UK Government

Making Work Pay

Consultation on the application of zero hours contracts measures to agency workers

21 October 2024

Closing Date: 2 December 2024

Foreword

A pro-worker, pro-business economy demands genuine, two-sided flexibility for both employers and employees. The problem to date has been that this flexibility has too often gone one way.

This Government wants to rebalance the scales, ensuring security at work and genuine flexibility for all.

Through the Employment Rights Bill, we're fulfilling our pledge to end exploitative zero hours contracts. We're introducing a right to guaranteed hours reflecting the hours qualifying workers have worked during a reference period, anticipated to be 12 weeks. And we're also enshrining into law the right to reasonable notice of shifts and a right to payment for shifts cancelled or curtailed at short notice.

We now need to consider how these rights should apply to agency work. We recognise that for a lot of businesses, using agencies is vital for remaining agile and flexible in a competitive market. Indeed, there are around one million temporary agency workers in the UK. Temporary agency work is also worth around £34 billion to our economy.

While we're determined to ensure that the benefits of reforms in the Employment Rights Bill extend to agency workers, we recognise that the application of these new rights might be different.

That's what this consultation is for. The *Next Steps to Make Work Pay* document, published earlier this month, emphasised our commitment to delivering all our manifesto commitments with a *Plan to Make Work Pay* and work to take place over multiple delivery phases. The first phase of delivery includes the passage of legislation, and an initial package of consultations to ensure that our reforms deliver for both workers and employers.

We are seeking views on several areas to inform the Government's next steps, with the potential to bring changes through the Employment Rights Bill, including on how to apply the measures on zero hours contracts to agency workers. This consultation poses questions about how these measures could work in practice.

Our *Plan to Make Work Pay* was developed through close engagement with business and trade unions and that same spirit of partnership runs through the heart of everything the Government is doing. To that end, I am looking forward to reading your responses to this consultation. Your views and insights will be invaluable in making these reforms a success. Together, we will ensure that our workplace rights are fit for a modern economy, empower working people and contribute to economic growth.

Rt Hon Jonathan Reynolds MP, Secretary of State for Business and Trade

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Introduction

The Government's Employment Rights Bill will help to ensure that work provides a baseline of security and predictability so that workers can better plan their lives and finances. The Government is tackling one-sided flexibility in zero hours contracts through two measures:

- A right to guaranteed hours, where the number of hours offered reflects the hours worked by the worker during a reference period. This initial reference period will be specified in regulations and is anticipated to be 12 weeks.
- A right to reasonable notice of shifts and a right to payment for shifts cancelled or curtailed at short notice.

The Government believes that these rights will be beneficial for all workers facing insecurity because of uncertainty in their hours, including agency workers. If the new rights were not applied to agency workers, then agency work would provide an obvious alternative to employers who want to avoid the new rights, meaning that the workers involved would not gain the benefits of the new measures. However, the Government acknowledges that the measures may need to apply in a different way in the case of agency workers because of the tripartite relationship between end hirers, employment agencies and agency workers.

We have analysed the potential impacts of these measures, please refer to http://www.gov.uk/guidance/employment-rights-bill-impact-assessments to read our published impact assessments.

This consultation seeks views on how to apply these measures to agency workers, to help us ensure that the measures within the Employment Rights Bill are effective and appropriately applied to them, with the potential to inform amendments during its passage. The Government will also consult at a later date on the implementation of these two measures more generally.

Zero hours contracts generally mean that the worker has a relationship with their employer where they are not obliged to accept work that is offered to them, and the employer does not have to offer work. This can offer some workers flexibility, meaning they can work around other commitments such as childcare or studying.

However, this type of contract does not offer the worker any form of certainty as to their earnings, making it difficult to apply for credit or a mortgage, to rent a flat, to plan for major events like weddings or holidays, or even to manage day to day life expenses. Flexible hours of work can benefit both workers and employers but without proper safeguards this flexibility can be one-sided, with workers bearing all the financial risk.

Certain exploitative practices associated with zero hours contracts have already been dealt with in legislation. Zero hours contracts cannot include exclusivity clauses which prevent an individual from working for another employer. However,

these measures do not go far enough and still leave the employer with too much power in the relationship.

As of March 2024, there were around 1,030,000 employees on zero hours contracts in the UK according to ONS figures. The number of people reporting they are on a zero hours contract has stabilised in recent years following significant growth between 2010 and 2016.[1] ONS data suggests that zero hours contract workers are more likely to be young, female or in full time education. 37% of people on zero hours contracts are between 16 and 24 whereas only 10% of all people in employment are in this age band. 53% of people on zero hours contracts are women, compared to 48% of people in employment. And 24% of people on zero hours contracts are in full time education compared to 3% of people in employment. Workers on zero hours contracts are more likely to work in industries such as hospitality, and health and social care.

Agency workers

As of March 2024, there were approximately 900,000 agency workers, of whom approximately 140,000 also stated that they were employed on a zero hours contract[2]. The nature of agency work is that it is often unpredictable. Critically, an agency worker can choose not to take up the offer of an assignment if it does not fit in with their needs at any given time. Some agency workers choose this type of work specifically because of the flexibility it provides for them. Agency workers have a different employment model because they have a contract with an employment agency but work under the direction and control of an end hirer. The complexity of the employment relationship for agency workers means it can be harder for them to identify their employment rights and who is responsible for fulfilling them. Agency workers often have a more complicated working life than other workers as they may rely on more than one agency to provide them with work.

This can be further complicated if they are paid through an umbrella company. Umbrella companies are payment intermediaries that often employ workers and conduct a payroll function for agencies (or sometimes for employers) that cannot or prefer not to run their own. Some agency workers prefer to be paid via an umbrella company. In most cases, the umbrella company employs the agency worker and pays their wages through PAYE.

The measures in the Employment Rights Bill relating to zero hours contracts involve responsibilities on the employer. In the case of agency workers, consideration is needed as to where the responsibilities should fall, since there are more parties in the employment model. There may also be interaction with the existing legislation that applies to employment agencies and agency workers, as outlined in the following section. In this consultation, the Government is seeking views on how the new employment rights should apply to agency

[1] The increase in reported use can likely be explained in part by the growing awareness of such contracts in addition to genuine increase in their use.
[2] DBT analysis of ONS Labour Force Survey data

workers, agencies (and umbrella companies, in cases where they are used) and end hirers.

Legislation applying to employment agencies and agency workers

There are already specific laws relating to work-seekers and hirers when they use the services of an employment agency[3]. Agencies must operate in accordance with the Employment Agencies Act 1973 and the Conduct of Employment Agencies and Employment Businesses Regulations 2003 (as amended). These are enforced by the Employment Agency Standards Inspectorate (EAS), which sits in the Department for Business and Trade. EAS is the regulator of employment agencies and employment businesses in Great Britain. Northern Ireland has its own legislation.

Agency workers have the same rights as other workers to be paid at the least the National Minimum Wage or National Living Wage. They are entitled to receive payslips and to be paid on time and by the agreed method. They are also protected against any unlawful deductions from their pay. Any deductions that an agency worker agrees to, for services or goods provided by an agency or third party, must be set out in writing and agreed. Agency workers are also required to be given terms and conditions or a contract before any work-finding services are provided by the agency. They must also be given a Key Information Document when they first approach the agency, and this will set out some key pay-related facts including who will pay them (i.e. the agency or an umbrella company).

EAS investigates all complaints that fall within its remit and regularly conducts targeted inspections to ensure that agencies are complying with this legislation.

Where an agency is found to be non-compliant, they are potentially committing criminal offences, and they will receive a Warning Letter setting out the corrective action that needs to be taken. If they fail to comply with this letter, a range of sanctions can be applied, from Labour Market Enforcement Undertakings or Orders to prosecution and/or prohibition. Prohibition effectively bans the directors, managers and/or owners from running an agency for up to 10 years.

The Agency Workers Regulations (AWR) 2010 provide further protections for agency workers. The AWR provide that all agency workers are entitled to be treated no less favourably than comparable permanent staff in relation to access to certain collective facilities and information on vacancies from day 1 of an assignment. They also provide that after 12 weeks in the same role with the same hirer, agency workers are entitled to the same basic working and employment conditions as directly recruited employees, including key elements of pay and annual leave.

[3] Employment agencies are referred to in the Employment Agencies Act 1973 and the Conduct of Employment Agencies and Employment Businesses Regulations 2003 as “employment businesses”. The phrase “employment agency” is used in the legislation to refer to a business placing people to work directly for an employer, i.e. a head-hunter or recruitment agency.

The obligations in the AWR apply to “temporary work agencies” as they are defined in the AWR. Under the AWR, a temporary work agency is an individual or organisation in business, whether operating for profit or not and including both public and private sector bodies involved in the supply of temporary agency workers.

The definition of “temporary work agency” covers both employment agencies and intermediaries such as umbrella companies if they are involved in supplying agency workers.

Consultation Details

Issued: 21 October 2024

Respond by: 11:59pm 2 December 2024

Enquiries and Responses to:

zerohours.consultation@businessandtrade.gov.uk

Write to:
Zero Hours Contracts, Employment Rights Directorate

Department for Business and Trade
Old Admiralty Building
Admiralty Place
London
SW1A 2DY

Consultation reference: Consultation on the application of zero hours contracts measures to agency workers.

Territorial extent:

The zero hours contract measures in the Employment Rights Bill extend and apply to England & Wales and Scotland. Employment law is devolved to Northern Ireland.

How to Respond

Respond online at:
https://ditresearch.eu.qualtrics.com/jfe/form/SV_e4CK7NkKUS0MgLk

or

Email to: zerohours.consultation@businessandtrade.gov.uk

or

Write to:
Zero Hours Contracts, Employment Rights Directorate

Department for Business and Trade
Old Admiralty Building
Admiralty Place
London
SW1A 2DY

When responding, please state whether you are responding as an individual or representing the views of an organisation.

Your response will be most useful if it is framed in direct response to the questions posed, though further comments and evidence are also welcome.

Confidentiality and data protection

Information you provide in response to this consultation, including personal information, may be disclosed in accordance with UK legislation (the Freedom of Information Act 2000, the Data Protection Act 2018 and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please tell us, but be aware that we cannot guarantee confidentiality in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not be regarded by us as a confidentiality request.

We will process your personal data in accordance with all applicable data protection laws. See our privacy policy.

We will publish a Government response on GOV.UK.

Quality assurance

This consultation has been carried out in accordance with the Government's consultation principles.

If you have any complaints about the way this consultation has been conducted, please email: enquiries@businessandtrade.gov.uk

Background questions

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

- Business representative organisation, trade body
- Trade union or staff association
- Think tank or academic
- Employer
- Individual
- Legal representative
- Other (please specify)

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)?

- End hirer of Agency Workers
- Employment Agency
- Umbrella Company
- Agency Worker
- Other (please specify)

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

- Private sector organisation
- Public sector
- Charity/voluntary sector
- Other (please specify)

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?

- Micro (1-9 workers)
- Small (10-49 workers)
- Medium (50-99 workers)
- Large (100-249 workers)
- Very large (250+ workers)

PART 1: Right to guaranteed hours

The Government has introduced the Employment Rights Bill which creates a new obligation for employers to offer guaranteed hours to certain workers who are on a zero hours contract or have a low number of hours guaranteed in their contracts. The Government will consult in due course on how to define low hours contracts under which workers will be entitled to this new right, before setting out the definition in regulations.

The guaranteed hours offered should reflect the hours that the worker regularly works, based on a twelve-week reference period. The Government will consult in due course on what constitutes regular hours and how employers should calculate the guaranteed hours to offer.

This new right will be an automatic entitlement, initiated by the employer. The worker should not need to approach the employer and ask for guaranteed hours. However, a worker will be able to decline the guaranteed hours offered and remain on their existing zero or low hours contract if they prefer.

The Government is planning to repeal the Workers (Predictable Terms and Conditions) Act 2023. The 2023 Act would have brought in a 'right to request' a predictable work pattern, which could be turned down by the employer. The Government does not want to confuse employers and workers with two different models, so the Employment Rights Bill provides for the 2023 Act to be repealed.

The Government believes that all workers – including agency workers – should have the right to guaranteed hours which reflect the hours they regularly work. In this consultation it is seeking to understand how these measures can best apply to agency workers, and how we can mitigate unintended consequences.

The offer of guaranteed hours

After twelve weeks, the employer of an eligible worker will be required to offer them guaranteed hours which reflect the hours that they have regularly worked over the twelve-week reference period. The contract offered should be permanent unless the work is inherently temporary. In considering how best to apply a similar requirement for agency workers, the Government is considering whether agency workers should be offered guaranteed hours by the employment agency, or by the end hirer.

In many sectors, it is difficult to predict when an agency worker will be needed. For instance, demand may be difficult to predict where agency workers are used to provide cover for illness, where the offer of work may occur only a few hours before they need to start work. In other cases, it may be quite possible to forecast approximate demand but not precisely. In still other cases, a single assignment might run for many months on a full-time or regular basis.

The Government is not considering requiring both the employment agency and the end hirer to offer guaranteed hours. This would increase the cost to businesses unnecessarily. It would make it difficult for workers to understand which contract they should accept and how to enforce their right when they do not receive the guaranteed hours they were entitled to.

Instead, the Government intends to legislate on whether the responsibility for offering workers guaranteed hours should fall to (option 1) the employment agency or (option 2) the end hirer.

Option 1: the guaranteed hours are offered by the employment agency.

Some agency workers are likely to work for multiple end hirers found by an agency. Agency workers are likely to be entitled to more guaranteed hours if the agency is required to offer them guaranteed hours which reflect the hours that they have worked for multiple end hirers. However, agencies would become liable to guarantee hours over which they have little or no ultimate control, since the demand for hours is largely dictated by end hirers, so this would be an additional business risk for employment agencies. Large agencies might be more able to manage this through effective demand forecasting, but it may be more difficult for smaller agencies.

Option 2: the guaranteed hours are offered by the end hirer.

Alternatively, the end hirer could be required to offer guaranteed hours. This would follow the logic that the hirer is in a better position to forecast and manage the flow of future work. In the case of an agency worker who works for multiple end hirers, they could become entitled to guaranteed hours from any hirer for which they have worked regularly over a twelve-week period, or more than one.

However, requiring the end hirer to offer the guaranteed hours could change the nature of the relationship with the agency worker. In offering the guaranteed hours, the hirer might effectively be required to become the agency worker's employer. This could have other financial consequences for the end hirer addressed below. It is not clear whether it would be practical for the hirer to offer guaranteed hours which did not involve directly employing the agency worker. Views are welcome on whether this would be viable and worth pursuing.

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

Transfer fees to hiring companies ('temp-to-perm')

If the agency worker accepts guaranteed hours directly with the end hirer (under option 2), they would, for that contract, switch from a contract with the agency to a contract with the end employer. Under current legislation[4] the end hirer would generally be required to pay a transfer fee to the agency (called a 'temp-to-perm' fee) or opt to pay for an extended period of hire.

This is because an employment agency can sometimes charge a transfer fee to a hirer if they directly employ a worker that the agency had initially provided. An employment agency can only charge a transfer fee if all the following apply:

- their contract with the hirer gives them the option to extend the worker's assignment;
- the hirer does not take the option to extend the assignment; and
- the hirer directly employs the worker less than 8 weeks after the end of their initial assignment - or less than 14 weeks after it started, if that is later.

If the worker had more than one assignment with the hirer, and there were more than 42 days between assignments, the later assignment is treated as if it was the first one.

For example, an employment agency may supply a worker to a hirer for 4 weeks. The hirer may then wish to offer the worker a permanent job. The agency's contract with the hirer may say that the hirer must pay a transfer fee unless the hirer first hires the worker from the agency for an extra six weeks. The hirer can pay the transfer fee now or keep hiring the worker from them for the extended period (i.e. the additional six weeks). Alternatively, the hirer can stop hiring the worker and wait ten weeks before recruiting them directly.

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?

Yes

No

Don't know

Please explain your answer

[4] Regulation 10 of the Conduct of Employment Agencies and Employment Businesses Regulations, 2003 (as amended)

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.

[Free text]

PART 2: Reasonable notice of shifts and payment for shifts cancelled or curtailed at short notice

Reasonable notice of shifts

The Government is legislating to require employers to provide eligible workers with reasonable notice of shifts and changes to these. Many employers work hard to plan ahead and provide good notice of future requirements, but others allocate and change shifts at short notice, in some cases without good reasons. By setting in law that workers are be given reasonable notice of shifts, the Government intends to give workers:

- greater certainty about when they will be working and the number of hours they will be working;
- the ability to plan both their finances and their lives more easily;
- more notice to plan travel, childcare, and other work-related arrangements; and
- the ability to balance multiple jobs more easily.

It will also prevent employers from only scheduling shifts at the last minute in order to avoid paying for cancelled shifts.

If employers do not provide reasonable notice of shifts, workers will be able to take a case to an employment tribunal to receive compensation for loss that they have suffered as a result of unreasonable notice. The Government will set out what notice should be presumed ‘reasonable’, following consultation. This will be a starting point for the tribunals, but they will ultimately decide what is reasonable based on the facts of each case.

The Government intends to ensure that agency workers, like other workers, are entitled to reasonable notice of their shifts. However, this is complicated by the tripartite relationship between the agency worker, the agency, and the end hirer.

Agencies often depend on end hirers to know when a shift is available. It is then often for the agency to pass on that information to the agency worker in a timely manner. The Government proposes that both the end hirer and the agency should be responsible for providing reasonable notice of shifts. The Government accordingly considers that a tribunal should be able to find that either the agency or the hirer or both should be liable to compensate the agency worker for their losses suffered as a result of unreasonable notice, but only to the extent that they are responsible for the unreasonable notice.

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?

Yes

No

Don't know

Please explain your answer

We do not anticipate that legislation needs to specify how the end hirer should notify agencies that they have a shift available or when this is deemed to be received. Agencies would remain free to include requirements about these and other issues in their terms of business with hirers if necessary.

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?

Yes

No

Don't know

Please explain your answer

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.

[Free text]

Short notice cancellation and curtailment of shifts

Employers sometimes cancel or curtail (shorten) shifts when they no longer need as much resource as expected. This is sometimes done at short notice. This allows employers to mitigate the cost of unforeseen circumstances, but it can present difficulties for workers, as they would have been expecting to work the full shift and to be paid for the full shift.

When accepting work offered by the employer, workers may have to make arrangements for childcare or pay for travel, and they may not be able to recoup these costs if shifts are cancelled at short notice. They may also have turned down other work in order to accept the shift. The Government is addressing this issue in the Employment Rights Bill by requiring employers to make a payment to workers when they cancel or curtail shifts at short notice. The aim is to incentivise employers to plan effectively so they do not need to cancel as many shifts at short notice, and to ensure workers do not bear all the financial risk of unforeseen circumstances. The combination of these will give workers more financial certainty.

The amount of the cancellation/curtailment payment and what constitutes “short notice” will be defined in regulations. The Government also intends that there may be some limited exceptions from the requirement to pay, to be set out in regulations. The Government is committed to consulting on these issues in due course.

The Government’s intention is that agency workers and non-agency workers should receive payment for shifts that are cancelled or curtailed at short notice.

However, the tripartite relationship between the worker, the agency, and the end hirer (and potentially further parties) adds complexity. The Government proposes that agencies should be responsible for the cancellation payments to agency workers alongside their other payments. This is in line with the responsibility of the agency for payment of the agency worker’s wages.

It is likely to be appropriate for the agency to be able to recoup the cost of the payment from the hirer where in fact the hirer was responsible for cancelling or curtailing the shift (or to the extent that it was the hirer’s responsibility).

However, the Government is reluctant to interfere in business-to-business relationships between agencies and end hirers. For that reason, we are seeking views on whether the Government should legislate to ensure that agencies can recoup costs from end hirers to the extent that the hirer is responsible for the short notice. The Government believes this may be better dealt with by contractual arrangements between businesses.

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

Yes

No

Don't know

Please explain your answer

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

No

Don't know

Please explain your answer

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?

Yes

No

Please explain your answer

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

Yes

No

Please explain your answer

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.

[Free text]