individual is re-employed in the same part of the public sector after a period of less than 1 year. The sections will also allow the appropriate Secretary of State (or the Scottish Ministers) to waive this requirement in certain circumstances.

Concessionary coal

88. On 4 March 2015, it was announced that the Government would assume responsibility and meet the costs of around 700 employees of UK Coal Production Ltd and certain other UK Coal companies. The Act enables the Government to support UK Coal Production Ltd by way of meeting the company's concessionary fuel obligation to members of its workforce in accordance with the rules on regular and proper expenditure.
89. Due to the rules on what constitutes regular and proper expenditure, this expenditure cannot rest on the Supply and Appropriation Act. This Act applies to a person's contractual entitlement to concessionary coal or payments in lieu of concessionary coal arising in connection to his employment at UK Coal Production Ltd, UK Coal Thoresby Limited and UK Coal Kellingley Limited. This person includes an employee, redundant person, retired person or in some cases, a dependant of such persons. In the case of a dependant, they will not have a direct contractual entitlement with the company but their entitlement would be referable to a contractual right. UK Coal Production Ltd, UK Coal Thoresby Limited, UK Coal Kellingley must be carrying on the business of deep coal-mining (as opposed to opencast coal-mining) on 1 January 2014.