IoD response to BIS consultation on Zero hours employment contracts

The Institute of Directors (IoD) welcomes the opportunity to respond to the consultation document on *Zero hours employment contracts* published by the Department for Business Innovation & Skills in December 2013.

About the IoD

The IoD was founded in 1903 and obtained a Royal Charter in 1906. It is an independent, non-party political organisation of approximately 35,000 individual members. Its aim is to serve, support, represent and set standards for directors to enable them to fulfil their leadership responsibilities in creating wealth for the benefit of business and society as a whole. The membership is drawn from right across the business spectrum. 80% of FTSE 100 companies and 60% of FTSE 350 companies have IoD members on their boards, but the majority of members, some 72%, comprise directors of small and medium-sized enterprises (SMEs), ranging from long-established businesses to start-up companies. s. IoD members' organisations are entrepreneurial and resolutely growth orientated. More than two-fifths export. They are at the forefront of flexible working practices and are fully committed to the skills agenda.

General comments

The IoD has surveyed its members twice in the past year on their use of zero hours contracts. The results of these surveys are included in our responses to individual questions below.

It is clear from our member surveys that, for companies which use zero-hours contracts, they are regarded as an important means of maintaining flexibility that enables them to offer a cost-effective service. Using zero hours contracts is a way of offering a service – or offering a better or wider service - to consumers/customers or other businesses without adding the significant fixed costs incurred by employing people on permanent contracts, or paying overtime, or incurring costs and administrative burdens in frequently recruiting and dismissing people in line with demand. In many cases, this would make the service commercially unviable. Zero-hours contracts are therefore an essential tool for some businesses.

Examples of the use of zero-hours contracts by IoD members are:

- to staff a pub in a popular tourist area where the weather makes a huge difference to the number of customers;

- students who are offered work to fit around their studies in order to gain experience with a company, with a view to possibly being recruited when studies are completed;

- a new business project that may lead to a full contract in the future, where it would not have been possible to ‘test the waters’ without using zero-hours contracts to limit risk;

- individuals who have retired from a company, but who have skills that the company would like to continue to call on;

- to provide cover for holiday or sickness absence;

- to provide additional services alongside contracted care and support services, thereby adding value to a service offer without an increase in net costs;

- to match work performed by care staff to demand from clients for their services, and so to fulfil contractual obligations;

- to economically cover 8+8 hours 7 days a week in contact centres and distribution centres to match demand and marketing campaigns;

- to react quickly to peaks and troughs in production levels using employees who are fully trained and therefore efficient with production requirements;

- flexibility in more remote geographic locations where the amount of work available varies and is limited; or specialists that act as regional representatives when required, but for only a few hours per month. Use of zero hours contracts therefore enables a wider geographical coverage than would otherwise be possible;

- to provide additional security officers at the request of clients when they organise events. There is no work in between events;

- to have staff on the books, involved in training and company communications, without having to employ them full time, or going through an agency with the need to train new people each time;

- to offer short-term consultancy at short notice all over the world;

- to tie senior people into a business for specific consulting opportunities;

- to use staff who are vetted, trained and knowledgeable of internal company issues, without having to use multiple, short-term contracts;

- to fulfil ad hoc short-term contracts where there is a huge variation in requirements for staff;

- to provide specialist consulting services, giving staff the flexibility they want, paying well when there is work, and avoiding the intolerable expense of employing people full time and having to make redundancies when work is scarce.

Objections to zero hours contracts by IoD members tend to focus on the potential for exploitation of vulnerable workers, and the financial impact on such workers if they cannot

secure more regular work. This is a legitimate concern, but it needs to be distinguished from situations where those employed on zero hours contracts are happy to be so.

Our responses to the questions posed in the consultation document are below.

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.

Very few IoD members surveyed incorporate an exclusivity clause in a zero hours contract. Of 161 members who currently make use of zero hours contracts, just 16 stated that they incorporate an exclusivity clause – 9 do so in all zero hours contracts, while 7 do so in some contracts.

The reasons given for using an exclusivity clause were (some respondents gave more than one reason):

- To protect company secrets (44%)
- To protect investment (eg training) in an individual (50%)
- To protect intellectual property (63%)
- To ensure people are available when needed (63%)
- Tax reasons, ie to simplify payment of income tax and national insurance (1 company)
- To protect clients, ie to ensure an employee is not working for a competitor of a client via another employer (1 company)

We understand another reason given is to enable an employer to monitor and control an individual's working hours so as to comply with the Working Time Regulations and for safety reasons, eg lorry drivers, care workers.

In our view, each of these reasons is a legitimate interest that a company may wish to protect. The issue is whether it is possible to protect these interests as effectively, without resorting to an exclusivity clause. For example, would it be possible to protect company secrets as effectively by using a confidentiality clause rather than an exclusivity clause, or to protect intellectual property with a specific IP clause?

It is not clear to us, either from the consultation document, or from our own survey of members, to what extent exclusivity clauses are used for other than high-level employees. Intuitively there seems less need to impose an exclusivity restriction to protect company secrets, intellectual property or investment in individuals in the case of those at the

“vulnerable worker” end of the spectrum. We pick up this point in the response to the next question about banning exclusivity clauses in zero hours contracts.

Question 2 - Do you think the Government should seek to ban the use of exclusivity clauses in employment contracts with no guarantee of work?

In our survey of IoD members, 70% said they would support a ban on using exclusivity clauses in zero hours contracts, 14% would not, and 17% were undecided. This level of support did not vary significantly between members who use zero hours contracts and those that do not.

We believe the strength of this opposition to exclusivity clauses is driven primarily by concern for the well-being of vulnerable workers – those in low-skill, low-paid jobs struggling to make ends meet. It certainly seems unfair to prevent such workers supplementing their income by working for another employer when they are not guaranteed any work in the first place.

We do have concerns though that an outright ban on exclusivity clauses in zero hours contracts could have unintended adverse consequences for employers seeking to protect legitimate interests of the kind referred to above. We pick up this point in the response to the next question.

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?

It seems unlikely that such a ban would by itself discourage employers from creating jobs other than on a very marginal basis. The decision to recruit is based on more substantial factors such as profitability of the business, expected upturn in demand, as well as a perception of the overall extent of employment regulation with its associated costs, burdens and risks.

As noted in the response to the previous question, we are concerned there could be unintended consequences to an outright ban on exclusivity clauses in zero hours contracts. Employers have legitimate interests that they are seeking to protect by using an exclusivity clause, such as company secrets, intellectual property, client requirements, investment, and compliance with working time rules. However, we simply do not have enough information at present to know what impact such a ban would have on the protection of these interests, and whether they could be protected as effectively through means other than an exclusivity clause. We hope that this will come out more clearly as a result of the consultation exercise, but if not, we would urge the Government to investigate this aspect of the issue more thoroughly.

One option would be to consider allowing use of an exclusivity clause where it is a proportionate means of achieving a legitimate aim.

A possible consequence of banning exclusivity clauses could be to cast doubt on the employment status of individuals on zero hours contracts. The existence of an exclusivity clause could well mean that an individual is deemed to be an "employee" with the associated employment rights that come with that status.

A further element that would need to be considered is that any ban on exclusivity clauses would need a definition of a zero hours contract within the legislation. As pointed out in the consultation document, there is currently no legal definition in domestic law. Our concern is that any definition could either be cast too wide that it catches other types of contract, or be cast too narrowly such that it would be easy to circumvent.

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?

We think there is certainly a need for better Government guidance but we are not convinced it should go into detail on "commonly-accepted circumstances" for using exclusivity clauses. This would be better in a Code of Practice, as suggested below. There is a danger of duplication and overlap between Government Guidance and a Code if both delve into detail, and this could be confusing for employers/employees, could raise problems of consistency, and would simply be more for people to have to read. Government guidance should be confined to explaining what an exclusivity clause is, giving some examples of why it might be used, and referring on to more detailed guidance in the Code of Practice.

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.

We would support a Code of Practice agreed by employer groups on the fair use of zero hours contracts. IoD would want to be involved in developing the Code. Employers who use zero hours contracts could state that they have signed up to the Code and would make sure that it was accessible to their workers so that they could see it was being complied with.

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?

We are not aware that there is <u>any</u> guidance at present on exclusivity clauses in zero hours contracts. We doubt that common law provisions would be sufficient, particularly in the case of vulnerable workers, though we repeat the point that there is insufficient evidence of the extent to which exclusivity clauses are imposed on vulnerable workers.

Improving the transparency of zero hours contracts

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 there is a need for greater guidance to employers and employees on the use of zero hours contracts, and the implications. The guidance provided on the *gov.uk* website is minimal in the extreme, consisting of a grand total of 55 words in the employer section and nothing at all in the employee section.

What is needed is separate guidance aimed at employers and workers/employees. In each case it needs to explain that a zero hours contract may or may not confer employment status, and the factors that are taken into account in determining this including those that are specific to zero hours contracts (and including the fact that Employment Tribunals will look past the terms of the contract to what actually happens in practice).

The guidance could then link through to the rights that will apply depending on whether the individual is a worker or an employee.

Thereafter, information/guidance is needed in particular on:

- How breaks between work affect qualifying periods, and continuity of employment;
- What are the rights as regards paid annual leave, sick leave, notice periods and how they are affected by breaks between work;
- What are the rights as regards pension contributions, including auto-enrolment, and employee share schemes;
- What is the legal position regarding the inclusion of zero hours workers/employees employee thresholds, eg for collective redundancy consultation, information and consultation bodies, and trade union recognition
- What is the position regarding eligibility to benefits, especially job seekers allowance, for those on a zero hours contract

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?

As noted earlier, we would support an employer-led Code of Practice, and would want to be involved in drawing it up. However, it should not cover "best practice" as this might suggest a standard that is out of reach for some employers. Rather it should cover good practice in the use of zero hours contracts. IoD would want to be involved in developing the Code.

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?

Model clauses may be useful to employers as part of a Code of Practice. This is something that should be discussed between employer groups as part of the process for developing a Code. One of the key considerations in drawing up a Code, and model clauses, would be flexibility, recognising that different employers – especially those in different sectors - use zero hours contracts for very different reasons.

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 we think this is the right approach. We do not want to see further new regulation in this area, for example a right/obligation to obtain legal advice before accepting a zero hours contract (as will settlement agreements and employee-shareholder contracts), or a statutory "right to request" a "regular" contract or guaranteed number of hours work after a qualifying period. Such regulation simply creates further administrative burdens for employers and risks from making mistakes. A Code of Practice combined with much better government guidance will help both employers and employees make more informed decisions and choices.

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?

There is anecdotal evidence that some employees have been unaware that they are working on a zero hours contract, and that some job applicants have been unaware that a post for which they had applied was on a zero hours basis. Clearly, this is not acceptable. There are already legal obligations on employers to provide a written statement of particulars of the major terms of the contract, including any terms and conditions relating to hours of work. This should state whether the contract confers a set or minimum number of hours of work. This is one element that Government guidance and an employer Code of Practice could usefully cover.

Question 13 - Are there unintended consequences of introducing any of these options? Please explain your response.

We have already highlighted our concerns about unintended consequences of banning exclusivity clauses within zero hours contracts. More generally we think that regulating the use of such contracts could create further administrative burdens and legal risk for the great majority of employers who want to comply with the law, with a disproportionate impact on smaller employers; and be ineffective by provoking some employers to make minor

modifications to contracts in order to keep within the law (eg a low number of guaranteed hours of work).

Questions for employers

Question 14 - Do you use zero hours contracts in your business and if so, for what purpose?

The IoD has surveyed its members twice in the past year on their use of zero hours contracts.

In June 2013:

- 1,027 IoD members responded to the survey - 617 small firms, 213 medium-sized firms, 138 large firms[1], and 51 businesses with no employees.
- 11% of respondents said that their organisations were currently using zero hours contracts for some of their employees (7% of small employers, 14% of medium-sized, 20% of large).
- Greatest use was the hospitality sector at 31%, followed by administration and support services at 23%, arts, entertainment and recreation at 18% and education, health and public administration at 17%
- Of those using zero hours contracts, the majority (58%) said that they were using them for no more than 10% of their workforce.
- Of those using zero hours contracts, 47% said that their use of the contracts had increased over the course of the last two years.
- The verbatim comments showed that the mean reason for the use of zero hours contracts is fluctuating, unpredictable or sporadic demand (see the examples given on pages 1 and 2 above).

The follow-up survey in January 2014 showed a similar level of usage. Amongst the 1,170 respondents 14% said they use zero-hours contracts for at least some of their workers, while 85% do not use them at all.

Question 15 - Have you offered a job on a zero hours contract basis that includes an exclusivity clause? If so, for what reason?

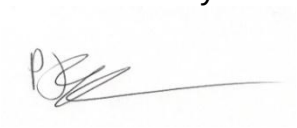
See our response to question 1 above.

We are not responding to the remaining questions in the consultation document since they are aimed at individual employers or employees.

[1] Small = 1-49 employees, medium = 50-249 employees, large = 250+ employees

Thank you once again for inviting the Institute of Directors to participate in this consultation. We hope you find our contribution useful.

Yours sincerely



Philip Sack
Senior Adviser, Employment Policy
Institute of Directors