



## Zero Hours Contracts

### Client Services:

- General advice in relation to all employee-related issues
- Resolving Personal Grievances and Workplace Disputes
- Employment Agreements - drafting and negotiation
- Employment Relations Authority/Employment Court and Mediation Representation
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Changes in employment legislation amending the issue of so called 'zero hour contracts' have recently come into force. These changes have the potential to affect many existing hours of work provisions and all employment agreements need to be reviewed with the following in mind.

The Minister defined zero hour contracts as ones where employees are given no guaranteed of hours from week to week, but are required to be available. He went on to talk of circumstances where employees were being required to be available for work without necessarily being given the opportunity to receive work or payment for that availability.

The stated intention of the new changes was that parties to an employment agreement would be required to commit to a set amount of hours and where they did not set agreed contracted hours, the employee would be free to decline work. Also when employees were offered work above their agreed hours they would be free to decline on a case by case basis.

It is our view that the effect of the legislation is far broader than appears at first sight. The changes apply to all new employment agreements from 1 April 2016 and from 1 April 2017 for existing individual agreements. They apply to all Collective Agreements from the next agreed Collective.

All agreements must now provide hours of work provisions that include:

*"Any agreed hours of work specified in accordance with s.67(c) or if no hours of work are agreed an indication of the arrangements relating to the times the employee is to work."*

- S.67 (c) defines 'agreed hours of work' as including **any** or all of the following:
  - a) The number of guaranteed hours of work:
  - b) The days of the week on which work is to be performed:
  - c) The start and finish times of work:
  - d) Any flexibility in the matters referred to in paragraph (b) or (c).

- The new law does not require an agreement to provide for agreed hours of work, for example in genuine casual arrangements.

### AVAILABILITY PROVISIONS

- S.67E  
An availability provision means any provision in an employment agreement under which:

- a) The employee's performance of work is conditional on the employer making work available ("*as and when required*").

AND

- b) The employee is required to be available to accept any work that the employer makes available.

- S.67E  
Where an agreement specifies agreed hours of work **AND** that includes guaranteed hours **AND** there are hours additional to the guaranteed hours during which the employee is **REQUIRED** to make themselves available to work, then the employment agreement **MUST** provide for an availability provision.

- To have an availability provision there must be:

- a) Reasons based on reasonable grounds for requiring the employer to work the additional hours; AND
- b) Payment of reasonable compensation.

### GENUINE REASONS

Genuine reasons for requiring an employee to make themselves available require the employer to consider:

- a) Whether it is practicable for the employer to meet business demands for the work to be performed by the employee without including an availability provision:

## Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Neil McPhail, Raewyn Gibson, or Peter Zwart**.

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- b) The number of hours for which the employee would be required to be available:
- c) The proportion of the hours referred to in paragraph (b) to the agreed hours of work

### REASONABLE COMPENSATION

Any consideration of whether or not compensation is reasonable must include:

- a) The number of hours for which the employee is required to be available:
- b) The proportion of the hours referred to in paragraph (a) to the agreed hours of work:
- c) The nature of any restrictions resulting from the availability provision:
- d) The rate of payment under the employment agreement for the work for which the employee is available:
- e) If the employee is remunerated by way of salary, the amount of the salary.

- Note the effect on salaries:

An employee who is remunerated for agreed hours of work by way of salary may agree that the employee's remuneration includes compensation for the employee making himself or herself available for work under an availability provision.

### THE RIGHT TO REFUSE ADDITIONAL WORK

- **67EA Employee may refuse to perform work**

*"An employee is entitled to refuse to perform work in addition to any guaranteed hours specified in the employee's employment agreement if the agreement does not contain an availability provision that provides for the payment of reasonable compensation to the employee for making himself or herself available to perform work under the availability provision."*

### WHAT DOES THIS ALL MEAN?

1. You don't have to agree hours of work in an employment agreement but if you do not the agreement must provide (as is currently the case) an indication of the arrangements relating to the times the employee is to work.
2. If you have agreed hours of work these must be recorded in the written agreement.
3. If you have guaranteed hours and you require an employee to work hours in addition to the guaranteed hours, the employment must include an availability provision.

4. An employer must have genuine reasons based on reasonable grounds for requiring an employee to be available to work additional hours; these need not be included in the agreement.
5. An availability provision must provide for reasonable compensation for being available. This is distinct from any payment that may apply for actually carrying out the work.
6. If there are guaranteed hours and there is no reasonable availability clause in the agreement, the employee may refuse extra work.
7. Without a proper availability clause you cannot require employees to work or work additional hours as and when required.

### CONSEQUENCES OF A BREACH;

The definition of personal grievance in s.103 is amended to include the disadvantage of an employee because:

- Hours of work are not properly specified within the Agreement [S.67C].
- No proper availability provision [s.67E].
- The cancellation of shifts provisions [67G] have not been followed.

What the new provisions leave ambiguous is the situation where there are agreed hours that are not guaranteed. It is not clear in such circumstances whether or not an employee can be **required** to work additional hours.

The Minister in his opening statements appears to have implied that the employees offered work above their agreed hours would be free to decline.

This is most common in the circumstances where agreements contain the 'requirement' to work overtime. It is at least arguable that such a provision may be unenforceable unless it is accompanied by an availability provision.

We are advising all employers to review their employment agreements and if in any doubt, contact MGZ to review them.

## Coming up Next Month:

The third and final issue covering the changes to the Parental Leave and Employment Protection Act.