

Flexible staffing options: an interactive guide



Zero hours / casual contracts

Minimum-hours / short-hour contracts

Annualised hours contracts

Agency workers

Self-employed contractors

Self-employed contractors
engaged via a Personal Service
Company ("PSC")

Fixed-term contracts

Part-time contracts

Secondees

Flexible staffing options

There are other ways to staff a business apart from using permanent employees on full time contracts. In an unpredictable economy, many employers are turning to a range of alternative staffing models.

Our interactive guide explains the alternative staffing models to consider along with the regulatory issues to be aware of. For each type of engagement we consider:

- ▶ Advantages
- ▶ Drawbacks
- ▶ Key regulatory restrictions and possible legal developments
- ▶ When you might use the resourcing option and best practice

Click a staffing option on the left to see the considerations for each type of engagement.



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Zero hours / casual contracts

Minimum-hours / short-hour contracts

Annualised hours contracts

Agency workers

Self-employed contractors

Self-employed contractors
engaged via a Personal Service
Company ("PSC")

Fixed-term contracts

Part-time contracts

Secondees

Staffing option



Can have various meanings but these terms are generally used in relation to a contract where one party engages another to perform work, but there is no minimum level of work. Pay will normally be at an hourly rate.

Those engaged under zero hours or casual contracts can be engaged as employees or workers.

[Scroll down](#)



Zero hours / casual contracts

Minimum-hours / short-hour contracts

Annualised hours contracts

Agency workers

Self-employed contractors

Self-employed contractors engaged via a Personal Service Company ("PSC")

Fixed-term contracts

Part-time contracts

Secondees

Advantages



- ▶ Can help to manage fluctuating demand, particularly when work is seasonal or unpredictable and there isn't a consistent demand for a certain level of staffing. Normally used in conjunction with "core" staff working regular contractual hours.
- ▶ Flexibility for the individual (although in some contracts the individual is obliged to accept work offered).

Key regulatory restrictions and potential developments in the law



- ▶ A provision in a zero hours contract prohibiting a worker from working elsewhere under another contract (or doing so without the business's consent) i.e. an exclusivity clause, is unenforceable.
- ▶ Zero hours employees with contracts containing exclusivity clauses can bring claims if they are subject to a detriment or are dismissed by their employer for failing to comply with such a clause.
- ▶ Following the Good Work Plan, the government indicated that it would introduce a right for all workers to request a more predictable and stable contract after 26 weeks' service. This is will be introduced in the Employment Bill (expected soon). The government has also consulted on giving workers the rights to reasonable notice of shifts and compensation for shift cancellation.

Drawbacks



- ▶ Depending on the contractual arrangement in place, the individual might not be obliged to accept work when offered, which could lead to gaps in staffing.
- ▶ Without set hours, calculating holiday pay can be complicated. Rolling up holiday pay into the individual's hourly rate is unlawful.
- ▶ Risk of greater regulatory intervention because of perceived misuse.
- ▶ Status needs to be clearly set out, but even where status is characterised as "worker" there is a risk that the individual asserts employment rights (particularly where work is regular).

When you might use this option and best practice



- ▶ Where work fluctuates from week to week or month to month.
- ▶ To cover a series of longer "assignments" where there are periods of inactivity between assignments.
- ▶ To manage seasonal or unpredictable fluctuations in demand, e.g. in retail, catering, leisure, logistics (e.g. delivery) and hospitality sectors.
- ▶ Some organisations might utilise a large "bank" of casual workers.
- ▶ There has been a lot of media scrutiny over such arrangements with some press coverage suggesting that zero hours contracts are being used by unscrupulous employers to deprive employees and workers of their rights. The Living Wage Foundation has developed a Living Hours initiative which includes a call for all employers to provide the right to a guaranteed minimum of 16 hours per week (unless the individual requests otherwise).

Zero hours / casual contracts

Minimum-hours / short-hour contracts

Annualised hours contracts

Agency workers

Self-employed contractors

Self-employed contractors
engaged via a Personal Service
Company ("PSC")

Fixed-term contracts

Part-time contracts

Secondees

Staffing option



Those engaged on minimum hours or short-hour contracts are guaranteed a small number of hours of work each week. They may be offered additional hours but are not obliged to accept these.

Those engaged under minimum hours / short-hour contracts may be workers or employees.

[Scroll down](#)



Zero hours / casual contracts

Minimum-hours / short-hour contracts

Annualised hours contracts

Agency workers

Self-employed contractors

 Self-employed contractors
 engaged via a Personal Service
 Company ("PSC")

Fixed-term contracts

Part-time contracts

Secondees

Advantages


- ▶ Can help to manage fluctuating demand, particularly when work is seasonal or unpredictable and there isn't a consistent demand for a certain level of staffing.
- ▶ Flexibility combined with some certainty for the individual.
- ▶ Avoids possible negative publicity associated with zero hours contracts.
- ▶ Currently there is no restriction on putting in place exclusivity clauses.

Key regulatory restrictions and potential developments in the law


- ▶ The government has just launched a consultation on a specific proposal to extend the ban on exclusivity clauses beyond zero hours contracts, to contracts where the workers' guaranteed weekly income is less than the Lower Earnings Limit (currently £120 a week). The intention is to allow low-income workers who are not able to secure the number of hours they would like from their current employer to seek additional work elsewhere. The consultation is open until 26 February 2021.

Drawbacks


- ▶ If the individual is not obliged to accept additional hours when offered, there could be gaps in staffing.
- ▶ If there aren't set hours, calculating holiday pay can be complicated. Rolling up holiday pay into the individual's hourly rate is currently unlawful.
- ▶ Can be engaged as employees or workers. Status needs to be clearly set out, but even where status is characterised as "worker" there is a risk that the individual asserts employment rights (particularly where work is regular).

When you might use this option and best practice


- ▶ Where work fluctuates from week to week or month to month.
- ▶ To manage seasonal or unpredictable fluctuations in demand, e.g. in retail, catering, leisure, logistics (e.g. delivery) and hospitality sectors. This has to date avoided the possible negative publicity associated with zero hours contracts. However, note the Living Wage Foundation initiative that asks employers to guarantee a minimum of 16 hours per week, plus the government consultation on extending the exclusivity ban.

Zero hours / casual contracts

Minimum-hours / short-hour contracts

Annualised hours contracts

Agency workers

Self-employed contractors

Self-employed contractors
engaged via a Personal Service
Company ("PSC")

Fixed-term contracts

Part-time contracts

Secondees

Staffing option



Those engaged on annualised hours contracts have their working hours expressed as a total to be worked over the course of a year. Hours worked on a weekly or monthly basis will differ.

Scroll down



Zero hours / casual contracts

Minimum-hours / short-hour contracts

Annualised hours contracts

Agency workers

Self-employed contractors

 Self-employed contractors
 engaged via a Personal Service
 Company ("PSC")

Fixed-term contracts

Part-time contracts

Secondees

Advantages


- ▶ Can be used to manage workloads which fluctuate over the course of a year.
- ▶ Depending on context, can provide flexibility for the individual.
- ▶ Useful for handling (for example) term-time working patterns (or similar).
- ▶ Can enable predictable peaks and troughs to be dealt with within an existing permanent workforce.
- ▶ May be possible to pay consistent monthly salary despite fluctuations in hours worked each month, giving certainty to both parties.
- ▶ Calculating holiday pay may be less complicated due to the fixed annual hours.

Key regulatory restrictions and potential developments in the law


- ▶ Employees will be eligible for all usual employment rights.
- ▶ Beware of complex national minimum wage requirements when putting together an annualised hours contract for those whose hourly rate is around minimum wage level.

Drawbacks


- ▶ Employees may be resistant to working longer hours during peak times, where pay remains the same.
- ▶ Likely to be employees rather than workers.
- ▶ If the individual is paid by reference to an hourly rate, where employment terminates during a quiet period salary may have been overpaid.

When you might use this option and best practice


- ▶ Where there are predictable fluctuations in demand over a year and concentrating hours can avoid overtime or additional temporary labour costs during peak times.
- ▶ Where there are annual shift patterns in place which vary week to week or month to month, but which are fixed by reference to a year.
- ▶ May be used for term-time working patterns (or similar).

Zero hours / casual contracts

Minimum-hours / short-hour contracts

Annualised hours contracts

Agency workers

Self-employed contractors

Self-employed contractors
engaged via a Personal Service
Company ("PSC")

Fixed-term contracts

Part-time contracts

Secondees

Staffing option

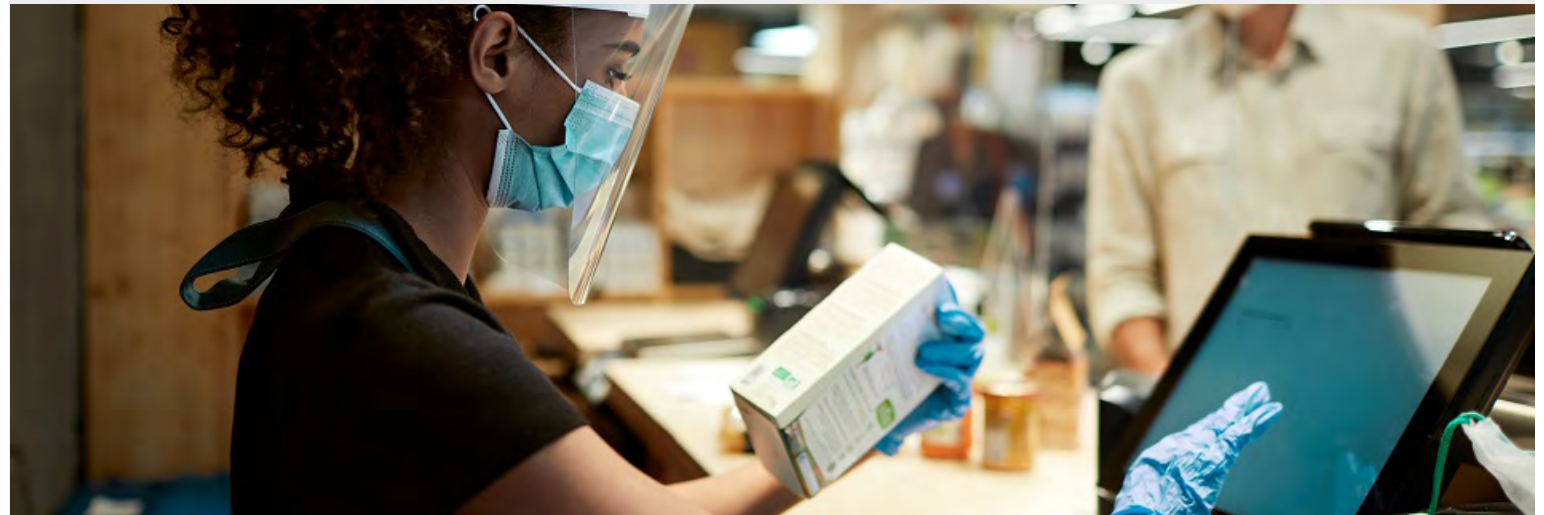


Agency workers are workers who are supplied by a temporary work agency (known as an "employment business") to work temporarily for and under the supervision of a hirer.

The classic relationship is where the agency worker has a contract with and is paid by the agency. However, there can be more complicated arrangements, with umbrella companies or other intermediaries in the chain.

Take a look at our [Staffing Solutions Inbrief](#) for more information.

[Scroll down](#)



Zero hours / casual contracts

Minimum-hours / short-hour contracts

Annualised hours contracts

Agency workers

Self-employed contractors

 Self-employed contractors
 engaged via a Personal Service
 Company ("PSC")

Fixed-term contracts

Part-time contracts

Secondees

Advantages


- ▶ Provides temporary cover for absent employees.
- ▶ Can avoid internal headcount restraints.
- ▶ Enables flexibility when there are peaks and troughs in workload.
- ▶ Ease of being able to engage or terminate labour.
- ▶ Don't need to deal with administrative issues such as operating PAYE, auto-enrolment etc.
- ▶ The employment business is generally responsible for employment and tax-related responsibilities and legal risks (including compliance with the 12 week rights under the Agency Workers Regulations).
- ▶ The employment business is responsible for "management issues" e.g. performance, disciplinary and grievance).
- ▶ Can be a way to "try before you buy" – i.e. a route to recruitment of the worker as a permanent employee.
- ▶ Often amounts to low-cost cover of work (subject to regulatory obligations).

Drawbacks


- ▶ Need for regulatory compliance (see next column) which could be administratively burdensome.
- ▶ Some risk of liability in instances of regulatory non-compliance (although the primary responsibility for compliance lies with the employment business).
- ▶ The fee paid to the employment business includes additional costs to cover their overheads and margin. This can be more than the cost of directly engaging the worker.
- ▶ Transfer fees (e.g. "temp-to-perm" fees) may apply if the agency worker is subsequently recruited directly.
- ▶ Agency workers likely to be less engaged in and committed to the aims of the business, as the assignment is temporary only.
- ▶ Hirer has less direct control over the agency workers in respect of general management issues (e.g. performance, disciplinary and grievance).
- ▶ Increased difficulty in imposing or enforcing such obligations as confidentiality or post-termination restrictions, as the contractual relationship is between the hirer and the employment business only.

Scroll down

Zero hours / casual contracts

Minimum-hours / short-hour contracts

Annualised hours contracts

Agency workers

Self-employed contractors

 Self-employed contractors
 engaged via a Personal Service
 Company ("PSC")

Fixed-term contracts

Part-time contracts

Secondees

**Key regulatory restrictions and
 potential developments in the law**


- ▶ The Agency Workers Regulations 2010 ("AWR") apply. This gives agency workers two key rights: (1) Day 1 rights; and (2) 12 week rights.
- ▶ Day 1 rights are the responsibility of the hirer. These cover agency workers being told of relevant vacancies within the hirer and being treated no less favourably than a comparable worker in relation to "collective facilities and amenities". The hirer is solely responsible for any breaches that relate to this.
- ▶ After completing a 12 week qualifying period, agency workers are entitled to the same basic working and employment conditions as if they had been recruited directly by the hirer to do the same job. This is primarily the employment business's responsibility, and covers terms and conditions relating to pay, duration of working time, night work, rest period and rest breaks and annual leave. Hirers need to provide certain information to employment businesses in this regard.
- ▶ The AWR contain anti-avoidance provisions which give an agency worker the right to be treated as if they had met the 12 week qualifying period if a structure of assignments develops in an attempt to avoid this. Either or both of the agency or the hirer could also be fined up to £5,000.
- ▶ The agency is responsible for setting the agency worker's terms and conditions, and it is therefore liable for any breach in relation to the 12 week rights, to the extent that it was responsible for the infringement. However, the hirer will be responsible to the extent it was at fault e.g. if it gave the agency incorrect information about basic working and employment conditions.
- ▶ Employment businesses are also subject to the Conduct of Employment Agencies and Employment Businesses Regulations 2003.
- ▶ There is a new obligation on employment businesses (but not on the hirer) to provide a Key Information Document to agency workers prior to them agreeing terms. This should set out a number of pay related facts and details about their engagement.
- ▶ Self-employed individuals generally only have contractual rights but may be protected from discrimination and retaliation for whistleblowing in some circumstances.
- ▶ As part of the Good Work Plan, the government has committed to reviewing the tests for employment status and aligning them with the relevant tax tests. Future reform is likely.

**When you might use this
 option and best practice**


- ▶ Short term cover.
- ▶ Cover of specific absences such as sick leave or family-related leave.
- ▶ Dealing with temporary or seasonal increases in demand.
- ▶ Frequently used where internal headcount restrictions mean recruitment of an employee is restricted.
- ▶ Convenient for use where the company does not want to take on the legal and administrative responsibilities associated with directly employing someone.
- ▶ Should not normally be used on a long-term basis to staff core or senior level roles within an organisation.
- ▶ Likely to become more widespread in the light of the IR35 reforms. Many organisations are insisting that all contingent workers (who were previously self-employed contractors or freelancers operating through their own PSC) become directly employed by an agency.
- ▶ Possible that the government will look to reform or repeal aspects of the AWR although the scope for significant reform is restricted by the terms of the UK-EU trade deal.

Zero hours / casual contracts

Minimum-hours / short-hour contracts

Annualised hours contracts

Agency workers

Self-employed contractors

Self-employed contractors
engaged via a Personal Service
Company ("PSC")

Fixed-term contracts

Part-time contracts

Secondees

Staffing option



An individual will be self-employed if they are not an employee or a worker. Someone who is self-employed is either: (1) not obliged to provide personal service and/or there is no mutuality of obligation; or (2) obliged to provide personal service and there is mutuality of obligation but the individual is carrying on a business and the other party is his or her client.

[Scroll down](#)



Zero hours / casual contracts

Minimum-hours / short-hour contracts

Annualised hours contracts

Agency workers

Self-employed contractors

Self-employed contractors engaged via a Personal Service Company ("PSC")

Fixed-term contracts

Part-time contracts

Secondees

Advantages



- ▶ Allows for flexibility and to cover specific projects or work. No continuing obligation on the company to provide work or pay the individual.
- ▶ Self-employed contractors may have specialist skills that are needed on a temporary basis.
- ▶ Easier to terminate an engagement than an employment relationship.
- ▶ Only pay for completed projects or time worked and (subject to the individual being genuinely self-employed) do not need to provide additional benefits or pay employer NICs etc.

Key regulatory restrictions and potential developments in the law



- ▶ Self-employed individuals generally only have contractual rights but may be protected from discrimination and retaliation for whistleblowing in some circumstances.
- ▶ As part of the Good Work Plan, the government has committed to reviewing the tests for employment status and aligning them with the relevant tax tests. Future reform is likely.

Drawbacks



- ▶ No guarantee that a self-employed contractor will be available and/or willing to do the work when required.
- ▶ Less control over how the work is delivered.
- ▶ Can be costly, particularly if the contractor is a specialist in a niche area.
- ▶ Questionable enforceability of post-termination restrictions.
- ▶ Employment status risks if the actual relationship does not align with the contractual relationship.
- ▶ Owe no implied duties (unlike an employee) and so intellectual property likely retained and no implied duties of confidentiality. Obligations can be imposed contractually – but these should be carefully drafted to avoid unnecessary employment status risks.
- ▶ Risk that they are considered employees for tax purposes and PAYE obligations will rest with the company.

When you might use this option and best practice



- ▶ For specific projects that are time limited and which possibly require certain specific skills that are not otherwise available in the company's workforce.
- ▶ The reality of the relationship should be consistent with what is set out in the contract - how the parties have labelled the arrangement will be relevant, but it is not decisive.
- ▶ Reassess as the relationship develops and if there are any changes, determine whether the individual's employment status has changed.
- ▶ An increase in PAYE audits and enforcement is likely and HMRC consider very few arrangements to be genuine self employment.

Zero hours / casual contracts

Minimum-hours / short-hour contracts

Annualised hours contracts

Agency workers

Self-employed contractors

**Self-employed contractors
engaged via a Personal Service
Company ("PSC")**

Fixed-term contracts

Part-time contracts

Secondees

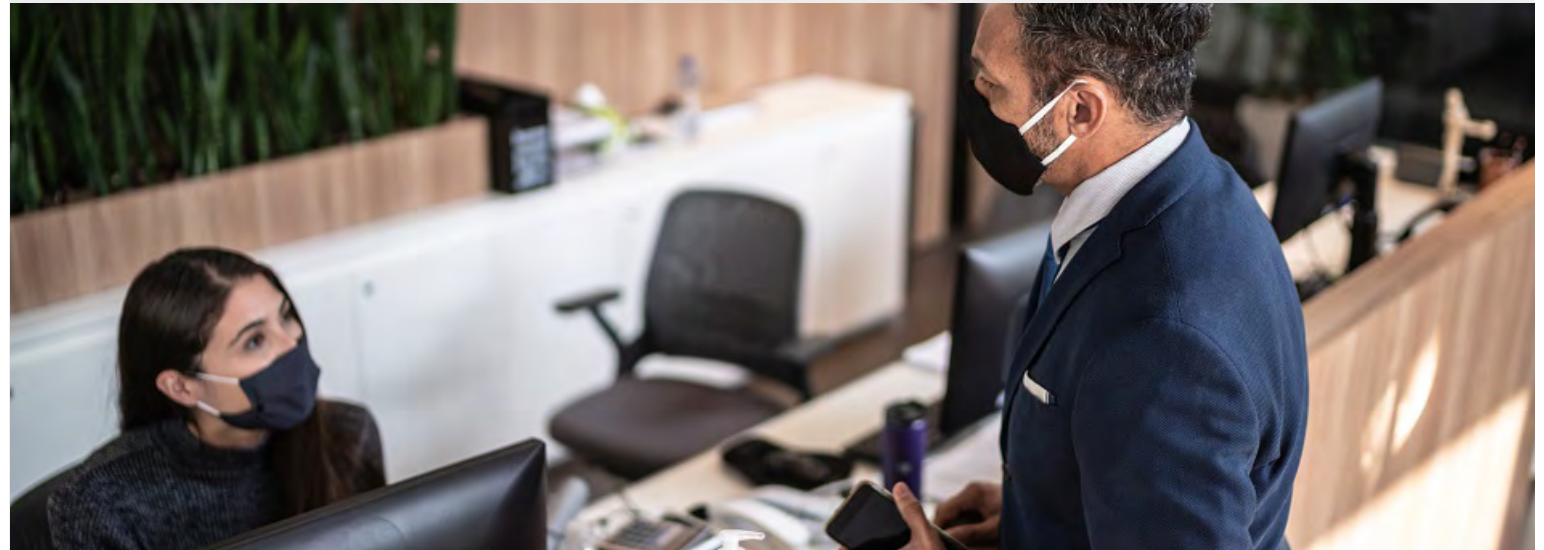
Staffing option



An individual contractor providing their personal services (i.e. their labour) to an end-user via their own intermediary, such as a PSC or partnership.

There may also be other intermediaries in the "chain" between the PSC and the end-user, such as an employment business or umbrella company.

[Scroll down](#)



Zero hours / casual contracts

Minimum-hours / short-hour contracts

Annualised hours contracts

Agency workers

Self-employed contractors

**Self-employed contractors
engaged via a Personal Service
Company ("PSC")**

Fixed-term contracts

Part-time contracts

Secondees

Advantages



- ▶ As for self-employed contractors.
- ▶ As the individual is most likely employed by the PSC, there is little chance of them being found to be employed by the end-user company for employment status purposes.

Drawbacks



- ▶ As for self-employed contractors.
- ▶ From April 2021, there is an additional administrative burden to assess whether IR35 applies (see Key regulatory restrictions below).

Key regulatory restrictions and potential developments in the law



- ▶ From April 2021 the IR35 rules are changing. Large and medium-sized private-sector businesses who engage PSC contractors will have responsibility for determining whether IR35 applies i.e. whether the contractor would be an employee for tax purposes if they were hired directly. If IR35 applies, the business paying the contractor's fee will need to operate PAYE and NICs on the fees the PSC receives. The process will involve making a status determination and providing the contractor with a Status Determination Statement.
- ▶ If the end-user is contracting directly with the PSC, the end-user will be responsible for operating PAYE and NICs. If there is another intermediary in the "chain" between the end-user and the PSC, the intermediary which is paying the contractor's fee will be responsible for operating PAYE and NICs. The end-user remains responsible for issuing the Status Determination.

When you might use this option and best practice



- ▶ For specific projects that are time limited and which possibly require certain specific skills that are not otherwise available in the company's workforce.
- ▶ Remember that the change in rules relates to the tax status of a PSC contractor, not their employment status.

Zero hours / casual contracts

Minimum-hours / short-hour contracts

Annualised hours contracts

Agency workers

Self-employed contractors

Self-employed contractors
engaged via a Personal Service
Company ("PSC")

Fixed-term contracts

Part-time contracts

Secondees

Staffing option



Fixed-term workers or employees are engaged under a contract that is set to last for a specific period of time, or to terminate on the occurrence of a specific event.

Scroll down



Zero hours / casual contracts

Minimum-hours / short-hour contracts

Annualised hours contracts

Agency workers

Self-employed contractors

 Self-employed contractors
 engaged via a Personal Service
 Company ("PSC")

Fixed-term contracts

Part-time contracts

Secondees

Advantages


- ▶ A way to resource specific projects or provide absence cover, for example, if someone is on maternity leave.

Key regulatory restrictions and potential developments in the law


- ▶ Employees eligible for all usual employment rights.
- ▶ The Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 apply, which means that a fixed-term employee (but not worker) has the right not to be treated less favourably than a comparable permanent employee (unless it can be objectively justified).
- ▶ Employees who have been continuously employed for four years or more on a series of successive fixed-term contracts are automatically deemed to be permanent employees, unless the continued use of a fixed-term contract can be objectively justified.
- ▶ Not renewing a fixed-term contract will amount to a dismissal and an employee with sufficient service will be able to bring an unfair dismissal claim. The fact that the contract provided for expiry on a certain date will not be a sufficient reason for dismissal.

Drawbacks


- Not as flexible as other forms of temporary arrangement.
- Need to be aware of specific protections that apply to fixed-term employees (see Key regulatory restrictions below).

When you might use this option and best practice


- ▶ Where there is a specific absence to cover (e.g. family-related or sick leave) or a specific project to complete.
- ▶ Dealing with temporary or seasonal increases in demand
- ▶ Particularly useful where the company will benefit from the control that comes with employing someone directly.

Zero hours / casual contracts

Minimum-hours / short-hour contracts

Annualised hours contracts

Agency workers

Self-employed contractors

Self-employed contractors
engaged via a Personal Service
Company ("PSC")

Fixed-term contracts

Part-time contracts

Secondees

Staffing option



Part-time workers or employees have shorter or fewer contractual hours than full time workers or employees.

Scroll down



Zero hours / casual contracts

Minimum-hours / short-hour contracts

Annualised hours contracts

Agency workers

Self-employed contractors

Self-employed contractors
engaged via a Personal Service
Company ("PSC")

Fixed-term contracts

Part-time contracts

Secondees

Advantages



- ▶ A way to fulfil a resourcing need which is less than a full time equivalent position.
- ▶ Commonly requested by existing full time employees as a type of flexible working arrangement.

Drawbacks



- ▶ Specific protections apply to part-time employees and workers (see Key regulatory restrictions below)

Key regulatory restrictions and potential developments in the law



- ▶ Employees eligible for all usual employment rights.
- ▶ The Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 apply, which means that a part-time employee or worker has the right not to be treated less favourably than a comparable full time employee or worker unless it can be objectively justified. Benefits can be provided on a pro-rata basis reflecting the period of work and less favourable treatment can be justified if the overall package is no less favourable than that of the comparable full time employee.

When you might use this option and best practice



- ▶ Where there is a need for resource on a less than full time basis.

Zero hours / casual contracts

Minimum-hours / short-hour contracts

Annualised hours contracts

Agency workers

Self-employed contractors

Self-employed contractors
engaged via a Personal Service
Company ("PSC")

Fixed-term contracts

Part-time contracts

Secondees

Staffing option



An employee is seconded when they are employed by one party, (the "employer") but are sent to work for another party for a limited period of time (the "host"). They remain employed by the same company and will return to their employer after the secondment has ended.

Scroll down



Zero hours / casual contracts

Minimum-hours / short-hour contracts

Annualised hours contracts

Agency workers

Self-employed contractors

 Self-employed contractors
 engaged via a Personal Service
 Company ("PSC")

Fixed-term contracts

Part-time contracts

Secondees
Advantages


- ▶ Business development opportunities for the employer and host company.
- ▶ If being seconded to a company within the group – a way to utilise skills and experience in another part of the organisation or to provide short term cover.
- ▶ Offers career development opportunities to the individual who may be able to develop new skills.
- ▶ Preservation of specific benefits, for example membership of a pension or share option scheme, by the employee remaining employed by their original employer.

**Key regulatory restrictions and
 potential developments in the law**


- ▶ International secondments are more complicated: tax, social security, employment, health and safety, data protection and immigration issues will need to be considered.
- ▶ Some jurisdictions prohibit secondments in certain circumstances as an unlawful leasing of labour.

Drawbacks


- ▶ Legal risks to be aware of, for example whether the arrangement might be subject to the Transfer of Undertakings (Protection of Employment) Regulations. This will be the case if work done by the seconded individual could on its own amount to an undertaking.
- ▶ Possible risk that the host company will be found to be the seconded employee's employer.
- ▶ Issues can frequently arise on termination of the secondment – for example, where the secondee's original role is no longer available.

**When you might use this
 option and best practice**


- ▶ A way to utilise skills and experience from one group company to another.
- ▶ May be useful from a business development perspective.
- ▶ The arrangement should be documented in writing, likely by way of a letter of secondment between the employer and secondee and an agreement between the employer and host. It should be clear in the documentation what terms will apply during the secondment, how payment will be dealt with, what happens when the secondment comes to an end etc.
- ▶ Seek specialist advice if considering an international secondment.

