

Zero Hours Contracts

Definitions

1. A zero hours contract is not a term of legal art although a definition has been attempted in the Small Business, Enterprise and Employment Bill which proposes to insert as S.27A of the Employment Rights Act 1996:

(1) In this section “zero hours contract” means a contract of employment or other worker’s contract under which –

(a) The undertaking to do or perform work is an undertaking to do so conditionally on the employer making work or services available to the worker, and

(b) There is no certainty that any such work or services will be made available to the worker.

(2) For this purpose, an employer makes work or services available to a worker if the employer requests or requires the worker to do the work or perform the services.

2. However, the purpose of that definition is to include contracts where, by the proposed S.27A(3), exclusivity clauses will be rendered unenforceable (see below).

3. CIPD adopt the following definition:

“An agreement between two parties that one may be asked to perform work for another but there is no minimum set contacted hours. The contract will provide what pay the individual will get if he or she does work and will deal with circumstances in which work may be offered and possibly turned down.”

4. In other words, the bare essential is that the relationship whereby work is done by one for another is governed by a contract when the work is done but there is no commitment on one or both sides to continue to provide or perform work.

Flexibility and the absence of commitment

5. A party to an employment contract who desires flexibility necessarily avoids or limits commitment to future work. Theoretically that flexibility can be afforded to either or both contracting parties.
6. At one end of the spectrum is the individual who turns up at a fruit farm and offers to do a day's fruit picking for a day's pay with no further commitment on either side. At the other end of the spectrum is the worker who signs up to work for one employer whenever he is required and agrees not to do work for any other employer even if he is not gainfully employed (although see legislative proposals below).
7. It is rare (perhaps non-existent) for contracts to provide for a worker to have the converse rights; in other words to be able to insist that he is given paid work whenever he wants it, but not otherwise, and to prohibit the employer from employing anybody else ! That reflects the comparative bargaining positions.

Benefits of zero hours contracts for employers

8. The principal advantage to an employer of having zero hours contracts is that they enable them to vary the size of their labour force to cater for variable demand; particularly when it fluctuates unexpectedly. It is true that they could take workers on and lay them off without having to pay redundancy but there will usually be a notice period, there will be the administration of engaging, dismissing and re-engaging and the employees may feel misled if they understand, at recruitment, that they are being engaged on a permanent basis. A zero hours contract makes no promise of ongoing work.
9. In addition to coping with variable demand, employers may want to have cover for sickness and holiday absence and maternity leave. Large employers

may be able to cover that by having modest overstaffing but smaller employers would try to avoid that.

10. By having a bank of zero hours contact workers, employers are able to avoid paying agency fees. This is now common in health care. Individuals can be interviewed and vetted in advance and then be called upon to work when it is mutually agreeable.

Benefits of zero hours contracts to employees / workers

11. Contrary to popular myth, plenty of workers are happy to work on zero hours contracts. When the terms are appropriately balanced, they can work to the worker's advantage as much as they work to the employer's advantage. In many cases, workers have external commitments; child care, relative care, hobbies, other work. They can make the employer aware when they are available to work and enjoy a realistic expectation of being gainfully retained without having to enter into a long term commitment.
12. The CIPD survey in November 2013 found that ZHC workers had equal job satisfaction with permanent workers, were more happy with their work / life balance and were less likely to think they were treated unfairly.

Disadvantages of zero hours contracts to employees / workers

13. Some workers enter into zero hours contracts because they cannot find permanent work; they would prefer to have a permanent job with a regular income and associated employment benefits. The absence of a permanent job with a commitment to pay a regular salary may impact upon their ability to raise a mortgage or to rent property even if they are, effectively, working full time.
14. The employer may cancel scheduled work at short notice without providing any compensation.

15. The zero hours contract may prohibit the worker from taking on any other work or may require the worker to be available for work at the employer's whim.

The extent of use of zero hours contracts

16. Zero hours contracts are now a significant form of flexible labour provision.

17. The CIPD survey found:

- 1 million people (3.1% of UK workforce) are employed under ZHCs;
- 23% of employers use ZHCs;
- 28% of public sector and 42% of non-profit sector use ZHCs;
- 30% of education and 29% of healthcare employers use ZHCs

Recommended good practice

18. CIPD recommends:

- Explain to workers why ZHCs are being used;
- Provide written terms and conditions (even if workers) explaining how the ZHC will operate, what are the rights and obligations, what notice is to be given, compensation for short notice etc;
- Review the need for ZHCs – consider whether any can be made permanent employees, alternative forms of flexible working;
- Provision of notice for requiring and cancelling work;
- Act fairly when work is cancelled at short notice – including compensation payments, travel costs etc
- Pay comparable rates to permanent staff – avoid the second class citizen status
- Permit working for other employers when no work is available

Features of zero hours contracts

Employee, worker or self-employed ?

19. It is possible for a person engaged on a zero hours contract to be an employee, a worker or self employed. The usual criteria to determine status will still apply; requirement for personal service, mutuality of obligation, control, integration, whether carrying on a business etc.

20. Typically, a zero hours contract worker engaged in the health, education or retail sector will be an employee for the period of the engagement. It is possible that there may be an umbrella employment contract depending on the contractual terms and what happens in practice.

Notice periods

21. In the case of employees, but not workers, the statutory minimum notice periods will apply – which can be important if there is an umbrella contract.

Holiday pay

22. Zero hours employees and workers are entitled to paid holidays, pro rated to 28 days pa. However, irregular hours can give rise to difficult calculations when attempting to apply the statutory formula.

Legislative proposals

23. The Small Business, Enterprise and Employment Bill is proposing to ban exclusivity clauses in zero hours contracts without any exceptions. The proposed S.27A provides:

- (3) Any provision of a zero hours contract which –
 - (a) Prohibits the worker from doing work or performing services under another contract or under any other arrangement, or
 - (b) Prohibits the worker from doing so without the employer's consent,

Is unenforceable against the worker.

Problems with legislative proposals

24. The government is currently undergoing a consultation process in which it is asking for advice on loopholes and anti-avoidance measures.
25. The definition of a zero hours contract limits the applicability of S.27A(3). A contract that guarantees one hour of work a year would fall outwith the definition in S.27A(1).
26. By rendering the restriction unenforceable, it merely permits the worker to contravene the restriction without fear of being in breach of contract. There is no protection if the employer declines to use their services ever again; in other words disregard of the restriction is not a protected act.
27. It does not prohibit a contractual obligation on the worker to accept work, even on short notice, when it is offered.
28. It is unclear how the legislation fits with the common law of restraint of trade. It would seem that you could never employ a person under a zero hours contract if you wanted to be able to restrain them from working for a competitor in the aftermath of their employment.

Further reading

29. See:

- (1) CIPD / Lewis Silkin Guide: Zero-hours contracts: understanding the law
- (2) CIPD Research Report November 2013
- (3) DBIS Zero Hours Contracts – Banning Exclusivity Clauses: Tackling Avoidance
- (4) Small Business, Enterprise and Employment Bill

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