



## More Flexible Contract Options

My clients are frequently asking me about more flexible contract options. They are normally referring to casual or zero hours contracts but these terms are often interchangeable and in practice there may be little to distinguish between these types of working arrangements.

Employers are using zero hours and casual contracts as a response to uncertain economic conditions, to retain flexibility and to remain competitive but these have been criticised by trade unions as being too heavily weighted in favour of the employer and designed to deprive individuals of a guaranteed income and many of their employment rights. What is often ignored is that they also provide employees with a welcome degree of flexibility in many cases.

A **"zero hours" contract** is a contract under which the individual is not contracted to work a set number of hours and is paid only for the number of hours that he or she actually works.

A **casual worker** is not generally guaranteed a fixed number of hours of work.

### Status of casual and zero hours staff

These types of contracts have no legal definition and do not confer any status on the individual. It is important to understand the employment status of individuals who work under a zero hours or a casual arrangement as it determines their statutory employment rights. This depends on whether they fall within the definition of "employee" or "worker".

The legal definition of "employee" is set out in the Employment Rights Act 1996 as "an individual who has entered into or works under ... a contract of employment", which is defined as a "contract of service or apprenticeship".

The three principal tests in establishing employment status are:

- personal service - the individual must provide his or her services personally, rather than being able to send a substitute;
- mutuality of obligation - the employer is obliged to provide work and the individual is obliged to carry out the work when it is offered; and
- control - the employer must exercise a sufficient degree of control over the manner in which the individual carries out the work as in an employer/employee relationship.

In the absence of these elements for an employment relationship, it is likely that the individual will be a worker rather than an employee.

The distinction between an employee and a worker is important in determining what legal rights and protections are available to the individual concerned. Whereas a worker has a limited number of statutory rights an employee has a much broader range of entitlements in addition to the rights available to workers.

### Casual worker contracts

Most employers will want to engage casual staff as workers rather than employees, to retain maximum flexibility and to avoid the possibility that they will be entitled to the additional rights available to employees, particularly the right to claim unfair dismissal on termination.

When recruiting casual workers, it is important that it is made clear in job adverts or correspondence, that the contract will not guarantee any set hours of work and that it is not an employment relationship.



A casual worker contract should include statements that make clear:

- that the employer is under no obligation to offer work and the individual is under no obligation to accept work;
- that mutuality of obligation does not exist between the parties between periods of work and that it is not the intention to enter into an employment relationship;
- the arrangements for offering and agreeing hours of work;
- that the individual is obliged to turn up and perform the work personally during the agreed hours;
- that payment will be made only for the hours worked;
- the entitlement to rest breaks;
- how the entitlement to paid holiday is calculated;
- what arrangements apply in the event of sickness including the payment of statutory sick pay if applicable; and
- the arrangements for terminating the contract.

**Holiday** The statutory minimum holiday entitlement of 5.6 weeks but as the casual worker is unlikely to have regular hours, the best way to work out holiday entitlement is to calculate 12.07% of the hours worked by the individual.

**Sickness** Provided that they fulfil the other qualifying requirements, workers under casual contracts will be entitled to SSP.

**Termination** The contract would not normally include provision for termination on notice but instead, employers may wish to retain the ability to remove individuals from the work rota in the event that they do not accept or carry out any work over a specified period.

**Disciplinary and grievances** It would not usually be necessary for an employer to follow a full disciplinary procedure in respect of a casual worker and if the disciplinary procedure is followed, this could be a factor to show employee status. Having said this it is always advisable for employers to follow a basic procedure where there is a risk that the individual in question could pursue a claim for unfair dismissal.

**Zero hours contracts** A zero hours contract will typically differ from a standard casual worker agreement in the obligation on the employer to offer work or on the individual to accept it.

Most zero hours contracts will make clear that while the employer is under no obligation to offer work, the individual is obliged to be available and to accept work offered. The employer might give the individual a limited ability to turn down some of the work offered. Employers that engage a number of "bank" staff often engage those staff under this type of contract.

While this may not appear to be a properly "mutual" obligation on the parties, tribunals and courts interpret this type of arrangement as being sufficient to fulfil the requirement of mutuality of obligation for an employment relationship to arise.

If individuals are permitted to refuse at least some of the work offered, this may assist the employer in demonstrating that mutuality of obligation does not exist and help to avoid the possibility of an employment relationship arising. A zero hours contract should otherwise include those provisions that should also be incorporated into casual workers contracts.

From this you will see that:

- it is important to have a written contract between the two parties and
- to make sure that the arrangements in the contract are operated in practice.

[Contact us](#) for professional advice to draft these contracts.