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THE RT HON JONATHAN REYNOLDS MP

Zero Hours Contracts, Employment Rights Directorate

Department for Business and Trade

Old Admiralty Building

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Dear Secretary of State,

IoD response to the consultation on the application of zero hours contracts measures to agency workers

About the IoD

The IoD is an independent, non-party political organisation representing approximately 20,000 company directors, senior business leaders, and entrepreneurs. It is the UK's longest-running organisation for professional leaders, having been founded in 1903 and incorporated by Royal Charter in 1906. Its aim is to promote good governance and ensure high levels of skills and integrity among directors of organisations. It campaigns on issues of importance to its members and to the wider business community with the aim of fostering a climate favourable to entrepreneurial activity in the UK.

The IoD welcomes the opportunity to respond to this consultation on the application of zero hours contracts measures to agency workers. Striking an appropriate balance between worker protections and labour market flexibility is of considerable interest to the IoD and its membership, and we are therefore pleased to present our views.

In the first section, we provide a summary of our key perspectives on the proposals. We then offer more detailed views in respect of the specific questions posed in the consultation.

Summary of the IoD view

While the government's aim to avoid agency work being used to circumvent its reforms to zero hours contracts is understandable, we are concerned that the application of these reforms to agency workers will severely undermine the viability of agency work as a form of employment, one which frequently offers valuable flexibility to both the end hirer and the agency worker.

The policies proposed in this consultation are designed with a model of agency work in mind which is out of sync with how the majority of employers consider it to operate, that is, most employers who use agency workers do so to meet fluctuating demand in inherently unpredictable scenarios, rather than to deny workers employment rights. In implementing policies to tackle the latter scenario, the government will severely undermine the ability of employers to use agency workers for the core – and, for many workers, mutually beneficial – purpose of sourcing flexible labour.

“There is a difference between the genuine use of agency labour (for example to cover for illness or holiday) and the wholesale use of agency labour in order to avoid the workforce acquiring employment rights. Any legislative framework needs to address this issue.” – Large employer, Wholesale and retail trade, South East England

We are therefore responding to the questions in this consultation with a view to identifying the least harmful of the options presented, but ultimately would strongly encourage government to deliver its manifesto commitment to ban 'exploitative zero hours contracts' in a manner more considered and less likely to severely undermine the flexibility of the labour market.

Specific questions

5. Do you think the guaranteed hours should be offered by the employment agency (option 1) or the end hirer (option 2)?

Option 1, guaranteed hours should be offered by the employment agency. Both options carry with them significant risks and costs, but we consider Option 1 the least damaging option of the two. Ideally, the responsibility would differ according to whether the agency worker is engaged for one or multiple end hirers, but as such differentiation would be impossibly complex to legislate for then Option 1 is preferable.

An IoD survey of 601 business leaders in November 2024 found a small majority of support for the responsibility resting with the employment agency; of those who expressed an opinion, 55% stated that the employment agency should offer the guaranteed hours and 45% believed the responsibility should be the end hirer's (Appendix: Figure 1).

Ultimately, end hirers engage agency workers because they need flexible labour; a requirement to offer guaranteed hours would therefore undermine the economic proposition of agency work. Were end hirers required to offer guaranteed hours, it is unclear why any employer would make the decision to engage agency workers.

“It would be entirely impractical for us to offer guaranteed hours. We use agency staff for unexpected or unpredictable needs. We have no idea from one week to the next how many hours we will need.” – Medium-sized employer, Financial services, East of England

“The whole point of 'zero hours' is to offer flexibility for staff and employees. Guaranteed hours removes that flexibility so instead business will have to look to a self-employed model.”
– Microbusiness, Professional, scientific and technical activities, East of England

“We have employees who are on zero hours contracts because their work is project driven and is not guaranteed, and we can therefore not afford to offer them guaranteed hours. The risks of a downturn in work are too high. If we were using agency workers [and had to offer them guaranteed hours], we would likely turn away work that could not be carried out by our own employees rather than get locked into contractual agreements that could lose us money.” – Microbusiness, Information and communication, East of England

“Guaranteed hours are the complete opposite of the flexibility of a zero hours contract - just making it harder for businesses to be flexible, so there will be more making do through busy times instead of giving some opportunity of work to people.” – Microbusiness, Professional, scientific and technical activities, East of England

Agency workers often work for multiple end hirers, something which is outside the control of any one end hirer. As the organisation with the direct employment relationship with the workers, agencies are therefore best placed to manage the offer of guaranteed hours. Where hours from an end hirer fluctuate, larger agencies in particular would be able to explore meeting the guaranteed hours offer with work from other end hirers.

“This could destroy business models for the end hirer, and many of these will be very infrequent opportunities. Agencies should manage their caseloads adequately to be able to meet this.” – Microbusiness, Professional, scientific and technical activities, North West England

“[The requirement resting with agencies] would provide flexibility as the end hirer might have a finite number of sessions to offer whereas the agency will have a wider menu to offer.” – Large employer, Education, North West England

Such an approach would undoubtedly increase costs and risks for agencies. Agencies would be required to price in the cost of delivering guaranteed hours to agency workers who want them; that cost – but importantly, not the legal risk – would be passed on to end hirers and would make agency work a less viable economic proposition. Agency workers would consequently lose access to flexible work as fluctuations in demand will lead to agencies having to make workers redundant where they may otherwise have simply reduced hours.

As with the right to guaranteed hours as a whole, there is also a risk that agencies will be forced to reallocate work from workers who do not exercise their right to guaranteed hours – because they desire true flexibility in their work – to those who do exercise the right.

While we believe that Option 1 is the least damaging option of the two, therefore, it should be noted that there is a significant risk that it will undermine the viability of the agency sector.

“We have over 1200 contractors working as a temporary recruitment business across multiple sectors. Guaranteed hours cannot be offered by the employment agency as that is wholly

unfeasible.” – Medium-sized employer, Professional, scientific and technical activities, North West England

6. Should end hirers be required to pay a transfer fee or use an extended hire period if they are required to offer guaranteed hours to an agency worker? Yes No Don't know Please explain your answer

No. As described above, the requirement to offer guaranteed hours should sit with the agency. However, if the decision is made to place that requirement with the end hirer, then end hirers should not be required to pay a transfer fee. Requiring them to do so would further undermine the case for engaging agency workers and penalise end hirers for being required to offer guaranteed hours which likely already do not suit their business models.

At the same time, however, it is not clear why an agency worker would need to switch into direct employment to benefit from the right to guaranteed hours. Even if end hirers are required to offer guaranteed hours, it should be possible for them to do so through the existing tripartite relationship.

8. Do you agree that the responsibility for providing an agency worker with reasonable notice of shifts should rest with both the employment agency and the hirer, so that where a tribunal finds that unreasonable notice was given, it will apportion liability according to the extent that the agency and the hirer are each responsible for the unreasonable notice?

No. Primary responsibility and liability for providing an agency worker with reasonable notice of shifts is best discharged by the employment agency because they are the party best placed to manage and mitigate it. Agencies may, for instance, be able to find the agency worker alternative work. Agencies can also mitigate the increased risk via its commercial terms if it is unable to implement such measures to manage the risk; indeed, some agencies already include late shift cancellation penalty provisions in their contractual terms with end users.

In an IoD survey of 601 business leaders in November 2024, of those who expressed an opinion, half (48%) agreed that responsibility for reasonable notice of shifts should rest with both the employment agency and the end hirer (Appendix: Figure 2). The remainder of respondents were roughly evenly split between considering that responsibility should rest solely with the agency (24%) and the end hirer (27%). However, it should be noted that the general theme of responses was that, if there is to be a penalty attached to not providing reasonable notice of shifts, that it should be borne by both parties. We therefore consider the optimal outcome to be as described above, that is, that the legal responsibility rests with the agency but is to a large extent passed to the end hirer through contractual terms.

A flaw in the design of this policy – and indeed, the wider reforms around guaranteed hours – is that it seeks to tackle the exploitative uses of agency workers but brings into scope the perfectly reasonable use of them. This consultation itself makes reference to employers allocating and changing shifts at short notice *‘in some cases [emphasis added] without good reasons’* and then proceeds to describe a policy intervention which targets all employers, including those who change shifts with good reasons.

The primary economic function of agency work is to provide a flexible workforce at short notice, thus the notion of employers being required to provide significant amounts of notice is inherently flawed and impractical.

“As the whole point of agency staff is usually to deal with unexpected increases in workforce requirements e.g. to cover sickness absence, I honestly fail to see how this can be realistically planned in advance.” – Microbusiness, professional, scientific and technical activities, East of England

“We rarely use agency workers. However, those that do don't always know when and for how long they will be required for. If they did, they probably wouldn't need them!” – Medium-sized employer, Financial services, London

“This ends up as a cost on employment, as companies can't always be sure ‘with reasonable notice’. That's the whole point of flexible labour.” – Microbusiness, Professional, scientific and technical activities, London

“Completely unworkable policy in many industries.” – Small employer, Information and communication, North West England

“The end result of this will likely be a move to fixed term contracts.” – Small employer, Professional, scientific and technical activities, North West England

The key to mitigating these negative effects will lie in what is ultimately deemed to be ‘reasonable notice’. If the notice period is sufficiently short, but long enough to prevent the potential for exploitative scenarios such as shifts being cancelled once a worker is already commuting, then the option of responsibility resting with the agency may avoid having severe economic consequences.

9. Do you think that legislation should prescribe how the end hirer should notify the agency that they have a shift available and of changes to these and when notification should be deemed to be received?

No. Agencies would be free to specify such conditions in their terms of business if required. The government should, as far as possible, avoid involvement in contracts between private enterprises.

11. Do you agree that the agency should be responsible for paying any short notice cancellation or curtailment payments to an agency worker?

Yes. In some circumstances, the cause of short notice cancellation lies with the employment agency. Where the cause of cancellation or curtailment lies with the end hirer, agencies could use contractual arrangements between themselves and the end hirer to recoup whatever costs they consider appropriate.

“It's up to the employment agency to negotiate terms with the employer. Otherwise, what's the point of the agency?” – Medium-sized employer, Financial services, London

It should be noted, however, that where agencies are operating in low-margin sectors, particularly those frequently dependent on government funding such as the care sector, current funding arrangements will need to be amended as a direct result of this and other policies in the *Make Work Pay* package.

“[As an employment agency] there is not enough revenue in a margin... Local Authorities are looking at 40 pence an hour to cover all of our overheads including our internal staff.” – Medium-sized employer, Professional, scientific and technical activities, North West England

12. Do you think that the agency should be able to recoup this cost from the end hirer if/to the extent that the end hirer was responsible for the short notice cancellation or curtailment?

Yes. IoD research found that, where responsibility for cancellation or curtailment lies exclusively or partially with the end hirer, business leaders generally consider it appropriate for the agency to recoup some or all of the costs.

“If the end hirer makes the change, then they should be responsible, otherwise the agency.” –
Large employer, Transportation and storage, North West England

13. If you think that the agency should be able to recoup this cost from the end hirer, do you think the Government should legislate to ensure that the agency can recoup the costs?

No. While it will in many cases be appropriate for the agency to recoup some or all of the costs from the end hirer, government should not legislate for their ability to do so. Where responsibility for cancellation or curtailment lies with the end hirer, agencies could stipulate terms in their contracts to enable appropriate recoupment. The government should, as far as possible, avoid involvement in contracts between private enterprises.

I hope you have found our comments helpful. If you require further information about our views, please do not hesitate to contact us.

With kind regards,



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Appendix

Figure 1: IoD Policy Voice results: November 2024, 601 responses

Employers will be required to offer guaranteed hours to agency workers who are on a zero hours contract. Do you think the guaranteed hours should be offered by the employment agency or the end hirer?

The employment agency	42.8%
The end hirer	34.9%
Don't know	22.3%

Figure 2: IoD Policy Voice results: November 2024, 601 responses

Employers will be required to provide agency workers with reasonable notice of their shifts, and any changes to them. Whom do you think that responsibility for providing agency workers with reasonable notice of shifts should rest with?

Both the employment agency and end hirer	42.8%
The employment agency	21.3%
The end hirer	24.3%
Don't know	11.6%