These notes refer to the Small Business, Enterprise and Employment Act 2015 (c.26) which received Royal Assent on 26 March 2015

SMALL BUSINESS, ENTERPRISE AND EMPLOYMENT ACT 2015

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 11: EMPLOYMENT

Whistleblowing

Section 148: Protected disclosures: reporting requirements

814. This section inserts a new section 43FA in to Part 4A of the Employment Rights Act 1996 (ERA), which provides protection for workers who blow the whistle on malpractices by their employers or third parties.

815. The whistleblowing framework was established by the Public Interest Disclosure Act 1998. Its purpose is set out in the preamble as, "an Act to protect individuals who make certain disclosures of information in the public interest; to allow such individuals to bring action in respect of victimisation".

816. A worker who blows the whistle, by making a protected disclosure in accordance with the criteria set out in Part IVA sections 43B to 43H of the ERA, has the right not to be unfairly dismissed or suffer a detriment as a result of having made that disclosure.

817. For a disclosure to be protected by the provisions, the worker must make sure it is either made internally to their employer or another responsible person or to various external bodies including a legal advisor, a Minister of the Crown or a prescribed person listed on the Public Interest Disclosure (Prescribed Persons) Order 1999 (PID(PP)O).

818. Under the existing legislation, there is no legal obligation on prescribed persons to take any action in relation to the public interest disclosures that they receive.

819. 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 whistleblowing framework. The responses to the call for evidence indicated a lack of consistency in the approach taken by bodies on the PID(PP)O, and a lack of communication by prescribed persons.

820. This section provides a power for the Secretary of State to require certain bodies listed on the PID(PP)O to report annually on disclosures by workers. The content of the report will be prescribed by regulations, which will also determine how the report is published and timing of the report. The Secretary of State also has the power to make further regulations setting out additional bodies to report annually. These regulations will be subject to parliamentary scrutiny by debate in both Houses.

821. The section makes provisions to protect both the identity of the individual who has made the disclosure and the employer or organisation to which the disclosure relates.

822. This section also allows the Secretary of State to make later amendments to the content of the annual report or prescribe different methods or timing for publication of the report. This would be subject to a lighter parliamentary procedure. This flexibility enables the Secretary of State to ensure that the information being captured and reported is relevant as circumstances change over time and to ensure that the method of publication remains effective.

Section 149: Protection for applicants for employment etc. in the health service

823. This section inserts a new section into the Employment Rights 1996, which gives the Secretary of State a power, through Regulations, to prohibit defined NHS Employers in England, Scotland and Wales from discriminating against job applicants because it appears to the NHS employer that the applicant has made a protected disclosure (within the meaning given by section 43A of the Employment Rights Act 1996). For the purposes of this section, an NHS employer discriminates against an applicant if, because it appears to the NHS employer that the applicant has made a protected disclosure, the NHS employer refuses the applicant's application or in some other way treats the applicant less favourably than it treats or would treat other applicants in relation to the same contract.

824. The section defines who would be an 'applicant' for the purposes of Regulations. In addition, the Secretary of State through such regulations may also confer jurisdiction (including exclusive jurisdiction) on employment tribunals or the Employment Appeal Tribunal, make provisions for the grant or enforcement of remedies specified by a court or tribunal, and make provision for the making of awards of compensation calculated in accordance with the regulations.

Employment Tribunals: Failure to pay sums

Section 150: Financial Penalty for failure to pay sums ordered by employment tribunal etc

825. This section inserts a new Part, 2A, into the Employment Tribunals Act 1996 to allow financial penalties to be imposed on employers who do not pay workers the award that the Employment Tribunal has ordered (or awards ordered on a relevant appeal) including costs and sums to cover preparation time as awarded by an Employment Tribunal. Employers who do not pay costs (in Scotland, expenses) awarded against them to cover a worker's Employment Tribunal fee can also be required to pay a penalty under the new provisions, as can employers who fail to pay sums due under Acas conciliated settlements (new sections 37A to 37D). The financial penalty regime will be operated by enforcement officers appointed or authorised by the Secretary of State (new section 37M).

826. The way that the provisions will work in the case of an unpaid Employment Tribunal award is that the procedure for imposing a penalty will start, at the earliest, when the time for appealing the Employment Tribunal decision has expired without an appeal being made (new section 37B(5)) and there are no unresolved matters in relation to an application for costs. As a first stage in the procedure, the employer will be told – in a warning notice – that the intention is to impose a financial penalty on them. They will then have 28 days either to pay the whole unpaid amount of the award or settlement sum or to set out their case for why no financial penalty should be imposed (new section 37E). Where the unpaid amount is paid before the end of the 28 day period it is to be treated as paid in full.

827. If, having taken what the employer has said into account, the enforcement officer is still minded to impose a financial penalty, the officer will issue a penalty notice. The amount of the penalty will be based on the total amount that remains unpaid to the worker, including interest on the award payable on the last date for responding to the warning notice, as well as any amount the employer has been told to pay in respect to

employment tribunal fees: it will be 50% of the sum owed with a minimum of £100 and a maximum of £5000 (new section 37F). In cases where an employer has defaulted on an agreement to pay by instalments, the penalty will be based on the whole unpaid amount (new section 37D). Penalties will be payable to the Secretary of State and ultimately into the Consolidated Fund (new section 37H (6)).

828. Where a penalty notice has been issued the amount of the penalty can be reduced by 50% if both the penalty and the whole unpaid amount are paid within 14 days of the penalty notice (new section 37F (9) to (11)).

829. There are procedures for withdrawing and replacing warning notices (new Section 37I) and penalty notices (new section 37J) if they are defective. If a penalty notice has been served following a warning notice which is later withdrawn, that penalty notice will cease to have effect and the employer will be repaid with interest any amount that they have paid under the penalty notice.

830. If an enforcement officer withdraws a penalty notice they may remedy the defects and serve a replacement penalty notice to the employer. If a penalty notice is withdrawn and not replaced, an employer must be repaid any sum with interest that they have paid under the withdrawn notice.

831. Under new section 37G an employer has 28 days beginning with the day the penalty notice was served to appeal the notice or the amount of the financial penalty specified. The appeal is to an Employment Tribunal.

832. Where a penalty is not paid if will be subject to interest and recoverable through the relevant court (new section 37H).

833. New sections 37N and 37O provide the Secretary of State with powers to make regulations to make specific amendments to Part 2A of the Employment Tribunals Act 1996 and allow the provisions to apply with modifications in certain circumstances.

834. Subsections (4) and (7) of the section make provisions in relation to disclosure of information for the purposes of the provisions. Subsection 4 means that a worker cannot be prevented from providing information about their ACAS conciliated settlement to an enforcement officer if a settlement sum is unpaid. Subsection (7) also amends the Trade Union and Labour Relations (Consolidation) Act 1992 to put an enforcement officer on the same footing as anyone else to whom ACAS discloses information.

Employment tribunals: Postponements

Section 151: Employment tribunal procedure regulations: postponements

835. This section amends sections 7 (employment tribunal procedure regulations), 13 (costs and expenses) and 13A (payments in respect of preparation time) of the Employment Tribunals Act 1996 (‘the 1996 Act’) to insert powers to make rules on the determination of applications for postponement, and on the possible cost implications of postponements being granted.

836. Subsection (2) inserts a new provision into section 7 of the 1996 Act to expressly allow Employment Tribunal procedure regulations to include rules limiting the number of postponements that can be granted to a party on their application and provide for the procedure regulations to set out in more detail how the new rule would apply. It further explains that the provision also applies to adjournments.

837. Subsection (3) amends section 13 of the 1996 Act so that Employment Tribunal procedure regulations on costs have to include provisions obliging an Employment Tribunal to consider making a cost order against the successful applicant for a late postponement of an Employment Tribunal hearing.

838. Subsection (4) inserts a similar provision into section 13A of the 1996 Act in respect of time preparation orders.

National Minimum Wage

Section 152: Amount of financial penalty for underpayment of national minimum wage

839. This section amends section 19A of the National Minimum Wage Act 1998. Under section 19 of this Act an enforcement officer can issue a notice of underpayment to an employer requiring that employer to pay its workers any underpayment of the national minimum wage specified in the notice. The notice of underpayment also contains a financial penalty calculated in accordance with section 19A of the Act. Section 19A sets maximum and minimum limits for the penalty; the maximum is £20,000 per notice. This section amends section 19A so that the maximum penalty which can be imposed on an employer by a notice of underpayment is limited by the amount owed to each worker within the scope of the notice.

840. Subsection (3) provides that the arrears owed to each worker, subject to a maximum figure for each worker, forms the basis of the penalty calculation. The maximum arrears per worker provided for is £20,000 but can be increased (or decreased) by statutory instrument. The relevant percentage of the arrears owed which is taken into account in setting the penalty (currently 100%) can also be replaced by a different percentage by statutory instrument.

841. Subsections (4) and (5)(b) remove the power to make regulations to set an overall limit on the penalty which can be imposed through a notice of underpayment.

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.

Public sector exit payments

Section 154: Regulations in connection with public sector exit payments and Section 155Section 154(1): further provision

851. These sections establish a power to make regulations to require the repayment of a staff exit payment made to a public sector worker in the case that they return to work in the public sector within 12 months. The power can be used to specify which workers, which employers, and which staff exit payments are in scope, and how much of the staff exit payment falls to be repaid.

Section 156: Power to make regulations to be exercisable by the Treasury or the Scottish Ministers

852. This section enables the Scottish Ministers to use the power to make regulations in respect of staff exit payments made by Scottish public bodies, and the Treasury to use the power to make regulations in respect of all other staff exit payments made to public sector workers throughout the UK.

Section 157: Power to Secretary of State to waive repayment requirement

853. This section provides the Secretary of State with a power to waive the requirements of the Treasury regulations in specific circumstances, and the Scottish Ministers with the same power in respect of the Scottish regulations.

Section 158: Concessionary Coal

854. Subsection (1) of this section 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.

855. Subsection (2) provides the enabling power to allow the Secretary of State to make payments in order to secure a person's entitlement to concessionary coal or payments in lieu of concessionary coal.

856. Subsection (3) provides for HMT's consent.

857. Concessionary coal is defined in subsection (4).