

Making Work Pay: Consultation on the application of zero hours contracts measures to agency workers

CONSULTATION RESPONSE by Thompsons Solicitors LLP

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Initial Observations

Labour's Plan to make work Pay promised that:

'Labour will end 'one-sided' flexibility and ensure all jobs provide a baseline level of security and predictability, banning exploitative zero-hours contracts and ensuring everyone has the right to have a contract that reflects the number of hours they regularly work based on a twelve-week reference period.'

Zero Hours contracts

The use of zero hours contracts has increased exponentially over the past 20 years.

'Supplementary LFS data on zero-hours contracts'¹ published by the Office for National Statistics (ONS) shows that, in 2004, there were 108,000 people employed on zero-hours contracts. By 2014, the figure had increased to 697,000.

There is a common misconception that zero-hours contracts are used primarily for short-term casual work, but this is not true. The 'Labour Force Survey: zero-hours contracts data tables'² published by the ONS shows that, in the period July to September 2024, there were 1,134,000 people employed on zero-hours contracts. Table 13 shows that two-thirds of people on zero-hours contracts (66.9%) had been on a zero-hours contract for more than 12 months, and nearly half (45.3%) had been on a zero-hours contract for more than 5 years.

The impact assessment '*ZHCz - Right to Guaranteed Hours*' says that there is evidence that zero-hours contracts do not work for a sizeable minority of workers

¹<https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/datasets/supplementarylfsdataonzerohourscontracts>

²<https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetype/datasets/emp17peopleinemploymentonzerohourscontracts>

and references a CIPD report, '*Zero Hours Contracts, Evolution & Current Status*'³, which suggests that 21% of workers on zero-hours contracts said that this contractual arrangement '*does not suit their life*.' We consider that this is an understatement of the true position for the reasons set out below.

'Good Work - The Taylor Review of Modern Working Practices - July 2017'⁴ says:

'However, we have heard repeatedly during the Review that there is an issue of flexibility not being reciprocated with a requirement to be available for work at very short notice, without any guarantee that work will actually be available. This makes it very difficult for a person to manage their financial obligations, or for example secure a mortgage. This can feel unfair, especially when the reality of the working arrangement is that the individual regularly works 40 hours a week. While in theory individuals in these working arrangements have the right to turn down work, we were told that workers, needing work but lacking unfair dismissal rights, often felt that to express legitimate views about conditions or make even reasonable requests risked having future work denied to them.'

A report by the TUC, '*Great Jobs with Guaranteed Hours - What do workers really think about 'flexible' zero-hours contracts?*'⁵ published in December 2017, looked at the experiences and views of workers employed on zero-hours contracts and found that:

- 66% would prefer to have a contract with guaranteed hours.
- 73% had been offered work with less than 24 hours' notice.
- 51% had had work cancelled with less than 24 hours' notice.
- 35% had been threatened with not being given shifts in the future if they turned down work.

A more recent survey of zero-hour contract workers carried out by the TUC in May 2024⁶ found that:

- 84% wanted regular hours of work.

³ https://www.cipd.org/globalassets/media/knowledge/knowledge-hub/reports/zero-hours-contracts-report-aug-2022_tcm18-110465.pdf

⁴ <https://assets.publishing.service.gov.uk/media/5a82dcdce5274a2e87dc35a4/good-work-taylor-review-modern-working-practices-rg.pdf>

⁵ <https://www.tuc.org.uk/research-analysis/reports/great-jobs-guaranteed-hours>

⁶ <https://www.tuc.org.uk/news/over-8-10-zero-hours-contract-workers-want-regular-hours-tuc-poll-reveals>

- 75% said they had experienced difficulty meeting living expenses due to not being offered enough hours.
- 52% had had shifts cancelled with less than 24 hours' notice.
- 66% had received no compensation for cancelled shifts, and only 5% were fully compensated.
- 50% had experienced difficulty managing childcare with their work.
- 76% had missed out on a planned family or social event due to needing to work.

Although employers often depict zero-hours contracts as a flexible labour solution to fluctuating demand, the increasingly widespread and long-term use of zero-hours contracts permits employers to fail to undertake proper workforce planning and, in some cases, to circumvent employment protection and withhold job security from workers. The one-sided flexibility inherent in using zero-hours contracts is causing serious hardship for workers, and it urgently needs to be addressed.

Agency workers

The impact assessment says that analysis of Labour Force Survey data shows that there are around 900,000 agency workers of whom around 140,000 are identified as being employed on a zero hours contract.

A report by the Resolution Foundation '*Secret agents: Agency workers in the new world of work*⁷ in December 2016 found that the number of agency workers has been increasing in number over time.

'In the five years between 2011 (the point from which we have a full dataset) and 2016, we estimate that the number of agency workers has increased by over 200,000, the equivalent of a 30 per cent increase. And if agency workers continue to grow at the same rate as they have over the last five years, even factoring in projected lower employment growth we estimate that their number will exceed 1 million before the end of the decade.'

In 2017, the Taylor report noted that:

'There is a lack of robust data on the number of agency workers in the UK. Estimates range from 800,000 to around 1.2 million.'

⁷ <https://www.resolutionfoundation.org/publications/secret-agents-agency-workers-in-the-new-world-of-work/>

The Recruitment and Employment Confederation (REC) estimate of 1.2 million is generally considered to be more reliable, with REC suggesting that the number of agency workers has remained fairly stable over the last number of years, but with a low of 900,000 in 2009/10.

and went on to say:

‘While there is undoubtedly an important role for flexibility in the labour market, we believe that too many employers and businesses are relying on zero hours, short-hours or agency contracts, when they could be more forward thinking in their scheduling. We want to incentivise employers to provide certainty of hours and income as far as possible, and to think carefully about how much flexibility they can reasonably expect from their workers. Workers need to be able to make informed decisions about the work that they do, to plan around it, and to be compensated if arrangements change at short notice.’

Workers urgently need stronger protection from those ‘*end hirers*’ who could employ the workers directly but choose to use employment agencies, instead of directly employing workers, as a means of depriving workers of employment rights and job security.

The need for reform

The TUC report, referred to above, recommended that the government should:

- Ban the regular use of zero hours contracts, and ensure all workers receive premium pay for any non-contracted hours and compensation when shifts are cancelled at short notice.
- Make sure companies and public bodies report on how many people they employ in agency work, zero hours contracts and short hours, including through supply chains in their annual reports.

The proposals set out in the Employment Rights Bill go some way towards implementing the first recommendation. However, much of the detail is to be set out in Regulations which have not yet been published.

It would have been preferable if further detail about the zero hours contracts measures had been available in advance of this consultation; this would perhaps have enabled respondents to the consultation to have commented more

meaningfully on the application of the measures to agency workers. However, it is clear that, if the zero hours contracts measures are not expanded to cover these workers, then this would provide employers with an easy route to avoid the measures and to undermine their purpose to such an extent as to render them ineffective.

The TUC recommendation, that companies should include information about the number of people they employ in agency work and on zero hours contracts, needs to be implemented. There needs to be more clarity about the extent to which employers rely on these methods of employing people so that there can be more accountability and more effective scrutiny of the reasons for such reliance, in particular the question of whether it is motivated primarily by a preference to deny workers' employment rights rather than by a genuine need for flexibility.

It is also important not to overlook the important and related issue of worker status. In particular, the cynical use of bogus self-employment arrangements to deprive workers of employment rights also need to be urgently addressed. We note that the policy paper published with the Bill, '*Next Steps to Make Work Pay*' says that the government intends to consult separately on the implementation of a single worker status, involving a simpler framework that differentiates between workers and the genuinely self-employed.

Specific Responses

Background questions

Q1: Are you (please select from the following):

Thompsons is the UK's largest firm of solicitors representing workers and trade unions.

Q2: If you are an employer or individual, what is your role or the role of the organisation that you work for (please select from the following)?

Not applicable.

Q3: If you are an employer or individual, what type of organisation (do you work for) (please select from the following)?

Not applicable

Q4: If you are an agency, an umbrella company or an end hirer of agency workers, how would you describe the size of your entire organisation?

Not applicable

Q5: Do you think the guaranteed hours should be offered by the employment agency (option 1) or the end hirer (option 2)?

- option 1, guaranteed hours should be offered by the employment agency
- option 2, guaranteed hours should be offered by the end hirer
- don't know

Please explain your answer.

The guaranteed hours should be offered by the end hirer and the worker should become directly employed by the end hirer.

There are some circumstances where the use of a temporary agency worker employment model is necessary, because the end hirer's requirements for workers are genuinely of a short term and uncertain nature, such as cover for sickness absence.

However, it would not be appropriate for the zero hours contracts measures to set up a system where it is deemed to be acceptable for end hirers to employ workers through employment agencies on a longer-term basis, i.e. for more than 12 weeks. Where the end hirer has a longer term need for a worker, then the measures should provide for the worker to become directly employed by the end hirer.

This approach would also dovetail with the right of agency workers, after 12 weeks, to be employed on the same conditions as employees of the end hirer, set out in Regulation 5 of the Agency Workers Regulations 2010.

It would mean that after 12 weeks the end hirer would no longer benefit from the convenience of HR and payroll functions being undertaken by the agency.

However, we would suggest that the inconvenience for end hirers is marginal when compared to the disadvantage to workers of being disenfranchised of their employment rights through long term agency work.

It is also important to note that there would be a commercial advantage for the endhirer in that it would no longer be tied into paying the agency mark-up on top of the rate of pay which it pays direct employees doing the same work as the agency worker. As agency workers are frequently used in the public sector, particularly in the education and health sectors, there could potentially be a significant costs saving for the tax payer.

The zero hours contract measures provide sufficient flexibility for employers in the form of the exclusions applicable to the requirement to issue a guaranteed hours contract i.e. there is no requirement to do so where the employer can demonstrate that the work relates to specific time-limited task or event or where there is a genuine need for temporary workers.

Q6: Should end hirers be required to pay a transfer fee or use an extended hire period if they are required to offer guaranteed hours to an agency worker?

No. End hirers should not be required to pay a transfer fee nor to use an extended hire period if they are required to offer guaranteed hours to an agency worker. If end hirers were required to pay a transfer fee to the agency, then this would act as an incentive for the end hirer to seek to avoid the effect of the zero hours contracts measures.

Regulation 10(4) of The Conduct of Employment Agencies and Employment Businesses Regulations 2003 provides that any term of a contract which is contingent on a work-seeker taking up employment with the hirer is unenforceable after the end of the '*relevant period*' which is defined to end 14 weeks after the day on which the first day on which the agency worker began work for the end hirer. Regulation 10 should be amended to reduce this period so that it aligns with the reference period in the regulations implementing the zero hours contracts measures (currently anticipated to be 12 weeks.)

If end hirers are required to use an extended hire period, then this would unnecessarily extend the period during which the worker would be a temporary agency worker with no job security. Regulation 10 should be amended to prevent

extension of the hire period beyond the reference period set out in the regulations implementing the zero hours contracts measures.

An employment agency which has provided a temporary worker for a 12-week period will already have been remunerated for its services, in introducing the worker to the employer, because the agency will have charged the employer a significantly higher hourly rate than the hourly rate which it has paid to the worker for the 12 week period when it has directly employed the worker.⁸

Q7: If you think there are other factors specific to agency workers that need to be taken into account in applying the new right to guaranteed hours to them, please explain them here.

As we have set out in our initial observations, above, the employment of workers through employment agencies is open to exploitation by unscrupulous employers whose main motivation is not a genuine need for flexibility but rather a desire to deny those workers employment rights.

As the government recognises in the introduction to the consultation, if the new rights are not applied to agency workers, then agency work would provide an obvious alternative for unscrupulous employers who want to avoid the new rights.

Therefore, it is critical that zero hours contracts measures are extended to agency workers, otherwise even greater numbers of workers are likely to be pushed into insecure agency work.

Q8: Do you agree that the responsibility for providing an agency worker with reasonable notice of shifts should rest with both the employment agency and the hirer, so that where a tribunal finds that unreasonable notice was given, it will apportion liability according to the extent that the agency and the hirer are each responsible for the unreasonable notice?

⁸ For example ‘*Agency mark-up and the impact on temporary worker pay*’ published by the Crown Commercial Service indicates that agency mark ups can range from 15% to as much as 38%. - <https://www.crowncommercial.gov.uk/news/agency-mark-up-and-the-impact-on-temporary-worker-pay>

Responsibility for providing an agency worker with reasonable notice of shifts should rest with the agency.

In our experience, where legislation makes provision for two employers to be jointly liable (such as in cases involving the transfer of undertakings) it is often the case that each employer seeks to blame the other and the worker is put in the unfortunate position of having to bring an employment tribunal claim against both employers, in order to secure their legal rights.

Employment agencies are commercial organisations which, unlike temporary agency workers, are in a strong position to dictate the terms of business on which they will accept instructions from end hirers.

Employment agencies can, therefore, make provision, in the contracts which they enter into with end hirers, to recover costs incurred by the agency in compensating the worker for unreasonable notice of a shift.

Q9: Do you think that legislation should prescribe how the end hirer should notify the agency that they have a shift available and of changes to these and when notification should be deemed to be received?

No. We consider that this would be overly prescriptive, it would introduce unnecessary complication and increase the likelihood of litigation.
We refer to our answer to question 8 above.

Q10: If you think there are other factors specific to agency workers that need to be taken into account in applying the new right to reasonable notice of shifts to them, please explain them here.

For the reasons set out in response to question 7 above and in our initial observations, we consider that it is critical that zero hours contract measures are extended to agency workers, to avoid even greater numbers of workers being pushed into insecure agency work.

Q11: Do you agree that the agency should be responsible for paying any short notice cancellation or curtailment payments to an agency worker?

Yes, for the same reasons as we have set out in response to question 8.

Q12: Do you think that the agency should be able to recoup this cost from the end hirer if/to the extent that the end hirer was responsible for the short notice cancellation or curtailment?

Yes, as set out above in response to question 8, the agency should be able to make provision, in its contract with the end hirer, to recover costs incurred by the agency in compensating the worker for short notice cancellation or curtailment.

Q13: If you think that the agency should be able to recoup this cost from the end hirer, do you think the government should legislate to ensure that the agency can recoup the costs?

No.

Our view is that legislation is not necessary. As set out above, agencies can make provision, in their contracts with end hirers, to recoup these costs. Employment agencies are commercial organisations which, unlike agency workers, are in a strong position to dictate the terms of business on which they will accept instructions from end hirers.

The focus of these reforms should be on protecting workers not employment agencies.

Q14: Do you think that it should be possible to override legislative provisions allowing agencies to recoup cancellation or curtailment costs through contracts signed after implementation (or that are clearly entered into in contemplation of the commencement of the legislative provisions)?

Not applicable. Please see our answer to question 13 above.

Q15: If you think there are other factors specific to agency workers that need to be taken into account in applying the new right to payment for short notice cancellation or curtailment to them, please explain them here.

For the reasons set out in response to question 7 above and in our initial observations, we consider that it is critical that the new rights are extended to

agency workers, to avoid even greater numbers of workers being pushed into the insecurity of agency work.

In addition to this, it is vital that whatever statutory regime is eventually applied to agency workers there is a clear route available for the enforcement of these rights and anti-avoidance measures are implemented.

It is imperative that protection from dismissal and detriment, by both the agency and end hirer, is put in place for those seeking to rely on these rights.

It is noted that the current proposals focus on workers enforcing their rights through employment tribunal litigation. This is welcome but it is our view that the new Fair Pay Agency should also have a role in the regulation of employers and agencies in relation to the zero hours contracts measures, with the ability to fine and publish details of organisations who do not comply with the legislation.

Finally, we would urge the government to take action on its proposals for single worker status as soon as possible. While the zero hours contracts measures cover both workers and employees, there remain serious issues in relation to the position of workers in 'bogus' self-employment and, while this situation is allowed to persist, some workers will continue to be deprived of not only the benefit the proposed zero hours contracts measures but all employment rights.