

SMALL BUSINESS, ENTERPRISE AND EMPLOYMENT ACT 2015

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 11: EMPLOYMENT

Exclusivity in zero hours contracts

Section 153: Exclusivity terms unenforceable in zero hours contracts

842. This section inserts two new sections, 27A and 27B into the Employment Rights Act 1996 ('ERA').
843. Section 27A renders unenforceable a provision in a zero hours contract which prohibits the worker from working for another employer. Section 27A(1) defines a zero hours contract as a contract of employment or a workers' contract under which a worker agrees to perform personally work or services when that work is offered by an employer, but where there is no certainty any hours of work will be made available.
844. Section 27A(3) provides that a provision in a zero hours contract which prohibits the worker from doing work under any other arrangement is unenforceable. This means that a worker on a zero hours contract can work for another employer and the employer cannot take any legal action to prevent the worker from doing so.
845. However, when an Employment Tribunal considers mutuality of obligation in terms of determining the employment status of an individual working under a zero hours contract, the Employment Tribunal can ignore the prohibition on exclusivity terms in section 27A(3). This avoids any risk that by prohibiting exclusivity terms in zero hour contracts, an individual who might have been held to be an 'employee' by virtue of such an exclusivity clause, could lose that status and their eligibility to certain rights. Exclusivity terms are rendered void and unenforceable against the worker for other purposes.
846. This provision does not affect the current common law position regarding restrictive covenants (including exclusivity clauses) in contracts other than zero hour contracts. Under the common law, it is expected that an exclusivity clause in a contract of employment will be upheld by the courts, as long as it is no more than is adequate to protect the employer's legitimate interests in the circumstances. An employer will need a good reason to justify an exclusivity clause in any contract of employment as it could be deemed an unreasonable restraint on the individual's freedom to work.
847. On commencement, section 27A will apply to existing zero hour contracts as well as those which are entered into after the new section comes into force.
848. Section 27B(1) provides a power for the Secretary of State to make regulations to further ensure that zero hours workers are not restricted from working for another employer. This power could be used to deal with attempts by employers to avoid the ban on

exclusivity terms in zero hour contracts provided for in section 27A. This is not a power to regulate zero hours contracts in general. It is a power to regulate contractual provisions which restrict a worker from doing other work. This could involve extending the prohibition on exclusivity terms to other types of contract and/or providing remedies or causes of action for those already protected under section 27A.

849. Section 27B(2) provides a power for the Secretary of State to extend the definition of 'zero hours workers' to cover other individuals who work under other prescribed contracts. The Secretary of State can, when doing so, consider matters such as the income, rate of pay or working hours specified in that contract. For instance, if considered appropriate, the provisions which make exclusivity terms unenforceable in zero hour contracts could be extended to protect individuals who earn below a certain threshold or income or work below a certain threshold of guaranteed hours.
850. Section 27B(5) also sets out further provisions that may be made by the Secretary of State to deal with exclusivity clauses. These might include provisions to amend affected contracts, measures to impose financial penalties on employers or measures to compensate zero hours workers. Furthermore, the power to make further provisions will also allow the Secretary of State to consider whether any express rights need to be conferred on zero hours workers to better protect their interests. This might include a new cause of action in the Employment Tribunal, for example, if this is considered appropriate.