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Guide

November 2013

Zero-hours contracts: understanding the law

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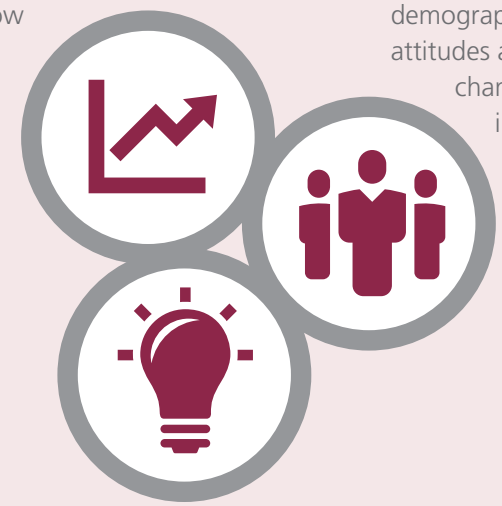

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Zero-hours contracts: understanding the law

Contents

Introduction 2

1 What is a zero-hours contract? 3

2 Employment status: the big three 4

3 Summary of legal rights and protections 6

4 The pros and cons of status 8

5 How to decide what contract to use 10

6 Difficult issues 14

- Exclusivity 14
- Holiday pay 14
- National Minimum Wage 14
- Statutory Sick Pay 15

Summary 16

Appendix: Case law examples 17

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Introduction

A typical workforce will be made up of a variety of working arrangements. At one end of the spectrum are permanent employees, who form the core of an employer's workforce, and at the other end are genuinely self-employed contractors, who work on one-off projects and invoice for fees. The types of working relationship which lie in between are many and varied and may include office-holders, fixed-term employees, part-time workers, agency workers, purchased service staff, interns and casual labour.

Casual labour contracts cover many different types of working arrangement. For example, 'casual labour' could refer to people working on short-hours contracts, annualised hours contracts and zero-hours contracts. This guidance addresses zero-hours contracts only.

CIPD research into zero-hours contracts[1] highlights the wide range of working arrangements that fall under this broad umbrella term. One reason for this, as this guidance makes clear, is that 'zero-hours contract' is not a legal term. The CIPD's research and this guide define a zero-hours contract as *'an agreement between two parties that one may be asked to perform work for the other but there is no set minimum number of hours. The contract will provide what pay the individual will get if he or she does work and will deal with the circumstances in which work may be offered (and, possibly, turned down).'*

Organisations considering using zero-hours contracts should think carefully about the business rationale for doing this, including whether there are other types of flexible working or employment practices that would deliver the same benefits. In the CIPD's view zero-hours contracts work best when the flexibility that they provide works for both the employer and the individual.

If zero-hours contracts are identified as the best option, employers need to be clear about what type of arrangements will suit them and what this means in terms of their responsibilities as an employer and the employment rights of the individuals engaged in this way.

This guide is designed to help employers ensure that they are using zero-hours contracts responsibly and understand the legal issues surrounding them.

It also includes information and key points for employees/workers to help them understand their employment status and rights under different types of zero-hours arrangements.

[1] *Zero-hours contracts: myth and reality*, CIPD, 2013.

1 What is a zero-hours contract?

'Zero-hours contract' is not a legal term. The CIPD *Labour Market Outlook* survey (produced in partnership with SuccessFactors, an SAP company) defines it as:

'an agreement between two parties that one may be asked to perform work for the other but there is no set minimum number of hours. The contract will provide what pay the individual will get if he or she does work and will deal with the circumstances in which work may be offered (and, possibly, turned down).'

This reflects the basic foundation of a zero-hours contract. However, the exact nature of zero-hours contracts may differ from organisation to organisation. For example:

- Individuals on zero-hours contracts may be engaged as employees or workers.
- In some zero-hours contracts the individual will be obliged to accept work if offered, but in others they will not.
- Some zero-hours contracts prevent the individual from working for others even when the employer has no work to offer, but some contracts will allow the individual to work elsewhere.
- The pay arrangements and benefits provided may differ.

Almost two-thirds of employers (64%) classify zero-hours staff as employees, whereas only just less than a fifth (19%) describes them as workers. Only 3% of employers classify their zero-hours contract workers as self-employed. Perhaps reflecting the confusion that surrounds the employment status of zero-hours contract staff, 7% of employers have not classified their status and a similar proportion (7%) don't know. (Source: *Zero-hours contracts: myth and reality*, CIPD, 2013)

Because 'zero-hours contract' does not have a specific meaning in law, it is important for employers to ensure that written contracts contain provisions setting out the status, rights and obligations of their zero-hours staff.

The purpose of this guidance is to help employers and individuals understand:

- what a zero-hours contract is (Section 1 and Section 5)
- the legal rights and obligations associated with employee and worker status (Section 2 and Section 3)
- the advantages and disadvantages of employee and worker status from a practical perspective (Section 4)
- difficult issues that arise in connection with zero-hours contracts (Section 6).

Terminology

For convenience, this guidance uses the term 'employer' to mean the hiring party in a contract for work, whether or not the individual being hired is an employee, a worker or a self-employed person.

Key points for employers:

- 'Zero-hours contract' does not have a specific meaning in law.
- Contracts referred to as zero-hours contracts may differ from organisation to organisation.
- Zero-hours staff may be engaged as employees or workers.
- It is important for organisations to ensure that written contracts contain provisions setting out the status, rights and obligations of their zero-hours staff.

Key points for employees/workers:

- 'Zero-hours contract' does not have a specific meaning in law.
- If you are unclear about your status, rights or obligations under a zero-hours contract, you should ask your employer for clarification.

2 Employment status: the big three

This section describes the legal tests for employment status, including the types of obligations that employees, workers and self-employed individuals are owed and owe.

There are three main types of employment status:

1 employee
2 worker
3 self-employed.

Almost all working individuals will fall into one of these three categories. In principle, an individual on a zero-hours contract could be an employee, worker or self-employed (although in practice it is unlikely that an individual on a zero-hours contract will be self-employed). The correct category will depend on what the contract says and how the working arrangements operate in practice (see Section 5 *How to decide what contract to use*).

The boxes below summarise the legal tests for each type of employment status. The terms in bold are explained below.

Employee

An individual will be an employee if:

- there is an obligation to provide **personal service**; and
- there is **mutuality of obligation**; and
- the employer **controls** the way in which work is done; and
- other factors are consistent with employment (for example level of integration into business, label applied by the parties, nature and length of engagement, benefits received by the individual).

Self-employed

An individual will be self-employed if:

- there is no obligation to provide **personal service**; or
- there is no **mutuality of obligation**; or
- he or she is carrying out a business and the other party is the customer.

Whether an individual is carrying out a business and whether the other party is a customer of that business will depend on various factors being established, such as:

- The employer does not exert a high level of control over the individual.
- The individual is not integrated into the employer's business.
- The individual actively markets his or her services to the world in general.
- The engagement is relatively short in duration.
- The individual is providing specialist services.
- The individual invoices for fees.
- The individual supplies the equipment needed to perform the service.
- The individual carries a level of risk (for example, if the work is not done, the individual does not get paid).

Worker

An individual will be a worker if:

- there is an obligation to provide **personal service**; and
- there is **mutuality of obligation**; and
- he or she is not carrying out a business and the other party is not a customer; and
- he or she does not otherwise meet the test for being an employee.

'Worker' is the hardest category to identify. This is because workers tend to exhibit characteristics of both employee and self-employed status. One way to understand what a worker is, is to think of workers as a 'sweep up' category which ensures that individuals who would otherwise be self-employed, but who show some characteristics of employees (for example **control**), have meaningful legal rights (see Section 3 *Summary of legal rights and protections rights* for more information). It is important to remember that all employees are workers.

Understanding specific terms

Control means the employer has power to decide what, how, when and where the work is done. The focus is on whether the employer has a contractual right to control, rather than exercising day-to-day supervision over the individual.

Mutuality of obligation is normally taken to mean that there is a written or oral contract between the employer and individual under which the employer is obliged to provide work, and the individual is obliged to accept the work in return for pay. However, it can also mean simply that there is a written or oral contract between the employer and individual. Therefore, even if the contract does not include an obligation on the employer to provide work nor an obligation on the individual to accept work in return for pay, the individual will still be an employee or worker if that contract is in all other respects consistent with employee or worker status (see Section 5 *How to decide what contract to use* for more information).

Personal service means that the individual agrees to perform the work or services personally (that is, themselves). If the individual is free to send substitutes instead, this is inconsistent with a worker or employee relationship. However, the right to substitute must be genuine (and ideally used in practice) and not significantly restricted.

Appendix 1 gives examples of cases where individuals who were ostensibly self-employed, workers or employees were held by the courts to have a different status based on the tests summarised above.

Almost two-thirds of employers surveyed that use zero-hours contracts (61%) report that zero-hours staff are not contractually obliged to accept work and are free to turn it down. However, 15% of employers say zero-hours staff are contractually required to be available for work, and a further 17% report that in some circumstances zero-hours contract staff are expected to be available for work. (Source: *Zero-hours contracts: myth and reality*, CIPD, 2013)

Key points for employers:

- There are three main types of employment status: (1) employee, (2) self-employed and (3) worker.
- Individuals on zero-hours contracts will usually be employees or workers.
- The individual's employment status will depend on what the contract says and how the arrangement operates in practice.
- The tests to establish the correct status of employee, worker and self-employed are established by case law.

Key points for employees/workers:

- Under your zero-hours contract you may be an employee or worker.
- Your employment status will depend on what your contract says and how the arrangement operates in practice.

3 Summary of legal rights and protections

This section sets out the legal rights which attach to each category of employment status.

Employment status is important because it determines an individual's legal rights. Employees have the most rights, self-employed people have the least rights and workers are somewhere in between. An employer can give an individual additional rights in the individual's contract. However, the legal rights referred to below cannot be taken away.

Employees benefit from the most protection, including the right not to be unfairly dismissed, the right to statutory minimum notice and statutory redundancy pay, family-related rights and certain other rights to time off, and protection against discrimination and whistleblowing.

Workers have fewer rights than employees. Essentially they are given statutory protection which recognises that even though they are not employees, they are in a subordinate position to the person for whom they work and that some basic protection is required. As such, workers have certain rights relating to pay, rights under the working time and whistleblowing legislation and protection from discrimination.

Self-employed individuals generally only have contractual rights but may be protected from discrimination and are protected under the data protection legislation as 'data subjects'.

The general categories of rights and protections and the extent to which they are enjoyed by employees, workers and the self-employed are set out in Table 1.

Table 1: General categories of rights and protections

Right/protection	Employee	Worker	Self-employed
Right not to be unfairly dismissed (after two years' service)	Yes	No	No
Right to receive written statement of terms and conditions	Yes	No	No
Itemised payslip	Yes	No	No
Statutory minimum notice	Yes	No	No
Statutory redundancy pay (after two years' service)	Yes	No	No
Protection from discrimination in the workplace	Yes	Yes	Possibly
National Minimum Wage	Yes	Yes	No
Protection from unlawful deduction from wages	Yes	Yes	No
Paid annual leave	Yes	Yes	No
Right to daily and weekly rest breaks	Yes	Yes	No
Pension auto-enrolment	Yes	Yes	No
Right to be accompanied at a disciplinary or grievance hearing	Yes	Yes	No
Rights under data protection legislation	Yes	Yes	Yes
Whistleblowing protection	Yes	Yes	Possibly
Statutory Sick Pay	Yes	Possibly	No
Statutory maternity, paternity, adoption leave and pay	Yes	No	No
Unpaid time off to care for dependants	Yes	No	No
Right to request flexible working	Yes	No	No
Time off for ante-natal care	Yes	No	No
Time off for trade union activities	Yes	No	No
Protection under the transfer of undertakings legislation	Yes	No	No
Health and safety in the workplace	Yes	Yes	Yes

The CIPD's survey of zero-hours workers shows that there is a high level of uncertainty among zero-hours contract workers over which employment rights and benefits they are entitled to or eligible for.

In all, just 18% of respondents say they have the legal right not to be unfairly dismissed by their employer after two years' service and 40% of respondents say don't they have unfair dismissal rights; however, 42% say they don't know.

One in ten respondents believe they are eligible for statutory redundancy pay, while 61% say they are not and 28% don't know. (Source: *Zero-hours contracts: myth and reality*, CIPD, 2013)

Key points for employers:

- Understanding status is important because it determines an individual's legal rights and an employer's obligations towards that individual.
- Employees enjoy the most extensive legal protection.

Key points for employees/workers:

- Your employment status is key to the legal protections you will benefit from while working.
- If you are not clear what your status is, you should ask your employer for clarification.

4 The pros and cons of status

This section looks at the advantages and disadvantages of different types of status in practice.

Tables 2 and 3 illustrate the pros and cons of employee and worker status from a practical perspective. The pros and cons will not apply to every employee or worker, but are likely to apply in most cases.

Table 2: Pros and cons of employee and worker status from the employer's point of view

	Pros	Cons
Employee status	• The employer has **a stable workforce** upon whom it can rely to carry out its main business. • **Employee relationships are likely to last longer** than worker relationships. • The employer has **control** over **when the employees work and how they carry out their work**. • Employees are likely to be the **most productive members of staff** as they are incentivised by **long-term career development prospects** and **rewards and benefits**. • The employer will benefit from **longer notice periods** (allowing it to plan replacements) and can subject employees to enforceable **post-termination restrictions** (for example non-competes).	• Employees will **receive the fullest range of benefits (for example bonuses, insurances and enhanced sick pay)** and therefore are generally **more expensive** to employ than workers. • If the employer wishes to **reduce headcount**, it will be **more procedurally difficult** and **more expensive** to dismiss employees. • The employer will usually be expected to invest in the employee's **career development and training**. • The employer will need to provide an employee with a **workstation** and **equipment**.
Worker status	• Workers are likely to receive **lower pay** and **fewer benefits** than employees, and so generally will be cheaper to engage. • The employer **invests less time and resource** in the worker, for example it typically would **not offer career development/training**, and **may be less likely to provide the worker with equipment**. • The employer can **respond to increased demand quickly and cost-effectively** by engaging workers. • Similarly, the employer can **dismiss workers more quickly and cost-effectively** than employees. It would not necessarily have to follow its disciplinary or grievance procedures for workers.	• The **workforce is less stable and reliable**. Workers may not be available to work when needed. • **Rates of staff turnover** will be higher for workers. • Workers may be less productive as they do not have **long-term career development prospects** and have fewer **rewards and benefits**. • If workers feel disengaged, there may be **higher absence/sickness rates**. • **Administrative burden** – pay and holiday calculations may be more complicated and take more time. • **Post-termination restrictions** (for example non-competes) are less likely to be enforceable.

Table 3: Pros and cons of employee and worker status from the individual's point of view

	Pros	Cons
Employee status	• Employee status offers **stability** and usually a **degree of permanency**. You are normally an employee because you are part of the employer's core workforce. • The employer will usually invest in your **career development and training**. • Employees are usually **fully integrated** into the employer's organisation. For example, you will have established **reporting lines**, be **part of a permanent team** and the employer will provide you with a **workstation** and **equipment**. • Employees will also be **subject to and benefit from the employer's policies and procedures**. • Employees will **receive the widest range of benefits (for example bonuses, insurances and enhanced sick pay)**.	• If you wish to leave the employer's employment, you will have a **notice period** (which is unlikely to be less than one month) and may be subject **to post-termination restrictions** (for example non-competes) because the employer wishes to protect its business. • There may be a **lack of flexibility about when you work**, as employees usually have set hours or a set pattern of work. There is **usually no option to refuse work**. • It may be **difficult to juggle other professional/work-related interests**.
Worker status	• Workers **typically have more flexibility than employees**. Some workers have more scope to **dictate their own schedule and balance their work commitments around their personal lives**. • Some workers enjoy a feeling of **detachment from a business's success or failure**. • Workers will typically have **shorter notice periods** and will be subjected to **fewer post-termination restrictions** (for example no non-compete clauses).	• There is typically more **uncertainty about when you will get work** and **over what period** you will be required to work. • You may feel **disengaged with the business** as you are not as integrated as an employee. • Workers will typically **not be subject to the employer's policies and procedures**. • Workers will typically **not receive the fullest range of benefits**. • **Lack of job security** can sometimes **affect confidence and general job satisfaction/well-being**.

Key points for employers:

- Engaging individuals as workers has advantages. In particular, workers may be cheaper to employ and give the employer a greater degree of flexibility in responding to business demands. However, worker status has downsides for the employer. For example, workers may not be available when needed, they may feel less invested in the employer's future and administering certain aspects of worker relationships (for example pay and holiday calculations) can be complicated.
- Employee status also has advantages for an employer, specifically a stable and motivated workforce over which the employer has a greater degree of control. The main downside to employment status is the potential expense of employing (and ultimately terminating) employees.
- Remember that employment status depends both on what the individual's contract says and how the working arrangement operates in practice (see Section 5 *How to decide what contract to use* for more information).

Key points for employees/workers:

- Workers typically have more flexibility than employees, in that they have more scope to dictate their own schedule and balance their work commitments around their personal lives. However, there is typically more uncertainty about when workers will get work and over what period they will be required to work.
- An employee is normally part of the employer's core workforce and receives the fullest range of benefits. They also benefit from more career development opportunities. The main disadvantage is that there is a lack of flexibility about when you work, as employees usually have set hours or a set pattern of work.
- Remember that employment status depends both on what your contract says and how the working arrangement operates in practice (see Section 5 *How to decide what contract to use* for more information).

5 How to decide what contract to use

This section looks at various factors that should be taken into account when deciding what contract to use and what terms the contract should include.

Employee or worker?

Individuals on zero-hours contracts may be engaged as employees or workers and the employer should decide what employment status to use.

The best practice approach to deciding what employment status to use is for the employer to consider how it wants the relationship with the individual to work in practice, and to apply the employment status which most closely matches that.

To decide what employment status most closely matches the reality of the relationship, the employer should consider the various employment status tests (see Section 2 *Employment status: the big three* and Section 4 *The pros and cons of status* for more information).

For example, if the employer wants:

- the zero-hours individual to provide personal service, to be fully integrated into its business and to receive a range of benefits; and
- to control the way in which work is done and provide work to the individual for a prolonged period

the individual is likely to be an employee, not a worker.

It is important for the employer to determine the employment status of its zero-hours staff based on how the relationship will work in practice. The reason for this is that if the contract with the individual does not match the reality of the situation (for example the contract says the individual is a worker but in reality he or she is working as an employee), the law will treat the individual as having a different employment status (for example employee status), regardless of what the contract says.

Ideally, line managers should receive training on the different types of status, so that they understand:

- that an individual will either be an employee, a worker or self-employed
- how the rights of employees, workers and the self-employed differ
- that the way they treat an individual could change that individual's status.

What if employment status changes during the relationship?

Relationships should be reviewed regularly to check that individuals are being managed in line with the status specified in their contract.

It may be that, over time, the way the relationship works in practice changes so that an individual's status changes from one type of status (for example worker) to another (for example employee). This would typically happen where an individual is not being managed consistently with their status. For example, the individual was originally engaged as a worker but over time has become increasingly integrated into the employer's business, such that he or she now bears many characteristics of an employee.

If an individual's status does change, it would be best practice to issue a new contract to reflect the new status. Issuing a new contract ensures that both the employer and individual are clear about their respective rights and obligations and avoids problems arising at a later date.

When should an employer use a zero-hours contract?

A zero-hours contract should be used where the employer wishes to engage an individual on an ad hoc, as required, basis, and where the employer cannot guarantee work. In other words, where work fluctuates unexpectedly.

> Flexibility lies at the heart of the employer rationale for using zero-hours contracts. The most common reason for using zero-hours contracts cited by employers is that these arrangements provide them with the flexibility to manage fluctuations in demand, with two-thirds of respondent organisations' citing this. However, employers also regard zero-hours contracts as a means of providing flexibility for staff. Almost half of respondents also say they use them to provide flexibility for individuals. (Source: *Zero-hours contracts: myth and reality*, CIPD, 2013)

What should the contract look like?

As mentioned in Section 1 *What is a zero-hours contract?*, 'zero-hours contract' is not a legal term. The CIPD *Labour Market Outlook* survey defines it as:

'an agreement between two parties that one may be asked to perform work for the other but there is no set minimum number of hours. The contract will provide what pay the individual will get if he or she does work and will deal with the circumstances in which work may be offered (and, possibly, turned down)'.

This reflects the basic foundation of a zero-hours contract. Beyond this, the exact nature of zero-hours contracts may differ from organisation to organisation. For example (this list is not exhaustive):

- Individuals on zero-hours contracts may be engaged as employees or workers.
- In some zero-hours contracts the individual will be obliged to accept work if offered, but in others they will not.
- Some zero-hours contracts prevent the individual from working for others even when the employer has no work to offer, but some contracts will allow the individual to work elsewhere.
- The pay arrangements and benefits provided may differ.

An employer should make sure that a zero-hours contract contains the following basic terms (please note that this list does not include all the terms that are mandatory in an employment contract, nor all clauses which are advisable for inclusion in an employment or worker contract, such as place of work, working time opt-out, governing law provisions).

1 Whether the individual is an employee or a worker

The employer should decide whether an individual is an employee or a worker based on how the relationship will operate in practice (see Section 2 *Employment status: the big three* and Section 5 *How to decide what contract to use*).

If the individual will be a worker, rather than an employee, it is good practice to include confirmation that the contract is not an employment contract and does not confer employment rights on the individual.

2 The business need that is driving the zero-hours arrangement

The contract should state why a zero-hours arrangement has been adopted. For example, it could state that the employer has engaged the individual as a zero-hours worker/employee because of fluctuating demands of the business. This is a useful provision because:

- it helps the individual to understand how the arrangement will operate
- it helps to show that the zero-hours arrangement is being used for legitimate reasons
- it evidences the parties' intentions when entering into the contract, which may be relevant when determining issues such as whether there is an umbrella contract (see below).

3 The rate of pay

Typically an individual on a zero-hours contract will be paid an hourly rate. However, other arrangements may be used.

4 How holiday and holiday pay will be dealt with

Zero-hours employees and workers have the right to paid holidays. Full-time employees and workers are entitled to a statutory minimum of 28 days' holiday per year. Zero-hours employees and workers are treated as part-time workers, and so will usually be entitled to a pro-rated amount of holiday (see Section 6 *Difficult issues* for more information). However, because zero-hours workers work irregular hours, it can be difficult to calculate their holiday entitlement.

The difficulty arises from the fact that the legislation calculates holiday in terms of 'weeks', providing for accrual of holiday in the first year as being at a rate of 1/12 of the annual entitlement each month. However, where hours worked are irregular and the annual entitlement cannot be predicted with certainty, this formula is of little assistance.

4.1 Working out holiday accrual

It is important to deal with the accrual of holiday in the contract itself. For employees or workers with irregular hours, it is usually easiest to calculate holiday entitlement based on the number of hours worked. On this basis, employees and workers accrue holiday at the rate of 12.07% per hour worked. This percentage is reached by taking the 5.6 week statutory holiday entitlement and dividing it by 46.4 weeks (46.4 being the sum of 52 weeks in a year minus the 5.6 week statutory holiday entitlement). This means that the amount of holiday accrued by

an employee or a worker can be calculated at any time by multiplying the number of hours they have worked up to that point by 12.07%.

4.2 Timing of holidays

The timing of when accrued holiday can be taken is a separate question and can be decided by the employer. For example, if a zero-hours employee or worker has worked ten hours, they will have accrued 1.2 hours of holiday entitlement (10 hours x 12.07%). However, the employer may not be willing to allow individuals to take holiday during an assignment. An employer can decide both the length and timing of holidays taken by its employees or workers, provided that:

(a) the employer does not prevent the individual from taking the holiday for the entire holiday year; and
(b) if the employer wants the individual to take holiday on specified dates, it must give the individual notice of at least twice the length of the period of leave the individual is being required to take.

In this way, an employer can decide whether to allow a zero-hours employee or worker to take any accrued holiday during the assignment, or to pay the employee or worker in lieu of the accrued but untaken holiday at the end of the assignment.

4.3 Calculating holiday pay

The calculation of holiday pay depends on whether the holiday has actually been taken, or is paid for in lieu.

If the holiday is being paid for in lieu on termination, the amount payable will be the sum set out in the contract.

If there are no provisions in the contract about payment in lieu of holiday on termination, or in the case of holiday taken during the assignment, an employee/worker is paid based on an average of their earnings in the previous 12 working weeks. Case law is currently unclear on what counts as 'earnings' (which varies according to whether the individual has normal working hours or not).

Section 6 *Difficult issues* looks at some further tricky issues around holiday and holiday pay.

5 Whether or not the relationship continues between engagements

Zero-hours contracts may be structured as overarching contracts (also known as '**umbrella contracts**'). Under this arrangement, there is a continuing contractual relationship with ongoing obligations between the employer and individual regardless of whether the individual is working at the time. The continuing relationship usually makes it easier for the employer to administer holiday pay (which can otherwise be difficult) and individuals can be provided with benefits, such as health cover, even when they are not working on an assignment.

Even when a zero-hours contract states that there is no continuing relationship between engagements, if, in practice, the individual is prohibited from working elsewhere between engagements, or there is a well-founded expectation of further engagements (which is common in many zero-hours situations), that could be sufficient to create an umbrella contract.

If the employer does not want a continuing relationship between engagements, it should not prohibit the individual from working elsewhere between engagements and should not create an expectation of further work. The contract should confirm:

- There is no contract between the parties between assignments.
- Each assignment shall be regarded as separate.
- The fact that the employer has offered work does not mean that there is any entitlement to or any expectation of future work.

The existence of a continuing relationship is particularly important for employees as the length of continuous service for employees is relevant to the accrual of certain statutory rights (see Section 3 *Summary of legal rights and protections*). It is also relevant to employees and workers for holiday pay purposes (see Section 6 *Difficult issues* for further information on tricky holiday issues).

6 Any restrictions on individuals working for other parties between engagements

Restricting an individual from working for other parties between engagements may result in an overarching employment or worker contractual relationship covering the periods between engagements.

When dealing with requests to work for another employer, around two-thirds (67%) of employers report that casual workers are free to work for another organisation. Just 8% of employers say that casual workers should not work for other companies, 12% report that this is acceptable sometimes and depends on the circumstances and 14% do not know.

Six in ten zero-hours workers report they are allowed to work for another employer when their primary employer has no work available. A further 15% say they are able to sometimes. Just 9% say they are never able to work for another employer and a sizeable 17% don't know. (Source: *Zero-hours contracts: myth and reality*, CIPD, 2013)

7 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

The arrangements for notifying work will vary widely between employers. For example, it may be that the employer will contact the individual to offer work, or it may be that the individual is expected to make enquiries of the employer. Whatever the arrangements are, it is good practice to include a detailed explanation of the notification mechanism so that both parties are clear (see *5 Whether or not the relationship continues between engagements* above).

In some zero-hours contracts the individual will be obliged to accept work if offered, but in others they will not. If the employer wishes the individual to be obliged to accept work if offered, it must say so in the contract. The drawback of including an obligation to accept work if offered is that it may result in an umbrella contract being imposed.

8 How the relationship will be brought to an end

The contract could state that the contract comes to an end automatically at the end of each engagement, or by notice given by either party.

Any notice provisions will, in the case of employees only, be subject to the following statutory minimum notice periods:

- if an employee has been continuously employed for more than one month – a minimum notice period of one week
- if an employee has been continuously employed for more than two years – one week's notice for each year of continuous employment
- if an employee has been continuously employed for more than 12 years – 12 weeks' notice.

These statutory minimum notice periods will be particularly important if an umbrella contract has been implied and an employment relationship continues to exist between assignments.

Only just over half of employers (55%) which use staff on zero-hours contracts report that they have a provision, a practice or policy on the amount of notice they give zero-hours staff to terminate the company's relationship with the individual. More than a fifth (21%) say they don't have a policy and almost a quarter (24%) report that they don't know. (Source: *Zero-hours contracts: myth and reality*, CIPD, 2013)

Key points for employers:

- Employers should decide how the relationship will operate in practice and ensure that (1) they apply the corresponding employment status and (2) this is accurately reflected in the contract.
- Employers should regularly review working arrangements to assess whether the way in which individuals are working has changed and the implications of any changes on status. If status has changed, the employer should consider issuing a new contract to reflect the new status.
- Employers should ensure that contracts confirm basic terms, including pay, holiday and pay entitlements, notice and other terms which relate to the way work will be managed in practice.

Key points for employees/workers:

- You should ensure you have a clear understanding from the terms of the contract what your status is.
- If the way in which you work in practice differs from what is set out in your contract, you may not be treated in law as having the same status, which will affect your legal protections.

6 Difficult issues

This section looks at a number of difficult issues which arise specifically in the context of zero-hours contracts.

Exclusivity

Some zero-hours contracts prevent the individual from working for others, even when the employer has no work to offer. In other words, the individual is required to work for the employer exclusively. Even if the contract does not include wording to this effect, in practice there may be a clear expectation that the individual will not work elsewhere.

Similarly, some zero-hours contracts require the individual to accept any work that is offered. Even if the contract itself does not include wording to this effect, in practice individuals who turn down offers of work may be penalised. This kind of requirement could also have the effect of preventing individuals from working for others because they must keep themselves available to accept any work that is offered.

However, these exclusivity arrangements may be reasonable, depending on the context. For example, exclusivity may be reasonable where:

- due to the nature of the work, it is likely to come in short frequent bursts – in these circumstances the individual would be needed at short notice and there would only be short breaks between one assignment and the next; or
- the work is highly specialised and the employer is operating in a highly competitive market where confidentiality is important – in these circumstances if individuals were to work for others they would be likely to be competitors and the individual's knowledge of the employer's business could intentionally or unintentionally give competitors an unfair advantage.

Holiday pay

Holiday rights in the UK are derived from European legislation. European law currently does not prevent employers from pro-rating accrual of paid holiday based on the number of hours an employee or worker on a zero-hours contract has actually worked.

However, European law conflicts with the relevant UK legislation, which provides that workers (which will include employees) accrue 5.6 weeks' paid holiday each year if they have an overarching umbrella contract (see Section 5 *How to decide what contract to use*) whether or not they do any work.

If there is no continuing relationship between the individual and the employer between assignments, there will be no accrual of holiday pay between assignments.

With zero-hours employees or workers, employers often want to roll up holiday pay into the individual's hourly rate. The term 'rolled-up' holiday pay refers to the practice of paying individuals inflated basic pay which includes their holiday pay. The worker does not then get paid when they take holiday.

European case law has held that rolled-up holiday pay is unlawful because it discourages individuals from taking holiday. However, if an employee or worker makes a claim for unpaid holiday, it seems that an employer should be given credit for any rolled-up holiday pay that has been paid provided that the roll-up arrangement was transparent and it was made clear to the employee or worker which portion of the pay represented holiday pay.

It is currently unclear whether this means that employers can continue to operate rolled-up holiday pay arrangements that are transparent or whether rolled-up holiday pay should be stopped. Government guidance says that employers need to renegotiate any contract that still includes rolled-up holiday pay. Employers should also bear in mind that employees or workers who successfully claim that they have been prevented from using their holiday entitlement can claim 'just and equitable' compensation under UK legislation.

National Minimum Wage

Under UK legislation, employees and workers will benefit from the National Minimum Wage but individuals who are genuinely self-employed will not.

Individuals engaged on zero-hours contracts will typically be paid by reference to the time that they work, often on an hourly rate. They are entitled to be paid the National Minimum Wage for the time that they have spent working. Working time for these purposes will include:

- time spent actually working
- time spent attending training during normal working hours
- travel time but not time spent commuting to and from the workplace (subject to some exceptions)
- time the individual is required to spend at the workplace waiting to find out if they are required to work, regardless of whether they are then given any work or sent home
- in general, time during which the individual is required to be available for work at or near a place of work.

Zero-hours employees or workers who spend time at home waiting to hear if they have been allocated work may consider themselves to be 'on call'. However, such time should not count as working time. Time spent on rest breaks or away from work, such as holiday or sick leave, should also not count.

Statutory Sick Pay

Only 'qualifying employees' are entitled to SSP. Anyone paying Class 1 National Insurance Contributions will satisfy this criteria, regardless of whether they are an employee or worker. In order to receive SSP, in addition to being a 'qualifying employee', an individual must also be absent due to incapacity for work for four or more days in a row and have had average weekly earnings of not less than the lower earnings limit (currently £109 per week) within the previous eight weeks.

Individuals on zero-hours contracts may find it difficult to satisfy these criteria. In between assignments individuals may not be a 'qualifying employee' or may not have sufficient average earnings to qualify for SSP.

Summary

Key points for employers:

- 'Zero-hours contract' does not have a specific meaning in law.
- Contracts referred to as zero-hours contracts may differ from organisation to organisation.
- Zero-hours staff may be engaged as employees or workers.
- It is important for organisations to ensure that written contracts contain provisions setting out the status, rights and obligations of their zero-hours staff.
- There are three main types of employment status: (1) employee, (2) self-employed and (3) worker.
- Individuals on zero-hours contracts will usually be employees or workers.
- The individual's employment status will depend on what the contract says and how the arrangement operates in practice.
- The tests to establish the correct status of employee, worker and self-employed are established by case law.
- Understanding status is important because it determines an individual's legal rights and an employer's obligations towards that individual.
- Employees enjoy the most extensive legal protection.
- Engaging individuals as workers has advantages. In particular, workers may be cheaper to employ and give the employer a greater degree of flexibility in responding to business demands. However, worker status has downsides for the employer. For example, workers may not be available when needed, they may feel less invested in the employer's future and administering certain aspects of worker relationships (for example pay and holiday calculations) can be complicated.
- Employee status also has advantages for an employer, specifically a stable and motivated workforce over which the employer has a greater degree of control. The main downside to employment status is the potential expense of employing (and ultimately terminating) employees.
- Employers should decide how the relationship will operate in practice and ensure that (1) they apply the corresponding employment status and (2) this is accurately reflected in the contract.
- Employers should regularly review working arrangements to assess whether the way in which individuals are working has changed and the implications of any changes on status. If status has changed, the employer should consider issuing a new contract to reflect the new status.
- Employers should ensure that contracts confirm basic terms, including pay, holiday and pay entitlements, notice and other terms which relate to the way work will be managed in practice.

Key points for employees and workers:

- 'Zero-hours contract' does not have a specific meaning in law.
- If you are unclear about your status, rights or obligations under a zero-hours contract, you should ask your employer for clarification.
- Under your zero-hours contract, you may be an employee or worker.
- Your employment status will depend on what your contract says and how the arrangement operates in practice.
- Your employment status is key to the legal protections you will benefit from while working.
- Workers typically have more flexibility than employees, in that they have more scope to dictate their own schedule and balance their work commitments around their personal lives. However, there is typically more uncertainty about when workers will get work and over what period they will be required to work.
- An employee is normally part of the employer's core workforce and receives the fullest range of benefits. They also benefit from more career development opportunities. The main disadvantage is that there is a lack of flexibility about when you work, as employees usually have set hours or a set pattern of work.
- You should ensure you have a clear understanding from the terms of the contract what your status is.
- If the way in which you work in practice differs from what is set out in your contract, you may not be treated in law as having the same status, which will affect your legal protections.

Appendix: Case law examples

Examples of cases where individuals who appeared to be self-employed were held by the courts to be workers

Byrne Brothers (Formwork) Ltd v Baird & Ors [2002] IRLR 96

This case considered the status of carpenters who were ostensibly 'self-employed' working as subcontractors in the building industry. Their contracts included a number of statements which indicated they were self-employed. For example, their contracts stated that assignments were offered 'on a self-employed basis' and they were taxed as such. Their contracts also provided for the carpenters to take on risk and that they must provide their own tools (once approved by the company).

Nevertheless, the Employment Appeal Tribunal (EAT) found that the carpenters were workers for the following key reasons:

- The requirement to obtain approval from the company before providing a substitute if the carpenter was unable to do the work fell far short of giving the carpenter a blanket licence to supply the contractual services through a substitute, since it implied that substitution could only be used in limited circumstances. In the EAT's view, **personal service** was present.
- The EAT also decided that the carpenters had not been carrying out a business because they worked exclusively for the company for a significant, and indefinite, period. They also worked under the close direction of the company and were paid on a time basis.

Yorkshire Window Company Ltd v Parkes UKEAT/0484/09

This case concerned a double-glazing salesman who had registered his own business for tax purposes, and filed accounts as a self-employed individual. The company made appointments with customers for the salesman to attend the following day and the salesman earned commission from any customer orders arising out of the appointments. The salesman's contract stated that he was an independent contractor, and there was no obligation for him to accept an appointment. If he was unable (not unwilling) to go to an appointment, he could arrange for another salesperson among the existing salesforce to attend in his place. The salesman was subject to a 12-month non-solicit restriction which prevented him from accepting orders for the goods or services supplied by the company once his contract ended.

The EAT found that the salesman was a worker. It held that he had been required to undertake the work personally (**personal service**) because the right of substitution was limited (both to a specific pool of substitutes, and to the circumstance where he was 'unable' rather than 'unwilling' to accept an appointment). The EAT also found that the salesman did not carry on his own business undertaking because, as a matter of fact, the salesman was not carrying out a commercial venture aimed to profit. He did not market his services as an independent person to the world in general – instead he was recruited by the company to work for it as an integral part of that company's operations.

***The Hospital Medical Group Ltd v Westwood* [2012] EWCA Civ 1005**

This case concerned a doctor who provided hair restoration services at a surgery once a week. **Personal service** was not at issue in this case, since both parties agreed that the doctor had been required to provide personal service and could not provide a substitute. The key issue was whether or not the doctor was carrying out a business on his own account and whether the surgery was his client or customer.

The Court of Appeal found that although the doctor was in business on his own account, it was relevant that the doctor was referred to as 'one of our surgeons' in the surgery's marketing material, and was an integral part of the surgery's business. The doctor was restricted from providing services to competitors or soliciting patients, he was contracted to provide services exclusively to the surgery and used the surgery's own equipment. Therefore, the doctor was a worker.

Example of a case where an individual who appeared to be an employee was held by the courts not to be an employee

***Stringfellow Restaurants Ltd v Quashie* [2012] EWCA Civ 1735**

This case concerned a lap dancer who worked at Stringfellows. The dancer worked to a rota which was determined by Stringfellows, she was required to attend meetings at the club and fines were imposed by Stringfellows if she was late for her shifts or if she didn't attend meetings. It was clear that the dancer provided **personal service** and Stringfellows had **control** over how she carried out her work, but the question for the court was whether there was sufficient **mutuality of obligation** to give rise to an employment relationship. The Court of Appeal decided that there was not.

The most important factor was that Stringfellows was under no obligation to pay the dancer anything at all. She negotiated her own fees with customers and risked being out of pocket on any given night. In the court's view, it would be unusual to find an employment relationship where the individual is paid exclusively by third parties and takes the economic risk. This conclusion was reinforced by the terms of the dancer's contract, under which she accepted that she was self-employed, and by the fact that she paid tax as a self-employed individual. The dancer was therefore not an employee. Please note that this decision may be appealed to the Supreme Court.

Example of a case where individuals who appeared to be workers were held by the courts to be employees

***White & Anor Troutbeck SA* [2013] UKEAT 0177/12**

This case concerned the status of two housekeepers who were contracted to run a farm and had autonomy in terms of how they carried out their day-to-day duties. Their employer tended to be absent for the majority of the time and made infrequent visits. The principal issue in this case was to decide to what extent the employer could be said to have **control** of the individuals in circumstances where they were unable to exercise day-to-day supervision of the individuals.

The EAT held that in order to determine the question of control, the correct analysis was whether the employer had a contractual right of control as opposed to exercising day-to-day supervision over the individual. It emphasised that in general terms many workers are provided with a significant amount of autonomy in the way that they carry out their work but are deemed to be employees. The EAT held that in the present case, the individuals, while autonomous, were employees since their employer retained a contractual right of control.

The Court of Appeal agreed that an employment relationship existed between the parties. It also confirmed that the employment tribunal had made a mistake in finding that the lack of day-to-day control was a decisive factor rather than considering the cumulative effect of the employment contract and the circumstances as a whole.

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