Bargaining Support Group

Bargaining on types of employment contracts

UNISON
the public service union

Introduction

Every type of work requires a contract between the worker and the person or organisation who pays for the work, confirming what has been agreed by each party.

The status of the worker and the type of relationship with the employer will determine what type of contract is required.

In most cases, staff will be employees whether they work full-time or part-time, whether they are permanent members of staff or working for a time-limited period (sometimes referred to as temporary or fixed-term). Having employees means that the employer must fulfil certain legal responsibilities and employees have certain employment rights.

However, different types of agency, casual or self-employment contracts for services have increasingly become a feature of the labour market alongside employment contracts.

The drive toward insecure forms of employment has intensified and the emergence of zero hours contracts has been a high-profile part of that general pattern over recent years.

This guide highlights the case that can be made for keeping more secure forms of employment, before going on to set out the most effective ways of representing those engaged on less secure terms.

Contact your **regional education teams and / or LAOS** to find out what training and resources are available to assist you with negotiating with your employer or promoting the issues in this guide with your members https://learning.unison.org.uk

Further guidance is available from **bargaining support** www.unison.org.uk/bargaining-guides If you have any feedback that could improve the content of the guide, contact bargaining support at bsg@unison.co.uk

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Less secure contracts

Why insecure contracts do not benefit the worker

For some staff, a permanent job on full time hours is not suitable for their personal and family circumstances. However, for many others, different forms of working relationships are agreed to out of necessity rather than choice.

Many workers find themselves working for fewer hours than they would like, for a shorter duration than they would like, and with much worse terms and conditions.

The TUC, in their August 2020 report 'Insecure work: why decent work needs to be at the heart of the UK's recovery from coronavirus' www.tuc.org.uk/sites/default/files/2020-08/Insecurework.pdf found that

> "some 3.6 million people, one worker in nine were in insecure work ahead of the coronavirus outbreak…
>
> Those in occupations such as caring and leisure were particularly likely to be in insecure work including working on zero hours contracts, in agency, casual and seasonal work or among low-paid self-employed who earn less than the minimum wage."

The negative consequences for workers vary according to the exact type of contract, but in general, less secure forms of employment will tend to mean:

- lower income, (for example, the typical worker on a zero hours contract is on an hourly rate a third lower than the average employee[1])
- less certainty over income and the ability to meet expenses or withstand shocks to their income
- less certainty over hours creating greater disruption to personal lives, often with shifts offered or cancelled at short notice (TUC polling shows that over half of zero hours workers have had shifts cancelled at less than a day's notice – and nearly three-quarters had been offered work in the same time frame[2])
- a reduced tendency to assert employment rights out of fear of having hours cut or non-renewal of contracts (for example, low-paid care workers on insecure contracts were forced to go to work without the protective kit they felt they needed during the Covid-19 pandemic[3]

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[1] The TUC's August 2020 report 'Insecure work: why decent work needs to be at the heart of the UK's recovery from coronavirus' www.tuc.org.uk/sites/default/files/2020-08/Insecurework.pdf

[2] The TUC's August 2020 report 'Insecure work: why decent work needs to be at the heart of the UK's recovery from coronavirus' www.tuc.org.uk/sites/default/files/2020-08/Insecurework.pdf

[3] The TUC's August 2020 report 'Insecure work: why decent work needs to be at the heart of the UK's recovery from coronavirus' www.tuc.org.uk/sites/default/files/2020-08/Insecurework.pdf

- fewer opportunities to progress and develop at work, with little investment in training and development by employers for those with insecure contracts
- it deters whistleblowing about poor organisational practice (including crucial health and safety issues) because workers fear that they will be victimised by failing to renew contracts or offer hours.

The result is that insecure contracts push all the risk onto the worker, rather than being shared with the employer who benefits from the flexibility of using these types of workers with reduced responsibility for them.

Why insecure contracts do not benefit the employer

Employers will inevitably consider other types of work contracts other than permanent employment contracts in order to reduce costs. Where demand for services goes through peaks and troughs, they will often be attracted by types of contracts that enable them to cut jobs or hours of work when demand falls.

When making the case to an employer to protect more secure forms of employment, it is important to highlight the need to look beyond short-term cost-cutting made from using insecure contracts. Instead employers should be encouraged to consider the long-term financial consequences alongside the organisation's ability to deliver quality services.

Potential negative consequences for an employer who uses insecure contracts for their workers are:

- reduction in the ability to attract and retain high quality staff
- loss of experienced and skilled staff
- higher turnover leading to increased recruitment and training costs
- higher sickness absence resulting from the anxiety and stress of insecure employment
- lower productivity as a result of lower job satisfaction
- reduction in the continuity and quality of services provided.

As the TUC have also highlighted: "The OECD argues that countries with policies and institutions that promote job quality, job quantity and greater inclusiveness perform better than countries where the focus of policy is predominantly on enhancing (or preserving) market flexibility[4]."

[4] OECD (2017). Economic Surveys: United Kingdom 2017, www.oecd-ilibrary.org/sites/eco_surveys-gbr2017-en/1/2/1/index.html?itemId=/content/publication/eco_surveys-gbr-2017en&_csp_=af42fd060842c10b19dd161a0d87fa81&itemIGO=oecd&itemContentType=book#sec1-00001

Alternatives

Allowing genuinely more flexible ways of working, such as more part-time work will help employers cope with variations in a demand for services.

Fixed-term employment contracts provide some security and greater rights and encourage more loyalty from workers than a zero hours contract or use of agency staff.

Allowing for overtime can also help deal with issues when work demands increase.

If those on more casual contracts are guaranteed some core hours alongside on-call or standby hours or greater notice for shift arrangements, then they may be better able to balance work life with domestic responsibilities.

Although the use of annualised hours contracts (where an employee's hours are expressed as a total number of hours to be worked during the course of the year, although they may fluctuate from week to week and month to month) or voluntarily reduced working time may not be desirable, they may be preferable to the introduction of more insecure forms of employment.

For example, Bassetlaw District Council's agency workers policy and procedure sets out guidance for managers:

> Consider whether there are alternative ways of meeting the short-term need for staff that:
>
> (a) Preserve employment of existing staff (e.g. are there any staff in the redeployment pool who have the knowledge, skills and abilities to do the work and for whom it would be a suitable temporary redeployment?)
> OR
> (b) Offer greater opportunity for getting the best person for the job by offering direct employment (consider urgency, length of appointment balanced against time it will take to recruit etc).
> OR
> (c) Are more productive and cost-effective (e.g. could you offer the work to existing part-time employees who already undertake the same or very similar duties? If so, is this more productive and cost-effective?).

Negotiating a collective agreement that outlines the circumstances when alternatives can be used may help to ensure greater use of permanent, secure contracts.

For example, you may want to negotiate the inclusion of an opening statement setting out a presumption in favour of permanent contracts, such as

> [The employer] recognises indefinite contracts as the standard form of employment relationship between employers and employees and will appoint new and existing staff to indefinite contracts unless absolutely necessary and objective reasons justify alternatives.

This could be accompanied by a joint statement recognising the advantages to both employer and staff of secure forms of employment such as:

> [The employer] recognises the benefits to both the organisation and to staff members of indefinite contracts, including
>
> - An ability for the employer to attract and retain high quality staff
> - Increased productivity and quality of services provided
> - Greater ability for staff to balance work/life commitments.

The agreement may then go on to define the scenarios when temporary contracts may be used such as:

> Reasons for using additional temporary employees could include;
>
> - To cover brief unplanned increases in workload or absence, where cover cannot be provided by a member of staff
> - To cover staff absence as appropriate, such as maternity and adoption leave, long-term sickness, sabbatical leave, secondments etc.
> - Need for specific skills/expertise for a fixed period of time (e.g. to implement a specific project).

If the circumstances listed are limited as to when alternative types of workers can be used by the employer, the agreement will be more valuable in guaranteeing secure employment.

However, some agreements may go further in committing the employer not to use certain types of contract entirely. For example, UNISON's Ethical Care Charter includes a commitment from employers who sign up to it, that "zero hour contracts will not be used in place of permanent contracts."

Contracts of employment

What is an 'employee'?

As soon as someone accepts a job offer they have a contract with their employer. The contract does not have to be written down in order for it to exist. The terms of the contract should cover employment conditions, rights, responsibilities and duties.

Employees will be expected to do the work once they have agreed. They cannot turn the work down, nor can they select when they want to come in and do the work. In return, employees will expect the employer to provide them with work on a regular basis.

This is known as **mutuality of obligation** and is a clear indication that the person undertaking the work is an employee, and not self-employed and not a casual worker. The employer must provide work and the employee must do it, as instructed by the employer and under the **employer's control**.

The employee is also likely to be **expected to deliver specified aims and objectives** through their work, normally be listed in a job description. The employer may even tell them how they expect the employee to undertake their work.

Employees will expect to **use their employer's resources and equipment** such as the computer, telephone etc. Employees will probably not be allowed to send a substitute in their place should they not want to do the work themselves, in other words, they have to provide a **personal service**.

The employee will also normally be **integrated into the organisation** and will be subject to rules defined by the employer. The employee will be paid regularly and will **not take risks with their own money in carrying out the work**. The employee may often work exclusively for one organisation.

All these aspects clearly indicate that the member of staff is an employee, the most important aspect being mutuality of obligation.

Workers do not have all the same rights as an employee. The relationship with the employer is more casual, and there is usually very little obligation to receive or do work, although they will still need written terms outlining job rights and responsibilities.

Some statutory employment rights such as being able to claim redundancy and unfair dismissal, are only available to employees after they have had 2 years' service. However, some rights – such as a right not to be discriminated against – are day-one rights for both employees and workers.

More information

The government has more details on the different employment status in tax law, including worker, employee, self-employed and contractor.
www.gov.uk/employment-status

TUC information on employment status and rights
www.tuc.org.uk/employment-status-and-rights

What must an employer provide in writing?

Employers must provide every new employee and worker with the basic terms of their employment in writing on day one of their employment if not before. This is known as **the written statement of employment particulars**.

The following must all be included in the same document (the 'principal statement'):

- the employer's name
- the employee or worker's name
- the start date (the day the employee or worker starts work)
- the date that 'continuous employment' (working for the same employer without a significant break) started for an employee
- job title, or a brief description of the job
- the employer's address
- the places or addresses where the employee or worker will work
- pay, including how often and when
- working hours, including which days the employee or worker must work and if and how their hours or days can change
- holiday and holiday pay, including an explanation of how its calculated if the employee or worker leaves
- the amount of sick leave and pay (if this information is not included in the document, the employer must state where to find it)
- any other paid leave (if this information is not included in the document, the employer must state where to find it)
- any other benefits, including non-contractual benefits such as childcare vouchers or company car schemes
- the notice period either side must give when employment ends
- how long the job is expected to last (if it's temporary or fixed term)
- any probation period, including its conditions and how long it is
- if the employee will work abroad, and any terms that apply
- training that must be completed by the employee or worker, including training the employer does not pay for.

If further details are held in a policy (such as in a separate probation or annual leave policy), then the statement must clearly state this, and where the policy can be found.

In addition, the employer must provide the employee or worker with itemised pay statements.

There are other details that the employer can provide later but within two months of the employee starting the job:

- pension arrangements
- any collective agreements
- details of any training provided by the employer that is not compulsory
- disciplinary rules and disciplinary and grievance procedures

More information on the written statement of employment particulars and employment contracts from Acas www.acas.org.uk/what-must-be-written-in-an-employment-contract.

Part-time workers

With nearly half of UNISON's members working on a part-time basis, the protection of employment rights for part-time workers is a key issue for the union.

In England, Scotland and Wales, the rights of part-time employees and workers are protected under the Part Time Workers (Prevention of Less Favourable Treatment) Regulations enacted in 2000, while the same protections apply in Northern Ireland under equivalent legislation.

These regulations can cover a large range of employment arrangements, including casual, bank, homeworker, zero hours, term-time and job sharing contracts, since they apply to workers as well as employees. Only the self-employed lie outside the scope of the regulations.

Part-time workers have the right to all the benefits and the protection that full-time workers get in an equal proportion to the number of hours that they work, unless the difference in treatment can be justified on objective grounds.

However for a claim to be made, the part-time worker will need to be compared to a full-time worker in the same or broadly similar job with the same employer, ideally working in the same establishment (though a different part of the same organisation can be valid) on the same type of contract.

So a part-time worker should get the same hourly rate of pay as a full-time worker doing the same job. Part-time workers should also receive the same entitlements as a full-time worker for:

- maternity and other family pay rates and leave
- sick pay rates and leave
- training
- opportunities for promotion
- pension schemes.

Some entitlements will be at the pro-rata equivalent such as:

- annual leave
- travel allowance
- bonus payments
- shift allowances
- unsocial hours payments.

Some benefits are 'indivisible' i.e. they cannot be calculated on a pro-rata basis. In this case, a part-time member of staff must receive the benefit in full. Examples of such benefits are a company car, access to car parking, health insurance, childcare provision, gym membership or travel loans.

In addition, part-time staff cannot be singled out in the process of selecting staff for redundancy. They should be treated the same as full-time staff in relation to career development and progression. Training and communication events should be scheduled to allow the participation of part-time staff.

The Regulations apply to each separate employment condition or workplace benefit, so an employer cannot argue that inferior conditions in one area are balanced by better terms in other.

The only basis for an employer to deny equal treatment is where they can argue that unequal terms achieve a legitimate objective that is necessary and proportionate. The UK government's website provides an example:

> An employer may provide health insurance for full-time employees but not part-timers if this can be objectively justified.
>
> Their reason may be that the costs involved are disproportionate to the benefits part-timers are entitled to.
>
> In this case the employer may come up with an alternative like asking the part-time worker to make a contribution to the extra cost.

In addition, entitlement to the same overtime rates will usually not commence until a part-time worker has reached the qualifying number of hours demanded of a full-time worker.

In the event that a worker believes that they are being treated less favourably, they can make a written request for an explanation of their treatment from the employer, who is then required to provide a written answer within 21 days.

UNISON case study

Five thousand part-time cleaners, teaching assistants, catering, administrative, school meal workers and other staff working for Greenwich Council received pay outs following a five-year legal battle over holiday pay.

UNISON took the case on behalf of the Royal Borough's employees – the overwhelming majority of whom are women – over the council's failure to calculate their annual leave properly. As a result, some of the staff had been losing up to five days' pay a year.

UNISON brought employment tribunal claims on behalf of 476 of the term-time only staff, arguing that they had been unlawfully treated less favourably than colleagues owing to their part-time status. Councillors agreed to revise the formula used to calculate the holiday allowance and pay the correct rate, backdated to 1 January 2013.

The problem was first identified in 2012, when Julie, a school cleaner who has lived and worked in the borough all her life, noticed she had lost a significant amount of pay when her contract changed from a full year to a term-time only one.

While the case brought by UNISON only involved 476 workers, the corrected formula and back pay will apply to all 5,000 term-time only staff employed by the council.

The NHS terms and conditions handbook clearly states:

> **Part-time employees**
>
> 11.1 Part-time employees will receive the same entitlements on a pro-rata basis to full-time colleagues.

The National Joint Council for local government services national agreement on pay and condition of service also clarifies:

> **8. Part Time Employees**
>
> 8.1 Part time employees shall have applied to them the pay and conditions of service pro-rata to comparable full time employees in the same authority, except for:
>
> (a) training and development - where part time employees should have access equal to that of full time employees and when on training courses outside their contracted daily hours shall be paid on the same basis as full time employees.
>
> (b) the car allowance scheme - which applies to part time employees in full on the same basis as full time employees.

More information

UNISON's part-time working guide for the youth and community sector. Three quarters of staff in this sector work part-time
www.unison.org.uk/content/uploads/2013/08/On-line-Catalogue217243.pdf

UNISON's term-time negotiating advice for schools
https://shop.unison.site/product/term-time-negotiating-advice-for-schools/

Acas key points on part-time workers
https://archive.acas.org.uk/index.aspx?articleid=1576

TUC information on part-time workers: your rights
www.tuc.org.uk/research-analysis/reports/part-time-work-your-rights

Quick checklist

- ☐ Do part-time workers get the same hourly rate of pay as full-time workers doing the same job?
- ☐ Do part-time workers also receive the same entitlements and benefits as a full-time worker?
- ☐ If there are differences in the terms and conditions of fixed-term employees, can the employer objectively justify it?
- ☐ Has the employer also considered that it may also be discriminatory to treat part-time staff less favourably should, for example, the majority of part-timers be women?
- ☐ Do part-time staff receive the same training opportunities and staff development as full-time staff?
- ☐ Are pro-rata calculations such as for part-time staff holiday entitlement correct? Particular care needs to be taken when calculating entitlements for term-time workers.

Fixed-term employees

As a result of the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations in England, Scotland and Wales, alongside fixed-term employee legislation in Northern Ireland, temporary workers have to be treated no less favourably than similar permanent staff.

The Regulations define a fixed-term worker as someone "having an employment contract or relationship entered into directly between an employer and a worker where the end of the employment contract or relationship is determined by objective conditions such as reaching a specific date, completing a specific task or the occurrence of a specific event."

The **Regulations apply only to 'employees'** and not to 'workers', while agency temps and apprentices are also excluded.

Bargaining agreements can prescribe more tightly the circumstances when fixed-term contracts should be used in the organisation.

For instance, Bangor University states that:

> Fixed-term contracts will only be used where the University can demonstrate a real business need which is not outweighed by the detriment caused to the employee by remaining on a fixed term contract.

The Shrewsbury and Telford Hospital NHS Trust Fixed Term Contracts & Temporary Workers Policy includes the following statement:

> In most cases, posts will be for an indefinite period and people will, therefore, be employed on a "permanent" basis. Only where there is a strong business case to employ someone on a fixed term basis, such as when funding has been granted for a limited period should a fixed term contract be used. All fixed term posts should be advertised in the normal way and should clearly state that the post is fixed term with the duration and the reason.

Rights

Unless the employer can provide an 'objective justification' (showing that there is a good business reason) the Regulations make it unlawful for an employer to treat a fixed-term employee less favourably than a permanent employee.

Employers should ensure that they receive the same pay and conditions including holiday and pensions as permanent staff working for the same employer, and the same or equivalent benefits package. Fixed-term employees also have the right not to be treated less favourably in relation to receiving training or the opportunity to secure any permanent position.

If they are working for 2 or more years on a fixed-term contract for the same employer, they will have the same redundancy rights as a permanent member of

staff. In addition, as with permanent staff after 2 years' service, dismissal must be for fair reason.

Fixed-term contracts that have been renewed at least once, or a series of fixed-term contracts lasting for 4 or more years will automatically become permanent, unless the employer can show there is a good business reason not to do so.

It would be good practice to keep the use of temporary staff at a minimum in the workplace and for fixed term contracts to be kept short.

For instance, the University of Aberdeen has a collective agreement that states:

> Fixed term contracts will only be used where there is an objective and justifiable reason for their use.
>
> Fixed term contracts will normally only be used for one-off, non-recurring appointments for a period of less than 9 months in duration.
>
> Examples of situations where fixed term contracts will be offered are as follows:
>
> - The post requires specialist skills for a limited period or is to accomplish a particular task or project for a limited period of less than 9 months duration;
> - Where the student or other business demand can be clearly demonstrated as particularly uncertain;
> - Where the appointment is to provide cover for a member of the University's staff who is absent for a limited period and who will be returning to their post, eg. Maternity leave, sickness leave, career break, secondment or sabbatical leave. In these circumstances, fixed-term appointments may be for a longer duration to coincide with the expected period of absence;
> - Where duties are envisaged as being rotational ie where an individual has an indefinite contract but is appointed to undertake different duties for a specified period after which they will revert to their substantive appointment;
> - Where the post is a clearly defined training or career development position.

Unlike protections for part-time staff, the Fixed-Term Regulations allow for individual terms not to be exactly the same as for a permanent employee, as long as the overall employment package is no less favourable.

Employers may be able to argue, therefore, that worse conditions in one area can be 'objectively justified' because taken as whole, a fixed-term employee's employment package is no less favourable that that of a permanent employee. However, this does not stop branches from seeking an agreement from an employer to provide mirrored terms and conditions.

Objective justification for not including a specific aspect of a benefit package in a fixed-term worker's terms and conditions may be considered reasonable where it's not practical or unreasonably expensive, such as denying access to a long-term loan scheme or a car lease scheme to someone on a short-term contract.

If a fixed-term employee believes that they are being treated less favourably, they have the right, on request, to receive from the employer a written statement giving their reason within 21 days of the request.

Equally, after four years' service under more than one fixed-term contracts, employees have the right to receive from their employer a written statement, either confirming that their contract is to be regarded as permanent, or giving objectively justifiable reasons as to why it continues as a fixed-term contract.

When the fixed-term contract ends it is regarded in employment law as a form of dismissal. This means that fixed-term employees with two years' service have the right not to be unfairly dismissed, the right to a written statement of reasons for dismissal and the right to statutory redundancy payments.

There may be other dismissal reasons that are unfair, which do not require a qualifying period. These are the same as for permanent employees and include being dismissed for a discriminatory reason, or for becoming a member of a trade union.

Expiry of a contract because the work has come to a conclusion or the permanent post-holder they are covering for whilst on maternity leave for example, is returning to work, is likely to be considered fair reasons for dismissal. However, if a contract could have been renewed there may be scope for challenging the fairness.

Through negotiations procedures may be established that provide protection for fixed-term workers and maximise opportunities for continuing employment. For example, Exeter University has a clause as follows:

> Members of staff employed on fixed term contracts will be eligible for consideration for redeployment under the University's Redeployment Procedure when the University has confirmed that the appointment will not be renewed provided they have been continuously employed by the University for at least 24 months as at the expiry date of the current fixed-term appointment.

More information

Acas key points on fixed-term employees
https://archive.acas.org.uk/index.aspx?articleid=4587

TUC information on fixed-term employees: your rights
www.tuc.org.uk/research-analysis/reports/fixed-term-employees-%E2%80%93-your-rights-work

Quick checklist

- ☐ Does the employer provide the union reps and branch with details (including justifications for their use) of all fixed-term appointments so that they can be monitored?
- ☐ Is there a genuine need for the employer to use a fixed-term or temporary contract (such as for a specific time-limited task or period of cover for a permanent staff member)?
- ☐ Check that the employer isn't misusing the fixed-term contract as an extended trial period or probationary period, so that staff can be easily dismissed if they don't like them.
- ☐ Check that the employer isn't misusing the fixed-term contract because they want to cut staff numbers in the future and do not want to have to go through a fair redundancy process.
- ☐ Is there a collective agreement on when fixed-term contracts can be used and how long they will normally last, up to a usual maximum period?
- ☐ Are the fixed-term employees receiving the same pay and conditions as permanent members of staff?
- ☐ Does this include absence provisions? Holiday entitlement? Pension provision? etc.
- ☐ If there are differences in the terms and conditions of fixed-term employees, can the employer objectively justify it? Is the overall package genuinely as favourable as that provided for permanent staff?
- ☐ Do fixed-term staff receive the same training opportunities and staff development as permanent staff?
- ☐ Is the renewal of fixed-term contracts limited and permanent employment considered instead by the employer?
- ☐ Are fixed-term staff made aware of details of permanent vacancies within the organisation?

Zero hours and casual contracts

Zero hours and casual contracts represent the most insecure forms of employment. Casual work may be described as many types of work such as bank work, sessional work, or part of the gig economy. They are increasingly used by unscrupulous employers and they are particularly prevalent in the social care sector.

Research conducted by the TUC in 2020 found that 90% of workers on zero hours contracts who responded said they would opt for a full time or part time contract if offered, highlighting how working under zero hours contracts is more often out of necessity not choice.

Under these contracts, the employer has no obligation to provide any work but calls on the worker as and when they need work covered. The employer will then only pay for the hours worked and so the worker does not necessarily get a regular wage, nor do they accrue sufficient service to gain employee rights.

They are most often used by employers where work is erratic and highly unpredictable, varying from day to day and week to week. Often they are used by unprincipled employers to evade full employment rights.

UNISON case study

Sevacare was one of the biggest providers of adult social care in Haringey up to the summer of 2016. However, evidence of their employment practices suggested that they were non-compliant with national minimum/national living wage requirements, a problem that is endemic in the social care sector.

A 2014 National Audit Office report suggested that as many as 220,000 homecare workers may be being paid an illegal wage.

A group of care workers – all but one of whom are women – were employed on controversial zero hours contracts and care for elderly and disabled residents across the borough. The women visit people in their own homes and in some cases provide 24-hour live-in care.

Supported by UNISON, a tribunal claim was made over the failure to pay staff a legal wage, as time spent travelling between people's houses was unpaid. This meant that on a typical day the women might be working away from home for as many as 14 hours, but could receive payment for only half of them.

The workers' zero hours status means most have previously been too scared to complain about their treatment, conscious that if they did, they were likely to have their hours reduced or be given no work at all.

Rights

The rights of zero hours and casual workers are much more limited than an employee, but workers still must be paid the national minimum wage at least, have paid holiday, and rest breaks as the same as employees. Where there are no

normal working hours as in the case of zero hours workers with irregular hours, a week's holiday pay must be based on their average weekly earnings in the 52 weeks prior to the holiday being taken (disregarding any weeks with no pay).

Casual or zero hours workers are also protected from discrimination from day one of their engagement, under the Equality Act 2010. In addition, as from 6 April 2020, they have a day one right to a written statement of employment particulars (see page 3).

Additionally, under the Small Business, Enterprise and Employment Act 2015, the employer cannot stop zero hours workers working for another employer by putting an 'exclusivity clause' in their contract nor treat them unfairly if they do. It is automatically unfair to dismiss an employee for breaching a contract term that bans them from working for another employer.

(This law was formerly under scrutiny by the Northern Ireland Assembly prior to its suspension in January 2017, and exclusivity clauses may in the future similarly be banned in Northern Ireland.)

However, casual workers are not entitled to protection against unfair dismissal, redundancy rights and rights under TUPE that require a period of continuous service. It is also unlikely that they will earn a sufficient amount from their employer to qualify for statutory maternity pay or statutory sick pay or to qualify for automatic pension enrolment.

Although in theory, the flexible nature of the work works both ways in that the worker can turn down hours offered, there is often a perceived risk to the worker in doing so. Many fear that they may not be offered further work in the future.

For example, a social care worker on a zero hours contract working for a private employer in north London spoke at the 2019 UNISON national delegate conference of how they, with colleagues, were all underpaid and scared to take sick leave, because they felt it would jeopardise their jobs.

In general, there is a greater commitment to take work as and when offered and for the worker to make themselves available, rather than the employer to provide any regular, secure work.

The lack of requirements on both sides means that these contracts are vulnerable to failing the 'mutuality of obligation' test that determines whether they carry the rights of an employee. However, whether a specific contract fails or passes the test depends on the exact terms of the contract.

Employment status issues

Where long term zero hours contracts are in place, where work is regularly offered and accepted, an employment tribunal may consider that the relationship with the employer is of employment (rather than as casual work). The actual employment

status of the worker on the zero hours contract may have changed to employee with all the accompanying rights.

Additionally, many employers have used casual or zero hours contracts as a way of avoiding paying employers' national insurance contributions or taking account of the rights of workers and employees. Instead they have incorrectly described these casual workers as 'self-employed', paying them a gross fee (with no national insurance or tax deductions), which may not even comply with the hourly national minimum wage rate.

Pulse Healthcare Limited v Carewatch Care Services Limited & Others [2012]

This employment appeal tribunal case involved a group of care workers who were engaged on zero hours contracts. When the Primary Care Trust awarded the care package to new providers after a re-tender, the new employer argued that the workers were not employees, nor had they sufficient continuous service to claim an unfair dismissal.

However the care workers could prove that they had worked regularly over a number of years for an agreed number of hours providing the care. The tribunal found that the written contract did not represent the real relationship with the previous provider. The workers were employees with global contracts of employment to provide a fixed number of hours every week. They also had sufficient service to bring unfair dismissal claims.

Concern that arrangements will not lead to an employment relationship can play a part in leading employers to specify limits to the use of such contracts.

For example, Leeds Beckett University's casual workers policy specifies:

> A casual worker may be engaged to cover specific work/role for a maximum period of up to 12 weeks.

The University of Manchester's policy states:

> The University will take on casuals in the following circumstances:
>
> - Where the work is occasional. This may be on going over a period of time, for example, exam invigilators; student ambassadors; visiting lecturers providing a short series of lectures, or
> - Where there is no definite requirement to work a particular number of hours because the availability of work is uncertain or the demand is subject to other events. For example: conference staff for the vacation period, or
> - Where the work is temporary for a limited period of up to 13 weeks. For example additional staff covering student registration weeks.

Bargaining for improved rights

Though lacking any legislative bite, the UK government has also published advice on zero hours contracts that may be worth highlighting to employers. The advice clearly

states that zero hours contracts should not be used as a substitute for permanent contracts of employment, especially if an employee is expected to work regular hours over a continuous period of time. It also emphasises that zero hours contracts are rarely appropriate for employing workers to run the core business of the organisation.

Although it may not be possible to establish full employment rights because a role fails to fulfil the test for 'mutuality of obligation', it may still be possible to persuade an employer that there are issues of fairness to be addressed. This may then lead to improved rights for casual or zero hours staff into agreements over the course of negotiations.

For example, a UNISON branch at an NHS ambulance trust achieved agreement clauses for zero hours workers that enabled them to benefit from the same incremental progression and unsocial hours payments as permanent staff, along with the right to follow established grievance and disciplinary procedures. The impact of zero hours was also limited by an agreement that a minimum core element of every shift would be covered by permanent staff.

Zero hours contracts are usually part-time contracts and therefore the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations which covers workers as well as employees, may be useful to staff in seeking parity of conditions. The requirement under the Regulations is that equal terms must be drawn with a real full-time worker who does the same or broadly similar work and is based at the same establishment. Case law (*Roddis v Sheffield Hallam University [2018] UKEAT)* has shown that interpretation of the 'same type of contract' for both the claimant and the comparator can be quite wide. In this case the tribunal allowed the comparator to be someone on a full-time permanent contract, whereas the claimant was on a zero hours contract.

Homecare is an area of public services where zero hours contracts have made the greatest inroads. UNISON's 2012 study of the sector showed a decline in the continuity of care as zero hours contracts began to make shifts much more variable and reduce the chances that carers would visit the same homes.

The last-minute scheduling arrangements that tend to be inherent in a zero hours system also created breakdowns in services for the end user. Carers struggled to deal with the impact and having to apologise to the people they care for and their families.

This led to the UNISON campaign for councils and other care providers to sign up to the Ethical Care Charter. The charter includes a commitment that "Zero hour contracts will not be used in place of permanent contracts." It shows a recognition that they are not a suitable form of employment for delivering quality services.

Rotherham Council became the 46th signatory in February 2020 to the charter since it was established in 2013. The charter commits the Council to continue working

with the borough's care companies to help end zero hours contracts and reflect travel time between homecare visits in care workers' pay.

In 2018, Knowsley Metropolitan Borough Council signed the charter. UNISON Knowsley deputy branch secretary, James Robinson welcomed the signing as "a step in the right direction… Our branch's worst casework situations usually come from homecare – there's lots of bullying and harassment and procedures often aren't followed. Add to that the situation with zero hours contracts and these women [most of the homecare workers are women] often seem quite scared to me – they're being treated badly, but they're too nervous to do anything, in case it infringes on the amount of hours they're given."

In Wales, care providers are now required to give homecare workers a choice of contract after a three-month period of employment after Welsh government regulations were adopted in 2018. They recognised that "there is a very clear link between the use of zero hours contracts and a reduced quality of care, due to issues around the continuity of care and communication between workers and those they support." This success was in part due to the continuous lobbying of government ministers by UNISON Cymru/Wales.

As part of the 'Good Work Plan' under Theresa May's Tory government, there was a proposal for all workers with at least 26 weeks' service to have the "right to request" a more predictable and stable contract (for example, number of hours or fixed working days), and for this to be included in an Employment Bill "when parliamentary time allows." There was also a proposal to increase the maximum gap between periods of work without breaking service continuity from one to four weeks. However there is currently no implementation date for this change.

UNISON case study

After a number of 'relief staff' on zero hours contracts Cambridgeshire County and Peterborough City councils raised concerns during the COVID-19 pandemic, the union took the issue up with managers. Relief staff work in reablement support, residential care, children's play, libraries and elsewhere.

The two councils agreed that any workers who worked consistently over the previousthree months whose jobs were temporarily stopped during the pandemic were to continue to be paid based on the average wage from January to March until they could be redeployed.

Employees in high-risk categories who normally work in roles they cannot do from home received the same average pay until they could be redeployed into one they can do from home. And workers who were self-isolating were paid for any shifts they already had booked and then paid the three-month average for the remainder of the period they were off.

UNISON Eastern regional organiser Alex Porter said: "Relief staff could have easily be thrown to the wolves during this pandemic, with no wages coming in and

serious trouble finding alternative work. So we're glad the councils listened to our concerns and did the right thing, recognising the skill and commitment of the staff keeping our local services functioning."

More information

UNISON's campaign 'Care workers for change' calling for decent jobs, including 'fair contracts, no zero hours'
www.unison.org.uk/our-campaigns/care-workers-change/

UNISON's Ethical Care Charter
https://www.unison.org.uk/content/uploads/2016/08/22014.pdf

UNISON's Care workers – your rights
www.unison.org.uk/care-workers-your-rights/

Acas information on zero hours and casual contracts
www.acas.org.uk/zero-hours-contracts

TUC workplace guidance on zero hours contracts
www.tuc.org.uk/workplace-guidance/zero-hours-contracts

UK Government guidance on zero hours contracts for employers
www.gov.uk/government/publications/zero-hours-contracts-guidance-for-employers/zero-hours-contracts-guidance-for-employers

Northern Ireland Business Info on zero hours contracts for employers
www.nibusinessinfo.co.uk/content/zero-hours-contracts

Quick checklist

- ☐ Have they received a written statement of employment particulars?
- ☐ Double-check the status of the worker – does the relationship with their employer and any regularity of their work suggest a 'mutuality of obligation'? Are workers genuinely casual or should they really be employees and have full employment rights? Are the contracts for long periods? Is work regularly offered and regularly accepted?
- ☐ If genuine casual work or a zero hours contract is being offered, is the worker clear that there is no guarantee that work will be offered?
- ☐ Will casual or zero hours workers be paid through PAYE (pay as you earn) with appropriate tax and national insurance deductions? Only the genuinely self-employed should be paid a fee.
- ☐ Are casual or zero hours workers paid for holiday accrued (built up and not taken) during their engagement periods when they are not working?

- ☐ Are casual or zero hours workers paid notice pay if they are employed for more than a month, or if their contract says so?
- ☐ Do employers appropriately consider the health and safety of casual or zero hours workers? They have a duty of care for all workers and need to ensure that casual workers benefit from risk assessments that consider their circumstances, as well as induction and training on health and safety.
- ☐ If genuine casual work is being offered, will the employer consider offering a choice of moving to a permanent employment contract (probably part-time, possibly fixed-term) or continuing on a casual contract, after a period of time working with the organisation?
- ☐ Does the contract include any exclusivity clause? This is illegal. Zero hours workers can work for more than one employer without any detriment.
- ☐ For those workers who remain on casual or zero hours contracts will the employer consider providing at least some of the same benefits as permanent employees, such as being able to use the disciplinary and grievance procedures, to receive paid sick leave, incremental progression and unsocial hours payments.
- ☐ Will employers ensure rotas for casual or zero hours workers are organised well in advance with last-minute changes avoided wherever possible, so that workers can be better able to balance work life with domestic arrangements?
- ☐ If work is unavoidably cancelled at the last minute, is there some compensation for the worker?
- ☐ If the worker does not accept work offered by the employer, are they continued to be treated fairly and do not suffer any detriment?
- ☐ Will employers or providers in the care sector agree to sign up to UNISON's Ethical Care Charter?

Agency workers

Agency workers are engaged by an agency and get temporarily assigned to hiring organisations to carry out a temporary, fixed-term period of work. In most cases their employment status will be a worker.

Agency workers are not employees of the end user or hiring organisation even though they may carry out the assignment for years and work alongside a permanent member of staff doing the same job. It would be very rare for an implied contract of employment to be created between the worker and the hiring organisation.

Occasionally, the agency worker may be an employee of the agency or of the umbrella company that processes their timesheets and pay, if there is a contract of employment.

It is also possible that some agency workers may genuinely be self-employed in which case they do not benefit from employees' or workers' rights, including those rights outlined in the Agency Workers Regulations 2010. However when they take on an assignment through an agency they may become workers for the duration of the assignment.

It is generally understood that agency work is temporary. Case law (*Moran and others v Ideal Cleaning Services Ltd and another [2014]* and subsequently *Brooknight Guarding Limited v Matei [2018])* has shown that an agency worker with a zero hours contract who works as and when required, will qualify for protection under the Agency Workers Regulations as a temporary worker. On the other hand, an agency worker who is assigned on a long-term basis to just one client may fall outside of the protection if the tribunal determines that the assignment was permanent not temporary.

Rights

Agency workers who are workers or employees are protected from discrimination from day one of their engagement, under the Equality Act 2010. In addition, as from 6 April 2020, they have a right to a written statement of particulars (see page 3) from the first day of their assignment, as well as entitlement to 5.6 weeks' paid annual leave accruing from the first day of the first assignment. They must also be paid the national minimum wage at least.

Agency workers also benefit from a number of other protections under the Agency Workers Regulations 2010. As soon as they are taken on by the agency, they must receive details (in a key information document and/or contract or written terms of engagement) explaining how they will be paid, who pays them, any benefits they will be due, their holiday entitlement, any notice period, and whether they are workers (under a contract for services) or employees (under a contract of employment).

Unless the agency worker is an employee of the agency, they are not entitled to protection against unfair dismissal (unless it is related to the Regulations), redundancy rights and rights under TUPE that require a period of continuous service.

The hiring organisation also has an obligation to ensure that, from day one of an assignment, agency workers are treated 'no less favourably' in relation to access to shared (or 'collective') facilities and amenities such as crèches, canteens, staff common rooms, toilets/showers, transport services and prayer rooms.

In addition, agency workers are entitled to information about any relevant job vacancies within the hiring organisation so that they have the same opportunity as non-agency workers to apply for a permanent role. However, the hiring organisation can still give preference over agency workers to recruitment from within the internal permanent employees as a form of redeployment in a redundancy exercise (as determined by case law *Coles v Ministry of Defence 2015).*

The rights of agency workers who are workers or employees also increase after having worked for 12 weeks in the same role at the same hiring organisation. These 12 working weeks need not be full-time but are calculated as a period of 7 days within which the agency worker is working part-time or full-time at the hiring organisation, beginning with the start of the assignment. Weeks when the agency worker is not working because of pregnancy or when they are on maternity, paternity, adoption or shared parent leave count towards the 12 weeks.

Agency workers may have assignments at more than one hiring organisation and therefore may trigger more than one 12-week qualifying period that can run simultaneously.

However, the calculation of 12 (working) weeks will be paused if the agency worker takes annual leave due to them or is off sick or on jury leave or there is a break of less than 6 weeks. However, if the break is for more than 6 weeks (or more than 28 weeks if due to sickness or jury leave) or there is a different assignment with a different hiring organisation, then the calculation starts from zero.

Agency workers with 12 weeks' engagement on the same assignment at a hiring organisation are then entitled to 'equal treatment' or the same 'basic' terms and conditions as if they had been employed directly by that hiring organisation. These include:

- pay (including holiday pay, overtime pay, unsocial hours and shift allowances, bonuses and commission based on individual performance, vouchers such as child-care vouchers)
- holiday entitlement including the arrangements for public holidays and procedures for booking leave
- automatic pension enrolment
- working time and rest breaks (including requiring an agency worker to sign the 48-hour opt out clause, night work and shift arrangements)

- paid time off to attend ante-natal care or unpaid time off to accompany a pregnant partner to up to two ante-natal appointments
- the offer of an alternative assignment for pregnancy-related reasons or to be suspended on full pay when a suitable assignment is not available.

However, agency workers with 12 weeks' engagement will not be entitled to:

- bonuses linked solely to company performance or to reward long-term loyalty
- benefits in kind e.g. private medical insurance
- enhanced maternity, paternity and adoption pay and Shared Parental Pay
- company pension schemes
- redundancy pay
- sick pay
- guarantee payments
- season ticket loans
- paid time off for trade union duties.

The agency or the hiring organisation cannot avoid this equal treatment of agency workers after 12 weeks, even if the agency worker is paid by the agency during the breaks in their assignment (under a contract sometimes called a 'Swedish derogation' contract making reference to a clause in the Regulations. The Swedish derogation has been abolished as of 6 April 2020, under the Agency Workers Amendment Regulations 2019.)

For equal treatment to be enforced through a tribunal, a comparable employee to the agency worker needs to be identified. The employee needs to be directly employed by the hiring organisation conducting the same or broadly similar work and working in the same workplace (where this condition can't be met, another workplace owned by the hirer can be used).

Where an agency worker is employed in a workplace containing both TUPE transferred staff and new recruits, they are only liable to take up terms in line with new recruits.

Agency workers cannot be assigned to cover the work normally done by workers who are taking part in an official strike or other official industrial action.

Whilst the Regulations have provided a statutory minimum requirement for the equal treatment of agency workers, they are still amongst the most low-paid. Recent TUC analysis published in August 2020 ('Insecure Work' www.tuc.org.uk/sites/default/files/2020-08/Insecurework.pdf) found that those working for an employment agency typically received £9.69 per hour, well behind the £12.25 average for all employees.

However, it may be possible to negotiate policies that establish entitlement to equal treatment at a much earlier stage. For example, the University of Manchester sets out in its guidance for managers the following terms:

> "Agency workers should normally be paid on the bottom point of the comparator grade from Day 1 (i.e.) the grade staff employed by the University to do the same work would be paid. If in doubt as to the appropriate grade for the work, please seek advice from the appropriate Human Resources Partner. After 12 qualifying weeks it is a legal requirement that they are paid at the same comparator salary."

More information

UNISON information on agency and temporary workers
www.unison.org.uk/get-help/knowledge/vulnerable-workers/agency-and-temporary-workers/

Acas information on agency workers
https://www.acas.org.uk/agency-workers

TUC worker's guidance on agency work
www.tuc.org.uk/sites/default/files/agencyworkers_0.pdf
www.tuc.org.uk/sites/default/files/2020-04/Agency_Workers_Rights_2019_A4_Factsheet_AW_Digital_Final_0.pdf

TUC's bargaining guide 'Delivering Equal Treatment for Agency Workers'
www.tuc.org.uk/sites/default/files/Agency-Workers-Bargaining-Guide.pdf

Quick checklist

- ☐ Have the agency workers received a key information document and written statement of particulars from their agency?
- ☐ Double-check the status of the agency worker – does the relationship with their agency and/or the hiring organisation and any regularity of their work suggest a 'mutuality of obligation'? Are workers genuinely temporary or should they really be employees of the agency or of the hiring organisation and have full employment rights? Are the contracts for long periods? Are the same assignments at the same hiring organisation regularly offered and regularly accepted?
- ☐ If a genuine agency work contract is being offered, is the worker clear that there is no guarantee that work will be offered by the agency?
- ☐ Will the agency workers be paid through PAYE (pay as you earn) with appropriate tax and national insurance deductions? Only the genuinely self-employed should be paid a fee.

- ☐ Does the hiring organisation make agency workers aware of their rights from day one as part of any induction information provided?
- ☐ Are agency workers paid for holiday accrued (built up and not taken) during their engagement periods when they are not working?
- ☐ Do agency workers have full access to shared amenities and facilities at the hiring organisation?
- ☐ Does the hiring organisation have a systematic process in place for monitoring the 12-week qualification period and ensuring that equal treatment is triggered on completion?
- ☐ Are assignments for agency workers structured in such a way as to try to avoid the provision of equal treatment right after 12 weeks? For example, by rotating agency workers between assignments so that they do not build up qualifying service or making minor changes to the responsibilities of agency workers in an attempt to 'zero the clock' on their qualifying period.
- ☐ Are job roles for agency workers created to ensure that they are 'unique' and provide no comparable role in permanent staff members? Try to be involved in job specification procedures.
- ☐ Do agency workers who have worked for the hiring organisation on the same assignment for 12 weeks or more actually benefit from the same basic terms and conditions as permanent staff employed directly by the hiring organisation?
- ☐ Will the employer also agree to allow them to benefit from enhanced entitlements particularly maternity and other parental leave pay, and contractual sick pay?
- ☐ Do employers appropriately consider the health and safety of agency workers? They have a duty of care for all workers and need to ensure that agency workers benefit from risk assessments that consider their circumstances, as well as induction and training on health and safety.
- ☐ Are agency workers made aware of all permanent vacancies available at the hiring organisation in the same way that staff employed directly by the hiring organisation are notified?
- ☐ Will employers or providers in the care sector agree to sign up to UNISON's Ethical Care Charter?
- ☐ Does the employer provide reps with information on agency workers for collective bargaining? Under the Agency Workers Regulations 2010, employers must provide reps with information about the number of temporary agency workers working for the employer where those agency workers are working and what types of work they are carrying out .Employers also need to disclose agency worker information during statutory consultations under TUPE and collective redundancy regulations.

Recruitment and Organising

Gathering information

The first step in effective organising of staff on the types of contract outlined in this guide is to gather basic information on numbers of staff on different types of contracts, their location in the organisation and the roles they fulfil.

Where UNISON is recognised for collective bargaining by the employer, the general duty to disclose such information in line with the ACAS code on disclosure of information to trade unions for collective bargaining purposes should be sufficient.

To maintain an up-to-date picture, it's also useful to establish arrangements for the union branch to receive regular reports on the number and location of staff broken down by contract type.

In the event of an employer refusing to provide such information, it is possible to challenge the refusal through the Central Arbitration Committee or through the Industrial Court in Northern Ireland.

Freedom of Information (FoI) requests also offer an alternative in the public sector where an employer is obstructive and have the advantage of requiring a response from the employer within 20 working days.

More information:

UNISON's Guide to using the Freedom of Information Act includes a model letter to send to the employer
www.unison.org.uk/content/uploads/2016/08/Guide-to-using-the-Freedom-of-Information-Act.pdf

General principles

1. Constructing a claim - Consult workers on the different forms of contract used and the issues that are important to them for the union to pursue. Good practice is to start with an open meeting for members and non-members where the workforce is briefed about the current situation and potential improvements. The decisions about what claim should be put to the employers should then be made in a meeting open to members only.
2. Mobilising the membership - Members and non-members need to see that the union has been instrumental in achieving the claim. Members should be asked to support the claim by, for instance, signing a petition, wearing a badge or taking some other action. In this way, workers are empowered by showing that they can change things through joining together in the union, rather than simply being recipients of services.
3. Recognising wins - Too often we undermine our achievements and fail to point out that, without UNISON and more importantly our members, any improvements would not have been won.

More information

UNISON's full set of advice and guidance on recruitment work, including material on spotting future activists and supporting new activists, selling benefits, starting conversations with non-members and getting members to recruit www.unison.org.uk/get-involved/learning-development/activists/recruiting-members

Equality dimension

The marked tendency for the less secure forms of employment to be filled by women, as well as other groups defined as having protected characteristics under the Equality Act 2010, means that equality legislation can offer a useful means to make an employer assess the impact of changes to contract arrangements.

Reps and branches can particularly raise awareness of the disproportionate impact on low paid and insecure work on women, disabled, Black, LGBT+ or younger workers by working closely with the self-organised groups and the young members forum.

The Public Sector Equality Duty requires public authorities in England, Wales and Scotland to promote equality of opportunity and eliminate discrimination for service users and staff (in Northern Ireland equality legislation falls under Section 75 and Schedule 9 of the Northern Ireland Act 1998).

The general duty of the Public Sector Equality Duty does not impose a legal requirement to conduct equality impact assessments. However, equality impact assessments remain the most reliable way of demonstrating that equality issues have been given due regard prior to changes such as the widespread introduction of insecure forms of contracts. Workplace reps and branches can use equality impact assessments to help ensure that women, disabled workers, Black workers, LGBT+ workers and younger workers are not disproportionally affected by the use of insecure contracts.

Specific considerations

The erratic hours of workers on some of the contracts outlined in this guide can pose organising difficulties in terms of getting together a group of workers in a single workplace at the same time. Therefore, it may help to use social media, email and texting networks in order to distribute information and gather feedback as a supplement to more traditional ways of organising.

This can also be a factor in seeking agreement with the employer for access to all staff as a consistent part of their induction programmes.

Workers on insecure contracts may have second and even third jobs – often these will be in other areas where the union organises, but may not be covered by your branch. Try to find out and record the details of any further jobs - if they're not covered by your branch let the regional office know.

The benefits of membership can be tied to enforcing the rights specific to particular contract types and it can be worth stressing that union strength is even more important because limited rights leave these workers more vulnerable to attack by employers.

Many workers on the most insecure forms of contract will face financial insecurity, so the services of the There for You (UNISON Welfare), along with the array of discounts available to members and reduced subscriptions for low income workers, are worth stressing as benefits of membership.

Appendix 1 – IR35 Regulations or off-payroll working

For tax purposes, staff are defined as either employees or self-employed according to slightly different criteria to employment law.

These criteria are outlined in the 'intermediaries legislation' of Chapter 8 Part 2 within the Income Taxes (Earnings and Pensions) Act 2003 and are popularly known as the IR35 rules.

If an individual is defined as an employee according to these rules, their earnings are subject to Income Tax (PAYE) and National Insurance contributions. The employer will also be required to make National Insurance contributions and include the employee in calculations of the Apprenticeship Levy.

The IR35 rules were introduced as an anti-tax avoidance measure to prevent situations where a worker receives payment from a client through an intermediary to disguise a relationship where the worker is, in reality, an employee of the client. The rules apply if a worker provides their services to a client through an intermediary, but would be classed as an employee if they were contracted directly.

Intermediaries typically take the form of personal service companies (or partnerships) which sell services to a client either directly or through an agency.

The HMRC (HM Revenue and Customs) has an 'employment status tool' (www.gov.uk/guidance/check-employment-status-for-tax) that goes through the tests by which it is judged whether an individual is classified as an employee for tax purposes or not.

The tests include the following key considerations:

1. Does the end client/hirer have the right to reject a substitute (someone the worker sends in their place to do their role)?
   Reluctance to accept such a replacement could be seen as a sign of employment status.
2. Does the end client/hirer have the right to decide how the work is done?
   If there is a considerable amount of control over the person doing the work, this may indicate an employment relationship.
3. How will the worker be paid?
   Hourly, daily or weekly payment is seen as an indicator of employment, whereas a fixed price for a piece of work is more typical of self-employment.
4. If the end client/hirer isn't satisfied with the work, would the worker have to put it right?
   An employment relationship would be characterised by any extra work being conducted during usual working hours at the usual rate of pay, whereas the truly self-employed would have to carry the financial risk of putting work right.

If the end client is in the public sector, it's their responsibility to decide the worker's employment status. The definition of public authorities for these purposes is the same as that applied to the Freedom of Information Acts applicable across the UK

and therefore encompass most of the NHS, local authorities, police authorities, universities and further education colleges.

If the end client is in the private sector, it's the intermediary's responsibility to decide on the worker's employment status for each contract. The private sector includes community and voluntary sector organisations.

However, **from 6 April 2021**, all public sector authorities and medium and large-sized private sector clients (i.e. that meet 2 or more of the following conditions:

- having an annual turnover of more than £10.2 million
- having a balance sheet total of more than £5.1 million
- having more than 50 employees)

will be responsible for deciding if the rules apply.

Only if the end client organisation in the private sector is small will the intermediary remain responsible for deciding the worker's employment status and if the rules apply.

More information

HMRC guidance /www.gov.uk/guidance/understanding-off-payroll-working-ir35

Appendix 2 – Basic rights of employees and workers

While there are specific employment rights attached to some forms of jobs such as part-time, fixed-term and agency work, employment law principally determines the rights associated with a job on whether it meets the classification of an employee, a worker or self-employment.

The classification will not only be based on what is written down in a contract, but also according to how the contract operates in practice, as highlighted within this guide.

Generally speaking, individuals in indefinite permanent, temporary, fixed-term and part-time jobs are classified as employees. Zero hour, casual and agency jobs are more vulnerable to being classified as workers.

Rights of workers

- written statement of particulars
- to be paid at least the National Minimum Wage
- protection against unlawful pay deductions
- equal pay
- health and safety protection from accidents at work
- working hours limited to 48 hours on average per week and rest breaks
- paid annual leave
- right not to be refused work because of union membership
- right to be accompanied at a disciplinary/grievance hearing
- some protections whilst pregnant and time off to attend ante-natal appointments
- protection against unlawful discrimination
- protection against detriment for whistleblowing
- protection against detriment and right not to be refused work because of a blacklist.

Rights of employees only

- statutory minimum notice periods
- protection against unfair dismissal
- implied contract terms (such as mutual trust and confidence);
- statutory sick pay
- time off for union duties and training

- time off for union activities
- time off for safety reps
- time off for public duties
- time off for emergencies
- statutory maternity pay and leave
- statutory paternity pay and leave
- statutory adoption pay and leave
- statutory shared parental pay and leave
- parental leave
- further protections whilst pregnant and paid time off to attend ante-natal appointments
- right to request flexible working
- right to request time off for study or training
- protection in business transfers (TUPE)
- statutory redundancy pay and rights
- guarantee pay on layoffs.

If you have reason to believe that the correct employment status is not being applied to staff, contact your regional officer for clarification www.unison.org.uk/regions