



Department  
for Business  
Innovation & Skills

**CONSULTATION**

**Zero hours employment  
contracts**

DECEMBER 2013

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# Foreword from the Secretary of State



The Government is committed to achieving a labour market that is flexible and fair. Our policy is to give employers the confidence to hire and create new jobs, and to provide a framework that allows individuals to not only find work, but to find work that suits them and their individual circumstances. We have been implementing an ambitious range of employment law reforms to help us deliver this vision and sustain the recovery in the labour market that now sees record levels of employment in the UK.

But there is more to do. Zero hours contracts have been used responsibly in some sectors for many years. They can support business flexibility, making it easier to hire new staff and providing pathways to employment for young people. These contracts and other flexible arrangements give individuals more choice and the ability to combine their work with their other commitments. But this Government has always been clear that we will address and crack down on any abuse or exploitation of individuals in the workplace.

The Government therefore seeks to maximise the opportunities of zero hours contracts while minimising abuse and setting core standards that protect individuals. This consultation document sets out the issues we have identified so far, seeks further evidence and invites views on a range of potential actions Government and employers can take.

The Government will respond following the close of the consultation, and will set out any action we intend to take. In the meantime, I encourage you to engage in the consultation.

A handwritten signature in blue ink, appearing to read 'Vince Cable', with a small mark above the 'e'.

**Vince Cable MP**  
**Secretary of State for Business, Innovation and Skills and President of the Board of Trade**

# 1. Executive Summary

1. The Government's overarching aim is to achieve a labour market that is flexible, effective and fair. Over the summer the Government conducted an informal information gathering exercise on the use of zero hours employment contracts. This followed public and Parliamentary concern over whether there is abuse of such employment contracts. Specifically, in examining the existing evidence on zero hours contracts, the Government is seeking ways to prevent any abuse and to maximise opportunities both for employers seeking to create jobs and for individuals to get work that suits them.
2. This consultation seeks further evidence on the problems under consideration, and invites responses to a number of potential actions Government could take to address them and promote the outcome described above, including maintaining the status quo. At this stage, the Government has no preferred option. Views are sought in particular on maintaining a fair balance between the flexibility provided by zero hours contracts and ensuring adequate protection for individuals who experience some of the issues identified in this document.
3. There is no legal definition of a 'zero hours contract'. It is a term that is used to cover a wide range of employment contracts. It is a legitimate form of employment contract drawn up between employer and individual, providing both parties freely agree to it. ONS data shows the use of zero hours contracts has increased in the past 5 years, and that there are around 250,000 such contracts in use in the UK today.
4. The information gathering exercise has shown that the use of zero hours contracts can be useful and valuable for both employers and individuals in specific circumstances. They can promote flexibility for both parties, making it easier for business to hire new staff and suiting individuals who want the freedom to arrange their work around other commitments.
5. Nevertheless, the information gathering exercise identified certain concerns around the use of zero hours contracts:
  - **Exclusivity** – while exclusivity clauses may be justified in certain particular cases, in some circumstances zero hours contracts included an 'exclusivity clause' preventing an individual from working for another employer, even if the current employer is offering no work;
  - **Transparency** – individuals are not always clear on the terms, conditions and consequences of a zero hours contract, and employers do not always fulfil or understand their responsibilities. Individuals also referred to uncertainty over access to personal finance markets and their eligibility for benefits payments when their hours of work frequently changed.
6. The information gathering exercise also provided some examples of people who were, or had been, engaged on these contracts who felt they were penalised by their employer if they were not available for work when required. For example, individuals had been offered work and turned it down and subsequently the employer had not offered the individual any further work. The Government considers that this issue could be addressed if there was greater transparency around such contracts and better information, advice and guidance for

individuals and businesses.

7. To address exclusivity clauses in zero hours contracts, the Government is seeking views on the following options:
  - Legislating to ban the use of exclusivity clauses in contracts that offer no guarantee of work;
  - Government issuing guidance on the fair use of exclusivity clauses;
  - Encouraging the production of an employer-led Code of Practice on the fair use of exclusivity clauses, with an additional option to seek Government sponsorship of that Code; or
  - Rely on existing common law redress which enables individuals to challenge exclusivity clauses.
8. To improve transparency over zero hours contracts, the Government is seeking views on:
  - Improving the content and accessibility of information, advice and guidance;
  - Encouraging a broader, employer-led Code of Practice which covers the fair use of zero hours contracts generally; and
  - Whether and how Government could produce model clauses for zero hours contracts.
9. This consultation will be of interest to employers and individuals, legal representatives and other intermediaries who advise employers, trades unions and employment agencies. Details on how to respond are provided in Annex 3.
10. After considering the responses, the Government will publish a formal response to the issues identified through this consultation, including information on what further action Government intends to take.

## 2. What is a zero hours contract?

**This section outlines how zero hours contracts are typically used and their legal status. It describes the employment rights that individuals on zero hours contracts are entitled to.**

### What is a zero hours contract?

11. There is no legal definition of a zero hours contract in domestic law. In general terms a zero hours contract is an employment contract in which the employer does not guarantee the individual any work, and the individual is not obliged to accept any work offered.
12. The following is an example of a clause in a zero hours contract which does not guarantee a fixed number of hours work per week:

“The Company is under no obligation to provide work to you at any time and you are under no obligation to accept any work offered by the Company at any time.”

13. Such contracts are legal under domestic law. If they are freely entered into, a zero hours contract is a legitimate form of contract between individual and employer. As detailed in the next section, individuals on zero hours contracts work in sectors across the economy, and in occupations throughout the pay range.

### What employment rights does an individual on a zero hours contract have?

14. An erroneous view is that individuals who work under zero hours contracts have no protection under domestic employment law, or that they cannot be an employee.
15. However, the employment rights which an individual will have depend on his or her employment status. There are broadly three categories of employment status: (i) employee (and employee shareholder), (ii) worker and (iii) self-employed. It is likely that the majority of individuals on zero hours contracts are either employees or workers. A fuller discussion of employment statuses and their definition is provided in Annex 2. Table 1 overleaf demonstrates some of the employment rights enjoyed by individuals in each employment status.

Table 1: Employment Rights				
Employment right associated with each status	Employment status			
	Employee (incl. full/ part time & fixed term contracts)	Employee shareholder (incl. full/ part time & fixed term contracts)	Worker (incl. agency workers, contractors, freelancers)	Self- employed (incl. freelancers, consultants, contractors)
National Minimum Wage	✓	✓	✓	
Protection from unlawful deductions from wages	✓	✓	✓	
Paid annual leave	✓	✓	✓	
Maternity, Paternity, Adoption leave and pay	✓	✓		
Part-time status (no less favourable treatment)	✓	✓	✓	
Fixed-term status (no less favourable treatment)	✓	✓		
Rest breaks	✓	✓	✓	
Right to request flexible working	✓			
Right to request time to train (companies over 250 employees)	✓			
Protection from discrimination	✓	✓	✓	✓
Minimum notice periods	✓	✓		
Collective redundancy consultation	✓	✓		
Statutory redundancy pay	✓			
Protection from unfair dismissal (gained after 2 years in continuous employment)	✓			
Protection from unfair dismissal (automatically unfair)	✓	✓		
TUPE	✓	✓		



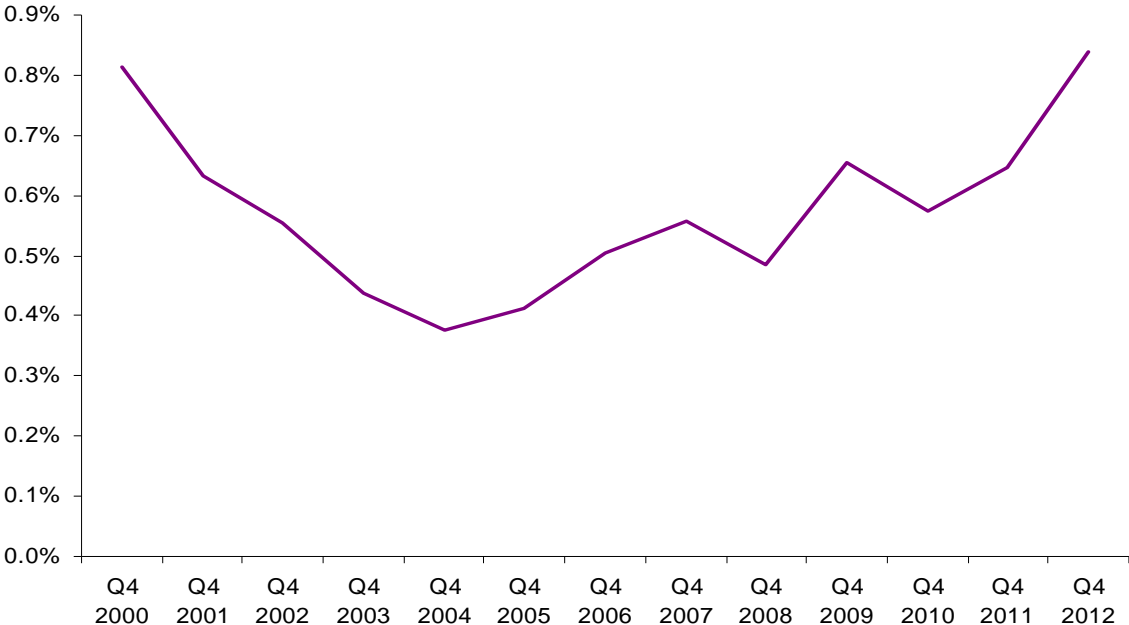
# 3. Evidence on the use of zero hours contracts

This section sets out the evidence on how zero hours contracts are used in the labour market. It outlines the process and results of the Government’s information gathering exercise on zero hours contracts undertaken over the summer. From this exercise the Government has identified key advantages and concerns over the current use of zero hours contracts.

## How many zero hours contracts are used in the labour market, and by whom?

Estimates for the fourth quarter of 2012 suggest 250,000 individuals were on zero hours contracts (0.8% of total employment)<sup>1</sup>. Chart 1 shows the prevalence of zero hours contracts in the past 12 years. Other estimates for the total number of zero hours contracts in the labour market include a CIPD calculation which suggests there could be around 1 million<sup>2</sup>. The difference in estimates reflects different survey methodologies. Given the limited data available on this issue, in October the Office of National Statistics (ONS) agreed to the Business Secretary’s proposal for a cross-Government working party to assess the strengths and weaknesses of statistics on zero hours contracts. The group will develop the ONS business statistics on zero hours contracts, and the combined presentation of these data and Labour Force Survey data to ensure the strength and quality of each data set.

**Chart 1: Individuals on zero hours contracts as a proportion of total employment**

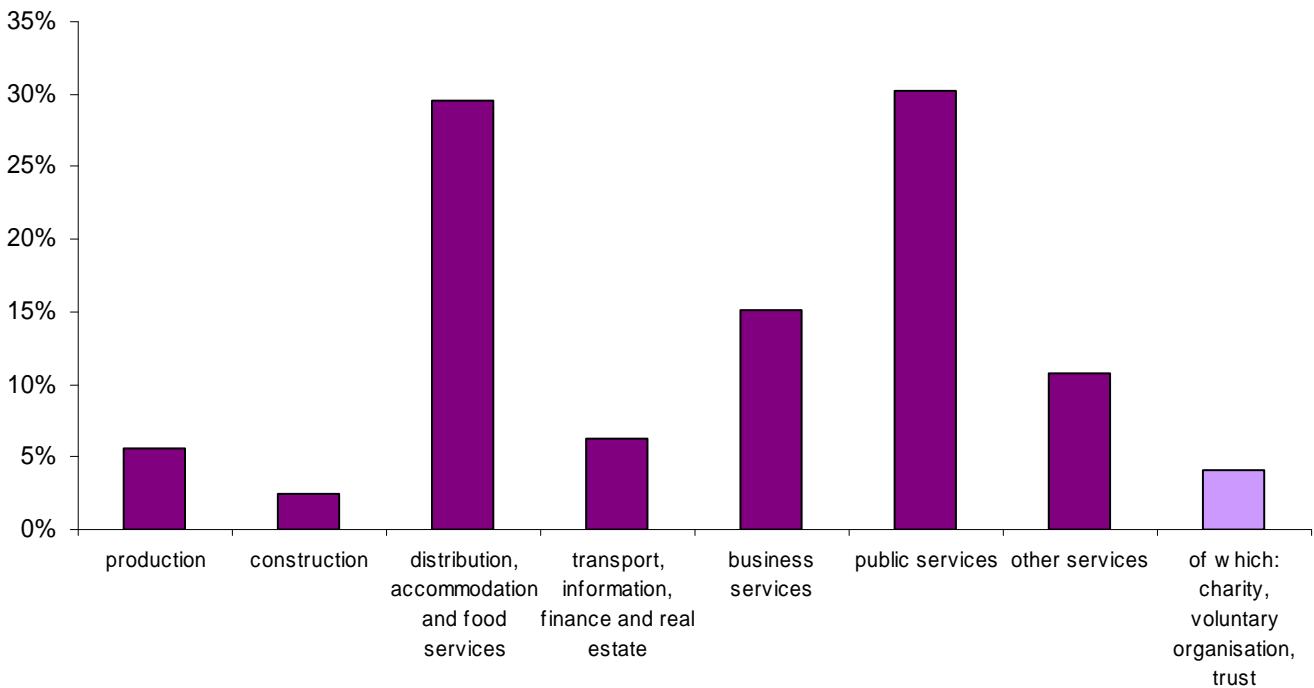


Source: BIS estimates based on Labour Force Survey data

<sup>1</sup> ONS, Estimating zero hours contracts from the Labour Force Survey, July 2013.  
<sup>2</sup> CIPD/YouGov survey of HR professionals for Labour Market Outlook, August 2013.

Individuals on zero hours contracts work across the economy, with a particular focus upon public services, and in distribution, accommodation and food services industries. Chart 2 shows the distribution of individuals on zero hours contracts by sector.

**Chart 2: Estimates from Labour Force Survey of the proportion of those on zero hours contracts by broad sector**



Source: BIS estimates from Labour Force Survey

Survey data from the Workplace Employment Relations Study (WERS) found that the largest increase in the proportion of workplaces using zero hours contracts between 2004 and 2011 was in the hotel and restaurant sector<sup>3</sup>. Other relatively large increases were in the education sector and the health sector.

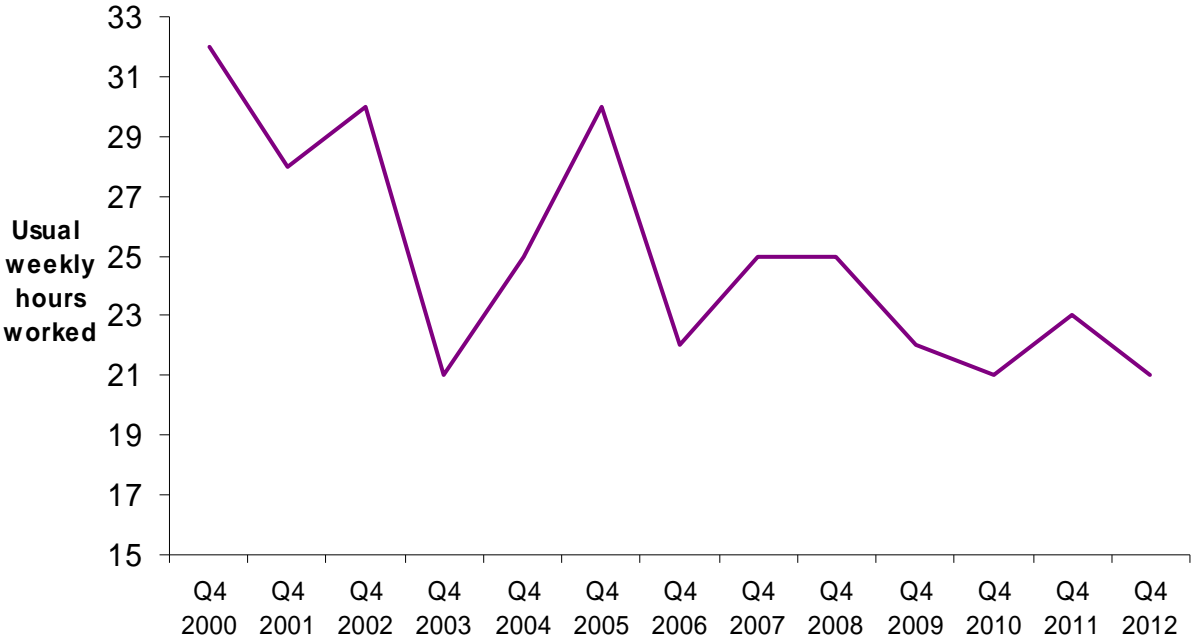
The available evidence suggests that zero hours contracts are used by individuals throughout the income distribution. For example the Labour Force Survey suggests that around 31% of those on zero hours contracts in Q4 2012 worked in elementary occupations (for example construction or cleaning) and around 20% worked in professional or associate professional or technical occupations.

<sup>3</sup> Workplace Employment Relations Study 2011, first findings: underlying data - part 1, Department for Business Innovation and Skills, 23 January 2013.

The available research suggests that zero hours contracts are used by businesses of all sizes, but with a greater concentration among larger businesses. Research conducted by the Institute of Directors (IoD) based on a survey of 1,027 of their members found 11% of respondents were currently using zero hours contracts for some of their workforce<sup>4</sup>. When this figure is broken down by the size of the business responding, the survey found that 7% of small employers, 14% of medium and 20% of large businesses were using zero hours contracts for some of their workforce.

In terms of the actual hours worked by those on zero hours contracts, the LFS data in Chart 3 shows that the average 'usual weekly hours' worked under zero hours contracts has declined from over 30 to in the range of 21 - 25 hours. This suggests that though the number of individuals on zero hours contracts has increased, the total employment hours worked under such contracts may not have.

**Chart 3: Estimates from Labour Force Survey of the median usual weekly hours worked by individuals on zero hours contracts**



Source: BIS estimates from the Labour Force Survey

<sup>4</sup> Private survey conducted by the Institute of Directors

Furthermore, the Survey<sup>5</sup> found that only 30% of individuals on zero hours contracts worked their usual hours in a particular reference week. Of the rest, close to 50% experienced variation in hours of up to 10 hours. Slightly more individuals experienced a reduction on usual hours than an increase. A CIPD survey of individuals, conducted in Autumn 2013<sup>6</sup>, indicates that seven in ten individuals on zero hours contracts have either some or a lot of choice over the number of hours they work. However, over a third would like to work more hours than they typically do in an average week.

### The Government's information gathering exercise on the use of zero hours contracts

The Government undertook an information gathering exercise over summer 2013 to build further evidence on employers and individuals' experience of zero hours contracts. This exercise identified both advantages and disadvantages in how zero hours contracts are used in the labour market.

For **employers**, the advantages of zero hours contracts include:

- **Flexibility.** Zero hours contracts allow businesses to hire staff while being able to adapt to changes in demand, for example offering more work when new orders arrive and being able to scale back when they do not. Furthermore, zero hours contracts are used by businesses to increase the range of services offered – such as creating specialist roles or having staff available in different geographical locations that their permanent staffing model could not provide.
- **Supporting expansion plans.** This flexibility also allows businesses to grow, with limited risk in terms of recruiting permanent staff if they find that the additional services they planned were not taken up. On the other hand if expansion is successful zero hours contracts provide a pathway to full-time or guaranteed hours work.
- **Retention of skills.** Zero hours contracts allow businesses to retain the skills and experience of staff who might wish to partially retire or who have retired. An employer may have made a significant investment in the individual, through training for example.
- **Knowledge of the company and its culture.** Businesses can also retain a pool of trained and skilled staff, who know the culture of the business and its procedures, rather than agency staff who may not.

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<sup>5</sup> BIS estimates from the 4<sup>th</sup> quarter 2012 Labour Force Survey dataset.

<sup>6</sup> CIPD, employee survey for Labour Market Outlook, published 26 November 2013

The information gathering exercise also identified a number of advantages for some **individuals**, which include:

- **Greater choice.** Zero hours contracts allow individuals a greater say over when, where and how much they work. For example, an individual may wish to take on a range of roles or to be able to flex their working hours around their other commitments or interests. A further CIPD survey of individuals on zero hours contracts<sup>7</sup> found that 47% of individuals on zero hours contracts were 'very satisfied' or 'satisfied' with having no guaranteed hours, compared to 27% being 'very dissatisfied' or 'dissatisfied'. Of those respondents who were happy with a zero hours contract, the key reason was the flexibility over their hours of work. Furthermore, 72% of all respondents believed they had 'a lot' or 'some' choice over the number of hours they worked.
- **Opportunities to enter the labour market and a pathway to other forms of employment.** Zero hours contracts allow young people, particularly students, to enter the labour market. For individuals who can not yet work full time, this type of flexible employment helps them gain workplace skills and experience at the same time as studying. In the same way as part time working, this initial experience is vital in helping individuals progress their career, and can provide a pathway onto other forms of employment contract when opportunities arise within the business.
- **Flexible retirement plans.** Zero hours contracts also allow individuals to consider a greater range of options for their retirement. They can offer flexibility for partially retired or retired individuals to remain connected to the labour market with occasional work, which provides them with an income and a wider range of work interests to pursue.

### What issues with zero hours contracts have been identified?

The information gathering exercise also heard views that zero hours contracts have not been used as intended and that they can be misused to exploit individuals. Two key concerns were identified:

- **Exclusivity.** A small number of individuals on zero hours contracts are prevented from working for another employer. For example, the CIPD survey found that 9% of individuals on zero hours contracts are never allowed to work for another employer when their primary employer has no work available for them<sup>8</sup>. It is clear that, in some circumstances, exclusivity clauses are useful and justifiable. For example, an individual may be entrusted with confidential commercial information which would make it problematic should that person choose to work with a competitor business at the same time. However, there is not always a clear or obvious reason why this should be part of the employment contract. This is particularly difficult given the individual is not guaranteed a certain number of hours work under a zero hours contract. Without a valid justification, such clauses undermine the choice and flexibility for the individuals concerned.

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<sup>7</sup> CIPD, employee survey for Labour Market Outlook, published 26 November 2013

<sup>8</sup> CIPD, employee survey for Labour Market Outlook, Autumn 2013, published 26 November 2013

- **Transparency.** The information gathering exercise heard that individuals were not always aware they are employed on a zero hours contract, or that there was a possibility they could be offered no work or 'zero hours'. In some cases employers did not make this clear when advertising or interviewing people for jobs, or in the employment contract itself. Furthermore, some employers may not fulfil, or understand, their responsibilities towards individuals they employ on a zero hours contract in terms of their employment rights. There may be employers who deliberately evade these obligations. For example the CIPD survey found that 20% of individuals on zero hours contracts reported they were 'always' or 'sometimes' penalised in some way by their employer if they are not available for work when required<sup>9</sup>. 40% of respondents to the CIPD survey also said they had 'no notice' when no further work was available from their employer, and 42% of respondents reported they had 'up to 12 hours' notice when work was available<sup>10</sup>. In some cases this can result in financial difficulties, and possible overpayment or underpayment of welfare benefits to the individual.

An additional issue that was highlighted during the information gathering exercise was of individuals who reported they had no say in their employment contract, and had no or limited dialogue with their employer. Particular examples involved individuals being asked to work at very short notice, which did not allow them to plan ahead, for example, to arrange childcare.

The examples provided by respondents were however based on poor management practices, which is not exclusively a zero hours contracts issue.

By trying to ensure that both the employer and the individual are well informed and understand their obligations and rights, the employment relationship can be more evenly balanced. Possible means of achieving this outcome are discussed in the following section.

### Payment for travel time for individuals on zero hours contracts

The information gathering exercise also received representations on the use of zero hours contracts in the care sector, particularly around the non-payment of travel time. The Government is examining ways to tackle any abuse of these rules through strengthened enforcement of existing National Minimum Wage regulations, which will include responding to concerns over the payment of travel time.

The minimum wage rules generally require that time spent travelling between care assignments counts as time worked for minimum wage purposes. The minimum wage should therefore be paid for this time. However, any rest breaks taken in travelling between one assignment and another does not count as time worked.

The time spent travelling between home and the first assignment and between the last assignment and home does not count as time worked for minimum wage purposes (unless the contract specifies that these periods are working time).

Where the travelling time is time for which the minimum wage should be paid, any associated expenditure incurred by a worker by that travelling is classified as being in connection with the employment. These expenses reduce a worker's pay for minimum wage purposes. A worker

<sup>9</sup> CIPD, employee survey for Labour Market Outlook, Autumn 2013, published 26 November 2013

<sup>10</sup> CIPD, employee survey for Labour Market Outlook, Autumn 2013, published 26 November 2013

paid at minimum wage rates would therefore need to be reimbursed such expenses in order to be paid the minimum wage.

## 4. Issues for consultation

**This section takes each of the main concerns over the use of zero hours contracts, and discusses possible options for addressing them. It seeks views on those options, particularly the costs and benefits of pursuing them, and any other options the Government should consider. At this stage, the Government has no preferred approach. The Government will use this evidence to further consider these options and decide its approach.**

### The Government's labour market strategy

The Government's vision is for a labour market that is flexible, effective and fair. There is a risk that the issues identified by the information gathering exercise could undermine this vision and undermine the valuable role zero hours contracts can play in the economy.

The Government has identified a range of possible actions that could be taken to address these problems, which are discussed below. Our aim through this consultation is to find which options best prevent any abuse of zero hours contracts while maximising the opportunity and flexibility such contracts can present.

The Government's labour market strategy is based upon individuals and employers being able to agree mutually their ways of working. This ensures flexibility and gives the greatest chance for individuals and employers to find the arrangements that work best for them. To aid this process, the Government's role is to encourage transparency over the rights and obligations of each party, and to provide a framework of employment law that supports employers and individuals to discuss and mutually agree employment contracts.

### Addressing exclusivity

In some circumstances, exclusivity clauses are useful and justifiable. For example, an individual may be entrusted with confidential commercial information which would make it problematic should that person choose to work with a competitor business at the same time. However in other circumstances reported to the information gathering exercise, it is harder to see how exclusivity is justified. In these circumstances, exclusivity acts as a limitation upon the flexibility of the employee and, if no work is forthcoming, means they have no other means of employment.

It is not unlawful for an employer to insert an exclusivity clause in an employment contract – but the individual must agree to it. An exclusivity clause must be no more than is adequate to protect the employer's legitimate business interests and the employer must therefore be able to justify it. It is already possible for an individual to challenge an exclusivity clause – either informally during the process of agreeing the employment contract or under common law. A key consideration therefore is the degree to which individuals already feel informed, empowered and able to withhold their agreement to such a clause. The Government welcomes views from consultees on whether this is the case, or whether any of the following options would help support individuals and reduce the misuse of exclusivity clauses.



The Government wishes to consider four broad options to address misuse of exclusivity clauses, and seeks views on the costs and benefits of them. These options are:

- **Legislating to ban the use of exclusivity clauses in contracts that offer no guarantee of work.** Under this option, the Government would consider how it would be possible to ban exclusivity clauses in contracts that offer no guarantee of work. A ban would prevent any individual having an exclusivity clause included in their zero hours contract. A key consideration is whether an outright ban might make any jobs which legitimately need an exclusivity clause unviable, and thus prevent such jobs being created at all.
- **Government issuing guidance on the fair use of exclusivity clauses in employment contracts.** Issuing guidance would provide an alternative to an outright ban, thus allowing some scope for exclusivity clauses in circumstances when they are justified. The Government welcomes perspectives on what guidance should include. Guidance might, for example, set out broad scenarios when an exclusivity clause is or is not suitable.
- **An employer-led Code of Practice on the use of exclusivity clauses, with an option of Government sponsorship of the Code.** Under this option, the Government would encourage employers and employer representatives, possibly by sector, to produce Code(s) of Practice themselves. The Code would outline what is fair use of zero hours contracts, and what is not. The Government welcomes views on whether and how Government should endorse the Code. The Government also welcomes views on how best a Code would capture the views of individuals and employee representatives.
- **Rely on existing redress available through common law which allows individuals to challenge exclusivity clauses.** Individuals already have a legal route to challenge exclusivity clauses. We welcome views on whether this is sufficient and whether introducing Government action through any of the options above would undermine business flexibility and individual choice.

### Improving the transparency of zero hours contracts

The information gathering exercise found evidence that some individuals were unclear on their employment rights while on a zero hours contract, or even the terms or consequences of their zero hours contract. This could have the knock-on effect of creating uncertainty over the individual's future earnings and benefit entitlement (because benefit entitlement and payments vary according to earnings), particularly if an individual has irregular hours of work. There was also some further evidence provided suggesting that employers did not know, or understand, the employment rights their staff were eligible for.

Regarding benefits, the introduction of Universal Credit will help to address uncertainty. It is an integrated in - and out - of work benefit, so people who move into work will continue to be entitled, until they earn enough to come off benefits completely. Universal Credit will be based on real time information about how much people earn, so there is a much lower risk of any over - or under - payment. Universal Credit claimants with no or low earnings may be required to carry out activity to help them find work or more work. Any decision on that activity could include an assessment of the likelihood that a zero hours contract provides for increased earnings in future months.

The Government will consider several options aimed at improving transparency around zero hours contracts. These include:

- **Improving the content and accessibility of information, advice and guidance on (a) employment contracts and rights, and (b) entitlement of zero hours workers to benefits.** The Government is seeking views on whether existing information is sufficient in explaining to individuals their rights under zero hours contracts and their benefits entitlement. Additional resources could include online tools to calculate statutory leave, sick pay or redundancy; guidance on drawing up employment contracts; or simplified guides to employment rights under various employment statuses. The Government is also interested in the most effective way of communicating this information.
- **Encouraging an employer-led Code of Practice on the fair use of zero hours contracts.** There is a role for employers to explain clearly to would-be staff the terms of the proposed zero hours contract. Building on the option discussed in paragraph 38 above, such a Code of Practice would encompass all best practice associated with zero hours contracts. It could, for example, outline the circumstances in which zero hours contracts are valuable, best practice in explaining in job adverts and to job applicants what the contract is likely to include, and what the employers' role is in communicating clearly to individuals hired on zero hours contracts the details of their employment particulars. The Government welcomes views on whether and how Government should 'sponsor' the Code.
- **Government providing model clauses for zero hours contracts.** Further to providing guidance on best practice in drawing up employment contracts (see first bullet point above) the Government would seek to develop a standard template for clauses in a zero hours contract. This would provide the basic clauses for an employment contract which an employer could choose to adopt and modify to tailor the clauses to the post they wish to fill – or the employer could choose to disregard the model clauses and produce their own contract. The format of the contract could include a simple 'key facts' section at the top of the contract to help individuals understand clearly the key terms within the contract. Simplified and consistent contracts may also save employers time and money in drawing up contracts, and make their obligations under the contract easier to understand.

# 5. List of consultation questions

## Confidentiality and disclosure of response

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses. If you wish your response to remain confidential you must provide a reason. Do you agree for your response to be published or disclosed if requested?

Yes       No      If no you must give a reason

## Addressing exclusivity

### Question 1

Are there circumstances in which it is justifiable to include an exclusivity clause in a zero hours contract? If you answer yes, please describe the circumstances that justify such a clause.

### Question 2

Do you think the Government should seek to ban the use of exclusivity clauses in employment contracts with no guarantee of work?

### Question 3

Do you think an outright ban on exclusivity clauses in employment contracts with no guarantee of work would discourage employers from creating jobs? Are there any other unintended consequences of Government action that should also be considered?

### Question 4

Do you think Government should provide more focused guidance on the use of exclusivity clauses, for example setting out commonly accepted circumstances when they are justified and how to ensure both parties are clear on what the clause means? If you answer yes, what information should be included?

### Question 5

Would a Code of Practice setting out fair and reasonable use of exclusivity clauses in zero hours contracts (a) help guide employers in their use, and (b) help individuals understand and challenge unfair practices? Please explain your response.

**Question 6**

Do you think existing guidance and common law provision are sufficient to allow individuals to challenge exclusivity clauses and therefore no specific action from Government is required?

**Improving the transparency of zero hours contracts****Question 7 - Improving the transparency of zero hours contracts**

If you have sought employment information, advice, or guidance on zero hours contracts before, (a) where did you receive it from, (b) how helpful was it to you in terms of explaining your position in regard to zero hours contracts, and (c) how could it have been improved?

**Question 8**

Would the additional information, advice and guidance suggested in the first option (first bullet point, para 41), help individuals and business understand their rights and obligations? If not, what other information should Government provide?

**Question 9**

Further to your answer to Question 5, would a broader employer-led Code of Practice covering all best practice on zero hours contracts encourage more transparency?

**Question 10**

Do you think that model clauses for zero hours contracts would assist employers in drawing up zero hours contracts, and support employers and individuals to better understand their employment rights and obligations? If you answer yes, what should be the key considerations be in producing model clauses?

**Question 11**

Do you think that existing employment law, combined with greater transparency over the terms of zero hours contracts, is the best way of ensuring individuals on zero hours contracts are making informed choices about the right contract for them to be on?

**Question 12**

Further to your answer to Question 11, do you think there is more employers can do to inform individuals on zero hours contracts what their rights and terms are?

**Question 13**

Are there unintended consequences of introducing any of these options? Please explain your response.

# Annexes

## Annex 1: Additional questionnaire on zero hours contracts

### Questions for employers

#### Question 14

Do you use zero hours contracts in your business and if so, for what purpose?

#### Question 15

Have you offered a job on a zero hours contract basis that includes an exclusivity clause? If so, for what reason?

#### Question 16

Are you aware of staff you employ on a zero hours contract who work for other employers?

#### Question 17

Do you offer staff on a zero hours contract training or opportunities to develop their skills? Is this usually just at the start of the contract or do you offer training opportunities throughout the employment relationship?

#### Question 18

How many hours – on average – do you offer individuals on a zero hours contract in a week or month?

#### Question 19

Do you let individuals have a choice or say in how many hours or when they work?

#### Question 20

What is your policy when an individual declines hours of work you offer?

#### Question 21

Do you employ any individuals on a zero hours contract who work a pattern of regular hours? If so: i) how many hours a week and for what period of time? ii) why do you employ that individual on a zero hours contract basis?

#### Question 22

How much notice do you give an individual if the number of hours they work will decrease or drop off to zero?

**Question 23**

If you offer additional hours of work – how much notice do you give the individual? And how e.g. phone call?

**Question 24**

Do you understand what employment rights an individual is entitled to when employed on a zero hours contract? If so: i) what do you believe they are? ii) did you explain these to the individual? iii) how did you find out?

**Question 25**

How do you calculate paid annual leave for an individual on a zero hours contract?

**Question 26**

When you advertise or recruit on a zero hours contract basis: i) do you explain the implications of this type of contract: ii) at what stage do you make it clear that there is no guarantee of a minimum hours of work?

**Questions for individuals**

**Question 27**

Have you accepted a job on a zero hours contract basis that has included an exclusivity clause? What was the job and what reason was given for including an exclusivity clause?

**Question 28**

If you are employed on a zero hours contract – do you have more than one employer or contract?

**Question 29**

Has being employed on a zero hours contract helped you to achieve a good balance between your work life and home life? Was this a factor in accepting a job on this basis?

**Question 30**

If employed on a zero hours contract, has your employer offered you training or opportunities to develop your skills? Was this at the start of the contract or have you had training opportunities further into your employment?

**Question 31**

How many hours – on average – do you work in a week or month?

**Question 32**

Do you have a choice or say in how many hours or when you will work?

**Question 33**

Would you like to work more hours than your employer currently offers you? If not – why?

**Question 34**

Have you worked a pattern of regular hours whilst on a zero hours contract? If so how many hours a week and for what period of time?

**Question 35**

If you work a regular pattern of hours under a zero hours contract, how much notice do you receive if the number of hours decrease or drop off to zero?

**Question 36**

If your employer offers additional hours of work – how much notice do you receive?

**Question 37**

Are you given a choice to accept, decline, or negotiate the hours your employer offers you?

**Question 38**

Do you feel you have a choice to accept, decline, or negotiate the hours your employer offers you?

**Question 39**

If you have ever declined any hours of work offered to you, did your employer subsequently stop offering you work, or reduce the number of hours offered?

**Question 40**

As a zero hours contract member of staff, do you know if your rate of pay is the same or different compared to staff working on guaranteed hours contracts doing a similar job?

**Question 41**

Do you understand what employment rights you are entitled as someone employed on a zero hours contract? If so – i) what do you believe they are? ii) did your employer explain? iii) how did you find out?

## Annex 2: Further information on employment statuses

An ‘employee’ means an individual who has entered into or works under a contract of employment (sometimes known as a contract of service). There are various factors which a court considers to decide whether an individual is an employee. The individual’s contract will be the starting point for determining the nature of the parties’ relationship. However, a court will also consider all the circumstances of the relationship created by the agreement.

There is no one single test to determine employee status. A multiple test has developed in case law<sup>11</sup> and it is well founded that the three key tests for determining the existence of a contract of service are:

- (i) Mutuality of obligation – the employer is obliged to provide work which the individual is required to undertake for a wage;
- (ii) Personal service – the individual must provide personal service (i.e. not send a substitute to work in their place); and
- (iii) Control – the employer exercises a degree of control over the individual and the way in which that individual undertakes his/her work.

This test will not necessarily be determinative of employment status, as other factors might suggest that there is no employment relationship.

A ‘worker’ generally means an individual who has a contract or other arrangement to do work or services personally for a reward. This category is often perceived as a hybrid of employee and self-employed status. ‘Workers’ have fewer protections than ‘employees’ in domestic employment law. All ‘employees’ are ‘workers’. However not all ‘workers’ will be ‘employees’.

A person is self-employed if they are in business for themselves. It is unlikely that a self-employed person is required to provide personal service to a company or that either party will be obliged to offer or accept work. Self-employed persons are also responsible for their own tax. Employment legislation does not generally cover self-employed people because they are, in effect, their own boss (although there are some exceptions).

The fact that a contract includes a clause which states that the individual is neither an employee nor a worker will not necessarily be determinative of the individual’s employment status. A court can disregard the written terms in an employment contract if they do not accurately reflect the true agreement of the parties.<sup>12</sup>

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<sup>11</sup> *Ready-Mixed Concrete (South East) Limited v The Minister of Pensions and National Insurance* [1968] 2 QB 497

<sup>12</sup> *Autoclenz Ltd v Belcher and others* [2011] IRLR 820 (SC)



There have been misconceptions that an individual working under a zero hours contract can never be an employee. This is incorrect. There is case law from the Employment Appeal Tribunal (EAT) which considered the employment status of nurses who worked rostered hours under a 'zero hours contract agreement' providing critical care services.<sup>13</sup> The EAT held that the written contracts did not reflect the true position between the parties. The nurses had worked fixed hours on a regular basis for several years rather than on an ad hoc basis. The EAT held that the nurses were employed under global contracts of employment and there was no difficulty in showing their continuity of employment.

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<sup>13</sup> *Pulse Healthcare Ltd v Carewatch Care Services Ltd & Others* [UKEAT/0123/12/BA]

## Annex 3: How to respond to this consultation

We invite views on all the issues discussed in this consultation document. We particularly welcome responses to the specific questions which are raised in each section. It is not necessary to respond to all the questions; you are welcome to provide answers only to those issues of most interest or relevance to you.

This consultation will run for 12 weeks and the closing date for responses is 13 March 2014.

When responding please, state whether you are responding as an individual or representing the views of an organisation. If you are responding on behalf of an organisation, please make it clear who the organisation represents by selecting the appropriate interest group on the consultation form and, where applicable, how the views of members were assembled.

You can reply to this consultation online at [survey monkey](https://www.gov.uk/government/consultations/). The consultation response form is available electronically on the consultation page: <https://www.gov.uk/government/consultations/> (until the consultation closes). The form can be submitted online/by email or by letter or fax to:

Name: Paula Lovitt MBE

Team: Employment Status and Employment Contracts Team

Department of Business, Innovation and Skills

Postal address: Labour Market Directorate, 3<sup>rd</sup> Floor, Abbey 1, 1 Victoria Street, London, SW1H 0ET

Tel: 020 7215 0123

Fax: 020 7215 6414

Email [zerohourscontracts@bis.gsi.gov.uk](mailto:zerohourscontracts@bis.gsi.gov.uk)

Alternative formats of this document are available on request.

### Help with queries

Questions about the consultation process and the issues raised in the document can be addressed to:

Email: [zerohourscontracts@bis.gsi.gov.uk](mailto:zerohourscontracts@bis.gsi.gov.uk)

## Annex 4: Further information about the consultation

### Data protection and confidentiality

Information provided in response to this consultation, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004. If you want information, including personal data that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.

In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

### Principles of consultation

The principles that Government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the consultation principles.

<http://www.cabinetoffice.gov.uk/sites/default/files/resources/Consultation-Principles.pdf>

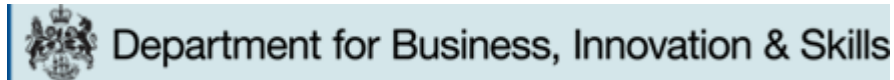
Comments or complaints on the conduct of this consultation

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to:

John Conway  
BIS Consultation Co-ordinator  
1 Victoria Street  
London  
SW1H 0ET

Telephone John on 020 7215 6402  
or e-mail to: [john.conway@bis.gsi.gov.uk](mailto:john.conway@bis.gsi.gov.uk)

## Annex 5: Consultation Response form



CONSULTATION: zero hours employmentscontract : Response form

A copy of the [Consultation: zero hours employment contracts](#) can be found at:

<https://www.gov.uk/government/consultations/>

You can complete your response online through [Survey Monkey](#)

Alternatively, you can email, post or fax this completed response form to:

Email: [zerohourscontracts@bis.gsi.gov.uk](mailto:zerohourscontracts@bis.gsi.gov.uk)

Postal Address:

Paula Lovitt MBE  
Employment Status and Employment Contracts Team  
3rd floor  
Department for Business, Innovation and Skills  
1 Victoria Street  
London SW1H 0ET

Tel: 0207-215 0123

Fax: 0207-215 6414

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

The closing date for this consultation is: [13 March 2014](#)

## Confidentiality & Data Protection

Please read this question carefully before you start responding to this consultation. The information you provide in response to this consultation, including personal information, may be subject to publication or release to other parties. If you do not want your response published or released then make sure you tick the appropriate box?

- Yes, I would like you to publish or release my response
- No, I don't want you to publish or release my response

If no you must give a reason

Your details

Name:

Organisation (if applicable):

Address:

Telephone:

Fax:

Please tick the boxes below that best describe you as a respondent to this consultation

- Business representative organisation/trade body
- Central government
- Charity or social enterprise
- Individual
- Large business ( over 250 staff)
- Legal representative

- Local government
- Medium business (50 to 250 staff)
- Micro business (up to 9 staff)
- Small business (10 to 49 staff)
- Trade union or staff association
- Other (please describe)

### Confidentiality and disclosure of response

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses. If you wish your response to remain confidential you must provide a reason. Do you agree for your response to be published or disclosed if requested?

- Yes       No

### Addressing exclusivity

#### Question 1

**Are there circumstances in which it is justifiable to include an exclusivity clause in a zero hours contract? If you answer yes, please describe the circumstances that justify such a clause.**

- Yes

Please explain your response:

- No

- Not sure

## Question 2

**Do you think the Government should seek to ban the use of exclusivity clauses in employment contracts with no guarantee of work?**

Yes

Please explain your response:

No

Not sure

## Question 3

**Do you think an outright ban on exclusivity clauses in employment contracts with no guarantee of work would discourage employers from creating jobs? Are there any other unintended consequences of Government action that should also be considered?**

Yes

Please explain your response:

No

Not sure

## Question 4

**Do you think Government should provide more focused guidance on the use of exclusivity clauses, for example setting out commonly accepted circumstances when they are justified and how to ensure both parties are clear on what the clause means? If you answer yes, what information should be included?**

Yes

Please explain your response:

No

Not sure

### Question 5

**Would a Code of Practice setting out fair and reasonable use of exclusivity clauses in zero hours contracts (a) help guide employers in their use, and (b) help individuals understand and challenge unfair practices? Please explain your response.**

(a)  Yes       Yes, only with Government endorsement       No       Not sure

(b)  Yes       Yes, only with Government endorsement       No       Not sure

**Please explain your response:**

### Question 6

**Do you think existing guidance and common law provision are sufficient to allow individuals to challenge exclusivity clauses and therefore no specific action from Government is required?**

Yes      Please explain your response:

No

No

## Improving the transparency of zero hours contracts

### Question 7

If you have sought employment information, advice, or guidance on zero hours contracts before, (a) where did you receive it from, (b) how helpful was it to you in terms of explaining your position in regard to zero hours contracts, and (c) how could it have been improved?

Very helpful       Helpful       No change       Not very helpful

Please explain your response:



**Question 8**

**Would the additional information, advice and guidance suggested in the first option (first bullet point, para 41), help individuals and business understand their rights and obligations? If not, what other information should Government provide?**

Yes                      Please explain your response:

No

Not sure

**Question 9**

**Further to your answer to Question 5, would a broader employer-led Code of Practice covering all best practice on zero hours contracts encourage more transparency?**

(a)    Yes             Yes, only with Government sponsorship             No             Not sure

(b)    Yes             Yes, only with Government sponsorship             No             Not sure

**Please explain your response:**

**Question 10**

**Do you think that model clauses for zero hours contracts would assist employers in drawing up zero hours contracts, and support employers and individuals to better understand their employment rights and obligations? If you answer yes, what should be the key considerations be in producing model clauses?**

Yes                      Please explain your response:

No

Not sure

### Question 11

**Do you think that existing employment law, combined with greater transparency over the terms of zero hours contracts, is the best way of ensuring individuals on zero hours contracts are making informed choices about the right contract for them to be on?**

Yes                      Please explain your response:

No

Not sure

### Question 12

**Further to your answer to Question 11, do you think there is more employers can do to inform individuals on zero hours contracts what their rights and terms are?**

Yes                      Please explain your response:

No

Not sure

### Question 13

**Are there unintended consequences of introducing any of these options? Please explain your response.**

**Please explain your response:**

**Questions for employers**

### Question 14

**Do you use zero hours contracts in your business and if so, for what purpose?**

Yes                      For what purpose:

No

**Question 15**

Have you offered a job on a zero hours contract basis that includes an exclusivity clause? If so, for what reason?

Yes                      For what reason:

No

**Question 16**

Are you aware of staff you employ on a zero hours contract who work for other employers?

Yes

No

**Question 17**

Do you offer staff on a zero hours contract training or opportunities to develop their skills? Is this usually just at the start of the contract or do you offer training opportunities throughout the employment relationship?

Yes                      Please explain your response:

No

**Question 18**

How many hours – on average – do you offer individuals on a zero hours contract in a week or month?

Zero hours contract in a week or month:

**Question 19**

Do you let individuals have a choice or say in how many hours or when they work?

Yes                      Please explain your response:

No

**Question 20**

What is your policy when an individual declines hours of work you offer?

Please explain your response:

**Question 21**

Do you employ any individuals on a zero hours contract who work a pattern of regular hours? If so: i) how many hours a week and for what period of time? ii) why do you employ that individual on a zero hours contract basis?

Yes                      Please explain your response:

No

**Question 22**

How much notice do you give an individual if the number of hours they work will decrease or drop off to zero?

Please explain your response:

**Question 23**

If you offer additional hours of work – how much notice do you give the individual? And how e.g. phone call?

Please explain your response:

**Question 24**

Do you understand what employment rights an individual is entitled to when employed on a zero hours contract? If so: i) what do you believe they are? ii) did you explain these to the individual? iii) how did you find out?

Please explain your response:

**Question 25**

How do you calculate paid annual leave for an individual on a zero hours contract?

Please explain your response:

**Question 26**

When you advertise or recruit on a zero hours contract basis: i) do you explain the implications of this type of contract: ii) at what stage do you make it clear that there is no guarantee of a minimum hours of work?

Please explain your response:

**Questions for individuals**

**Question 27**

Have you accepted a job on a zero hours contract basis that has included an exclusivity clause? What was the job and what reason was given for including an exclusivity clause?

Yes                      Please explain your response:

No

**Question 28**

If you are employed on a zero hours contract – do you have more than one employer or contract?

Yes                      Please explain your response:

No

**Question 29**

Has being employed on a zero hours contract helped you to achieve a good balance between your work life and home life? Was this a factor in accepting a job on this basis?

Yes                      Please explain your response:

No

**Question 30**

If employed on a zero hours contract, has your employer offered you training or opportunities to develop your skills? Was this at the start of the contract or have you had training opportunities further into your employment?

Yes                      Please explain your response:

No

**Question 31**

How many hours – on average – do you work in a week or month?

Please explain your response:

**Question 32**

Do you have a choice or say in how many hours or when you will work?

Yes                      Please explain your response:

No

**Question 33**

Would you like to work more hours than your employer currently offers you? If not – why?

Yes                      Please explain your response:

No

**Question 34**

Have you worked a pattern of regular hours whilst on a zero hours contract? If so how many hours a week and for what period of time?

Yes                      Please explain your response:

No

**Question 35**

If you work a regular pattern of hours under a zero hours contract, how much notice do you receive if the number of hours decrease or drop off to zero?

Please explain your response:

**Question 36**

If your employer offers additional hours of work – how much notice do you receive?

Please explain your response:

**Question 37**

Are you given a choice to accept, decline, or negotiate the hours your employer offers you?

Yes                      Please explain your response:

No

**Question 38**

Do you feel you have a choice to accept, decline, or negotiate the hours your employer offers you?

Yes                      Please explain your response:

No

**Question 39**

If you have ever declined any hours of worked offered to you, did your employer subsequently stop offering you work, or reduce the number of hours offered?

Yes                      Please explain your response:

No

**Question 40**

As a zero hours contract member of staff, do you know if your rate of pay is the same or different compared to staff working on guaranteed hours contracts doing a similar job?

Yes                      Please explain your response:

No

**Question 41**

Do you understand what employment rights you are entitled as someone employed on a zero hours contract? If so – i) what do you believe they are? ii) did your employer explain? iii) how did you find out?

Please explain your response:



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**BIS/13/1275**