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## Zero Hours Contract – Employer Advice & Guidance

### Introduction

A "zero hours" contract is a contract under which the individual is not contracted to work a set number of hours and is paid only for the number of hours that they actually work. Likewise, casual workers are not generally guaranteed a fixed number of hours of work. The terms "casual" and "zero hours" are often used interchangeably and, in practical terms, there may be little to distinguish between these types of working arrangements.

### Definition of "employee"

The legal definition of "employee" is set out in s.230(1) of the Employment Rights Act 1996 as "an individual who has entered into or works under ... a contract of employment", which is defined as a "contract of service or apprenticeship" (s.230(2)). An individual who is not engaged under a contract of employment (and is therefore not an employee within the meaning of the legislation) may, instead, work under a contract whereby "the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not ... that of a client or customer" (s.230(3)). Such an individual will generally be a "worker" rather than an "employee".

A contract of employment is commonly referred to as a "contract of service", which should be distinguished from a "contract for services". In practice, the distinction can be difficult to determine and there is a large body of case law under which various tests have been established to decide whether an individual is an employee or a worker, or if they are genuinely self-employed.

### Employment status

The three principal tests in establishing employment status are, in general terms:

personal service – the individual must be required to provide their services personally, rather than being able to send a substitute to carry out the work in their place;

mutuality of obligation – the employer is obliged to provide work and the individual is obliged to carry out the work when it is offered; and

control – the employer must exercise a sufficient degree of control over the manner in which the individual carries out the work, consistent with an employer/employee relationship.

## Clarification

### Holiday Entitlement

Under the Working Time Regulations 1998, workers are legally entitled to a minimum of 5.6 weeks' paid holiday per annum, including workers on zero hour contracts or those working variable hours;

This means that unless the worker is part-time or fixed-term, there is no difference in holiday accrual or entitlement compared to those working fixed hours;

### Holiday Pay

A week's pay is worked out according to the kind of hours someone works and how they're paid for the hours. This includes full-time, part-time, term-time and casual workers.

<b>Working pattern</b>	<b>How a week's pay is calculated</b>
Fixed hours and fixed pay (full- or part-time)	A worker's pay for a week
Shift work with fixed hours (full- or part-time)	The average number of weekly fixed hours a worker has worked in the previous 52 weeks, at their average hourly rate
No fixed hours (casual work, including zero-hours contracts)	A worker's average pay from the previous 52 weeks (only counting weeks in which they were paid)

To calculate average hourly rate, only the hours worked and how much was paid for them should be counted. Take the average rate over the last 52 weeks.

A 'week' usually runs from Sunday to Saturday. Only use another 7-day period (like Thursday to Wednesday) if that's how a worker's pay is calculated.

If no pay was paid in any week, count back another week so the rate is based on 52 weeks in which pay was paid. You can count back a maximum of 104 weeks to find these.

If a worker has less than 52 weeks of pay, use the average pay rate for the full weeks they have worked.

### **Workers who are paid monthly**

To work out a week's pay for someone who's paid monthly:

Calculate the worker's average hourly pay for the last month. Do this by dividing the month's pay by the number of hours worked in the month.

Calculate the weekly pay. Do this by multiplying the average hourly pay by the number of hours worked in a week.

Use the weekly pay calculation for each of the last 52 weeks to work out an average week's pay.

### **'Basic' and 'normal' rate of pay**

For regular-hours workers (full- or part-time) and for people who work part of the year, employers must pay:

at least 4 weeks of the worker's statutory entitlement at their 'normal' rate of pay  
the remaining 1.6 weeks at a 'basic' rate of pay

For leave years starting on or after 1 April 2024, all leave for people who work part of the year (for example, term-time workers) must be paid at their 'normal' rate of pay.

For irregular hours workers, all leave must be paid at their 'normal' rate of pay.

'Normal' rate of pay includes commission, regular overtime payments, and any payments related to length of service or professional qualifications. It does not usually include bonus payments.

### **Rolled-up holiday pay**

Holiday pay should be paid at the time when annual leave is taken. An employer cannot include an amount for holiday pay in the hourly rate (known as 'rolled-up holiday pay').

For leave years starting on or after 1 April 2024, employers will be able to use 'rolled-up holiday pay' for irregular hours and part-year workers.

## More information

There's [guidance for calculating holiday pay for workers without fixed hours or pay](#), which includes several examples. [Good Work Plan – GOV.UK \(www.gov.uk\)](#)

### What are the benefits of zero-hour contracts?

- **Flexibility:** If the workload for your business fluctuates, you might need more staff during certain seasons or to cover events. Zero-hours contracts allow you to remain agile.
- **Growth:** If you're a new business, or experimenting in new market areas, you may be unsure what the volume of work will look like. Taking on zero-hours contract workers will help to mitigate the risk of taking on, and having to pay for, more employees than you need.
- **Simplicity and affordability:** If the worker isn't working, the employer isn't paying. People classed as 'workers' rather than 'employees' have a more straight-forward financial relationship with their employer and are not entitled to additional rights such as maternity pay, statutory minimum notice periods and redundancy payments.
- **Productivity, worker retention and quality of work:** Flexible working patterns have been shown to have a positive impact on productivity and staff retention. The number of employees asking for flexible hours is increasing too.
- **Choice:** Workers on zero-hours contracts have a greater say over when they work, giving them greater flexibility to fit work around other commitments, such as education or caring for dependants.
- **Foot in the door / Keeping a hand in:** Zero-hours contracts are a good way for inexperienced workers to gain useful grounding in a new industry, and may lead to permanent contracts and more reliable employment. They also allow retired or partially retired people to 'keep their hand in', generate an income and pursue a wider range of interests.

### Disadvantages of zero-hour contracts

- **Unpredictability for the employer:** As zero-hours workers don't usually have to accept work, there's the risk that you may not be able to find anyone available to take on work you need doing. It's always best to give as much advance notice as you can to avoid this. Remember, flexibility works both ways here. Several companies have been called out for placing unreasonable demands on zero-hours workers' availability at short notice.

- Unpredictability for the worker: It can be tough to do any kind of financial planning on a zero-hours contract, creating a state of permanent uncertainty.
- Lack of control over the worker: An employer can't stop a zero-hours worker from working for another employer, even a competitor, and the law is on their side if the employer treats them unfairly for doing so. In this situation they have the right to claim unfair dismissal from day one of their contract.

### **Employee rights under zero-hour contracts**

In most cases, those working zero-hours contracts will be classified as 'workers' rather than 'employees'. As such, they're not legally entitled to:

- protection from unfair dismissal;
- the statutory minimum notice of intention to terminate employment;
- redundancy pay;
- the right to request flexible working;
- unpaid time off to care for dependants;
- protection in the event of a buyout or change of employer.

### **But they're still entitled to statutory employment rights including:**

- the statutory minimum level of paid holiday;
- rest breaks;
- the National Minimum Wage;
- protection from discrimination;
- whistleblowing protection;
- health and safety protection.

If you do employ workers, don't forget that they have these entitlements.

### **When does a zero-hours worker become an employee?**

This is an important one to watch.

If a worker on a zero-hour contract works for a long enough period, they may become entitled to full employee status, and therefore the employment rights of an employee.

It's therefore a good idea to keep zero-hour contracts under regular review. Sometimes it might be right to start someone off on a zero hour contract but be prepared to put them onto a permanent or fixed term contract if, for instance, their hours become more regular.

Despite what it says on paper, in an employment tribunal, what happens in practice will also be considered.

## Using zero-hours contracts correctly

Zero-hours contracts shouldn't pose a risk to a business if used correctly, with respect for the worker's entitlements. The biggest risk is incorrectly classifying someone as a worker, and treating them as such, when they are in fact an employee in the eyes of the law. A well written zero-hours contract will assist you.

## Alternative options to zero-hours contracts

Used correctly, zero-hours contracts could bring you, and those working for you, many advantages. But there are several other options you might want to consider if you need to accommodate fluctuating staffing needs:

- Offering overtime to permanent staff to ensure experienced staff deal with temporary fluctuations in demand.
- Recruiting a part time employee or someone on a fixed term contract if regular hours need to be worked to adapt to a change in the business needs.
- Offering annualised hours contracts if peaks in demand are known across a year.
- Using agency staff can be a quicker and easier way to hire someone if staff are needed temporarily or at short notice.

## Upcoming changes to zero-hours contracts

The [Independent Review of Employment Practices in the Modern Economy](#), led by Matthew Taylor, was launched in November 2016 to consider the implications of new models of working.

There was no proposal to ban zero-hours contracts, but it was recommended that they offer increased rights, including: the right to request a contract that guarantees their hours after 12 months; an increase in minimum wage for those who do not have guaranteed hours; and easier access to statutory sick pay.

We're still waiting to hear which of the proposals will be taken forward, so watch this space.