



Department  
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**EMPLOYMENT STATUS REVIEW**

DECEMBER 2015

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# Executive summary

Determining employment status is essential in ensuring both the individual and employer know what their rights and responsibilities are. It has become increasingly clear that determining whether you are an 'employee', a 'worker' or genuinely self-employed is not a simple calculation for some, requiring familiarity with complex legislation and decades of case law. All too often, employment status is only confirmed when a dispute between an individual and their employer lands up before an employment tribunal. Whilst this system means that employment tribunals are able to take a fair and balanced view based on the facts in front of them, this is a step that many do not want to take. Therefore, ensuring both individuals and employers have the clarity they require up front is an important part of a well-functioning, fair, labour market.

In order to gain a greater understanding of some of the issues being faced, officials were asked to consider what the UK labour market looks like and suggest ways in which government could deliver a framework that strikes the correct balance between the rights of the individual and the needs of business, supporting growth and prosperity in the 21st century. The employment status review involved discussions with a number of stakeholders. This report represents the findings of that review.

Part 1 examines the **current system**, seeking to understand how it has evolved and assessing how it currently operates. It considers some of the issues raised by stakeholders as well as some of the constraints on any reform. Those working in the UK enjoy a wide range of employment protections. Depending on the nature of the relationship (or 'employment status'), the individual and employer will have a number of rights and responsibilities. The approach to determining employment status consists of the court having to establish the existence of one of the required employment contracts set out in legislation. The court does this in the absence of the key elements of the relationship between the parties being defined in legislation, by applying general contract law principles, EU law and domestic case law and considering the true nature of the relationship based on the facts of the particular case. This allows the courts to assess the reality of the relationship between the individual and the employer and to respond to changing employment practices. The system has evolved over many decades, adapting well to the challenges placed before it. It continues to adapt given the new forms of employment relationships it is faced with and as a result of the high levels of flexibility in the framework, it is likely to continue to be able to adapt in future years. However, one consequence of this flexibility is that it is not always possible for individuals or employers to be certain of employment status up front when establishing rights and responsibilities. For some in atypical employment, such as those on zero hours contracts, this can add to a wider feeling of insecurity and lead to individuals not asserting their rights.

Part 2 examines the most common **atypical working** arrangements in the UK and identifies a number of issues affecting some in these groups. This includes those on zero hours contracts, contractors, freelancers, consultants, interims, agency workers and interns. As a result of the way in which employment status is determined, and the way it can evolve over time, it is not always possible to say for certain what the employment status is of people working under these arrangements and therefore it is not possible to establish how many 'workers' there are in the UK at any one time. However, a number of specific issues in determining status and enforcing individual rights can be identified. For

instance, it can be challenging for some casual workers such as those on zero hours contracts, to be sure of whether they have sufficient continuous employment to assert key rights. This means that they may not feel confident in claiming protections such as the right to maternity leave or shared parental leave, with some suggesting that a few are even reluctant to claim basic rights. In addition, the lack of formal definitions of self-employment and volunteer can result in a lack of certainty for some individuals and employers, with those employers that do rely on these types of individuals carrying a risk that they will be found to be 'employees' or 'workers' by an employment tribunal at a later date.

Part 3 examines **the future** and some of the challenges of reform. A range of options are set out that could be considered to change or improve the current system, highlighting some of the high level challenges associated with each. It considers whether there are ways in which those who participate in atypical working arrangements can increase clarity up front of what their employment status is if they so wish so as to know what protections they have. There are a number of options presented but most are highly complicated, would take years to deliver and could create new issues of their own. At the most radical end, it could be possible to reverse the presumption that underpins the current framework (i.e. the existence of an employment contract must be proved by an individual) to one where an individual is automatically eligible for all rights unless another employment status (such as 'self-employed' or 'volunteer') is proved. However, while this would certainly be a 'game changer', it would take many years to develop and implement and even then, is unlikely to solve all the issues identified in Part 2. Not all the issues identified though require fundamental reform and there are a number of specific options that could be considered further for key groups such as those on zero hours contracts. However, a great deal more consultation and analysis is required before action can be taken to ensure that in attempting to fix one issue, we don't inadvertently create another.

In short, the current framework works well for the majority, but for a small but growing section of the labour market there is a lack of clarity over employment status. As a result, individuals can feel reluctant to claim statutory rights for fear of retribution or loss of income. While the employment tribunal system will always provide a safety net, more can be done to mean fewer people have to rely on this route in future years. However, the framework is complicated and any reforms will take time.

**Labour Market Directorate**  
**December 2015**

# Introduction

The UK labour market is one of the most flexible in the world. It is this flexibility, allowing individuals and firms to vary working arrangements to weather reduced demand, as well as an active welfare-to-work system, that has helped the UK exit the recession with near historic high levels of employment. This flexibility is supported by a growing trend globally that predates the recent economic downturn towards more dynamic working arrangements and business models, many of which are internet-supported, aimed at changing the face of the labour market as we know it. However, against this backdrop, some argue that the recovery has been driven by an increase in insecure, low paid jobs. For many, zero hours contracts and a sharp rise in self-employment have become the symbols of that insecurity. While zero hours contracts have been a feature of the UK labour market for decades, favoured by many individuals as well as employers, they can result in uncertainty over income and a lack of clarity over what employment protections apply. Likewise, while longer-term analysis shows there has been a 30 year trend towards increasing rates of self-employment, the recent surge above trend has clearly seen more people going into business on their own, managing the added insecurities this can bring.

## The price of flexibility

In the UK, the majority of employment rights are enforced by an individual taking a claim against their employer to an employment tribunal. Therefore, establishing which employment status applies (normally 'employee' or 'worker') is vital to understanding what employment protections an individual is entitled to. The reality is that most people work in permanent, full-time jobs. For these individuals, they can be relatively sure that they are 'employees' and therefore know they benefit from the full suite of employment protections, subject to any qualifying periods. However, for some who participate in non-traditional, atypical arrangements, such as zero hours contracts, this may not be the case. Whether individuals choose to work in this way or not, many can lack the transparency they desire about their employment status and therefore do not have confidence in what rights they have. What is more, for those who feel vulnerable in this position, they can be reluctant to assert their rights for fear of repercussions from their employer. In addition, for those opting out of employment and going into business on their own, it is important they understand what this means before they take the decision.

There are a number of ways in which this lack of transparency can manifest itself. In the case of zero hours contracts, it can be difficult for an individual or employer to know whether there is sufficient mutuality of obligation for a contract of employment to exist. This is important because without one, the individual would not be eligible for the full suite of rights afforded to an 'employee'. This is further complicated by the fact that some employment protections have a qualifying period, requiring a certain length of continuous employment. Where work is sporadic, it can be difficult for people to know whether they have accrued the necessary continuous employment for protections such as statutory maternity pay to apply and so be left uncertain as to whether to make a claim and challenge their employer.

This is not just an issue for individuals. For those employers who rely on atypical workers, either because of the nature of their business, or the need to attract those individuals in the labour market who are unable to commit to traditional, fixed-hours contracts, there can also be a lack of transparency. Most businesses want to comply with the law and do their best to ensure they deliver their statutory obligations. However, while an employer (and even the individual) may consider the employment relationship in a given situation as that of a 'worker' or self-employment, when things go wrong, an employment tribunal may decide otherwise. In this instance, the employer has acted in good faith but can still suffer court sanctions as a result of making the wrong, albeit honest, judgement call.

## The question

This uncertainty has led to questions about whether the current framework for determining employment status is still fit for purpose. Are certain employment rights (for instance, the statutory right to request flexible working) reaching those groups who need them? For those who make the most of the flexibility the labour market affords, what issues, if any, are they facing and what can be done to improve their position?

**Ministers therefore asked officials to consider what the UK labour market looks like and suggest ways in which government could deliver a framework that strikes the correct balance between the rights of the individual and the needs of business, supporting growth and prosperity in the 21st century.**

In terms of what a fit for purpose framework looks like, for individuals, it is about increased transparency about their employment status, empowering them to claim those rights they are entitled to. For employers, it is about being sure they have clarity on what their rights and responsibilities are. In both cases, more clarity and transparency up front should result in less reliance on employment tribunals to act as a final arbiter. However, it is important that in considering what changes can be made, we ensure the flexibility for individuals and employers to negotiate a relationship that suits them both is not lost. This will ensure businesses can continue to weather economic downturns and individuals who cannot commit to traditional, permanent employment are not precluded from entering the labour market altogether.

# Part 1: The current system

## Summary:

Part 1 examines the current framework, seeking to understand how it has evolved and assessing how it currently operates. It considers some of the issues raised by stakeholders as well as some of the constraints on any reform.

## Key points:

- Employment law in the UK has evolved over many centuries, adapting to the challenges placed before it. It has responded well and continues to adapt given the new forms of employment relationships it is faced with.
- Currently, the employment rights that an individual has are dependent on the employment status of the individual.
- The approach to determining employment status is based on the overarching principles of contract law and allows maximum flexibility to the courts with many key elements not defined in detail in legislation.
- This allows the courts to assess the reality of the relationship between the individual and the employer and to respond to changing employment practices.
- However, one consequence is that it is not always possible for individuals or employers to be certain of employment status up front when establishing rights and responsibilities.

## Employment status

1. Establishing an individual's employment status is important as it determines their eligibility for certain statutory rights. In general, there are considered to be three main employment statuses:
  - i. **Employee** (where it can be determined that a contract of employment exists);
  - ii. **Worker** (where a contract of employment or contract to personally do work exists<sup>1</sup>); and
  - iii. **Self-employed** (where neither of the above types of contract exists).
2. Most types of working relationship will fit into one of these statuses once all the facts are considered. Both 'employee' and 'worker' are defined in the Employment Rights Act 1996 (the 'ERA 1996') and other pieces of employment legislation. However, 'self-employed' is not officially a status for employment purposes and can sometimes be used as a catch all for employment relationships where neither a contract of employment, nor a contract to personally do work exists.

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<sup>1</sup> Sometimes also known as a contract for service – however, this term can also be used to describe genuine business to business contracts entered into between self-employed individuals and their clients.

3. In addition, there are a few exceptions where separate legislation dictates status. These include<sup>2</sup>:
  - i. **Agency Worker** (covered by the Agency Workers Regulations 2010);
  - ii. **Employee Shareholder** (covered by s31 of the Growth & Infrastructure Act 2013); and
  - iii. **Office Holder** (including constables, the clergy, Armed Forces and others).
4. While the majority of individuals in the UK are in full-time, permanent employment and therefore can be relatively sure of what employment protections they have, for some this is not the case. As we will see in Part 2, for some individuals (such as those engaged on a zero hours contract), knowing up front whether they are an 'employee' or a 'worker' can be difficult. For these groups, the only way an individual and their employer can be sure of which employment status applies is through a judgment from an employment tribunal. This is because each case is considered on the facts and the reality of the working relationship. This review has considered why this is the case and how more clarity and transparency can be achieved up front for both individuals and employers on what their rights and responsibilities are.

## Employment rights

5. Individuals working in the UK have a wide range of employment protections. A number are day one rights and apply to all 'employees' and 'workers' in the UK from the moment they start working. On the other hand, a number of employment protections are available only to 'employees'. Some of these are also day one rights while others require a qualifying period, such as 26 weeks continuous employment in the case of the right to request flexible working.

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### Rights and responsibilities

When discussing employment rights, we normally refer to the 'rights' of the individual and the 'responsibilities' of the employer. However, certain employment statuses also come with key 'responsibilities' for the individual and 'rights' for the employer.

For instance, an 'employee' has a responsibility to provide notice if they are planning to leave their role. They may also have a responsibility to turn up for a certain number of hours each week. For some, the decision to participate in a non-standard arrangement is a result of not wanting, or not being able to, commit to these responsibilities.

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Likewise, employers have the right to be informed by a certain point if one of their 'employees' is intending to take maternity leave, or return to their job after the leave has been taken. They are also entitled in the case of 'employees' to be provided with sufficient notice if the individual is planning to leave their service.

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<sup>2</sup> A number of other specific employment statuses do exist, each with a slightly different set of employment protections.

6. These are statutory rights and non-negotiable. Employers cannot seek to opt staff out of these employment protections and nor can individuals take the decision to forgo them. They broadly fall into four categories, each representing a stage of the employment process.

### **Taking staff on (or getting a new job)**

7. There are a number of factors that employers and individuals need to consider when the employment relationship begins and it is at this stage that establishing employment status is so important. If an employment business is recruiting an agency worker, there are specific rules surrounding what information must be supplied prior to the work starting. Where the employer is engaging the staff directly, they will need to consider a range of issues relating to that status. This will include the basics such as ensuring payment of at least the National Minimum Wage or preparing a written statement of particulars in the case of an 'employee'.

### **Managing staff (or managing your time at work)**

8. Once in the workplace, the employer and the individual will have to consider those protections that ensure a healthy working relationship is maintained. These can include maternity and paternity rights, wellbeing and fair treatment protections and basic working time entitlements (such as holiday pay). In some of these areas, such as legislating to encourage flexible working arrangements and a more family-friendly approach to working, the UK leads the way. For instance, the recent implementation of Shared Parental Leave goes beyond current international standards and is aimed at striking the right balance between work and family life which the previous system did not fully support.

### **Managing disputes**

9. When an issue does arise there are statutory processes for protections such as whistleblowing and equal treatment that need to be in place so that due process can be followed and a fair outcome can be achieved for the employer and the individual. A number of statutory bodies also provide services at this stage from the Advisory, Conciliation and Arbitration Service (ACAS) to the Employment Agency Standards Inspectorate, aiming to resolve issues without the need for formal action. A trade union may also have a role at this stage.

### **Letting staff go (leaving work)**

10. Sometimes it is necessary for an employer and individual to part company. This can be initiated by the individual (for instance through resignation or retirement) or the business (through compulsive or voluntary redundancy or dismissal) but in both cases there can be statutory processes which may need to be followed.
11. In addition to the individual rights provided for in the ERA 1996, the UK recognises a range of collective rights. Some examples include the right to join a trade union, who can collectively bargain with the employer on the individual's behalf, the incorporation of collective agreements as legally enforceable provisions in individual employment

contracts, protection from discrimination due to membership of a trade union or involvement with trade union activities<sup>3</sup>.

## Who gets what?

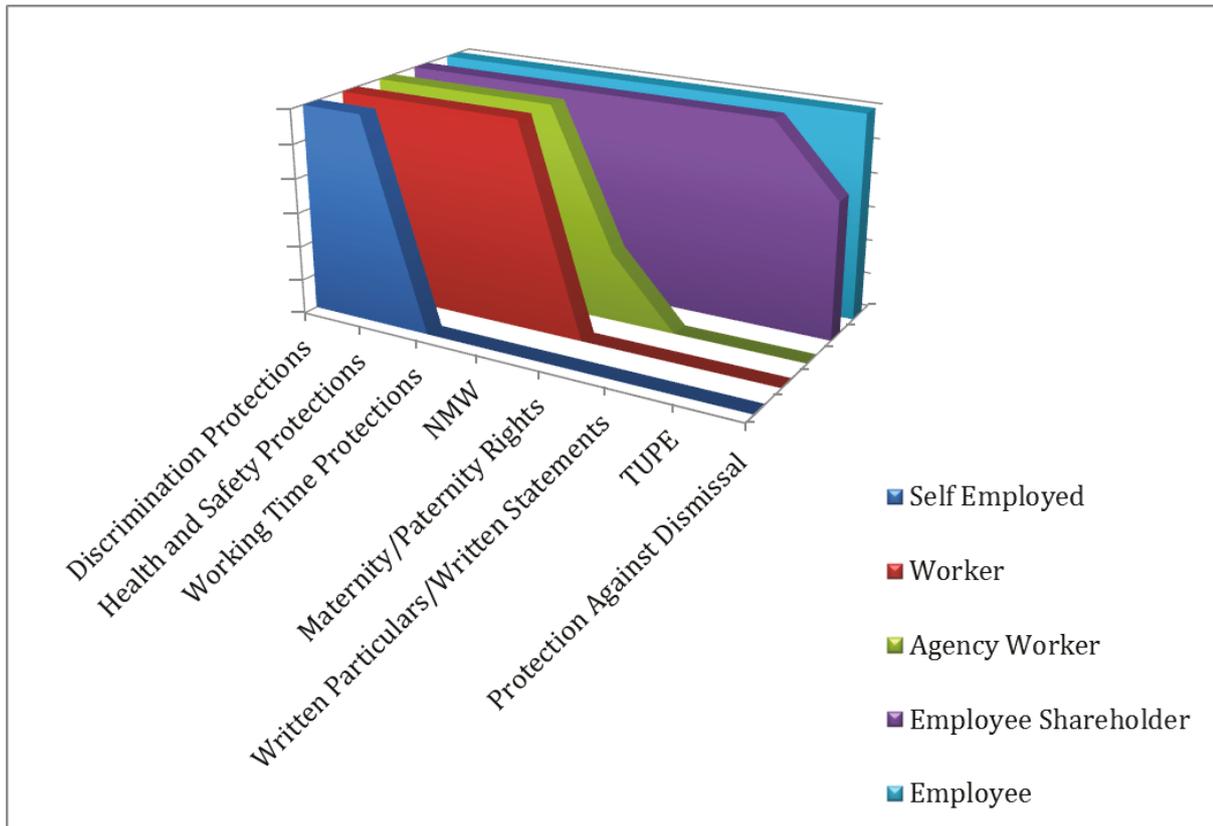
12. Every slightly different collection of rights (for instance, those enjoyed by ‘constables’) is essentially an employment status in its own right, although many of them align with either the ‘worker’ set of rights or the enhanced ‘employee’ set of rights. The chart below illustrates how some of the key rights are distributed. However, there are a number of employment protections that all ‘workers’ receive from day one. For example, in addition to the collective rights provided for in the Trade Union and Labour Relations (Consolidation) Act 1992 (‘TULR(C)A 1992’), all ‘workers’ are entitled to at least:
- The National Minimum Wage;
  - Protection from unlawful deductions from salary;
  - Health and safety protections;
  - Paid annual leave and rest breaks;
  - Whistleblowing protections;
  - The right to equal treatment on the basis of working pattern or protected characteristics;
  - The right to claim breach of contract (wrongful dismissal); and
  - The right to be accompanied.
13. In addition, those working under a contract of employment and enjoying the status of ‘employee’ have further rights, some of which include a qualifying period. These include:
- A right to written particulars (terms and conditions of employment);
  - A right to an itemised pay statement;
  - The right to request flexible working;
  - The right to time off for dependents (unpaid);
  - Statutory maternity leave;
  - Full TUPE rights;
  - Protection against unfair dismissal;
  - The right to notice of termination of employment;
  - The right to a redundancy payment;

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<sup>3</sup> Trade Union and Labour Relations (Consolidation) Act 1992.

14. Agency workers will generally be entitled to those employment protections afforded to a 'worker' as well as further protections relating to equal treatment as laid out in the Agency Workers Regulations 2010. The self-employed are also not without protections with many health and safety protections and anti-discrimination rights extended to them.

### Illustration of employment protection distribution by employment status



## The role of the European Union

15. The European Union (EU) has taken an active role in recent years in seeking to achieve minimum levels of employment protection across Member States. EU law establishes a set of baseline standards for Member States to comply with in relation to aspects such as working time, agency working and equal treatment. As a result, many of the employment protections enjoyed by people working in the UK stem from the EU.
16. The UK recently undertook a review of the impact of the EU competence on social and employment policy and the final report was published in 2014<sup>4</sup>. The main Directives that impact on employment regulation in the UK are summarised in Annex 2. In the most part, these directives are transposed to produce a minimum baseline in the UK with any extension beyond this considered to be gold plating by business groups.

<sup>4</sup> [www.gov.uk/government/consultations/review-of-uk-and-eu-balance-of-competences-call-for-evidence-on-social-and-employment-policy](http://www.gov.uk/government/consultations/review-of-uk-and-eu-balance-of-competences-call-for-evidence-on-social-and-employment-policy)

## Establishing employment status

17. So far, we have looked at what statuses exist and the rights and responsibilities that apply for individuals and employers in each case. However, as we have already mentioned, establishing employment status, and therefore understanding your rights and responsibilities, can be difficult. In order to understand how the current framework operates and consider options for reform, it is important to understand how we have ended up with the framework we have.
18. Employment law governing the basic employment relationship (and the terminology used to describe it) has developed over many years and, at its core, follows the general nineteenth century principles of ‘master and servant’. Given the multitude of different employment relationships that are possible in a labour market as flexible as the UK’s, this has resulted in a principles-based approach, assigning employment rights to certain employment relationships. This means that today, an employment tribunal can consider these principles against any type of employment relationship that comes before it and deliver a decision that is right and just, based on the facts.
19. A light touch approach to legislating industrial relations existed for much of the 20th century with collective agreements forming the basis of many employment rights all the way up to the 1960s. However, by the 1960s, growing disquiet over the role of trade unions and increasing levels of strike action was making some consider whether a new approach was needed. In response the government launched a Royal Commission on Trade Unions and Employers’ Associations. The resulting Donovan Report was published in 1968 and was followed soon after by a government white paper entitled ‘In place of strife’, aimed at clarifying the policy on industrial relations. This began a sequence of events that saw a shift towards more individual rights, enforced through employment tribunals (or industrial tribunals), rather than solely relying on collective bargaining.
20. As a result, from the 1970s onwards, there has been more legislation providing statutory rights for people working in the UK. This was in part designed to ensure that everyone had a basic set of rights, regardless of whether they were a member of a trade union. Much of this was consolidated in the ERA 1996, which now contains the statutory definitions of ‘worker’ and ‘employee’. It is these definitions that an employment tribunal will consider before deciding whether the individual has the right to have their case heard<sup>5</sup>.
21. While a small number of these employment rights and protections are enforced by enforcement bodies (e.g. NMW by HMRC), the majority – including unlawful deduction of wages, holiday pay and unfair dismissal - are enforced by individuals bringing a claim against their employer in an employment tribunal<sup>6</sup>. The tribunal system has developed over the past five decades and, as independent judicial bodies, employment tribunals aim to provide timely access to justice, playing an

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<sup>5</sup> Unless it relates to other bespoke legislation, such as a discrimination claim brought under the Equality Act 2010.

<sup>6</sup> In a limited number of cases enforcement occurs by means of a trade union bringing a claim in an employment tribunal e.g. an employer’s failure to adequately consult before making large scale redundancies in a particular workplace.

integral role in the enforcement of employment rights when other interventions have failed.

## The test

22. The main two employment statuses in the UK are ‘employee’ and ‘worker’<sup>7</sup> and an employment tribunal will first establish if the individual in front of them fits into one of these statuses to establish whether the case in front of them can be heard. For instance, if an individual brings a case for unlawful deductions from salary (available to all ‘workers’), the court will establish whether a contract to personally do work exists. If the individual brings a case for unfair dismissal (available only to ‘employees’), the court will establish whether a contract of employment exists. In both examples, if the status cannot be established, the case is generally dismissed.
23. The statutory definitions are covered below, but in short, ‘employees’ work under a contract of employment (also known as a contract of service<sup>8</sup>), whereas ‘workers’ work under a contract to personally do work. However, there is some lack of clarity about the difference between the two. The definition of ‘employee’ which is typically used appears in s230 of the ERA, which says that ‘employees’ work under a contract of employment.

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### Section 230 of the Employment Rights Act 1996 - Employees, workers etc.

- 1) In this Act “employee” means an individual who has entered into works under (or where the employment has ceased, worked under) a contract of employment.
  - 2) In this Act “contract of employment” means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.
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24. While this is clear, the actual test for determining whether a contract of employment exists is not defined in legislation, rather it has evolved through case law over decades as the courts have sought to adapt it for the particular employment relationships that appear before them. In most cases, the court will consider three things when determining whether a contract is one of employment:
- i. **Is there a commitment to personal service?** That is, does the individual agree to undertake the work themselves and not send a substitute?
  - ii. **Is there a degree of control over the individual from the employer?** For instance, does the individual have to do certain things, such as work certain hours or perform certain tasks?

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<sup>7</sup> All ‘employees’ are in fact ‘workers’ also as a result of section 230(3)(a) of the Employment Rights Act 1996. This is covered in future sections, but for the purposes of this review, when the term ‘worker’ is used, it is meant to refer to those ‘workers’ who are not ‘employees’.

<sup>8</sup> For the purposes of this report, when a contract of employment is referred to, it should be assumed that this also means a contract of service.

- iii. **Is there mutuality of obligation?** There needs to be mutual obligations for the employer to provide work (and to pay for it) and for the individual to perform that work, whether this is expressly provided for in any terms and conditions or implied by the reality of the working relationship.
25. This three-part test has become known as the ‘irreducible minimum’<sup>9</sup> and while meeting these three limbs is no guarantee in itself of a contract of employment existing, it is generally accepted that without all three, a contract of employment would not exist. If these requirements are met then the courts will go on to consider whether other factors point to there being an employment contract. Whether these requirements exist will be established on the reality of the working relationship. For example, in the case of *Pulse Healthcare v Carewatch Care Services Ltd* [2012], the employer argued that individuals who were not guaranteed set hours in their contract, were not ‘employees’ as there was no mutuality of obligation. However, in summing up, the judge disagreed in this case stating:
- “I am satisfied that there was sufficient mutuality of obligation for the claimants to be employees. Once the rota was prepared they were required to work and the employer was required to provide that work. They were subject to control and discipline; they had to provide personal services; they were provided with uniforms and equipment; they were paid on a PAYE basis; they had all worked regularly over a number of years and had only taken time off for holidays and sickness and when suspended for which they received payment; it was not established that there were gaps in the continuity of employment. The claimants required regular work and this was provided by the first respondent.”*<sup>10</sup>
26. As all ‘employees’ are also ‘workers’, if the individual is engaged under a contract of employment, they are covered by section 230(3)(a) of the ERA (see below). However, there are a group of ‘workers’ who are not ‘employees’ and these are covered by section 230(3)(b) of the ERA. These can be referred to as ‘limb b workers’ or workers.

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### **Section 230 of the Employment Rights Act 1996 - Employees, workers etc.**

- 3) In this Act “worker” (except in the phrases “shop worker” and “betting worker”) means an individual who has entered into or works under (or, where the employment has ceased, worked under) -
- a) A contract of employment, or
  - b) Any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.
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<sup>9</sup> Outlined in the case of *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968].

<sup>10</sup> *Pulse Healthcare v Carewatch Care Services Ltd* [2012].

27. In this respect, where the employment tribunal is considering whether the individual is a 'worker', it can consider the slightly lower test outlined in section 230(3)(b) of the ERA 1996. The courts have said that determining whether a section 230(3)(b) contract exists ("a contract to personally do work") will require consideration of similar factors as when one is determining whether a contract of employment exists – personal service, control, mutuality of obligation and a range of other factors will once again fall to be considered. The difference is one of degree – the pass mark needed to establish a contract to personally do work is lower than that which is required to establish a contract of employment<sup>11</sup>.
28. For both 'employees' and 'workers' it is also important to establish that a contract exists. In order for a contract to exist several conditions must be satisfied. There must be an agreement between at least two people with the intention of creating legal relations, and it must be supported by consideration (i.e. something of benefit must pass from both parties to each other). The individual terms of the contract must be sufficiently certain for the courts to be able to give them meaning. This is more of an issue in some situations, such as the case of unpaid internships, which will be discussed in the next section.

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### Workers and employees

Historically, UK domestic employment legislation has used the term 'employee' to describe someone in traditional employment. The term 'worker' was first used in trade union legislation and this definition is still found in section 296 of TULR(C)A 1992. The definition outlined in s230(3)(b) of ERA 1996 has since become the standard for defining someone who is not an 'employee', but is also not genuinely self-employed. This wider definition has been used to extend a range of protections beyond simply 'employees', including the National Minimum Wage and whistleblowing provisions.

The UK definition of 'worker' is not the only one applicable to domestic law though. Many of the rights conferred on workers arise out of European Directives and the definition of worker for the purpose of implementing directive obligations may differ from home grown legislation giving such rights. In case C-256/01 *Allonby v Accrington & Rossendale College*, the Court of Justice of the European Union stated that for the purposes of European legislation, a 'worker' was a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration. However, it is worth noting that this element of control is more aligned to the definition of an 'employee' in UK legislation.

29. In short therefore, in both cases (determination of whether there is a contract of employment or a contract to personally do work), an individual has to perform any work personally and there has to be some form of mutuality of obligation. This mutuality of obligation would be present whilst the individual was working if they had agreed to perform certain works or services for someone, who, by virtue of being party to a contract, it can be assumed has requested the work or service to be done

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<sup>11</sup> See *Byrne Brothers v Baird* [2002] IRLR 96

and agreed to pay the individual at least National Minimum Wage. In addition, there would generally be some level of control. A range of other factors also fall to be considered (e.g. the extent of integration into the business, who provides any tools and equipment etc.). Establishing the relevance of, and weight to be attributed to, any of these factors depends on the individual case and is largely open to the discretion of the court based on the facts, so it is unsurprising that there is little clarity or certainty for some individuals or employers prior to an employment tribunal ruling.

## Continuous employment

30. As already mentioned, a number of employment protections require a qualifying period to be met. This is one area where the current system can be confusing for some atypical workers. Even where they are able to prove the irreducible minimum, it can be difficult for them to show the requisite continuation of employment necessary to qualify for certain rights. This is because there may be gaps in employment (for instance, term times in the case of a student worker) which mean that the work is seen as distinct work packages, where the individual may be an 'employee' or 'worker' for short periods but without any continuation.
31. One way the courts have addressed this is through the concept of an overarching contract of employment. This is where it can be established that there are in fact ongoing obligations to provide and perform work spanning any gaps between assignments. The statutory rules laid out in Part XIV, Chapter 1 of the ERA 1996 also allow continuity of employment to be maintained in certain circumstances, such as where the gaps in employment are either sufficiently short, or adequately justified (for instance because there is no work available)<sup>12</sup>.
32. In either of these circumstances, the employment can still be considered to be continuous, and the individual can begin to accrue continuous employment. In the case of an overarching contract, it can be difficult for an individual or employer to be certain of whether an overarching contract exists in respect of an intermittent pattern of work without an employment tribunal ruling.

## Initial assessment of the current system

33. There are significant benefits associated with the current system. The fact that the principles-based tests to determine employment status are not fully defined in primary legislation allows the employment tribunal flexibility to consider the reality of a situation rather than a pre-determined statutory checklist which could result in unexpected or 'unfair' outcomes that do not respond to the reality of the situation. This means it can be adapted to the full spectrum of evolving employment relationships, so that if something looks, feels and sounds like a contract of employment, even where the irreducible minimum is not met, the tribunal can decide it is a contract of employment. This principles-based approach is to an extent therefore future proofed as it has sufficient flexibility to allow tribunals to adapt it to changing circumstances.

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<sup>12</sup> See for example *Ford v Warwickshire County Council* [1983] - a case in which a teacher employed for several years under successive fixed-term contracts, which were stated to expire in July every year, was held to have continuity on the basis that there was a temporary cessation of work every summer.

34. This principles-based approach can be seen to provide ultimate protection in an employment tribunal for an individual against an unscrupulous employer who seeks to manipulate employment status through sham contracts with the aim of depriving them of their rights. To this end, a written contract or terms and conditions form only one element of the court's consideration, and if they do not accurately reflect the reality of the situation, they can be disregarded<sup>13</sup>.
35. However, the price for this protection is that some individuals and employers lack clarity about employment status in advance of an employment tribunal decision. What is more, the system we have has developed in response to what has previously existed and as such, the courts are increasingly considering judgments that were not only specific to the initial case in question, but that have little applicability to the case in front of them.<sup>14</sup> While the current framework's applicability to some atypical working arrangements is already complicated, this is only likely to get more so as employment arrangements continue to develop. For instance, in recent years there has been an increase (not only in the UK) in forms of working which demonstrate a very high degree of flexibility of hiring and employment conditions. In assessing whether the current framework is fit for purpose, providing the transparency and clarity desired by some up front, we must have one eye on the future, ensuring that it would also work where there is an increase in these new forms of employment.
36. In some atypical and casual working arrangements, it can be difficult to be sure of mutuality of obligation, especially where there is no commitment to accept work or to have work offered. Given these arrangements are an important part of the labour market today, the courts have sought to address this issue in some cases, for instance through establishing that mutuality of obligation (i.e. on the employer to provide work and on the individual to perform work) can be implied in circumstances where the reality is that a set working pattern is expected.<sup>15</sup>

## Stakeholder views

37. As far as possible in the time available, we have discussed the issues with stakeholders including business representatives, trade unions, legal professionals and others to understand their views of the current system and potential reform. The views here represent a high level summary and are not intended to capture all the points that were raised in those discussions.
38. Business groups were keen to point out the benefits of having such a flexible system and pointed to the economic recovery as evidence that this approach was working. In general, they believed the current system worked well. While they did agree that in parts it lacked some clarity, they believed there was enough for many individuals and employers to live with. Many believed that the current system was good at ensuring businesses were able to make the most of casual staff when they needed to, with individuals free to negotiate terms and move on as suited them. Some raised concerns about the grey area between self-employment and employment. This is

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<sup>13</sup> *Autoclenz Ltd v Belcher and Others* [2011] IRLR 820.

<sup>14</sup> In his paper, *The contract of employment: A study in legal evolution* (2001), Simon Deakin explains in more detail some of the constraints associated with relying on this kind of 'juridical record'.

<sup>15</sup> *Pulse Healthcare v Carewatch Care Services Ltd* UKEAT 0123/12/0608.

because many businesses relied on contractors, freelancers and other self-employed individuals to deliver specialist roles. However, in a number of cases, although these individuals had been taken on in good faith, there had been examples of where the courts had determined the individuals to be employed at a later date.

39. In summary, business groups were keen that the flexibility afforded by the current system was maintained although they did see a case for additional clarity when hiring. They were also clear that any changes to the current system should not increase the regulatory burden or cost on employers as this could have a wider impact on job creation and market flexibility.
40. The TUC and unions have long been calling for a review of employment status and believed the current system is far too weighted in favour of the employer. A number of examples were cited of where this perceived imbalance manifested itself, for instance where individuals had been coerced into engaging on a self-employed basis when in reality the relationship was more permanent. While this represents an abuse of the system and not the norm, unions felt the current framework was too open to manipulation by unscrupulous employers. In addition, questions were raised about the use of agency workers and zero hours contracts to deliver services where it would be more appropriate, in their view, to appoint permanent staff – both in the public and private sector. Likewise, there were concerns about individuals in some forms of employment being sure of their rights and sufficiently confident to assert them, especially where unscrupulous employers were explicit that individuals were not entitled to certain rights.
41. Many unions believed that businesses were using the complexity around status to deprive individuals of their core rights either through sham contracts or designing them in such a way as to make it difficult for individuals to enforce their rights. They believed the framework should be based more on the presumption of employment, with the distinction between ‘worker’ and ‘employee’ erased so that all individuals working in the UK benefitted from the same level of statutory protections. Likewise, they believed trade unions should play a more active role in the workforce, negotiating terms and protecting the rights of workers.
42. The response of legal experts has been mixed. Generally, they believed the system is working well and felt that there was a certain amount of clarity for legal practitioners and the courts – although they did accept it was not always clear for employers and individuals up front. An approach of considering the whole framework rather than just some small element of it was regarded as being preferable. However, there was scepticism over whether anything could actually be done to change the system without a wider impact on the flexibility of the labour market. There was some concern around any attempts to tweak around the edges of the current system with many pointing to the associated risks of further complexity and litigation as a result. However, most were open-minded to a different approach and all were keen to engage with any further work in this area.
43. We have also discussed the matter with other government departments. The public sector employs over five million people either directly or indirectly making use of

almost every conceivable type of employment relationship.<sup>16</sup> As such, many government departments were very familiar with the current framework and believed that the system worked well. However, there was interest in options that could bring greater clarity to both public sector employers and the individuals they hired. Any change to the current definitions of ‘employee’ and ‘worker’, or any extension of rights to other categories of staff, had the potential to impact on government departments and agencies who currently engage significant numbers of atypical workers, such as sessional staff, self-employed contractors, office holders and volunteers.

## Other issues

44. In addition to our discussions with stakeholders, other issues have arisen since the launch of this review which have a link to the problem under consideration. For instance, the closure of Citylink in December 2014 raised questions over the rights of the self-employed, especially when they are performing similar roles to permanently employed staff.
45. The campaign by a number of unions on the use of umbrella companies has led to questions over the clarity and transparency of some pay arrangements (and wider terms of engagement) in the agency sector.<sup>17</sup> While each individual case will have to be judged on its merits, questions over clarity and transparency have been considered.
46. In line with comments by the trade unions about power imbalance and opportunity for exploitation of vulnerable people, the debate surrounding the development and progress of the Modern Slavery Bill has alluded to the possible exploitation of migrant workers as a result of the complexity of the current system. Some have suggested that migrant workers, sometimes brought in through specialist agencies, are being deprived of core rights such as the National Minimum Wage by being told they are ‘self-employed’ or simply not eligible.
47. While we will not be examining these specific examples in detail, the issues raised by them are ones that cut right to the heart of what we are considering. Does the current system provide the right balance between the rights of individuals and the needs of business with the necessary levels of transparency and clarity to ensure everyone knows their rights and responsibilities?

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<sup>16</sup> Office For National Statistics published data Q2, 2015,

<sup>17</sup> [www.ucatt.org.uk/files/publications/141023%20Umbrella%20Company%20Con-Trick%20Report.pdf](http://www.ucatt.org.uk/files/publications/141023%20Umbrella%20Company%20Con-Trick%20Report.pdf)

## Part 2: Atypical working

### Summary:

Part 2 examines some of the most common atypical working arrangements in the UK and identifies the key issues affecting some in these groups.

### Key points:

- In general, most of the people who fall into the 'worker' category will be working in atypical or non-standard arrangements.
- However, it is not possible to say for certain what the employment status is of people working under these arrangements and therefore it is not possible to establish how many 'workers' there are in the UK.
- A number of specific issues in determining status and enforcing individual rights can be identified including:
  - It can be challenging for some casual workers to determine continuous employment, which means that they may not be able to be sure that they qualify for the rights they wish to assert.
  - The lack of a formal definition of self-employment or volunteer can result in individuals drifting into a status that neither they, nor their engager wishes, and has the potential to lead to abuse.

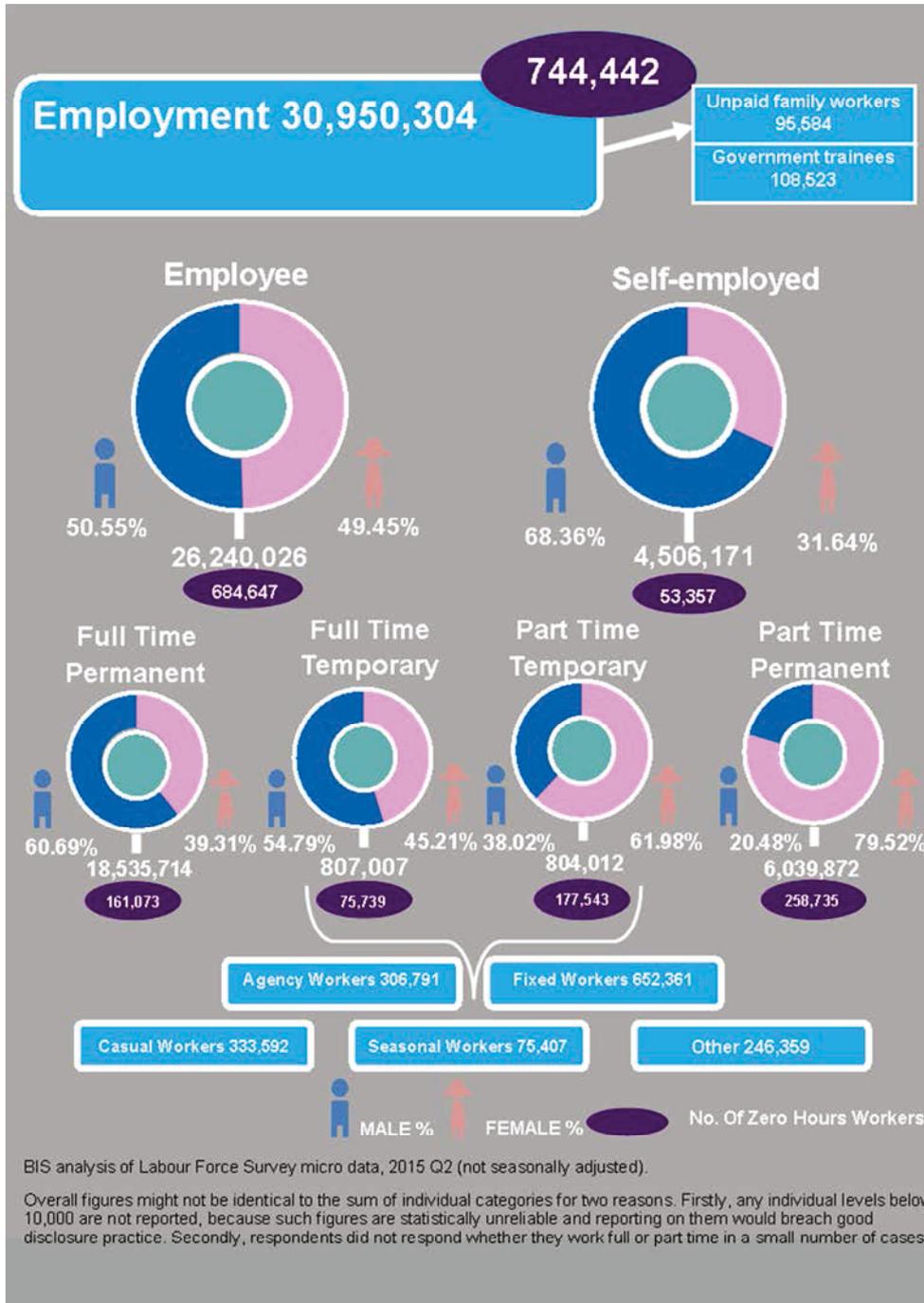
### Who are the workers?

48. As part of our assessment of how the current framework operates, we were asked to consider who falls into the 'worker' category and how many there were in the UK labour market, in part to establish whether an extension of employment protections would address some of the perceived issues faced by this group. In general, most of the people who fall into the 'worker' category will be working in atypical or non-standard arrangements. However, given the way in which employment status is determined it **is not possible to say for certain whether people working under these arrangements are 'workers' and therefore it is not possible to establish how many 'workers' there are in the UK.**
49. According to the Office of National Statistics (ONS) Labour Force Survey (LFS), in the three months ending August 2015, there were 31.12m people in employment in the UK. Of this number, 4.5m considered themselves to be self-employed with the remaining 26.4m considering themselves to be employees.<sup>18</sup> There are likely to be 'workers' in each of those categories. In addition, as we are generally looking at non-standard working arrangements, it is likely that an individual's status will change over time, making it even more difficult to estimate a number.

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<sup>18</sup> Office for National Statistics published data, June 2015 - August 2015.

**Illustration of employment breakdown**



50. The remainder of this section attempts to identify those types of atypical employment relationship that can fall into the ‘worker’ category. Although we could never successfully identify and assess every type of working arrangement in this report, we can consider some of the most common types. However, it is worth being clear from the outset that there will be a significant amount of overlap between these groups.

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## Atypical work

According to Eurofound's European Industrial Relations Dictionary, 'atypical [or non-standard] work refers to employment relationships not conforming to the standard or "typical" model of full-time, regular, open-ended employment with a single employer over a long time span.'<sup>19</sup> This covers a multitude of different arrangements in the UK given the high level of flexibility for individuals to agree terms with their employer.

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## Zero hours contracts

51. While this type of working arrangement has been part of the UK labour market for as long as casual contracts have been in existence, the term 'zero hours contract' is one that has been coined by the media in recent years. In general terms, a zero hours contract is a working arrangement in which the employer does not guarantee the individual any work, and the individual is not obliged to accept any work offered.
52. Zero hours contracts can be found across all levels of employment, from lower skilled, lower paid work right across into highly skilled and highly paid work. For example, zero hours contracts can be used in the service sector – bars, hotels, event management, leisure services - where service take up or demand cannot be guaranteed. However, such contracts are also used for doctors who act as locums, a surgeon who works in a specialised area, or an engineer who has a specific set of skills where, again, demand for their skills cannot be guaranteed.

## How many zero hours contracts are there?

53. We cannot be sure of how many zero hours contracts there are in the UK. The latest ONS LFS estimates 744,000 people reporting a zero hours contract in the second quarter of 2015.<sup>20</sup> However, these numbers will include some individuals who believe themselves to be on a zero hours contract who are not (for instance agency workers) as well as missing some who are on a zero hours contract but who work regular hours and so do not consider themselves to be. As such, the number is only ever a rough estimate. The same ONS survey published in February 2015<sup>21</sup> estimates 1.5m individual 'active' zero hours contracts. This number relates to individual contracts, not people. Many of the professionals identified above will have a number of zero hours contracts out of choice.

## Why are zero hours contract used?

54. Zero hours contracts are used for many reasons. They allow employers to adapt to changes in their circumstances, supporting workforce flexibility, making it easier to hire new staff, as well as providing pathways to employment for young people, retired people or those with caring responsibilities. These contracts can also give individuals

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<sup>19</sup> [http://eurofound.europa.eu/sites/default/files/ef\\_files/pubdocs/2010/10/en/2/EF1010EN.pdf](http://eurofound.europa.eu/sites/default/files/ef_files/pubdocs/2010/10/en/2/EF1010EN.pdf)

<sup>20</sup> Office for National Statistics published data, Q2 2015

<sup>21</sup> Contracts with No Guaranteed Hours, Employee contracts that do not guarantee a minimum number of hours: 2015 update – ONS, September 2015.

more choice and the ability to combine their work and other commitments, increasing the potential size of the pool of labour available to employers. This is because some may not be able to commit to regular hours, but are happy to sign up to a zero hours contract that allows them to work when it suits them.

55. A survey conducted by the Chartered Institute of Personnel and Development in 2013 (and updated in 2015) suggests many individuals on a zero hours contract are happy with the arrangement and are more content than their counterparts in permanent employment.<sup>22</sup> According to that report, zero-hours workers, when compared to the average UK employee, are:
- just as satisfied with their job (60% versus 59%);
  - happier with their work-life balance (65% vs 58%);
  - less likely to think they are treated unfairly (27% vs 29%).
56. Zero-hours workers are, on average, nearly twice as likely to be satisfied with having no minimum set contracted hours, as they are to be dissatisfied. Almost half (47%) say they are satisfied compared with around a quarter (27%) who report being dissatisfied. The most common explanation for this satisfaction is that flexible working suits their current circumstances (44% of those saying they are satisfied or very satisfied with having no minimum set contracted hours). The most recent published ONS data reports that 5% of those responding and currently on a zero hours contract want an additional job; 12% want a replacement job with longer hours; 24% want more hours at their current job; and 59% do not want more hours.

### Employment status of those on zero hours contracts

57. A zero hours contract is simply an working relationship where there is no guarantee of any hours. The actual employment status of the individual in question will depend on the facts of the case and as such, we will never know for sure whether someone engaged on a zero hours contract is an 'employee', a 'worker' or self-employed'. This is further complicated by the fact that status can evolve over time and it is possible that individuals engaged on a zero hours contract can drift between statuses during the course of their employment.
58. This group will include a number of individuals who, in effect, could meet the test to establish a contract of employment. They would be providing a personal service, under terms and conditions agreed in advance with their employer (normally a written contract) and would be under a significant amount of control when actually working. Whilst the written agreement may not on the face of it guarantee any hours it is possible that mutual obligations to provide and perform work can be inferred from the reality of the working relationship. For instance, if the individual worked for a large retail chain on average 40 hours a week, had to wear their uniform and undertake the tasks set out by the employer, the fact that there was no express guarantee of hours will be of less significance when the court determines status. Where the work is regularly performed and there are limited gaps in employment, it is more likely that the court will find that an overarching contract of employment exists, and therefore

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<sup>22</sup> [www.cipd.co.uk/binaries/zero-hours-contracts\\_2013-myth-reality.pdf](http://www.cipd.co.uk/binaries/zero-hours-contracts_2013-myth-reality.pdf)

the individual will be able to show the necessary continuous employment to qualify for certain 'employee' protections. Given that according to the ONS LFS, 61.9% of those on zero hours contracts usually work at least 16 hours a week (excluding overtime), it is likely that many zero hours workers would fall into this category.<sup>23</sup>

59. However, even if the individual did not work regular hours, when they agree to work a particular shift, unless they can come and go as they please (so a truly casual arrangement), there are likely to be mutual obligations to provide and perform work in respect of the shift in question. As such, they could already be eligible for the full suite of 'employee' rights during those periods when they are working. The challenge for some in this group is that they may find it difficult to accrue the necessary continuous employment to be able to qualify for rights which come with a qualifying period. This means that while they may be 'employees', they still do not benefit from many of the employment protections outlined earlier in this document. For many, this is not an issue, as they are aware of what their employment arrangement means. However, for those who seek protection against unfair dismissal, or fall pregnant, the inability to show continuous service can be an issue.
60. As we have already seen though, an irregular working pattern does not in itself mean the individual is not eligible for rights that require a qualifying period. This is because the courts have sought to infer continuous service in some cases. There have been a number of judgments in recent years that consider these gaps in employment. While judgments are made based on the facts of the case, it has been held on occasion that where no work was possible (for instance because a holiday park was closed during the winter months), this did not necessarily mean the individual lost their continuity. Therefore, many individuals working on zero hours contracts may be able to show the requisite continuous employment for key rights. However, this is not easy to determine up front, and where an employer and individual disagree, the individual is left with the decision as to whether to take their case to an employment tribunal to get clarity. Many will not do this for fear of being 'zeroed down' as a result.
61. There will be some on zero hours contracts though who are not 'employees'. For those who engage with employers on an ad hoc basis, providing skilled services or those provided with relative freedom to deliver their outputs in the way they deem most appropriate, these may fall into the 'worker' category or even be considered self-employed. However, many in this category will overlap with the freelancers, contractors, consultants and interims discussed next.

### Employment status issues faced by those on zero hours contracts

62. As identified by a number of stakeholders, a perceived power imbalance can mean that some individuals engaged on zero hours contracts are unsure of their rights. Even if they can be sure, the ability for the employer to restrict work opportunities for those who challenge them (zero down) means individuals can feel nervous about asserting their rights for fear of retribution and loss of earnings. This is in addition to the general insecurity of income that can be felt by some on zero hours contracts who may not know when the next shift is going to be offered. As such, it is not

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<sup>23</sup> Labour Force Survey micro-data, Q2 2015

necessarily an extension of employment rights that they require; rather it is more confidence in being able to establish and assert those rights they do have.

63. Many in this group may well meet the test for an ‘employee’. However, an inability to be sure that they have accrued the necessary continuous employment for some protections can make individuals reluctant to claim entitlements. For some in this situation it is only an employment tribunal that can establish whether the necessary continuous service has been accrued, for instance through establishing an overarching contract of employment, by which time the employment relationship has broken down completely.

## **Freelancers, contractors, consultants and interims, etc.**

64. Those individuals who participate on the margins of employment and self-employment, such as freelancers, contractors, consultants and interims may fall into the ‘worker’ category at some point during their work. There are no agreed definitions of these categories. However, for the purposes of this section, we consider these to be skilled individuals providing a service, rather than labour in isolation. In this respect, they are likely to be in business on their own providing personal services to a number of different clients either concurrently or during the course of a year.
65. This group will include legal professionals, project managers, IT professionals, members of the entertainment industry and other skilled individuals who may consider themselves self-employed but can sometimes be engaged in longer term assignments that can drift into employment. For instance, where a skilled project manager is brought in by a company to deliver a major IT project, it could be that the individual in question is self-employed. However, if the individual is expected to work certain hours each day and use the company’s IT system (even provided with a company laptop and smart phone), it could be that an employment tribunal would consider the individual to be a ‘worker’.

### **How many are there?**

66. The BIS Business Population Estimates (BPE) estimates the number of UK businesses with ‘no employees’.<sup>24</sup> This suggests the business is small, normally a sole trader, and providing services to clients. In October 2015 there were just over 3m unregistered private sector businesses in the UK with ‘no employees’, in addition to just over 1m who were registered.<sup>25</sup> However, it is likely that only a fraction of this number would be at risk of straddling the ‘worker’ category.

### **Why do people participate in this way?**

67. A recent study by the Recruitment and Employment Confederation<sup>26</sup> polled a number of former agency workers, freelancers and contractors to understand why they had decided to participate in this form of employment. While around half of individuals

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<sup>24</sup> [www.gov.uk/government/collections/business-population-estimates](http://www.gov.uk/government/collections/business-population-estimates)

<sup>25</sup> Businesses with no employees can be ‘registered’ for either VAT and/or PAYE or are ‘unregistered’ (due to operating in a VAT exempt industry or they operate below the VAT threshold and do not operate a PAYE scheme).

<sup>26</sup> [www.rec.uk.com/data/assets/pdf\\_file/0006/155562/Flex-Appeal-2014.pdf](http://www.rec.uk.com/data/assets/pdf_file/0006/155562/Flex-Appeal-2014.pdf)

stated that this was because they could not find permanent work at the time, a wide range of other reasons were cited including the ability to earn more money than in a permanent role, to work independently and not for one company or to work flexibly around other family commitments. Likewise, experience of working as a freelancer or contractor is broadly positive. Of those who had worked as a contractor in the past, 50% said they would do so again, with 44% suggesting they would consider freelance work also. Of those who had previously worked as a freelancer, 59% suggested they would consider doing so again, with 41% considering future work as a contractor.

## Employment status

68. As discussed above, some in this category may find themselves in the ‘worker’ category at some point during their working relationship. For many, where they are providing a service as part of their wider business undertaking, they will be self-employed, but where that relationship formalises (for instance, a long term assignment lasting many years), they could stray into the ‘worker’ category.
69. For instance, a self-employed plumber undertaking a number of jobs for different customers is likely to be neither an ‘employee’ nor a ‘worker’. They are likely to be genuinely self-employed and enjoy the freedoms that this status affords them. However, the line between self-employment and employment becomes blurred when the plumber in question secures a contract on a large construction site as one of a number of resident plumbers. At one end of the spectrum, the plumber’s business may be hired on a truly sub-contracting basis to deliver a certain task. In this instance, the individual is clearly self-employed. However, if the individual is hired because of their personal skills, is expected to pass health and safety training before undertaking the assignment and is provided with set hours when they are expected to work, it becomes less certain that the individual, albeit in business on their own account, is truly self-employed. While the individual and employer may regard this to be self-employment, it could be that an employment tribunal later determines that a contract for services exists. In this situation both the individual and the employer have entered into an arrangement in good faith with only the employer carrying any risk of a subsequent change of status, a concern raised by some business groups.

## Employment status issues faced by this group

70. Given that many in this group engage regularly on a self-employed basis, while there is a level of income and job insecurity, this is likely to be understood up front and weighed up against the benefits of engaging in this way. While some in this category may benefit from additional employment rights if extended from ‘employee’ to ‘worker’, many will not want the additional responsibilities that entails.
71. One of the issues raised by business groups is the need for more certainty when hiring individuals in this category. Many do so to provide specific skills for particular projects in the knowledge that the relationship is not one of employment – changing this could restrict opportunities in this area of the labour market.

## Temporary agency workers

72. Temporary agency workers play an important role in labour markets across the world, providing flexible labour for businesses and work opportunities for individuals. The government guidance on the Agency Workers Regulations 2010 (AWR) defines an agency worker as someone who has a contract with the temporary work agency (an employment contract or a contract to perform work personally) but works temporarily for and under the direction and supervision of a hirer.<sup>27</sup> In this type of arrangement, the work-seeker approaches an employment business and asks them for work. The employment business will then find work for the work-seeker with a hirer. The work-seeker will then work for the hirer, the hirer will pay the employment business and the employment business provides the work-seeker with their pay. In this type of arrangement, there is likely to be no formal employment relationship between the work-seeker and the hirer.
73. Agency workers engaged in this type of arrangement are likely to be entitled to core 'worker' rights which will generally be the responsibility of the employment business to ensure, not the hirer. However, a number of employment rights and protections are specifically extended to agency workers who would not otherwise be entitled to them (e.g. the NMW, right to paid annual leave and whistleblowing protection) with liability assigned to either the agency, the hirer or both. In addition, agency workers receive further protections through the AWR, ensuring that they receive equal entitlements to comparable permanent staff across a number of areas. Some of these take effect from day one, such as access to vacancies and facilities, with others taking effect once the agency worker has been with the same hirer and in the same role for 12 weeks.

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### Difference between employment agencies and businesses

**Employment agencies** find work for work-seekers who are employed and paid by employers. This is often called 'permanent employment' because once the worker has been taken on, they are an employee of the company they are working for.

**Employment businesses** engage a work-seeker under a contract who then works under the supervision of someone else. This is normally called 'temporary agency work' or 'temping'. Workers under these arrangements are paid by the business instead of the company they're supplied to.

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74. However, it is possible for an individual in this kind of arrangement to be considered an 'employee' where the temporary work agency hires them on a permanent contract of employment. This can be a standard contract of employment between the work-seeker and the employment business or, since the introduction of the AWR, a 'pay between assignments' contract. Enabled by Regulation 10 of the AWR, this is a contract of employment which guarantees the work-seeker pay between assignments in return for opting out of the equal pay entitlement at 12 weeks. Agency workers engaged on any contract of employment benefit from the full suite of employment

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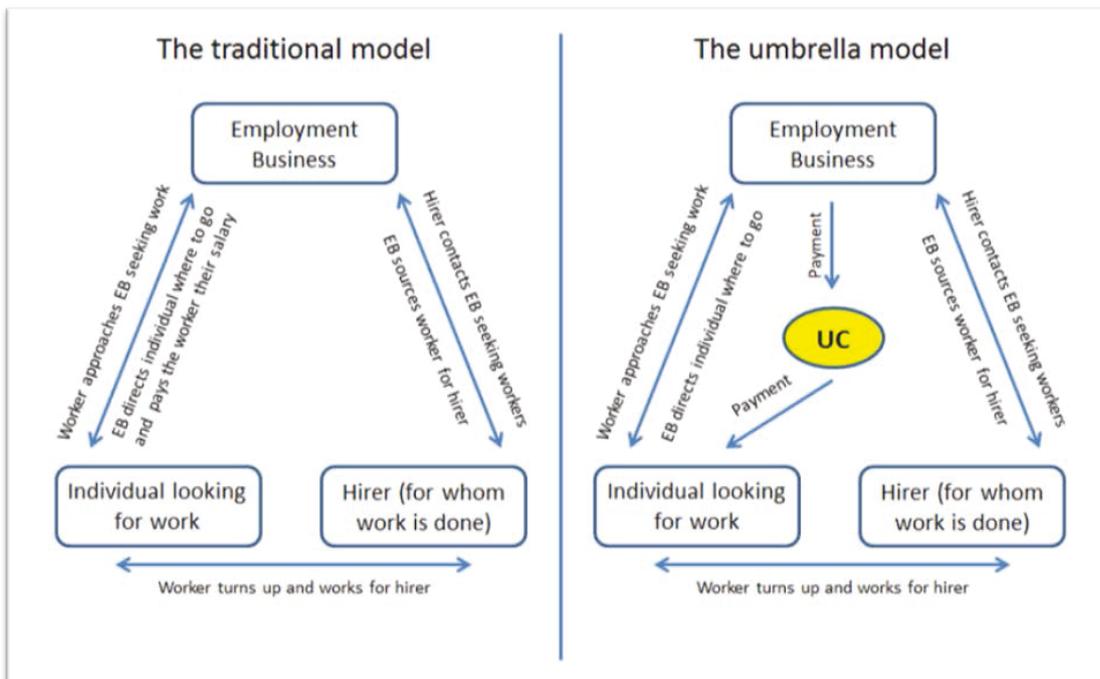
<sup>27</sup> [www.gov.uk/government/publications/agency-workers-regulations-2010-guidance-for-recruiters](http://www.gov.uk/government/publications/agency-workers-regulations-2010-guidance-for-recruiters)

rights that any 'employee' does. However, as with the standard relationship, there is likely to be no formal employment relationship between the individual and the hirer.

### **Umbrella companies**

75. It could be that for some agency workers, pay is channelled through an intermediary. Payment intermediaries such as umbrella companies have been a feature of the labour market for some time. Unlike employment agencies and employment businesses, umbrella companies do not source work for the work-seeker, rather they act as a single conduit through which payments are made. Intermediaries of this type are popular with many skilled professionals as way of effectively drawing a salary from their own business, having the umbrella company deal with tax, National Insurance contributions (NICs) and expenses. Individuals who expect to work for several different companies during the course of a year may opt for payment through an umbrella company so that a single entity can keep track of their payments and tax liabilities.
76. Use of umbrella companies has increased in recent years, with the changes made in last year's Finance Act to deal with the issue of 'false self-employment' acting as a catalyst. As a result of those changes, where an employment business supplies a worker to a client and the worker is subject to control, or to the right of control, as to how they undertake their work, the employment business must deduct income tax and NICs from the worker's pay. This can be done by the employment business, or they can arrange for PAYE to be operated by a third party, such as an umbrella company.
77. Where an umbrella company is involved, the sum agreed between the worker and the employment business is paid to the umbrella company. The umbrella company retains from this sum an amount to cover its administration fee and any other relevant deductions (for instance, employers' NICs and holiday pay). The remainder is then classed as gross pay, from which income tax and employees' NICs are deducted. The worker receives the resultant net pay. Before a worker enters into an umbrella company arrangement, the employment business must provide the work-seeker with sufficient information so that they can make an informed decision on whether or not to enter into the arrangement.

## Flow of responsibility for the traditional and umbrella model



## Numbers

78. The ONS LFS suggests there were 307,000 agency workers in the UK labour market as of Q2 2015.<sup>28</sup> The Recruitment and Employment Confederation (REC) also estimate the number of agency workers in the UK. Their most recent estimate suggests that on any given day in the 2013/14 financial year, 1.15m agency workers were engaged in the UK labour market.<sup>29</sup>

## Employment status

79. Agency workers hired under the standard tripartite relationship are regularly grouped with 'workers' when discussing the UK labour market. However, as discussed, they have a slightly different set of protections. While they generally benefit from all the same day one rights as any 'worker', they also benefit from additional protections through the AWR. Given employment status is simply nomenclature to help identify a certain bucket of statutory employment protections, agency workers can be considered a distinct status for the purpose of employment rights. Those agency workers who are 'employees', whether of the employment business or an umbrella company, enjoy the benefits of enhanced employment rights.

## Employment status issues for agency workers

80. There is some clarity for agency workers hired under the standard relationship. For those hired as permanent 'employees', either through a standard contract of employment or one covered by Regulation 10 of the AWR, they are 'employees'. For

<sup>28</sup> Office for National Statistics published data, Q2 2015

<sup>29</sup> [www.rec.uk.com/data/assets/image/0008/176525/RITS-infographic-JPEG.jpg](http://www.rec.uk.com/data/assets/image/0008/176525/RITS-infographic-JPEG.jpg)

others, they are agency workers, generally entitled to day one ‘worker’ rights and the enhanced protections afforded by the AWR.

81. However, there can be difficulty for an agency worker in establishing exactly who is liable for their employment rights. The agency worker is likely to be able to establish that they are a ‘worker’ of the agency but they is likely to find it difficult to establish that they are a ‘worker’ of the hirer. The position is further complicated by the use of umbrella companies and other intermediaries. This has been dealt with in some cases by specifically extending rights such as the NMW to agency workers who are not ‘workers’ and assigning liability to the agency, hirer or both. The AWR offer further protections in relation to key rights.

## Interns

82. The use of internships is relatively new and increasingly popular in the UK labour market. In some sectors, internships are a gateway into permanent employment and can provide valuable opportunities for both employers and young people looking for short term experience in an industry. Internships can be an important part of a thriving labour market. They offer young people, particularly graduates, the chance to develop their skills and learn the basics, trying out an industry without committing long term. This can significantly boost their chances of securing employment in the future. Internships also benefit employers who are looking to make their businesses more attractive to young people and build the skills they need for the future while allowing their existing staff the experience of mentoring and supervising.

## What is an internship?

83. There is no legal definition of an internship in UK legislation. This gives rise to a number of different working relationships as employers have the flexibility to develop a programme that suits them. While there are many different types of internship, the Gateways to the Professions Collaborative Forum, representing around 60 professional bodies has worked to develop a best practice code for high quality internships.<sup>30</sup> In this, they attempt to define high quality internships as a situation where “an individual works so as to gain relevant professional experience before embarking on a career. Well managed, high-quality internships should be beneficial to both employer and intern. The intern should develop professional skills and an understanding of a profession by undertaking work of value for an employer, enhancing their future employability and creating a new, highly-talented future workforce. In addition, employers can use internship programmes to directly identify and recruit motivated and capable individuals.” They suggest that although an internship can last anywhere between 6 weeks to 12 months they should typically last around 3 months.

## Numbers

84. Given there is no legal definition or standard programme and many internships are informal, it is difficult to know exactly how many interns there are in the UK labour market. Estimates range from as many as 250,000 in a 2010 IPPR report, to around

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<sup>30</sup> [www.gov.uk/government/publications/providing-quality-internships-code-and-guidance-for-employers](http://www.gov.uk/government/publications/providing-quality-internships-code-and-guidance-for-employers)

7,000 graduates in the Higher Education Destination Leavers Survey. The CIPD Spring 2014 survey found that 16% of employers use internships as 'formal training schemes'. This is in contrast to the winter 2011-12 survey which said that 29% of employers use internships to support the recruitment of young people. These figures need to be treated with caution - the sample size is small and biased towards CIPD members who tend to be professional organisations.

85. The evidence about whether these opportunities are either paid or unpaid is also not robust and incredibly mixed. Almost all (99 per cent) of the vacancies on the Graduate Talent Pool, a government funded website aimed at encouraging employers, especially small enterprises, to offer graduate internships, are for paid positions. However, a survey of 74 organisations by XpertHR found that 44 per cent did not normally pay their interns a wage. Analysis by the Sutton Trust uses the Higher Education Destination Leavers Survey to estimate that around 31% of interns are not paid.

## Employment status

86. As there is no statutory definition of an 'intern', individuals doing an 'internship' are likely to be either volunteers, 'workers' or 'employees' depending on the facts of the employment relationship. If they are a 'worker' or 'employee', they are entitled to exactly the same employment rights as any other 'worker' or 'employee', including the National Minimum Wage. However, if they are volunteers the majority of these rights, including National Minimum Wage, do not apply.
87. An intern participating in the type of high quality internship defined by the best practice code above will be expected to turn up at certain times, deliver a personal service to their provider and perform certain tasks. While it may seem that the individual would fall into the 'employee' or 'worker' category as a result, it is the presence of consideration that puts this in doubt. Consideration would normally involve payment of wages, however, this can go beyond simple monetary remuneration and extend to other 'benefits in kind' such as an offer of a job at the end of the internship. However, for many interns who enter into the arrangement without any expectation of a future job, the decision to knowingly participate on a voluntary basis, could result in an employment tribunal or HMRC (who enforce the National Minimum Wage legislation) not being able to establish consideration and therefore a contract.
88. Each case has to be judged on its own facts and the difference between unpaid work experience which may solely be for the benefit of the individual and an internship where the individual is more likely to provide value to the employer as well as building their own experience is not always clear. As such, many interns may not be clear of their employment status.

## Employment status issues for interns

89. A number of organisations have reported either to government or the Low Pay Commission that some employers are offering short-term work placements and calling them internships to get away with not paying the National Minimum Wage. They claim that there is a perception that employers do not need to pay the National Minimum Wage to their interns or that some young people can opt out of receiving a

wage in order to secure the opportunity. It is not possible for an ‘employee’ or a ‘worker’ to opt themselves out of core statutory rights or for an employer to get round them through offering internships. While National Minimum Wage legislation does not apply to voluntary workers, this is primarily aimed at ensuring individuals can choose to do voluntary work for certain organisations (e.g. charities) without the requirement for payment.

90. Determining the employment status of interns is the same as any other employment relationship. An employment tribunal or HMRC will look at whether a contract of employment or a contract of service exists. A key issue with respect to interns is whether there has been consideration to pay a wage or another benefit in kind. For instance, while voluntary workers (interns in this case) can receive payment of travel and subsistence related to their work, they cannot receive any other payment in kind. Where this occurs, the individual is automatically considered to be a ‘worker’ for the purposes of the National Minimum Wage and non-payment in full by the employer would be unlawful. For instance, someone undertaking work experience may legitimately be unpaid and in receipt of basic expenses. However, after a particularly good presentation they are rewarded with a £50 bonus. This would result in the individual being eligible for the National Minimum Wage.
91. Given many interns can find themselves in a very vulnerable position, especially if an unpaid internship is seen as a pre-requisite to full employment within a particular sector, a number of safeguards are built in. For instance, a benefit in kind can also go beyond simple remuneration. Where an offer of permanent work is attached to an internship, this could be considered to be a benefit in kind and so the individual would become eligible for the National Minimum Wage. This has complicated the employment relationship and some have questioned whether the ability to build experience for future employment, or the opportunity to make useful contacts also counts as a benefit in kind.

## Other atypical arrangements

### Home workers

92. Home workers are not standard ‘employees’ or ‘workers’ who simply work from home. Rather, these are individuals who engage with an employer (or a number of employers), sometimes on an ad hoc basis, generally to deliver certain tasks. For instance, some publishers will engage proof readers on a home working basis, paying them for the work delivered rather than set hours. Likewise many highly skilled individuals covered in the previous section may deliver their services as home workers. For instance, a retired solicitor may decide to continue writing wills in retirement on a home working basis, advertising in a local newspaper and charging on a piece by piece basis.
93. Home workers can choose how much work they wish to undertake and, as with those on zero hours contracts, can refuse work when it is offered. Home workers will generally fit into the ‘worker’ category but have, on occasion, been found to have

overarching contracts of employment and therefore enjoy the rights of an 'employee'.<sup>31</sup>

94. The ONS LFS does estimate the number of home workers in the UK.<sup>32</sup> As of August 2015, it was estimated that 1.5m home workers were operating in the UK. While this number seems high, this is because it is likely to include a significant number of those individuals mentioned above as well as other self-employed individuals.
95. Even though some in this category may consider themselves to be self-employed, additional provisions were made in the National Minimum Wage Act 1998 to ensure home workers were eligible for the National Minimum Wage. Likewise, the provisions on public interest disclosures in the ERA 1996 also extend to home workers even where they are not deemed to be 'workers'. As such, individuals in this group do have some employment protections.

## Volunteers

96. Volunteers are not defined in primary legislation, although s44 of the National Minimum Wage Act 1998 does provide an exemption for 'voluntary workers'. Volunteers are not exclusive to the charitable sector and can be found across both the public and private sector. Most volunteers participate in this way either for philanthropic reasons, or to build skills and experience in a given area. Those who have genuinely engaged on a voluntary basis are neither 'employees' nor 'workers', but for some, the roles they will be undertaking will be very similar to, if not the same as, paid individuals alongside them.
97. Volunteers aren't paid for their time but can be paid for any out-of-pocket expenses. These expenses could include travel, postage and telephone costs if working from home, and essential equipment, such as protective clothing. If a volunteer receives any type of reward or payment other than expenses, they may see this as a salary and they could be classed as an 'employee' or 'worker'.

## False self-employment

98. A number of stakeholders raised concerns about the use of 'false' self-employment by some employers to circumvent employment protections. This is an issue that the government is aware of and there has already been some legislative changes to try and address this kind of abuse of the system. However, the media and others continue to raise examples of individuals who are coerced into setting up their own business so that they can engage with a particular employer. The individual is then engaged on what is communicated as a very casual arrangement with the employer.
99. In these cases, employers can insert substitution clauses into contracts, casting doubt on whether the individual is required to provide personal service even where the reality of the situation means it is only they that can work. Likewise, individuals can be engaged on a zero hours basis, again casting doubt on whether there is any mutuality of obligation. However, if an employment tribunal believes the substitution

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<sup>31</sup> *Airfix Footwear Ltd v Cope* [1978] and *Nethermere (St Neots) Ltd v Taverna and Gardiner* [1984].

<sup>32</sup> Labour Force Survey micro-data Q2 2015. Home-working is defined here as workers who report that they 'work from own home' or 'work in same building or grounds as home'.

clause to be false, or consider that there is an implied mutuality of obligation they can find that the individual is a ‘worker’ or even ‘employee’.

100. This kind of participation is not always forced upon individuals though. Some individuals may choose to participate in this way because of the tax advantages of doing so. While employment tribunals will consider the facts of the case in front of them, and will disregard any contract that does not reflect the reality of the working relationship, that still relies on the individual taking their employer to court in the first place. For those in a vulnerable position, for example because work opportunities in their region are limited or because they don’t speak English, this kind of abuse of the system could be one route by which unscrupulous employers attempt to circumvent their responsibilities.

## The digital age

101. Employment relationships continue to evolve, meeting the needs of employers and individuals. In recent years, there has been an increase in new, atypical working relationships, many of which are internet-supported, designed to produce maximum flexibility for all parties in the relationship. At one end, this could be an online platform that allows an individual with specific skills to tout for a couple of hours work a week from a global market place. However, the possibilities are endless and more elaborate networks, bringing together those who seek specific skills with those who may be interested in offering them, continue to develop.

102. It is hard to know how many people are engaged in this form of employment right now, although we can be relatively sure that it will increase in the coming years. However, individuals should not find themselves without basic employment protections simply because of the way they have engaged with the end client or clients. A recent report explained the extent of the confusion stating:<sup>33</sup>

*“The employment status of people using sharing platforms to find work is unclear – are they volunteers, workers, self-employed or employees? This has implications for defining the rights of people using the platforms, and determining the responsibilities of the platforms themselves.”*

103. The report recommended that the government should clarify the employment status of people who use online platforms to find freelance work. The issues faced by these individuals (called freelancers in the report but potentially very different in their working relationship to those covered earlier in this part) are similar to some others engaged in atypical working arrangements. In assessing the options available for reform, we must consider the framework’s applicability and relevance to the emergence of these new forms of employment.

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<sup>33</sup> [www.gov.uk/government/publications/unlocking-the-sharing-economy-independent-review](http://www.gov.uk/government/publications/unlocking-the-sharing-economy-independent-review)

## Key issues

104. A number of employment status issues have been identified in this section. Many do not relate to a lack of employment rights, but rather further clarity on key aspects of their status. For instance:
- For some on **zero hours contracts**, there can be a high level of income insecurity given the nature of the relationship means there are no guarantees of hours or work, or requirements to accept work. For those who may be 'employees' and entitled to the full suite of employment protections, including the ability to request guaranteed hours, there can be uncertainty about whether the necessary continuous employment has been met to qualify for particular rights.
  - For some **freelancers, contractors, consultants and interims, etc.** the lack of a formal definition of, or statutory test for, self-employment can leave both them and their hirer in some doubt as to the reality of the relationship. The sometimes fluid nature of the definition of 'worker' can result in individuals drifting into a status that neither they, nor their engager wishes.
  - For some **agency workers**, there can be a lack of clarity over who is responsible for providing the statutory protections they are entitled to, particularly when they are 'employees' of a payment intermediary such as an umbrella company.
  - For some **interns** and those organisations hiring them, there can be confusion as to whether the individual is truly a voluntary worker or whether they are an 'employee' or a worker' and therefore entitled to the National Minimum Wage.
  - For some engaging **volunteers**, the lack of a clear definition means they are managing a risk of the individual being found to be a 'worker' or an 'employee' by a tribunal and as such, entitled to key protections such as the National Minimum Wage.
  - For those who are in **false self-employment**, where the system is being abused, any action will depend on whether the individual has chosen to engage in this way or has been coerced into doing so. For those who are coerced, there are questions as to what can be done to make these individuals feel more empowered to challenge their employer.

# Part 3: The future

## Summary:

Part 3 examines the challenges of reform. It sets out a range of options that could be considered to change or improve the current system, highlighting some of the high level challenges associated with each.

## Key points:

- The current framework for establishing employment status has evolved over many decades and allows individuals and employers a high degree of flexibility in the way they work.
- This flexibility means the framework has adapted well to changes in the labour market and in the future, employment tribunals will be able to adapt it further to any new forms of employment that evolve.
- For those who do not desire flexibility in their working arrangements, there can be relative clarity over employment status and rights and responsibilities. However, for some who make the most of this flexibility, there can be a degree of uncertainty.
- There are a number of options for reform of the current framework that could increase clarity and understanding for some in these groups. These are all highly complicated, would take years to deliver and could create new issues of their own.
- It could be possible to reverse the presumption that underpins the current framework to one where an individual is automatically eligible for all rights unless another employment status (such as 'self-employed' or 'volunteer') could be proved. This would be a 'game changer' and take many years to develop and implement.
- Not all the issues identified require fundamental reform and there are a number of specific options that could be considered further for key groups.

## The challenge of reform

105. The framework which we have is long-established, developing slowly over many decades. Any attempt to change the framework substantially will be challenging, potentially resulting in a different set of issues being created. As has already been stated, for the majority of individuals and employers, the current system provides them with everything they need. Most people working in the UK are in standard forms of employment, and as a result are relatively clear about what their rights are. Likewise, most businesses are confident in the employment status of their workforce and are well aware of their responsibilities. Many of those working in non-standard forms of employment are also relatively clear about what their rights are, content in their arrangement and treated well by those they work for.
106. However, for a small but growing section of the UK labour market, the lines between statuses are not clear and so understanding which rights and responsibilities apply may be harder to determine. Whether that is someone working on a zero hours

contract during school holidays, or a contractor engaging in a long-term agreement with a single employer, more people are starting to participate in atypical, non-standard relationships. While some individuals and employers would welcome more certainty up front about what their rights and responsibilities are, and more could be done to address some of the specific abuses, there are questions as to how this could be achieved without a wider negative impact on the flexibility of the labour market.

107. In short, there are three aspects we are considering:

- i. **Flexibility:** Ensuring individuals and employers are able to participate in the labour market in the way that suits them. For instance, individuals may not be able to participate on a permanent basis or may want the additional flexibility that being self-employed or an agency worker affords. Likewise, some businesses require truly casual staff to manage peaks in demand as well as reaching out to those who are unable to commit to permanent work.
- ii. **Clarity:** Ensuring that once in work, both individuals and employers can be more sure of their rights and responsibilities. For instance, individuals should be more able to identify which employment status applies and whether they have the requisite continuous employment to qualify for some protections. In addition, the majority of employers want to ensure they know what is expected of them and what they can expect from those working for them in return.
- iii. **Understanding:** Ensuring individuals and employers understand what certain employment relationships mean both before entering into them, and once they are participating. For instance, for individuals, this may be understanding the risks and opportunities associated with going into business on their own or signing up to work through an employment business. For employers, this could be knowing what rights a casual workforce has.

108. Those participating in the labour market, whether individuals or employers, can achieve one or two of the elements above, but it can be difficult to achieve all three as there will always be some tension between flexibility and clarity. For instance, a specialist IT programmer may not wish to participate on a permanent basis because of other commitments and may welcome the opportunity to engage on a zero hours basis, even if the employer wants more of a commitment. However, the result of this is that both parties can be unsure of the individual's employment status and therefore what employment protections apply. While the business may believe it has hired a self-employed contractor, they can never be certain that an employment tribunal wouldn't decide at a later date that they were a 'worker'. However, for an individual who is happy to sign up to a permanent, full-time contract and therefore forgo this flexibility, they, and their employer, can be relatively sure of what their employment status is and what rights and responsibilities they have.

109. In considering any changes to the framework, ministers will want to look at the possibility of any wider impacts. Labour market flexibility is important not just for employers, but also individuals. In considering changes aimed at helping the growing number of people in atypical work, ministers will want to limit the impact on those individuals who are served well by the current system (for instance, because their own personal circumstances make them not want to, or simply unable to, work in

other ways). There would be little benefit in improving the situation for one group, only to make it worse for another. Any changes that resulted in employers being less willing to create jobs could damage the UK labour market and ultimately, impact on those individuals that any reform was seeking to protect.

110. This means that whatever changes are considered, further consultation, discussion and review will be required to ensure the right balance is struck between the rights and needs of individuals and the rights and needs of business. In addition, the current framework, while lacking clarity up front for some individuals and employers, is considered relatively clear by many in the legal profession. Any changes to the definitions and tests would result in years of litigation and uncertainty. As such, there are no “quick wins”. Even small tweaks to the framework could take years to deliver and ultimately have subsequent effects that undo any intended good work.
111. This review sets out a range of options that could be considered to change or adapt the current system, increasing clarity and understanding whilst managing the impact on flexibility. However, all would require significant further analysis before changes were considered.

## The current framework

### Flexibility

112. The current framework is highly flexible and allows for a variety of employment relationships to co-exist. This means that individuals and employers can participate in any of the types of atypical arrangements outlined in Part 2 and many more. As we have seen, this can increase the size of the labour market, bringing in groups who would otherwise not be able to participate. For employers, it can provide a range of hiring choices that allow them to adapt to any given situation, strengthening and growing their business. For the courts, the principles-based approach to establishing employment status allows them maximum flexibility to consider all the facts and deliver a judgement that is right and fair for both parties.
113. For those who choose not to make the most of this flexibility and participate in traditional, permanent roles, there is relative clarity over what their employment status is and therefore a great deal of certainty about what employment protections they enjoy. What is more, a number of statutory protections have been introduced to ensure those individuals are provided with some flexibility (if they want it) after a certain period of time. Protections such as the right to request flexible working and shared parental leave allow even the most permanent ‘employee’ to adapt their working pattern around other commitments if they so wish at a later date. However, as we have identified, for some who decide to make the most of the flexibility, this can be at the expense of clarity and ministers will need to decide whether the balance for these groups should shift.

### Clarity

114. For those who participate flexibly, there are a number of ways in which the current framework could be adapted to try and provide more clarity about employment status. However, all would require a significant transition period as the changes would present major challenges for employers and individuals. In addition, while the

aim may be to provide greater clarity up front, it is highly likely that changes of this type would cause an increase in uncertainty and litigation in the short to medium term.

115. Further work could be undertaken to consider whether the distinction between **'worker'** and **'employee'** is still relevant. Many trade unions have long called for this distinction to be erased, citing it as creating a two-tier model of employment. Business groups however, have been clear that this distinction is necessary to enable them to manage flexibility within their workforces and respond to the fluctuations and demands of the market. It is also not clear that all 'workers' would want the full set of rights and responsibilities afforded to an 'employee'.
116. A significant amount of further analysis would be required before any changes were considered to assess the full impacts on both individuals and employers. However, if it were decided that the distinction should be considered further, there are a range of ways in which this could be done. On the one hand, all 'employee' rights could be extended to those currently in the 'worker' category. This would see an increase in the number of individuals who qualified for certain rights, including some who may not want them. Alternatively, those 'workers' who meet the 'limb b test', straddling employment and self-employment, could be catered for elsewhere (for instance an 'independent contractor' employment status), or not at all. While removal of the two categories may increase clarity for some, this could be at the cost of flexibility and could create new and different areas of uncertainty. In addition, this could simply shift unscrupulous employers' avoidance efforts elsewhere, rather than stop it outright.
117. Some stakeholders suggested that it may be helpful to have a statutory test for 'self-employment'. There is currently no definition of **'self-employment'** in employment legislation, in part because the employment protections afforded to individuals through the ERA do not apply to this group. As such, there is no legal merit in defining the term at present for the purposes of employment law. However, there have been calls by some to extend a number of employment protections to the self-employed. As such, it would be prudent to work with HMRC, HMT and DWP if a statutory definition or test was designed to ensure that it did not produce any unintended consequences in employment law, as well as providing a useful template should rights be extended to this group in the future. It is also important that any changes being considered in relation to defining self-employment act to increase clarity and transparency between the employment and tax frameworks and not add extra layers of complexity.
118. The term **'volunteer'** is also currently not defined in primary legislation<sup>34</sup>. For those organisations and businesses that rely on volunteers to deliver services, there may be some merit in being clearer about how and when individuals can opt out of employment. However, as with self-employment, unless a bespoke set of employment protections are applied to this group, there is no legal merit in defining such a broad term in the current framework. As such, it may be that more guidance is

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<sup>34</sup> However, there is a definition in secondary legislation. [The Police Act 1997 \(Criminal Records\) Regulations 2002 \(SI 2002/233\)](#) (which provide for criminal record checks) define a volunteer as: "a person engaged in an activity which involves spending time, unpaid (except for travel and other out of pocket expenses), doing something which aims to benefit some third party other than or in addition to a close relative" ([regulation 2](#)).

produced to provide that clarity. It would be difficult to draft a definition or guidance that provided the levels of clarity desired by some without adversely impacting on those who truly wished to provide their time on a voluntary basis. Again, this would not be a simple definition to draft for employment law purposes and a significant amount of further work, alongside those in the voluntary sector, would be required.

119. There are some current employment statuses that do provide a bespoke set of protections. Government could consider whether it was necessary to retain these in their current form, or go further and define more in legislation. For instance, rather than a generic group of 'workers' (or in addition to that group) we could attempt to legislate for, '**contractors**' or '**directors**', or any other type of working relationship that ministers believed warranted a slightly different package of rights. However, this would still be very difficult to do and it would be impossible to create an exhaustive list, meaning some individuals would still fall between the cracks with new areas of uncertainty created as a result.
120. For those employment statuses that are defined, we could seek to go beyond the high-level principles currently used and provide statutory tests of whether a certain type of contract exists. However, placing definitions in statute is likely to reduce the flexibility available to the courts to address different facts that arise. The less flexibility the courts have, the easier it is for unscrupulous employers to game the system with avoidance measures. As a result, while this might go some way to helping a few individuals be more sure of their employment status, it is more likely that the new tests would present a framework for unscrupulous employers to consider when drafting contracts that seek to circumvent employment protections.
121. A number of employment protections take effect on day one, but others have a qualifying period. While for most individuals working in the UK this is not an issue (as most employment is permanent), for some 'employees' in atypical arrangements such as a zero hours contract, this can act as a barrier to individuals accruing sufficient qualifying service to become eligible. One option would be to review the differences between the qualifying periods and consider whether they should be changed. For example, to address the problems faced by some in atypical arrangements you could reduce the length of service, even to day one, of some protections. However, this would have a significant impact on employers who rely on casual staff and could see them simply not create jobs in the first place putting people out of work.
122. An alternative to changing the qualifying periods would be to better define what is meant by '**continuous employment**'. The provisions on continuity of employment are set out in Chapter 1 of Part 14 of the ERA 1996. There is case law on these provisions and on how and when continuity continues across breaks. The ERA 1996 provisions apply to a number of rights, or are used as the base against which other tests are applied for consistency (for instance, shared parental leave). Consequently, careful thought will need to be given to the impact of changes to provisions on continuity and the wider picture.
123. One way forward would be not to make a general change to the provision on continuity but draw a distinction between the position of an individual in continuous employment whose entitlement to certain rights depends on the passing of time (continue to be governed by the current provisions), and individuals in short term

contracts of employment without an overarching contract. In respect of the latter a targeted solution could be used. For instance, a contract for intermittent employment or adding up how many hours a person has worked in a particular time period regardless of the pattern worked within that period.

124. If a broader legislative solution was considered, potentially covering both examples above, it would be difficult to strike the right balance between ensuring individuals have access to rights without placing a disproportionate burden on employers and tying the hands of employment tribunals. For instance, permissible breaks in continuous employment would have to be set at a level that prevented an unscrupulous employer from using it as a business model to avoid their workforce being entitled to some rights, but also not so open ended that truly casual relationships fell within scope. Defining this in sufficient detail to provide the clarity some individuals and employers want, without tying the hands of employment tribunals in exceptional cases would be difficult.

## Understanding

125. The options above take the approach of trying to create more clarity within the current framework so that individuals and employers have a better chance of determining employment status and understanding their rights and responsibilities. However, it would be possible to deliver more clarity without the need for reform of the framework.
126. Some individuals and businesses are simply unclear on what their rights and responsibilities are when it comes to employment law and better **education** may be one answer. Many schools and colleges now explain the benefits of work experience to young people, of apprenticeships, internships or even setting up your own business, but how many go into the basic rights and responsibilities involved in certain employment types? Further work could be undertaken to consider whether key employment rights and responsibilities could be included before young people enter the labour market. Likewise, where individuals are taught about the benefits of entrepreneurship and setting up their own business, greater emphasis could be placed on the benefits of investing in your workforce, developing skills and improving wellbeing. However, pressures are already tight on curriculums and further work would be required to see whether this was feasible.
127. It may be possible to develop an '**online tool**' catering to the needs of both employers and individuals. It could be designed in such a way as to be 'smart', interpreting requests and pointing individuals and businesses to the specific information they need, when they need it, rather than simply signposting them to other guidance. The government already has an online employment status indicator tool.<sup>35</sup> This tool enables people and businesses to check employment status for tax purposes - that is, whether an individual is employed or self-employed for tax, NICs or VAT. The Office for Tax Simplification has already identified the potential benefits of building on this tool to incorporate employment protections. It could be designed to be a one-stop-shop for all employment queries, providing information and advice to all who want it. However, creating an online tool that covered all scenarios would be

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<sup>35</sup> [www.gov.uk/employment-status-indicator](http://www.gov.uk/employment-status-indicator)

impossible and so decisions would have to be taken as to what it was seeking to achieve. As a bare minimum it could be used to deal with simple issues such as businesses who want to know what to include in a contract and individuals on a zero hours contract who want to know if they are entitled to holiday pay.

128. Not everything can be delivered online, and while a resource of this type could provide some support in more straightforward cases, for the more complicated issues, there is no substitute to discussing the matter with an expert. ACAS already provides advice to employers and individuals before the formal early conciliation process begins, but in the most part, contact is only made when things have started to go wrong. However, it is clear from our discussions that employers can find an early discussion about issues helpful and individuals too, would benefit from being able to discuss issues before they escalate. While trade unions can provide helpful support in these situations, not everyone is a member and while organisations like Citizens Advice can help as well, there is a question as to whether government could play more of a role. One service that could be provided is a **bespoke helpline** that attempts to determine status and therefore ascertain rights and responsibilities. For individuals and employers, they could answer plain English questions and be provided with a probable employment status, allowing them to have slightly more clarity on rights and responsibilities in certain arrangements. However, given the flexibility afforded to tribunals in employment disputes, it would not be possible to be absolutely certain of an individual's employment status in every scenario and so there are limitations on how useful this service could be with advice being heavily caveated and open to legal challenge.

## Fundamental reform

129. The current system is predicated on a presumption that no contract exists until one is proved. When individuals seek to enforce their rights at an employment tribunal, the courts will first establish whether a contract of employment or contract for service exists (depending on the right being enforced). If the tribunal cannot establish the required type of contract, then the employment law in question does not apply and the case is dismissed. This requirement to prove that a contract exists can leave some in atypical arrangements uncertain as to whether they are eligible for particular rights and reluctant to take a case forward.
130. One way forward would be to seek to change this presumption and build a future system around statutory presumption that an individual working in the UK was automatically entitled to the full suite of employment protections, carving out those employment relationships that required different treatment. This would create a new legal framework based on a different premise, which has a major bearing on the meaning and effect of all the other options discussed in this report. In fact, if a change of this type were considered, it would be **necessary** to identify those categories of relationship that did not warrant the full suite of employment protections and define these (such as 'self-employed', 'volunteer', 'agency worker', and others) to avoid severely damaging the flexibility of the labour market, introducing an element of rigidity which could restrict the creation of new ways of working. While this change need not necessarily limit the types of employment relationship available in the UK, it would be essential to get the statutory definitions and tests associated with any sub-categories right to avoid any unintended consequences and, to some extent, we

would have to regularly return to legislating as new relationships evolved. This would not be a simple task and where gaps remained, it would result in an employment tribunal having no choice but to find the person to be eligible for the full suite of employment protections. However, it would not stop avoidance measures by unscrupulous employers working the system, especially where individuals do not know their rights.

131. A change of this type would also necessitate a full consideration of the relevance of the 'worker' category. Under this system, it would be more sensible to identify those groups that did not warrant the full suite of rights and properly define them, such as those alluded to previously. For employers seeking to hire truly casual staff rather than try and define a number of diverse and very different relationships, an alternative approach could be adopted, such as a tiered set of employment protections. For instance, while a number of day one rights would still exist, as they do now, other current 'employee' only rights could come in after a certain amount of time. However, in order to allow for truly casual relationships to remain as flexible as they are now, this could result in some individuals participating in standard forms of employment requiring a qualifying period for rights they currently enjoy from day one. If this approach was adopted, it would also be essential to properly define 'continuous employment' for this reason. As discussed earlier, getting this right would not be a simple task.
132. Further consideration would also be required to understand how employment tribunals would operate under such a model. Currently, the courts have a very high degree of flexibility in determining employment status, but a change of this type would necessitate quite rigorous and detailed statutory tests which could tie the hands of a court. Therefore while it may be harder for an unscrupulous employer to design elaborate contracts that seek to present an individual as self-employed, an employment tribunal may not have as much flexibility as it does now to disregard this arrangement where the facts of the case suggest a different employment status is applicable.
133. Any attempt to change the presumption to one where individuals were automatically entitled to core rights would be very complicated, requiring a long period of transition. In order to ensure the wider impact was understood, it would be necessary to consult widely with stakeholders before undertaking a full review considering all aspects of the change. In addition, a significant amount of primary legislation would be required not only to deal with the framework itself, but also how the courts interpret it. This would have to undergo pre-legislative scrutiny ahead of formal introduction to ensure it had been properly tested.
134. Change of this type would also be highly contentious, with minimal support from external stakeholders. Business groups are likely to oppose any change to the current presumption because of the impact it could have on the flexibility of the labour market. Likewise, trade unions are unlikely to support the additional steps that are required to limit the impact on flexibility (such as changing qualifying periods and defining those statuses eligible for fewer rights). As such, making any changes of this type would have to be delivered in a potentially hostile environment.

## Delivery challenges associated with framework reform



## The way forward

135. None of the options outlined above are simple. Even options such as developing an online tool would require a great deal of consultation, discussion and consideration. Any attempt to legislate could result in years of further litigation as the courts come to terms with the new provisions. The most radical of the options, changing the current presumption to one of employee status, would be a 'game changer', meaning even longer implementation timelines.
136. Depending on the scale of the intention, one way forward would be to consider an **independent review** or commission to evaluate the options. Prior to such a review, it would be prudent to engage formally with stakeholders through a public consultation so that the parameters of any review can be structured to reflect the issues under consideration. An independent review could consider any of the options above including:
- i. Whether and how certain statuses should be defined;
  - ii. Whether the employee/worker split is still relevant today;
  - iii. Whether and how continuous employment issues should be addressed;
  - iv. Whether the rights afforded to certain statuses are still appropriate;
  - v. Whether there should be a fundamental change in presumption.

137. The review could also consider some of the options designed to increase understanding from an online tool to better education, but this could also be achieved through a wide-ranging discussion with stakeholders and public consultation.
138. If primary legislation was required, pre-legislative scrutiny of any clauses prior to formal introduction by an expert committee would be essential to ensure that the clauses put before Parliament were fit for purpose. Legislation of this type would be scrutinised very carefully by Parliament – and would by its very nature be controversial – and so the government would need to be able to show that clauses had been well tested. Any changes would need some time to bed down and so an extended period of transition may be required. Fundamental reform of the framework would require careful implementation, especially as many contracts may have to be amended as a result.

## Other options

139. Reform of the framework is not necessary to deal with all of the issues identified by stakeholders and this review and it could be that other action is considered in the medium-term either alongside fundamental reform or instead of it. Some action could benefit all atypical workers with others targeted at certain types of employment relationship.

## Targeted guidance

140. Many of the issues identified could be at least in part addressed with more specific, targeted guidance that aims to outline the basic employment rights and responsibilities. This could outline the basics for individuals and businesses ensuring that some of the easier myths (such as those on zero hours contracts not being eligible for holiday pay or auto-enrolment) are quashed quickly. This could build on what is currently provided by ACAS or other non-governmental bodies such as Citizens Advice.
141. This kind of guidance could also target employers, identifying the benefits associated with investing in a workforce. This could show that the need for flexibility does not automatically require zero hours contracts or agency workers. Any work undertaken here should link into the wider skills programme aimed at ensuring employers have the skilled workforce they require in the coming years<sup>36</sup>. This could result, over time, in more employers hiring staff permanently even when they require significant levels of flexibility.

## Written particulars

142. Understanding the terms of employment can be an important step in knowing what rights and responsibilities you have. For ‘employees’, s1 of the ERA 1996 provides for written particulars to be issued to the individual within two months of the work starting. This statement must include key details about the terms of that engagement from pay and hours to basics such as who the ‘employer’ is. This ensures the

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<sup>36</sup> More detail is included in *Fixing the Foundations: Creating a more prosperous nation*. This can be found at [www.gov.uk/government/publications/fixing-the-foundations-creating-a-more-prosperous-nation](http://www.gov.uk/government/publications/fixing-the-foundations-creating-a-more-prosperous-nation)

'employee' knows who they work for and what their basic terms and conditions are. For agency workers, this level of detail has to be issued prior to an assignment beginning, again ensuring they have basic details about their employment relationship.

143. A number of organisations have long called for 'workers' to have access to written particulars and it could be that this is one area where an extension of a particular right is useful. However, further analysis would need to be undertaken to ensure that those potentially falling into this category are getting the information they need and want. Even if the information is wanted, it may be difficult for written particulars to accurately set out the factual positions of various flexible or casual working arrangements. It is also far from a perfect solution for some of those whom we have identified in Part 2 (such as freelancers and contractors) who may participate on a self-employment basis and therefore not expect, or indeed want, a set of written particulars from the client.
144. It could be that further consideration is also given to the timescales in which written particulars are provided as well as the information it includes. For instance, two months is a long time to wait for an 'employee' given that agency workers receive similar information up front. That said, as some agency workers paid through umbrella companies have identified, even up front details do not always provide them with the clarity and transparency they want. Consideration would also have to be made about how to reflect truly casual labour, such as individuals hired for a day or two during the harvest season.

### Zero hours contracts

145. It has been suggested that the key issue facing some on zero hours contracts is income insecurity. While some participate in this working arrangement because it suits them to do so, others may have no option and will continue to seek out a role with permanent, guaranteed hours. This in itself is not an employment status issue. However, as identified earlier, some individuals engaged on zero hours contracts who work regular hours are likely to be 'employees'. As such, they are already entitled to make a statutory request under the Flexible Working Regulations 2014 for permanent hours. If this is successful, not only are some of the income insecurity issues addressed, but the individual can have more clarity over their employment status and length of service for certain protections.
146. However, there have been calls to go further and ensure that individuals have the right to demand set hours after a certain period of time. This may not be appropriate in every situation and could significantly limit business flexibility, potentially leading to individuals being dismissed prior to any statutory threshold. However, a similar right to permanent employment does exist after four years for fixed-term workers. In that case, individuals who have worked on continuous fixed terms contracts for a period of four years are entitled to be made permanent unless there is a business reason not to do so. A similar approach, that allows those employers who have a business requirement for this flexibility could be considered for those on zero hours contracts. However, further work would be required to find a point at which this should apply and a mechanism under which challenges could be made.

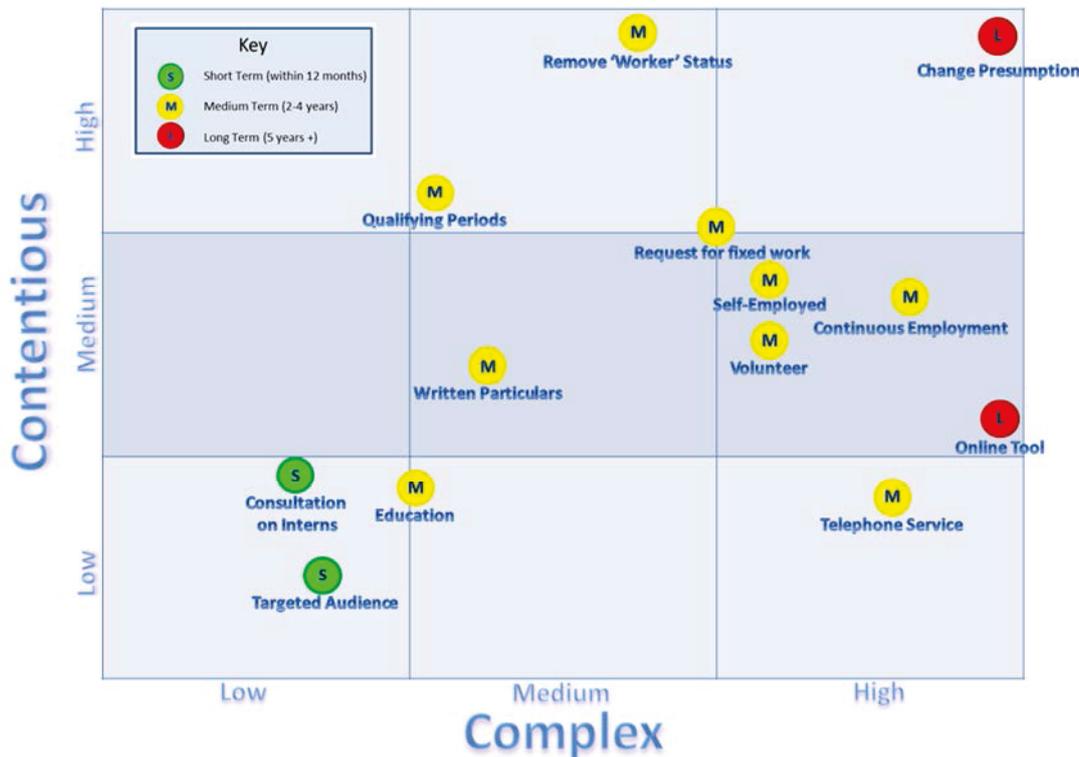
147. In addition, it would seem strange to extend this right only to those on zero hours contracts. Many others may benefit from the ability to demand a change in their working arrangement if the reality is they work more than their conditioned hours. For instance, some individuals can find themselves on short-hour contracts (maybe five or six hours a week) but in reality work full time. While these individual may be 'employees', other than through the Flexible Working Regulations, they have no route to demand their hours are amended. As such, creating a new right solely for those on zero hours contracts would not help this latter group in gaining more income security, even if the reality was they were regularly working in excess of their conditioned hours.
148. There is not a simple solution to the issues being faced by some interns. On the surface, it appears that most interns are entitled to the National Minimum Wage from day one, although determining their employment status can be difficult. In part, this is because an unpaid internship can be very similar to other working relationships that are widely recognised as standard 'employees' or 'workers' and others that are recognised as genuine volunteering roles. In this respect, although HMRC or an employment tribunal will always consider the reality of the working relationship, their entitlement to 'worker' rights becomes more about whether the individual chooses to engage on an unpaid basis.
149. In the first instance, more could be done to clarify the advice and guidance available to employers and individuals to make clear some of the standards and boundaries expected in this type of relationship. This could outline the kinds of 'benefits in kind' that the government considered may bring the individual within scope of National Minimum Wage legislation – for instance, the opportunity to meet individuals of influence and gain vital experience in a particular sector that could not be achieved through any other approach.
150. While some have suggested legislating to clarify eligibility for National Minimum Wage in the case of interns, this would not necessarily deliver the desired result. Any legal definition would risk being either too narrow and so open to exploitation, or too broad, capturing many genuine voluntary relationships. Striking the right balance would be extremely challenging. In order to see whether this would be achievable, a full consultation should be undertaken with interested parties to ensure a position was identified that supported employers in continuing to deliver both high value paid internships whilst also providing clarity over valuable short-term work experience that maximises opportunities for individuals to gain experience whilst protecting them from exploitation. Once concluded, the government could decide whether a legislative solution is necessary.

## Agency workers

151. The main employment status issue identified for agency workers related to those who are 'employees' of an intermediary or umbrella company. For these, knowing who is responsible for delivering statutory protections can be unclear. For many individuals who use umbrella companies to manage their income and participate in the labour market on a self-employed basis, there is no issue. However, where the individual is engaged under a contract of employment as outlined in Part 2, the responsibility as an employer can be delegated to the payment intermediary. The government is currently undertaking research on this subject and once that concludes, this matter

could be considered further. Specifically, to examine when and whether this type of delegation is appropriate and whether more clarity can be achieved for individuals employed through an umbrella company.

### Delivery challenges associated all options



### Emerging issues

152. As mentioned in Part 1, since this review was launched, a number of further issues have been highlighted. For instance, in the case of Citylink, questions had been raised about the rights of the self-employed in certain situations. It is important that before taking the decision to become self-employed, all the risks and opportunities are understood. While all the information needed for the individual is already available, it could be more targeted and reflect the reality of some forms of personal service self-employment.
153. For those employers who seek to manipulate contracts and coerce, or even force, people into self-employment where that is not the reality of the relationship, it is possible that a reversal of the presumption and a clear statutory test for self-employment could make that more difficult. Rather than casting doubt on one element of a contract of employment or contract for service (such as inclusion of a substitution clause suggesting there is no requirement for personal service), the employer would have to show all aspects of a self-employment arrangement had been met. If they couldn't, there would be a safety net for the individual. However, this would still rely on the individual bringing a case to an employment tribunal in the first place and there is no guarantee that the court would retain the flexibility it required to find the individual not to be self-employed.

154. On the issue of pay transparency where a payment intermediary, such as an umbrella company, is used, examples were cited of where individuals had applied for roles through an employment business or employment agency and the advertised pay rate was higher than the final sum paid. In part, this is because the advertised rate represents the full amount paid by the hirer to the employment business, employment agency or intermediary and included any fees, commissions or other costs borne by the employer such as NICs, pension contributions and holiday pay. In the majority of these examples, no unlawful deductions have been made, rather the original rate has been poorly communicated to the work-seeker.
155. While this is not an employment status issue as such, it does link into some of the wider concerns about lines of responsibility where a number of intermediaries are used in a particular relationship. The solution is not simple as tax and NIC rates may vary depending on the individual and any attempt to crack down on the fees charged by these companies is just as likely to see the deduction displaced rather than completely removed. However, further work could be undertaken to establish how best to achieve clarity for these individuals.
156. Finally, some had suggested that migrant workers may be vulnerable to exploitation under the current framework in the UK, suggesting in part that only migrants are willing to work in non-standard relationships. However, the facts show that many resident in the UK are also happy to work under these arrangements and there is nothing specific within the framework that would make it any more or less likely for migrants to be exploited. Migrant workers in the UK are treated no differently to domestic workers and can benefit from all the same protections. It is possible that there are communications difficulties however and more could be done, through advice and guidance, to make their rights clear to those individuals and more work could be undertaken to see how best this could be achieved.

# Conclusion

We were asked to **consider what the UK labour market looks like and suggest ways in which government could deliver a framework that strikes the correct balance between the rights of the individual and the needs of business, supporting growth and prosperity in the 21st century.**

The framework to determine employment status in the UK is highly flexible and has responded well to changes in employment relationships over the past few decades. The current framework provides most individuals and employers with everything they need to determine status, abide by their responsibilities and claim their rights. What is more, the flexible framework as it stands should be able to adapt to what it is presented with in the years to come. However, one side effect of this flexibility is that, for those who make use of it (either out of choice or because those are the only jobs on offer), there can be a lack of clarity up front about what employment protections they have. This lack of clarity is likely to affect more people as the growth of atypical working continues.

In the most extreme cases, this lack of clarity and transparency can lead to a feeling of insecurity and vulnerability and can see some unscrupulous employers take advantage, even exploiting low skilled, low paid workforces. For some on a zero hours contract, seeking out an internship, being paid through an umbrella company or providing a personal service through their own company, it can be difficult to know what your rights and responsibilities are without resorting to an employment tribunal, a step most people do not want to take.

So what can be done? Some of the issues that have been identified can be addressed through better education, guidance or support and in many cases, this may go some way to providing the desired clarity up front. That could involve having a better understanding of what your rights are or even simply understanding the deductions on your payslip. A number of options are presented that seek to clarify the current framework for employers and individuals, although none of them are simple. However, a certain lack of clarity will remain for some in atypical work whilst the final arbiter of whether a particular employment relationship exists is the employment tribunal. Even the most radical of options presented, flipping the presumption to one of employment for all unless another relationship could be established, would not address all of these issues.

That is not to say that action is not worth it. Increasing awareness of employment status and associated protections, as well as clarifying some of the key terms may increase individual confidence and will go some way to empowering individuals to claim their rights. Some of the more unscrupulous employers will also have to start to take notice if a significant proportion of their workforce stand up for what is rightfully theirs as a result. Flipping the presumption could see a safety net created with individuals who do not conform to specific statuses being protected by default. Those businesses that are keen to mitigate some of the risks associated with hiring contractors or freelancers, or relying on volunteers, could benefit from a better definition of what this relationship looks like so as to have more certainty that they would not be penalised at a later date by an employment tribunal.

As this report demonstrates, employment status is an incredibly complex issue and any reforms will be challenging. What is more, it will be necessary to ensure that in trying to correct perceived issues in the current framework, we do not simply create new ones in a different framework. It is not yet clear that fundamental reform is the answer and remains possible that the issues identified within the current system could be addressed through less radical reforms in order to preserve the high levels of flexibility in the current system. In order to assess the viability, benefits and impacts of any change in this area, a substantial amount of further work is required.

# Annex A: EU Employment Directives

The **Working Time Directive** (2003/88/EC) applies to all workers in the UK and while it has been updated twice, in 2000 and 2003, the original text was agreed in 1993. The Directive was transposed through the Working Time Regulations 1998 and as such, has been a feature of the UK labour market for nearly two decades.

Provisions include an entitlement for four weeks' paid annual leave, one day's rest in seven (or two in a fortnight), 11 hours' rest between working days, a rest break if the working day exceeds six hours and certain restrictions for night workers. It also introduced the requirement for a maximum working week of 48 hours – but the individual can opt-out of this element.

The **Agency Workers Directive** (2008/104/EC) was agreed in 2008. It was transposed by the Agency Workers Regulations 2010. The Directive ensures temporary agency workers have access to a number of core rights from day one. These include access to vacancies and facilities. In addition, after a certain period of time, agency workers become eligible for equal treatment (with a comparable permanent employee in the firm) in respect of pay, the duration of working time, night work, rest periods, rest breaks and annual leave. Some European countries have legislated to ensure equal treatment from day one, with others making use of a derogation in the original Directive that allows a qualifying period before these rights take effect. In the UK, agency workers are entitled to equal treatment after 12 weeks in the same job, with the same employer.

Article 5(2) of the Directive also allows for agency workers to opt out of equal pay, and equal pay alone, where they sign a contract of employment with the agency guaranteeing payment between assignments. Colloquially known as the 'Swedish Derogation', this has been transposed in the UK and allows agency workers to opt out of equal pay, in return for pay between assignments and the accrual of a number of employment rights that are only available to 'employees'. Transposition of the Directive and use of the derogations was subject to a social partner agreement between the Trades Union Congress (TUC) and Confederation of British Industry (CBI) in 2008.

The Transfers of Undertakings, Businesses or Parts of Undertakings or Businesses Directive (2001/23/EC) is better known as the **Acquired Rights Directive** and has been transposed by the Transfer of Undertakings (Protection of Employment) Regulations 2006 (known as TUPE). The Directive itself replaced a 1977 Directive (transposed by a 1981 set of Regulations) but increased the scope of protection. The 2001 Directive ensures those employees who are transferring from one employer to another have their basic terms and conditions protected.

The **Posting of Workers Directive** (96/71/EC) seeks to deal with the complex issue of employment protections for individuals employed in one country, but sent by their employer to work temporarily in another Member State. The Directive entitles these workers to certain core employment rights in the country they are posted to such as

minimum pay, rest breaks, etc. Regulations were not required to transpose these conditions as posted workers were already entitled to these rights in the UK.

In 2014, the **Posting of Workers Enforcement Directive** (14/67/EC) was agreed. It addressed concerns that had been raised that the protections delivered through the 2006 Directive were not being adequately enforced. The Directive aims to improve cooperation between national authorities as well as placing a duty on Member States to verify compliance of the 1996 Directive. A transposition date of June 2016 has been set by the EU.

The **European Works Council Directive** (2009/38/EC) replaced the Works Council Directive of 1994 and applies to every company that has 1,000 employees or more who also employ at least 150 people in another Member State. While relatively few UK companies are affected, those that are must establish a works council to ensure that a robust information and consultation framework exists within its organisation. The original Transnational Information and Consultation of Employee Regulations 1999 still applies.

The **Information and Consultation of Workers Directive** (2002/14/EC) stipulates that where an employer has 50 or more employees, those employees have the right (on request) to be informed and consulted on a regular basis about issues in the organisation for which they work (e.g. on matters which may affect job security or terms and conditions). The Directive was transposed by the Information and Consultation of Employees Regulations 2004.

The **Collective Redundancies Directive** (98/59/EC) sets minimum standards to ensure that major redundancies are subject to proper consultation with worker representatives and that the competent public authority is notified prior to dismissal. This Directive was transposed via amendment to the Trade Union and Labour Relations Consolidation Act 1992.

The **Pregnant Workers Directive** (92/85/EC) was passed in 1992 and sets down the minimum standards expected in relation to female workers before and after pregnancy. This includes details on how the individual informs their employer, the limitations on the type of work that can be undertaken by a pregnant worker and the protections that must be put in place to ensure an individual cannot be discriminated against as a result of their pregnancy. A number of amendments were made to existing domestic legislation to transpose this into UK law.

The **Parental Leave Directive** (10/18/EU) aims to ensure that parents are provided with sufficient flexibility so that they can look after their child. This included adoptive parents and provision for time off for emergencies and the right to return to the same or similar role within a company. Much of this was already present in UK employment law with only a few additions to the domestic legal framework required. However, as discussed earlier, this is one area where the UK has gone further than the statutory minimum, for instance with the right to request flexible working and shared parental leave.

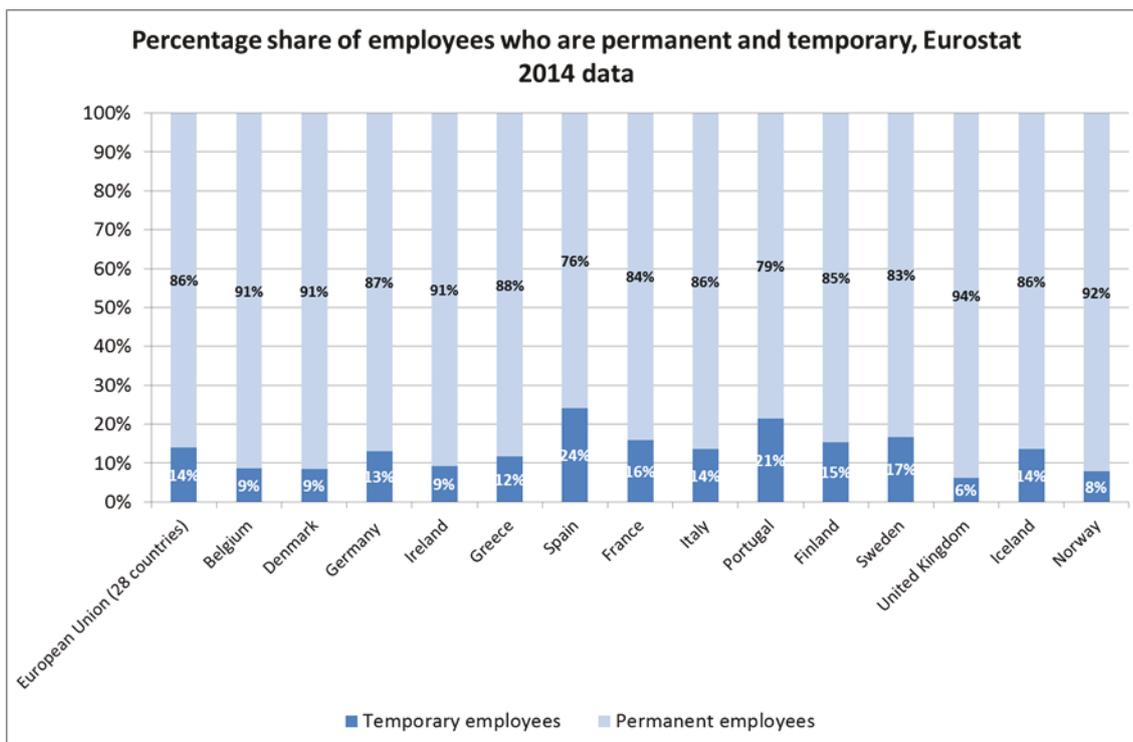
The **Part Time Work Directive** (97/81/EC) was transposed in the UK by the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000. This was followed in quick succession two years later with the Fixed-term Work Directive (99/70/EC) which was already covered by provisions in the Employment Rights Act 1996. In both cases, the

aim was to ensure that individuals did not get treated less favourably as a result of their chosen working pattern or arrangement.

The **Racial Equality Directive** (00/43/EC) concerned the principle of equal treatment irrespective of racial or ethnic origin. While this was implemented in the UK in 2003, the Equality Act 2010 goes even further, providing protection from discrimination on the basis of any protected characteristics. As a result, it is against the law in the UK to discriminate against anyone because of age, sexual orientation, marital status, race, disability, sex or religion.

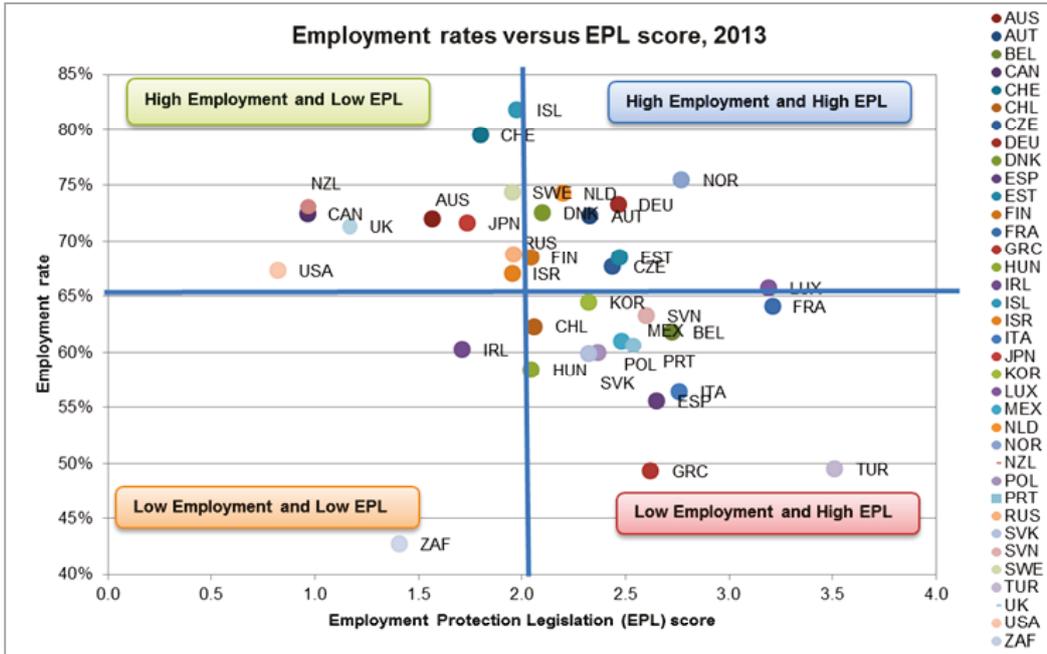
## Annex B: International comparisons

The UK government's overall aim is to promote a labour market which balances the need to maximise opportunities for entry into the labour market, protect employees and workers from exploitation, as well as minimising burdens on businesses by allowing them scope to operate, within the law, in a way which best suits their business needs. As a result, the UK is internationally recognised as a 'successful employment performer', has achieved a steady rise in employment and the UK's share of employment that is permanent employees is greater than the EU average, even though all member states are obliged to comply with the same Directives.



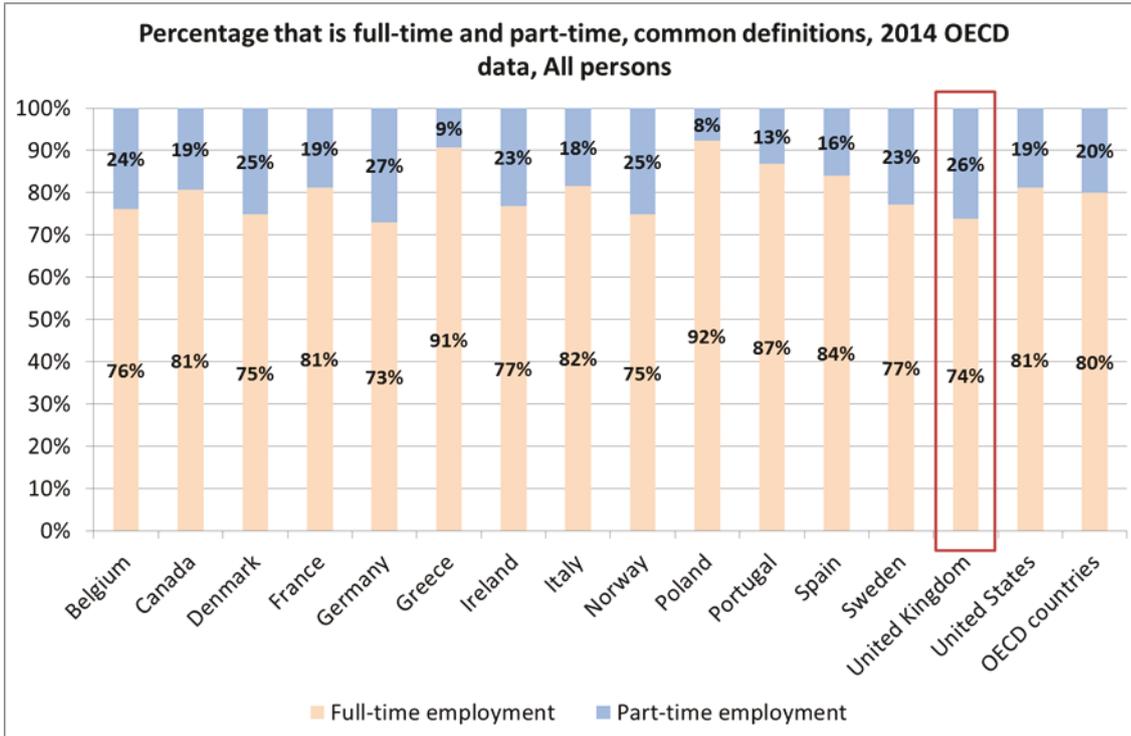
The UK labour market, like other markets, requires a framework of rules but the UK framework is less onerous than most. According to the Organisation for Economic Cooperation and Development (OECD), the UK has one of the most lightly regulated labour markets amongst developed countries, with only the US and Canada having lighter overall regulation.

Many European labour markets are more heavily regulated and have complex labour law but in the UK, labour law is more relaxed so easier to manage your workforce. However, this does not mean that those working in the UK do not have any rights, on the contrary, they have far more than the statutory minimum outlined by European and International law.

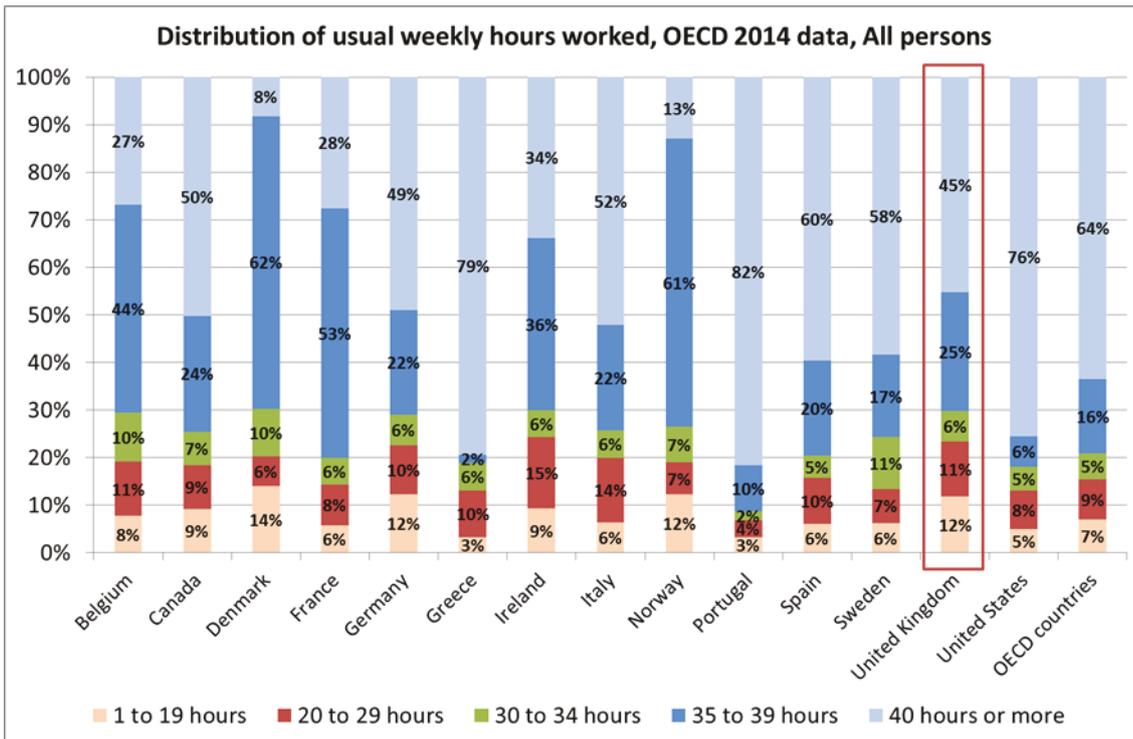


The flexibility of the UK labour market is underpinned by the wide array of atypical work patterns (including temporary work and zero hour contracts) that individuals are able to agree to. The UK model focuses on the relationship between an individual and their employer where they are able to develop arrangements that suit the circumstances of both parties. As a result, there is a much wider range of patterns of work in the UK than other Member States. Based on 2013 figures, 26.9% of the UK workforce was employed part-time compared to the EU average of 20.3%. Part time work is also less likely to be temporary than in other Member States, as is demonstrated by the fact that that in the three months ending in August 2015, 94% of all UK employees were in permanent work, one of the highest rates in the EU, and part-time workers have the same level of protection as full time workers. As a result, in the UK, part-time work is not inherently more precarious than full-time work in the same way that it is in some other countries.<sup>37</sup>

<sup>37</sup> Source from Review of the Balance of Competences between the UK and the European Union: Social and Employment Policy



The ‘light and even’ employment regulation system that we have means that if you look for a job that suits your circumstances, there is a good chance that you will find one. Consequently, one of the structural features of the UK labour market is that our employment rates are amongst the highest in the world because entry rates for ‘other groups’ – old, young, women, part-time, etc. – are very high. In short, those who cannot, or do not want to commit to full-time, permanent employment are not excluded from the labour market. For those who can only commit to a small number of erratic hours, employment is still an option. This is highlighted by the diverse set of average weekly hours compared with some of our international partners.



The Employment Law Review sought to go further, improving functionality of the UK labour market, allowing even more people to enter work by reducing the regulatory burden on employers. This, along with flexible working and the new shared parental leave entitlements for both parents means that individuals are able to remain in the workforce and work more flexibly, finding a work pattern that suits them.

## Annex C: Glossary

ACAS	The Advisory, Conciliation and Arbitration Service
AWR	Agency Workers Regulations 2010
CBI	Confederation of British Industry
CIPD	Chartered Institute of Personnel and Development
ERA	Employment Rights Act 1996
EU	European Union
LFS	Labour Force Survey
NIC	National Insurance Contributions
NMW	National Minimum Wage
ONS	Office for National Statistics
PAYE	Pay As You Earn
REC	Recruitment & Employment Confederation
TUC	Trades Union Congress
TUPE	Transfer of Undertaking (Protection of Employment)
TULR(C)A	Trade Union and Labour Relations (Consolidation) Act 1992



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