Introduction

Zero hours contracts (ZHCs) have been a hot media topic since about 2012, and indeed many recent Labour Force Surveys have shown a large rise in the use of ZHCs across the UK - although in 2019 this trend looks to be slowing, with an estimated 844,000 people employed on zero hours contracts in their main job, 57,000 fewer than in 2018.

While some, such as the ONS, claim the rise has been partly due to an increased awareness of the zero hours contract, others, like the CIPD, claim the increase can be put down to a natural, long-term trend moving towards more flexible working patterns.

In fact, casual contractual arrangements, like these, have been utilised by the hospitality, care, and retail industries for many years. For these sectors in particular ZHCs can offer employers an effective way to manage fluctuating demands, without the need to provide regular or minimum hours.

Yet these contracts are highly controversial - both the TUC and Labour Party have called for a ban on ZHCs. Indeed, people on zero hours contracts are more likely to work part-time, they’re also more likely to be young, female, or in full-time education. Is this just because they, like their employers, need flexibility? Or, is that flexibility actually one-sided, as the 2017 Taylor Review suggests?

So, with more awareness and an increasing demand for real flexibility from both employers and workers, this guide aims to define what a zero hours contract really is. We will highlight key legal considerations and upcoming changes being implemented through the Good Work Plan, the pros and cons of zero-hours contracts, and the alternatives.

Definition of a zero hours contract

‘Zero hours contract’ isn’t a legal definition in itself, but the government uses this term to mean a casual contract where no work is guaranteed.

This usually means:
- Zero hours staff are on-call to work when employers need them
- Employers do not have to give zero hours staff work
- Zero hours workers do not have to do work when asked

ZHCs can give staff ‘worker’ or ‘employee’ status, and this seems to be where some confusion lies. While a ‘worker’ has less rights than an ‘employee’, they still have the same employment rights as regular workers. This means zero hours workers are entitled to:
- Annual leave
- The National Minimum Wage and National Living Wage
- Pay for work-related travel

However breaks in their contracts, may affect rights that accrue over time.

TIP: The ACAS website has some useful guidance for employers and workers.
Legal changes

In 2016 the government began an independent review of modern working practices in the UK, led by Matthew Taylor, chief executive of the Royal Society of Arts. Published in 2017 the Taylor Review made 53 recommendations focused largely on protecting the rights of those working in the gig economy. In 2018 the Department for Business, Energy and Industrial Strategy (BEIS) published its response to the Taylor Review, the Good Work Plan, which aims: “[T]o ensure that workers can access fair and decent work, that both employers and workers have the clarity they need to understand their employment relationships, and that the enforcement system is fair and fit for purpose”.

Proposed and actual legal changes which will affect zero hour contracts include:

- The repeal of Regulations 10 and 11 of the Agency Workers Regulations 2010 – The Agency Workers (Amendment) Regulations 2019 have been introduced, to come into force from 6th April 2020. The proposed workplace reforms include a repeal of the so-called ‘Swedish derogation’ contract, which currently means agency workers do not need to receive the same pay and conditions than their permanent counterparts.

- An extension of The Employment Rights Act 1996 – The Employment Rights (Miscellaneous Amendments) Regulations 2019 increased the maximum financial penalty available for aggravated breach of a worker’s employment rights from £5,000 to £20,000.

- Clarification of employment status – The government will “bring forward legislation” that will clarify employment status together with proposals that will align tax and employment rights.

- Extension of continuous service – A break in service for the calculation of continuous service will be four weeks instead of the current one week. The Taylor Report identified that people with atypical working patterns find it hard to establish a continuity of service, thus excluding them from certain rights.

- Changes to holiday pay – The holiday pay reference period will increase from 12 to 52 weeks, which the government says will ensure people in atypical or seasonal roles will get the paid time off they are entitled to. The Employment Rights Act 1996 (Itemised Pay Statement) (Amendment) (No. 2) Order 2018.

- Strengthening The Employment Tribunals Act 1996 – As of 6th April 2019 the Employment Rights (Miscellaneous Amendments) Regulations 2019 increased the maximum financial penalty available for aggravated breach of a worker’s employment rights from £5,000 to £20,000.

- Clarification of employment status – The government will “bring forward legislation” that will clarify employment status together with proposals that will align tax and employment rights.
Legal changes (cont...)

- Key facts document for agency workers – From 6th April 2020, employment businesses are required to issue agency workers with a ‘key information document’. This must include: the type of contract the candidate will be engaged under; pay rate; holiday entitlement; plus deductions; and fees payable. For more information see The Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2019.

- The right to request a more predictable and stable contract – The Good Work Plan states that legislation will be introduced to allow all employees and workers with varying hours and shift patterns (including agency and zero-hours workers) to formally request a more fixed working pattern after 26 weeks of work for the same employer. Workers on ZHCs who have worked for 26 weeks can request a contract that guarantees their hours.

- Extending the remit of the Employment Agencies Standards Inspectorate – The EAS will regulate umbrella companies (a standard UK limited company which is operated by a third party supplier acting as an ‘employer’) in the employment supply chain. The proposals aim to place joint responsibility on end clients and their suppliers to instil good working practices and avoid worker exploitation.

- Introduction of an employer ‘name and shame scheme’ – From 18 December 2018 a naming scheme was introduced so employees can register employers with BEIS who have failed to pay at least £200 of a tribunal award. For more on the naming scheme see the Gov.UK website.

- Ban on deducting staff gratuities – At the time of writing, in 2019, there is no effective date yet announced for this proposed measure. See the Gov.UK website for best practice advice.

The Good Work Plan can be read here: www.gov.uk/government/publications/good-work-plan

Ban on exclusivity clauses

The nature of a ZHC means that an employer does not have to provide a minimum number of hours’ work. But in order to make sure workers were available whenever they needed them some employers have used exclusivity clauses to prevent zero hours staff from seeking or accepting work with other organisations.

However, since May 2015, under the The Small Business, Enterprise and Employment Act, exclusivity clauses in zero hours contracts have been banned and cannot be enforced by the employer – even if there is a clause in a contract to that effect.

At the time Nick Boles, Business Minister, said:

“[B]anning these clauses will give working people the freedom to take other work opportunities and more control over their working hours and income. It brings financial security one step closer for lots of families.”

Furthermore, as of 11 January 2016 ZHC staff have been able to claim compensation at an employment tribunal if they’re punished or dismissed for looking for work elsewhere.

Exploring the pros + cons

Whether part of a natural trend towards more flexible ways of operating or not, ZHCs seem like an ideal solution to increasing company agility and competitiveness. But are they really?

As the Institute of Economic Affairs (IEA) notes: “The growth of these contracts has helped to keep levels of joblessness down at a time when many other European countries with less flexible labour markets have seen staggering levels of unemployment.”

But, says the IEA; “Zero hours contracts are not ideal, and not for everyone. They make little sense for many employers in sectors where workloads are consistent and predictable.”
For employers

In short, zero-hours contracts enable employers to be extremely flexible, and thus:

- Deal with busy periods and seasonal fluctuations - Think Christmas or summer holidays, for example.
- Cover events which require extra staff support - Like a conference, business expo, or wedding.
- Handle an unforeseen event - From a sudden increase in demand to last-minute shift cover.
- Manage long-term staff absences - For example, maternity leave and sick-leave.
- Assess how many staff they really need - Useful for new start-ups or for testing a new service.

Another benefit of the current ZHC for employers is cost, because:

- Only work undertaken is paid for - They only employ the workers they need, when they need them.
- No minimum amount of work has to be guaranteed
- People classed as ‘workers’ are not entitled to certain rights - These include: maternity pay, statutory minimum notice periods, and redundancy payments.

On the downside, staff employed on ZHCs may lack motivation and have little loyalty to the organisation. This means, far from being the practical time-saving, cost effective solution they look to be, zero hours contracts can foster a culture of instability, prompting workers to look elsewhere for more fulfilling and reliable opportunities.

In short, key issues with ZHCs can include:

- Constant recruitment and training - Recruitment and training not only takes time, but according to Glassdoor.co.uk the average employer spends about £3,000 and 27.5 days to hire a new worker.
- Unpredictability - As zero hours workers aren’t usually obliged to accept work, there’s always a risk that no-one will be available for that last-minute shift.
- Lack of control - Employers can’t stop a ZHC recruit from working for another employer - even a competitor! Plus, if they are treated unfairly for doing so ZHC staff have the right to claim unfair dismissal from day one of their contract.
For Staff

One of the attractions of working under a zero hours contract is its flexible nature. Many ZHC staff are looking to work around other commitments, ranging from care to education, to other employment roles.

Indeed a common criticism of permanent full-time roles is their inflexible nature, with some surveys suggesting that ZHC workers are more likely to be happy (65% v 58% according to the CIPD) with their work-life balance than other workers.

In short, zero hours contracts can give people:

- Freedom of choice - Staff have a bigger say over when they work, giving them the ability to fit work around other commitments.
- The potential to gain valuable experience - Workers have the chance to experience an industry or role without the initial commitment.
- The ability to keep working - People who might otherwise drop out of employment, due to care responsibilities or partial retirement, for example, have an opportunity to keep their hand in.

However, problems can arise when staff have little choice other than to take on a ZHC, or when they are used inappropriately. Key issues for staff include:

- Being involuntarily employed on a ZHC - A UK Commission for Employment and Skills survey claims just over 30% of zero hours workers are actually “involuntary”, suggesting there was little alternative employment available.
- Little notice - CIPD research found almost half (40%) of ZHC workers received no notice, or found that a shift was cancelled at the start of an expected shift.
- Financial instability - Financial planning on a zero hours contract can be tough. Plus, mortgages and loans are often out of reach, potentially creating a state of permanent uncertainty.
- Not enough work - At least a quarter of ZHC workers and employees would like more hours according to the ONS.
Worker or Employee?

A key issue for people working under ZHCs is a perceived lack of transparency. A person can be recruited either as a ‘worker’ or an ‘employee’ under a zero hours contract, something both employers and staff need to understand from the outset. With this in mind, it’s best practice to provide a clear and transparent contract covering the following, says the Gov.UK website:

- Employee or worker - With information on relevant employment rights.
- How statutory employment entitlements will be accrued - If appropriate.
- How work will be offered - Backed by an assurance that they are not obliged to accept work every time.
- How the contract will be brought to an end - For example, will the contract end on completion of each work task or with notice given by either party?

So, what is the basic difference between a worker and an employee?

- Zero hours worker - Someone contacted on an ad hoc basis, who may or may not be available to work.
- Zero hours employee - Someone who works at specified times, on the mutual understanding that they will turn up at these times.

Remember ZHC employees receive some rights workers do not, although some of these rights can require a minimum length of service:

- Statutory sick pay
- Time off for emergencies involving dependants
- Statutory maternity or paternity leave and pay
- A minimum notice period
- Statutory redundancy pay
- Protection against unfair dismissal
- The right to request flexible working

However, the ZHC worker will still benefit from the right to receive the National Minimum Wage, paid annual leave, rest breaks and will be protected from discrimination.

On a positive note, while it’s often claimed that zero hours workers are more likely to be classified as workers (with fewer rights) rather than employees, CIPD research found that just 18% of organisations classify ZHC recruits as workers.
One-sided Flexibility

A key published by the Taylor Review stated:

“Zero hours contracts can be a positive part of work-life balance if they offer genuine two-way flexibility...”.

While flexibility can work for the employer, the misuse of such arrangements can foster a culture of one-sided flexibility through unpredictability in working hours, income insecurity, and a reluctance among workers to assert basic employment rights.

While some of these potential issues were highlighted in the pros and cons section above, the case of Sports Direct clearly illustrates why ZHCs have received such poor press in recent years, and why alternative employment options need to form part of a truly flexible employment strategy.

In the case of Gabriel-Abraham v Sports Direct the company had engaged nearly 80% of its team as workers on zero hour contracts or short term hours agency worker agreements. This amounted to around 20,000 people. This, said Steven Turner, Assistant General Secretary of the Unite Union, had created a: “[B]usiness model that has exploitation at its heart.” Temp staff at Sports Direct were punished for taking sick days, and prevented from seeking second jobs by now-banned exclusivity clauses.

So what are the alternatives?
Alternatives

The majority of employees in the hospitality industry work in shifts. This pattern of working provides employers with flexibility, and means they can manage multiple sites using a number of employees, with a variety of skills. But while the industry’s working methods sound flexible in theory there’s increasing pressure on the hospitality sector to offer a different kind of flexibility.

Real flexibility, which benefits both staff and employer, has been found to:

• Widen the pool of talent for businesses
• Aid reduction in workplace stress
• Help increase productivity
• Improve staff retention

Yet only 9% of hospitality employers are looking at introducing more flexibility according to a recent report.

This is an issue for an industry renowned for its high staff turnover - on average around 30% a year - competing for talent in a time of high employment. As CEO mentoring firm Vistage, claims: “Nearly two-thirds (73%) of UK CEOs and business leaders believe organisations that fail to offer flexible working to employees will face a struggle to attract talent.”

Plus, as UK hotel chain Travelodge shows, it can be possible to provide flexible employment without the use of zero hours contracts. At the time of writing, in 2019, Travelodge announced plans to open 100 hotels across the UK. This, the company claims, will create 3,000 new jobs.

Many of these jobs are aimed at parents looking to return to work and students wanting to make money in their spare time - the very people said to benefit from ZHCs - and, yet Travelodge have banned them from their business model.

Travelodge Chief Executive, Peter Gowers, explained: “I want all the people who work at Travelodge on the frontline to feel part of our business…”. Which is perhaps why Travelodge won Best Budget Hotel Brand 2019 and was placed eighth in The Sunday Times Top Track 250 in 2018.

With this in mind, alternative flexible employment options include:

• A part-time permanent contract - An ideal option for regular work occurring for a few hours’ on a weekly basis.

• A fixed term contract - Offered on a full or part time basis, a fixed term contract can be a useful way to cover short term needs (up to 12 months) and can be renewed or extended if required.

• Annualised hours - Simply put, the employee is expected to work a certain number of hours per year, rather than per week, allowing the employer to manage seasonal fluctuations.

• Overtime - If work levels are unpredictable, permanent staff could be offered paid overtime as a way to cover busy periods.

• Agency staff - A good recruitment agency can provide quality short term support with quick turnaround times. The employment relationship is with the agency, not the candidate, although remember agency staff have the same rights to benefits as permanent staff if they work more than 12 weeks consecutively.
Conclusion

As the CIPD have said:
“The evidence shows that where the flexibility associated with atypical working practices works for both the employer and the individual working in this way then it can provide a real ‘win-win’.”

However, zero hours contracts need to be used with care. ZHCs should not be used on a long term or permanent basis unless there is a real justification. And, businesses who run their core business with zero hours staff run the risk of exploiting staff and missing out on real talent.

Ultimately what is seen by some as an employment option offering flexibility, can be unpredictable and disruptive to others. While, the high numbers of ZHCs in industries like hospitality suggest that workers are not always choosing to work this way and highlight a need for employers to frequently review their use of such contracts.

Further Resources

CIPD members can find information on zero hours contracts here: https://www.cipd.co.uk/knowledge/fundamentals/emp-law/terms-conditions/zero-hours-factsheet

ACAS offers guidance on zero hours contracts to both employers and employees here: https://www.acas.org.uk/index.aspx?articleid=4468


The Good Work Plan can be read here: https://www.gov.uk/government/publications/good-work-plan

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