

Zero hours contracts



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Introduction

Zero hours contracts allow organisations to hire individuals without guaranteeing them any work. They have attracted controversy because of the perceived disadvantages for workers, but in reality most people working under these types of contracts will have some employment law protection. In this Inbrief, we summarise the legal and practical issues associated with zero hours contracts.

What is a zero hours contract?

The term “zero hours contract” can have various meanings, but is generally used to mean a contract where one party engages another to perform work but there is no minimum level of work or pay. In some such contracts the individual is obliged to accept work offered, but not in all*.

Zero hours contracts are a type of casual work contract. Other casual work contracts include short-hours contracts (where there is a promise of a minimum number of hours per week), flex-up contracts (where the hours offered to an individual can be increased within a specified margin) and annualised hours contracts (where an individual is required to work for a certain number of hours per year with no fixed working pattern). There are as many types of casual work contract as there are organisations with specific business needs.

Why use zero hours contracts?

One of the main reasons for using these sorts of agreements is to enable organisations to manage fluctuating demand. Some of the sectors where zero hours contracts are most common are hospitality, catering, leisure, education and healthcare, where the need for staff is not constant (for example because work is seasonal or unpredictable).

Zero hours contracts are also used to meet demand from individuals themselves for flexible working arrangements. This is not only from groups which have historically looked for flexibility, such as parents of young children, carers and students, but also from those who choose not to work the classic ‘9 to 5’, for example, professionals who want more free time to pursue other interests.

Some press coverage has suggested that zero hours contracts are being used by unscrupulous employers to deprive workers of their rights. But in practice, even if that is their motivation, individuals on zero hours contracts are likely to have some valuable statutory rights (see below).

Employment status

Individuals have different statutory rights depending upon their employment status. There are three categories of employment status –

employee, worker and self-employed.

An employee works under a contract of employment. For a contract of employment to exist there must be mutuality of obligation (the employer provides work and the individual is required to do it), the individual must provide their services personally and the employer must exercise a degree of control over the way the work is performed. These three factors are known as the ‘irreducible minimum’ because without them, there is no employment. However, even if these elements are present, other aspects of the relationship might point away from employment.

A self-employed individual carries on a business for which the other party is a client/customer. Typically they are not obliged to provide personal service (they can provide a substitute) and/or there is no mutuality of obligation (neither party is obliged to offer/accept work). The individual is responsible for his or her own tax.

A worker is somewhere in-between the other two categories. He or she may look self-employed, but with some factors which point towards employment. As for employment, worker status is dependent upon mutuality of obligation and a requirement for personal service.

See our Inbrief Employment Status for more information on the different types of employment status.

Depending on the circumstances, individuals on zero hours contracts are most likely to be employees or workers, because there will normally be a requirement for the individual to provide their services personally and there will often be mutuality of obligation.

Employee and worker rights

A table summarising the statutory rights of employees and workers can be found at the end of this Inbrief.

Employees enjoy the fullest range of rights. However, workers benefit from important rights too, for example, the right to the national minimum wage, the right to paid annual leave and rest breaks, protection from discrimination and whistle-blowing protection. Workers may also qualify for statutory sick pay. These are

statutory rights which cannot be contracted out of – so zero hours staff that are employees or workers always have these rights, regardless of what is said in the contract.

Continuing relationship / obligations between engagements

Zero hours contracts may be structured as overarching contracts (also known as “umbrella contracts”) such that there is a continuing contractual relationship with ongoing obligations between the business and individual regardless of whether the individual is engaged in carrying out work at the time. The continuing relationship usually makes it easier for the business to administer holiday pay (which can otherwise be difficult) and the individual can be provided with benefits, such as health cover, even when they are not working on an engagement.

Even when a zero hours contract states that there is no continuing relationship between engagements if, in practice, there is a well-founded expectation of further engagements (which there is in many zero hours situations), that could be sufficient to create an overarching, employment or worker, contractual relationship covering periods between engagements.

The existence of a continuing employment relationship and, therefore, whether the individual has continuous service, is relevant to the accrual of certain statutory rights (see table below).

Rolled up holiday pay

With zero hours workers (and other types of part-time and casual workers) employers often want to roll up holiday pay into the individual’s hourly rate. Unfortunately this has been unlawful for several years.

Instead there are two options:

- if the engagements will be short and the relationship will end after each engagement, pay out holiday pay at the end of the engagement, identifying it as a separate payment in the final payslip; or
- if the engagement will be long or there will be a continuing contractual relationship between engagements, accrue holiday in the usual way and allow the individual to

take paid holiday during the engagement.

Exclusivity clauses

A provision in a zero hours contract prohibiting a worker from working elsewhere under another contract (or doing so without the employer’s consent) is unenforceable.

Individuals with contracts containing exclusivity clauses can bring an unfair dismissal claim (without qualifying service) or a detriment claim if they are subject to a detriment or dismissed by their employer for failing to comply with such a clause.

Practical considerations

Using the ‘zero hours contract’ label does not allow businesses to treat individuals as a form of zero-protection labour. Additionally, as there is no uniformity in practice about zero hours contracts, organisations wishing to use them should not assume that the individual will know what ‘zero hours’ means and should state clearly what the arrangement involves in the contractual documentation. Factors that should be recorded in the contract are:

- the rate of pay for work offered
- whether the individual is an employee or a worker
- the business need that is driving the zero hours arrangement
- how holiday and holiday pay will be dealt with
- the continuance (or not) of the relationship between engagements
- how the relationship will be brought to an end – for example automatically at the end of each engagement, or by notice given by either party
- how any work that is being offered will be notified to the individual and what obligation there is on the individual to accept work that is offered.

Bear in mind, however, that the courts may disregard the written terms of an agreement if they consider it does not accurately represent the true arrangement between the parties.

Alternatives to zero hours contracts

Employers should consider whether or not a zero hours contract is the best type of

arrangement for them, depending on the nature of the work required. It lends itself to situations where the workload is irregular, there is not a constant need for staff, or staff needs are driven by an external factor outside the employer’s control. It may be that casual workers are not the best option at all. For example, it may be quicker and easier to use an agency worker, if a worker is needed temporarily at short notice. Other options might include increasing the overtime of permanent employees or, if regular hours need to be filled, recruiting a part-time employee.

In the pipeline

In February 2018, the Government published its response to the Matthew Taylor Good Work Review. This Review was commissioned by the Government in response to increasing difficulties in determining the employment status of individuals working in the emerging “gig” economy. The Review made a number of recommendations, including in relation to zero hours contracts.

The Government has launched consultations in a number of areas, including in relation to zero hours contracts. The consultation calls for views on:

- introducing a right for all workers with variable hours to request a more predictable contract;
- asking the Law Pay Commission to consider the impact of higher minimum wage rates for workers on zero hours contracts;
- increasing the pay reference period for calculating holiday pay from 12 weeks to 52 weeks (the Government’s position in relation to “rolled-up” holiday pay remains unchanged);
- extending the relevant break in service for the calculation of the continuous service qualifying period (currently one week).

***For convenience, this Inbrief uses the term “employer” to mean the hiring party in a contract for work, whether or not it is actually an employment relationship in a legal sense.**

Employee and worker rights and protections

Right/Protection	Employee	Worker
Right not to be unfairly dismissed (after 2 years' service)	Yes	No
Right to receive written statement of terms & conditions	Yes	No
Itemised payslip	Yes	No
Statutory minimum notice	Yes	No
Statutory redundancy pay (after 2 years' service)	Yes	No
Protection from discrimination in the workplace (as long as individual is obliged to perform work personally)	Yes	Yes
National minimum wage	Yes	Yes
Protection from unlawful deduction from wages	Yes	Yes
Paid annual leave	Yes	Yes
Right to daily & weekly rest breaks	Yes	Yes
Pension auto-enrolment	Yes	Yes
Right to be accompanied at a disciplinary or grievance hearing	Yes	Yes
Whistleblowing protection	Yes	Yes
To receive statutory sick pay	Yes	Possibly (a technical question which is outside the scope of this InBrief)
Statutory maternity, paternity, adoption leave & pay	Yes	No
Unpaid time off to care for dependents	Yes	No
Right to request flexible working	Yes	No
Time off for ante-natal care	Yes	No
Time off for trade union activities	Yes	No
Covered by the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE)?	Yes	No
Health & safety in the workplace	Yes	Yes

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