

# Bulletin:

# Atypical Workers and Different Types of Employment Contracts

**Audience:** Schools, Academies and Free Schools

**Action required:** Ensure that you have fully understood the charges that agencies apply and the terms under which you engage the agency staff

**EPM support:** Please contact your named HR Advisory contact for further support

There has been a rapid rise increase in the flexibility and diversity of working practices in schools. This has made it harder to decide whether an individual, undertaking paid work, does so under an employment contract and, if so, for whom.

## What is an atypical worker?

Atypical work is any pattern of work which does not fit the classic or traditional concept of an employee working for a single employer under a contract of employment.

## Why is the difference important?

Different workers have different rights and protection by law. Atypical workers may be:

- contracted employees, rather than workers, and so entitled to the rights and protections available to employees; or

- entitled to certain protections available to workers/employees (for example the right not to be treated less favourably/suffer a detriment under the Equality Act 2010 and protection afforded by the Part-time workers (prevention of Less Favourable Treatment) Regulations 2000 and the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002.

## Types of atypical workers in schools

### Agency workers

This is a term used to describe an individual engaged by an employment agency to perform work for the school (often referred to as an end-user or hirer) normally to provide cover during periods of illness, holidays or maternity leave. For further information please see [EPM Advice Note Agency Workers May 2011](#).

### Apprenticeships

An apprenticeship involves on-the-job training for the apprentice over a fixed term, during which the apprentice also undertakes work for their employer. Since 2011 there are two methods of engaging an apprentice:

- Under a “traditional” contract of apprenticeship, entered into and governed by common law. The focus of a contract of apprenticeship is the training which the apprentice receives, rather than the work performed for the employer. It is more difficult to dismiss an apprentice working under a contract of apprenticeship than an ordinary employee.
- Under an “apprenticeship agreement”, entered into and governed by the Apprenticeships, Skills, Children and Learning Act 2009 (ASCLA 2009). Such agreements have the status of contracts of service. Apprentices working under such agreements can therefore be dismissed in the same way as ordinary employees.

For further information on Apprenticeships see [EPM Advice Note Apprenticeships September 2012](#).

### Casual workers

The term ‘casual worker’ has no special legal meaning. Casual workers have irregular or informal working arrangements under which there is no obligation to provide or accept work. Such work often takes the form of one-off tasks or events. Supply teachers fall into this category when they are engaged on an ad hoc basis to cover for an absent teacher.

- Although a casual worker is not regarded as an employee and therefore will not have a contract of employment, it is good practice to confirm to them the terms of their engagement. A template is available [on www.epm.co.uk](http://www.epm.co.uk) in [Documents/ Appointing Employees and Contracts of Employment](#). This should be downloaded and issued by the school at the start of each casual worker’s period of engagement.
- Please note that casual workers are entitled to holiday pay. The ACAS guide [Holidays and Holiday Pay](#) explains how holiday pay for casual staff can be calculated and paid.

### When does a casual worker become an employee?

There is no simple answer to this question. The employment status of casual workers depends on the nature of the relationship between the worker and the employer. If an employer engages a person on an ad hoc basis to help out during staff shortages, at busy times of the year or when an emergency arises and recognises that they can turn down the request to work, then the person is unlikely to be an employee. But, if the employer regularises the arrangement with such a worker and undertakes to provide work on specified days and times, which are agreed by the worker, then it is likely that the casual worker is an employee. Supply teachers who are working on a regular basis on an agreed pattern are employees, not casual workers. ‘Casual’ workers who are regularly paid on a ‘claims’ basis through the school payroll are also likely to have the legal status of employee.

An Employment Tribunal will determine the true nature of the contractual relationship, based on the facts of each case. If the relationship is deemed to be that of employee, then the individual will be entitled to a greater number of legal rights.

### Zero hours contracts

The term ‘zero hours contract’ has no precise legal meaning. There is scope for different interpretations. A common understanding is the worker being available on an on-call basis: e.g. the employer contacts the worker when work becomes available but there is **no obligation** on the worker to accept the work.

The Exclusivity Terms in Zero Hours Contracts (Redress) Regulations 2015 introduced protection for workers on zero hours contracts. A worker on a zero hours contract is protected from detriment and dismissal (irrespective of age or length of service) for breaching an exclusivity clause in his or her contract of employment by doing work or performing services under another contract or other arrangement. This removed the previous obligation of the employee being required to accept work offered to them by the employer.

An employee will be able to bring a complaint of unfair dismissal if he or she is dismissed for failing to comply with an exclusivity clause in a zero hours contract. The dismissal will be automatically unfair and there is no requirement for the employee to have the normal qualifying service to bring a claim.

In the case of a support staff worker employed on the type of contract described above; if it is to last for more than 3 months, the pension regulations for support staff require the worker to be put into the pension scheme. This is different to true casual workers, see above.

In our experience, it is unusual to find roles in schools where it is appropriate to use a Zero Hour contract. Please consult your HR Adviser if you believe that you have work which can only be delivered in this way.

### **The Fixed-term Employees Regulations**

The Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (The Fixed Term Regulations) are designed to prevent less favourable treatment of fixed-term employees compared with permanent employees. The Fixed-term Regulations only apply to employees, and not to workers.

### **Flexible working**

The right to request flexible working applies to employees with at least 26 continuous weeks' employment at the date of request. An employee can only make a statutory request once in any 12 month period. There is a duty on employers to act reasonably when dealing with a flexible working request and respond within certain timescales. The law requires that all requests, including any appeals, must be considered and decided on within a period of three months from the first receipt unless this period is extended with the employee's agreement. Employers should also ensure that they act in accordance with their Flexible Working Policy if there is one in place.

EPM has a model Flexible Working Policy which is tailored to circumstances in schools and provides a robust framework within which applications for flexible working can be considered. This document is available on [www.epm.co.uk](http://www.epm.co.uk) in [Documents/Family Friendly Matters](#).

### **Part-time workers**

The Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (PTW Regulations) are designed to ensure that part-time workers are not treated less favourably than comparable full-time workers. The PTW Regulations apply to all workers, not just employees. There is no qualifying period or upper age limit for bringing a claim. In a redundancy situation, the selection of part-time staff, because they are part-time, is likely to be unlawful on two counts: it could well infringe these Regulations to treat part-time workers less favourably than their full-time equivalents; and, since the majority of part-time workers in schools are women, it is likely to be a form of unlawful sex discrimination. Different treatment of full-time and part-time workers will only be lawful if it can be justified on objective grounds.

The employment of part-time teachers and how their pay and working time must be calculated in maintained schools is set out in the School Teachers Pay and Conditions Document. It is also important to note that, in line with the School Teachers Pay and Conditions Document, a part-time teacher cannot be required to work on a day that they are not normally required to be available for work (i.e. a non-working day). Academies and other schools that comply with the STPC document must also comply with this.

### **Secondees**

If an employee is seconded to another organisation (the host) then the employee remains under their substantive contract of employment. The purpose or reason for the secondment and the duration of the secondment should be clearly stated in a secondment agreement. Because questions may arise about the status of the employee, it is important that the secondment agreement sets out the duties and responsibilities that each party will be responsible for.

There is little case law on how seconded employees are treated for the purposes of employment law. An employment relationship is not normally created between the seconded employee and the host, assuming that a secondment agreement is used and issues considered before the secondment. To avoid this possibility the host should not act like an employer to the secondee. For example, responsibility for disciplinary processes, grievance procedures and salary reviews should be retained by the substantive employer. The parties will need to agree on which is to be responsible for determining annual leave, dealing with sickness or other absences and other operational matters. The secondee should remain on the payroll of the substantive employer with the host being invoiced for the services provided. Please contact your HR Adviser if you require further information.

### **Employed or self-employed?**

A worker's employment status, that is whether they are employed or self-employed, is not a matter of choice. Whether someone is employed or self-employed depends upon the terms and conditions of the relevant engagement. The tax and National Insurance contributions (NICs) rules do, however, contain some special rules that apply to certain categories of workers in certain circumstances. Employers have an obligation to classify the worker's status correctly and HMRC have issued the Employment Status Service (ESS) to support employers with their obligations <https://www.gov.uk/guidance/check-employment-status-for-tax>, your EPM HR and Payroll Advisers can also assist.

### **Volunteers**

In a genuine voluntary arrangement, there will be no mutuality of obligation between the volunteer and the school and the volunteer will not be paid. Nevertheless, an appropriate induction should still be carried out which should cover child protection and health and safety obligations and other relevant policies and procedures.

In April 2017 IR35 legislation came into effect which sets out rules relating to the tax situation of consultants and interims working in the public sector. EPM Advice Note **Payroll Changes April 2017** provides further information.