Consultation on application of zero-hours contracts measures to agency workers Acas response

2 December 2024

This is the Acas Executive response to the government's consultation on the application of zero-hours contracts measures to agency workers.

Our response

1. Acas (the Advisory, Conciliation and Arbitration Service) welcomes the opportunity to respond to the government's consultation on the application of zero-hours contracts measures to agency workers.

2. Acas is a statutory, non-departmental public body with a duty to promote the improvement of industrial relations in Great Britain. We have a further statutory duty and powers to provide individual and early conciliation in potential and actual employment tribunal claims, and collective conciliation in trade disputes. Acas therefore has considerable practical experience of employment relations and of the issues that can be experienced by employers, workers and representatives across all areas of employment law and workplace practice.

3. We work with millions of employers and employees every year to improve workplace relationships. We provide free and impartial advice on employment rights, good practice and policies, and preventing and resolving workplace conflict. In 2023 to 2024 we saw: approximately 18 million visits to our website; 12 million visits to our advice; almost 600,000 calls to the Acas helpline, and over 2,000 training sessions delivered by Acas advisers. We handled over 600 collective conciliation cases, 105,000 early conciliation notifications and 33,500 individual conciliations in employment tribunal cases.

4. Acas has actively engaged over several years in helping to inform and shape policy on the issue of 'one-sided flexibility' in some parts of the labour market, and on the need to achieve the right balance between business flexibility and individual job security and wellbeing.

5. Acas recognises that flexible contracts can benefit organisations and individuals where they meet the needs of both parties. For example, they can help businesses respond to fluctuating demands, and can give individuals the flexibility they may need to balance their work and home lives. However, evidence from calls to our helpline shows that the trade-off between the benefits and risks of flexibility is not always understood, desired or shared equally between those engaged in flexible contracts.

6. Flexible contracts should always be used responsibly and fairly. Those entering into such arrangements should be able to do so on an informed basis as to the potential benefits and risks. Organisations should regularly review their use of these arrangements to make sure they are working in the interests of both the business and its workers. In some cases, providing more predictability around working hours and patterns can give workers greater financial stability and allow them to better plan their work and personal commitments.

7. The government has rightly recognised that some workers on flexible contracts can lack confidence to assert statutory rights for fear of having work denied to them in response. This chimes with previous Acas analysis of calls to our helpline which identified the potential for poor management practices of 'zeroing down' the hours of some workers on less secure contracts. Where such practices

occur, Acas has termed this a form of 'effective exclusivity' from statutory rights for such workers and noted the deep-seated nature of the power imbalance in such cases.

8. Acas is keen to share its evidence and insights on both one-sided and two-sided flexibility and we look forward to continuing our engagement with the government as it considers next steps in this area and its wider Plan to Make Work Pay.

9. This response centres on questions 7 and 10 of the consultation. It sets out factors that, in Acas's view, should be taken into account in the event that the government decides to extend to agency workers the new right to guaranteed hours and reasonable notice of shifts with payment for shifts cancelled or curtailed at short notice. It also offers reflections on question 6 relating to temp-to-perm transfer fees and question 8 on liability in tribunal claims on unreasonable notice.

Question 7 and 10 – Application of zero-hours contracts measures to agency workers

10. The government's question of how the zero-hours contracts measures in the Employment Rights Bill should effectively apply to agency workers raises a number of considerations.

11. A first important consideration for the government is the potential for unintended consequences, particularly in its efforts to address anti-avoidance behaviours. For example, the extension of zero-hours contracts measures to agency workers could inadvertently drive businesses towards greater use of informal, less regulated forms of work, or result in the false classification of workers as 'self-employed'.

12. The complex issue of employment status also arises with regard to the parties to fall within scope of the proposed reforms. In particular, the umbrella term 'agency workers' may refer to individuals classified as 'workers', 'employees' or 'self-employed'. The language of the consultation document does not make clear whether the proposed extension to agency workers is also intended to include those agency workers who are employees, or whether the government plans to distinguish between such groups (whose current rights and protections already vary in other respects), and if so, how.

13. Thirdly, as the consultation and Employment Rights Bill confirms, the Workers (Predictable Terms and Conditions) Act 2023 is to be repealed. In anticipation of the Act coming into force, in 2023 Acas began work to develop a new statutory Code of Practice on requests for a more predictable working pattern. While the Code will no longer progress, the insights gathered from our public consultation will be valuable in informing considerations on the application of new zero-hours contracts measures to agency workers. Indeed, we note that the impact assessment for the new measures observes that there will be similarities between the framework for processing and moving workers onto new contracts under the right to guaranteed hours as under the right to request a more predictable working pattern.

14. Respondents to Acas's consultation sought clarity on the following areas which are indicative of the types of issues that may arise and require clarification if the current zero-hours contracts measures in the Employment Rights Bill are to be extended to agency workers:

- whether the 12-week 'qualifying period' for requests to hirers was to be calculated in line with regulation 7 of the Agency Workers Regulations 2010 (a question which similarly applies to the proposed 12-week reference period under a right to a guaranteed hours contract)
- the complex management of the 'triangular relationship' between an agency worker, agency and end hirer (as also recognised in the government's consultation document at page 6), in particular the challenges of needing to engage multiple parties in a request and to understand the relevant obligations of each
- opposition from some respondents to end hirers being within scope of the Workers (Predictable Terms and Conditions) Act, on the basis that an agency worker's contract is with their agency, driving a need for close engagement between both parties within what was considered a tight response window for handling requests
- the importance of clarity on the role of umbrella companies and whether they fall within scope of the legislation – see further below

15. Finally, as outlined in Acas's response to the previous government's call for evidence on umbrella companies and our later response to a consultation on tackling non-compliance in umbrella companies, a challenge facing agency workers engaged by umbrella companies is that there can be significant confusion over:

- the different 'employment statuses' they may have for employment rights and tax purposes
- which regulations apply specifically for tax purposes and which for employment rights
- for employment rights purposes, whether they are a 'worker' of the employment business or an 'employee' of the umbrella company, or self-employed
- who holds responsibility for addressing problems relating to the individual's employment contract, in addition to responsibility for other employment matters, and the options for legal redress where appropriate

16. Acas acknowledges that compliant umbrella companies can provide useful services within the labour market which can benefit both individuals and employers. However, the largely unregulated nature of the current arrangements can also allow unscrupulous companies to take advantage of their unregulated status. As set out in Acas's previous responses noted above, we would welcome measures to bring umbrella companies within a stronger regulatory framework. These should include, for instance, an obligation on the umbrella company to provide accurate information to the employment business to inform the worker's Key Information Document, and an obligation on the umbrella company to confirm to the individual worker that they are their employer, where appropriate.

17. Acas notes that the recent Autumn Budget confirmed plans to legislate to move the responsibility to account for PAYE from the umbrella company to the agency (or where there is no agency, the end client). Care needs to be taken to ensure that such changes do not unintentionally exacerbate worker confusion regarding the correct identity of their employer and who to approach to resolve any issues around deductions from pay. More broadly, clear and accessible guidance will be of particular importance as new areas of regulation will inevitably lead to an important period of learning and adaptation for all affected parties.

Question 6 – Transfer fees to hiring companies ('temp-to-perm')

18. While Acas does not have evidence to respond directly on whether payment of temp-to-perm transfer fees should apply in cases where a guaranteed hours contract is offered, the government should consider here any potential impacts that retaining or removing these fees could have on businesses' demand and interest in engaging agency workers. This includes, for instance, whether removing fees could potentially incentivise greater use of agency workers over permanent recruitment processes, as a way for hirers to assess workers before deciding on direct employment.

Question 8 – Apportioning liability in an employment tribunal claim

19. On the question of whether, where a tribunal finds that unreasonable notice was given, it should apportion liability according to the extent that the agency and the hirer are each responsible for the unreasonable notice, we would recommend the government to draw on any relevant learning from the judicial system on the current application of regulation 14 of the Agency Workers Regulations 2010. That regulation provides that an agency would not be liable where, for example, they have taken 'reasonable steps' to obtain relevant information from the hirer.

20. Should the government decide that liability can rest with either party in the case of unreasonable notice, the specifics around the definition of both 'reasonable notice' and what would amount to an appropriate defence in any tribunal claim will be of paramount importance. This will ensure not only that tribunals can effectively determine liability in any claim, but also clarity around obligations for parties within the supply chain (for example, building in sufficient time to enable timely correspondence between the agency and the hirer).

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