Types of contract and negotiating for more secure work

UNISON Bargaining Support Group

includes agency, fixed-term and zero hours 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 their employer will determine what type of contract is required.

In most cases, staff are '**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 employees**). 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.

In 2023, an estimated 6.8 million people (21.4%) were in severely insecure work in the UK.

For many people, insecure work is not a free choice. The **UNISON/Work Foundation report 'Limiting Choices: Why people risk insecure work'** found that four in ten (44%) insecure workers earning less than £18,000 per year said they were in their current job due to limitations, such as the availability of jobs in their area, poor transport infrastructure or a lack of available childcare.

This guide highlights the case that can be made for providing more secure forms of employment, as well as setting some of 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.

Analysis of 2023 UK labour market data by the Work Foundation reveals that three in five (60%) newly insecure workers are **women**, with women 2.3 times more likely than men to experience severely insecure work when accounting for other factors.

Their analysis also shows that **young workers** (aged 18-24) are twice as likely as older age workers (aged 50-65) to be in severely insecure work.

Additionally the rate of insecure work grew more strongly during 2023 among Black workers ("Indian workers and Black African and Black Caribbean workers" as described by the Work Foundation) than White British workers and other ethnic minority groups.

And **Black women** are now nearly three times as likely to be on zero-hours contracts as white men (6.8% compared to 2.5%), according to TUC analysis published in November 2023.

The Work Foundation in 2023 also estimated that **disabled workers** are 1.5 times more likely than non-disabled workers to be in severely insecure work. Some groups are particularly disadvantaged, including autistic workers, female disabled workers, and those with mental health conditions. A record 1.45 million disabled workers are now in severely insecure work.

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 TUC highlighted how the typical worker on a zero hours contract is on an hourly rate a third lower than the average employee)
- less certainty over income and the ability to meet expenses or withstand shocks to their income or to build up a credit history to secure mortgages or loans
- 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)

- a reduced tendency to assert employment rights out of fear of having hours cut or non-renewal of contracts (for example, the TUC found that 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)
- a reduced access to some employment rights reliant on service length or average wages or secure employment contracts (such as statutory sick pay, full maternity pay and paternity pay)
- 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 have their contracts renewed or being offered hours.

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

Research from the Work Foundation in partnership with the Chartered Management Institute – 'Managing insecurity: The role of good management' – found that:

- Approximately one in three workers in insecure work (30%) expect to lose their jobs in the next 12 months. And almost half of workers in insecure jobs (49%) cannot personally pay an unexpected bill of £300 if it was due within the next seven days.
- Almost three in five (57%) of the insecure workers surveyed wanted more predictable hours and one in five (22%) workers who have spoken to their manager about this issue have not obtained more predictable hours.
- Over one in three (34%) workers reported having at least one of their shifts cancelled with less than two days' notice in the past month. Worryingly, half of workers surveyed (51%) say their mental wellbeing is affected by sudden changes to their work, schedule or weekly hours.

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[1]."

[1] OECD (2017). Economic Surveys: United Kingdom 2017, https://www.oecd-ilibrary.org/economics/oecd-economic-surveys-united-kingdom-2017_eco_surveys-gbr-2017-en

Alternatives

Allowing more **flexible working**, such as more part-time work could help employers cope with variations in a demand for services, as well as improve on recruitment and retention. Genuine flexible working provides opportunities for workers to balance home and work lives.

More information

UNISON's 'Bargaining on working hours' including flexible working
www.unison.org.uk/content/uploads/2023/11/Bargaining-on-working-hours-0923-v5.pdf

Fixed-term employment contracts provide some security for a period of time, as well as greater rights for the individual. It is also likely to produce far more loyalty from workers than offering only 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, as well as giving 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

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 to the relevant agreement, 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.
- A 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."

Future changes – more predictable working pattern

UNISON reps and branches should also be aware that the **Workers (Predictable Terms and Conditions) Act 2023** received royal assent. When enacted, (**expected in September 2024**) it will give people in atypical work such as working under zero hours contracts or agency workers, the right to request a more predictable working pattern.

Workers who have worked for their employer at least once in the month in the period before the 26 weeks leading up to the day of the request, can ask their employer for a more predictable working pattern if their working pattern lacks predictability. A working pattern refers to the number of hours the worker works, the days and times they work, or the length of their contract.

Agency workers who have had a contract with the agency at some point in the month before the 26 weeks leading up to the day of the request can make their request to the agency. Agency workers who have worked in the same role with the same hirer for 12 continuous weeks within the 26 weeks leading up to the day of the request can make their request to the hirer. Their working pattern refers to the number of hours or the days and times the worker works under an assignment with a hirer, or the length of their assignment with a hirer.

The procedure for making a request will broadly follow the same pattern as making flexible working requests in that requests must be made in writing and may be refused on one of a series of specified grounds. A worker will be able to make two statutory requests within a 12-month period and it must be dealt with by the employer within one month.

In response to this new legislation, Acas has prepared a draft statutory Code of Practice on handling requests for a predictable working pattern and, at the time of writing they are considering responses to their public consultation on the Code.

In addition to a new statutory Code, Acas will produce new non-statutory guidance which will provide more detailed guidance on the principles set out in the Code.

The Code recognises that workers currently could use their right to make a flexible working request in order to ask for a more predictable working pattern. It highlights how employers should allow workers to be accompanied by a fellow worker, a trade union representative, or an official employed by a trade union at any meeting to discuss their request (although this will not be a statutory right), and should be allowed to appeal against the decision made by the employer.

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 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, such as in the staff handbook. 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.

Some statutory employment rights such as being able to claim redundancy and unfair dismissal, are only available to employees after they have had two years’ service (except in Northern Ireland where the qualifying period of continuous service for an employee to have the right to bring a claim of unfair dismissal is one year).

However, some rights – such as a right not to be discriminated against – are day-one rights for all employees.

What is a ‘worker’?

A worker’s relationship with the employer is more casual, and there is usually very little obligation to receive or do work. However a worker will still need written terms outlining job rights and responsibilities.

The UK government states that a person is generally classed as a ‘worker’ if:

- they have a contract or other arrangement to do work or services personally for a reward (a contract can be written or unwritten)
- their reward is for money or a benefit in kind, for example the promise of a contract or future work
- they only have a limited right to send someone else to do the work (subcontract)
- their employer has to have work for them to do as long as the contract or arrangement lasts
- they are not doing the work as part of their own limited company in an arrangement where the 'employer' is actually a customer or client.

Workers do not have all the same rights as employees. But the right to not be discriminated against is also a day-one right for those classed as 'workers'.

More information

The UK government has more details on different employment status in tax law, including worker, employee, self-employed and contractor
www.gov.uk/employment-status
and to help individuals and businesses understand which employment rights apply to them
www.gov.uk/government/publications/employment-status-and-employment-rights

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* every new 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 only exception is in Northern Ireland where only employees are entitled to a 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 it is 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

There are some differences again in Northern Ireland where some terms do not need to be included in the written statement concerning: days of the week that must be worked; arrangements for varying working hours; paid leave other than sick pay (which must be included); benefits other than sickness, pension and holidays (all of which must be included); probationary periods; and training.

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

For Northern Ireland: www.nidirect.gov.uk/articles/written-statement-employment-particulars

Variation of contracts

As the contract of employment is a legally binding agreement, any changes to the terms will mean a variation of the contract that must be agreed by both the employer and employee.

It would be *essential* for the employer to get the individual agreement of the worker to any variation in their contract following a full discussion on the implications. The employer should confirm any changes made to the contract in writing. It is important to note that an employee can 'agree' to the change in contract just by performing the changed duties even for a short time.

Some terms may be agreed collectively. The employer will have an agreement with the trade union that allows the union to negotiate and agree certain changes on behalf of the workers. By law, if the change proposed is to terms and conditions covered by a collective agreement, the employer *must* consult with the trade union.

Some contracts may include a 'flexibility clause' or 'variation clause' that allows a particular change (such as to the employee's duties or work location) in some circumstances but even so, the change must be within reason.

Acas highlights some of the risks employers experience should they mishandle changes to contracts, including:

- damaging working relations
- legal claims, for example claims of breach of contract or constructive dismissal
- a decrease in commitment and performance, if employees do not support the changes, or feel they have not had the opportunity to inform decisions
- increased levels of stress or absence
- discrimination, for example if changes are introduced that apply to a group of employees but put employees with a certain 'protected characteristic' at a disadvantage
- valued people leaving an organisation, if you propose a change they do not support or agree to
- reputational damage to an organisation or brand, making it difficult to attract new employees
- strikes or other industrial action if there's a trade union
- collective action by a group of employees that's not authorised by a trade union ('wildcat' industrial action).

If the employer imposes the change (known as a unilateral variation of contract), it would be a breach of contract. Nonetheless, options for workers unhappy with the change are complex and may need legal advice.

Also in recent years, employers are increasingly risking the practice of dismissal and re-engagement, commonly known as ‘fire and re-hire’, when they cannot get the agreement of employees to the changes through consultation.

This practice is when the employer gives notice to terminate the contract of employment while at the same time offering immediate re-engagement under a new contract on the changed terms they want to impose.

The UK government has published an updated Code of Practice on dismissal and re-engagement which is expected to come into force in summer 2024. It does stress that a ‘fire and re-hire’ approach has the following negative consequences:

- it creates legal and reputational risks for the employer
- it can be harmful to employees’ interests
- it can damage the employer’s relationships with its employees, potentially leading to disengagement and industrial conflict.

More information

UNISON’s guidance on collective redundancy includes information about dismissal and re-engagement
www.unison.org.uk/content/uploads/2020/12/Bargaining-Over-Collective-Redundancy-v7.pdf

From Acas
Making changes to employment contracts – employer responsibilities
www.acas.org.uk/changing-an-employment-contract/employer-responsibilities

If there is any concern about a proposed variation of contract, the branch should contact their regional organiser (**www.unison.org.uk/regions**) and seek legal advice if appropriate.

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 homeworkers, casual, bank, 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 another.

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 applied 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

Acas key points on part-time workers
https://www.acas.org.uk/part-time-workers

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

Offering part-time work, can provide much-needed flexibility for many workers. But as pointed out by the Timewise report 'Can a more flexible jobs market raise the status and pay of part-time workers?' limited opportunities can trap certain groups of people out of work or in low pay. As a consequence employers miss out on a huge pool of diverse talent and skills by not considering part-time work during the recruitment process.

The report concludes that "More than half a million workless people are seeking a part-time job; and many others who have left the labour market citing ill health during the pandemic could potentially be tempted to return with reduced hours.

Employers are also failing to maximise the skills of their existing part-time workforce, many of whom are highly likely to be over-qualified for their jobs. If they enabled more opportunities for people to take their part-time arrangement into more senior jobs, they would make better use of people's skills and potentially drive up performance.

And employers who want to help support people through the cost of living crisis would do well to consider opening up to greater flexibility. Unlocking more quality jobs to flexibility, especially part-time, could help people access better work and raise their living standards."

Annualised hours and term-time contracts

An annualised hours contract averages out the member of staff's hours and pay over an entire year, whilst also taking account of the paid holiday weeks due.

The individual gives a commitment to work a specified minimum number of annual hours as stated in the contract and the organisation commits to provide work for the minimum guaranteed hours within the year. Therefore the contract allows employers considerable flexibility in how they schedule work amongst staff and may reduce the need to make overtime payments.

Payment for these hours is spread evenly across the year, so each month the employee receives the same salary payment, regardless of the hours actually worked in the month.

Continuity of employment is maintained during the periods of time that the employee is not working. This is important as certain employee rights are built up after a period of service (e.g. the right to claim unfair dismissal and the right to statutory redundancy pay after two years).

Reps and branches need to make sure that employers are completely clear in annualised hours contracts about annual leave entitlement, hours of work, provisions relating to sickness absence, frequency of payment and when overtime payments will apply.

Term-time only contracts means that employees only work during the school term period. Payment may be spread across the year as in an annualised contract or the employees may only be paid during the weeks of the term when they are at work, other than for any paid holiday due and paid during the term breaks. It is common for employers to stipulate that annual leave must be taken during the term breaks.

Although there is a temporary break in the work, the contract is not ended with each term break. There is still a continuity of service as the contract of employment is not terminated. It is very likely that an employment tribunal would decide that ending the contract each holiday and starting a new contract with the new term would be unfair or would not prevent the employee building up the service required to claim employment rights.

Again it is important that the terms of the contract are clear, when the employee is required to work and to take annual leave, as well as the benefits that the employees are entitled to and how they will be calculated.

Term-time only contracts and annualised hours contracts are common in the education sector. They also may be an option for flexible working, particularly to support employees with childcare demands.

They are, in effect a form of part-time working and therefore workers under these contracts benefit from the protection of part-time workers' Regulations (see above).

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.

The UK government has now enacted the Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023 (which reverses the statutory holiday entitlement for term-time workers clarified in the case of Harpur Trust v Brazel & UNISON). This now means that annual leave for part-year or irregular hours workers (as defined in the Regulations) will accrue on the last day of each pay period at the rate of **12.07% of hours worked** in that period. This definition of part-year worker only includes term-time workers who are paid when they work, not those on annualised contracts who get a salary over the full 12 months, even when there are periods they are not working.

The Regulations came into force on the 1 January 2024 but the elements of the legislation relating to holiday pay will only apply from **annual leave years commencing on or after 1 April 2024.**

Employers are also now (in relation to holiday years from 1 April 2024) allowed to use **rolled-up holiday pay for part-year or irregular hours workers** (as defined). In other words they can include an additional amount with every payslip to cover a worker's holiday pay, as opposed to paying holiday pay when a worker takes annual leave. The amount of the payment must be separately itemised in payslips and does not count towards pay when calculating the national minimum wage.

Where a worker has irregular hours or works part of the year, employers can **calculate their holiday pay using an average from the last 52 weeks** in which they have worked and have earned pay. If a worker has been in employment less than 52 weeks, their employer should use however many complete weeks of pay data they have.

More details in the UK government guidance www.gov.uk/government/publications/simplifying-holiday-entitlement-and-holiday-pay-calculations/holiday-pay-and-entitlement-reforms-from-1-january-2024

Further information

UNISON's 'Bargaining guide on leave' www.unison.org.uk/content/uploads/2021/05/Bargaining-on-leave-0421-v2.pdf

UNISON's 'Negotiating for working parents' includes information on qualifying for family leave for term-time workers www.unison.org.uk/negotiating-for-working-parents/

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 part-time employees, can the employer objectively justify it?
- ☐ Has the employer also considered that it may 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.
- ☐ Will employers base maternity pay on the best paid 8 weeks or 2 months over the last year for term-time workers who are not on annualised contracts, and is this clearly stated in the contract or the maternity leave and pay policy?
- ☐ Where workers are on annualised contracts, will enhanced maternity pay be based on what they would be paid if they were not on an annualised contract?
- ☐ Do all family leave schemes for term-time workers allow annual leave entitlement accrued during the family leave, to be taken during term-time if it cannot be taken within the school closure period?

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.

In order to ensure more secure work, it may be a priority for bargaining agreements to prescribe more tightly the circumstances when fixed-term contracts should be used in the organisation in order to limit the use of fixed-term contracts rather than employing permanent staff.

For example, 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.

UNISON case study

In December 2021, UNISON welcomed the announcement by the University of Winchester that workers on fixed-term contracts would no longer be excluded from the Local Government Pension Scheme.

The decision by the University came following a lobbying campaign led by UNISON Hampshire branch, who had argued against the University's unfair practice of only allowing employees on permanent contracts into the LGPS.

For fixed-term workers who were paying into the inferior HEDCS pension scheme, the University paid a lump sum to cover the difference between the employer's contributions should they join the LGPS. All new fixed-term workers are now given the opportunity to join the LGPS, from day one of their employment.

UNISON workplace representative Rory Elliott said: "Fixed-term workers should be treated fairly and equitably with their colleagues on permanent contracts. Today's U-turn by the University is a great victory for our members, and proves there is power in a union."

If employees are working for **two 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 two years' service, dismissal must be for a fair reason.

Unless the employer has an objective reason for doing so, a fixed-term employee must not be selected for **redundancy** simply because of their fixed-term status. It would also be unfair for the employer to select one fixed-term employee over other fixed-term employees for redundancy simply because their contract is due to end sooner than the contracts of the others.

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

Gaps between a succession of fixed-term contracts may or may not create a sufficient break in the continuity of employment, particularly if the working arrangement settles into an informal but regular pattern over a period of time. Even where there are clear gaps between periods of work these may often be considered as temporary cessations of work and therefore ignored, such as for some seasonal workers who regularly return after an unpaid holiday break.

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 example, 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."

However, 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.

Therefore, employers may be able to argue that worse conditions in one area can be 'objectively justified' because taken as a 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 for the employee. 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, which are day one rights.

Expiry of a contract because the work has come to a conclusion or because the fixed-term employee was covering for a permanent post-holder (whilst on maternity leave for example) and they are now returning to work, are 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 the following clause:

"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

UK government guidance on fixed-term employment contracts
www.gov.uk/fixed-term-contracts

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

Casual work may be described as **bank work, sessional work, part of the gig economy** or **zero hours contracts.**

Under these contracts, the employer has no obligation to provide any work but calls on the worker as and when they need work covered.

They represent the most insecure forms of employment and are increasingly used by unscrupulous employers. They are particularly prevalent in the social care sector.

February 2023 figures from the Office for National Statistics (ONS) show that 1,133,441 people were employed on a zero hours contract in October to December 2022.

This is the highest figure ever recorded and an increase of 8.5% on the previous three months.

This type of insecure work is disproportionately experienced by young workers (between 16 and 24), women workers and people born outside the UK. However, it is also on the rise among workers over the age of 50. A third of all direct care workers in England are on a zero hours contract, rising to half in London.

Under zero hours contracts, the employer only pays 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.

Worryingly, an Acas survey has found that 3 in 5 workers (61%) are unaware of the rights of people on zero-hours contracts.

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.

Research for the TUC in 2021 found that 84% of zero hours contracts workers were offered shifts at less than 24 hours' notice and more than two-thirds (69%) had had work cancelled at less than 24 hours' notice.

But a Chartered Institute of Personnel and Development (CIPD) report in 2022 showed that about half of organisations provided no compensation to zero-hours workers if the employer cancelled shifts at very short notice. In addition, a significant minority of zero-hours employers put pressure on workers to accept work when they offered it to them.

However, there was evidence that the working patterns of some zero-hours workers varied very little each week in terms of hours and days worked, indicating that it

would be easy for the employer to move them to more stable, typical working arrangements and contracts, yet they declined to do so.

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 may have been paid an illegal wage.

A group of care workers – all but one of whom are women – were employed on controversial zero hours contracts and cared for elderly and disabled residents across the borough. The women visited people in their own homes and in some cases provided 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 meant most had 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.

Casual or zero hours workers are also **protected from discrimination from day one** of their engagement, under the Equality Act 2010[2]. In addition, as from 6 April 2020, they have a day one right to a **written statement of employment particulars** (except in Northern Ireland where only zero hours employees are entitled to a written statement of employment particulars not workers, further information 'What must an employer provide in writing?' above).

However, casual workers are not entitled to protection against unfair dismissal, redundancy rights and rights under TUPE that require a period of continuous service.

[2] In Northern Ireland the relevant legislation includes: the Disability Discrimination Act (DDA) 1995 and subsequent amendments and supplementary laws, Employment Equality (Age) Regulations (NI) 2006 and subsequent amendments, Equal Pay Act (NI) 1970, Sex Discrimination (NI) Order 1976 and subsequent amendments, Maternity and Parental Leave etc. Regulations (NI) 1999, Race Relations (NI) Order 1997 and subsequent amendment, Fair Employment & Treatment (NI) Order 1998 and subsequent supplementary laws, Employment Equality (Sexual Orientation) Regulations (NI) 2003, Equality Act (Sexual Orientation) Regulations (NI) 2006 and subsequent amendments, and under Section 75, 76 and Schedule 9 of the Northern Ireland Act 1998.

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.

If employers do not monitor working hours, there is also a risk that zero hours workers might work excessive hours across various contracts leading to burn out and long-term health problems.

For example, UNISON health branches have seen an immediate termination clause in the event of a complaint or issues being raised in many bank workers' contracts, and there is also no automatic right to raise a grievance.

More information in 'How to build a better bank contract'
www.unison.org.uk/health-news/2023/05/how-to-build-a-better-bank-contract-june-2023/

Exclusivity clause banned

Some zero hours workers have additional rights 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 ban on exclusivity clauses has also been **extended to those who earn less than the lower earnings limit** (currently £123 per week) under the Exclusivity Terms for Zero Hours Workers (Unenforceability and Redress) Regulations 2022.

(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.)

More information

Acas information on exclusivity clauses
www.acas.org.uk/employment-contracts-and-the-law/exclusivity-clauses

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

Annual leave entitlement

The UK government has now enacted the Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023 (which reverses the statutory holiday entitlement for term-time workers clarified in the case of Harpur Trust v Brazel & UNISON). This now means that annual leave for part-year or irregular hours workers (as defined in the Regulations) will accrue on the last day of each pay period at the rate of **12.07% of hours worked** in that period.

Irregular hours workers are where the number of paid hours that the person will work in each pay period during the term of their contract in that year is, under the terms of their contract, wholly or mostly variable. It includes casual or zero hours contract workers.

The Regulations came into force on the 1 January 2024 but the elements of the legislation relating to holiday pay will only apply from **annual leave years commencing on or after 1 April 2024.**

Employers are also now (in relation to holiday years from 1 April 2024) allowed to use **rolled-up holiday pay for part-year or irregular hours workers** (as defined). In other words they can include an additional amount with every payslip to cover a worker's holiday pay, as opposed to paying holiday pay when a worker takes annual leave. The amount of the payment must be separately itemised in payslips and does not count towards pay when calculating the national minimum wage.

Where a worker has irregular hours or works part of the year, employers can **calculate their holiday pay using an average from the last 52 weeks** in which they have worked and have earned pay. If a worker has been in employment less than 52 weeks, their employer should use however many complete weeks of pay data they have.

More details in the UK government guidance
www.gov.uk/government/publications/simplifying-holiday-entitlement-and-holiday-pay-calculations/holiday-pay-and-entitlement-reforms-from-1-january-2024

Further information
UNISON's Bargaining guide on leave
www.unison.org.uk/content/uploads/2021/05/Bargaining-on-leave-0421-v2.pdf

Employment status issues

In general, for those working under zero hours contracts, 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, rather than just as a worker. However, whether a specific contract fails or passes the test depends on the exact terms of the contract.

Where long-term zero hours contracts are in place, and work is regularly offered and accepted, an employment tribunal may consider that the relationship with the employer is of employment (rather than just casual work). The actual employment status of the worker on the zero hours contract may be considered as having changed to employee with all the accompanying rights if tested in a tribunal.

But some employers continue to use casual or zero hours contracts as a way of avoiding paying employers' national insurance contributions as well as to avoid taking account of the rights of employees. Some employers even incorrectly describe t casual workers as 'self-employed' in order to avoid taking account of the rights of workers. They may pay the worker a gross fee (with no national insurance or tax deductions) and 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.

Highlighting to employers that some casual worker arrangements may lead to an employment relationship, could provide an argument to encourage employers to limit 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."

More information from UK government 'Employment status and employment rights' www.gov.uk/government/publications/employment-status-and-employment-rights

Bargaining for improved rights

Though lacking any legislative bite, the UK government has published advice on zero hours contracts that it would 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 a worker is expected to work regular hours over a continuous period of time. It also emphasises that zero hours contracts are rarely appropriate for engaging workers to run the core business of the organisation.

UNISON guidance is available aimed at UNISON health branches and organisers to help them have informed conversations with members who work **on an NHS-operated bank as their primary contract** (rather than those employed via NHS Professionals or a private agency).

It covers ideas to improve these terms and how to build a 5-step plan to win. www.unison.org.uk/health-news/2023/05/how-to-build-a-better-bank-contract-june-2023/

Additionally there is health sector guidance on '**Making the financial case for better bank pay**' www.unison.org.uk/content/uploads/2023/05/Making-the-financial-case-for-better-bank-pay.pdf

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.

UNISON case study

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.

Roddis v Sheffield Hallam University [2018] UKEAT

Case law 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.

Use of zero hours contracts in the care sector

Zero hours contracts are increasingly used in the provision of homecare. 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 calling 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.

UNISON case studies

Rotherham Council signed up to the charter in February 2020. 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. As a result of their commitment, all home care firms contracted to work with the council pay at least the real living wage which led to a pay rise to around 800 home care workers.

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 required to give homecare workers a choice of contract after a three-month period of employment after Welsh government Regulations (The Regulated Services (Service Providers and Responsible Individuals) (Wales) Regulations 2017, as amended) were adopted in 2018.

The Welsh government 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.

The Living Wage Foundation's Living Hours scheme urges employers to offer secure arrangements alongside its recommended living wage. This includes at least four weeks' notice of shifts, with guaranteed payment if they are cancelled during this timeframe.
More details at: www.livingwage.org.uk/living-hours

More information

UNISON's Ethical Care Charter
www.unison.org.uk/care-workers-your-rights/the-ethical-care-charter/

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

Right to request more predictable and stable work

The Living Wage Foundation's report 'The Living Hours Index' showed that 8% of employees in the UK received less than 24 hours' notice for shifts, with 50% of below Living Wage workers having less than a week's notice. 21% of workers in the UK had their shifts cancelled unexpectedly with 72% of low paid workers receiving less than half of their wages when shifts are cancelled.

But 27% of these same low paid workers of workers have had to pay higher travel costs due to the way their hours are organised, while 17% have had to pay higher childcare costs.

UNISON reps and branches should be aware that the **Workers (Predictable Terms and Conditions) Act 2023** received royal assent.

When enacted, (expected in **September 2024**) it will give people in atypical work such as working under zero hours contracts or agency workers, **the right to request a more predictable working pattern.**

Workers who have worked for the employer at least once in the month in the period before the 26 weeks leading up to the day of the request, can ask their employer for a more predictable working pattern if their working pattern lacks predictability. A working pattern refers to the number of hours the worker works, the days and times they work, or the length of their contract.

The procedure for making a request will broadly follow the same pattern as making flexible working requests in that requests must be made in writing and may be refused.

Although employers must deal with the request in a 'reasonable manner', they will be able to refuse a request based on one of six statutory grounds: additional cost, ability to meet customer demand, impact on recruitment, impact on other areas of the business, insufficiency of work during the proposed periods, and planned structural changes.

A worker will be able to make 2 statutory requests within a 12-month period and it must be dealt with by the employer within one month.

In response to this new legislation, Acas has prepared a draft statutory Code of Practice on handling requests for a predictable working pattern. Following a public consultation, at the time of writing they are considering responses.

In addition to a new statutory Code, Acas will produce new non-statutory guidance which will provide more detailed guidance on the principles set out in the Code.

The Code recognises that workers currently can use their right to make a flexible working request in order to have a more predictable working pattern. It highlights how employers should allow workers to be accompanied by a fellow worker, a trade union representative, or an official employed by a trade union at any meeting to discuss their request (although it will not be a statutory right) and be allowed to appeal against the decision made by the employer.

Quick checklist

- ☐ Have workers on casual or zero hours contracts received a written statement of employment particulars?
- ☐ Double-check the real 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, will the worker's contract guarantee a minimum number of hours? If this is not the case, 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 (except in Northern Ireland). 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 they also provide disability leave for all disabled workers whether casual or zero hours workers or permanent staff? Are all disabled workers aware of the Access to Work scheme in England, Wales and Scotland (and the different system in Northern Ireland)?
- ☐ Will employers ensure rotas for casual or zero hours workers are organised well in advance (at least 4 weeks) with last-minute changes avoided wherever possible, so that workers can be better able to balance work life with domestic arrangements? Are all workers provided with predictable working patterns?
- ☐ Will the employer sign up to become a Living Hours employer?
- ☐ 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 normally 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 would not benefit from employees' or workers' rights, including those rights outlined in the Agency Workers Regulations 2010 mentioned below. 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[3].

They also have **a right to a written statement of particulars** (see 'What must an employer provide in writing' above) from the first day of their assignment (except in Northern Ireland where only employees are entitled to a written statement of employment particulars).

[3] In Northern Ireland the relevant legislation includes: the Disability Discrimination Act (DDA) 1995 and subsequent amendments and supplementary laws, Employment Equality (Age) Regulations (NI) 2006 and subsequent amendments, Equal Pay Act (NI) 1970, Sex Discrimination (NI) Order 1976 and subsequent amendments, Maternity and Parental Leave etc. Regulations (NI) 1999, Race Relations (NI) Order 1997 and subsequent amendment, Fair Employment & Treatment (NI) Order 1998 and subsequent supplementary laws, Employment Equality (Sexual Orientation) Regulations (NI) 2003, Equality Act (Sexual Orientation) Regulations (NI) 2006 and subsequent amendments, and under Section 75, 76 and Schedule 9 of the Northern Ireland Act 1998.

In addition, the hiring organisation must also ensure that the agency worker receives appropriate information, instruction and training on any health and safety risks associated with the work that they have been hired to do.

Agency workers must also be paid the **national minimum wage** at least and benefit from the statutory annual leave entitlements of workers or employees, depending on the particular status of the agency worker.

Annual leave entitlement

The UK government has now enacted the Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023 (which reverses the statutory holiday entitlement for term-time workers clarified in the case of Harpur Trust v Brazel & UNISON). This now means that annual leave for part-year or irregular hours workers (as defined in the Regulations) will accrue on the last day of each pay period at the rate of **12.07% of hours worked** in that period.

Irregular hours workers are where the number of paid hours that the person will work in each pay period during the term of their contract in that year is, under the terms of their contract, wholly or mostly variable. It includes some agency workers.

The Regulations came into force on the 1 January 2024 but the elements of the legislation relating to holiday pay will only apply from **annual leave years commencing on or after 1 April 2024.**

Employers are also now (in relation to holiday years from 1 April 2024) allowed to use **rolled-up holiday pay for part-year or irregular hours workers** (as defined). In other words they can include an additional amount with every payslip to cover a worker's holiday pay, as opposed to paying holiday pay when a worker takes annual leave. The amount of the payment must be separately itemised in payslips and does not count towards pay when calculating the national minimum wage.

Where a worker has irregular hours or works part of the year, employers can **calculate their holiday pay using an average from the last 52 weeks** in which they have worked and have earned pay. If a worker has been in employment less than 52 weeks, their employer should use however many complete weeks of pay data they have.

More details in the UK government guidance
www.gov.uk/government/publications/simplifying-holiday-entitlement-and-holiday-pay-calculations/holiday-pay-and-entitlement-reforms-from-1-january-2024

Further information
UNISON's Bargaining guide on leave
www.unison.org.uk/content/uploads/2021/05/Bargaining-on-leave-0421-v2.pdf

Agency Workers Regulations 2010

Agency workers also benefit from a number of other protections under the **Agency Workers Regulations 2010**[4]. 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.

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[4] The Agency Workers Regulations 2010 do not apply to Northern Ireland except to the limited items listed in Schedule 1. However The Agency Workers Regulations (Northern Ireland) 2011 implement almost identical provisions to those in force in the rest of the UK.

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.

All agency workers are entitled to the same pay as a permanent employee of the hirer after twelve weeks in the same role with the same hirer, including those agency workers who are on a contract sometimes called a 'Swedish derogation contract' (referring to a clause in the Regulations). The Swedish derogation was abolished under the Agency Workers Amendment Regulations 2019[5]. From 6 April 2020, there has no longer been any exemption from equal treatment provisions on pay when an agency instead offers an agency worker a permanent contract of employment and pays them between assignments.

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, adoption and shared parental pay
- company pension schemes
- redundancy pay
- sick pay
- guarantee payments
- season ticket loans

[5] Whilst the Swedish derogation was abolished in England, Wales and Scotland, Regulation 10 of the Agency Workers Regulations (Northern Ireland) 2011 still provides for a derogation from equal treatment for agency workers in relation to pay where they have a permanent contract of employment with a temporary work agency.

- paid time off for trade union duties.

UNISON case study – suspension on pay

UNISON was consulted on a proposed regional School's Disciplinary Policy. It stated that the policy did not apply to:

- Staff employed directly by the Local Authority
- Staff employed by an employment agency
- Staff whose contract of employment is held by another body, i.e. is shared with another school
- Staff engaged under a contract to provide services.

Therefore the trade union was concerned that an agency worker (a supply teacher in this case) would not receive any payment should they be suspended from work.

The legal advice was that it could depend on the status of the agency worker, on whether they were an employee or a worker. Also, the right to pay is usually an express term of the contract, rather than an implied term of trust and confidence.

Commonly, agency staff are employed as 'workers' and therefore do not enjoy the same statutory rights as an employee. Their relationship is often governed by a 'contract for services'. The remuneration clause within this contract will often provide that payment is dependent on submitting authorised time sheets. If the individual has been suspended, it's unlikely they will be able to do so.

Also, the contract is likely to provide that the worker is not entitled to receive payment for time not spent working on any given assignment, for example because of holidays, illness or absence for any other reason. Even if the assignment continued for more than 12 weeks, it is unlikely that it will extend to suspension pay, particularly if there is an express clause similar to the one described.

A contract clause that expressly provides for the agency to suspend agency workers without pay while an investigation takes place is likely to be common.

Alternatively, should the status of the agency worker be an 'employee' then it might be possible to argue that they are entitled to receive pay whilst suspended. However, this would still be subject to the express terms of the contract of employment.

Further investigations showed that in the particular circumstances, although the agency worker's contract stated that they were self-employed, in actuality their status was more likely to be as a 'worker'. However, their contract did explicitly include a clause: "Subject to any statutory entitlement under the relevant legislation the Temporary Worker is not entitled to receive payment under the Agreement for time not spent actually working on Assignment whether in respect of travelling to the Client's premises, lunch breaks, other rest breaks, holidays, illness or for any other reason, unless otherwise agreed." Therefore, the worker in this particular case was unable to claim they should be paid whilst suspended during an investigation.

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.

More information

'Agency Workers Regulations 2010: guidance for recruiters' from the UK government www.gov.uk/government/publications/agency-workers-regulations-2010-guidance-for-recruiters

'Agency Workers Regulations NI guidance' www.economy-ni.gov.uk/publications/agency-workers-regulations-ni-guidance

Bargaining for improved rights

Whilst the Regulations have provided a statutory minimum requirement for the equal treatment of agency workers, they are still amongst the most low-paid.

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."

Right to request more predictable and stable work

UNISON reps and branches should be aware that the **Workers (Predictable Terms and Conditions) Act 2023** received royal assent.

When enacted, (expected in **September 2024**) it will give people in atypical work such as working under zero hours contracts or agency workers, **the right to request a more predictable working pattern.**

Agency workers who have had a contract with the agency at some point in the month before the 26 weeks leading up to the day of the request can make their request to the agency. Agency workers who have worked in the same role with the same hirer for 12 continuous weeks within the 26 weeks leading up to the day of the request can make their request to the hirer. Their working pattern refers to the number of hours or the days and times the worker works under an assignment with a hirer, or the length of their assignment with a hirer.

The procedure for making a request will broadly follow the same pattern as making flexible working requests in that requests must be made in writing and may be refused.

Although employers must deal with the request in a ‘reasonable manner’, they will be able to refuse a request based on one of six statutory grounds: additional cost, ability to meet customer demand, impact on recruitment, impact on other areas of the business, insufficiency of work during the proposed periods, and planned structural changes.

A worker will be able to make 2 statutory requests within a 12-month period and it must be dealt with by the employer within one month.

In response to this new legislation, Acas has prepared a draft statutory Code of Practice on handling requests for a predictable working pattern. Following a public consultation, at the time of writing they are considering responses.

In addition to a new statutory Code, Acas will produce new non-statutory guidance which will provide more detailed guidance on the principles set out in the Code.

Agency workers and industrial action

The ban on using agency workers to cover official industrial action was repealed in England, Wales and Scotland under the Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2022 (SI 2022/852). (The ban has not been repealed in Northern Ireland.)

However, the amendment to the Conduct Regulations 2003 was challenged in the High Court. The High Court’s decision was that the amendment to lift the ban on the use of temporary workers to cover strike action, was unlawful and should be quashed with effect from 10 August 2023. The Court found that the 2022 Regulations were unlawful because the UK government had failed to carry out the required consultation before implementing them.

The government has since undertaken a public consultation to “repeal regulation 7 of the Conduct of Employment Agencies and Employment Businesses Regulations 2003 (SI 2003/3319) which prevents employment businesses supplying agency workers to cover the duties normally performed by a worker who is taking part in a strike or other industrial action". Responses are currently being considered by the government.

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/guide-to-using-the-freedom-of-information-act/

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[6], 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.

More information

UNISON's model equality impact assessment flowchart
www.unison.org.uk/unison-eia-guidance-and-flowchart-jan-2022/

[6] In Northern Ireland the relevant legislation includes: the Disability Discrimination Act (DDA) 1995 and subsequent amendments and supplementary laws, Employment Equality (Age) Regulations (NI) 2006 and subsequent amendments, Equal Pay Act (NI) 1970, Sex Discrimination (NI) Order 1976 and subsequent amendments, Maternity and Parental Leave etc. Regulations (NI) 1999, Race Relations (NI) Order 1997 and subsequent amendment, Fair Employment & Treatment (NI) Order 1998 and subsequent supplementary laws, Employment Equality (Sexual Orientation) Regulations (NI) 2003, Equality Act (Sexual Orientation) Regulations (NI) 2006 and subsequent amendments, and under Section 75, 76 and Schedule 9 of the Northern Ireland Act 1998.

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 additional 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 really 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.

As from 6 April 2021, if the end client is a public sector authority or medium or large-sized private sector client (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)

it's their responsibility for deciding on the worker's employment status and if the rules apply.

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.

The private sector includes community and voluntary sector organisations.

Only if the end client organisation in the private sector is small will it be the intermediary's responsibility 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
- statutory parental bereavement pay and 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