



Department
for Business
Innovation & Skills

Impact Assessment

Consultation on tackling
avoidance of ban on exclusivity
clauses in zero hours contracts

OCTOBER 2014

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Title: Tackling avoidance on ban on exclusivity clauses in zero hours contracts in the UK IA No: BISLMD002 Lead department or agency: BIS Other departments or agencies:	Impact Assessment (IA)		
	Date: 6 th October 2014		
	Stage: Consultation		
	Source of intervention: Domestic		
	Type of measure: Secondary legislation		
Contact for enquiries: Ivan Bishop ivan.bishop@bis.gsi.gov.uk Abbey 1, Floor 3, 1 Victoria Street, London, SW1H 0ET			
Summary: Intervention and Options			RPC Opinion: Awaiting Scrutiny

Cost of Preferred (or more likely) Option			
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, Measure qualifies as One-Out?
£ N/A	£ N/A	£ N/A	Yes In/out/zero net cost

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

The Government has introduced a clause in the Small Business, Enterprise and Employment Bill that will ban the use of exclusivity clauses in employment contracts which guarantee no hours (zero hours contracts). During the consultation for this policy, stakeholders indicated that such a ban may be straightforward for unscrupulous employers to circumvent. If the ban was not complied with, then 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 would be negated. Consequently, if avoidance of the ban is likely to be high, then Government needs to intervene to ensure compliance, and the improved functioning of the labour market. The consultation seeks evidence about the potential extent of avoidance. **There is currently no preferred policy option.**

What are the policy objectives and the intended effects?

The policy objective is to tackle potential avoidance on the ban on exclusivity clauses in zero hours contracts in the most effective and proportionate way, and provide individuals on zero hours contracts negatively affected by employer non-compliance 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 zero hours contracts is achieved.

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

The possible policy options suggested in the consultation to tackle non-compliance with the ban on exclusivity clauses in zero hours contracts include:

- Non-statutory codes of practice relating to the ban on exclusivity clauses
- A legislative response involving extending the range of employment contracts covered by the ban on exclusivity clauses, determined by a particular threshold, based on income, hours worked or hourly pay-rate.

The consultation also identifies potential mechanisms for individuals affected by non-compliance to seek redress, the impact of which will be assessed when the responses to the consultation have been assessed and the possible mechanisms have been considered in more detail.

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:

Date: October 2014

Summary sheets of Costs and Benefits

Summary: Analysis & Evidence

Policy Option 1a

Description: Regulations will ban exclusivity clauses in employment contracts that offer a basic working week of less than 35 hours (in addition to ZHCs).

FULL ECONOMIC ASSESSMENT

Price Base Year 2013	PV Base Year 2015	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low:	High:	Best Estimate: 71.99

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	1		
High			
Best Estimate		1.3	0.4

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

Employers face one off familiarisation costs of £0.3 million for the legislation banning exclusivity clauses. Some employers will also amend their affected contracts to include confidentiality clauses (£1m). Employers will face ongoing reorganisation costs of £0.4 million a year due to additional unavailability of workers no longer restricted by exclusivity clauses.

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

There are no key non-monetised costs. We have not costed the possibility that employers may make enabled individuals redundant due to the new policy as we consider the risk of this happening very low: Workers will still primarily be available for their usual hours for their primary employer – with any disruption to employers mainly linked to additional hours or overtime.

BENEFITS (£m)	Total Transition (Constant Price) Year	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	N/A		
High			
Best Estimate			8.9

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

Ongoing benefits to new employers of enabled individuals taking additional work, due to returns on additional output generated of £0.9 million each year. Also, the benefits to individuals from wages for their additional hours worked (though some may go to the Exchequer in reduced benefits) of £8.0m annually.

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

The benefit to the economy resulting from expenditure of the additional wages, which is likely to benefit UK businesses through increased turnover.

Key assumptions/sensitivities/risks

Discount rate

3.5

We have assumed that enabled individuals on less than 35 hours a week with exclusivity clauses will only get additional jobs in line with the proportion of those who currently have additional jobs. There is no available evidence on the number of individuals with basic working hours below 35 a week who exclusivity clauses in their contract. We have used the minimum assumption of 1% of employees/workers within each threshold, and used the consultation to obtain further information.

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:	In scope of OITO?	Measure qualifies
Costs: 0.3	yes	Zero in
Benefits: 0.5		
Net: 0.2		

Summary: Analysis & Evidence

Policy Option 1b

Description: Regulations will ban exclusivity clauses in employment contracts that offer basic weekly earnings of less than national minimum wage (NMW) x 35 (in addition to ZHCs).

FULL ECONOMIC ASSESSMENT

Price Base Year 2013	PV Base Year 2015	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low:	High	Best Estimate: 29.84
COSTS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)		Total Cost (Present Value)
Low					
High					
Best Estimate	0.4		0.2		1.8
Description and scale of key monetised costs by 'main affected groups'					
Employers face one off familiarisation costs of £0.3 million for the legislation banning exclusivity clauses. Some employers will also amend their affected contracts to include confidentiality clauses (£0.1m). Employers will face ongoing reorganisation costs of £0.2 million a year due to additional unavailability of workers no longer restricted by exclusivity clauses.					
Other key non-monetised costs by 'main affected groups'					
There are no key non-monetised costs. We have not costed the possibility that employers may make enabled individuals redundant due to the new policy as we consider the risk of this happening very low: Workers will still primarily be available for their usual hours for their primary employer – with any disruption to employers mainly linked to additional hours or overtime.					
BENEFITS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)		Total Benefit (Present Value)
Low					
High					
Best Estimate	N/A		3.7		31.7
Description and scale of key monetised benefits by 'main affected groups'					
Ongoing benefits to new employers of enabled individuals taking additional work, due to returns on additional output generated of £0.4 million each year. Also, benefits to individuals from wages for their additional hours worked (though some may go to the Exchequer in reduced benefits) of £3.3m annually.					
Other key non-monetised benefits by 'main affected groups'					
The benefit to the economy resulting from expenditure of the additional wages, which is likely to benefit UK businesses through increased turnover.					
Key assumptions/sensitivities/risks					Discount rate
We have assumed that enabled individuals on weekly income of less than NMW x 35 with exclusivity clauses will only get additional jobs in line with the proportion of those who currently have additional jobs.					3.5
There is no available evidence on the number of individuals with basic working hours below 35 a week who exclusivity clauses in their contract. We have used the minimum assumption of 1% of employees/workers within each threshold, and used the consultation to obtain further information.					

BUSINESS ASSESSMENT (Option 2)

Direct impact on business (Equivalent Annual) £m:	In scope of OITO?	Measure qualifies
Costs: 0.1	Yes	Zero in
Benefits: 0.2		
Net: 0.1		

Summary: Analysis & Evidence

Policy Option 1c

Description: Regulations will ban exclusivity clauses in employment contracts that offer an hourly pay rate of the national minimum wage (NMW) (in addition to ZHCs).

FULL ECONOMIC ASSESSMENT

Price Base Year 2013	PV Base Year 2015	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)			
			Low:	High:	Best Estimate: 3.23	
COSTS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)		Total Cost (Present Value)	
Low	1		0.0		0.5	
High						
Best Estimate						0.3
Description and scale of key monetised costs by 'main affected groups'						
Employers face one off familiarisation costs of £0.3 million for the legislation banning exclusivity clauses. Employers will face ongoing reorganisation costs of £0.02 million a year due to additional unavailability of workers no longer restricted by exclusivity clauses.						
Other key non-monetised costs by 'main affected groups'						
There are no key non-monetised costs. We have not costed the possibility that employers may make enabled individuals redundant due to the new policy as we consider the risk of this happening very low: Workers will still primarily be available for their usual hours for their primary employer – with any disruption to employers mainly linked to additional hours or overtime.						
BENEFITS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)		Total Benefit (Present Value)	
Low	N/A		0.4		3.8	
High						
Best Estimate						
Description and scale of key monetised benefits by 'main affected groups'						
Ongoing benefits to new employers of enabled individuals taking additional work, due to returns on additional output generated of £0.05 million each year. Also, benefits to individuals of wages for their additional hours worked (though some may go to the Exchequer in reduced benefits) of £0.4m annually.						
Other key non-monetised benefits by 'main affected groups'						
The benefit to the economy resulting from expenditure of the additional wages, which is likely to benefit UK businesses through increased turnover.						
Key assumptions/sensitivities/risks					Discount rate	3.5
We have assumed that enabled individuals on a pay rate of NMW with exclusivity clauses will only get additional jobs in line with the proportion of those who currently have additional jobs. There is no available evidence on the number of individuals with basic working hours below 35 a week who exclusivity clauses in their contract. We have used the minimum assumption of 1% of employees/workers within each threshold, and used the consultation to obtain further information.						

BUSINESS ASSESSMENT (Option 3)

Direct impact on business (Equivalent Annual) £m:			In scope of OITO?	Measure qualifies
Costs: 0.02	Benefits: 0.01	Net: -0.01	yes	in

Summary: Analysis & Evidence

Policy Option 2

Description: Non-statutory guidance relating to the ban on exclusivity clauses

FULL ECONOMIC ASSESSMENT

Price Base Year 2013	PV Base Year 2015	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low:	High:	Best Estimate: -0.34
COSTS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)		Total Cost (Present Value)
Low	N/a		-		n/a
High	n/a		-		n/a
Best Estimate	0.3		-		0.3
<p>Description and scale of key monetised costs by 'main affected groups'</p> <p>Employers face one off familiarisation costs of £0.3 million with the guidance of best practice not enforcing (or including) exclusivity clauses in employment contracts that come within an hours worked, weekly income or pay rate threshold.</p>					
<p>Other key non-monetised costs by 'main affected groups'</p> <p>Costs of implementing the non-enforcement of exclusivity clauses in relevant contracts for employers that choose to do so (no aggregate monetisation due to being a permissive change). Costs include: cost of some companies amending their employment particulars in order to include confidentiality clauses; Ongoing reorganisation costs for employers due to increased unavailability of enabled employers who take on second job: .these would include costs of employment cover, reorganisation of work among existing employers and potential loss of extra work due to unavailability of individual.</p>					
BENEFITS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)		Total Benefit (Present Value)
Low	Not quantified		Not quantified		Not quantified
High	Not quantified		Not quantified		Not quantified
Best Estimate	N/A				
<p>Description and scale of key monetised benefits by 'main affected groups'</p>					
<p>Other key non-monetised benefits by 'main affected groups'</p> <p>The benefits to employers providing additional employment to enabled individuals from returns on additional output generated. Enabled workers benefitting from increased weekly income due to wages from the additional job. The benefit to the economy resulting from expenditure of the additional wages, which is likely to benefit UK businesses through increased turnover.</p>					
Key assumptions/sensitivities/risks					Discount rate 3.5

BUSINESS ASSESSMENT (Option 4)

Direct impact on business (Equivalent Annual) £m:			In scope of OITO?	Measure qualifies
Costs: 0.03	Benefits: 0	Net: -0.03	yes	In

Evidence Base (for summary sheets)

Strategic overview:

1. The Government has included legislation banning exclusivity clauses in employment contracts that do not guarantee any hours in the Small Business, Enterprise and Employment Bill. This Bill was introduced into Parliament on the 23rd June.
2. This legislation was introduced following consideration of the evidence on how such contracts 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 zero hours contracts, 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 zero hours contract (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 zero hours contracts responsibly and that these contracts can offer flexibility and opportunities to both the employer and individual:
 - ◆ Employers benefit from: flexibility in the workforce, allowing them to be responsive to demand; a reduction in the risk of expansion; retention of skills through enabling those looking to partially retire to continue to work for the organisation, and retention of knowledge of an organisation's culture/structure in individuals not on guaranteed hours.
 - ◆ Some individuals benefit from: the flexibility – enabling those requiring this sort of flexibility to join the labour market – and providing those in the labour market greater choice in the hours they work ; enabling those looking to retire to retain a connection to the labour market through occasional work.
5. However, there was evidence presented that raised concerns around how some ZHCs were used in practice. In some circumstances, maybe due to lack of clarity about the legal terms and conditions of ZHCs, some employers didn't always fulfil their responsibilities to their workers on ZHCs¹. Also, some ZHCs (CIPD estimating around 9% of ZHC workers were affected²) included an exclusivity clause preventing an individual from working for another employer even if their current employer is offering no work.
6. The policy to ban exclusivity clauses in ZHCs (contracts that do not guarantee any hours of work) 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.

¹ The Resolution Foundation report, *A matter of time: The rise of zero hours contracts*, reports on p13 anecdotal evidence of employers using zero hours contracts to avoid particular employment obligations.

² CIPD, *Zero Hours Contracts, Myth and Reality*, November 2013, p23.

7. The key rationales for the legislative intervention were:

- ◆ **Market power:** prior to the intervention coming into force, employers can offer ZHCs including exclusivity clauses. They can do this because they have market power over the staff they recruit. However it has the equity consequences below via restricting the ability of individuals to undertake additional work with other employers.
 - ◆ **Incomplete, uncertain or asymmetric information:** the banning of exclusivity clauses in ZHCs provides greater certainty of the legal position of these clauses. This will enable individuals on ZHCs to confidently take up employment opportunities with additional employers if they wish to. Current common law does allow individuals to challenge exclusivity clauses in their contracts. However, employers can justify these clauses under law by demonstrating that the clause is required to protect its legitimate interests. The lack of certainty here makes it less likely that individuals on ZHCs would challenge the legal status of exclusivity clauses.
 - ◆ **Equity:** employers' use of exclusivity clauses in ZHCs could unduly restrict the freedom and opportunities of those individuals on such contracts. Under ZHCs, the employer utilising an exclusivity clause may not supply sufficient work for the individual, or any work in some weeks, but would prevent the individual earning wages from another employer. The ban on exclusivity clauses would remove this barrier to potential additional work and earnings.
8. We estimate that between 48,000 and 125,000 individuals on ZHCs are subject to an exclusivity clause in their contract, and thus will be enabled by the legislation to get an additional job³. Based on existing number of those in work taking up second jobs, a smaller number, between 3,100 and 7,900, are expected to actually take an additional job.

Problem under consideration

9. Government discussions with stakeholders (during the consultation at the turn of the year) have indicated that the ban on exclusivity clauses in ZHCs (contracts offering no guaranteed hours) would be straightforward for unscrupulous employers to circumvent (see paragraph 18 below).
10. Therefore, the Government is carrying out this consultation to ask for views on:
- ◆ how extensive avoidance of the exclusivity ban in contracts that do not guarantee any hours would be, and
 - ◆ the best mechanism to tackle avoidance, and
 - ◆ possible routes of redress for the individual.
11. As Stakeholders had warned that avoidance of the ban may be an issue, clause 139 of the Bill inserts a new section 27B into the Employment Rights Acts 1996. Section 27B provides the BIS Secretary of State with an order making power that will allow for avoidance of the ban to be dealt with via secondary legislation. This potentially allows for avoidance to be

³ BIS, Final Impact Assessment: Banning Exclusivity Clauses in Zero Hours Contracts, October 2014, Annex A.

tackled by extending the ban on exclusivity clauses to a wider range of employment contracts.

12. Any statutory changes considered necessary following this consultation will be implemented via regulations made under the powers set out in the Bill.

Background on ZHC usage

13. 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 583,000 people, including self-employed). BIS estimated from the LFS that around 542,000 of these were employees or workers in their main job. The ONS estimates that the number on non-guaranteed hours contracts (at 1.4 million) represent around 4 per cent of workforce jobs in the UK⁴.
14. BIS estimates from the LFS show that of employees or workers on ZHCs in their main job in the 4th quarter of 2013:
 - ◆ 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 26% being students.
 - ◆ They were more likely to be in relatively low paid occupations, such as elementary occupations (34%), caring leisure and other services (25%), and sales and customer services (10%).
15. The ONS data on no-guaranteed hours contracts where individuals on the contracts had recently worked suggested that around a quarter of the 1.4 million contracts were in the accommodation and food industry, with a further quarter in administrative and support services⁵. Other industries accounting for substantial proportions of individuals working on no guaranteed hours contracts include health and social work and wholesale and retail.
16. Further background information on those on ZHCs is published in *Banning exclusivity clauses in zero hours contracts: final impact assessment*, October 2014.

Rationale for intervention

17. The legislation included in the Small Business, Enterprise and Employment Bill bans the use of exclusivity clauses in contracts offering no guaranteed hours of work. The rationales for introducing this ban were restricting employers from exerting undue market power, preventing market failures related to incomplete, uncertain or asymmetric information, and providing equity for individuals on zero hours contracts (see paragraph 7).

⁴ ONS, Analysis of Employee Contracts that do not guarantee a minimum number of Hours, 30th April 2014, http://www.ons.gov.uk/ons/dcp171776_361578.pdf. This provided an estimate of 583,000 individuals (including those who were self-employed, and 542,000 who were employees/workers) whose main job was on a zero hours contract (LFS) and an estimate of 1.4 million contracts that offered no guaranteed hours where work was carried out in the past two weeks (from a survey of employers).

⁵ ONS, Analysis of Employee Contracts that do not guarantee a minimum number of Hours, 30th April 2014, p12

18. Stakeholders consulted by Government suggest that it might be straightforward for unscrupulous employers to circumvent the ban. For instance, stakeholders identified that such employers could amend the affected contracts so that they guaranteed 1 hour of work during a particular period. Employers could also refuse to offer work to individuals on zero hours contracts who regularly refused work on specific shifts or who also worked for other employers.
19. 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 zero hours contracts, 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.
20. The powers provided for in clause 139 of the Small Business, Enterprise and Employment Bill include the potential for the ban on exclusivity clauses to be widened to include other employment contracts if this is deemed appropriate to tackle avoidance. Such an approach may further improve the functioning of the labour market.

Policy objective

21. The policy objective is to tackle potential avoidance on the ban on exclusivity clauses in zero hours contracts in the most effective and proportionate way, and provide individuals on zero hours contracts negatively affected by employer non-compliance 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 zero hours contracts is achieved.

Consultation on tackling avoidance of the ban on exclusivity clauses in ZHCs

22. The government has launched a 12-week consultation (25th August to 3rd November), for which this is the impact assessment, on tackling avoidance of the ban on exclusivity clauses in zero hours contracts. It is specifically seeking views on:
 - ◆ What the likelihood of employers avoiding a ban on exclusivity clauses might be and how that might be achieved?
 - ◆ Whether the Government should do more to deal with potential avoidance, and how and when might that be best achieved?
 - ◆ Whether there should be consequences for an employer if they circumvent a ban on exclusivity clauses and, if so, what those consequences should be?
 - ◆ Whether there are any potentially negative or unintended consequences as a result of the wording of the legislation.
23. The Government is therefore looking for evidence from the consultation to establish the likely extent of avoidance, and the most appropriate way to tackle potential avoidance, and enable affected individuals on Zero hours contracts to get redress.

Policy options

24. The Government is not putting forward any preferred policy options at this stage. However, the consultation questions do suggest a few potential options which may form part of a policy solution once the consultation responses have been considered.

Potential mechanisms for tackling avoidance

25. There are a number of possible ways identified to tackle avoidance of the ban, three of which are legislative and relate to the powers set out in Section 27B of the Small Business, Enterprise and Employment Bill:

- ◆ Option 1: Increasing the threshold covered by the ban on exclusivity clauses to cover, alongside those on zero hours contracts:
 - a. those employment contracts where less than a certain number of hours are guaranteed, or
 - b. those employment contracts where less than a certain level of earnings is guaranteed, or
 - c. those employment contracts where less than a certain hourly rate of pay is guaranteed.
- ◆ Option 2: a non-statutory code of practice on exclusivity clauses in zero hours contracts.

Potential mechanisms for providing redress

26. Government has suggested some potential mechanisms for affected zero hours contract workers to seek redress where employers circumvent the ban on exclusivity clauses in zero hours contracts by either amending contracts to guarantee a small number of hours, or by refusing to offer work to those on zero hours contracts who may also be working for another employer. The non-compliant employer may also face some additional sanction under these options, which are:

- ◆ The do nothing option – do not put any specific mechanism in place to enable affected individuals to seek redress
- ◆ Government enforcement, with additional sanctions including just civil penalties, or also criminal penalties.
- ◆ Enabling employees to seek redress at Employment Tribunals.

27. These possible options for providing redress have not been considered in any detail at this stage. The consultation will provide useful information about the potential for avoidance of the ban on exclusivity clauses in zero hours contracts, which could help indicate the sort of enforcement mechanism required, and the resources needed. The consultation should also help provide information supporting one enforcement approach or another. The lack of detail as to how these possible options may be put in place means that we have not attempted to monetise any costs or benefits. We will fully monetise in the related impact assessment the cost and benefits of any options that follow the consultation once the potential policy has been considered in more detail. However, we do provide a qualitative assessment of where costs and benefits are expected to arise, and who will be affected.

Timing

28. We are consulting on when any regulatory changes resulting from this process should be introduced. They could take place so that they entered into law alongside the ban on exclusivity clauses in zero hours contracts, or they could come in later, if there was clear evidence of non-compliance.
29. If it is decided to put in place an enforcement mechanism for the ban on exclusivity clauses in zero hours contracts, it is expected that the earliest it would come into operation would be when the ban comes into force in October 2015. However, we will need to assess the responses to the Consultation before the policy can be more fully developed.

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

30. This section outlines the potential costs and benefits of the anti-avoidance options suggested in the Consultation questions. Where possible, we have monetised the costs and benefits arising from these proposed policies. There is limited data available on the use of exclusivity clauses in employment contracts.
31. The costs and benefits of the ban on exclusivity clauses in zero hours contracts have been monetised in the related impact assessment⁶ 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.

Option 1 (a, b and c) – the legislative approach

32. This option would involve using the powers set out in Section 27b of the Small Business, Enterprise and Employment Bill to regulate a widening of the ban on exclusivity clauses to cover other employment contracts, alongside zero hours contracts. Three possible types of threshold are referred to in the consultation document: Option 1.a: a guaranteed hours of work threshold, Option 1.b: a guaranteed earnings threshold and Option 1.c: an hourly pay rate threshold.
33. Although the thresholds could be set at various levels, as no particular option has been favoured in the consultation, the examples used to estimate the monetised impacts are based on particular levels that we believe are sensible to provide information on how the threshold options compare, and what the potential impacts might be. In tackling potential avoidance of the ban on exclusivity clauses in zero hours contracts, the focus should be on protecting individuals who do not usually work full-time, or those on low pay rates, or a combination of the two.
34. For the guaranteed hours threshold (Option 1a) we use 35 hours, as in the UK full-time workers will generally work at least 35 hours a week⁷. As the policy banning exclusivity clauses in zero hours contracts was designed to enable workers to work if their employer did not provide them with sufficient hours, then it seems sensible that the maximum hours threshold should be set at the level where workers are considered to be working full-time.

⁶ BIS, *Final Impact Assessment: Banning exclusivity clauses in zero hours contracts*, October 2014.

⁷ Gov.uk guidance, part-time workers rights, <https://www.gov.uk/part-time-worker-rights> (accessed 22 July 2014)

35. We set the guaranteed hourly pay rate threshold (Option 1c) at the national minimum wage, as this is the legal minimum hourly rate. Banning exclusivity clauses for those on the national minimum wage would enable the lowest paid who were restricted by an exclusivity clause to earn additional wages in a week.
36. For the guaranteed earnings threshold (Option 1b), we use a combination of the two levels above. The earnings threshold example is therefore the weekly wage obtained by working 35 hours at the relevant national minimum wage. Information on wage rates and weekly earnings is shown in Table 1.

Table 1: National Minimum Wage rates, and weekly earnings from 35 hours at these rates

<u>Age of individual</u>	<u>Current National Minimum wage Rate (October 2013)</u>	<u>Weekly earnings from 35 hours at National Minimum Wage</u>
16-17	£3.72	£132.20
18-20	£5.03	£176.05
21+	£6.31	£220.85

37. BIS estimates for the numbers on zero hours contracts without a second job range from 510,000 (based on LFS data) to 1,318,000 (based on ONS business survey data), with a best estimate of 914,000 (the midpoint between the two)⁸. For each of the three thresholds, we base our estimates on individuals within the thresholds that are not on zero hours contracts and don't have second jobs. In all cases, we have used figures on employee numbers from the 2013 Annual Survey of Hours and Earnings, as this has better quality data on employee earnings than the LFS, and excluded the best estimate for numbers on zero hours contracts shown above to avoid double counting the costs and benefits⁹.
38. This results in the following estimated ranges of numbers of employees or workers within each threshold (see Table 2).

Table 2: Estimated numbers of employees/workers within each threshold and not on a zero hours contract or with a 2nd job

	<u>Employees/workers excluding those on ZHCs or with a 2nd job</u>
Hours based threshold (under 35 hours a week (Option 1a))	8,149,000
Weekly earnings threshold (no more than NMW at 35 hours a week) (Option 1b)	4,523,000
Hourly wage rate (no more than NMW) (Option 1c)	1,093,000

⁸ BIS, *Final Impact Assessment: Banning exclusivity clauses in zero hours contracts*, October 2014, Annex A.

⁹ The costs and benefits of a ban on exclusivity clauses in zero hours contracts are taken account of in the IA referred to in footnote 8, above.

39. We have no information about the numbers of part-time or low-paid employees/workers who have exclusivity clauses in their employment contracts. The only available information we have relating to exclusivity clauses is from the the CIPD *Zero Hours Contracts: Myth and Reality* report, which identifies the proportion of employees on zero hours contracts who are never allowed to work for another employer even when their primary employer has no work for them¹⁰. This suggests that overall 9% of those on zero hours contracts have exclusivity clauses. However, this figure does not relate to employees who are not on zero hours contracts. As we don't have information on those not on ZHCs covered by exclusivity clauses, we have based our estimates on what we consider a minimum assumption that 1% of employees/workers within the thresholds have exclusivity clauses in their contracts. This provides the following estimates of affected employees/workers for each threshold (see Table 3).

Table 3: Estimated employee/worker numbers within each threshold, not on a zero hours contract or with a 2nd job, who have an exclusivity clause (nearest 000)

	<u>Total</u>	<u>Private sector</u>	<u>Public sector</u>
Those working under 35 hours a week (Option 1a)	81,000	55,000	26,000
Those with weekly wages below NMW rate x 35 hours (Option 1b)	45,000	37,000	8,000
Those on NMW rate or below (Option 1c)	11,000	11,000	Less than 500

¹⁰ CIPD, *Zero Hours Contracts, Myth and Reality*, November 2013, p23.

40. We would welcome respondents to this consultation to consider whether the assumption that 1% of employees/workers within the thresholds covered are likely to have exclusivity clauses is realistic, or whether the figure is likely to be higher. Please could respondents provide an answer to the following questions:

Consultation Impact Assessment Question 1:

Do you think that 1% is a realistic estimate for the proportion of part-time employees/workers which have an exclusivity clause in their employment contract?

- a) Yes b) No c) Don't know

Consultation Impact Assessment Question 2:

If you answered no to question 1, why do you think 1% is not a realistic estimate?

Consultation Impact Assessment Question 3:

If you answered no to question 1, do you think a more realistic estimate is:

- a) Between 5-15%
- b) Between 16-25%
- c) Between 26% and 50%
- d) Between 51% and 100%

Consultation Impact Assessment Question 4:

Could you provide us with your evidence for the basis of the estimate in question 3?

- 41. As well as encouraging respondents to the consultation to answer the questions posed in this IA, BIS is looking to increase the evidence base by meeting with key stakeholders during the consultation. The Department is holding workshops and stakeholder events with interested parties at which the evidence base will form part of the discussion.
- 42. The impact of banning exclusivity clauses in employment contracts covered by the thresholds are monetised below.

Transition costs

- 43. There will be familiarisation costs to employers using exclusivity clauses in employment contracts where the in-work individual has a basic working week of lower than 35 hours, or basic weekly pay lower than that obtained from working 35 hours on the relevant NMW, or is on the NMW hourly pay rate.

Familiarisation costs – employers using exclusivity clauses in affected employment contract

- 44. There is no clear information about the number of employers who use exclusivity clauses in employment contracts. Also, there is no specific information on the number of employers who employ individuals on the NMW, or on basic pay rates and hours that would result in a weekly wage of NMW x 35. However, we can estimate for employers of part-time workers (which relates to those working less than 35 hours a week).

45. BIS business population estimates for 2013¹¹ suggest that there are around 1.27 million employers in the UK. We have no specific information about how many employees/workers generally have exclusivity clauses in their employment contracts, or how they are distributed across different types of employer. We are basing our estimates on the assumption that a minimum 1% of employees/workers within the thresholds have exclusivity clauses in their contracts. As we have no information about distribution across employers, we have assumed that these are distributed proportionally across employers such that 1% of employers have an employee on zero hours contracts. It seems proportionate, given the lack of precision in these assumptions, to use the total number of employers as the basis of our estimates, even though there will be a minority of employers that do not have part-time staff (with part-time status defining the largest of the thresholds).
46. To estimate the familiarisation costs, we consider that it would take on average around one hour of management time for affected employers to familiarise themselves with the policy relating to the banning of exclusivity clauses in protected employment contracts. This is similar to estimated familiarisation times specified in recent IAs relating to changes of legislation affecting employment rights¹². The policy change assessed in this IA involves one relatively straightforward change to employment rights. Employers should have good awareness of whether they use exclusivity clauses so familiarisation with the possible regulatory change should take no longer than familiarisation with the removal of the default retirement age, or regulations prohibiting the blacklisting of trade unions.
47. To estimate the cost of management time, we use the Annual Survey of Hours and Earnings estimate for the median hourly wage excluding overtime of full-time HR managers or directors was £23 in 2013. Up-rated by 17.8% to account for employers' non-wage costs¹³, the hourly cost per employer is estimated at £27. The estimated number of employers affected by familiarisation costs, and the estimated familiarisation costs, at 2013 prices, are shown in table 4 below.

Table 4: Estimated number of employers with exclusivity clauses in employment contracts of part-time workers, and estimated familiarisation costs

	<u>Whole economy</u>	<u>Private sector</u>	<u>Public Sector</u>	<u>Non-profit organisations</u>
Number of employers with exclusivity clauses	12,688	12,109	66	513
Estimated familiarisation costs (2013 prices) £000s	344	328	2	14

Source: BIS estimates

¹¹ <https://www.gov.uk/government/statistics/business-population-estimates-2013>

¹² BIS, Final Impact Assessment: Regulations Prohibiting the Blacklisting of Trade Unionists, January 2010, p8-9 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/245412/10-506-impact-assessment-regulations-prohibiting-blacklisting-of-trade-unionists.pdf and BIS, Phasing out the default retirement age- Government response to consultation: Impact Assessment, January 2011, p22 http://www.legislation.gov.uk/ukia/2011/44/pdfs/ukia_20110044_en.pdf

¹³ This estimate is based on Eurostat figures for employers' labour costs and non-wage costs in the UK, 2012, for the whole economy excluding agriculture and public administration.

48. We would welcome evidence from respondents to the consultation on the assumptions we have made on the proportion of employers that will have part-time staff with exclusivity clauses in their employment contracts. It would be helpful if respondents could answer the following questions.

Consultation Impact Assessment Question 5:

Do you think that 1% is a realistic estimate for the proportion of employers that would have part-time employees/workers with an exclusivity clause in their employment contract?

b) Yes b) No c) Don't know

Consultation Impact Assessment Question 6:

If you answered no to question 5, why do you think 1% is not a realistic estimate?

Consultation Impact Assessment Question 7:

If you answered no to question 5, do you think a more realistic estimate is:

- a) Between 5-15%
- b) Between 16-25%
- c) Between 26% and 50%
- d) Between 51% and 100%

Consultation Impact Assessment Question 8:

Could you provide us with your evidence for the basis of the estimate in question 7?

49. It is likely that the number of employers with workers with exclusivity clauses paid at the NMW rate or earning less than the NMW rate x35 would be lower than the estimate in Table 4 for employers of part-time workers with exclusivity clauses. However, there is no readily available information to assess the extent to which the numbers would be lower. Although the estimates for the number of workers in these groups are lower than that for the number working below 35 hours a week, they still remain substantial. Potentially many of these employers will include the lower paid (either on a weekly or hourly basis) as a subset of their total part-time employment. Therefore we will use this estimate for all three thresholds in this consultation IA, but will investigate the issue further if needed for the final IA. Additional evidence from consultation responses, including stakeholder meetings and workshops, will help further consideration.

Other transition costs

Costs to employers of change to existing contracts

50. Some employers may use exclusivity clauses to ensure that high level company information or intellectual property remains confidential by preventing their workers with access to this information from working for other employers. These employers may wish to introduce confidentiality clauses into employment contracts for particular individuals holding such information.

51. Lawyers suggest that, while an individual remains in work at an employer then that individual has an implied duty of confidentiality to the employer. However some employers

may which to include an express term in an employment contract, stating in broad terms the individual's confidentiality obligations while they remain in their employ¹⁴. Employers with strong concerns about the confidentiality of information that their workers had access to are likely to have already included confidentiality clauses in their employment contracts.

52. For these reasons, we would expect relatively few employment contracts of those within the thresholds would be amended to introduce confidentiality clauses following the ban on exclusivity clauses. We would expect this to be more likely to affect those on higher hourly rates of pay, reflecting skilled labour or some level of seniority (where access to confidential, commercially important data – which could be restricted – may be more likely)¹⁵.
53. The numbers for those individuals within the thresholds being monetised who are estimated to have exclusivity clauses in their contracts are contained in Table 3. BIS estimates from ASHE 2013 suggest that around 19% of workers with a basic working week of under 35 hours (12% for the private sector, 34% for the public sector) have hourly wage rates in the upper quartile of the wage distribution¹⁶. BIS analysis of ASHE also showed that around 3% of those whose weekly earnings (2.6% in the private sector, 6% in the public sector) were less than relevant NMW x35 have hourly wages in the upper quartile of the wage distribution. No workers earning the NMW hourly rate feature in the upper quartile of the hourly wage distribution.
54. Applying these percentages to the figures in Table 3, the estimated numbers of individuals who would have their employment contracts amended to include confidentiality clauses are as shown in Table 5. While we expect that employers are likely to limit access among its workforce to information which it is important to keep confidential, it may be that affected employers will think that some staff with hourly earnings outside the upper quartile will require a confidentiality clause in their employment contract. However, there are likely to be some high hourly wage employees affected by the ban who will not have their contracts amended, so these numbers may balance out. Overall we expect the numbers to be relatively small, and more for the reasons discussed above

¹⁴ Paul Maynard, Briefing Note: Business Information, Gaby Hardwicke solicitors, September 2013,p3.

¹⁵ Sue Jenkins, New Research: Companies turning away from exclusivity clauses in zero hours contracts, DAB Beachcroft, April 2014 <http://www.dacbeachcroft.com/news-and-events/press-releases/companies-turning-away-from-exclusivity-clauses-in-zero-hours-contracts> This article states that some business respondents “*point to specific, limited projects undertaken by senior employees or directors, particularly where there is a need to protect commercial confidentiality or trade secrets, as occasions where such clauses may still be necessary*”.

¹⁶ The Annual Survey of Hours and Earnings shows that the upper-quartile gross hourly wage rate excluding overtime for employees in April 2013 was £17.66. This equates to an annual salary of £32,141 for individuals working 35 hours a week for a year.

Table 5: Number of individuals within thresholds with contracts containing exclusivity clauses whose contracts would be amended to include confidentiality clauses

	<u>Total</u>	<u>Private sector</u>	<u>Public sector</u>
Those working under 35 hours a week (nearest 000) (Option 1a)	15,000	7,000	9,000
Those with weekly wages below NMW rate x 35 hours (nearest 000) (Option 1b)	1,000	1,000	Less than 500
Those on NMW rate or below (nearest 000) (Option 1c)	0	0	0

55. The 2008 Employment Law Admin Burdens Survey 2008¹⁷, by ORC International, using the Standard Cost Model approach, estimated that the unit cost for employers in making changes to a statement of employment particulars was £58. Updated to 2013 prices using the GDP deflator, this rises to £65. Evidence from lawyers, including the Briefing Note by Paul Maynard referenced above¹⁵, and evidence from legal firms' web pages, suggests that a specific generic statement about the employee's or worker's confidentiality obligation would be used¹⁸. Applying this total to the numbers of contracts affected, we estimate the following costs to employers resulting from amending employment contracts.

Table 6: costs resulting from employers amending employment contracts to include confidentiality clauses (2013 prices)

	<u>Total</u>	<u>Private sector</u>	<u>Public sector</u>
Those working under 35 hours a week (£ thousand) (Option 1a)	999	431	568
Those with weekly wages below NMW rate x 35 hours (£ 000) (Option 1b)	94	62	32
Those on NMW rate or below (£ 000) (option 1c)	0	0	0

¹⁷ BERR/ORC International, Employment Law Admin Burdens Survey 2008: Final Report, December 2008, p38

¹⁸ A search of the internet suggests that generic confidentiality clauses for UK employment contracts are available, so there is no evidence that such changes would be more costly than expected using the Standard Cost Model approach.

Ongoing Costs

Ongoing costs to employers

56. Affected employers will face some costs due to the loss of having individuals available to work for them when required. The potential regulations will make exclusivity clauses legally unenforceable in affected employment contracts. It will enable these individuals, if their circumstances allow, and they are interested in doing so, to take on an additional job with another employer. Employers who have been using exclusivity clauses to ensure that they will have individuals available for work when work is available would have to adjust to this potential loss of availability.

57. Only a proportion of the individuals enabled by the ban on exclusivity clauses in protected contracts will want, or be able to take on, an additional job. Based on analysis of 5 quarter longitudinal LFS data, it is clear that only a small proportion of individuals in-work will take on an additional job. Figures for those without second jobs in the first quarter are set out for each of the three thresholds in the table below. Around 6.2% of those with no second job in the first quarter who work less than 35 hours basic a week had a second job in at least one of the four subsequent quarters: This compared with 6.1% of those with weekly earnings below NMW x 35, and 3.5% of those on NMW rates.

Table 7: Estimated proportion of employees/workers who get a 2nd job from not having a 2nd job in first quarter

	Those Working less than <u>35 hours basic a week</u>	Those earning less than <u>NMW x 35 a week</u>	Those paid the hourly <u>NMW rate (or below)</u>
4 subsequent quarters	0.6%	0.5%	0.0%
3 subsequent quarters	1.6%	1.2%	0.3%
2 subsequent quarters	1.0%	1.3%	1.4%
1 subsequent quarter	3.0%	3.0%	1.7%
Total	6.2%	6.1%	3.5%

58. We therefore assume that while the policy enables all those with exclusivity clauses in their employment contracts to get an additional job, only a small proportion will do so – based on the proportions currently who don't have a second job but subsequently take one on (shown in Table 7). This reflects that some will not be able to take an additional job, due to their personal circumstances or availability of something suitable, and some won't want an additional job, while some will be able to obtain more hours in their main job. The estimated numbers of enabled individuals taking an additional job are set out in the table below.

59. It was considered that the estimate could be based on the proportion of workers within the thresholds who said wanted to take an additional job. These data are collected by the LFS. However, BIS analysis of the LFS longitudinal data shows that of the majority of those who said that they wanted an additional job did not get an additional job in the following quarters. It also shows that primarily those who did take an additional job came from the group who were not looking for a different or additional job, but were either content with their working hours at their current job or were looking for more hours. Therefore, we have assumed that of those enabled by the ban on exclusivity clauses, those taking a second job are best estimated by comparing with existing rates of take up of a second job in the labour market.

Table 8: Estimated numbers of individuals excluding those on ZHCs enabled by the ban on exclusivity clauses in their contract to get an additional job

	<u>Total</u>	<u>Private sector</u>	<u>Public sector</u>
Those working under 35 hours a week (nearest 000) (Option 1a)	5,000	3,000	2,000
Those with weekly wages below NMW rate x 35 hours (nearest 000) (Option 1b)	3,000	2,000	Less than 500
Those on NMW rate or below (nearest 000) (Option 1c)	Less than 500	Less than 500	Less than 500

60. This will mean that, in some circumstances where their primary employer has work available, these individuals will be unavailable. As the individuals are enabled by the policy to take an additional job, we assume that they arrange this to accommodate their usual working pattern in their primary job as far as possible.

61. As employers are likely to have access to the enabled individuals for work for most of the week, the potential unavailability introduced by this policy is similar to that due to absence (through leave, sickness, caring responsibilities etc.). Employers who have workers on basic hours that tend to vary may be used to dealing with unavailability of some individuals, and may therefore have a pool of individuals to offer work to (or may allow individuals on variable hours to select shifts on rotas in advance). In such cases, the primary employer might not be affected by having reduced availability in some of their workers. Also, where workers tend to have fixed basic hours, then it is likely that any additional job they take will not clash with their primary job, so the employer will not face any increase in unavailability due to this policy (though if these workers do overtime, then there might be some impact).

62. Just over half of those in each threshold without a 2nd job and not on a zero hours contract, according to data from the LFS, 4th quarter of 2013 dataset, worked hours that didn't usually vary and didn't do overtime. If these individuals took on an additional job, the employer should not face any reorganisation costs. This reduces the number of workers whose additional job leads to an employer facing reorganisation costs to the numbers shown in the table below.

Table 9: Estimated numbers of individuals enabled by the ban to get an additional job which causes main employer reorganisation costs

	<u>Total</u>	<u>Private sector</u>	<u>Public sector</u>
Those working under 35 hours a week (nearest 000) (Option 1a)	2,000	2,000	1,000
Those with weekly wages below NMW rate x 35 hours (nearest 000) (Option 1b)	1,000	1,000	Less than 500
Those on NMW rate or below (nearest 000) (Option 1c)	Less than 500	Less than 500	Less than 500

63. We assume that increased unavailability of some of the workers within the thresholds enabled by the ban to get an additional job will impact on the affected employers. These employers will face some reorganisation costs to cope with increased unavailability of the enabled workers who work variable hours (and potentially those working overtime). These reorganisation costs could cover¹⁹:

- ◆ Arranging employment cover (this may involve extending the pool of variable hours individuals employed)
- ◆ Re-allocating work among existing staff (which may involve using less productive workers)
- ◆ Potential loss of work due to individual not being available

64. The Modern Workplaces Impact Assessment²⁰ considers how to estimate the cost of absence to employers. Based on an analysis of the weekly cost of absence suggested by a 2011 CBI survey²¹ on absence and workplace health, the Impact Assessment estimate was that the cost of reorganisation due to absence was 11% of total labour costs. However, it was acknowledged that this was likely to be an underestimate due to the difficulties faced by employers in fully accounting for these reorganisation costs. The upper bound of the likely range of reorganisation costs due to planned absence, as a proportion of total labour costs, was 14%. As the primary employer will be aware that the individual has got an additional job, then it will be able to plan for the worker's additional unavailability.

65. When considering how much disruption per week an employer may face from an individual worker we have considered the following factors:

¹⁹ Bevan.S et al, *How Employers Manage Absence*, DTI Employment Relations Series 25, March 2004, p44-48.

²⁰ BIS, *Modern Workplaces: Shared parental leave and pay administration consultation impact assessment*, February 2013, Annex 4, p66-68.

²¹ CBI, *Healthy Returns? Absence and Workplace Health Survey*, 2011

- ◆ According to BIS estimates from the LFS, over 60% of employees covered by each of the thresholds worked their usual hours in the survey reference week. Excluding those on leave, training or off-sick etc, those whose reference week hours differed from their usual hours were more likely to work fewer hours in the reference week. However, for those working less than 35 hours a week, and those earning less than the NMW x 35, over 50% of those with differing hours worked between 4 hours less and 4 hours more than their usual hours in their reference week (known as actual hours). For those on the NMW hourly rate over 50% of those whose actual hours differed from their usual hours worked within +/- 5 hours of their usual hours.
- ◆ The median hours of paid overtime for those working overtime was 5 hours a week for those whose basic hours were fewer than 35 hours, and for those whose weekly wage was less than NMW x 35. For those on the NMW hourly rate and working overtime, median hours of paid overtime were 6 hours a week (BIS estimates from LFS).

66. Taking these factors into account, we estimate that the average weekly disruption per enabled worker will be small. It will affect those on variable hours and those working paid overtime. We make the cautious assumptions that enabled workers offered extra hours can't take them, and that workers doing their usual hours, or less, also face some disruption. On this basis, we estimate that the additional job makes the individual unavailable for 5 hours a week if they have under 35 basic working hours a week, or if they earn less than NMW x 35 a week, or unavailable for 6 hours a week if they are on the NMW pay rate.

67. We estimate the percentages of enabled individuals who will have a second job for 1 through to 4 quarters in a year based on the figures in Table 7. For instance, 0.6% of employees / workers with under 35 hours of work a week basic get 2nd jobs for four subsequent quarters, according to the LFS. This represents 9.4% ($0.6/6.2 = 0.094$ (or 9.4%)) of the 6.2% of employees / workers working basic hours of under 35 a week who get 2nd jobs. These percentages are set out in Table 11.

Table 10: Estimate extent of second job obtained by enabled individuals

	<u>Those Working less than 35 hours basic a week</u>	<u>Those earning less than NMW x 35 a week</u>	<u>Those paid the hourly NMW rate (or below)</u>
4 subsequent quarters	9.4%	9.0%	0.0%
3 subsequent quarters	25.3%	20.4%	9.6%
2 subsequent quarters	16.2%	21.1%	40.2%
1 subsequent quarter	49.0%	49.6%	50.2%
Total	100.0%	100.0%	100.0%

68. We estimate the number of additional hours each year that the individuals are unavailable to their main employer (see Table 11). We take the numbers of enabled individuals who work variable hours or overtime and get a second job (table 9) and multiply these by the percentages in Table 10. We then assume that individuals taking second jobs throughout the year are unavailable for 5 (or 6) hours a week for 48 weeks in the year (This is because there won't be additional unavailability for periods of leave, and the statutory minimum holiday is for 4 weeks pro rata a year). For those getting a second job for three quarters of

the year the calculation of unavailable hours is based on 36 weeks, for 2 quarters it is 24 weeks, and for 1 quarter, 12 weeks²².

Table 11: Estimated annual hours of additional unavailability to main employer due to enabled individuals taking second jobs

	<u>Total</u>	<u>Private sector</u>	<u>Public sector</u>
Those working under 35 hours a week (000s) (Option 1a)	277	188	89
Those with weekly wages below NMW rate x 35 hours (000s) (Option 1b)	141	116	25
Those on NMW rate or below (000s) (Option 1c)	205	200	5

69. We use the mean hourly wages of workers excluding those in 2nd jobs, obtained from ASHE 2013 data, and uprate by 17.8% to include non-wage costs. We also used the estimated reorganisation cost figure, of 14% of total labour costs.

Table 12: Estimated cost per hour of reorganisation for main employer due to enabled individuals taking second jobs

	<u>Those working under 35 hours a week</u>	<u>Those with weekly wages below NMW rate x 35 hours</u>	<u>Those on NMW rate or below</u>
Median hourly wages	£8.9	£7.0	£6.2
Hourly labour costs	£10.48	£8.25	£7.30
Cost per hour of reorganisation	£1.47	£1.15	£1.02

70. We apply the resulting reorganisation cost per hour to the numbers of hours of additional unavailability, set out in Table 12, to estimate the annual cost to employers from reorganisation costs as shown in Table 13.

²² For the Private sector minimum estimate of 188,000 hours this would be (approximately) $5 \times 48 \times 0.094 \times 2,000 + 4 \times 36 \times 0.253 \times 2,000 + 4 \times 24 \times 0.162 \times 2,000 + 4 \times 12 \times 0.49 \times 2,000$.

Table 13: Estimated annual reorganisation costs for employers resulting from coping with increased unavailability of individuals taking additional jobs (2013 prices)

	<u>Total</u>	<u>Private sector</u>	<u>Public sector</u>
Those working under 35 hours a week (£ 000s) (Option 1a)	406	276	130
Those with weekly wages below NMW rate x 35 hours (£ 000s) (Option 1b)	162	134	29
Those on NMW rate or below (£ 000s) (Option 1c)	22	21	1

Ongoing benefits

71. The policy will enable individuals currently constrained from taking additional jobs because of exclusivity clauses to take up a second job. Their new employer will benefit from their output produced in the additional hours they work.

72. To estimate this benefit, we have taken a similar approach to the one for estimating employers' reorganisation costs:

- ◆ We use the estimated numbers of enabled individuals contained in Table 8.
- ◆ We use the median weekly hours worked in a second job by those with a second job in each threshold (based on analysis of the 4th quarter 2013 LFS dataset):
 - i. Workers with basic hours of less than 35 hours a week – median 7 hours in their second job
 - ii. Workers earning less than 35 x NMW a week – median 7 hours in their second job
 - iii. Workers on hourly NMW rates or below – median 8 hours in their second job
- ◆ We assume that these individuals will get 7 (or 8) hours a week at the median wage rates for each threshold (see Table 13).
- ◆ As with the ongoing costs estimate, the proportions having a 2nd job for 1, 2, 3 or 4 quarters a year are based on the figures in Table 11. However, as these individuals are entitled to statutory paid holiday in their 2nd job, this will be based on 13,26,39 and 52 weeks (for those working less than 35 hours basic a week, with a 2nd job for one quarter a year, the calculation is £8.9 x 13 x 7).

Table 14: Estimated annual hours worked in additional job by enabled individuals (including leave entitlement)

	<u>Total</u>	<u>Private sector</u>	<u>Public sector</u>
Those working under 35 hours a week (000s) (Option 1a)	897	611	287
Those with weekly wages below NMW rate x 35 hours (000s) (Option 1b)	470	385	86
Those on NMW rate or below (000s) (Option 1c)	63	61	2

73. The total additional wages paid to these workers annually is shown in the table below.

Table 15: Estimated additional wages paid annually to individuals enabled to get an additional job, 2013 prices, £000s

	<u>Total</u>	<u>Private sector</u>	<u>Public sector</u>
Those working under 35 hours a week (£ 000s) (Option 1a)	7,984	5,434	2,550
Those with weekly wages below NMW rate x 35 hours (£ 000s) (Option 1b)	3,291	2,692	599
Those on NMW rate or below (£ 000s) (Option 1c)	390	376	14

74. The purpose of this policy is to improve the functioning of the labour market, by ensuring that the ban on exclusivity clauses in zero hours contracts is not circumvented by unscrupulous employers. If the selected approach involves extending the ban on exclusivity clauses to other employment contracts, then this will further increase the potential opportunities for additional employment and growth, by enabling more individuals, who are predominantly low paid, to take on an additional job with another employer. We have estimated the wages resulting from additional employment in Table 15. However, the improved functioning of the labour market will also provide opportunities for growth, through employers' returns from additional output.

75. The benefit to employers will be in the profit resulting from the output produced by these individuals working 7 (or 8) hours a week in their second job. There is no clear estimate on the rate of return for businesses of individuals with low weekly wages.

76. Looking at the UK National Accounts (the Blue Book 2013²³), the labour share of total output is estimated at around 65%²⁴, and 35% goes to business as profit, which is the ratio

²³ ONS, UK National Accounts, The Blue Book 2013, November 2013, Table 1.2.

²⁴ J. Appleton, Revised Methodology for Unit Wage and Unit Labour Costs: Explanation and Impact, ONS, October 2011.

of total labour costs per worker to output per worker. On average, for each unit of labour employed, UK business is estimated to receive 53% (35%/65%)²⁵. However, operating surplus (or returns) will vary by industry, and within industry, and it seems likely that firms with higher wage rate employees (reflecting, skills, knowledge and/or productivity) may have higher rates of return on their labour costs. As we are assuming that most enabled individuals coming under the thresholds will get 2nd jobs at a low wage rate (in line with the median rates, we would assume that any rate of return on the labour costs for the enabled second jobs will be well below this overall rate.

77. Alternatively, in the long run the benefits to employers from employing an additional worker will be zero; given the marginal cost of employing workers in the long run will equal the marginal benefits in a perfectly competitive market. Banning exclusivity clauses in certain employment contracts is intended to improve the flexibility of workers in the labour market, so that they are no longer prevented from taking on an additional job. We would assume the rate of return is likely to be greater than zero if the reform takes the form of a widening of the ban on exclusivity contracts to other employment contracts predominantly held by the low paid. This is because such reform would further improve the functioning of the labour market, as well as preventing the easy circumvention of the initial ban on exclusivity clauses in zero hours contracts.
78. No information is readily available about what return employers would need to make in addition to labour costs to take on employees/workers, especially in the specific circumstances of it being a 2nd job for the individuals, with relatively few hours in a week. For the reasons discussed, we assume that is likely to be lower than the 53% business receives on average for each unit of labour, but greater than zero. We therefore make a cautious estimate that for employers to take on these individuals; they will get a return on average of 10% on their labour costs, calculated as wages multiplied by 17.8% to take account of non-wage costs. The estimated annual benefit to employers is set out in the table below.

Table 16: Estimated benefits to employers from additional output produced by individuals enabled to take an additional job, 2013 prices, £000s

	<u>Total</u>	<u>Private sector</u>	<u>Public sector</u>
Those working under 35 hours a week (£ 000s) (Option 1a)	941	640	300
Those with weekly wages below NMW rate x 35 hours (£ 000s) (Option 1b)	388	317	71
Those on NMW rate or below (£ 000s) (Option 1c)	46	44	2

²⁵ We calculate the unit labour cost ratio, which is the ratio of total labour costs per worker to output per worker. Using current prices figures for 2012 of £433 billion for gross operating surplus, £842 billion for compensation of employees, £85 billion for mixed income and £1,383 billion for gross value added, we estimate that unit labour costs account for around 65% of output per employee.

Benefits to individuals and the Exchequer

79. We expect that individuals enabled to take an extra job will earn additional wages, as set out in Table 15 above. However, it is likely that some of those enabled to take an additional job will be on universal credit. Their additional weekly earnings will result in an adjustment to their benefits to take account of their increased income. The benefit from the additional earnings will therefore be shared between the individuals and the Exchequer to some extent. We have not attempted to estimate this split as it is dependent on a number of factors that it would not be sensible to try and estimate.
80. Those enabled workers who take on a second job are giving up some leisure time in order to work more hours in a week. Therefore, economic theory suggests that the benefit obtained in additional consumption from earnings additional wages should be net of the cost of lost leisure time. This is difficult to measure, as individuals will place a different value on the extra consumption they can achieve through working additional hours, and the leisure hours they will have to give up.
81. The Green Book considers the effect of relative prosperity on the satisfaction derived from an additional unit of consumption (pages 91 to 94). It states that this satisfaction is likely to decline as income grows. It suggests that the relative weights for the marginal utility of additional consumption across quintiles of the income distribution can be calculated by the ratio $(1/(\text{median income for the quintile}) \text{ divided by } (1/\text{overall median income}))$.
82. BIS estimates for the overall 2013 ASHE distribution of basic weekly wages suggest that for the 5th (or lowest) weekly wage quintile, the relative weight was 3.8, while for the the 4th (2nd lowest) quintile it was 1.6, relative to the middle quintile's weight of around 1. This suggests that for the lowest quintile substantially more satisfaction is obtained from an additional unit of consumption than those in the highest 3 quintiles, with those in the 4th quintile also gaining at least 60% more satisfaction.
83. The ASHE data also places a high percentage of those employees/workers covered by the three thresholds considered within the 4th and 5th quintile for basic weekly wages.

Table 17: Estimated percentage of employees/workers covered by each of the exemplified thresholds that falls within the 4th and 5th basic weekly wage quintile

	<u>4th quintile</u>	<u>5th quintile</u>
Those working under 35 hours a week (£ 000s) (Option 1a)	28%	44%
Those with weekly wages below NMW rate x 35 hours (£ 000s) (Option 1b)	20%	80%
Those on NMW rate or below (£ 000s) (Option 1c)	35%	65%

84. Therefore, for most of the individuals who take an additional job, especially in the cases of Option 1b and Option 1c it is likely that the utility value of additional consumption through extra wages significantly outweighs the opportunity cost of leisure foregone. The figure for additional wages is therefore a maximum for the benefit realised for individuals taking an

additional job, in reality it would be lower as some workers, particularly among those covered by Option 1a, would have a marginal utility of additional consumption well below the additional wages earned. However, given the difficulty of measuring the opportunity cost of leisure foregone, we have used the maximum of additional wages (shown in Table 15) to capture the benefit to enabled individuals. Prior to the consultation response, we will further explore possible ways of accounting for the cost of leisure foregone.

Option 2: non-statutory code of practice

85. This is a non-regulatory option, with Government looking to work with business representatives and unions to develop a code of practice on the fair use of zero hours contracts, which could include some guidance about compliance with the ban on exclusivity clauses in zero hours contracts. In terms of the wider code of practice, the content and approach has yet to be fully decided upon. It therefore remains unclear what costs employers may face in applying the code. There will be costs involved in drafting the code of practice, for both the Exchequer and business, but the code of practice should improve operation of zero hours contracts by providing greater certainty of the rights and responsibilities associated with such contracts. The monetised impacts relating to the wider code of practice will be set out in the final IA, when these details become clearer.

Familiarisation

86. The non-statutory code of practice in relation to the ban on exclusivity clauses could be developed in a number of ways:

- ◆ The code of practice could provide guidance on how to implement the ban on exclusivity clauses in zero hours contracts;
- ◆ The code of practice could provide guidance on implementing a ban on exclusivity clauses in zero hours contracts, but in addition could provide non-statutory guidance suggesting best practice would include a ban on exclusivity clauses in a wider range of employment contracts, as exemplified above

Code of practice on ban on exclusivity clauses in zero hours contracts

87. We have already included the costs of employer familiarisation with the ban on exclusivity clauses in zero hours contracts in the final impact assessment for the legislation implementing the ban (which the Regulatory Policy Committee considered fit for purpose)²⁶. This would include the cost of employers becoming familiar with guidance related to the ban on exclusivity clauses. The estimated costs are set out in Table 18.

²⁶ BIS, *Final Impact Assessment: Banning exclusivity clauses in zero hours contracts*, October 2014,

Table 18 Estimated number of employers using ZHCs with exclusivity clauses and estimated familiarisation costs

	<u>Whole economy</u>	<u>Private sector</u>	<u>Public Sector</u>	<u>Non-profit organisations</u>
Estimated familiarisation costs (2013 prices) £000s	472	442	3	28

Source: BIS estimates

88. As these costs have already been accounted for in the earlier impact assessment, they will not be included in the calculations of costs and benefits.

Code of practice on a ban on exclusivity clauses in employment contracts that come within particular hours worked, income or pay-rate thresholds

89. We have estimated the cost of familiarisation for employers if secondary legislation was introduced extending the ban on exclusivity clauses to employment contracts which covered those with a) a basic working week of under 35 hours, or b) those with a weekly wage below NMW x 35 or c) those on a pay rate of the NNMW. The estimate, based primarily on threshold a) is £0.3 million (See Table 4). We assume that the familiarisation with non-statutory guidance covering the same ground would have the same cost to employers.

Implementation

Code of practice on ban on exclusivity clauses in zero hours contracts

90. Costs of implementation have already been included in the final impact assessment for the legislation banning exclusivity clauses in zero hours contracts, viewed as fit for purpose by the Regulatory Policy Committee. The estimated annual costs to employers of implementation excluding familiarisation costs (at 2013 prices) ranged from £0.5 million to £1.3 million, with a best estimate of £ 0.9 million. As this ban is statutory, affected employers are legally required to implement the policy. These costs, as they have already been taken account of, will not be included in this IA.

Code of practice on a ban on exclusivity clauses in employment contracts that come within particular hours worked, income or pay-rate thresholds

91. If this non-statutory option was pursued, there would be no legal requirement for employers to apply the ban to employment contracts covered by whichever threshold was used.

92. Because the code of practice option is non-statutory, and therefore does not require companies to act on it, this option could be classified as a ‘Permissive Change’. Paragraphs 1.9.20 to 1.9.21 of the Better Regulation Framework Manual (July 2013) state that:

“Regulatory changes are permissive in nature where they allow, but do not force, businesses to do something. If there is a reasonable expectation that business will only adopt these changes where they lead to net benefits for business, the analysis in the impact assessment can assume that benefits are at least equal to costs, even if it is not proportionate or possible to quantify or monetise the benefits.”

93. Potentially affected employers would therefore only implement the ban on exclusivity clauses suggested in the guidance if they felt a benefit in doing so. This may be influenced by potential effects on the employer’s reputation, trade association membership rules,

consideration of the code of practice by arbiters in labour disputes or perhaps beneficial impacts on workforce morale.

94. For the purpose of calculating the total net direct costs to business, we have not estimated aggregate costs and benefits for the companies that choose to implement the optional ban. Given that companies will only choose to implement it if the benefits outweigh the costs, the net benefit to business should be positive (or at least zero). For the purpose of estimating an overall cost to business, we have assumed that the net benefit to the companies that choose to implement the ban will be zero. Overall, it is likely that, compared to the legislative option, fewer employers would be willing to adopt the ban on account of the code of practice. This would mean that the costs resulting from the non-statutory option would be lower than those estimated for the regulatory option. However, this would mean that the net benefits to the economy would also be lower.
95. The level of potential benefits would be influenced by how far the code of practice gained acceptance. If the recommendations in non-statutory code of practice were able to obtain the status of common practice, then employers using employment contracts covered by the suggested threshold would generally implement the ban because they considered it was in their interests to do so. This would lead to the overall economic benefits of the non-statutory option moving towards those expected from the legislative option (monetised above).
96. Of the possible threshold options considered, this would suggest that benefits arising from the threshold with greater coverage (Option 1a, guaranteed hours worked in a week) would be highest, followed by the weekly earnings threshold. Option 1b, with the lowest level coming from the narrowest threshold, based on NMW pay rate (Option 1c). Potentially, an alternative threshold with wider coverage, if the non-statutory code of practice was generally complied with, may yield greater economic benefits.

Risks and assumptions

97. There are a number of risks to the assumptions made in monetising the costs and benefits. Potential risks include:
 - ◆ Although the consultation has not applied any figures to the thresholds suggested as possible policy options, we have chosen some limits that we think are reasonable to populate the thresholds, and estimate possible costs and benefits. If a threshold limit was narrowed, then costs and benefits will be reduced, while the reverse would be the case if the thresholds were widened. The three thresholds exemplified present a fairly wide range in terms of number of individuals enabled, so facilitating an assessment of the impacts of different threshold coverage.
 - ◆ Employers who use affected employment contracts with exclusivity clauses may make individuals on these contracts redundant if exclusivity clauses are banned. This would appear to be a very low risk. As noted above, only a small proportion of those with exclusivity clauses are expected to get an additional job after being enabled by the ban. However, among those employed on terms and conditions that come within the thresholds exemplified is likely to be some demand for additional hours. Therefore, it may be relatively easy for some affected employers to find existing workers willing to make up the hours not taken up by those obtaining a 2nd job. As banning exclusivity clauses frees workers up to take additional work alongside their main job, it is expected that workers taking on a 2nd job will aim to minimise conflict with their main job. The employer should therefore still generally get the benefit of the output produced in their regular hours, though in some circumstances individuals may not be able to work additional, irregular hours.

- ◆ As many enabled individuals within the thresholds are likely to be low paid, they may lose some benefit payments to reflect their additional earnings, providing a disincentive to take the 2nd job. As DWP's universal credit policy is designed to make work pay, individuals will see a net gain in income from the wages received for the 2nd job. At the same time, DWP will be looking to encourage those in work who could work additional hours to do so, offering the potential to lower dependency on welfare. These two factors are likely to act as a driver for individuals, which will mitigate against any disincentive relating to lost benefits.
 - ◆ Of the three thresholds we have used to exemplify the different approaches to widening the ban on exclusivity clauses in employment contracts, it may be considered that some employers might circumvent the ban if the wage rate approach is used by paying slightly over the wage rate used. This may be more likely to occur if the wage rate used is the NMW, as workers should be on at least this rate. We will need to consider this risk going forward, if it is decided that an extension of the ban on exclusivity clauses is considered appropriate to combat potential avoidance of the ban on these clauses in zero hours contracts.
98. Due to the lack of data specifically covering many of the issues raised when considering the impacts of the possible policy options exemplified, a number of assumptions have been made. These are discussed below.

- ◆ No data is available that explicitly measures the number of individuals that have an exclusivity clause in their employment contract. We have therefore based the estimate on an assumed minimum of 1% of employees/workers within the thresholds. We have also assumed that this 1% applies to the proportion of employers with staff who have exclusivity clauses in their contracts. Within the IA, we have included questions to test whether respondents to the consultation think that these are realistic assumptions, or whether the proportion is likely to be higher. If the proportions with exclusivity clauses are higher, then the number of individuals enabled will rise. However, evidence suggests only a small proportion of those workers would be likely to take on a 2nd job.
- ◆ Similarly, there is no data available on the number of employers that would be affected by the extension of the ban on exclusivity clauses. In line with the assumptions above, we assume that 1% of businesses would be affected, and have included questions within the IA to test this assumption. If the proportion is higher, then the costs to employers would rise,, primarily transition costs (as noted above, only a small proportion of enabled workers are likely to take an additional job).

Potential mechanisms for providing redress: qualitative assessment

99. The potential options for enabling individuals to seek redress from employers non-compliant with the ban on exclusivity clauses in zero hours contracts have not been considered in sufficient detail to enable monetisation.
100. The consultation asks whether there should be consequences for employers who restrict opportunities of work to individuals who choose to take an additional job with another employee? It follows this by asking those who believe there should be consequences whether this should involve criminal penalties (which may involve a fine or other criminal penalty), civil penalties (not incurring a criminal record) or redress via Employment Tribunals (ET) for individuals. This suggests that, potentially, the Government will not set up a specific system of enforcement or redress, or that it will set up some system of government enforcement (which would result in criminal or civil penalties for employers found to be non-compliant), or facilitate individuals to seek redress through the ET system. The consultation should help to provide an indication as to the extent that some means of redress will be required, and the enforcement approach if any that might best

address this (for instance, whether an existing government enforcement agency might be appropriate, or whether a new agency is required). This will help the development of more specific options for providing redress which will allow reasonable monetised costs and benefits. However, at this stage we provide below a qualitative assessment of potential costs and benefits arising, indicating who may be affected.

No change option

101. The no change option will not generate any new costs and benefits. However, there is a potential risk that if employers do not face some pressure to comply with the ban on exclusivity clauses then unscrupulous employers will not comply. This would undermine the policy objective of improving the functioning of the labour market, and reduce the net benefits to the economy that are expected to occur.

Enforcement options

102. Two possible enforcement options are being consulted on: government enforcement, or individual enforcement through an employment tribunal. Both would result in costs to the Exchequer.
103. If government enforcement was introduced, the Exchequer would face set-up costs for the enforcement body, and ongoing operational costs. The set up costs could be mitigated in part if an existing enforcement agency was enhanced to include the additional responsibilities (sharing back office functions, building space etc). Nevertheless, there would still be costs resulting from recruitment, training, publicity, setting out enforcement protocols, ICT etc.
104. If the selected mechanism for redress was individual enforcement via the employment tribunal, there would similarly be set-up and ongoing operational costs to the Exchequer. There would be a need to set up a new employment tribunal jurisdiction, and additional training and documentation for Acas and employment tribunal staff (all potential employment tribunal claims have to initially go through Acas early conciliation, in the hope that they can be resolved quickly and at lower cost). There would be ongoing administrative, conciliation and judicial costs generated by claims made under the new jurisdiction.
105. If the government enforcement mechanism included penalty fines for non-compliant businesses, then some of the costs accrued in enforcement may be paid for by these fines. Similarly, some of the running costs of the employment tribunal may be obtained through the fees charged to claimants.
106. If a claim for redress is made, and the employer turns out to be compliant with employment law, there will be some costs for the employer facing the claim. Primarily, via government enforcement this will involve the time taken by staff of the employer to deal with the investigation. For NMW enforcement, this would involve providing the inspector with payroll records (which compliant businesses should have readily available) and the inspector interviewing the manager and payroll staff. Compliant businesses will also tend to run up costs when defending an employment tribunal claim. This relates to the time spent by managers and other staff preparing their defence, and the cost of legal advice paid for. If early conciliation is successful, then these costs should be reduced.
107. Benefits should be derived by workers who would be able to gain redress from non-compliant employers. Workers potentially enabled by the ban on exclusivity clauses may also benefit as the threat of enforcement may encourage some potential avoiders of the ban to comply.

108. Compliant employers should benefit as non-compliant employers would face some penalty for seeking to gain an unfair advantages through not complying with employment law.

Direct costs and benefits to business calculations

109. The monetised estimates of costs and benefits to business of the potential policy options exemplified are:
- ◆ A one-off transition cost to account for the time businesses will require to familiarise themselves with the legislative change which makes exclusivity clauses in employment contracts legally unenforceable. We have assumed that familiarisation will be the same for each of the three thresholds – exemplified using working less than 35 hours a week, earning weekly wages of less than NMW x 35, and being paid at the NMW hourly rate. We also estimate that the same familiarisation cost to business would occur if a non-statutory code of practice put forward these options (extending the ban on exclusivity clauses using the thresholds stated) as best practice. The cost to business would be £0.3 million.
 - ◆ It is assumed that some employers using exclusivity clauses in contracts with individuals on high hourly wages to protect confidential information will wish to amend the contracts to include confidentiality clauses, to continue to protect their information, if the ban on exclusivity clauses is extended. We estimate that if a legislative change extended the ban to those working less than 35 hours a week this will cost businesses (at 2013 prices) £ 0.4million as a one-off transition cost. If a legislative change extended the ban to those with a weekly wage below NMW x 35, we estimate a cost to business of £0.06 million. We assume there would be no such contracts for those on the NMW hourly rate (see Table 6). We have not monetised any specific amount for the non-statutory option (see paragraphs 79 to 82).
 - ◆ If a legislative change extending the ban on exclusivity clauses based on the thresholds discussed above is introduced, we estimate that there would be an ongoing cost to business due to reorganisation. This would take account of increased unavailability of individuals working for them who would be enabled to take an additional job with another employer. As shown in Table 14, we estimate that this reorganisation will cost business (at 2013 prices):
 - i. £0.3 million, if the ban was extended to those with who worked less than 35 hours a week.
 - ii. £0.1 million, if the ban was extended to those with weekly wages of less than NMW x 35.
 - iii. £0.02 million, if the ban was extended to those on an hourly pay rate of the NMW.
 - iv. No specific ongoing costs have been monetised for the non-statutory option.
 - ◆ If the ban on exclusivity clauses was extended under a legislative option, then the additional output produced by individuals enabled to take an additional job would benefit business at an estimated rate of return of 10% of total wages. The estimated annual benefit to business from this potential return, shown in Table 17 is (at 2013 prices):
 - i. £0.6 million, if the ban was extended to those with who worked less than 35 hours a week.

- ii. £0.3 million, if the ban was extended to those with weekly wages of less than NMW x 35.
 - iii. £0.04 million, if the ban was extended to those on an hourly pay rate of the NMW.
 - iv. No specific ongoing costs have been monetised for the non-statutory option..
- ◆ Overall, for the three possible legislative options exemplified, and for the potential non-statutory option there are estimated equivalent annual net costs to business (at 2009 prices):
 - i. -£0.2 million if the ban was extended to those who worked less than 35 hours a week
 - ii. -£0.1 million if the ban was extended to those with weekly wages of less than NMW x 35.
 - iii. £0.01 million if the ban was extended to those on the NMW hourly pay rate.
 - iv. £0.03 million if a non-statutory code of practice put forward an extension of the ban as best practice.
- ◆ For the possible legislative changes with an equivalent net benefit to business, it is considered a zero-in as secondary legislation would be used to enact this change.

110. The best estimate figures are summarised in the table below:

Table 19: Monetised costs and benefits for Business included in One-in-Two-Out estimates

£ millions (2013 prices)

	<u>Possible legislative options</u>			<u>Non-statutory option</u>
	<u>Option 1a</u>	<u>Option 1b</u>	<u>Option 1c</u>	<u>Option 2</u>
Transition costs				
Familiarisation with regulatory change on exclusivity clauses	0.3	0.3	0.3	0.3
Amending contracts to include confidentiality clauses	0.4	0.06	0	-
Ongoing costs				
Reorganisation costs due to increased unavailability of enabled individuals	0.3	0.1	0.02	-
Ongoing benefits				
Return from additional output from additional jobs	0.6	0.3	0.04	-
Equivalent annual net cost to Business (2009 prices)	-0.2	-0.1	0.01	0.03

Wider impacts

111. If the legislative (or non-statutory code of practice) options are introduced, individuals enabled by the ban on exclusivity clauses would be expected to work additional hours in a week. They would therefore have additional income from wages for this extra work (see Table 16 for estimates), though some of these individuals may also lose some universal credit payments that would reduce their net increase in income. As the individuals would spend their additional income, it would help increase turnover for other businesses in the economy. Therefore there would be likely to be additional economic benefit to business through extra expenditure by enabled individuals. We have not attempted to monetise this benefit.

Summary

112. Overall, the possible extension of the ban on exclusivity clauses would also be a removal of a constraint to participation in the labour market, as well as a mechanism to prevent avoidance of the ban on exclusivity clauses in zero hours contracts. This impact assessment estimates that if the ban was extended then there may be an overall net economic benefit (shown by the net present value), due to additional wages and a small net benefit to businesses. In addition, there is likely to be additional benefits resulting from expenditure of some of the extra wages.

Table 20: Summary of costs and benefits for Options 1a, 1b and 1c

	Estimated costs and benefits £ millions		
	<u>Option 1a</u>	<u>Option 1b</u>	<u>Option 1c</u>
Costs			
Annually recurring costs:			
Employer reorganisation costs	0.4	0.2	0.02
Transition costs:			
Employer familiarisation with exclusivity clauses legislation	0.3	0.3	0.3
Employer amendment of contracts to include confidentiality clauses	1.0	0.1	0.0
Total annual transition costs	1.3	0.4	0.3
10 year Cost (net present value)	4.8	1.8	0.5
Benefits			
Annual Ongoing benefits:			
Employer benefits from additional output	0.9	0.4	0.05
Individual/Exchequer benefits from additional wages	8.0	3.2	0.4
Total annual ongoing benefits	8.9	3.6	0.4
Plus unquantified benefits	Additional economic benefits resulting from expenditure of additional wages		
10 year Benefits (net present value)	76.8	31.7	3.8
10 year Net Benefits (net present value)	71.99	29.83	3.23

Summary of costs and benefits for Option 2

This non-statutory option would leave it to the employer to decide if it wanted to follow the best practice guidance that exclusivity clauses should not be enforced in relevant employment contracts. Apart from an estimated one –off familiarisation cost for employers of £0.3 million at 2013 prices, we have not specifically monetised any of the costs or benefits that may result. We have assumed that overall there will be a zero net benefit for employers that choose to implement a ban on exclusivity clauses. This suggests that there may be an overall benefit to employers from returns on any additional output generated, and from expenditure of additional wages earned. There would also be a benefit to enabled workers of additional wages from their second job.

Annex A

Small and Medium Business Assessment

113. The possible policy options assessed is aimed at removing a barrier to individuals from being able to work more hours in a week if they want to, through banning exclusivity clauses in certain employment clauses whose terms and conditions place the workers within certain thresholds.
114. For the purpose of the small and micro assessment, the following exemptions were considered:
- Full Exemption
 - Partial exemption
 - Extended transition period
 - Temporary exemption
 - Varying requirements by type and/or size of business
 - Direct financial aid for smaller businesses
 - Opt-in and voluntary solutions
 - Specific information campaigns or user guides training and dedicated support for smaller businesses
115. The consultation asks for evidence about the potential scale of avoidance of the ban on exclusivity clauses in zero hours contracts. It then asks about potential approaches for tackling avoidance, including a non-statutory approach and a regulatory approach.
116. The non-statutory approach to ensuring compliance is built a voluntary code of practice, or best practice guidance setting out that exclusivity clauses in zero hours contracts are made legally unenforceable by the legislation included in the Small Business, Enterprise and Employment Bill. This non-statutory option could go wider and suggest that employers do not enforce exclusivity clauses in a wider range of employment contracts (potentially defined by thresholds as set out in the impact assessment above). As employers would have to opt-in to non-enforcement of exclusivity clauses, they are only likely to do so if their benefits at least cancel out their costs.
117. The potential legislative options would have costs for affected employers (using exclusivity clauses), including small and micro businesses, but also benefits to employers, notably those who provide second jobs for enabled workers.
118. Any exemption from the possible policy options for small and micro businesses would impact negatively on the policy aim of ensuring compliance with the ban on exclusivity clauses in zero hours contracts. It would make it more likely that those individuals on ZHCs with exclusivity clauses working for smaller businesses would remain restricted from finding additional work to boost their weekly wages. Therefore, the non-compliant employer would benefit fully from the flexibility of the ZHC, while the individual would not. It would prevent other employers, including small and micro businesses, from benefitting from greater output through employing these individuals in additional jobs, and the wider benefits expected.
119. Also, if small and micro businesses were exempted from implementing a ban on exclusivity clauses in a wider range of employment contracts, then they may gain some competitive advantage on other employers required to implement the ban. Also, the benefits from removing restrictions on workers accessing the hours of work they wish to do

would not be realised for those individuals working for small and micro businesses. The improvement in the functioning of the labour market would only be partially achieved.

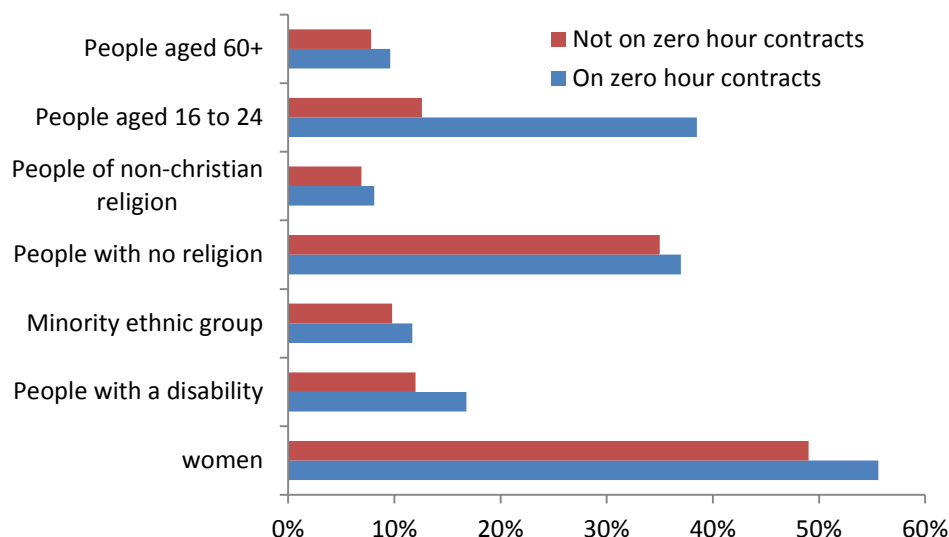
120. We do not believe that the costs of complying with this policy will warrant direct financial aid for small and micro businesses.
121. BIS is considering in more detail how to improve the quality and accessibility of information and guidance on employment contracts and rights and on the rights of those on ZHCs to benefits (both employment rights and welfare payments). Potentially the guidance and information could be tailored so that it relates specifically to small and micro businesses, and we will explore with relevant stakeholders if they consider it would be beneficial.
122. The available evidence is not clear that the possible policy options will place a disproportionate burden on small or micro businesses. Although 2013 data from the Annual Survey of Hours and Earnings suggests that for all three of the thresholds considered, (a) basic working hours of under 35 hours a week, (b) weekly wages of lower than NMW x 35 and (c) working on the hourly NMW pay rate, a higher proportion of workers employed by micro employers (and, for b) and c), small employers) are within the threshold than compared with the labour market as a whole. However, there is no information available about use of exclusivity clauses by size of employer. Therefore we have no clear evidence that small and micro employers are more likely to be affected by a ban on exclusivity clauses in affected employment contracts than other sized employers.
123. Also, overall, the monetised costs and benefits suggest a small net benefit to business resulting from Options 1a and 1b, with only a marginal net cost to business from Options 1c and 2. Along with larger employers, micro and small businesses would benefit from the additional hours worked by enabled individuals.

Equality Assessment

124. 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.
125. The potential policy proposals considered in this IA should benefit those individuals on ZHCs with exclusivity clauses, as the policy objective is to ensure that employers are compliant with the ban on exclusivity clauses in zero hours contracts. The ban on exclusivity clauses in protected contracts such as 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).
126. The possible policy options also allow for an expansion of the ban on exclusivity clauses to cover some other employment contracts. If these were implemented, the functioning of the labour market may be further improved by removing a restriction preventing workers who wished to work more hours than their employer can provide from doing so by taking an additional job. Largely, the thresholds considered in Options 1a, 1b and 1c would benefit the relatively low paid.
127. We have considered the extent to which individuals on zero hours contracts 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 4th quarter of 2013

suggests that this is the case for women, individuals aged 16 to 24 and individuals aged 60 or over, people with a disability, people with no religion and people of a non-Christian religion and individuals from a minority ethnic group (however, not all of these differences are statistically significant).

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



Source: LFS

128. Similarly, we used 4th quarter 2013 data from the LFS to test whether those workers with employment contracts that place them within the three thresholds exemplified in the impact assessment:

- ◆ Option 1a: Threshold of having under 35 hours of guaranteed work a week
- ◆ Option 1b: Threshold of having guaranteed weekly earnings below NMW x 35
- ◆ Option 1c: Threshold of having a guaranteed hourly pay rate of the NMW.

129. This shows that, for the basic working week of under 35 hours threshold, workers with the following characteristics have a statistically significantly higher proportion within the threshold than in the workforce as a whole: those with a disability, women, those aged 16 to 29, those aged 60 and over, and those who follow the Christian or Muslim religions,

130. For the basic weekly earnings of NMW x 35 threshold, workers with the following characteristics have a statistically significantly higher proportion within the threshold than in the workforce as a whole: those with a disability, women, those aged 16 to 24, those aged 60 and over, and Muslims.

131. For the basic hourly payrate of the NMW threshold, workers with the following characteristics have a statistically significantly higher proportion within the threshold than in the workforce as a whole: women, those aged 16 to 24, those aged 60 and over, Muslims, Sikhs, those of mixed ethnic background, those with Asian and Asian British ethnicity. It is worth noting that the equality assessment for Impact Assessment for the Amendment to the

National Minimum Wage regulations 2014- increase in NMW rates²⁷ shows that, as well as the groups mentioned above, a higher proportion of those with disabilities than employees overall were on the NMW pay rate.

132. As identified in paragraph 12, the policy is expected to impact beneficially on individuals on ZHCs with exclusivity clauses, including those with protected characteristics. If the potential policy options widening the coverage of the ban on exclusivity clauses to cover additional employment contracts (the new limits determined by one of the thresholds referred to above) then the policy would be expected to impact beneficially on those individuals who had the exclusivity clause restriction removed from them.
133. As some groups with protected characteristics comprise a higher proportion of those on ZHCs, and those within the three thresholds discussed, relative to those on other employee/worker contracts, the policy may have some positive equality impacts.

²⁷ S.Patel, Amendment to the National Minimum Wage regulations 2014- increase in NMW rates Impact Assessment, May 2014, BIS, p26-28

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