



Zero-hours contracts

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Author: Doug Pyper and Daniel Harari

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This note discusses zero-hours contracts; a type of contract used by employers whereby workers agree to be available for work although have no guaranteed hours. They are used increasingly by companies seeking labour flexibility when meeting short-term staffing needs without taking on the obligations associated with contracts of employment. This raises a number of issues, including whether persons working under such contracts are classed as “employees” or “workers” and whether the employer is required to pay workers whilst they are on-call.

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1 Introduction

The expression "zero-hours" or "nil hours" contract is colloquial term for an employment contract under which the employee is not guaranteed work and is paid only for work carried out. They generally lead to "a form of working where the worker is not guaranteed any work but has to be available as and when the employer needs them".¹ The Advisory, Conciliation and Arbitration Service (Acas) has discussed zero-hours contracts in the following terms:

Increasingly, many companies in the retail and hospitality industries are taking on staff on 'zero-hours' contracts - that is, where people agree to be available for work as and when required, but have no guaranteed hours or times of work. Zero-hours contracts effectively provide employers with a pool of people who are 'on-call' and can be used when the need arises.

Generally, as an employer, you are not obliged to offer work to workers on zero-hours contracts - but nor are they obliged to accept any work you offer. It's important to be aware of the provisions of the National Minimum Wage Regulations, which state that workers on 'stand-by time', 'on-call time' and 'downtime' must still be paid the National Minimum Wage if they are at their place of work and required to be there. Similarly, such time is likely to count as 'working time' under the Working Time Regulations if the worker is required to be on-call at the place of work. This means that it's against the law to ask employees to 'clock off' during quiet periods but still remain on the premises.

Zero-hours contracts may suit some people who want occasional earnings and are able to be entirely flexible about when they work. However, the unpredictable nature of working times means that they won't be for everyone.²

The perceived increase in the use of zero-hours contracts has prompted expressions of concern both inside and outside of Parliament. The trade union UNISON has described zero-hours contracts as presenting "huge drawbacks in comparison to permanent regular work", such as no certainty of earnings, a lack of employment rights and the potential disruption to family life caused by frequent short-notice requirements to attend work.³ This latter point about family life was noted by Sheila Gilmore MP, in relation to their use in the retail sector, during a debate about jobs and social security:

The reason I have any criticism of jobs in the retail sector, for example, is not because they are not important jobs, but because people are increasingly being offered short-hours jobs, on zero-hours contracts and with little security, which simply does not work for those trying to organise child care.⁴

A number of Members of Parliament have highlighted problems associated with an increase in the use of zero-hours contracts in their constituencies.⁵ The following provides an overview of recent data about the prevalence of zero-hours contracts, the sectors in which they are used and the legal issues that surround them.

¹ "Close to the core: zero hours working surveyed", *Flexible Working*, January 1997

² [The rise of the 'zero-hours' contract](#), Acas website (accessed 16 January 2013)

³ [Zero Hours Contracts](#), UNISON website (accessed 16 January 2013)

⁴ [HC Deb 28 November 2012 c317](#)

⁵ See: [HC Deb 9 January 2013 c122WH](#) "...a growing army of people in my constituency who work part-time hours, despite desperately wanting to work for longer, or have zero-hour contracts..."; [HC Deb 22 November 2012](#) "Too many people in my constituency are being squeezed by rising food and fuel prices, and by other factors such as the role of employment agencies in our local labour market. Too many people are on zero-hours contracts where no work is guaranteed".

2 The prevalence of zero-hours contracts

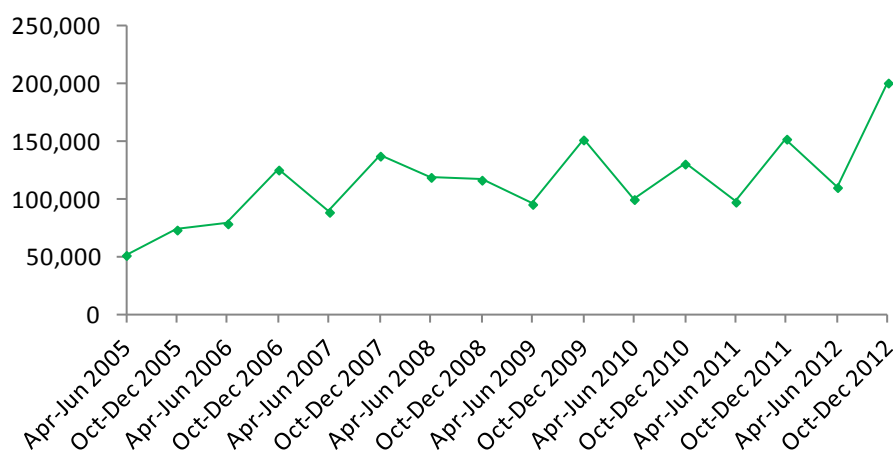
2.1 The number of people employed

The main source of statistics on the number of people on zero-hours contracts comes from the Office for National Statistics' Labour Force Survey. Employed respondents are asked what type of work arrangement they have. For example, whether they work flexible hours, work a nine-day fortnight or are on a zero-hours contract.

Estimates from the three-month period October-December 2012 show that 200,000 people reported that they were on zero-hours contracts (around 0.7% of the total workforce), 38% of which were aged under 25. Zero-hours contracts appear to be highly seasonal, with the number of such contracts higher in the autumn than in the spring (these data are not seasonally adjusted). This seasonality is clearly visible in the chart below, which shows the number of people reporting to be on zero-hours contracts back to 2005.⁶

Number of people estimated to be on a zero hours contract

Not seasonally adjusted



Source: ONS, *Labour Force Survey*

Due to the nature of the Labour Force Survey these estimates are entirely dependent on the responses provided by individuals taking the survey. It is possible that people are on zero-hours contracts but are not aware of this, or are not aware that they are called zero-hours contracts.⁷ If this is the case, the numbers presented above are likely an underestimate.

2.2 Prevalence among businesses, by size and sector

A government survey of businesses, the Workplace Employment Relations Survey shows that the proportion of workplaces that have some employees on zero-hours contracts has increased from 4% in 2004 to 8% in 2011.⁸ Larger companies are more likely to use zero-hours contracts, with 23% of workplaces that have 100 or more employees using them in 2011 compared with 11% of those with 50-99 employees and 6% of those with fewer than 50 employees.

Workplaces in the hotels and restaurants sector were the most likely to use zero-hours contracts, 19% did so in 2011 (up from 4% in 2004). The health sector had the second

⁶ ONS, [ad hoc analysis of zero hours contracts](#) [Excel file], Mar 2013

⁷ For more see: Ian Brinkley, [Zero hours contracts and the flexible labour market](#), the Work Foundation website (accessed 8 February 2013)

⁸ BIS, [The 2011 Workplace Employment Relations Study \(WERS\)](#), Jan 2013; previous survey conducted in 2004.

highest proportion at 13% (up from 7% in 2004) and then the education sector with 10% in 2011 (up from 1% in 2004).

2.3 Use in the public sector

An analysis of the available statistics by the Work Foundation highlighted the use of zero-hours contracts in the NHS and in the education sector:

Although [...] zero hours contracts are more often associated with hotels and restaurants and the entertainment industries, zero hours contracts are also used in the NHS to manage short-term staffing shortages and provide short-term cover, by universities for teaching and support staff where demands are highly unpredictable, and in education to provide supply teachers.⁹

The use of zero-hours contracts in the NHS has been picked up by the British Medical Association. The *British Medical Journal* reports:

Mark Porter, chairman of the BMA council, said, "An expansion of zero hours contracts in the NHS is of great concern. While they have a minor role in allowing recently retired doctors to continue to work, they are not conducive to planning coherent cohesive services which focus on the care of patients."¹⁰

Academics at Edinburgh University have also highlighted an increasing use of zero-hours contracts:

A recent survey at Edinburgh University found 27% of staff are on such contracts, rising to 47% for those in the College of Humanities and Social Science.

Mary Senior, Scottish official of the UCU, said: "The statistics from Edinburgh go some way to revealing the true extent of the casualised workforce in Scottish higher education. It is deeply concerning that over one-quarter of staff at one of Scotland's leading institutions are on zero-hours contracts, with no job security and inferior terms and conditions."¹¹

2.4 Summary

It appears therefore that zero-hours contracts are being used primarily in the low skilled food and recreational service industries, with growing use in the NHS and academic institutions. In view of their prevalence, it is important to be clear about the legal implications of their use.

3 The legal implications of zero-hours contracts

The use of zero-hours contracts raises a number of legal issues which affect both their utility to the employer as a contract for flexible labour and the worker in respect of their employment rights. Chief amongst these issues is the question of employment status, ie whether or not those working under such contracts are defined in law as "employees" or "workers". Persons with employee status are afforded a number of important legal rights which workers are not, such as the right not to be unfairly dismissed, maternity rights,

⁹ Ian Brinkley, [Zero hours contracts and the flexible labour market](#), the Work Foundation website, Aug 2012 (accessed 8 February 2013)

¹⁰ [BMA warns against any extension of "zero hours" contracts in NHS](#), *BMJ* 2012; 345: e59695, September 2012. See also: [Zero hours contracts for NHS staff explained](#), BBC website, 19 September 2012 (accessed 16 January 2013); [Health warning over army of NHS 'temps'](#), the *Independent* [online], 3 September 2012 (accessed 16 January 2013); [UNISON warning over zero hours contracts in NHS](#), UNISON website, 3 September 2012 (accessed 16 January 2013)

¹¹ [Academics attack 'zero hours' trend](#), *HeraldScotland* website, 14 January 2013 (accessed 16 January 2013)

redundancy rights and rights under [the Transfer of Undertakings \(Protection of Employment\) Regulations 2006](#). Their use also raises a question about whether it is necessary to pay those employed under zero-hours contracts the National Minimum Wage whilst they are on call. These issues are discussed below.

3.1 Zero-hours contracts and employment status

The principal purpose, from an employer's perspective, for the use of zero-hours contracts is the development of a flexible workforce, capable of meeting short-term staffing needs, without taking on the obligations associated with contracts of employment. As such, zero-hours contracts are drafted to avoid conferring employment status upon those working under them. Notwithstanding the intentions of the draftsman, the case law indicates that if the day-to-day reality of the work suggests a relationship of employment, the contract will be one of employment, and the person working under it will be classed as an employee.

A number of factors determine whether or not a contract is one of employment. The essential elements which form the "irreducible core" of the contract of employment are:

- the contract must impose an obligation on a person to provide work personally;
- there must be a mutuality of obligation between employer and employee; and
- the worker must expressly or impliedly agree to be subject to the control of the person for whom he works to a 'sufficient' degree.¹²

The case law on the use of zero-hours contracts has focused on the second issue: mutuality of obligation. In the case of contracts of employment, the employee normally is obliged to work and the employer is obliged to provide work and pay for it. Such obligations are not apparent features of zero-hours contracts; therefore they do not outwardly provide for the mutuality of obligation required for contracts of employment. However, mutuality of obligation may in certain cases be inferred. The circumstances in which they will be inferred were considered by the Employment Appeals Tribunal (EAT) in [Pulse Healthcare v Carewatch Care Services Ltd & Ors \[2012\]](#).¹³ The focus in that case was the reality of the agreement between the company and the worker, rather than an exclusive concern with the written terms of the zero-hours contract.

The reality of the agreement

In [Pulse Healthcare](#) the EAT was required to decide whether the claimants were employees, within the meaning of [section 230 of the Employment Rights Act 1996](#), despite being employed under a "Zero-hours Contract Agreement". The EAT concluded that the claimants were employees, and that there was a mutuality of obligation, notwithstanding the fact that the written terms of the contract suggested otherwise. As noted by the EAT, the proper approach to interpreting labour contracts is that set out by Mr Justice Elias in [Consistent Group Ltd v Kalwak \[2007\] IRLR 560](#):

The concern to which tribunals must be alive is that armies of lawyers will simply place substitution clauses, or clauses denying any obligation to accept or provide work in employment contracts, as a matter of form, even where such terms do not begin to reflect the real relationship. Peter Gibson LJ was alive to the problem. He said this (p 697):

¹² See: *Tolley's Employment Law Handbook*, 26th Ed, 2012, pp342-343; *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 Q.B. 497*

¹³ UKEAT 0123_12_0608

‘Of course, it is important that the industrial tribunal should be alert in this area of the law to look at the reality of any obligations. If the obligation is a sham, it will want to say so.’

In other words, if the reality of the situation is that no-one seriously expects that a worker will seek to provide a substitute, or refuse the work offered, the fact that the contract expressly provides for these unrealistic possibilities will not alter the true nature of the relationship.¹⁴

Thus, when deciding whether a zero-hours contract constitutes a contract of employment, conferring employee status, the wording of the contract will not be determinative of whether there is, in practice, a mutuality of obligation. The tribunal will look closely at the reality of the agreement. If the reality is that there is a pattern of regular work which is regularly accepted, the tribunal may deem the contract to be one of employment.¹⁵ This is illustrated by the decision at first instance (ie pre-appeal) of the Employment Tribunal in *Pulse Healthcare*:

Most of the factors point to the claimants in this case being employees under section 230(1). The only issue pursued on behalf of the second respondent is that of a lack of mutuality of obligation. I am satisfied there was sufficient mutuality of obligation for the claimants to be employees. Once the rota was prepared they were required to work and the employer was required to provide that work. They were subject to control and discipline; they had to provide personal services; they were provided with uniforms and equipment; they were paid on a PAYE basis; they had all worked regularly over a number of years and had only taken time off for holidays, sickness and when suspended for which they received payment; it was not established that there were gaps in the continuity of employment. The claimants required regular work and this was provided by the first respondent.

I am satisfied that the documents did not reflect the true agreement between the parties and that four essential contractual terms were agreed: (1) that the claimants would perform the services for the first respondent (2) that the claimants would be paid for that work; (3) that the claimants were obliged to carry out the work offered to them and the first respondent undertook to offer work and (4) that the claimants must personally do the work and could not provide a substitute to do so. Those were the true terms of the contract.¹⁶

The decision of the EAT has important implications for employers and employees. It indicates that where a worker is employed on a zero-hours contract and provided with regular work which is regularly accepted, there is significant possibility that the contract will be one of employment. One effect of this is that many employers, who proceed on the basis that staff working under zero-hours contracts have limited employment rights, may discover the existence of additional rights only when these are asserted against them.

Another important issue employers and employees may need to consider when using zero-hours contracts is whether the employer is required to pay the worker whilst on-call. This is addressed below.

¹⁴ Para 57-58; see also: *Autoclenz v Belcher* [2011] UKSC 41, para 25; *Pulse Healthcare v Carewatch Care Services Ltd & Ors* [2012], para 35

¹⁵ See also: *St Ives Plymouth Ltd. v Haggerty* [2008] All ER (D) 317; *Wilson v Circular Distributors Ltd* [2005] EATS/0043/05

¹⁶ *Pulse Healthcare v Carewatch Care Services Ltd & Ors* [2012], para 22

3.2 Zero-hours contracts and the National Minimum Wage

The National Minimum Wage must be paid to workers for all hours they are required to be at or near work and available for work even if they are not actually given any work during this time. Under the [National Minimum Wage Regulations 1999](#) those on zero-hours contracts are defined as “time workers” (see [regulation 3](#)). A time worker must be paid at least the national minimum wage for the times when:

- they are at work and required to be at work (excluding rest breaks). Workers who turn up to work as required and who are available for work must be paid the National Minimum Wage during that time. It makes no difference whether or not work is actually provided for that time. But time when a worker is absent from work (for example, rest breaks, tea breaks, lunch breaks, sick leave, holiday) does not count as hours of time work;¹⁷
- they are on standby or on-call at or near the place of work. If the worker is waiting to be given work, the National Minimum Wage is payable for that time. However, a worker who is on standby or on-call at home, or is entitled to be at home, does not have to be paid the National Minimum Wage for that time, regardless of where the person works;¹⁸
- they are kept at their place of work but are unable to work because plant or machinery has broken down.

The current rates for the National Minimum Wage can be found on the [GOV.UK website](#).¹⁹

4 Review of zero-hours contracts and comment

On 30 May 2013 the human resources magazine *People Management* reported that the Secretary of State for Business, Innovation and Skills, Vince Cable, had said the Government is reviewing the use of zero hour contracts:

We’re looking at it... For some people they work but they’re not looking for long-term security. However, we’ve got to try to balance this with people who are.²⁰

On 1 July 2013 Jo Swinson, Minister for Employment Relations, responded to questions from Chuka Umanna, the Shadow Business Secretary, about the investigation of zero-hours contracts:

Mr Umunna: To ask the Secretary of State for Business, Innovation and Skills how many officials are currently working on his Department’s investigation of zero-hours contracts.

Jo Swinson: A team of three officials within the Department for Business, Innovation and Skills are spending part of their time researching how zero-hours contracts are being used by businesses. They are speaking informally to a variety of stakeholders, including industry bodies representing sectors where they are in use and also trade unions to gather information.

¹⁷ [Regulation 15\(1\) and 15\(7\)](#)

¹⁸ [Regulation 15\(1\)](#)

¹⁹ GOV.UK, [National Minimum Wage rates](#) (accessed 23 January 2013).

²⁰ CIPD website, [Government ‘reviewing zero hours contracts,’ says Business Secretary](#), 30 May 2013 (accessed 3 June 2013)

Mr Umunna: To ask the Secretary of State for Business, Innovation and Skills by what date he expects his Department's investigation of zero-hours contracts to be complete; and if he will publish any subsequent report.

Jo Swinson: Officials are currently speaking informally to a variety of stakeholders, including trade unions and industry bodies representing sectors where zero-hours contracts to gather information. They will report their findings to me after summer recess.

We will consider next steps when we better understand the issues for both businesses and people engaged on these contracts.

Mr Umunna: To ask the Secretary of State for Business, Innovation and Skills whether he will issue a call for evidence and initiate a consultation process as part of his Department's investigation into zero-hours contracts; and by what other means organisations and interested parties can submit evidence as part of his Department's investigation.

Jo Swinson: There are no plans to issue a call for evidence or consultation at this stage. Officials within the Department for Business, Innovation and Skills (BIS) are currently researching how zero-hours contracts are being used by businesses.

They are currently speaking informally to a variety of stakeholders, including industry bodies representing sectors where they are in use and also trade unions to gather information. If organisations have information they feel is relevant to the work that is currently under way, they should contact the Labour Market Directorate in BIS.²¹

On 24 May 2013 *The Independent* reported the Liberal Democrat peer, Lord Oakeshott, as having said "A zero-hours Britain is a zero-rights Britain in the workplace – Beecroft by the back door. Being at the boss's beck and call is no way to build a skilled, committed, loyal labour force".²²

On 22 May 2013 Lord Sewell, the Chairman of the Committees of the House of Lords, responded to a question about how many people work in the House of Lords on zero-hours contracts. He stated that 19 employees who work for *Hansard* and 26 employees who work for the Catering and Retail Services are employed on zero hour contracts.²³

Between 15 and 20 May 2013 Labour Party politicians tabled several Parliamentary Questions seeking data on the number of people employed in Government departments on zero-hours contracts; the Ministers responded stating that no people employed in their departments were on zero-hours contracts.²⁴ On 28 April 2013 Andy Burnham, the Shadow Secretary of State for Health, stated that a future Labour government should "ban things like zero hours contracts".²⁵

²¹ [HC Deb 1 July 2013 c512W-513W](#)

²² "Pressure grows on Government to outlaw 'zero hours' contracts as it is revealed Parliament uses them too", *The Independent* [online], 24 May 2013 (accessed 3 June 2013)

²³ [HL Deb 22 May 2013 WA85](#)

²⁴ For example: [HC Deb 20 May 2013 c545W](#)

²⁵ BBC News website, [Transcript of the Andrew Marr Show Interview with Andy Burnham MP](#), 28 April 2013, p6 (accessed 3 June 2013)