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BECAUSE RECRUITMENT MATTERS

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Zero hours contracts – what's next?

What's in your Legal bulletin?

Zero hours contracts continue to capture the attention of politicians and the general public alike, particularly in the run up to the general election. While the phrase seems to have become a by-word for any type of flexible working arrangement, there is now specific legislation which will govern their use. Here we look at the impact for employers and recruiters.

Background

Summer 2013

The Government conducted an informal review to gather information about the use of zero hours contracts. The review highlighted one particular concern about the extent to which zero hours workers could be prevented, under a clause in the contract (an exclusivity clause), from carrying out other work during periods that their zero hours employer is unable to find work for them.

December 2013

Following the findings of the informal review, the Government launched a formal consultation on zero hours contracts to consider:

- Whether to introduce legislation to ban the use of exclusivity clauses in zero hours contracts;
- How to improve transparency about the use of zero hours contracts, for example by introducing Government guidance for employers and workers and the production of a Government lead Code of Practice.

June 2014

The government announced that provisions to ban exclusivity clauses would be included in the Small Business, Enterprise and Employment Bill which was then introduced to Parliament.

August 2014

Having determined that a ban on exclusivity clauses was to be introduced, the Government launched a consultation to take views on whether employers would be likely to try to avoid the ban by, for example guaranteeing as little as one hour of work, and to consider proposals to tackle anti-avoidance.

Where are we now?

March 2015

Responding to the August 2014 consultation (above) the Government has now released details of draft regulations which aim to prevent employers from getting around the ban on exclusivity clauses and to protect workers from suffering any detriment if they do not accept work from their employer.

The Legislation

The Small Business, Enterprise and Employment Act 2015 (the Act) which only recently passed into law on 26 March 2015 defines a zero hours contract as:

> *a contract of employment or other worker's contract under which*
>
> *(a) the undertaking to do or perform work or services is an undertaking to do so conditionally on the employer making work or services available to the worker, and*
>
> *(b) there is no certainty that any such work or services will be made available to the worker*

Essentially this is a contract under which the employer does not guarantee to provide any work to an employee or worker. The reference to 'workers' includes individuals who do not have an employment contract, but have a contract under which they provide their services personally. The word 'worker' in this article is used to refer to both employees and workers.

Exclusivity clauses banned

The Act goes on to make any provision in this type of contract, which prevents the worker from working elsewhere (or requires them to obtain consent to work elsewhere) unenforceable.

Although the Act has been passed into law, these provisions relating to zero hours contracts are not yet in force. This will require a commencement order which will now be down to the new Government to introduce.

In the meantime, the Government has also proposed further regulations which will extend the ban on exclusivity clauses to a wider range of contracts and will also provide protection for workers to prevent their employer subjecting them to a detriment if they turn down work which is offered to them.

Under the draft Zero Hours (Exclusivity Terms) Regulations 2015 exclusivity clauses will also be unenforceable in a 'prescribed contract' which is a contract of employment or worker's contract which entitles the worker to be paid no more than a set minimum amount per week. The formula proposed for calculating the set minimum will be based on the adult national minimum wage (NMW) in force from time to time (currently £6.50) multiplied by a set number of hours (which is yet to be determined).

However, in order to avoid higher earners who choose to work fewer hours from being brought into scope, these provisions will not apply in respect of contracts where the employee or worker is paid at least £20 per hour.

Detriment

Under the draft regulations workers engaged on zero hours contracts or a prescribed contract will have the right to take action against their employer if they are subjected to a detriment because they turn down work offered by their employer. The Government explains that this provision has been included because, despite the exclusivity clause ban, employers could choose not to offer work to workers who have undertaken work for other employers. Detriment is not defined in the draft regulations as this will be left to employment tribunals to determine.

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Impact for recruiters

Despite the fact that most of the negative publicity about the abuse of zero hours contracts relates to staff directly engaged by employers on such contracts, these amendments will impact recruiters who supply agency workers.

Employers who have typically restricted staff from working elsewhere or required employees to seek consent to do so (for example to ensure that employees are not working for a competitor) will be caught by these changes if their staff work on contracts which are below the weekly income threshold or hourly rate threshold (above).

Agency workers

Recruiters are already subject to the Conduct of Employment Agencies and Employment Businesses Regulations 2003 (the Conduct Regulations). This prohibits them from subjecting or threatening to subject candidates to any detriment for a range of reasons, including where an agency worker takes up or proposes to take up work elsewhere. Additionally since recruiters will generally have a range of clients to supply workers to, unlike employers of other zero hours workers, recruiters will generally have more options to find their workers work elsewhere with other clients.

These restrictions in the Conduct Regulations don't apply where agency workers are engaged on contracts of employment or contracts of apprenticeship, so recruiters may need to review these contracts, particularly where the temporary worker may need consent to work to do work elsewhere.

Next steps

It is clear that some steps will be taken to provide zero hours workers with some additional protections. As to when this happens and whether more extensive measures than those outlined above will be put in place will very much depend on the outcome of the general election.

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Umbrella companies and tier 2 visas – an update from the Home Office

Many REC members say they have been approached by umbrella companies offering to sponsor workers through the tier 2 visa system, but there are many concerns about the extent to which this is feasible within the tier 2 visa rules. REC asked the Home Office for its view.

Click here to read the full response from the Home Office.

RYAN HUGGETT, LEGAL ADVISER AT THE REC, BRINGS YOU A SAMPLE OF QUESTIONS POSED TO THE LEGAL HELPLINE

My client made an offer of employment to my candidate with a later starting date and my candidate accepted. My client has now decided to withdraw their original offer before the candidate started working. What are the legal ramifications of this?

It can be very frustrating when a client decides to withdraw an offer of employment to a candidate or to terminate their employment, particularly if the candidate has not yet started working for the client. In this situation, candidates are often confused as to what their legal rights are and members are faced with the dilemma of managing their relationship with their client and candidate, whilst also potentially refunding the introduction fee that they charged the client.

There are a number of issues to consider when looking at this question.

1) Withdrawal of Offer VS Termination of Employment

Under basic contract law, a contract is formed when one party makes an offer to another party and that other party accepts the offer. If the client makes an offer of employment to a candidate but subsequently withdraws that offer before the candidate accepts, then no contract is formed and there are no legal issues to consider.

However, in this question the candidate has accepted the offer of employment. Therefore the client cannot withdraw their original offer as a contract has been formed and must terminate the contract of employment if they no longer wish to work with the candidate. Terminating a contract of employment has legal consequences and it is these consequences that are to be considered in answering this question.

2) What are the Legal Consequences of Terminating a Contract of Employment?

The most obvious example is unfair dismissal. Under the Employment Rights Act 1996 ("ERA") an employee has the right to not be unfairly dismissed by their employer. If the candidate has their contract terminated before they start working because of an automatically unfair reason, then the candidate will be able to bring a claim for unfair dismissal. However, if the termination is not for an automatically unfair reason, then the candidate will not be successful in a claim for unfair dismissal, as they will not have satisfied the two-year qualifying period.

Wrongful dismissal is another possibility, which occurs where the client breaches the contract of employment. This often occurs where the client decides to terminate the contract without the proper notice. Under section 86 ERA an employer must give at least one weeks statutory notice to terminate a contract of employment if that employee has been continuously employed for at least one month but less than two years. However, section 211 ERA provides that "continuous employment" **begins on the day that the candidate starts working**. In this question the candidate has not yet started working and so will not be entitled to any statutory minimum notice. However, if the client has set out a fixed notice period in the contract, then they are contractually bound to provide this notice and pay the employee for this notice period. Failure to do so will amount to a breach of contract and thus, wrongful dismissal.

More information and guidance on dismissals can be found in the REC Legal Guide, available here.

3) Does an Employment Tribunal ("ET") have jurisdiction to hear a breach of contract claim if the candidate has not started working?

This final issue was addressed in the case of ***Sarker v South Tees Acute Hospitals NHS Trust***. In this case Sarker was offered a contract of employment by the Trust to start at a later date and accepted. The Trust then withdrew the offer before Sarker started working. The ET originally held that it had no jurisdiction to hear the claim on the grounds that Sarker's employment had never begun.

However, the Employment Appeal Tribunal ("EAT") overturned the decision and held that the tribunal had jurisdiction to hear the claim, on the grounds that the parties had entered into a contract of employment irrespective of the start date. The EAT provided that the reason for this extension of jurisdiction was to avoid the situation where an employee would need to use both an ET and a court of law in order to pursue all their claims.

Therefore, if the client decides to ***"withdraw"*** an offer of employment that they have made to your candidate, there are a number of issues to consider. It is also important to note that both the client and the candidate must seek their own independent legal advice on these issues.

In light of the new intermediaries legislation how can I safeguard my employment business against any tax liability?

The REC Legal Helpline frequently receives queries from members requesting advice on the new intermediaries legislation and how to prevent them from being exposed to any tax liability when engaging with limited company contractors.

The tax risks arise from Section 44 Income Tax (Earnings and Pensions) Act 2003 ("ITEPA"). Under this section the pay to the contractor is treated as employment income and the employment business is treated as the employer for tax purposes, ultimately responsible for tax (PAYE) and national insurance contributions ("NICs"). Therefore if the limited company fails to deduct the correct tax and NICs then the employment business that supplied the contractor could be pursued for the unpaid tax and NICs.

However, there are two circumstances in which section 44 will not apply:

1. Where it is shown that the contractor is not subject to (or there is no right of) supervision, direction and control of any person; or
2. Where the income that the contractor is receiving is shown to be employment income other than in consequence of section 44.

The ultimate risk to members is if the limited company fails to deduct the tax and NICs correctly where the contractor is subject to the supervision, direction and control of the client or is paid in such a way that their income is not employment income. In these circumstances members could be exposed to tax liability and could be pursued for unpaid tax and NICs.

Fortunately for members, there is a way that they can safeguard themselves against these tax risks. Under section 44(4) ITEPA, liability for unpaid tax and NICs will not transfer to the employment business where it can be shown that they have relied on a fraudulent document given by either:

A) **The client:** which was intended to demonstrate that the contractor is not subject to (or to the right of) supervision, direction and control of any person: or

B) **The limited company:** which was intended to demonstrate that the contractor's income is employment income (as per (2) above).

If the employment business relies on a fraudulent document, any liability for unpaid tax and NICs will not transfer to the member. Although not specified in the legislation, agencies in all likelihood will need to have acted in good faith in relying on the document. "Fraudulent" requires a criminal level of proof so it remains to be seen how HMRC approach this (they have told us that they would look at all the evidence and whether the agency reasonably relied on the document. The key is that an agency should not accept or try to rely on a document which it suspects or knows not to be true.

As such, in circumstances where it is asserted that the section 44 ITEPA (see above) does not apply, agencies should obtain a written declaration that is signed by either:

A) **The client:** declaring that the contractor will not be not be subject to (or there is no right of) supervision, direction and control of any person; or

B) **The limited company:** declaring that the income that the contractor is receiving is employment income (as per (2) above).

More guidance on what constitutes supervision, direction and control can be found in HMRC's guidance document, available here.

By obtaining this signed, written declaration and acting in good faith members will be able to rely on the protection of section 44(4) ITEPA if the document they have relied upon turns out to be a fraudulent document, thereby protecting their business against any tax or NICs liability as the liability will not transfer to the employment business.

Further information on the new ITEPA changes and also the new reporting requirements can be found in the REC Guide On Where to Find Information on the ITEPA Changes and Worker Reporting Requirements, available here.

The REC Legal Helpline frequently receives queries from members requesting advice on the new intermediaries legislation

The new shared parental leave and shared parental pay regulations recently came into force. How will these affect the rights of my agency workers?

The new Shared Parental Leave and Shared Parental Pay Regulations recently came into force and apply to children due to be born or placed for adoption on or after 5th April 2015. The new Regulations will have a major impact on both employees and agency workers.

Shared Parental Leave ("ShPL") is a new entitlement that allows mothers or adopters to reduce the amount of statutory maternity leave or adoption leave that they can take. The remaining balance of that entitlement can then be shared by either the mother or adopter and their partner, or alternatively taken solely by the partner as a period of ShPL.

As members will already be aware, agency workers engaged under contracts for services are not entitled to statutory maternity leave or statutory paternity leave, as these entitlements are reserved only for employees engaged under a contract of service. They may however be entitled to statutory maternity pay or statutory paternity pay, provided that they meet the relevant qualifying criteria.

Although ShPL is only available to employees, mothers who are agency workers can now sacrifice the period of time that they would be paid statutory maternity pay or maternity allowance so as to create ShPL for their partner who is an employee. This allows the partner to take ShPL that can be used by the partner to take further time off after they have exhausted their entitlement to statutory paternity leave.

For example, a mother who is an agency worker decides to reduce her statutory maternity pay and only receive statutory maternity pay for 10 weeks out of a possible 39 weeks. These 10 weeks will then be deducted from 52 weeks to leave a total of 42 weeks ShPL, which their partner can take as they are an employee.

Another example would be a mother who is an agency worker who decides to receive statutory maternity pay for 25 weeks out of a possible 39 weeks. These 25 weeks will again be deducted from 52 weeks to leave 27 weeks ShPL, which again their partner can take as they are an employee.

In order for the partner to claim ShPL once the mother has sacrificed some of their entitlement to statutory maternity pay or maternity allowance, the partner must meet a number of conditions specified in Regulation 5 of the Shared Parental Leave Regulations 2014. These include satisfying a continuity of employment test, providing notice and the required evidence to take ShPL to their employer and also demonstrating that apart from the mother they have the main responsibility to care for the child. In addition, the mother would also have to satisfy certain conditions, including satisfying the statutory employment and earnings criteria.

Further information on ShPL can be found on the ShPL section of the REC Legal Guide, available here.

In addition, mothers or partners who are agency workers are also entitled to Shared Parental Pay ("ShPP"), provided that they satisfy all the relevant conditions. These conditions are specified in Regulations 4 and 5 of the Shared Parental Pay (General) Regulations 2014 and include satisfying a continuity of employment test and again providing the correct notice. Similarly, the other respective partner must also satisfy the employment and earnings criteria specified in the Shared Parental Pay (General) Regulations 2014 and again have the main responsibility for caring for the child.

Further information about ShPP can be found in the ShPP section of the REC Legal Guide, available here.

Shared Parental Leave is a new entitlement that allows mothers or adopters to reduce the amount of statutory maternity leave or adoption leave that they can take

Legal round up

Election Special

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Given the recent May 2015 election, we have outlined below the manifesto plans of the various political parties on the issues recruiters will be interested in.

Agency workers

Labour on the Agency Workers Regulations 2010 (AWR): As recruiters will be aware, the AWR entitle agency workers to receive at least equal treatment on certain employment terms compared with the staff of the hirer they are supplied to, after completing a 12 week qualifying period. But under a derogation in the European Agency Workers Directive (commonly referred to as the Swedish Derogation), workers engaged on employment contracts that meet certain conditions and which provide for the worker to be paid between assignments, are not entitled to equal pay. The Labour party outlined plans to repeal the Swedish derogation.

Conservatives on supplying agency workers during strike action: The Conservative manifesto sets out plans to repeal regulation 7 of the Conduct of Employment Agencies and Employment Businesses Regulations 2003. Under this regulation, agencies are currently prohibited from supplying agency workers to clients to cover staff taking part in industrial action.

This plan runs alongside further proposals to tighten the thresholds required for ballots to authorise lawful industrial action.

Europe

Conservative: position on Europe include plans to renegotiate a return of powers from the European Union (EU) to the UK on key areas such as social policy and employment laws, pending a UK referendum on retained membership of the EU.

Labour: oppose a referendum on EU membership.

Liberal Democrats: oppose a referendum on EU membership.

UKIP: strongly campaign for withdrawal from the EU and committed to a referendum on EU membership.

Zero hours contracts

Conservative/Liberal Democrats: As summarised in the lead article (Zero hours contracts – what's next?) above, the previous coalition government has already put into place legislation which will curtail the use of exclusivity clauses in zero hours contracts and contracts which do not guarantee workers a minimum amount of pay.

Labour: While not disagreeing with the previous coalition government's measures on exclusivity clauses in zero hours contracts, Labour also proposed to go further by giving zero hours contract workers a right to a fixed hours contract after 12 weeks (the fixed hours would be based on the hours worked over the 12 weeks already worked). Additionally, such workers would be entitled to be compensated if shifts are cancelled at late notice.

National Minimum Wage (NMW)

Labour: The current NMW adult rate is £6.50 per hour and will increase to £6.70 from 1 October. Labour proposed to increase this to £8 per hour by 2020.

Green Party: proposed an increase on NMW to £10 per hour (in line with the Living Wage) by 2020.

SNP: proposed an increase to £8.70 by the end of the next Parliament.

Case Law: Lock v British Gas

The long awaited judgment in the case of Lock v British Gas was finally handed down in March by the Leicester employment tribunal. The case addresses the issue of whether commission payments should be taken into account when calculating workers statutory holiday pay.

In essence, the decision is that holiday pay should include commission when calculated in order to comply with European law and this outcome is to be achieved by adding extra wording to the Working Time Regulations 2008 to comply with European law.

Click here to read a summary of the judgment.

Just as we were going to press, Eversheds, the law firm which is representing British Gas has reported that their client intends to appeal against the decision. See their briefing here.

Due in force

And finally.... a reminder that the reporting requirements which require agencies to provide specific information to HMRC about payments made in respect of workers supplied to clients which are not included their own Real Time Information reports, are now in force. The first deadline for the reporting period 6 April – 5 July 2015 is 5 August 2015. The reporting requirements support the onshore intermediaries' legislation amendments of April 2014, and apply in respect of payments made by agencies which are 'specified intermediaries' to workers who provide services to the agencies' clients. The reporting periods and deadlines for 2015/2016 tax year are shown below.

Reporting period 2015/2016	Deadline date
6 April to 5 July 2015	5 August 2015
6 July to 5 October 2015	5 November 2015
6 October to 5 January 2016	5 February 2016
6 January to 5 April 2016	5 May 2016
and continuing every tax quarter…	…

Click here to access all REC factsheets on the intermediaries' legislation and reporting requirements.

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