



## BRIEFING PAPER

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# Zero-hours contracts

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## Summary

This note discusses zero-hours contracts: a type of contract used by employers whereby workers have no guaranteed hours and agree to be potentially available for work. They are used increasingly by companies seeking labour flexibility and by workers seeking flexibility around their other commitments.

Opinion on zero-hours contracts has been mixed. Employee organisations tend to argue that the contracts result in financial insecurity for workers who lack key employment rights; employer organisations stress their utility when seeking to meet fluctuating demand and argue that they play a vital role in keeping people in employment.

Prior to the 2015 General Election, the Coalition Government and the Opposition proposed measures to address concerns about the use of zero-hours contracts. Notably, [section 153](#) of the *Small Business, Enterprise and Employment Act 2015* and supporting regulations seek to prevent the use of “exclusivity clauses” in zero-hours contracts (i.e. prohibit a contractual requirement for a worker to work exclusively for one employer irrespective of the hours offered).

# 1. Introduction

The expression "zero-hours contract" is a colloquial term for a contract of service under which the worker is not guaranteed work and is paid only for work carried out. It generally leads to "a form of working where the worker is not guaranteed any work but has to be available as and when the employer needs them".<sup>1</sup> The Advisory, Conciliation and Arbitration Service has discussed zero-hours contracts in the following terms:

Increasingly, many companies in the retail and hospitality industries are taking on staff on 'zero-hours' contracts - that is, where people agree to be available for work as and when required, but have no guaranteed hours or times of work. Zero-hours contracts effectively provide employers with a pool of people who are 'on-call' and can be used when the need arises.

Generally, as an employer, you are not obliged to offer work to workers on zero-hours contracts - but nor are they obliged to accept any work you offer. It's important to be aware of the provisions of the National Minimum Wage Regulations, which state that workers on 'stand-by time', 'on-call time' and 'downtime' must still be paid the National Minimum Wage if they are at their place of work and required to be there. Similarly, such time is likely to count as 'working time' under the Working Time Regulations if the worker is required to be on-call at the place of work. This means that it's against the law to ask employees to 'clock off' during quiet periods but still remain on the premises.

Zero-hours contracts may suit some people who want occasional earnings and are able to be entirely flexible about when they work. However, the unpredictable nature of working times means that they won't be for everyone.<sup>2</sup>

The perceived increase in zero-hours contracts has prompted expressions of concern both inside and outside of Parliament, although many support their use.

The following summarises recent data about the prevalence of zero-hours contracts, the legal issues that surround these contracts and the policy response to their use.

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<sup>1</sup> "Close to the core: zero hours working surveyed", *Flexible Working*, January 1997

<sup>2</sup> [The rise of the 'zero-hours' contract](#), Acas website (accessed 16 January 2013)

## 2. The prevalence of zero-hours contracts

All figures in this section are estimates from surveys and are therefore subject to sampling error and a degree of uncertainty.

### 2.1 Number of contracts: estimates from ONS business survey

For what are colloquially called a 'zero-hours contracts' the Office for National Statistics (ONS) uses the more precise definition of "employee contracts that do not guarantee a minimum number of hours".

ONS estimates there were around **1.7 million** zero-hours **contracts** in November 2016, based on its latest survey of UK businesses. This was equivalent to approximately **6%** of all employment contracts at the time.<sup>3</sup>

The table below shows the estimates from the ONS business survey over time. This shows that while the number of zero-hour contracts has remained relatively stable the percentage of businesses using them has reduced. This would indicate that a smaller number of business are more heavily using zero-hour contracts.

#### Zero-hour contracts, ONS business survey estimates

	Number of zero-hour contracts (millions)	% of all contracts that are zero-hour	% of businesses making some use of zero-hour contracts
2014-Jan	1.4	5	13
2014-Aug	1.8	6	11
2015-Jan	1.5	6	11
2015-May	2.1	7	11
2015-Nov	1.7	6	10
2016-May	1.7	5	8
2016-Nov	1.7	6	7

**Source:** ONS, Contracts that do not guarantee a minimum number of hours: May 2017

#### Zero-hours contracts that do not provide work

This 1.7 million estimate excluded contracts with no guaranteed hours which did **not** provide work in the fortnight covered by the survey. These contracts (of which ONS estimates there were around a **1.9 million** in January 2015<sup>4</sup>) are harder to analyse, as they may include people who have several contracts with different employers, people who remain on an employer's records despite having changed job, people who are sick or on leave or who do not want to work, as well as

<sup>3</sup> ONS, [Contracts that do not guarantee a minimum number of hours: May 2017](#), 11 May 2017

<sup>4</sup> ONS, [Contracts that do not guarantee a minimum number of hours: 2015](#), 2 September 2015

employees who would have liked to work but were not offered any hours.

## 2.2 Number of people in employment: estimates from the Labour Force Survey

ONS also collects statistics on zero-hours contracts as part of the Labour Force Survey (LFS), which asks workers (rather than employers) about their employment arrangements.<sup>5</sup> The people who are identified by ONS as being on a zero-hours contract are those in employment who are aware that their contract allows for them to be offered no hours.

Estimates for October- December 2016 suggested that **905,000** people were on zero-hours contracts – representing **2.8%** of all people in employment.<sup>6</sup> This was **13%** higher – or **101,000** more people – than the same period a year before.

### How significant is this increase?

Estimates from the Labour Force Survey shows that there were fewer people on a zero-hour contract for less than 12 months in October-December 2016 than the same period a year earlier. This suggests that people may have failed to report or acknowledge that they were in a zero-hours contract in earlier surveys. As a result, we cannot know for sure if the increase in the number of people on a zero-hour contract was due to more awareness of zero-hours contracts as a result of media coverage or to an actual change in people's circumstances.

### Issues with workers surveys

Some individuals may be unaware of their contractual arrangements or may not recognise the term 'zero-hours contract', in which case they will be excluded by ONS from the figures - this explains part of the difference with the official estimate based on the survey of businesses (see above).<sup>7</sup> Unlike the business survey, the LFS also counts people rather than contracts (one person may have contracts with several different employers). ONS provides further explanation as to why the two estimates differ<sup>8</sup>:

Employers and employees will have differing perceptions and awareness about the types of employment contracts used;

The employer survey will count employee contracts, not people, and will provide higher estimates (as one person can have more than one contract);

<sup>5</sup> ONS revised previously published estimates of numbers of people on zero-hours contracts in July 2013, following technical adjustments to the data. The statistics now show a higher number of people on zero-hours contracts. Further details of the revisions are published in an ONS briefing note, [Estimating zero hour contracts from the Labour Force Survey](#).

<sup>6</sup> ONS, [Contracts that do not guarantee a minimum number of hours: March 2016, 15 March 2017](#), p2

<sup>7</sup> Limitations of the LFS figures are discussed further in: Ian Brinkley, [Zero hours contracts and the flexible labour market](#) and [How many on zero hours contracts? Nobody knows](#), Work Foundation website

<sup>8</sup> There was also a change to the LFS questionnaire between 2012 and 2013 but ONS reports "this has not had a significant impact on the 583,000 estimate. The impact is likely to be less than 30,000."

## 7 Zero-hours contracts

Employers in the business survey may report multiple contracts for each job;

The questions asked of respondents differed slightly, with the business survey asking about contracts not guaranteeing any hours, while the LFS question uses the term “zero-hours contracts”;

The LFS includes all people in employment (including the self-employed) while the business survey only includes employees.<sup>9</sup>

### 2.3 Prevalence by business size and industry

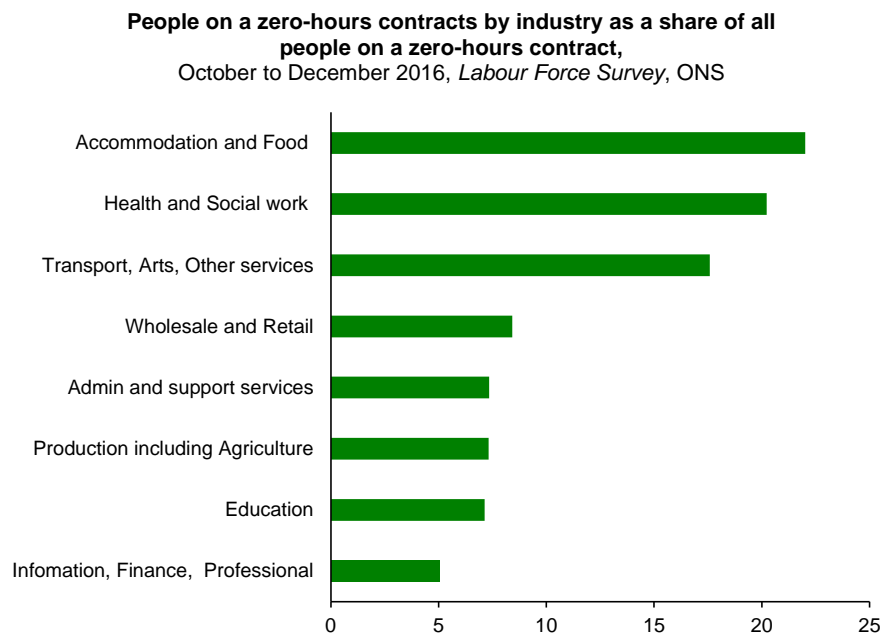
Around 7% of employers had at least some employees on zero-hours contracts in November 2016, as estimated from the ONS business survey.<sup>10</sup>

#### Business size

Zero-hours contracts were more common among larger employers as **23%** of employers with at least 250 employees made some use of zero-hours contracts compared with **5%** of employers with fewer than 10 employees.<sup>11</sup>

#### As a share of all people

According to ONS data, in October- December 2016 **22%** of all people on a zero-hour contracts worked in the accommodation and food services industry. In second position, the Health and Social Work had **20%** of all people working on a zero-hours contract. The graph below shows what the distribution is like in other industries.



Notes: Data excludes construction and public administration as estimates were too unreliable.

<sup>9</sup> ONS, [Analysis of Employee Contracts that do not Guarantee a Minimum Number of Hours](#), 30 April 2014

<sup>10</sup> See page 5 for details.

<sup>11</sup> ONS, [Contracts that do not guarantee a minimum number of hours: May 2017](#), 11 May 2017

## As a share of employers

The concentration of workers on zero-hours contracts in specific industries does not necessarily predict which employers most heavily use these contracts. ONS data found that employers in Education were the biggest users of these contracts (around **18%** of them), closely followed by employers in Accommodation and Food (about **12%** of employers).<sup>12</sup>

However the 'education' classification includes large Local Authorities whose main activity is education but may be utilising zero-hour contracts in other parts of their operations. Therefore this might not accurately reflect the use of zero-hour contracts in the education industry.

## As a share of industry workforce

Finally, the Labour Force Survey revealed that Accommodation and Food, and Health and Social Work were the industries which had the biggest share of their workforce working on a zero-hours contract. In October to December 2016, around **11%** of the total Accommodation and Food workforce worked on a zero-hours contract.<sup>13</sup>

## 2.4 Characteristics of people employed on zero-hours contracts<sup>14</sup>

The Labour Force Survey also provides additional information about the type of people who report that their main employment is on a zero-hours contract.

**52%** of people on a zero-hours contract were women in October-December 2016. These **471,000** women represented around **3%** of all women in employment in that quarter.

**18%** of people on a zero-hours contract were in full-time education compared with around **3%** of other people in employment.

People on a zero-hours contract were more likely to be at the youngest end of the age range. **33%** of all people reporting to be on a zero-hours contract in October to December 2016 were aged 16-24.

<sup>12</sup> ONS, [Contracts that do not guarantee a minimum number of hours: May 2017](#), 11 May 2017

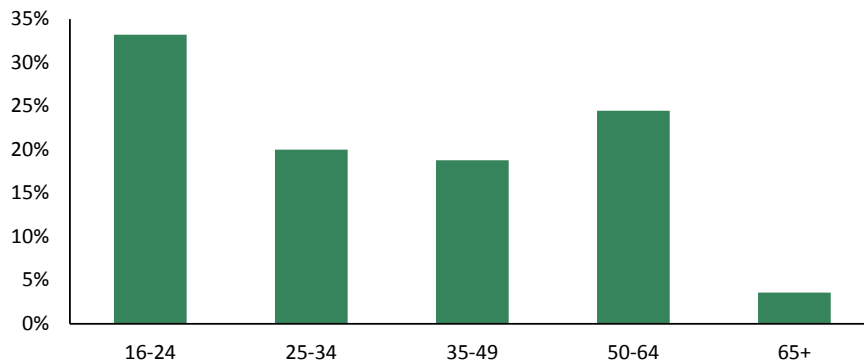
<sup>13</sup> Ibid. p9

<sup>14</sup> All data in this section are from ONS, [Contracts that do not guarantee a minimum number of hours: March 2016](#), 15 March 2017



**People on a zero-hours contract by age as a share of all people on a zero-hours contract,**

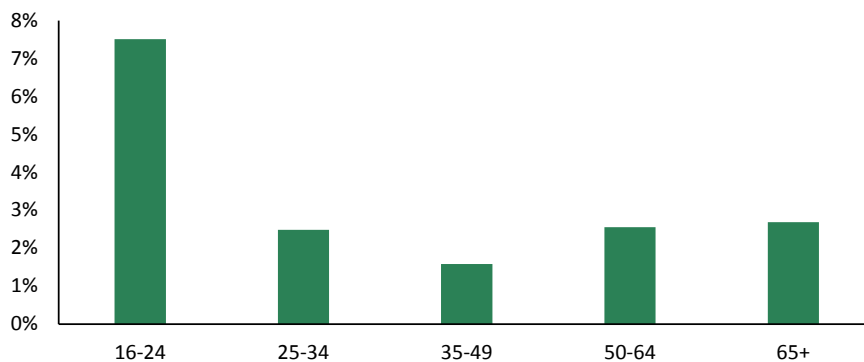
October to December 2016, *Labour Force Survey*, ONS



Likewise, zero-hours contracts made up a bigger share of the young workforce: **8%** of all 16-24 year-olds in employment were working on these contracts in December-October 2016 as opposed to around **2%** of those aged 35 and older.

**People on a zero-hours contract as a share of their own age group,**

October to December 2016, *Labour Force Survey*, ONS



**Number of hours worked**

**65%** of people reporting that they were on a zero-hours contract were working part-time. In contrast 26% of people not on a zero-hour contract were working part-time.

Between October- December 2016 people reporting to be on a zero hour contract worked an average of **22 hours** of actual weekly hours. This compares to 25.2 hours for all people in employment.

**Around 19%** of people on a zero-hours contract reported that they wanted more hours in their current job in October-December 2016. A further **9%** wanted a replacement job with longer hours. This compares to around 7% who in employment not on a zero-hour contract who would like more hours in their current and around 1% who would like a replacement job with longer hours.

## 3. The legal implications of zero-hours contracts

### 3.1 Zero-hours contracts and employment status

The use of zero-hours contracts raises a number of legal issues which affect both their utility to the employer as a contract for flexible labour and the worker in respect of their employment rights. Chief among these is the question of employment status; i.e. whether or not those working under such contracts are “employees”, “workers” or self-employed.<sup>15</sup> The distinction between these concepts is complex although the principle point is that “worker” is a broad status affording core employment rights; “employee” is a narrower, overlapping status (all employees are also workers) affording additional rights, such as the right not to be unfairly dismissed; and a self-employed person is someone who is in business on their own account. The case law indicates that if the day-to-day reality of the work suggests a relationship of employment, the contract will be one of employment, and the person working under it will be classed as an employee.

A number of factors determine whether or not a contract is one of employment, although key elements of a contract of employment are:

- it must impose an obligation on a person to provide work personally;
- there must be mutuality of obligation between employer and employee;
- the worker must expressly or impliedly agree to be subject to the control of the person for whom he works to a ‘sufficient’ degree;
- the other provisions of the contract must be consistent with it being a contract of service.<sup>16</sup>

The case law on the use of zero-hours contracts has focused on the second issue: mutuality of obligation. Under contracts of employment the employee is normally obliged to work and the employer is obliged to provide work and pay for it. Such obligations are not readily apparent features of zero-hours contracts. However, mutuality may in certain cases be inferred. The circumstances in which it will be considered by the Employment Appeal Tribunal (EAT) in [Pulse Healthcare v Carewatch Care Services Ltd & Ors \[2012\]](#).<sup>17</sup> The focus in that case was the reality of the agreement between the company and the worker, rather than an exclusive concern with the written terms of the contract.

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<sup>15</sup> For a basic overview of the distinction, see the GOV.UK page on employment status, [here](#).

<sup>16</sup> See: *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 Q.B. 497; *Carmichael v National Power plc* [2000] IRLR 43

<sup>17</sup> UKEAT 0123\_12\_0608

## The reality of the agreement

In *Pulse Healthcare* the EAT was required to decide whether the claimants were employees, within the meaning of [section 230](#) of the *Employment Rights Act 1996*, despite being employed under a contract entitled “Zero-hours Contract Agreement”. The EAT concluded that the claimants were employees, and that there was a mutuality of obligation, notwithstanding the fact that the written terms of the contract suggested otherwise. As noted by the EAT, the proper approach to interpreting labour contracts is that set out by Mr Justice Elias in [Consistent Group Ltd v Kalwak](#) [2007] IRLR 560:

The concern to which tribunals must be alive is that armies of lawyers will simply place substitution clauses, or clauses denying any obligation to accept or provide work in employment contracts, as a matter of form, even where such terms do not begin to reflect the real relationship. Peter Gibson LJ was alive to the problem. He said this (p 697):

‘Of course, it is important that the industrial tribunal should be alert in this area of the law to look at the reality of any obligations. If the obligation is a sham, it will want to say so.’

In other words, if the reality of the situation is that no-one seriously expects that a worker will seek to provide a substitute, or refuse the work offered, the fact that the contract expressly provides for these unrealistic possibilities will not alter the true nature of the relationship.<sup>18</sup>

Thus, when deciding whether a zero-hours contract constitutes a contract of employment, conferring employee status, the wording of the contract will not be determinative of whether there is, in practice, a mutuality of obligation. The tribunal will look closely at the reality of the agreement. If the reality is that there is a pattern of regular work which is regularly accepted, the tribunal may deem the contract to be one of employment.<sup>19</sup> This is illustrated by the decision at first instance (i.e. pre-appeal) of the Employment Tribunal in *Pulse Healthcare*:

Most of the factors point to the claimants in this case being employees under section 230(1). The only issue pursued on behalf of the second respondent is that of a lack of mutuality of obligation. I am satisfied there was sufficient mutuality of obligation for the claimants to be employees. Once the rota was prepared they were required to work and the employer was required to provide that work. They were subject to control and discipline; they had to provide personal services; they were provided with uniforms and equipment; they were paid on a PAYE basis; they had all worked regularly over a number of years and had only taken time off for holidays, sickness and when suspended for which they received payment; it was not established that there were gaps in the continuity of employment. The claimants required regular work and this was provided by the first respondent.

I am satisfied that the documents did not reflect the true agreement between the parties and that four essential contractual

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<sup>18</sup> Para 57-58; see also: [Autoclenz v Belcher](#) [2011] UKSC 41, para 25; [Pulse Healthcare v Carewatch Care Services Ltd & Ors](#) [2012], para 35

<sup>19</sup> See also: [St Ives Plymouth Ltd. v Haggerty](#) [2008] All ER (D) 317; [Wilson v Circular Distributors Ltd](#) [2005] EATS/0043/05

terms were agreed: (1) that the claimants would perform the services for the first respondent (2) that the claimants would be paid for that work; (3) that the claimants were obliged to carry out the work offered to them and the first respondent undertook to offer work and (4) that the claimants must personally do the work and could not provide a substitute to do so. Those were the true terms of the contract.<sup>20</sup>

The decision of the EAT indicates that where a worker is employed on a zero-hours contract and provided with regular work which is regularly accepted, there exists a possibility that the contract will be one of employment.

The EAT considered the employment status of zero-hours workers again in an unreported decision from 2014, in the case of *Saha v Viewpoint Field Services Ltd* UKEAT/01116/13. In *Saha* the EAT concluded that the claimant (a telephone interviewer) was not an employee due a lack of mutuality. Material to that decision was the fact the claimant lacked a set working pattern and was free to decline shifts. When looked at together, *Pulse Healthcare* and *Shah* show that the factual working pattern of a zero-hours worker will play a significant part in determining their employment status.

### **Continuity of service**

Assuming that a zero-hours worker is able to establish employee status, they may yet face further difficulty. Many employment rights take effect only after a period of qualifying service. For example, the right not to be unfairly dismissed is only available to employees with two years' qualifying service. The sporadic nature of zero-hours work can lead to a break in the zero-hours employee's continuity of service (if, say, he is not provided with work for a week), preventing him or her from accumulating sufficient qualifying service to acquire these rights.

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<sup>20</sup> *Pulse Healthcare v Carewatch Care Services Ltd & Ors* [2012], para 22

## 4. Zero-hours contracts and jobseeker benefits

Under [Universal Credit](#), which replaces a number of previous benefits, including income-based JSA, refusal of zero-hours work could lead to a sanction and a loss of benefits. In 2014, in reply to a letter from Sheila Gilmore MP, Esther McVey, then Minister for Employment, [stated](#) sanctions could be imposed for failing to accept zero-hours work:

We believe that jobseekers on any benefit should do all they reasonable can to get into paid employment. This includes applying for suitable jobs and accepting any reasonable offer of employment. As part of this Jobcentre Plus coaches can require claimants to apply for particular vacancies that they consider to suitable. If someone fails to meet such a requirement – without good reason – then a sanction can be imposed.

We do not consider zero hours contracts to be – by default – unsuitable jobs. Indeed, the flexibility they offer can be valuable for some individuals. Within jobseekers Allowance, however, our coaches do not currently require claimants to apply for jobs with zero hours contracts. The structure of Jobseeker's Allowance (JSA) and supporting processes could make the interaction of zero hour contracts and the benefit system difficult to manage – short periods of work could end a JSA claim, requiring new claims to be made in periods where earning fall.

Universal Credit, of course, is payable when people are in work as well as out of work so the need to reclaim when earning fluctuate is removed. In addition Universal Credit is designed to be response to variations in earnings so each monthly payment will reflect the amount actually earned, even if this includes some weeks when no work was done. So in Universal Credit our coaches can mandate zero hours contracts.<sup>21</sup>

According to the *Guardian*, a spokesperson for the Department for Work and Pensions told the newspaper “jobseekers would not be required to take a zero-hours contract that tied them in exclusively to work for a single employer”.<sup>22</sup> It appears that the Department for Work and Pensions does not know how many people on Universal Credit work under zero-hours contracts:

### [Universal Credit: Zero Hours Contracts: Written question - 21673](#)

**Q**

Asked by [Frank Field](#)

Asked on: 08 January 2016

#### **Department for Work and Pensions Universal Credit: Zero Hours Contracts**

To ask the Secretary of State for Work and Pensions, what information his Department holds on the number of universal credit claimants who are employed on a zero-hours contract.

<sup>21</sup> [Letter from Esther McVey MP to Sheila Gilmore MP, dated 1 March 2014.](#)

<sup>22</sup> [‘Jobseekers being forced into zero-hours roles’](#), the *Guardian*, 5 May 2014

**A**

Answered by: [Priti Patel](#)

Answered on: 13 January 2016

Universal Credit is paid on the basis of earnings. Information on types of contracts that claimants are on is not routinely collected.

## 5. Coalition Government review of zero-hours contracts

On 30 May 2013 the Chartered Institute of Personnel Development reported that the then Business Secretary, Vince Cable, had said the Coalition Government was reviewing the use of zero-hours contracts.<sup>23</sup>

On 1 July 2013 Jo Swinson, then Minister for Employment Relations, responded to questions from Chuka Umunna, then Shadow Business Secretary, about the review:

**Mr Umunna:** To ask the Secretary of State for Business, Innovation and Skills by what date he expects his Department's investigation of zero-hours contracts to be complete; and if he will publish any subsequent report.

**Jo Swinson:** Officials are currently speaking informally to a variety of stakeholders, including trade unions and industry bodies representing sectors where zero-hours contracts to gather information. They will report their findings to me after summer recess.

We will consider next steps when we better understand the issues for both businesses and people engaged on these contracts.

**Mr Umunna:** To ask the Secretary of State for Business, Innovation and Skills whether he will issue a call for evidence and initiate a consultation process as part of his Department's investigation into zero-hours contracts; and by what other means organisations and interested parties can submit evidence as part of his Department's investigation.

**Jo Swinson:** There are no plans to issue a call for evidence or consultation at this stage. Officials within the Department for Business, Innovation and Skills (BIS) are currently researching how zero-hours contracts are being used by businesses.

They are currently speaking informally to a variety of stakeholders, including industry bodies representing sectors where they are in use and also trade unions to gather information. If organisations have information they feel is relevant to the work that is currently under way, they should contact the Labour Market Directorate in BIS.<sup>24</sup>

On 9 July 2013 Ms Swinson said:

We will work with other Departments. There is no call for evidence at this stage, but we do not rule it out for the future. Research shows that doing our homework before issuing a call for evidence is useful. I welcome the interest the debate has sparked, and I am sure that we will return to the topic when we have the further information from the BIS fact-finding review.<sup>25</sup>

In an interview with the *Guardian* Vince Cable said that the Government may seek to legislate on zero-hours contracts, although he ruled out a ban. He highlighted as a specific problem situations

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<sup>23</sup> [Government 'reviewing zero hours contracts,' says Business Secretary](#), CIPD website, 30 May 2013 (accessed 3 June 2013)

<sup>24</sup> [HC Deb 1 July 2013 c512W-513W](#)

<sup>25</sup> [HC Deb 9 July 2013 c56WH](#)

... where there is an exclusive relationship with a particular employer who actually cannot provide stable employment, or indeed any employment, that stops the worker going to another company.<sup>26</sup>

An August 2013 paper by a research organisation, The Work Foundation, stated that the review was welcome although it argued for “a more systematic approach – perhaps along the lines of the Coalition’s Fair Pay Review”.<sup>27</sup>

A Department for Business, Innovation and Skills press statement issued on 16 September 2013 described the outcome of the review:

The review conducted over the summer highlighted 4 key areas of concern:

**Exclusivity:** This is where someone agrees to a contract that does not guarantee them a minimum number of hours and is stopped from working for another company. This is described as an ‘exclusivity clause’. In certain cases this can mean that people were stopped from looking for work elsewhere particularly when they needed more hours to bump up their earnings. Feedback from employers themselves suggests awareness that there can be abuses that limit flexibility.

**Transparency:** There is no clear or legal definition of a ZHC and it can cover a number of working arrangements. This can lead to confusion and a lack of understanding on contract details and what it means for the individual. In some cases people were not aware of the fact that there was a possibility that they might not be offered work on a regular basis.

**Uncertainty of earnings:** The amount of money a person on a ZHC can expect to earn is dependent on the number of hours worked. This means that people on a ZHC find it hard to calculate earnings and it can lead to concerns about how benefits might be affected.

**Balance of power in the employment relationship:** Our review found that people perceived they would be penalised if they did not take hours offered even if the hours were offered at very short notice and did not suit. This meant it could lead to a climate of fear that a person is less likely to be offered regular work in future if they failed to accept the hours on offer.<sup>28</sup>

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<sup>26</sup> [Zero-hours contracts could be subject to new legislation, says Vince Cable](#), *The Guardian* [online], 5 August 2013 (accessed 3 September 2013)

<sup>27</sup> Ian Brinkley, [Flexibility or insecurity? Exploring the rise in zero hours contracts](#), August 2013, p.27; see also [Government zero hours review 'inadequate'](#), *The Telegraph* [online], 28 August 2013

<sup>28</sup> [Cable announces plans to boost fairness for workers](#), BIS press statement, 16 September 2013 (accessed 18 September 2013)



## 6. Coalition Government consultations

On 16 September 2013 Vince Cable announced that he would launch a consultation on zero-hours contracts. He said:

I have been examining closely the issue of zero-hour contracts over the last few months. We've been speaking to businesses, trade unions and other groups both about their downsides and their benefits.

It is clear that they are much more widely used than we had previously thought. It is also clear that there are abuses in the system, especially around the issue of exclusivity which some employers are demanding from workers on these contracts.

Today I am announcing that we will proceed to issue a consultation, which will explore how to tackle any abuses, particularly around exclusivity. I am determined to make sure people are paid and treated fairly, in a way that also helps keep people employed in these delicate economic times.<sup>29</sup>

The consultation was launched on 19 December 2013 and ran until 13 March 2014. The [consultation document](#) identified exclusivity clauses as being particularly concerning and sought views on whether it was appropriate to ban these in contracts that provide no guarantee of work.<sup>30</sup>

### 6.1 Consultation outcome: banning exclusivity clauses

On 25 June 2014 the Coalition Government published a [press release](#) detailing the outcome of the consultation, and announcing the Government's intention to ban the use of exclusivity clauses:

Employees on zero hours contracts will have the freedom to find work with more than 1 employer after Business Secretary Vince Cable announced plans to ban exclusivity clauses.

Exclusivity clauses prevent an individual from working for another employer, even when no work is guaranteed. The use of exclusivity clauses in zero hours contracts undermines choice and flexibility for the individuals concerned.

The ban, set to benefit the 125,000 zero hours contract workers estimated to be tied to an exclusivity clause, is part of a bid to clamp down on abuses in the workplace by less scrupulous employers. It will allow workers to look for additional work to boost their income.

Business Secretary Vince Cable said:

Zero hours contracts have a place in today's labour market. They offer valuable flexible working opportunities for students, older people and other people looking to top up their income and find work that suits their personal circumstances.

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<sup>29</sup> Ibid

<sup>30</sup> BIS, [Consultation: Zero hours employment contracts](#), December 2013

But it has become clear that some unscrupulous employers abuse the flexibility that these contracts offer to the detriment of their workers. Today (25 June 2014), we are legislating to clamp down on abuses to ensure people get a fair deal.

Last December (2013), I launched a consultation into this issue. Following overwhelming evidence we are now banning the use of exclusivity in zero hours contracts and committing to increase the availability of information for employees on these contracts. We will also work with unions and business to develop a best practice code of conduct aimed at employers who wish to use zero hours contracts as part of their workforce.

This action follows a government consultation into zero hours contracts which received over 36,000 responses. 83% were in favour of banning exclusivity clauses in zero hours contracts.

The Business Secretary also announced that the government will:

- consult further on how to prevent rogue employers evading the exclusivity ban, for example through offering 1 hour fixed contracts
- work with business representatives and unions to develop a code of practice on the fair use of zero hours contracts by the end of the year (2014)
- work with stakeholders to review existing guidance and improve information available to employees and employers on using these contracts.<sup>31</sup>

## 6.2 Consultation on banning exclusivity clauses

The Coalition Government proposed measures in the *Small Business, Enterprise and Employment Bill* – now an Act (see below) - that would render exclusivity clauses unenforceable.

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<sup>31</sup> [Government crackdown on zero hours contract abusers](#), GOV.UK, 25 June 2014 (accessed 29 June 2014)

## 7. Small Business, Enterprise and Employment Act 2015

The *Small Business, Enterprise and Employment Act 2015* came into force on 26 March 2015. [Section 153](#) came into force on 26 May 2015 and seeks to render unenforceable exclusivity clauses in zero-hours contracts. The section amended the *Employment Rights Act 1996*, inserting a new Part 2A.

Section 27(1) defines “zero hours contract” as

a contract of employment or other worker’s contract under which—

- (a) the undertaking to do or perform work or services is an undertaking to do so conditionally on the employer making work or services available to the worker, and
- (b) there is no certainty that any such work or services will be made available to the worker.

Commentators criticised this definition, pointing out that it might easily be sidestepped by providing a nominal amount of work (e.g. one hour per month).

Section 27A(2) of the 1996 Act as amended contains the ban on exclusivity clauses:

(3) Any provision of a zero hours contract which—

- (a) prohibits the worker from doing work or performing services under another contract or under any other arrangement, or
- (b) prohibits the worker from doing so without the employer’s consent,

is unenforceable against the worker.

Commentators highlighted that the contractual unenforceability of the clause would be meaningless vis-à-vis the worker if the employer was nonetheless free to refrain from providing future work should the worker ignore an exclusivity requirement.

Partly to address the above criticism, the Act created a power to make delegated legislation supporting the prohibition of exclusivity clauses, which the Coalition Government consulted on, but which were not brought into force at the same time as the 2015 Act, as some had expected.

### 7.1 Exclusivity Terms Regulations

The Act created a power enabling a Minister to make regulations that would penalise employers who use exclusivity clauses. The Coalition Government [consulted](#) on how best to go about using this power; the consultation ran between 25 August 2014 and 3 November 2014, and

included a set of draft regulations.<sup>32</sup> Draft regulations were laid before the House of Commons on 19 October 2015, subject to the affirmative resolution procedure, and came into force on 14 December 2015 as the [Exclusivity Terms in Zero Hours Contracts \(Redress\) Regulations 2015 \(SI 2015/2021\)](#).

The regulations create rights for:

- zero-hours workers classed as “employees” not to be unfairly dismissed for failing to comply with an exclusivity requirement;
- zero-hours workers classed as “workers” not to be subjected to any detriment for failing to comply with an exclusivity requirement.

The rights are enforceable against an employer by way of a claim to an employment tribunal. Where a tribunal considers a claim to be well-founded, it may make a declaration to that effect and award compensation, subject to the same limit as that applicable in unfair dismissal claims.<sup>33</sup>

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<sup>32</sup> Zero hours employment contracts: exclusivity clause ban avoidance, GOV.UK (accessed 18 November 2014)

<sup>33</sup> This is a combination of the ‘basic award’ calculated by reference to age and period of service, currently capped at £14,370, and the ‘compensatory award’, designed to reflect the claimant’s loss, subject to a cap of £78,962 or a year’s pay whichever is less. In practice, it is unlikely that compensation ordered would come anywhere near these limits.

## 8. Labour Party proposals

Labour's 2017 general election manifesto committed to:

Ban zero hours contracts – so that every worker gets a guaranteed number of hours each week.<sup>34</sup>

During the 2016 Labour Party conference the leader of the Labour Party, Jeremy Corbyn, said

Without proper employment regulation, there's been an explosion of temporary, insecure jobs nearly one million people on zero hour contracts.

...

we'll ban zero hours contracts<sup>35</sup>

Mr Corbyn also advocated banning zero-hours contracts during a speech earlier in the year, on the 'Labour case to vote remain in the EU':

... if we want to stop insecurity at work and the exploitation of zero hours contracts that are being used to drive down pay and conditions, why don't we do what other European countries have done and simply ban them?

Zero hours contracts are not allowed in Austria, Belgium, Czech Republic, Denmark, France, Germany, Hungary, Italy, Netherlands, Poland and Spain. It seems we're the odd one out. Our politicians now in power are choosing not to tackle exploitation, but we will.<sup>36</sup>

This Full Fact [report](#) has further information on the treatment of zero-hours contracts in other European countries.<sup>37</sup>

### 8.1 Labour Party proposals prior to the 2015 General Election

In a speech to the Trades Union Congress on 10 September 2013 the then Leader of the Opposition, Ed Miliband, stated that a Labour government would make a number of changes to the regulation of zero-hours contracts:

We'll ban zero hours contracts which require workers to work exclusively for one business. We'll stop zero hours contracts which require workers to be on call all day without any guarantee of work. And we'll end zero hours contracts where workers are working regular hours but are denied a regular contract.<sup>38</sup>

On 16 October 2013 there was an Opposition Day debate on a motion calling on the Government to initiate a full consultation and formal call for evidence on the use of zero-hour contracts.<sup>39</sup> Alongside these

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<sup>34</sup> [The Labour Party Manifesto 2017](#), p47

<sup>35</sup> [Jeremy Corbyn, Leader of the Labour Party, speech at Annual Conference in Liverpool 2016](#), Labour Press, 28 September 2016

<sup>36</sup> [Jeremy Corbyn speech on the Labour case to vote remain in the EU in South Yorkshire](#), Labour Party website, 16 June 2016

<sup>37</sup> Zero hours contracts: is the UK "the odd one out"?, Full Fact website, 26 July 2016

<sup>38</sup> [Speech by Ed Miliband to the TUC, 10 September 2013](#), TUC website (accessed 14 October 2013)

<sup>39</sup> [HC Deb 16 October 2013 cc744-797](#)

statements, Mr Miliband asked Norman Pickavance, the former director of human resources at supermarket chain Morrisons, to investigate the possible regulation of zero-hours contracts,<sup>40</sup> and a [consultation](#) into the issue was launched.<sup>41</sup>

## The Pickavance Report

On 25 April 2014, Labour published the Pickavance Report: [Zeroed Out: The place of zero-hours contracts in a fair and productive economy](#).<sup>42</sup>

The report made a number of policy recommendations intended to “prevent certain exploitative practices used by a minority”.<sup>43</sup> The recommendations were:

- Employers should be prevented from requiring zero-hours workers to be available for work:

clauses that require workers on zero-hours contracts to be available for work should be declared by legislation to be unenforceable.... The employer would not be able to demand (either contractually or verbally) that they make themselves available without any guarantee of work.<sup>44</sup>

- A ban of exclusivity clauses:

Workers on zero-hours contracts should be free to work for other employers.... Clauses that require workers on zero-hours contracts to be available for work and prohibit the worker from working for another employer at the time should be declared by legislation to be unenforceable when there is no guarantee of work or pay.<sup>45</sup>

- Zero-hours workers who in practice work regular hours should, after a specified period, have a right to a contract with fixed minimum hours:

after 6 months, workers should have a right to request a contract that is other than zero-hours and which provides a minimum amount of work. Employers would only be able to refuse this request if they are able to demonstrate that their business needs cannot be met by any other form of flexible contract.... after a period of 12 months continuous employment, workers on zero-hours contracts who are working regular hours (e.g. a minimum of 8 hours a week over the reference period) should have the right to be offered a contract that is other than zero-hours and which provides a minimum amount of work. It is proposed that this would happen automatically and should reflect the actual hours that people are working on a regular basis. People working regular hours would only be able to be legally kept on a zero hour contract for more than a year if they formally opted-out of these arrangements. To do so the employer must demonstrate that the employee has

<sup>40</sup> [Ed Miliband to pledge crackdown on zero-hour contracts](#), BBC News website, 9 September 2013 (14 October 2013)

<sup>41</sup> *The Pickavance consultation on the abuse of zero-hours contracts*, 2013

<sup>42</sup> Labour Party, *Zeroed Out: The place of zero-hours contracts in a fair and productive economy: an independent report by Norman Pickavance*, 25 April 2014

<sup>43</sup> *Ibid*, p16

<sup>44</sup> *Ibid*

<sup>45</sup> *Ibid*

received independent advice from a trade union or independent legal adviser....<sup>46</sup>

- Zero-hours workers should have a right to compensation when shifts are cancelled at short notice.

In addition to the above, the report recommended that a zero-hours code of practice should be drawn up – developed by employer and employee representatives and Acas - to provide guidance to employers and employees.<sup>47</sup>

### Labour Party Manifesto 2015

The Labour Party's manifesto for the 2015 General Election included a commitment to "Ban exploitative zero hour contracts so that if you work regular hours you get a regular contract."<sup>48</sup>

## 8.2 Private Members' Bill

On 2 July 2014 the [Zero Hours Contracts Bill](#) - a Private Members' Bill sponsored by Ian Mearns MP - was presented to Parliament through the [ballot procedure](#).<sup>49</sup> The Bill's Second Reading commenced on 21 November 2014; the [debate](#) was adjourned and the Bill failed to progress further.

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<sup>46</sup> Ibid, p17

<sup>47</sup> Page 18

<sup>48</sup> Labour, [Changing Britain Together](#), 2015, p15

<sup>49</sup> Result of the Private Members' Bill ballot: Session 2014-15

## 9. Scottish Affairs Committee report

On 9 April 2014 the House of Commons Scottish Affairs Committee published a report on the use of zero-hours contracts in Scotland: [Zero hours contracts in Scotland: Interim Report](#).<sup>50</sup> The Committee's recommendations are summarised on the [Parliament website](#):

- zero hours contracts must only be used where the employer can objectively justify it;
- the Government must do more to protect workers who wish to challenge unfair, unsafe or unlawful conditions of employment;
- workers should be told from the outset of their employment what type of contract they are on and a written contract setting out the terms and conditions must follow within two months;
- there should be a minimum notice period of work and workers should not be punished for turning down offers of work made within that period;
- where workers arrive for work but find none available then the employer should compensate them for the inconvenience;
- travel time between appointments should be paid and pay for zero hours workers should accurately reflect the number of hours that are worked to fulfil contracted duties;
- an employer-led Code of Practice is unlikely to help workers who are exploited – in fact it may serve to embed a form of employment that in most circumstances is hard to justify;
- if a Code is produced it should only be as a stepping stone to, or following, legislative change aimed at reducing the use of zero hours contracts and ensuring workers receive the income, rights and protections to which they are entitled.<sup>51</sup>

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<sup>50</sup> House of Commons Scottish Affairs Committee, *Zero hours contracts in Scotland: Interim Report, Tenth Report of Session 2013–14*, HC 654, 9 April 2014

<sup>51</sup> [Commons Select Committee - Unscrupulous employers exploiting workers through zero-hours contracts](#), Parliament website (accessed 1 May 2014)



## 10. Comment

Opinion on zero-hours contracts has been mixed. Employee organisations tend to argue that the contracts result in financial insecurity for workers who lack key employment rights,<sup>52</sup> although acknowledge that some staff value the flexibility and opportunity to work a second job;<sup>53</sup> employer organisations stress their utility when seeking to meet fluctuating demand and argue that they play a vital role in keeping people in employment.<sup>54</sup> The Trades Union Congress has said:

The TUC believes that the rise of involuntary and casual temporary work, along with increases in involuntary part-time work and zero-hours contracts, show that beneath the headline employment figures lies an increasingly insecure, vulnerable workforce. Too many workers are not working enough hours to get by, or have no guarantee of paid work from one week to the next, says the TUC.<sup>55</sup>

The trade union Unite has said:

Unite believes that in general zero-hours contracts are unfair, creating insecurity and exploitation for many ordinary people struggling to get by. They are one of many forms of underemployment blighting the British economy. Employers use them to cut wages, avoid holiday pay, pensions, or other benefits enjoyed by employees and agency staff.<sup>56</sup>

The usage of zero-hours contracts by Sports Direct at its Shirebrook warehouse was one of the aspects of work there criticised in a recent report by the Business, Innovation and Skills Committee report, [Employment practices at Sports Direct](#).<sup>57</sup> The report illustrates some of the difficulties that may be faced by zero-hours workers:

Sports Direct employs staff on zero-hour contracts for their retail shops. When Keith Hellawell, Chairman of Sports Direct, gave evidence to the Scottish Affairs Committee in March 2015, he justified the use of zero-hour contracts by saying that "it gives us the flexibility of the work force. We have available the staff we need at the times we need them and for the number of hours that we need them".

We received damning testimonies from Sports Direct workers, past and present, about the misuse of the contracts and inadequate working conditions, including the following:

<sup>52</sup> [Government must act to halt rise in zero hours](#), Unite website, 1 August 2013 (accessed 3 September 2013); [UNISON fact sheet on zero hours contracts](#), UNISON website (accessed 3 September 2013)

<sup>53</sup> [UNISON fact sheet on zero hours contracts](#), UNISON website (accessed 3 September 2013), p.2

<sup>54</sup> [Zero-hours work kept down dole queues, says CBI](#), *Financial Times* [online], 7 August 2013 (accessed 3 September 2013); [JobsOutlook: More employers happy with the state of the economy](#), Recruitment and Employment Confederation Press Notice, 21 August 2013; [Banning zero hours contracts would be "misguided and extremely damaging" - says IoD](#), Institute of Directors Press Release, 5 August 2013

<sup>55</sup> [Involuntary temporary jobs driving rising employment](#), TUC website, 9 August 2013 (accessed 3 September 2013)

<sup>56</sup> [Government must act to halt rise in zero hours](#), Unite website, 1 August 2013 (accessed 3 September 2013)

<sup>57</sup> Third Report of Session 2016–17, HC 219, 19 July 2016

“... Staff on zero-hour contracts were being forced to work a further three hours without pay (and if they refused, they would not be offered any hours the following day)”<sup>58</sup>

John Cridland, former Director-General of the Confederation of British Industry has said “If we hadn’t had this flexible working when the economy contracted, unemployment would have topped 3m – and it didn’t it went to 2.5m”.<sup>59</sup> Mike Cherry, National Chairman of the Federation of Small Businesses, argued that the “use of these contracts is a question of responsible management. There are situations where zero hour contracts are a good fit for employee and employer”.<sup>60</sup> Alexander Ehmann, former Head of Regulatory Policy at the Institute of Directors said:

Taking on a full-time member of staff remains a risky and potentially expensive option for any company emerging from the downturn.

Zero Hours Contracts can be a vital tool in our economic recovery, giving flexibility to both employer and worker whilst also guaranteeing basic employment rights.<sup>61</sup>

In an article in *The Telegraph* Simon Walker, Director General of the Institute of Directors, said that part of the reason for the increase in zero-hours contracts is that current employment law is restrictive and taking on a full-time employee is risky.<sup>62</sup>

A June 2013 report by the Resolution Foundation stated that zero-hours contracts lead to financial uncertainty for workers and their dependants.<sup>63</sup> However, that report also noted that it might be too soon to implement a ban.<sup>64</sup> This was reiterated in an August 2013 report by The Work Foundation which said that “calls to ban zero hour contracts ... are in our view misplaced”.<sup>65</sup>

Research published in August 2013 by the Chartered Institute of Personnel and Development found that, across all zero-hours workers surveyed, 14% reported that their employer “...often or very often fails to provide them with sufficient hours to have a basic standard of living. However 18% say this does not happen very often and 52% say this does not happen at all often.”<sup>66</sup> Peter Cheese, CEO of the CIPD said

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<sup>59</sup> [Zero-hours work kept down dole queues, says CBI](#), *Financial Times* [online], 7 August 2013 (accessed 3 September 2013)

<sup>60</sup> [Less than one in 10 FSB members use zero hours contract](#), Investor Interactive, 21 August 2013 (accessed 4 September 2013)

<sup>61</sup> [Banning zero hours contracts would be "misguided and extremely damaging" - says IoD](#), Institute of Directors Press Release, 5 August 2013 (accessed 4 September 2013)

<sup>62</sup> [Zero hours are bad? Don't talk such nonsense](#), *The Telegraph* [online], 10 August 2013

<sup>63</sup> Alakeson, V., Cory, G, Pennycook, M., [A Matter of Time: The rise of zero-hours contracts](#), June 2013

<sup>64</sup> *Ibid*, p.4

<sup>65</sup> Ian Brinkley, [Flexibility or insecurity? Exploring the rise in zero hours contracts](#), August 2013

<sup>66</sup> [Zero hours contracts more widespread than thought - but only minority of zero hours workers want to work more hours](#), CIPD website, 5 August 2013 (accessed 3 September 2013)

that its figures suggest the assumption that zero-hours contracts are bad should be questioned.<sup>67</sup>

A report published by the CIPD in November 2013, based on a survey of over 1,000 employers and over 2,500 employees, derived from a sample of individuals that had agreed to take part in YouGov surveys, of which 479 were on zero-hours contracts,<sup>68</sup> made a number of findings, including:

- Zero-hours workers, when compared to the average UK employee, are just as satisfied with their job (60% versus 59%), happier with their work-life balance (65% vs 58%), and less likely to think they are treated unfairly by their organisation (27% vs 29%).
- Zero-hours workers are, on average, nearly twice as likely to be satisfied with having no minimum set contracted hours, as they are to be dissatisfied. Almost half (47%) say they are satisfied compared with around a quarter (27%) who report being dissatisfied. The most common explanation for this is that flexible working suits their current circumstances (44% of those saying they are satisfied or very satisfied with having no minimum set contracted hours).
- More than half (52%) of zero-hours workers say they would not like to work more hours than they do in a typical week, although just over a third (38%) say they would like more hours.
- Eight out of ten (80%) zero-hours staff say they are never penalised for not being available for work.
- Employers cite both sides of the flexibility equation in explaining their use of these contracts: two thirds (66%) highlight their need for the flexibility to respond to peaks and troughs in demand, but around a half (47%) of employers who use zero-hours contracts also cite the need to provide flexibility for individuals as one of the reasons informing their approach.
- One in five zero-hours workers say they are sometimes (17%) or always (3%) penalised if they are not available for work.
- Almost half of zero-hours workers say they receive no notice at all (40%) or find out at the beginning of an expected shift (6%) that work has been cancelled, and only about a third of employers tell us they make a contractual provision or have a formal policy outlining their approach to arranging (32%) and cancelling work (34%) for zero-hours workers.
- One in five (21%) zero-hours workers believe their pay is lower than comparable permanent staff doing similar jobs,

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<sup>67</sup> Ibid

<sup>68</sup> CIPD, *Zero-hours contracts - Myth and reality*, November 2013, pp43-44

while one in ten employers (11%) report that this is the case. In fact, almost two-thirds (64%) of employers who use zero-hours workers report that hourly rates for these staff are about the same as an employee doing the same role on a permanent contract. Nearly a fifth (18%) report that hourly rates for zero-hours staff are higher than permanent employees (with the proportion slightly higher in the private sector).

- Confusion among some employers and zero-hours staff over employment status and rights. For example, 42% of zero-hours staff don't know if they have the right to take legal action if unfairly dismissed after two years service.<sup>69</sup>

In a blog post on the Institute of Economic Affairs' website, Professor Len Shackleton said that zero-hours contracts have a place in the labour market, offering opportunities to those who would otherwise "find it difficult to take regular work at fixed times: think of students and single parents".<sup>70</sup>

Brian Groom, former UK business and employment editor at the *Financial Times*, wrote that regulation of the contracts would be fraught with danger, and that a blanket ban "could hit jobs by making many activities uneconomic".<sup>71</sup> An editorial in the *Financial Times* argued that the UK should not ban the contracts but regulate their use, particularly where exclusivity is demanded (i.e. the worker is unable to work for another employer), in which case workers should be guaranteed base pay or minimum hours, and statutory employment rights.<sup>72</sup>

An editorial in *The Telegraph* said that the contracts "make eminent sense in areas where work is seasonal or intermittent, such as retail and hospitality, or where money is tight",<sup>73</sup> whereas one in *The Guardian* suggested "the best way to see zero-hours contracts is as the most striking symptom of a sick economy and a malfunctioning labour market – one geared up to providing low-paid, precarious work."<sup>74</sup>

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<sup>69</sup> ['Zero-hours contracts have been unfairly demonised and oversimplified'](#), finds new CIPD research, CIPD website, 26 November 2013 (accessed 29 November 2013)

<sup>70</sup> [Zero-hours contracts have their place in the labour market](#), Len Shackleton, IEA blog, 6 August 2013 (accessed 3 September 2013)

<sup>71</sup> [Zero hours: act with caution](#), Brian Groom, *FT* website, 5 August 2013 (accessed 3 September 2013)

<sup>72</sup> [Zero-hours workers](#), *FT* website, 1 August 2013 (accessed 3 September 2013)

<sup>73</sup> [A misguided crusade against flexible labour](#), *The Telegraph* [online], 5 August 2013 (accessed 3 September 2013)

<sup>74</sup> [Zero-hours contracts: nil points](#), *The Guardian* [online], 9 August 2013 (accessed 3 September 2013)

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