EMPLOYMENT (ALLOCATION OF TIPS) BILL

EXPLANATORY NOTES

What these notes do

These Explanatory Notes relate to the Employment (Allocation of Tips) Bill as introduced in the House of Commons on 15 June 2022 (Bill 21).

- These Explanatory Notes have been prepared by the Department for Business, Energy and Industrial Strategy with the consent of Dean Russell, the Member in charge of the Bill, in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Bill will mean in practice; provide background information on the development of policy; and provide additional information on how the Bill will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Bill. They are not, and are not intended to be, a comprehensive description of the Bill.

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Overview of the Bill

1 The purpose of the Employment (Allocation of Tips) Bill is to create a legal obligation on employers across sectors to allocate all tips, gratuities and service charges which they are paid or which they exercise control or significant influence over ("qualifying tips") to workers without any deductions. The Bill also requires employers to ensure that the distribution of qualifying tips between workers is fair.

2 The desired outcome of the Bill is to improve fairness for workers by ensuring that the tips consumers leave in recognition of good service and hard work are going to the workers as intended. The Bill also aims to increase fairness for employers who already allocate all tips to workers by ensuring that all employers follow the same rules and by preventing a return to further unfair tipping practices in the future.

3 The Bill requires employers to have regard to a statutory code of practice ("the Code") when complying with their obligation to allocate tips fairly. The Code, which is being developed with the assistance of stakeholders representing employers and workers, will set out the principles of fairness and transparency, reflecting (as far as reasonably possible) the multitude of ways that tips are reasonably collected by employers and received by workers.

4 The Bill also addresses the enforcement of these new legal obligations by creating remedies to be made available to the Employment Tribunal in cases where employers fail to comply. These include allowing tribunals to order the employer to revise the allocation of tips or to order an employer to make a payment to one or more of their workers.

5 In order to allow workers sufficient information to take a claim to an Employment Tribunal, employers in a place of business where tips are paid on more than an occasional and exceptional basis will (unless none of these are qualifying tips) be required to make available to workers a written policy setting out how tips are dealt with in that place of business. An employer's policy must include how tips are allocated between workers. Upon request, employers will also be required to share records of the qualifying tips which they have received and the amount of those tips which have been allocated to the requesting worker.

6 Where an employer does not receive or exercise control or significant influence over tips, including where tips are paid directly to workers in cash and kept or informally pooled by workers, the Bill will not interfere with existing tipping practices.

Policy background

7 The issue of employers in (primarily) the hospitality sector retaining tips, gratuities and service charges ("tips") has been of public and media concern for several years. An earlier concern was the use of tips, gratuities and service charges to meet an employer's obligation to pay the National Minimum Wage. This concern was addressed in the National Minimum Wage Regulations 1999 (Amendment) Regulations 2009, which included a provision stating that such sums could no longer be used to make up the National Minimum Wage. However, these regulations did not address the wider issues of unfair retention and distribution.

8 In 2015, unfair tipping practices became a prominent issue in the media, particularly in relation to major restaurant chains and the percentage of tips being retained by some employers. At this time, evidence found that around two thirds of employers in hospitality were making deductions from staff tips, in some cases of around 10 per cent.

9 Some employers in the hospitality sector have more recently improved their tipping practices, including by passing 100 per cent of tips to workers. However, some employers still retain tips

which customers have intended to be given to workers as a reward for their hard work and good service, with deductions of 3-5 per cent now more commonplace. There are also concerns in some areas that some changes in practice following the pandemic, such as increased payments by card, have led to more incidents of workers not receiving tips in full.

10 At the Conservative Party Conference in October 2018 the Government committed to bring forward legislation to ensure that employers pass on all tips to workers as part of a wider commitment to end exploitative employment practices and ensure every worker is rewarded fairly for their work.

11 A proposed Private Members' Bill on this topic was introduced by Dean Russell MP in 2021, but was withdrawn in favour of supporting Government legislation.

Public consultation

12 In response to the concerns surrounding tipping practices, the Government published a call for evidence in 2013 focused on the hospitality sector. Responses indicated broad support for Government intervention to ensure that discretionary payments go to the workers for whom they are intended. The Government subsequently published a consultation on tips, gratuities cover and service charges in 2016. Two-thirds of respondents advocated that tips should belong to the workers.

13 In September 2021, the Government published a response to the consultation and announced the measures to be taken forward as part of legislation. Further media and stakeholder engagement took place at this time.

Legal background

14 There is presently no law which directly concerns the distribution of tips as between employers and their workers.

15 In terms of legal ownership: tips and gratuities which are paid directly to the employer (for example sums paid by debit card, credit card or cheque) are presently the legal property of the employer. This is also the case for all service charges. Tips and gratuities which are paid in cash directly to a worker are the legal property of the worker, although it remains possible for employers to exercise control or significant influence over these tips through the worker's terms of employment or by the employer giving instructions.

16 In 2009, there was a change in the law to prevent employers from using tips so as to meet their National Minimum Wage obligations. The current position is set out in Regulation 10(m) of the National Minimum Wage Regulations 2015, which specifies that payments made by an employer in respect of tips paid by consumers do not form part of a worker's remuneration for National Minimum Wage purposes.

17 The methods of taxation for tips can vary depending on the way in which they are received, but this Bill does not interfere with the law concerning the taxation of tips.

Territorial extent and application

18 All the clauses set out in the Employment (Allocation of Tips) Bill apply and extend to England, Wales, and Scotland. Employment matters are devolved to Northern Ireland.

19 See the table in Annex A for a summary of the position regarding territorial extent and application in the United Kingdom. The table also summarises the position regarding legislative consent

motions .

Commonly used terms

20 Terms that are used throughout these notes are explained here.

- A tip/gratuity is an uncalled for and spontaneous payment offered by a customer either in cash, as part of a cheque payment, or as a specific gratuity on a credit/debit card payment.
- A service charge is an amount added to the customer's bill before it is presented to the customer. A service charge can be voluntary or mandatory.
- A tronc or tronc system is a special pay arrangement used to distribute tips, gratuities and service charges.
- The tronc operator is the person / persons with the responsibility of operating the tronc.
- Tronc members are those workers who are eligible to receive an allocation of tips, gratuities and/or service charges through the tronc.

Commentary on provisions of Bill

Requirement to deal with tips, gratuities and service charges

Clause 1: Tips, gratuities and service charges

21 This clause inserts new Part 2B into the Employment Rights Act 1996, which sets out how employers must deal with qualifying tips, gratuities and service charges. "Employer" is defined in section 230(4) of that Act.

22 The new section 27C goes on to deal with some key definitions. Subsection (2) defines "qualifying tips, gratuities and service charges" by reference to:

a. "employer-received tips". This is a tip, gratuity or service charge paid by a customer of an employer, which is either received upon its payment or subsequently by the employer or an associated person, or which is received upon its payment by a person under a payment arrangement made between the employer and that person (see subsection (3)(b)). A payment arrangement is defined by subsection (9) as an arrangement between an employer and another person under which payments made by customers of the employer are to be received by the other person instead of the employer. The category of employer-received tips will therefore typically include tips or service charges paid to an employer using a credit or debit card and, by virtue of subsection (9), will also include any sums paid by customers by way of tip, gratuity or service charge which are paid to an organisation such as a bank (for example by way of a fee for a card transaction) instead of being received by the employer.

b. "worker-received tips". This is a tip, gratuity or service charge paid by a customer of an employer and immediately received by a worker of the employer, without later being paid on to the employer or an associated person (see subsection (4)). Typically, this would include tips paid in cash directly to a worker and which the worker is not required to pay on to the employer. "Worker" is defined in section 230(3) of the

Employment Rights Act 1996. However, worker-received tips are only treated as "qualifying tips, gratuities and service charges" where the employer or an associated person exercises control or significant influence over those tips or over other worker-received tips paid by customers during the same week or the following week – see section 27C(5) and (9). Control or significant influence might arise, for instance, where the employer directs that tips are shared amongst other workers. Where, for example, the employer simply allows workers to keep cash tips which they have individually received, it is unlikely that the employer would have exercised control or significant influence.

23 A tip, gratuity or service charge may be a "qualifying tip, gratuity or service charge" even though it is described as something else (see subsections (3) and (4). This may be relevant if, for example, an employer adds a service charge to a customer's bill but describes it as a "supplemental charge for waiting on tables". For the purposes of the Bill it also does not make a difference whether a service charge is mandatory or discretionary for the customer to pay. Deductions are to be disregarded (subsection (6)). However, an amount paid by a customer is not a tip, gratuity or service charge insofar as it represents a payment of value added tax (see subsection (7)).

24 Subsection (8) provides that qualifying tips, gratuities and service charges can include amounts not paid in money, such as vouchers, as long as the item has a fixed monetary value and can be exchanged for money, goods and/or services. For example, this would include typical casino chips but would not include an item such as a bottle of wine.

25 Part 2B also makes provision for the Secretary of State to issue a code of practice, see 27C(1)(b). New sections 27P to 27R, inserted by clause 9, make provision for the issue of a code of practice by the Secretary of State. Such a code will not be binding on employers, but employers must take it into account in dealing with their obligations under the new Part 2B: see in particular sections 27D(3), 27F(4) and 27T(2).

Clause 2: How tips must be dealt with

26 This clause inserts sections 27D and 27E, which provide how an employer must deal with qualifying tips, gratuities and service charges. The obligations apply to the "total amount" of qualifying tips, gratuities and service charges paid by customers (subsection 27D(1)). This will therefore include any amount deducted (for example) by way of bank, payroll or administrative charges: the intention being that the whole amount paid by customers is available for allocation to workers. Subsection 27D(1) requires employers to allocate that total amount fairly between workers of the employer at the place of business where the qualifying tips, gratuities and service charges were paid or to which they are attributable (a place of business is defined at section 27X(1) to include any location where the employer's activities are carried out permanently or temporarily). This means, for example, that qualifying tips, gratuities and service charges paid by customers at a particular restaurant will not be shared with workers at a different restaurant of the same employer. However, this is to be read with new section 27E (non-public places of business). The employer's obligation to allocate fairly is also to be read with section 27F (independent troncs), inserted by clause 3.

27 Subsection 27D(2) supplements subsection (1) to ensure that where a worker is allocated an amount of the tips received by an employer, that amount is payable to the worker. Payments to the worker will be subject to any required statutory deductions, such as tax and national insurance where relevant. Section 13(1) of the Employment Rights Act 1996, as amended by clause 11, allows the employer to make such deductions.

Non-public places of business

28 New section 27E distinguishes between "public places of business", where there is mainly face-to-

face interaction with customers, and "non-public places of business", such as a typical company headquarters (see subsection (3)). The employer can, if it wishes, allocate amounts paid at non-public places of business between workers at the non-public place of business and workers at one or more of the employer's public places of business, provided that this is done fairly.

Clause 3: Independent troncs

29 This clause inserts section 27F, which addresses how the employer's obligations apply where qualifying tips, gratuities and service charges are allocated through a tronc system (see commonly used terms, above) which operates independently of the employer.

30 Subsection 27F(2) deals with situations where an employer arranges for all of the total amount of qualifying tips, gratuities and service charges paid at (or attributable to) a place of business during a reference period (which must be of at least one day – see subsections (1) and (9)) to be allocated between workers by an independent tronc operator. To determine whether it is fair for the employer to make tronc arrangements under subsections 27F(2) or (3), regard must be had to the code of practice, see subsection 27F(4). If it is fair for the employer to make those arrangements, subsection 27F(2) provides that the total amount of those tips is treated as having been allocated fairly between workers in accordance with section 27D(1) (the obligation to allocate fairly, as explained above). Subsection 27F(3) then deals with situations where an employer arranges for part of the total amount of qualifying tips, gratuities and service charges to be allocated between workers by an independent tronc operator. Similarly to 27F(2), if it is fair for the employer to make those arrangements, that part of the total amount of tips is treated as having been allocated fairly between workers. The overall effect of these provisions is that the employer is responsible for the fairness of the allocation of an aggregate amount to a tronc, but not for the subsequent allocation of that aggregate amount between individual workers, which is a matter for the independent tronc operator. However, if it later became apparent to the employer that the independent tronc operator was acting unfairly in allocating the aggregate amount, that might require the employer to reconsider, for the future, the fairness of the allocation of such aggregate amounts to that operator.

31 Subsection 27F(5) makes it clear that section 27D(2) (which provides for an employer to pay to workers the sum of tips which they have been allocated under section 27D(1), subject to any statutory deductions) does not apply to an amount which is treated as having been allocated fairly under the provisions dealing with independent troncs and which is payable to the worker by the independent tronc operator.

32 Subsection 27F(6) defines an "independent tronc operator" by reference to a person who the employer reasonably considers to be operating arrangements which are independent of the employer and where the payments made to workers under these arrangements are payments to which paragraph 5(1) of Part 10 of Schedule 3 to the Social Security (Contributions) Regulations 2001 applies. That paragraph relates to exemption from national insurance contributions. Normally, payments by a tronc will fall within that paragraph and the tronc will be deemed independent if it is operated without direct or indirect control of the employer and where qualifying tips, gratuities and service charges are paid to workers of the employer. A sum of tips can be allocated by an independent tronc operator even in circumstances where the sum is eventually payable to the worker by the employer (see subsection 27F(6)(b)). This would typically be the case where a tronc makes use of an employer's payroll system and the independent tronc operator instructs the employer as to how much each worker should be paid on account of the relevant sum of tips. Subsection 27F(6) also requires that the amounts paid to workers are not subject to deductions other than statutory deductions such as tax (see subsections (6)(c) and (9)).

33 Subsection 27F(8) grants the Secretary of State the power to amend the definition of "independent tronc operator" by regulations, as a result of the making of any subsequent provision in social

security contributions regulations (such as by way of amendment to the Social Security (Contributions) Regulations 2001). This power is intended to ensure that the current effect of section 27F can be maintained in the event of any amendment to social security contributions regulations. Regulations made under the power are subject to approval in draft by each House of Parliament under the provisions set out in section 236(3) of the Employment Rights Act 1996 (which apply to section 27F because of clause 12(2)(e)(ii) of the Bill).

Clause 4: When tips must be dealt with

34 This clause inserts section 27G, which specifies when tips must be dealt with in accordance with Section 27D. An employer must ensure that qualifying tips, gratuities and service charges are allocated to workers and paid no later than the end of the month following the month in which they were paid by the customer. For example, if a qualifying tip was paid on 8 April, the employer would need to deal with the tip in accordance with Section 27D by 31 May.

Clause 5: Agency workers

35 This clause inserts section 27H, which provides for agency workers, who might not be workers of the principal (or hirer) to which they are supplied, to benefit from the Bill as if they were a worker of the principal. Subsection (1) explains that an "eligible agency worker" is an individual who is: supplied by "the agent" (e.g. an employment agency) to do work for "the principal" (the hirer – e.g. an employer of workers at a restaurant) under a contract between the agent and the principal; not a worker of the principal (because of the absence of a worker's contract between the worker and the principal); and not carrying on their own business for clients or customers.

36 Subsection (2) provides that where such an eligible agency worker does work for the principal at a place of business, the Bill applies as if that agency worker were a worker of the principal. In effect, this requires the principal to fairly allocate the tips, gratuities and service charges as between the agency workers and the workers which it directly employs.

37 Subsection (3) allows a principal, rather than making payments directly to the agency worker (who may not be on their payroll), to pay qualifying tips, gratuities and service charges to "the agent" (who may be the employer of the eligible agency worker) no later than the end of the month following the month in which they were paid by a customer. This mirrors the timings in new section 27G. Under subsection (4), the agent is required to pay the amount received from the principal to the agency worker before the end of the month after the month in which the agent is paid by the principal. The agent must not make any deductions from the amount payable under section 27D(2), other than statutory deductions such as tax. Subsection (6) explains that the provisions relating to agency workers also extend to former agency workers.

Clause 6: Information

Written policy

38 This clause inserts section 27I sets out the circumstances in which employers are required to have a written policy on dealing with tips and details the circumstances in which they must make this policy available to workers.

39 Subsection (1) provides that employers must have a written policy where qualifying tips are paid at, or otherwise attributable to, an employer's place of business on more than an occasional and exceptional basis.

40 Where an employer is not required by subsection (1) to have a written policy because qualifying tips are not paid at that place of business but the employer would be required by subsection (1) to have a written policy if worker-received tips paid at, or otherwise attributable to, that place of business were to count as qualifying tips, subsection (5) applies (see subsection (4)). This means

that subsection (5) applies where tips (which are not qualifying tips) are paid on more than an occasional and exceptional basis at an employer's place of business. This could, for example, be the case at a restaurant where all tips are paid to workers in cash and the employer exercises no control or influence over them.

41 Subsection (5) provides that in such circumstances the employer must make the following information available to all their workers at that place of business:

a. the fact that the employer is not required (under section 27I) to have a written policy in relation to that place of business; and

b. the reasons why the employer is not required to have a written policy under section 27I.

42 Where an employer is required by subsection (1) to have a written policy in respect of a place of business, it must include information on the following (subsection (2)):

a. whether the employer requires or encourages customers to pay tips;

b. how the employer ensures that all qualifying tips are dealt with in accordance with this legislation, including how the employer allocates qualifying tips, gratuities and service charges between workers.

43 Where an employer is required to have a written policy in respect of a place of business, subsection (3) requires the employer to make the written policy available to all workers of the employer at that place of business. Section 27I does not prescribe precisely how the employer achieves this. The employer may therefore select some suitable means based on the circumstances of its workers and their working practices. As the written policy must be made available, it would not be sufficient for the employer simply to tell its workers about the policy orally.

44 If an employer makes a written policy available to workers at their place of business and the employer subsequently amends it, the employer must make the amended version of the written policy available to all their workers at that place of business (subsection (6)).

Records

45 Clause 6 also inserts section 27J, which sets out the circumstances in which employers are required to keep records relating to tips and the right of workers to request those records.

46 Subsection (1) provides that employers must maintain records in respect of a place of business if qualifying tips are paid at, or are otherwise attributable to, that place of business on any more than an occasional and exceptional basis. Records must be kept for three years (subsection (1)(b)).

47 Where subsection (1) applies to an employer in respect of a place of business, subsection (2) requires the employer to maintain a record of the total amounts of:

a. qualifying tips paid at, or otherwise attributable to, that place of business;

b. the amount of those qualifying tips in (a) that have been allocated to workers of the employer at that place of business; and

c. the amount of those qualifying tips in (a) that the employer has arranged to be allocated to their workers at that place of business via an independent tronc operator.

48 Subsection (3) provides workers with a right to make a written request for specified parts of their employer's tipping records for a period specified in the request. The period must be a period of one month, or two or more consecutive calendar months that begins no more than three years before the date of the request and ends before the date of request, and the worker must have worked for the employer at any time during each month of that period (subsection (7)). A worker

can request from their employer the total amounts of:

a. qualifying tips paid at, or otherwise attributable to, the employer's place of business that the worker worked at;

b. those qualifying tips referred to in (a) that have been allocated to the worker, except those that have been allocated to the worker via an independent tronc;

c. qualifying tips paid at, or otherwise attributable to, the place of business that the worker worked at that have been allocated between the employer's workers by an independent tronc operator.

49 Subsection (8) limits the number of requests a worker can make under subsection (3) for information relating to the employer's tipping records to no more than one request in any three month period.

50 Where subsection (1) applies to an employer in respect of a place of business, so that they are required to maintain records, and they receive a written request from a worker under subsection (3), the employer must provide the worker with the requested information for the specified period, or a substantially similar period, within the "response period" (four weeks beginning at the date that the request is received by the employer (subsection (11)) (subsection (4)). The alternative of providing records for a substantially similar period allows for greater convenience where, for example, an employer keeps its records on a weekly or four weekly basis, rather than monthly.

51 Subsection (9) provides that the disclosure of records to workers requesting them under subsection (4) does not breach any obligations of confidence or other restrictions (such as might be contained in a contract, for example). Employers are not required to disclose information under subsection (4) if that disclosure would contravene "the data protection legislation", which has the same meaning as in section 3(9) of the Data Protection Act 2018 (subsections (10) and (11)). Broadly speaking, employers will be able, without any particular difficulty, to comply with their obligations to provide records under section 27J without contravening data protection legislation. The vast majority of requests for records will not require the disclosure of personal data which relates to any individual other than the worker requesting it. There may be a limited exception to this where there are only two workers at a place of business in respect of the relevant period. However, in any event, Article 6(1)(c) of the United Kingdom General Data Protection Regulation provides that data processing (such as, here, the disclosure of records about qualifying tips) will be lawful where it is necessary for compliance with a legal obligation to which a data controller (here, the employer) is subject. Section 27J(4) is such an obligation (as is envisaged by the wording in brackets in subsection (10)).

52 Where subsection (1) does not apply to an employer in respect of a place of business because no qualifying tips are paid at or attributable to that place of business, but tips are paid at the place of business on more than an occasional and exceptional basis and the employer receives a written request for records from a worker, subsection (6) applies to the employer due to subsection (5).

53 Subsection (6) requires the employer to respond to the worker's request for records relating to tips by notifying the worker that they are not required to maintain records relating to tips and of the reasons why they are not required to maintain records. The employer must notify workers in this way within the same "response period" of four weeks (subsection (11)). The employer's reasoning is likely to be similar to the reasoning that would apply under section 27I in similar circumstances.

Clause 7: Enforcement

Complaints to an Employment Tribunal about tips etc

54 Clause 7 inserts section 27K, which describes the circumstances in which a worker may present a complaint to an employment tribunal and the circumstances in which the employment tribunal can consider this claim.

55 Subsection (1) provides that a worker may present a complaint to an employment tribunal where the worker's employer has failed to comply with the obligation to allocate qualifying tips, gratuities and service charges fairly in accordance with section 27D, or where it has failed to do so within the time period specified in section 27G, in relation to the relevant worker.

56 Subsection (2) provides that an eligible agency worker (as defined in section 27H) may also present a complaint to an employment tribunal that an agent has not paid to the agency worker the total amount of qualifying tips which was paid to the agent by the principal (the hirer). An agency worker can make a complaint under subsection (2) even if they do not make a complaint under subsection (1) (see subsection (6)). This could occur where an agency worker is satisfied that they have been allocated a fair amount of the qualifying tips by the hirer, and that this sum has been paid on to the agent, but where the agent has failed to make a payment to the agency worker as is required.

57 Subsection (3) limits the time in which a worker can make a claim to an employment tribunal to 12 months beginning with either the date of the failure to comply, or the date of the latest failure to comply where the complaint is in respect of a series of failures to comply by the employer (subsection (5)).

58 Subsection (7) applies section 207B of the Employment Rights Act 1996, which means that time spent complying with the requirement to consult with Advisory, Conciliation and Arbitration Service (Acas) before instituting proceedings will not be counted for the purposes of the twelve month period. An employment tribunal may also consider a complaint after the expiry of the twelve month period if it is satisfied that it was not reasonably practicable for the worker to present the claim within that period, so long as the complaint is presented within such further period that the tribunal considers reasonable (subsection (4)).

Determination of complaints about tips etc

59 Clause 7 also inserts sections 27L and 27M. Section 27L describes the remedies available to an employment tribunal where it finds a worker's complaint under section 27K to be well founded.

60 Subsection (1) provides that if an employment tribunal finds a complaint under section 27K to be well founded it must make a declaration to that effect. If the complaint was made under section 27K(1), which will be the case where an employer has failed to comply with its obligation to fairly allocate all of the qualifying tips, gratuities and service charges to workers, or has failed to do so within the necessary time periods, the tribunal may also make an order under subsection (1)(b)(i) (see below). If the complaint was made under section 27K(2), which will be the case where an agent has failed to comply with its obligation to pay any sums received from an employer (i.e. a hirer) on to an eligible agency worker, the tribunal may also make an order under subsection (1)(b)(ii) (see below).

61 An order under subsection (1)(b)(i) is an order requiring the employer to deal with qualifying tips in accordance with any relevant provision of Part 2B. As explained in subsection (2), an order under subsection (1)(b)(i) may (though does not have to):

a. require the employer to revise any allocation they have previously made;

b. make a recommendation to the employer regarding an allocation they have previously made (this allows an employment tribunal to suggest how the employer should allocate the tips in order to achieve fairness). Subsection (3) explains that whilst any recommendation is not binding on the employer, it is admissible as

evidence in an employment tribunal and a provision of the recommendation must be taken into account by the tribunal in determining any question to which the provision is relevant. The effect of this is that recommendations can be considered in future proceedings in deciding whether an employer has complied with their obligations;

c. require the employer to make a payment to a worker or a number of workers of the employer (including an order that the employer makes a payment to a worker who has not made a complaint to the tribunal). This could enable a tribunal to provide a remedy where, for example, a particular group of workers, such as waiters, has been treated unfairly but only one of that group has brought a complaint.

62 Subsection (4) makes it clear that the fact that an order has been made under subsection (1)(b)(i) does not prevent a different worker of the same employer from presenting a complaint in relation to the same employer or the same qualifying tips, gratuities and service charges.

63 An order under subsection (1)(b)(ii) is an order requiring the agent to make a payment to the eligible agency worker of the amount that the agent was required to pay them.

Compensation

64 Section 27M(1) provides that, where an employment tribunal makes a declaration that a complaint is well founded, it may also order the employer or agent to pay compensation to the worker who has complained to the tribunal. Such a payment of compensation must be a sum which the tribunal considers appropriate to compensate the worker for any financial loss attributable to the breach. However, the compensation payment is not to exceed £5,000.

65 Subsection (2) makes it clear that an employment tribunal can order a payment of compensation whether or not it has made an order under section 27L. Compensation may, for example, provide a suitable remedy where a particular individual worker has been treated unfairly.

Clause 8: Enforcement: information

Complaints to employment tribunal about information

66 Clause 8 inserts Section 27N, which deals with complaints relating to an employer's obligations concerning information. This broadly covers obligations concerning written policies and record keeping.

67 Subsection 27N(1) allows a worker to make a complaint to an employment tribunal that their employer has failed to comply with a requirement set out in section 27I (which includes the requirement for employers to have and make available a written policy dealing with qualifying tips, gratuities and service charges at a relevant place of business) or section 27J (which includes the requirement for employers to maintain a record of how qualifying tips, gratuities and service charges have been dealt with and to comply with workers' written requests for information in accordance with the section).

68 Subsection 27N(2) provides that a time limit of three months for the worker to present such a claim to the tribunal. Subsection 27N(4) applies section 207B of the Employment Rights Act 1996, which means that time spent complying with the requirement to consult with Acas before instituting proceedings will not be counted for the purposes of this three month period. Subsection 27N(3) also provides that an employment tribunal may also consider a complaint after the expiry of the three-month period if it is satisfied that it was not reasonably practicable for the worker to present the claim within that period, so long as the complaint is presented within such further period that the tribunal considers reasonable.

69 Clause 8 also inserts section 27O, which provides the remedies available to an employment tribunal where it finds a worker's complaint under section 27N to be well founded.

70 Subsection (1) provides that if an employment tribunal finds a complaint under section 27N to be well founded it must make a declaration to that effect and may make an order requiring the employer to comply with the relevant requirement in accordance with section 27I or section 27J.

71 Subsection (2) provides that, where an employment tribunal makes a declaration that a complaint is well founded, it may also order the employer to pay compensation to the worker who has complained to the tribunal. Such a payment of compensation must be a sum which the tribunal considers appropriate to compensate the worker for any financial loss attributable to the breach. However, the compensation payment is not to exceed £5,000.

72 Subsection (3) makes it clear that an employment tribunal can order a payment of compensation whether or not it has made an order under subsection (1)(b) requiring the employer to comply with the requirement contained in section 27I or section 27J.

Clause 9: Code of practice about tips etc

73 Clause 9 inserts sections 27P – 27T.

Issue of code of practice

74 Section 27P grants powers to the Secretary of State in respect of the statutory code of practice regarding a fair and transparent distribution of qualifying tips, gratuities and service charges.

75 Subsection 27P(1) confers a power on the Secretary of State to issue a code of practice for the purpose of promoting fairness and transparency in the distribution of tips.

76 Subsection 27P(2) confers a power on the Secretary of State to revise the whole or any part of a code of practice and issue that revised code.

Procedure for issue of code of practice

77 Section 27Q sets out the procedure that must be followed by the Secretary of State in order to issue a code of practice, or a revised code of practice.

78 Subsection (1) requires the Secretary of State to:

a. consult Acas;

b. publish a draft of the code of practice (this gives stakeholders an opportunity to make representations to the Secretary of State relating to the draft); and

c. consider any representations made about the draft code and modify the code accordingly.

79 Subsection (2) provides that if the Secretary of State decides to proceed with publishing the draft code of practice referred to above, then the Secretary of State must lay the code before both Houses of Parliament and, if approved by each House, issue the code in the form of the draft.

80 Subsection (3) allows the Secretary of State by regulations to determine the date for the code of practice to come into effect. These regulations will be subject to annulment by resolution of either House (section 236(2) Employment Rights Act 1996).

Consequential revision of code of practice

81 Section 27R permits the Secretary of State to make certain limited revisions to the code of practice, without following the fuller procedure in section 27Q, and sets out the procedure to be followed to implement such revisions.

82 Subsections (1) and (2) provide that the Secretary of State may revise the issued code of practice in order to bring it into conformity with any subsequent provisions made by or under an Act of Parliament which come into force after the code of practice was issued.

83 Subsection (3) adds that if the Secretary of State proposes to revise a code of practice in that way then the Secretary of State must lay the code before both Houses of Parliament. Subsections (4) to (6) provide that if no resolution is made against the code in either of the two Houses within 40 days of its laying, the Secretary of State must issue the code in the form of the draft, and it will come into effect on a day that the Secretary of State stipulates via regulations. See paragraph 106 below as to procedure.

Revocation of code of practice

84 Section 27S allows the Secretary of State to revoke the code of practice by regulations. See paragraph 107 below as to procedure.

Failure to comply with code of practice

85 Section 27T(1) provides that a code of practice issued under this Part shall be admissible in evidence in proceedings before an employment tribunal.

86 Section 27T(1) also provides that, where any provision of the code appears to the tribunal to be relevant to a question which arises in a set of proceedings, the tribunal is required to take that provision of the code into account when determining that question. However, a failure by an employer to observe the code does not, in itself, mean that the employer will be liable to a worker. For example, there may be particular circumstances relating to an employer or a place of business which would make an allocation of qualifying tips fair in circumstances where, generally, it would not be.

Clause 10: General

87 Clause 10 inserts Sections 27U – Y.

No restitution claims by employer

88 Section 27U prevents an employer bringing a restitution claim (i.e. a claim seeking to recover any part of an original allocation of qualifying tips, gratuities and service charges) against a worker in circumstances where, subsequent to an employment tribunal order requiring the employer to revise the original allocation of qualifying tips, the worker is found to have received an over-allocation of those tips, gratuities and service charges.

Relationship with contractual rights

89 Section 27V relates to the relationship between this legislation and contractual rights.

90 Subsection (1) provides that, if the worker has a contractual right to receive an amount of qualifying tips under their contract of employment ("contractual tips"), any entitlement they have to be allocated qualifying tips under this legislation does not affect their right to the contractual tips.

91 Subsection (2) provides that any entitlement of the worker to qualifying tips can be discharged through the payment of contractual tips, and vice versa. This means that an employer is not required to pay the worker a fair allocation of the qualifying tips, gratuities and service charges in addition to the contractual tips which the worker is entitled to, to the extent that the worker's contractual right already comprises a fair allocation.

Restrictions on contracting out of this Part

92 Section 27W provides for restrictions which prevent workers from opting out of their rights under this legislation.

93 Subsection (1) provides that any "prohibited reimbursement provision" is void, whether set out in the worker's employment contract or otherwise. Subsection (2) explains that a "reimbursement provision" is an agreement which requires a worker to make a payment to the employer, or which

reduces the wages payable to the worker by the employer.

94 Subsections (3) and (4) explain that a reimbursement provision is "prohibited" if there is a relationship between the reimbursement provision and the worker being allocated qualifying tips or the receipt by the worker of worker-received tips. This includes situations where the possibility of a worker receiving an allocation of the qualifying tips or the amount of qualifying tips which a worker is to be allocated is dependent on an agreement to a "reimbursement provision" between the worker and employer.

95 Subsection (5) makes clear that nothing in section 27W affects the operation of section 203 of the Employment Rights Act 1996, which provides for more general restrictions on contracting out of rights under that Act, with certain exceptions.

Interpretation

96 Section 27X(1) defines the terms "customer" and "place of business". A customer is a person who is provided with services by the relevant employer and a "place of business" is a location where the employer's business is carried out. That location may or may not be premises belonging to the employer. Section 27X(2) provides that where a tip is attributable to one place of business but is paid at a different place of business then the legislation applies to the tip only in relation to the place of business to which the tip was attributable. Section 27X(3) provides that where an employer-received tip or a worker-receiver tip is neither paid at, nor otherwise attributable to, a place of business of the employer, Part 2B applies as if the tip was attributable to a place of business of the employer and all workers of the employer were at that place of business. If subsection (3) applies to two or more employer-received or worker-received tips, all tips are attributable to the same place of business of the employer. This provision prevents an employer from arguing that, because it is not clear whether or to what extent qualifying tips are attributable to a particular place of business, the obligations to allocate qualifying tips, and to do so fairly, do not apply at all.

97 Section 27X(5) defines when an employer and a person are to be treated as associated. An employer and a person are associated if either is a company of which the other, directly or indirectly, has control, or if both the employer and person are companies of which a third person, directly or indirectly, has control.

Application

98 Section 27Y provides that this legislation only applies in respect of tips, gratuities and service charges that are paid by customers on or after the date that section 27D, which provides the obligation on employers to allocate tips fairly as between workers, comes into force. This has the effect that a worker cannot bring a complaint to an employment tribunal in respect of any actions made by an employer before that date.

Clause 11: Wages

99 Clause 11 paragraph (a) modifies the usual operation of section 13 of the Employment Rights Act 1996 (right not to suffer unauthorised deductions) in respect of the amount of qualifying tips that have been allocated by an employer to a worker.

100 Section 13 provides that an employer cannot make deductions from wages of a worker unless: (a) the deduction is required or authorised by virtue of a statutory provision or a relevant provision of the worker's contract; or (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

101 For the purposes of qualifying tips allocated to a worker by an employer, clause 11 paragraph (a) omits 'or a relevant provision of the worker's contract' in paragraph (a) of section 13 and omits the entirety of paragraph (b) of section 13. The effect of this is that the worker cannot contract out of,

or consent to qualify, their right to receive tips that they have been allocated by the employer.

102 Clause 11 paragraph (b) modifies the definition of 'wages' under section 27 of the Employment Rights Act 1996 to make clear that 'wages' includes any amount of qualifying tips allocated to the worker under this legislation.

Clause 12: Amendments to employment legislation

103 Clause 12 amends the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA"), the Employment Rights Act 1996 ("the ERA 1996"), the Employment Tribunals Act 1996 ("the ETA") and the Employment Relations Act 1999 ("the ERA 1999").

104 Clause 12 subsection (1) inserts sections 27K and 27N of the ERA 1996 (as amended by this legislation) into Schedule A2 of TULRCA. This means that the employment tribunal may increase or reduce any award to an employee by no more than 25% in the event of an unreasonable failure by the employer or employee respectively to follow a relevant code of practice. A relevant code of practice is one which relates exclusively or primarily to the procedure for the resolution of disputes.

105 Clause 12 subsection (2)(a) – (c) amends certain categories of employment referred to in the ERA 1996 to bring them within or render them outside the scope of this legislation. Clause 12(2)(d) consequentially amends an existing definition in the ERA.

a. Clause 12 subsection (a) brings House of Lords staff within the scope of this legislation;

b. Clause 12 subsection (b) brings House of Commons staff within the scope of this legislation; and

c. Clause 12 subsection (c) brings mariners within the scope of this legislation to the extent that Part II of the Employment Rights Act 1996 already applies to them, and puts them outside the scope of this legislation in the circumstances that Part II does not apply to them.

106 Clause 12 subsection (2)(e)(i) inserts into the ERA 1996 a new section 236(2)(aa) referring to regulations made under section 27R concerning the consequential revision of a code of practice, with the effect that a regulation to bring a consequential revision to a code of practice into effect is not subject to the negative resolution procedure. Therefore regulations under section 27R are not subject to any parliamentary procedure.

107 Clause 12 subsection (2)(e)(ii) inserts sections 27F and 27S into section 236(3) of the ERA 1996, with the effect that regulations to revise the definition of an independent tronc operator under section 27F(9) and to revoke a code of practice under section 27S are subject to the affirmative resolution procedure.

108 Clause 12 subsection (3)(a) inserts sections 27K and 27N into subsection 4(3)(c) of the ETA 1999. This means that proceedings before an employment tribunal relating to complaints about tips or information under this legislation may be heard by the chairman of the employment tribunal alone, or any Employment Judge alone provided they are a member of the tribunal.

109 Clause 12 subsection (3)(b) inserts sections 27K and 27N into subsection 18(1)(b) of the ETA 1999 with the effect that a worker must contact Acas before instituting proceedings against their employer under this legislation.

110 Clause 12(4) inserts sections 27M(1) and 27O(2) into section 34 of the ERA 1999. This has the effect of increasing or decreasing the maximum compensation award capable of being awarded by the employment tribunal under this legislation of £5,000 in line with changes to the retail prices index

as compared to the previous year.

Clause 13: Extent

111 Clause 13 confirms that this legislation extends to England and Wales and Scotland.

Clause 14: Commencement

112 This clause provides that sections 13 to 15 come into force on the day on which this Act is passed. The rest of this Act comes into force on a day specified, through regulations, by the Secretary of State and different days may be specified for different purposes.

113 Paragraphs (4) and (5) provide that the Secretary of State may via regulations make transitional or saving provision in connection with the coming into force of any provision of this legislation, including the power to make different provisions for different purposes.

Clause 15: Short title

114 This clause provides that this Act may be cited as the Employment (Allocation of Tips) Act 2022.

Financial implications of the Bill

115 There will be new costs created with respect to additional claims made to an employment tribunal as a result of the legislation.

Parliamentary approval for financial costs or for charges imposed

116 The Bill does not require either a money resolution or a ways and means resolution.

Compatibility with the European Convention on Human Rights

Article 1, Protocol 1

117 The Bill interferes with an employer's right to the peaceful enjoyment of property (Article 1, Protocol 1) because it requires employers to allocate tips which they receive, and which are legally the employer's property, to workers.

118 As explained in *Sporrong and Lönnroth v Sweden [1983] 5 EHRR 35*, there are three rules established by Article 1, Protocol 1. The second of these rules, and the one which is relevant for the purposes of the Bill, is the rule that a State is entitled to control people's use of property in accordance with the general interest by enforcing such laws as it deems necessary for the purpose.

119 The government considers that this test is met by the Bill and that the control of an employer's use of property through requiring them to allocate tips to workers will therefore not be in breach of Article 1, Protocol 1. The aspects of the test and the way in which these are met are:

a. **The interference must be in accordance with conditions provided by law:** This condition is met because the control of the use of the employer's property will be set out in law through the Bill;

b. **There must be a legitimate aim in the public interest:** The case of *James v UK*

(20447/92) highlights the wide margin of appreciation which Member States have in deciding whether an aim is in the public interest. In the case of this Bill, the legitimate aim in the public interest is the elimination of injustice in sectors where tips, gratuities and service charges are paid;

c. **The interference must be proportionate to the legitimate aim:** The government considers that a fair balance is struck in the Bill between the interests of workers and employers. This is because the provisions of the Bill are likely to have a relatively small impact on most employers, particularly given that tips tend to be of a fairly low value in the context of employers' overall turnover and many employers already pay all of their tips to workers, whilst they are likely to have a significant positive impact on low-paid workers.

Article 6

120 The Bill provides for a determination of civil rights and obligations in respect of complaints made by a worker. It therefore engages the rights of workers and employers to have a fair trial (Article 6).

121 The government is satisfied that the enforcement regime for the rights established in the Bill, which adopts the usual rules of procedure in the Employment Tribunal, is compliant with the civil limb of Article 6.

Article 8

122 The Bill is unlikely to engage the right to respect for private and family life (Article 8). However, Article 8 could arguably be engaged in very limited circumstances where a place of business only has two workers and one of them makes a request for information about their own allocation of tips and the total amount of qualifying tips received by the employer. This is because such a request would reveal to the worker the amount of qualifying tips which the second worker received.

123 However, in any event, the government considers that the Bill would not breach Article 8 because any interference would be justified pursuant to an objective and reasonable legitimate aim. The limbs of the test for justification and the way in which these are met are:

a. **The interference must be in accordance with conditions provided by law:** This condition would be met because the request mechanism will be set out in law through the Bill;

b. **There must be a legitimate aim in the public interest:** The legitimate aim served by the requesting mechanism is the need to ensure that workers have sufficient access to information so as to have enforceable and effective rights under the Bill;

c. **The interference must be proportionate to the legitimate aim**: The government considers that a fair balance has been struck between the interests of workers whose data could in very limited circumstances be revealed and the need to ensure that all workers have sufficient information so as to be able to enforce their rights under the Bill. This is particularly so given that information about tips is unlikely to be particularly sensitive and owing to the time limited nature of the disclosure obligation which is set out in the Bill.

Annex- Territorial extent and application in the United Kingdom

Provision	Extends to England & Wales and applies to England?	Extends to England & Wales and applies to Wales?	Extends and applies to Scotland ?	Extends and applies to Northern Ireland	Would corresponding provision be within the competence of the Senedd Cymru?	Would corresponding provision be within the competence of the Scottish Parliament?	Would corresponding provision be within the competence of the Northern Ireland Assembly?	Legislative Consent Motion needed?
Clause 1	Yes	Yes	Yes	No	No	No	Yes	No
Clause 2	Yes	Yes	Yes	No	No	No	Yes	No
Clause 3	Yes	Yes	Yes	No	No	No	Yes	No
Clause 4	Yes	Yes	Yes	No	No	No	Yes	No
Clause 5	Yes	Yes	Yes	No	No	No	Yes	No
Clause 6	Yes	Yes	Yes	No	No	No	Yes	No
Clause 7	Yes	Yes	Yes	No	No	No	Yes	No
Clause 8	Yes	Yes	Yes	No	No	No	Yes	No
Clause 9	Yes	Yes	Yes	No	No	No	Yes	No
Clause 10	Yes	Yes	Yes	No	No	No	Yes	No
Clause 11	Yes	Yes	Yes	No	No	No	Yes	No
Clause 12	Yes	Yes	Yes	No	No	No	Yes	No
Clause 13	Yes	Yes	Yes	No	No	No	Yes	No
Clause 14	Yes	Yes	Yes	No	No	No	Yes	No
Clause 15	Yes	Yes	Yes	No	No	No	Yes	No

EMPLOYMENT (ALLOCATION OF TIPS) BILL

EXPLANATORY NOTES

These Explanatory Notes relate to the Employment (Allocation of Tips) Bill as introduced in the House of Commons on 15 June 2022 (Bill 21).

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