

Government Consultations

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a. Restrictive Covenants: Banning or restricting the use of non-compete clauses in employment contracts

The Government has opened a consultation on measures to reform non-compete clauses in employment contracts.

THE FACTS

To assist in economic recovery, the Government is exploring ways in which to increase competition and create new jobs. This includes mandatory compensation for the duration of a post termination restriction, with complementary measures or a ban on such clauses. The consultation focusses on the use of non-compete clauses. However, it also asks for views on whether measures should be introduced to restrict the use of other post termination restrictive covenants.

1. Mandatory financial compensation for the duration of the post termination restriction

This option reflects the position in some European Countries including France. If adopted, post-termination non-compete clauses would only be enforceable where the employer provides compensation for the duration of the clause.

The Government is seeking views on the appropriate level of compensation, including whether the compensation should be set as a percentage of weekly earnings, and (if so) what percentage. It is also seeking views on whether there should be an option to waive the non-compete clause early and release the employee from the restraint of the clause and the employer from the obligation to pay compensation.

o Enhancing transparency and communication where non-compete clauses are used

As a complementary measure to the mandatory compensation option above, the Government is proposing to introduce a requirement for employers to disclose the exact terms of the non-compete agreement to an employee in writing before employment begins. Failure to do so would make the clause unenforceable. The consultation does not cover how existing non-compete clauses would be dealt with, or the fact that non-compete clauses are often introduced during employment to reflect changes in the employment relationship, such as promotions.

o Statutory limits on the length of non-compete clauses

Another suggested measure, that would be complementary to mandatory financial compensation for the duration of the non-compete covenant, is the introduction of statutory restrictions on the maximum length of post-termination non-compete clauses. Views are sought on the maximum length of the non-compete period. The Government considers that a maximum length would give certainty and prevent the use of clauses that are unreasonably long. It acknowledges that employers might treat the maximum allowed period as a standard, rather than a maximum, potentially resulting in periods longer than might currently be regarded as enforceable by the courts. However, the Government considers that the mandatory payment during the non-compete period might be a disincentive to employers doing so.

2. Banning post-termination non-compete clauses by making them unenforceable

As an alternative to the above complementary options, the Government is considering making non-compete clauses unenforceable. It recognises that the scope of the ban would need to be clearly defined, that exemptions may be possible, and that there are arguments against doing so.

WHAT DOES THIS MEAN FOR EMPLOYERS?

If either approach is adopted it would mark quite a change. The Government did consult on this issue in 2016 and took no actions. However, in the light of the pandemic and its impact on the labour market they may feel change is necessary.

Employers can submit their views via the [online survey](#) or by email to frederick.everitt@beis.gov.uk. The consultation closes on 26 February 2021.

BEIS: Measures to reform post-termination non-compete clauses in contracts of employment

b. Exclusivity Clauses: Consultation on extending the ban on exclusivity clauses in contracts of employment.

The Government is consulting on whether exclusivity clauses should be banned where the worker's guaranteed weekly income is less than the Lower Earnings Limit.

THE FACTS

The Government has announced that, as part of its plan to maximise opportunities for individuals to find new work and apply their skills to drive economic recovery, it is seeking views on proposals to extend the ban on exclusivity clauses. At the moment, the ban and associated protection from dismissal and from being subjected to a detriment only relate to exclusivity clauses in zero hours contracts.

The Government is considering extending the ban to contracts for workers whose guaranteed weekly income is less than the Lower Earnings Limit, which is currently £120 a week (equivalent to 13.76 hours a week worked at the National Living Wage). The aim of this would be to ensure that low-income workers can take on additional work to boost their income should they wish to do so. The Government is proposing an exemption to the extended ban for well paid employees who only work a few hours a week. This exemption would be provided by setting an hourly wage cap, which would be reviewed regularly.

WHAT DOES THIS MEAN FOR EMPLOYERS?

Employers can submit their views via the [online survey](#) or by email to rebecca.lowe@beis.gov.uk. The consultation closes on 26 February 2021.

[BEIS: Measures to extend the ban on exclusivity clauses in contracts of employment](#)

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