

Consultation Response

Implementing employee owner status

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This consultation forms part of the Employment Law Review led by the Department for Business Innovation and Skills. It proposes that employers will be able to offer shares in their business to new and existing employees, worth between £2,000 and £50,000, in return for the individual giving up certain employment rights. Most notably, employee owners would be unable to pursue claims of unfair dismissal (except where this is automatically unfair or relates to discrimination law), would be ineligible for the right to request flexible working and to request time off for training, and would not qualify for redundancy payments. This would be voluntary for existing employees but new starters made such an offer would have to accept. Gains in the share price would be exempt from capital gains tax, but the consultation does not properly specify the methods used to value the shares.

Key points and recommendations

Employment rights are important for individuals and play a vital role in the smooth functioning of the labour market – they should not be up for sale, particularly as new employees will be forced to waive their rights in order to get the job. We therefore oppose the employee owner proposals.

For the proposals to work in practice, there must be greater safeguards for employees.

The right to request flexible working is likely to be important for many older workers. Losing this will mean that many people will not be able to access the options they need to remain active in the labour market.

It is odd that the consultation paper simultaneously recognises the benefits of flexible working and withdraws the right to request for employee owners.

An independent mechanism for valuing shares is essential – without this, employees will be at the mercy of employers who can decide what ‘reasonable’ means and at what value to buy back the shares at a later date (e.g. when the employee leaves the business).

It will be very difficult for individuals to obtain enough knowledge about the future prospects of the business to make an informed decision about whether to accept an offer.

1. Introduction

We have significant concerns with the proposed scheme. It is not clear what, if any, substantive value it will bring to business or the economy. Instead it will undermine individuals’ employment rights and complicate the legal framework for employers.

The current framework of rights has been negotiated over many decades, and there is a substantial evidence base confirming their value to all parties.

The UK already has the second lowest level of individual employment protection in the OECD.ⁱ There is no evidence that reducing employment rights further will help improve business or economic performance.

Even employers do not view overregulation in this area as a particular problem – the recent BIS SME quarterly survey finds that just four per cent of employers seek out advice relating to employment law or redundancies, proving that this is not a major issue among the business community.ⁱⁱ

The right to request flexible working, which the Government has said that it plans to be extend to all employees, remains an important employment right. Removing this will be counter-productive. Our concerns are explored in more detail under question 16.

2. Consultation questions

Q1. How can the government help businesses get most out of the flexibility offered and the different types of employment status?

We believe the proposals will only serve to complicate the legal framework for employers.

To enhance flexibility of the workforce, employers need to be more responsive to each employee's needs, and be able to offer a range of flexible working options. This has been shown to enhance employees' attachment to their employer and raise productivity.ⁱⁱⁱ

Instead of pursuing these proposals, the Government should focus on improving leadership and management skills among employers.

Q3. What restrictions, if any, do you think should be attached to the issue of shares or types of shares?

Q4. When an employer buys back forfeit shares, should this be at full market value or some other level (e.g. a fraction of market value) should some other level be allowed in certain circumstances?

Q5. How should a company go about carrying out a valuation of the shares? What would the administrative and cost impact be for a company if an independent valuation was required?

The initial valuation of the shares – when the offer is made – must be made at 'the price that the shares might reasonably expect to fetch on the open market, disregarding any restrictions'.

However, if or when the shares are surrendered, the only requirement is on the employer to pay a 'reasonable' price, with no firm guidance. There appears to be no protection for the employee owner if the two parties disagree.

The suggestion in question 4 that when employers come to buy back shares it could be at 'a fraction of market value' is grossly unfair against the individual, and demonstrates that under the proposals someone could sacrifice their employment rights for little or no gain.

Unless there is a right to request an independent valuation, at no cost, there is a clear opportunity for unscrupulous employers to exploit employees, especially as the employee owner may not have access to detailed information on the employer's financial position.

In addition, if the employee owner were facing redundancy, this would suggest that the business is struggling and so the shares may be of little or no value. The employee owner might have given up the right to a statutory redundancy payment without receiving any benefit from the shares.

Q6. The Government would welcome views on the level of advice and guidance that individuals and businesses might need to be fully aware of the implications of taking on employee owner status.

In the majority of cases, it is likely an employer would hold more information than an employee, thereby placing the former in a better bargaining position.

Individuals would need more than just factual information about employment rights – this could include business sensitive information about future expectations or HR information about turnover, employee engagement and redundancy. Even if the employer provides full information, in good faith, at the time of making the employment offer, there is no guarantee that the shares will be worth anything at the time they are bought back.

Furthermore, there needs to be explicit protection for existing employees who reject an employee owner offer. There appears to be no means of recourse for unfair dismissal in such situations at present.

Q10. What impact, if any, do you think the employee owner status will have on employment tribunal claims, e.g. for discrimination?

Potential employee owners must be fully informed of their employment rights, including on issues such as discrimination which remain unchanged.

Q16. Do you think 4 weeks is the right period? If not, why not? What would be the impact of a shorter or longer period?

Flexible working brings proven benefits to employers and individuals alike, and suggesting this right should be lost for employee owners runs contrary to all other Government policy advocating its usage and benefit.

Paragraph 41 clearly recognises that flexible working is beneficial to both parties – it is odd that it can be considered beneficial to business to remove the right to request.

Encouraging the use of flexible working is an important part of the extending working lives agenda. Losing the right-to-request would invariably have a negative impact on the many older workers who need a formal statutory process to raise the issue with their employer.

Often older workers are unwilling to raise such issues informally with managers, for fear of suffering discrimination as a result.^{iv} There is no reason to think employee owner would behave differently.

Impact Assessment on flexible working:

The evidence cited in the Equality Impact Assessment on age and flexible working, taken from the Work-Life Balance survey, shows very different results to all other studies.

For example, our recent report, '*A means to many ends: older workers' experiences of flexible working*', found that flexible working rates increase with age, in particular from the mid-50s onwards. This was a comprehensive analysis of the Labour Force Survey, and fully reflects qualitative research on the subject – many older workers need and benefit greatly from flexible working.^v

We question the evidence used in the Government's analysis. This may be due to the treatment of home working in the analysis – among older workers this is the most common form of flexible working and so it is imperative this is included.

ⁱ OECD (2008), Strictness of employment protection indicators. Also note that Canada cannot be used as a direct comparison owing the state-level control of most regulation, so in effect the UK has the second least protected labour market in the OECD.

ⁱⁱ BIS SME quarterly survey (Feb 2012)

ⁱⁱⁱ Hayward et al (2007) 3rd work-life balance employer survey, BERR

^{iv} McNair S & Flynn M & Owen-Hussey L (2006) "Older workers in the south-east, Centre for Research into the Older Workforce.

^v The report can be found at: <http://www.ageuk.org.uk/professional-resources-home/policy/work-and-learning/>.