

**DISCUSSION DOCUMENT ON
EMPLOYMENT STATUS
IN RELATION TO
STATUTORY EMPLOYMENT RIGHTS**

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Department of Trade and Industry

Discussion document on employment status in relation to statutory employment rights

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Executive Summary

British employees now enjoy a wide range of statutory employment rights, such as the rights not to be unfairly dismissed, to maternity and parental leave, time off for family emergencies and redundancy payments. These rights ensure a good balance in the workplace and foster enterprise and productivity.

Most employment rights have been conferred on employees, as opposed to self-employed people. However, there are some working people who are not considered to be self-employed but do not fit into the legal definition of 'employee'. Office holders (for example some clergy), agency workers and some casual workers may fall into this category.

Some 'core' employment rights introduced by the present Government (in particular the rights to receive the national minimum wage and to paid holidays) apply to all 'workers' (plus some other categories). This is a broader group of working people than 'employees', although it can exclude office holders. The present coverage of statutory employment rights is therefore uneven. Section 23 of the Employment Relations Act 1999 would enable the Government to extend some or many statutory employment rights to those who are currently excluded from them. Before deciding whether and how to use this power, the Government is seeking views on the potential effects of, and justification for, extending the current framework of statutory employment rights and whether there may be alternative approaches.

The main issues the Government wish to address are whether the present coverage of employment rights reflects the underlying economic reality of the employment relationship and whether a different coverage would better meet its aims for the labour market. These are high participation rates amongst all categories of working people and high productivity in flexible, diverse, high-performance workplaces.

The Government would welcome views to inform on the next steps. In particular, the Government is seeking views on:

- **Whether there are any categories of working people currently excluded from statutory employment rights who require the protection provided by some or all rights and how they would benefit;**
- **The effect of extending employment rights on the nature of the relationship between the work providers and working people affected;**
- **Whether the current coverage of statutory employment rights supports a wide range of diverse employment opportunities;**

- **The effect on the labour market of the extension of all or some statutory employment rights to a wider category of working person, in particular on working people’s willingness to accept and employers’ willingness to offer “atypical” working arrangements;**
- **How clear and easy to understand the current framework of employment protection rights is, in particular the clarity and ease of use of current definitions in employment law;**
- **What non-legislative approaches could be used to address problems that might arise from any lack of clarity in employment status;**
- **Whether all rights should apply to the same category of working people or whether coverage should be looked at on a case-by-case basis;**
- **What the costs and benefits of extending the scope of some or all employment rights may be for small businesses, other organisations and working people;**
- **Whether there are ways to overcome the practical difficulties in extending some or all rights to certain working people, especially where a third party is involved in the employment relationship;**
- **Whether there are any particular difficulties that small businesses face in relation to employment status, and how best to address these;**
- **Whether any categories of working people currently protected by statutory employment rights or any groups of work seekers are actually disadvantaged by the level of statutory protection or whether those not protected would be disadvantaged by extension of rights to them;**

The Government is requesting that responses be submitted no later than **11 December 2002**. Responses to these questions can be sent to:

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The Government would also welcome any feedback on the document itself; in particular, how helpful it has been in explaining the issues.

A Welsh language version of the executive summary and questions is available and we can provide large print and taped versions too – please contact Anita Thomas if you need these.

This discussion document applies to GB and Northern Ireland. The Department for Employment and Learning are co-ordinating the publication of, and responses to, the document in Northern Ireland. Further details can be obtained from:

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Responses to this discussion document may be made available publicly in whole or in part at the Department's discretion. If you do not want part or any of your response to be made public, please state this in your response and we will respect this. Where confidentiality is not requested, responses may be made available to any enquirer, including those outside the UK, or published by any means.

Introduction

1. The Government is carrying out a review of employment status in relation to statutory employment rights. The review is considering the scope of certain statutory employment rights and seeking views on the effects of extending their coverage. Since early this year, the Department of Trade and Industry has been consulting and will continue to consult employers and their representatives, including small businesses, unions and other worker representatives and employment lawyers to seek their views on employment status in relation to employment rights.
2. This discussion document is part of the review and sets out to describe the current coverage of statutory employment rights and consider the position of certain groups who may be excluded from some or all rights as a result of this coverage. The document considers the case for and against extending the coverage of statutory employment rights and is intended to stimulate discussion of employment status issues. Employment status is important because it determines what statutory employment rights a working person is entitled to. It also affects the social security benefits an individual may be entitled to, how they are taxed and how they are protected by certain health and safety rights.
3. The aim of the review is to seek views on the scope of statutory employment rights and in particular on whether the current framework encourages participation in the labour market, especially in flexible forms of work and whether it promotes a wide range and diversity of employment opportunities. It also seeks to establish whether the current framework is sufficiently clear, especially for small businesses. It will not initially consider employment status issues related to tax, social security benefits or health and safety rights, although the Government would welcome views on whether there is a need for a broader review of definitions across employment and tax law.
4. The Government is committed to working towards full employment and high productivity, high performance workplaces. Employment rights can play an important role in achieving these goals. Since 1997, employment rights have been strengthened, while employment has continued to rise. Our regulatory framework, in particular rights aimed at improving the work-life balance of working people, promotes participation in the labour market. It supports a wide range of working options from which to choose, which is good for employers matching supply to demand, good for people who are seeking employment on a flexible basis and good for UK productivity. The key issues are now whether the coverage of employment rights promotes participation in 'atypical' forms of work, and whether the scope of employment legislation supports the needs of a diverse workforce and high rates of employment.

5. The Government believes that employers should be able to conclude arrangements with working people that allow them to meet the needs of their customers. Businesses need to be able to adjust to changes in the economy and maximise the use of new technology, in order to compete in increasingly competitive global markets. The current employment law framework helps employers to achieve this by allowing work to be undertaken in a variety of different types of employment relationship that suit the needs of employers.
6. But flexibility for business can also mean increased choice for workers. The Government wants to see flexibility and choice in the employment opportunities employers are able to offer. This should also ensure flexibility and choice for their workforces. Working people should be able to participate in the labour market in a variety of different ways, suitable to their individual situations and aspirations. For example, businesses may need help on an occasional basis, which can suit the needs of working people who have family or other commitments that prevent them from accepting permanent or regular work. The existence of a variety of different working arrangements enables a greater range of people to participate in work, including parents with young children, older people who may not want regular employment and students. DTI research suggests that almost two-thirds of respondents working under some form of atypical working arrangement did so because they preferred to work this way.¹ This is not to say that workers with permanent contracts of employment are automatically denied flexibility. The Government is aiming to increase flexible working opportunities that contribute to career development, while allowing working people to balance work with family and other interests or commitments.
7. The framework of statutory employment rights should deliver minimum standards of employment protection in respect of all forms of employment. But it is important that it strikes the correct balance between flexibility and worker protection – high degrees of employment protection should not reduce flexibility to the extent that it reduces employment, or that it disadvantages any particular groups of work seekers. Protection of those in jobs should not be to the detriment of groups who find it more difficult to get a job in the first place.² Jobs provide the best protection against social exclusion and low income and it is important that the framework of employment rights facilitates job creation.
8. Statutory individual employment rights have been introduced over several decades and provide a framework of minimum standards for those working people who are not self-employed. Employment rights apply to differently defined groups of people, depending on the aims of

¹ B. Burchill, S. Deakin and S. Honey, *The Employment Status of Individuals in Non-Standard Employment* (1999) URN 98/943 no. 6, EMAR Employment Relations Research Series, DTI, London (hereafter, the DTI research on employment status).

² OECD *Employment Outlook*, 1999 provides some evidence that high degrees of employment protection could damage the employment prospects of women and young people.

the right in question. Different working people may require different levels of protection, depending on the nature of the relationship with their work provider, in particular the degree of control the working person has over how they do their work and when they do it and the degree of mutual obligation between them and their work provider. The Government considers that certain rights, such as the rights to receive the national minimum wage and not to suffer unlawful deductions from wages should apply to a broad category of working people, in order to ensure that work pays for all. This is in line with the aim behind the Working Families Tax Credit, which is to make work pay for people who are in remunerative work, with dependent children³. By contrast, other rights, such as rights to minimum notice periods and the right not to be unfairly dismissed, provide protection for employees with a contract of employment placing particular duties on them and their employers. The advantage of this approach is that it ensures that the framework of statutory employment rights reflects the variety of different arrangements between work providers and working people.

9. However, this 'targeted' approach inevitably means that the coverage of rights varies. The Government is reviewing this coverage to ensure it reflects the underlying economic realities of the employment relationship. In addition, the varied coverage of rights and the different definitions used may be confusing for all concerned and it is necessary to ensure that the confusion does not outweigh the benefits of a targeted approach. Confusion could arise as a result of a lack of knowledge of which rights apply to which category of person or because the definitions of 'employee' and 'worker' in legislation are not sufficiently clear and 'user-friendly'.
10. There is little evidence to suggest a significant trend away from the use of permanent contracts of employment. Around 7% of employees are in temporary employment and around 11% of all those in employment are self-employed⁴. Most people still work in permanent full-time jobs and data indicates that atypical working patterns may have stabilised, or even declined. The Appendix to this document sets out trends in atypical working patterns in more detail. The Government is seeking views on whether the current coverage of employment rights, which can exclude some working people in atypical working arrangements, is hampering the growth of atypical work or equally whether the extension of rights could reduce opportunities for those in atypical working arrangements.
11. Discussions have taken place between the Social Partners at the European level on 'economically dependent workers'. The Commission understands 'economically dependent workers' to mean working people who do not have a traditional contract of employment, but who

³ The Tax Credits Act 1999, Section 6(1). This would include 'atypical' workers, such as agency or casual workers, but may also cover the genuinely self-employed.

⁴ Labour Force Survey (LFS), Spring 2001. The LFS definition of employee does not necessarily correspond to legal definitions.

are economically dependent on a single employer for their source of income (or a significant part of it) and some independents who do not employ others. Following the Second Stage Consultation of the Social Partners on modernising employment relations (March 2001), the European Foundation for the Improvement of Living and Working Conditions published a study on economically dependent workers and the legislative framework and definitions used in the different European Union member states⁵. Following this research, the Commission could refer the issue back to the Social Partners or bring forward a proposal for a directive.

Section 23

12. The power in Section 23 of the Employment Relations Act 1999 enables the Government to extend the coverage of many statutory employment rights by secondary legislation. Section 23(4) states that an order under the section may:

- a. provide that individuals are to be treated as parties to workers' contracts or contracts of employment;
- b. make provision as to who are to be regarded as the employers of individuals;
- c. make provision which has the effect of modifying the operation of any right as conferred on individuals by the order;
- d. include such consequential, incidental or supplementary provisions as the Secretary of State thinks fit.

13. The power in Section 23 applies to any right conferred on an individual under the following legislation:

The Trade Union and Labour Relations (Consolidation) Act 1992;
The Employment Rights Act 1996;
The Employment Relations Act 1999;
Any instrument made under section 2(2) of the European Communities Act 1972;
The Employment Act 2002.

14. See page 15 for a table setting out the statutory employment rights conferred by or under this legislation.

15. However, the section 23 power does not apply to non-discrimination rights conferred under the Equal Pay Act 1970, Sex Discrimination Act 1975, Race Relations Act 1976 and Disability Discrimination Act 1995. The review of employment status will not cover the scope of this legislation, which has a broader application. Similarly, the review will not cover the recently agreed European Race and Employment

⁵ The European Foundation's study on 'Economically dependent workers: Employment law and industrial relations' can be found at <http://www.eiro.eurofound.ie/2002/05/study/index.html>

Directives⁶. The implementation of these directives is the subject of separate consultation.

16. The review will consider the coverage of existing rights and not whether new rights should be introduced or current rights should be repealed. It will not seek to re-examine the length of the qualifying periods for certain rights (for example the right not to be unfairly dismissed and the right to receive redundancy payments⁷). The definitions used in employment law are not necessarily consistent with definitions used in other jurisdictions, for example tax law. It is therefore possible for those who are considered to be self-employed for the purposes of tax law to be covered by some employment rights legislation (and for some working people who are taxed as employees not to have access to some or all statutory employment protection rights⁸). Section 23 in itself could not eliminate all these differences or address the coverage of social security rights and some health and safety rights. The review is therefore focussing on employment law definitions at the moment and most of the differences in coverage that exist within it.
17. Section 23 allows rights to be applied to individuals who are not currently covered by them in a way that is different from that in which the rights are applied to those they already apply to. This allows the legislator to achieve the aims of particular employment rights legislation in a way which is best suited to the needs of different types of working person.
18. Any proposals for legislation arising out of this review will be subject to a full public consultation and accompanied by a Regulatory Impact Assessment.

Definitions

19. Where the terms 'employee', 'worker' and 'employer' are used in this discussion document, the terms have the meanings given to them by Section 230 of the Employment Rights Act 1996. This is explained further in Section 1 of this document.
20. In this document, the term "working person" is used generally as meaning a person who works or who wants to work, who may or may not be an 'employee' or 'worker' as defined, but provides services to

⁶ Council Directive 2000/43/EC of 29th June 2000 (the Race Directive) and Council Directive 2000/78/EC of 27th November (the Employment Directive) aim to prevent discrimination on the grounds of race, disability, sexual orientation, religion and age.

⁷ Qualifying periods for these rights are one year and two years' continuous employment respectively - continuous employment is defined in the Employment Rights Act 1996 (part XIV) and in case law.

⁸ Some construction workers may be self-employed for tax purposes, while enjoying rights under the Working Time Regulations, National Minimum Wage Act and other legislation. Similarly, agency workers and some members of the clergy may be taxed according to PAYE but fall outside the definition of 'employee' in the Employment Rights Act.

another party or parties and is not genuinely in business on his or her own account.

21. The term 'work provider' is used generally as meaning a party who engages a working person to provide a service.
22. The term 'self-employed' in this document means persons who provide services to another party under a contract for services, but are genuinely in business on their own account, in that they are partners in a business or the sole owner of their own business and may employ others. This should not be taken to mean that they would necessarily be regarded as self-employed for tax purposes, or that other working people would not.
23. The term 'atypical' is used to describe working arrangements that are not permanent, involve complex employment relationships and/ or involve work away from the supervision of the normal work provider. These may be characterised by a high degree of flexibility for both the work provider and the working person, and may involve a triangular relationship that includes an agent. They can be contrasted with the model of a permanent, full-time employment contract between two parties, where one works standard hours under the control of the other and termination can only take place if there is grave fault or by giving notice. Atypical arrangements may involve an absence of mutual obligation between the work provider and working person beyond or within a given period of work or assignment and may also involve complex relationships between the working person, an agent paying and/ or supplying the working person and the principal, under whose supervision the working person may work. It is important to recognise, however, that atypical workers may often be employees⁹.
24. Part-time work is often described as 'atypical' work, but will not, in itself, be regarded as such for the purposes of this document. Most part-time working people are in permanent or open-ended work arrangements between two parties. There is no difference between them and full time working people apart from the fact that they work fewer hours. About a quarter of UK employees work part-time. Part-time workers are protected against less favourable treatment on the grounds that they work part-time by the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000¹⁰.
25. Employment status is a term used to describe the relationship between an individual and his or her employer, client or customer. Such a relationship may take a wide variety of forms, since the parties are free

⁹ For instance, the Regulatory Impact Assessment on fixed-term work estimated that 1.1-1.3 out of 1.4 fixed-term workers were employees (www.dti.gov.uk/er/fixe/ria2.pdf). The Government intends to bring the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 into force very shortly.

¹⁰ SI 2000/1551

to enter into any relationship that suits their particular circumstances and wishes.

26. Section 1 of this discussion document looks at the different definitions of 'employee' and 'worker' used in employment law and the definitions that the different statutory employment rights apply to. Section 2 looks at certain types of working people who might fall outside the scope of the employee definition or whose employment status may be unclear. Section 3 sets out some of the arguments for and against extending these rights to a broader category of people, with the aim of stimulating discussion on the current framework of employment protection rights.

SECTION 1

Who has which statutory employment rights?

27. The coverage of different individual employment rights is varied and depends on the aim of the right in question. This reflects the wide variety of different working arrangements that exist in the UK and the different degrees of control that working people have over when, how and whether they do their work. However, the result of this targeted approach is that employment rights legislation contains a variety of different definitions (which determine the working people the rights apply to) and the differences in coverage between different rights may cause confusion. This section outlines the different definitions used in employment rights legislation, sets out which statutory employment rights use which of these definitions and briefly describes the tests used for determining whether an individual is an employee.

28. Access to most statutory employment rights depends on whether an individual is employed as an employee. Those who are not employees are excluded from much employment protection law.¹¹

29. Section 230(1) of the Employment Rights Act 1996 defines an employee as:

‘an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.’

Section 230(2) goes on to say:

‘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’.

30. Whether a contract between a working person and a work provider is a contract of employment is a question of mixed law and fact. In the case of a dispute, the question can only be answered definitively by a court. In considering such questions, the courts have developed and applied several tests, which are outlined on page 16.

31. Section 230 (4) of the 1996 Act states that an employer, ‘in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed’.

¹¹ Note that non-discrimination legislation (Sex Discrimination Act 1975, Race Relations Act 1976 and the Equal Pay Act 1970) uses the terms ‘employer’ and ‘employee’, but defines them more widely – ‘employment’ means employment under a contract of service or apprenticeship, or a contract personally to execute any work or labour. This will include most people who are independent contractors.

32. A number of rights and responsibilities are implied at common law in a contract of employment, which applies to both the employer and employee. For example, the employee has a duty to obey the employer's lawful and reasonable orders and the employer has a duty of care towards the employee.
33. Employees, as defined in the 1996 Act, are entitled to, amongst other rights, the right not to be unfairly dismissed, the right to receive written particulars of employment, the right to receive a statutory redundancy payment, the right to receive minimum periods of notice, the right to maternity and parental leave and time off for dependants, and the right to protection of wages in the event of an employer's insolvency.
34. Provisions contained in the Employment Act recently passed by Parliament relating to paternity, adoption, maternity rights, fixed-term contracts, rights to time off for trade union learning representatives and the right to request to work flexibly will apply to employees only.
35. Some basic or 'core' rights, particularly those introduced recently, such as the right not to suffer unlawful deductions from wages, the right to receive the national minimum wage and working time rights, apply to a more broadly defined category of working people known as 'workers'. These are essentially employees and individuals who do not have a contract of employment, but who have some other contract to perform personally any work or services to another person although they are not genuinely in business on their own account. In other words, employees and those who fall between the status of 'employee' and self-employed (in business on their own account). Section 230(3) of the 1996 Act states that a worker is:
- '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 that individual'.
36. In the guidance on the Working Time Regulations, a worker is described as someone who has a contract of employment or 'someone who is paid a regular salary or wage and works for an organisation, business or individual. Their employer normally provides the worker with work, controls when and how the work is done, supplies them with tools and other equipment, and pays tax and National Insurance contributions'. This is distinct from someone who runs his or her own business, is free to work for a number of different clients and customers

and can profit from the sound management of his or her business.

37. The National Minimum Wage Act and the Working Time Regulations also apply to agency workers who might fall outside the 'worker' category provided they are not in business on their own account. Further, the National Minimum Wage Act applies to homeworkers who are not otherwise workers, provided they are not in business on their own account (although the definition used allows for situations where homeworkers can substitute labour, usually by asking members of their families to take on work that is provided).
38. The law relating to public interest disclosures in part IVA of the Employment Rights Act 1996 uses the definition of 'worker' in Section 230(3) of that Act but extends it to cover homeworkers, certain agency workers, National Health Service practitioners and certain categories of trainees.
39. The Trade Union and Labour Relations (Consolidation) Act 1992 contains a definition of 'worker' under Section 296 which differs slightly from the definition in the 1996 Act. Section 296 states:
- (1) In this Act, "worker" means an individual who works, or normally works or seeks to work -
- (a) under a contract of employment, or
 - (b) under any other contract whereby he undertakes to do or perform personally any work or services for another party to the contract who is not a professional client of his, or
 - (c) in employment under or for the purposes of a government department (otherwise than as a member of the naval, military or air forces of the crown) in so far as such employment does not fall within paragraph (a) or (b) above.
- This definition applies for the purposes of collective employment law matters as opposed to individual employment law rights.
40. The Transfer of Undertakings (Protection of Employment) Regulations 1981 provides that "employee" is "any individual who works for another person whether under a contract for service or apprenticeship or otherwise" but goes on to specifically provide that it does not include a person who "provides services under a contract for services". This unique coverage goes beyond the 1996 Act definition of 'employee', but not as far as the 'worker' definition in that Act.
41. The following table sets out the coverage of statutory employment rights in their application to employees only, or to all workers:-

STATUTORY RIGHT	EMPLOYEES only	At least ALL workers (including employees)
Written statement of employment particulars	✓	
Itemised pay statement	✓	
Protection against unlawful deductions from wages		✓
Guarantee payments	✓	
Protection in relation to Sunday trading and Sunday betting	✓	
Protection for making a protected disclosure		✓
Protection against detriment for exercising rights in respect of health & safety cases; Sunday working; trustees of occupational pension schemes; employee representatives; time off work for study and training; leave for family and domestic reasons; trade union membership; European Works Council	✓	
Protection against detriment for exercising rights in respect of working time cases; protected disclosures; national minimum wage; part-time work; right to be accompanied		✓
Time off for public duties	✓	
Time off to look for work or arrange training in the event of redundancy	✓	
Time off for ante-natal care	✓	
Time off for dependants	✓	
Time off for pension trustees	✓	
Time off for employee representatives	✓	
Time off for young person for study or training	✓	
Time off for members of a European Works Council	✓	
Remuneration on suspension on medical grounds	✓	
Suspension on maternity grounds	✓	
Ordinary maternity leave	✓	
Additional maternity leave	✓	
Parental leave	✓	
Right to notice	✓	
Written statement of reasons for dismissal	✓	
Right not to be unfairly dismissed (or selected for redundancy)	✓	(apart from in respect of right to be accompanied)
Right to a redundancy payment	✓	
Right to an insolvency payment	✓	
Protection of acquired rights on the transfer of an undertaking	✓	
Right to be accompanied		✓
Right to be informed and consulted through representatives about collective redundancies	✓	

Right to the national minimum wage		✓
Right to rest breaks, paid annual leave and to maximum weekly working time		✓
Right for part-time workers not to be treated less favourably than comparable full-time workers		✓
Right to belong or not to belong to a trade union	✓	
Time off for carrying out trade union duties	✓	
Time off for trade union activities	✓	
Right not to suffer deductions of unauthorised union subscriptions		✓

42. The following table summarises the coverage of individual employment rights to be conferred under the Employment Act:

STATUTORY RIGHT	EMPLOYEES only	ALL workers (including employees)
Right to paternity leave	✓	
Right to adoption leave	✓	
Right to increased maternity leave	✓	
Right to dispute resolution procedures	✓	
Time off for union learning representatives	✓	
Right for fixed term employees not to be treated less favourably than comparable employees in permanent employment	✓	
Right to request flexible working for parents of young children	✓	

The tests for deciding employment status

43. In practice, whether or not a person who works is an 'employee', a 'worker' or neither of these may be unclear in some situations. A variety of different working arrangements exist, since work providers and working people can enter into arrangements that suit their circumstances – employment law does not prescribe the kind of arrangements that can be agreed. In the event of a dispute, only an employment tribunal or court can determine the nature of the employment relationship. One possible consequence of this is that the actual nature of an employment relationship may differ from what one or both parties understood the relationship to be when it was entered into.

44. Common law has established fundamental criteria for the purpose of determining the issue of employment status, though tribunals have considerable discretion as to how they apply these tests to individual cases. Most cases have focussed on whether the individual is an 'employee' or self-employed. There is less case law on the distinctions between a 'worker' on the one hand, and those who are not workers on

the other or between ‘workers’ and ‘employees’.

45. In determining whether or not a person is an employee, the Court will generally consider first whether there is a contract between the individual and the alleged employer at all. In order for a contract to exist there must be an intention to be legally bound, an agreement reached by the process of offer and acceptance, and some form of value, known as ‘consideration’, given by the employer to the worker in return for a service. If there is a contractual relationship, the court goes on to consider whether the contract is one of service (that is, a contract of employment) or for services (that is, for the provision of goods or services); a person who contracts to provide goods or services will be self employed under the common law but may still be a “worker” within the definition in Section 230(3) of the 1996 Act. In determining whether an individual is an employee, the Courts will look at the facts of each case and apply a number of tests enshrined in common law. In particular, four tests are widely relied upon - control, integration, mutuality of obligations¹² and economic reality. In applying these tests, the courts consider a number of factors, such as personal service, length of the relationship and the method of payment agreed by the parties.¹³

¹² However, in *Byrne Brothers v Baird* [2002] IRLR 96, the Employment Appeal Tribunal, in applying the Working Time Regulations, accepted that mutuality of obligation is not a requirement just for a contract of employment: it is also needed for there to be a contract making a person a “worker” as defined in section 230(3)(b) of the 1996 Act.

¹³ The DTI research on employment status (fn. 1 above) provides a full account of the common law tests.

SECTION 2

Description of certain types of working person

46. There is a range of working people who personally provide a service to a work provider, and whose work patterns are associated with flexibility, discretion and, in some cases, relative lack of control by others. In practice, however, the work they do, their control over when or how they do it and who supervises them may differ little from people who do the same work and who are clearly employees. However, certain key characteristics of their relationship with their work providers may mean that they are not employees, or have unclear status.
47. There are various terms in use that may describe some of these working people, which categorise them according to their frequency or place of work or the nature of their relationship with a work provider. They can include some homeworkers, agency workers (or 'temps'), freelancers, sub-contractors, and possibly casual workers. Often these terms are not used in any precise sense and the working people they describe are very diverse – some might be employees, others might not. Definitions of employee and worker generally cut across these groups of people. Furthermore, the groups the labels above describe are generally diverse – some of their members may be highly skilled, while others may be much more vulnerable to changes in demand for labour.
48. In the case of certain types of working people, the courts have tended to take the view that the notion of a contract is not appropriate. These include office holders, such as the clergy and registration officers. Where no contract exists, people will fall outside of the definitions of worker and employee.
49. Some of these working people may be treated as employees for income tax purposes or as employed earners for the purposes of national insurance contributions (for example, many agency workers or people working through service companies), but these factors do not affect whether they would be regarded as employees for the purpose of the application of statutory employment rights.
50. This section considers the position of certain categories of atypical workers and some office-holders and, where appropriate, cites useful case law decisions that illustrate the difficulties of applying the current legal definitions to different groups of working people. The examples also demonstrate how the application of the common law tests in determining the status of certain working people can seem to lead to inconsistent decisions.

Homeworkers

51. Homeworkers usually work in their own home; they may or may not use tools or equipment supplied by the work provider; in some cases, they are permitted to substitute family members or friends to perform their work. They include 'outworkers' employed to manufacture products or do clerical work in their own homes. Many of these homeworkers are women from ethnic minority communities, who may have limited opportunities.
52. The status of some homeworkers may be unclear. There may be or appear to be the absence of mutuality of obligation between the work provider and working person and an agreement that the homeworker should be regarded as self-employed. Some may work for one work provider over a period of time and the work provider may exercise a significant amount of control over their work. The requirement for there to be mutuality of obligation can prevent homeworkers from having contracts of employment, although the courts have found mutuality of obligation to exist in several cases.
53. In *Airfix Footwear Ltd v Cope*¹⁴, a homeworker who usually worked five days a week, had done so for seven years, and worked under instructions from the employer, was found to be employed under a contract of employment, even though the worker had agreed to be treated as self-employed for tax purposes. In this case, the courts found that a continuing relationship based on a long-standing arrangement of providing and undertaking work can establish a contract of employment.
54. Similarly, 'umbrella' or global contracts have been found to exist in cases where homeworkers work on a part-time and irregular basis, under which the employer is under a continuing obligation to provide or pay for work and the homeworkers under a continuing obligation to accept and carry out the work provided. In *Nethermere (St Neots) v Taverna*¹⁵, the homeworkers could vary their hours, refuse work and take time off as required. However, the companies' conduct over a period of time had established a contract of employment through continued expectation of the employee accepting such work, in return for payment.
55. In the National Minimum Wage Act 1998 and the provisions on public interest disclosures in the Employment Rights Act 1996, specific provision is made for homeworkers to ensure that those homeworkers who may fall outside the scope of the 'worker' definition because they are not obliged to perform all work they are provided with personally, still come within the ambit of the legislation.

¹⁴ *Airfix Footwear v Cope* [1978] ICR 1210

¹⁵ *Nethermere (St Neots) Ltd v Taverna and Gardiner* [1984] IRLR 240

Agency Workers

56. Agency workers are often used for short-term cover, for example to replace staff on sick leave, or they may be used to meet increased demand. Working people often choose agency work as a way into the labour market or because the flexibility suits them. Some working people use agency work because they cannot find a permanent job. Although agency workers are usually non-employees under employment law, some agency workers are accorded employee status by their agency. Agency workers also have specific protection conferred by the Employment Agencies Act 1973 and subsequent regulations. This legislation is currently being modernised and the draft Conduct of Employment Agencies and Employment Businesses Regulations are to be the subject of a final consultation shortly.
57. The term 'agencies' as used in this document will cover both 'employment businesses' and 'employment agencies' as defined in the Employment Agencies Act 1973. The former supply their staff to work on a temporary basis for clients under the control of the hirer (although they are usually paid by the agency), while employment agencies introduce working people to be employed by, or form a business relationship with, the client themselves.
58. Some agency workers are self-employed and use employment agencies to find clients, and there is generally no continuing relationship between the agency and the working person. This is generally the case in the entertainment sector where the individuals enter into an agreement directly with the client with the agency finding them work. In such circumstances, they may be working under a contract of employment or may be self-employed working under a contract for services.
59. Where agencies (i.e. employment businesses) supply temporary staff to work for their clients, there is a triangular relationship between the agency worker, the agency and the client. The agency will have a contract with the client, while the agency worker will have a contractual relationship with the agency, but be working under the control of the client. This can lead to difficulties in determining whether the individual agency worker is an employee or not, and who their employer is. The following case law illustrates the difficulties the triangular relationship has caused the courts and reflects some of the inconsistencies in the application of the tests of employment status.
60. In *Montgomery v Johnson Underwood Ltd*¹⁶, the Court of Appeal found there to be insufficient control of the worker by the agency (the alleged employer) to find that the agency worker was employed by the agency. At the same time, there was insufficient mutuality of obligation to find

¹⁶ *Montgomery v (1) O.K.Orenstein (2) Johnson Underwood Ltd* [2001] IRLR 269.

that the hirer was the employer or that any contract existed between the worker and the hirer.

61. There is no general proposition in law that a worker whose services are supplied by an agency to a third party client on a temporary basis does not have a contract of employment with the agency or the client; it will depend on the particular facts of each case. In *Secretary of State for Employment v McMeechan*¹⁷, the Court of Appeal found that a temporary agency worker might be an employee of an agency for the duration of an individual contract. Other circumstances have led the courts to find an employment relationship between the worker and the client of the agency¹⁸, although this may be a sole instance. In *Serco Ltd v Blair*¹⁹, the courts found that the agency's involvement in the arrangements can prevent a relationship between client and worker amounting to a contract of employment. Some case law has pointed to the fact that the worker is neither employed nor self-employed, but rather has a 'sui generis' ('in a class of their own') relationship²⁰. This was first mentioned in a 1970's case, *Construction Industry Training Board v Labour Force*, which described it as being 'where A contracts with B to render services to C...the contract is not a contract for services but a contract sui generis, a different type of contract from either of the familiar two'.²¹

62. The Working Time Regulations and the National Minimum Wage Act and Regulations ensure that agency workers have the rights given by the legislation even where no employer of the agency worker can be identified. In all cases they are protected under discrimination law. The provisions of the Employment Rights Act 1996 dealing with public interest disclosures contain a still wider definition of agency worker for the purpose of protecting persons making a protected disclosure.

63. Some existing legislation has addressed situations in which the employer of an agency worker may not be easily identified. The National Minimum Wage Act 1998 specifies who should be regarded as the employer of the worker for the purposes of the Act. It provides that the contract will be considered to exist between the agency worker and either the agent or the principal, depending on which of them is responsible for paying the agency worker. If neither is responsible, the employer will be considered to be whichever of them actually pays the agency worker in practice. This approach was formulated specifically in the context of a right relating to pay. Similarly, under the Working Time Regulations, agency workers can enforce their rights against the organisation that pays them.

¹⁷ *Secretary of State for Employment v McMeechan* [1997] IRLR 353

¹⁸ *Motorola v Davidson and Melville Craig Group* [2001] IRLR 4. In this case the EAT was asked to consider whether the worker was an employee of the hirer solely on the basis of the control test.

¹⁹ *Serco Ltd v Blair* [1998] EAT 345

²⁰ *Ironmonger v Movefield Ltd* [1988] IRLR 461

²¹ *Construction Industry Training Board v Labour Force Ltd* [1970] All ER 220

64. However, there can be practical difficulties in applying some rights to agency workers, as can be illustrated by the Government's experience in introducing a new right for parents of children under 6, or 18 for disabled children, to apply to work flexibly²². This new right will apply to employees but not to agency workers as neither the Government nor the Work and Parents Taskforce were able to find a practical solution to apply it to agency workers. The key issue was who should be obliged to consider the request. Should this duty fall upon the agency, the client company or both and in such circumstances what would be the obligations on either party to try to accommodate the request? Agencies argued that they would be unable to consider requests because they would not know enough about their clients' businesses and were concerned about the effect on their relationship with client companies if they felt they had to move agency workers from one post to another to meet desired work patterns. Employers insisted that they would have approached the agency to fulfil a specific service without an expectation of having to adjust their working patterns to an individual's circumstances. However, unions were concerned that agency workers should not be denied rights due to technicalities in their contractual arrangements.

65. The European Commission has brought forward a proposal for a directive on agency workers²³. The current draft directive applies an equal treatment principle to agency workers as compared to similar permanent workers in the user company in respect of certain 'essential employment conditions'. The proposal may have the effect of extending certain statutory employment rights to agency workers. In considering the position of agency workers as part of the review, it will be important to take account of the progress of this proposal.

Casual Workers

66. Casual workers, who may also be described as temporary workers, generally supply a short-term or specific need and typically, will have periods of employment with breaks in between where no work is performed. The casual employment may be the working person's only job, or his or her second or even third job. The relationship will often be short-term but it can also be long-term, and the type of work may be skilled or un-skilled. The work may involve arrangements whereby the individual agrees to be available for work as and when required, but no agreement is made on the particular number of hours or times of work. This type of work may suit individuals who want earnings on an occasional basis.

67. In some cases, courts have considered whether working people with casual arrangements may be held to be employees if they can point to

²² This right is being introduced under the Employment Act 2002 and is due to come into force in April 2003.

²³ The Commission proposal is the subject of a public consultation (for more information, see www.dti.gov.uk/er/agency/directive.htm).

the existence of an 'umbrella' contract of employment, where the work is of such long-standing nature that a degree of mutuality of obligation exists, or that the working person worked under a succession of short-term contracts (although it would still be necessary to establish the requisite continuity of service required for some employment protection rights). In *Scarah v Fish Container Services Ltd*²⁴, the courts found that individual contracts of employment were created in relation to each separate period of work, but failed to establish continuity of employment for statutory purposes.

68. In many cases, casual workers have failed to establish umbrella contracts of employment because of an absence of mutuality of obligation between engagements, despite the *Nethermere* decision. In *Carmichael v National Power*²⁵, tour guides worked on a 'casual as required basis'. The House of Lords found that the parties' relationship was not intended to subsist during periods when the respondents were not working as guides, and that there was no mutuality of obligation such as to give rise to a global contractual relationship of employer and employee existing between periods of work.
69. The lack of mutually legally binding obligations on each side between crew agreements precluded the concept of a global contract of employment in *McLeod v Hellyer Brothers Ltd.*²⁶
70. Similarly, no overall contract of employment was found in the *O'Kelly & others v Trusthouse Forte plc*²⁷. Here 'regular' casual wine butlers were held to be independent contractors and not employees despite a long-standing relationship with their employer and despite the fact that they had no other work, on the basis that there was a lack of 'mutuality of obligation'. The workers had the right to decide whether or not to accept work and, although regular work was undertaken, the employer was under no contractual obligation to provide any work.
71. In some cases, it may be possible to identify small successive contracts of employment. In *Market Investigations Ltd v The Minister of Social Security*²⁸, the court held that despite there being no overall mutuality of obligation, a series of separate employment contracts were created when the part-time interviewer undertook a number of short engagements for a market research company over a period of time.
72. Workers of this kind are entitled to pro rata annual leave and rest breaks under the Working Time Regulations, and the national minimum wage applies to those on call in the workplace.

²⁴ Court of Appeal 8 November 1994 (unreported)

²⁵ *Carmichael v National Power* [1999] ICR 1226

²⁶ *McLeod v Hellyer Brothers* [1987] IRLR 232

²⁷ *O'Kelly & ors v Trusthouse Forte* [1983] IRLR 369

²⁸ *Market Investigations Ltd v The Minister of Social Security* [1969] 2 Q.B. 173

Labour-only subcontractors

73. This is where labouring work is subcontracted to another and can also be known as 'lump' working. It may take several forms, and is typically found in the construction industry. 'Self-employed' labourers may contract as a group directly with an employer, or indirectly through a sub-contractor, who then contracts their labour to a main contractor; or workers may have service contracts with a sub-contracting company, which then hires them out to a main contractor. Such workers often move from one to the other form of 'employment'.

74. Where there are only two parties, the contract may be classified as a contract of employment, despite the parties' intent to the contrary²⁹.

75. In *Byrne Brothers v Baird*³⁰, the Employment Appeal Tribunal found that the applicants, who were labour only subcontractors in the construction industry, were a good example of the kind of workers that the 'worker' definition in the Working Time Regulations intended to cover.

Office holders

76. Office holders are often found not to be employees when applying the common law tests, but they are liable for Schedule E tax and Class 1 National Insurance Contributions by legislation (i.e. they are taxed as employees). The distinction between officeholders and employees lies in the fact that while an employee's rights and duties are defined by an employment contract, the rights and duties of an office holder are defined by the office held and exist independently of the person who fills it. With office holders, there is usually no intention to create legal relations. Examples of some office holders include the clergy, police officers, company directors, prison officers, trade union officers, club secretaries, registration officers, and trustees. The position of registration officers is complex. They are appointed to a registration post by the local authority, which is also responsible for their pay and accommodation. However, they answer to the Registrar General for the performance of their registration duties and he or she has the sole power of dismissal.

77. In some cases, an office holder can be held to be an employee as well as an office holder; this is determined by applying the usual criteria for deciding whether an individual has a contract of employment according to the facts of the case³¹. Police officers are specifically covered by certain employment rights, along with other categories of working person who might not be employees (in particular crown servants, House of Commons and House of Lords staff).

²⁹ *Ferguson v Dawson John & Partners* [1976] IRLR 376 (although this judgement may not necessarily apply to other 'lump' workers).

³⁰ See fn. 12 above

³¹ *102 Social Club & Institute Ltd v Bickerton* [1977] ICR 911

Clergy

78. Members of the clergy are usually held to be ecclesiastical office holders. In considering the precise status of the clergy, case law points to the consideration of a number of factors, such as the nature of the position and whether a contract can be identified, although emphasis is placed on the spiritual nature of the office. Generally, the courts have established that the relationship between the church authorities and ministers of religion is not a contractual one at all³² (essentially on the basis that the ministers of religion owe their allegiance to God rather than to a terrestrial authority), not only in relation to the Church of England but also other religions. This means in effect that ministers of religion are unable to seek redress through the legal system in the event of any dispute over their treatment by the church authorities. Members of the clergy may be employees of hospitals, prisons or other organisations in respect of work for these organisations as chaplains.

³² President of the Methodist Conference v Parfitt [1984] ICR 176

SECTION 3

The case for and against extending statutory employment rights

79. This section looks at some of the arguments for and against extending employment rights to a broader category of working people. The aim is to stimulate debate on the potential effects of extending coverage and on whether any lack of clarity in the regulatory framework should be addressed by regulation or by other means. The arguments outlined below reflect initial discussions with stakeholder groups that represent employers, small businesses, workers and unions, as well as groups representing special categories of working people.

80. The Government is committed to consult on any proposals for legislation that arise from this review. There are, however, several possible options for addressing employment status issues. Those identified are:

- Maintain the status quo and consider the scope of new rights on a case-by-case basis. There may be a case for non-regulatory approaches to any lack of clarity in employment law or lack of awareness of employment status definitions.
- Extend the scope of some existing employment rights, on a case-by-case basis, to some or all of the groups of working people described in section 2, keeping coverage under review.
- Extend the coverage of all existing statutory employment rights across the board to the same group of working people, abandoning the ‘targeted’ approach to coverage, with the aim of simplifying the scope of employment law.
- Conduct a broader review of employment status and definitions, looking at the relationship between status for employment law and tax purposes. This may be best undertaken by a body such as the Law Commission.

Arguments for extending coverage

- There are concerns that some working people are being excluded from employment rights due to technicalities relating to the type of contract or other arrangement they are engaged under. Examples of these workers might be some agency workers, the clergy or labour-only subcontractors. These working people may, in practice, do the same type of work as employees, may be subject to similar demands in that they may have equally little autonomy over when and how they do their work in practice and may be economically dependent on a single source of work. There may be a fairness case for giving them the same

protection as employees.

- Extending employment rights may guarantee protection for more atypical workers and increase working peoples' willingness to take up atypical work, knowing their rights are secured. The numbers of atypical workers in the UK labour market remains surprisingly low and the extension of rights may increase the take-up of atypical work arrangements.
- Extending employment rights may help enable a more diverse range of people to participate in the labour market, particularly those who cannot accept regular work, due to other commitments. It could also help those in atypical working patterns to achieve a work-life balance. Some working people who are not protected by employment rights may consider their position vulnerable because they are often not protected from detriment if they need to take time off for family-related reasons. Examples of this might be additional maternity leave to look after young children or time off for family emergencies. This could discourage parents of young children from working some atypical work patterns or participating in the labour market. This in turn may reinforce the pay gap between men and women, as women are more likely to give up work after having a child.
- Extending certain rights could increase clarity in the law. It may remove anomalies in the coverage of some employment and other rights. For example, some non-employee workers may have a right to receive statutory maternity pay (SMP), but would not automatically have a right to take maternity leave or a right not to suffer detriment for reasons of pregnancy³³. This may be confusing for both employers and workers. Extending rights to all workers may also increase certainty and clarity for working people who are on the employee/non-employee borderline and their employers if a single definition were used in employment rights legislation, or fewer different definitions were used. This may particularly help small businesses.
- The numbers of working people who would be affected by adopting the definition of 'worker' is likely to be low³⁴ and the extension could bring significant benefits to the working people concerned and ensure they feel more valued. Work providers may be more willing to integrate more peripheral workers into their permanent workforce through investment in training and this could result in more high performance workplaces. The Government would welcome evidence of the potential benefits to working people and costs to business of an extension in the application of employment rights.

³³ The right to SMP is governed by the Social Security Contributions and Benefits Act 1992. Section 23 does not give the Secretary of State the power to apply this right to individuals who are currently excluded, therefore it is not contained in the table on page 15.

³⁴ The DTI research on employment status (fn. 1 above) estimates that adoption of the definition of 'worker' would be likely to increase the numbers covered by employment rights by 5%.

Arguments against

- If non-employees have a broader range of statutory employment rights, employers might increase their demands on them or the degree of commitment they expect of them. This could reduce flexibility for these working people. Some atypical workers may enjoy a higher remuneration package than other workers because they do not have the same employment rights protection. The Government would appreciate views on whether an extension of employment rights would fundamentally change the nature of the relationship between certain work providers and working people.
- Extending certain rights may reduce employers' willingness to offer atypical working arrangements. The Government is seeking evidence of the effects of extending employment rights on overall employment rates and opportunities for people. Extending some rights, such as maternity rights and the right to unfair dismissal may increase administrative burdens on business. The effect could be significant in certain sectors, such as in the temporary agency work sector, where there may be a high proportion of non-employee workers. In addition, there may be a risk that extending some rights to certain categories, such as agency workers, could lead to a reduction in demand for such working people.
- Legislation extending employment rights may be unnecessary to allow some working people to achieve a work-life balance. Some working people with looser employment relationships may in practice be able to exercise the same rights to time off as those on a contract of employment, even in the absence of statutory protection. Non-employees may be able to choose to work around domestic commitments or public duties and could refuse offers of work coinciding with periods where they would want to take maternity and parental leave. Some working people may be given certain benefits, such as parental leave, maternity leave or time off for emergencies, despite the absence of a legal requirement to do so.
- There may be set-up costs for business, especially small businesses, in the extension of rights. For instance, some small businesses who rely on non-employee workers would be especially affected by the extension of certain rights which involve putting in place certain procedures, such the right to a written statement of reasons for dismissal, right to a written statement of terms and conditions and the right to an itemized pay statement.
- Using a 'worker' definition more widely in employment rights legislation would not remove differences between the definitions used in

employment rights legislation and for tax purposes³⁵. It might not increase the clarity of employment status across different jurisdictions.

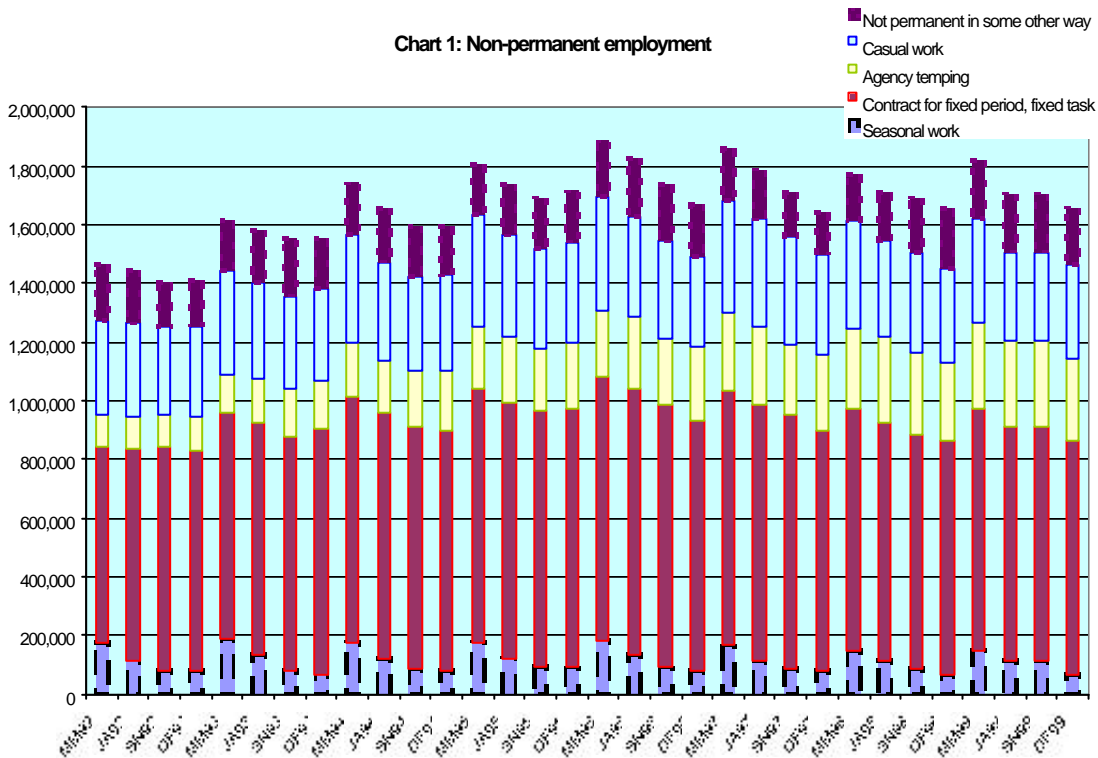
- Extending employment rights to all workers may not significantly reduce uncertainties over status, since disputes over status would still ultimately need to be decided by a tribunal.

³⁵ In his report on 'Undermining Construction: The corrosive effects of false self-employment', Dr Mark Harvey calls for the 'harmonising, simplifying and integrating statutory employment law, employment status common law and taxation classification' (UCATT, 2001, page 52). The National Audit Office and the Institute of Fiscal Studies have also called for a harmonisation of the employment status definitions used in tax and employment law.

APPENDIX

Labour market trends in atypical working arrangements

- Overall, there does not seem to have been an increase in the use of atypical working arrangements in the past decade and the use of non-permanent work may even have fallen. According to the Labour Force Survey, the share of employment accounted for by different forms of temporary work (fixed term contracts, agency workers, seasonal and casual workers) has been falling since 1997, although the overall numbers of temporary employees has increased since 1992³⁶. The chart below shows strong differences between the types of non-permanent work. Those on fixed-term contracts tend to consistently form the largest group, while agency temps are the only group which has constantly increased over time.



Source: LFS various years

- Keep and Mayhew's prediction that levels of non-permanent work in the UK could have reached 40% by 2001 has clearly not

³⁶ Although note that most fixed term employees are probably employees

materialised³⁷. According to the Labour Force Survey, the proportion of the workforce in non-permanent employment increased from 5.5% to 6.7% between 1992 and 2001, against the background of a 12% increase in total employment. However, a recent Economic and Social Research Council survey found that the proportion of people in permanent employment had actually increased between 1992 and 2000³⁸. It is important to recognise that atypical workers may often be employees and this is not necessarily a guide to the trend in the use of working arrangements other than contracts of employment³⁹.

3. Against this backdrop, there has been a substantial growth in the numbers of temporary agency workers – the Labour Force Survey indicates a 253% increase between 1992 and 2001. Growth in agency work across the EU is one trend driving the European Commission's proposal for a directive on agency workers.
4. The total number of employees who work mainly from home has increased from 860,000 to 1.3 million from 1996 to 2001. However, this is mainly due to an increased number of employees who use home as a base. The number of those who work entirely from home has stayed constant⁴⁰.
5. There does not appear to be any significant trend towards a growth in the proportion of people who are working in jobs for shorter periods of time with a greater number of different employers. People who have a second job, often known as portfolio workers, comprise only about 4% as a proportion of all in employment, although this is an increase from 3% in 1984⁴¹. According to one study, as many as 81% of workers in 2000 said they had worked more than 12 months in the same job, compared with 83% in 1992⁴².
6. There is a significant proportion of the workforce operating as self-employed who do not employ others, although the indications are that the growth in self-employment has been decreasing since 1997⁴³. Most of the self-employed without employees are in the construction sector (22%). Some of these self-employed workers may fall into the 'worker' or 'employee' definitions in the Employment Rights Act.

³⁷ Keep and Mayhew, 'Vocational education and training and economic performance' (1997)

³⁸ Source: Labour Force Survey, Spring 1992 and 2001

³⁹ For instance, the Regulatory Impact Assessment on fixed-term work estimated that 1.1-1.3 out of 1.4 fixed-term workers were employees.

⁴⁰ Source: Labour Force Spring Surveys.

⁴¹ Source: Labour Market Trends, People with Second Jobs (May 2002)

⁴² Robert Taylor, 'Britain's World of Work – Myths and Realities' (ESRC)

⁴³ Source: Labour Market Survey, Spring 2001

7. DTI research⁴⁴ revealed that 30% of those in employment had an ambiguous status. They were made up of two groups – those defining themselves as self-employed, but who were not directors or partners in their own business and did not employ others; and those defining themselves as employees who had some type of non-standard working pattern or classified their jobs as non-permanent.

⁴⁴ DTI research on employment status (see fn. 1)