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Consultation on the application of zero hours contracts measures to agency workers

Consultation response from Lewis Silkin LLP Lewis Silkin is a leading specialist employment law practice. We have around 279 specialist employment and immigration and data lawyers, including 42 partners, based in London, Oxford, Manchester, Leeds, Cardiff, Dublin, Belfast and Hong Kong. We are ranked in the top tier of employment practices by the independent legal directories and many of our lawyers are recognised as leading practitioners in employment law. This response is submitted on behalf of Lewis Silkin, rather than our clients, and is based on our experience in practice of advising predominantly medium to large-sized employers across the private sector. We are happy for you to publish our response.

PART 1: Right to guaranteed hours

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

   Don't know

   We have serious concerns about whether extending the guaranteed hours regime to agency workers will be workable in practice. We have answered that we 'don't know' whether the employment agency or the end hirer should be required to offer guaranteed hours because neither option is, in our opinion, desirable and will present significant practical issues that need to be addressed.

   Taking a step back, we believe that requiring either entity to guarantee hours to agency workers will seriously undermine the benefits of this flexible resourcing model. This could result in the recruitment agency industry suffering significantly. The agency sector could suffer mostly due to a reluctance of end-users to use agency workers as there would no longer be any advantage in doing so (particularly if they need to directly offer guarantee hours). Employers will need to be less agile in their operating models and the steps many will take to avoid overstaffing arising from guaranteed hours will be anti-growth. We recognise the objective of avoiding the exploitation of zero hours workers, but this is a significant overcorrection that fails to address this perceived problem.

   If the underlying objective is to regulate the use of agency workers, our view is that there are other, and better, options that the government could consider. For example, limits could be put in place on the amount of times agency workers are used or the reasons why an employer can use an agency worker.

   Neither proposed option is optimal. The obligation to guarantee hours implies that the offering entity has a significant degree of control over the working arrangement. However, the end user/hirer has no contract with the worker. Requiring the end user to make any offer would remove the entire reason for the agency model i.e. flexibility and agility for businesses and the ability to react quickly to changes in needs, and it may defeat the object of engaging agency workers altogether. On the other hand, the agency has little control over what that end user needs in respect of its business and resourcing. Larger employment agencies may be able to forecast a resourcing need across the sectors in which it operates to an extent, but outside of that, it is difficult to see how an agency could comply and guarantee hours.

We would also flag the numerous significant uncertainties relating to the guaranteed hours regime generally that make support for either option difficult. For example, the scope of future exceptions is unclear. Will this new obligation to offer guaranteed hours extend to a situation in which there is no need for further work at the end of the reference period? As it stands, a limited term contract is the only alternative, but the Bill does not stipulate a minimum period for this. And key questions, such as what the threshold is for a 'low hours' contract under s. 27BA, remain unresolved.

Based on this caveat, if required to choose from these two options, on balance, option 1 (i.e. guaranteed hours offered by the employment agency), is preferable. This is because:

- The end user is not the employer of the worker and it will have no direct contract with the worker. If it is required to offer guaranteed hours that would necessitate a transfer of the worker to the end user.
- As noted above, one of the reasons for using agency workers is flexibility: it provides access to additional resources on a short notice, and usually on a short term basis, without the business having to employ them. It would defeat the point of this model if the end user needs to ultimately offer direct employment.
- Overstaffing is a significant concern generally with the proposed guaranteed hours reforms, but particularly when considering agency workers: if the end user is obliged to make an offer but after the worker transfers the work need reduces or ends (e.g. the end of a seasonal rush), the end user is 'boxed into' the arrangement. This will leave the employer needing to consider redundancies. If the worker is still with the agency, they could take another available assignment instead (assuming that guaranteed hours can be split between assignments).
- If the agency is to take on the additional burden of guaranteeing hours, this is likely to become a question of commercial negotiation between the agency and end hirer as to how the arrangement would work in practice (for example recouping the cost of paying for additional guaranteed hours or periods of work shortages).

However, extending guaranteed hours to agency workers begs many questions. For example, the provisions in s. 27BC of the Employment Rights Bill, broadly speaking, do not allow the guaranteed hours to be offered on less favourable terms. However, in this context, agency workers are often better paid than those directly engaged by the end user. Would there be additional exceptions in the Bill to reflect this if end users are required to guarantee hours?

Finally, we would like to stress that, in our view, this would be the lesser of two evils: there would also be significant issues for the agency if they are obliged to offer guaranteed hours. For example:

- Larger employment agencies may struggle to comply with any guaranteed hours offered (particularly smaller agencies). For example, if an end user no longer requires additional resource (e.g. because there is a drop off in customer demand after a seasonal rush), what options will the agency have if there are no other available assignments? Or they do not have any available assignments do not meet the required number of hours?
- An agency is at the mercy of its clients: what if the agency has been required to guarantee hours but the end user does not want that particular worker?
- See points made under section 3 below.,

2. **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?**

No

Please explain your answer.

In practice, transfer fees are agencies' means of protecting their business and assets (i.e. agency workers) as generally they can not use restrictive covenants. However, if end hirers are forced to offer guaranteed hours to said workers, in our view it feels unfair to require them to pay a transfer fee. This is particularly the case given the agency wouldn't necessarily be precluded from using that agency worker and offering engagements with another end hirer. That said, this would of course be to the detriment of the agency which would have lost an asset (i.e. the worker) which, in some cases, could have involved a lengthy recruitment process.

Although this is the 'least worst' option of the two, we would reiterate the point that, in this situation, the end hirer may still just want a temporary resource. The obligation to offer guaranteed hours and 'cut out' the agency by engaging the worker directly would, even without a transfer fee, not necessarily be in the best interests of the worker, end user or agency.

3. **If you think there are other factors specific to agency workers that need to be taken into account in applying the new right to guaranteed hours to them, please explain them here.**

As stated above, neither option regarding the offering of guaranteed hours to agency workers is ideal when looking at how these arrangements work in practice.

The 'one size fits all' nature of the guaranteed hours proposals overlooks the fact that there tends to be two types of agency engagement: (1) an engagement by an agency with a particular end hirer in which the agency worker is consistently engaged for a period of 3 months or longer and (2) an engagement where the agency worker is sent to various different employers each week (or day even), for example locum type arrangements in the NHS or temporary administrative roles.

This blanket rule around guaranteed hours doesn't seem to recognise those differences (amongst others) and therefore it is difficult to see how it can actually work in practice and a number of questions arise:

1. How can an agency guarantee there are enough end users that want services? For example, if an agency worker has been working for a particular end user for 12 weeks, the agency then would need to offer them guaranteed hours. However, if the end hirer doesn't want to offer that person further work (for example due to performance concerns or some other reason), the agency would need to find another agency worker to send to that end hirer but would still be required to deal with the individual who could be entitled to guaranteed hours.

2. To help deal with situations like the above, can the guaranteed hours be split across different end users?

3. If the agency has been forced to offer guaranteed hours and the worker has accepted, but an assignment comes to an end, the agency needs to be allowed to fulfil their obligation by offering an assignment "reasonably suitable" for the agency worker. What if the agency worker rejects the assignment offered to fulfil the guaranteed hours – on the

basis of travel time or working hours or something else? Does the agency still need to pay the guaranteed hours?

4. How would these arrangements work with holiday pay? Would pay be based on actual hours worked or guaranteed hours?

5. How specific does the offer of guaranteed hours have to be – in this context, would it be necessary to specify how much and what work? We assume the hours could be fulfilled across different assignments, but would that fall foul of s. 27BC? Additional detail on this is arguably needed for agency workers.

6. How would these arrangements work alongside other reforms proposed by the government, for example to remove the distinction between employee and worker and introducing day 1 unfair dismissal rights? The more onerous obligations relating to guaranteed hours will be exacerbated by the stronger unfair dismissal obligations and the need to go through a full redundancy procedure if there is not enough work.

7. Will there be any right in the applicable legislation to 'opt out' and continue on zero hours with no need to make further offers? For example, an agency worker may wish to do so if they are engaged by different agencies and can't fulfil minimum hours for each one. In this situation, it would probably help them not to be tied to guaranteed hours. We appreciate a worker can say no to guaranteed hours if offered, but does this go far enough for the employer to have discharged their obligation? If not, do workers risk being dropped by their agency if shifts are turned down?

8. Will this new right lead to a shift in the industry? We can see a scenario where employers may not wish to engage agency workers for periods longer than 12 weeks as ultimately, agency workers are engaged where an employer has a need for flexibility and if they know that after 12 weeks, they'll need to effectively engage them on guaranteed hours this arrangement becomes less advantageous and leaves businesses with more of a permanent resource. Are there any anti-avoidance provisions proposed that would deal with this? Long term, this would amplify the existing issues that exist for agency workers.

9. No mention has been made of how these proposals will impact umbrella companies but this could have significant ramifications for what is a popular arrangement.

PART 2: Reasonable notice of shifts and payment for shifts cancelled or curtailed at short notice

4. **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?**

   Yes

   We agree that in the interests of fairness, responsibility should rest with both the employment agency and hirer if unreasonable notice is given in relation to a shift. Liability should therefore be apportioned by a tribunal depending on its findings. In our minds, apportionment would apply to a situation where, for example, the end hirer has cancelled the shift (with short notice) and let the agency know, and there is then a further delay by the agency in informing the worker.

However, a meaningful response to this question is hindered by the fact that we remain blind on significant details; more information is necessary to understand how this process will work in practice. For example, what is 'reasonable notice', and will this differ between roles (i.e. less notice would be required for roles that are, by their nature, back up cover)? And how will the payment for cancelled / curtailed shifts be calculated?

Another important consideration in this context is notice requirements. Who is expected to give such notice directly to the agency worker? Would it fall to whichever party has the relevant information as soon as they have it? If so, a requirement for the end hirer to communicate directly to the agency worker, rather than via the agency, could result in arguments that an employment relationship has been created (though we expect in practice that this may already be happening to some extent).

As noted in relation to the guaranteed hours provisions, this may result in employers being over-resourced so that short term absence can be accommodated without requiring additional resources and the risks falling foul of notice requirements.

5. **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?**

   Yes

   As an end user is likely to use multiple agencies, and an agency is likely to work with multiple clients. Consistency in process will therefore be important. It may not be necessary for this to be in legislation – guidance may be sufficient – but certainty around compliance will help. This does not need to be complicated and could simply be that notification must be in writing, stating what the old hours and the new hours are, leaving parties with discretion around who notifications should be made to.

6. **If you think there are other factors specific to agency workers that need to be taken into account in applying the new right to reasonable notice of shifts to them, please explain them here.**

   The proposal does not consider how notice and communication will be impacted where there are more complicated arrangements, with multiple parties. For example, if there is an umbrella company in the chain.

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

   Yes

   Yes, although parties should still be able to commercially negotiate an option to recoup the cost from the employer (but don't have to). See question 12.

8. **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

   Please explain your answer.

   We agree that agencies should be able to recoup costs from the end hirer in these circumstances and again, would see this as a matter for commercial negotiation. We do not

think this needs to be set out in legislation, although it is important that legislation does not prohibit recoupment.

9. **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

   Please explain your answer.

   Please see above.

10. **Do you think that it should be possible to override legislative provisions allowing agencies to recoup cancellation/curtailment costs through contracts signed after implementation (or that are clearly entered into in contemplation of the commencement of the legislative provisions)?**

    Yes

    We do not think this is applicable. We think all options should be possible but there is no need to legislate, instead it should be left to commercial negotiation**.**

11. **If you think there are other factors specific to agency workers that need to be taken into account in applying the new right to payment for short notice cancellation or curtailment to them, please explain them here.**

    As stated above, further thought needs to be given generally to the definition of reasonable notice and to what the payment for short notice cancellation / curtailment will look like (for example, would this be an entitlement to payment for the shift they would have worked had it not been cancelled or would there be a minimum payment?). This is of significant concern to employers generally, but also specifically in the context of agency workers.

    For example, would cancellation curtailment costs arise immediately, or would these be in reference to a particular period?

    We would also be interested to know if there is going to be any consideration of factors that could be seen to be mitigating, e.g. if a shift on a certain day was cancelled with little notice but an alternative was offered (with the same or a different end-user) or if there was a sound reason for the late notice.